

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

LM WASTE SERVICE CORPORATION

and

UNION DE TRONQUISTAS DE
PUERTO RICO, LOCAL 901, IBT

24-CA-091171
24-CA-096173
24-CA-097582
24-CA-097590
24-CA-097696
24-CA-103120
24-CA-109159

Ayesha K. Villegas Estrada,
for the General Counsel.

Francisco J. Grillo,
for the Respondent.

Luis Mangual,
for the Charging Party.

DECISION

Statement of the Case

HEATHER A. JOYS, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on November 19, 2013. The General Counsel issued the first consolidated complaint on March 28, 2013, and subsequent amended consolidated complaints on June 28 and October 31, 2013. Respondent filed a timely answer denying the essential allegations of the complaint.¹

The complaint alleges that Respondent LM Waste Service Corporation failed to continue in effect all terms and conditions of its collective-bargaining agreement with the Charging Party Union (the Union) for two of its units of employees at two of its Puerto Rico operations in violation of Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act (the Act). Specifically, the complaint alleges that Respondent failed to pay various bonuses specified in the collective-bargaining agreement to eligible employees, including a signing bonus; failed to

¹ The amended consolidated complaints will be referred to hereafter as a single “complaint.”

reimburse employees for unused excess sick leave; failed to pay employee wages according to the schedule specified in the collective-bargaining agreement; deducted health insurance premiums from employee pay; failed to provide employees with uniforms; failed to provide a bulletin board at its facility; failed to maintain functioning air-conditioning in vehicles used by employees; and, finally, failed to maintain health insurance for employees. Respondent admits its failure to comply with these terms of the collective-bargaining agreement, but raises several defenses. Respondent argues the Board lacks jurisdiction as the collective-bargaining agreement contains a grievance and arbitration clause that requires deferral by the Board on all matters. Next, it argues the Union consented to at least two of the contract modifications. Finally, Respondent argues it took the above alleged actions due to “compelling economic considerations,” a “dire financial emergency” or “economic exigency.”

The complaint also alleges that Respondent failed to bargain in good faith with the Union over mandatory subjects of bargaining for those units not covered by a collective-bargaining agreement at four of its Puerto Rico operations in violation of Section 8(a)(5) and (1) of the Act. Specifically, the complaint alleges that Respondent made unilateral changes to employee pay schedules; failed to pay “holiday pay” to employees consistent with past practice; laid off an employee due to lack of work; took disciplinary action against two employees; and failed to maintain health insurance for employees of units B, D, E, and F. Respondent responds, although the matters at issue were mandatory subjects of bargaining, the effects of the unilateral changes were not material or substantial enough to impose a duty to bargain. Even if the effects did impose a duty to bargain, Respondent counters it met its obligations, and the Union failed to respond to its notices and attempts to bargain, effectively waiving its right to bargain over the matters. Respondent additionally argues, with regard to payment of holiday pay and layoff for lack of work, it followed past practice. Therefore, it did not, in fact, make any unilateral changes to the terms or conditions of employment. Finally, Respondent raises the same argument as above, that economic exigencies necessitated its actions.

On the entire record,² including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent LM Waste Service Corporation is a Puerto Rico corporation with a main office in San Juan, Puerto Rico, and with other places of business in the commonwealth of Puerto Rico, including Juana Diaz, Yauco, Arroyo, Quebradillas, San German, Isabela, Morovis, and Maunabo. Respondent is engaged in the collection, transport, recycling, and disposal of waste throughout the commonwealth of Puerto Rico. During the past 12 months, a representative period, Respondent has provided services valued in excess of \$50,000 for Checkpoint Systems, of Puerto Rico, Inc., Coopervision Caribbean Corp., and Burger King

² The General Counsel filed a timely posthearing brief which I have reviewed as part of the record. Respondent declined to file a brief. Although Respondent failed to file a posthearing brief, it did raise several affirmative defenses in its answer. I have considered each of those defenses and, to the extent not discussed herein, those defenses are rejected.

Corporation, each of which is directly engaged in interstate commerce. The parties admit, and I find, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act (GC. Ex. 1(vv))³.

5 The parties admit, and I find, Union de Tronquistas de Puerto Rico, Local 901, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act (GC Ex. 1(vv)).

10 **II. Alleged Unfair Labor Practices**

A. Background

15 It is admitted, and I find, at all times material here, Human Resources Vice President Grace Diaz and Human Resources Director Mari Montalvo were supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act (Jt. Exh. 1). It is undisputed that Union Business Agent Luis Mangual is an agent of the Union within the meaning of Section 2(13) of the Act.

20 At different times over the last 5 years, the Board has certified the Union as the exclusive collective-bargaining representative of the six units constituting Respondent’s Puerto Rico operations. However, not all of the units were covered by a collective-bargaining agreement during the relevant time period. On March 3, 2008, the Board certified the Union as the exclusive bargaining representative of unit A, also known as the Juana Diaz unit (Operations).⁴ This unit is covered by a collective-bargaining agreement in effect from August 31, 2012, through July 1, 2015 (Jt. Exh. 17). On April 8, 2006, the Board certified the Union as the exclusive collective-bargaining representative of unit C, also known as the Yauco unit (Operations).⁵ This unit is covered by a collective-bargaining agreement in effect from June 4, 2012, through June 4, 2014 (Jt. Exh. 16). The Board also certified the Union as the exclusive collective-bargaining representative for unit B, also known as the Juana Diaz unit (Landfill)⁶;

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s exhibits; “Jt. Exh.” for Joint exhibits; “R Exh.” For Respondent’s exhibits; and “CP Exh.” for Charging Party .

⁴ Unit A is defined as: “All full-time and part-time commercial and residential employees, including mechanics, drivers, welders, checkers, helpers and laborers employed by the Employer at its facility located in Juana Diaz, Puerto Rico, but excluding all other employees, landfill contracted employees, guards and supervisors as defined in the Act.” (GC. Exh. 1rr).

⁵ Unit C is defined as: “All full-time and part-time residential and commercial drivers, helpers, mechanics, mechanic helpers, compactor technicians, welders and tow truck operators (delivery truck) employed by the Employer at its facility located in Yauco, Puerto Rico; but excluding all other employees, landfill employees, guards and supervisors as define din the Act.” (GC Exh. 1rr).

⁶ Unit B is defined as: “All full-time and regular part-time landfill department employees, including utility and auxiliary employees, spotters, handymen, heavy equipment operators, welders and truck drivers employed by the employer at its facility located in Juana Diaz, Puerto Rico, but excluding all other employees, janitors, clerical employees, guards and supervisors as defined in the Act.” (GC Exh. 1rr).

and unit D also known as the Yauco (Landfill)⁷; unit E, also known as the Quebradillas,⁸ and unit F, also known as the San German.⁹ However, there was no collective-bargaining agreement in effect at any relevant time for these latter four units. It is uncontested, and I find, the Union was the exclusive collective-bargaining representative of the employees in each of the six units.

5

At the time of the hearing, Respondent was no longer providing any waste disposal services in the commonwealth of Puerto Rico (Tr. 23).¹⁰ Raul Colon Aponte, Respondent’s accountant, testified the shutdown was the result of Respondent’s financial situation. Aponte testified Respondent’s financial decline started in 2011 for two reasons (Tr. 23). First, the operational expenses had increased over recent years as equipment aged and required more repair and maintenance. He further testified that Respondent’s customers were not paying timely, and in some cases, not at all (Tr. 23). He stated the situation deteriorated to the point where Respondent was making daily decisions as to which financial obligations to meet (Tr. 24). To date, Respondent has not filed for bankruptcy protection, and continues to maintain an office in Puerto Rico and employ certain management employees, including Aponte. However, it no longer provides waste disposal services.

10

15

In 2011 and 2012, Respondent undertook two financial obligations. The Company purchased several new trucks in 2011 (Tr. 26). Additionally, Respondent entered into new collective-bargaining agreements with the Union in June 2012 to cover employees in unit C and in August 2012 to cover employees in unit A (Tr. 26; Jt. Exhs. 16 and 17).

20

The collective-bargaining agreements between Respondent and the Union covering employees in unit A and unit C mirror one another in most respects (Jt. Exhs. 16 and 17). Moreover, the agreements contain provisions relevant to the violations alleged herein. Those provisions are as follows:

25

1. Article XXXV of the collective-bargaining agreement covering Unit C employees requires Respondent to pay bonuses to employees with “no absences, tardiness, or accidents” in amounts that vary depending upon the amount of time the employee has been in compliance [Jt. Exh. 16 p. 85].
2. Annex A to the collective-bargaining agreement covering Unit C employees requires Respondent to pay a \$100 signing bonus to “all regular employees who are active members” of the Union on the date the agreement is signed [Jt. Exh. 16 p. 90].

30

35

⁷ Unit D is defined as: “All full-time and part-time dump truck drivers, water truck drivers, assistant mechanics, utility employees, and heavy equipment operators working for the Employer at its facility in Yauco landfill facility, but excluding all other employees, guards, and supervisors as defined in the Act. (GC Exh. 1rr).

⁸ Unit E is defined as: “All full-time and part-time trailer drivers, front load drivers, roll off drivers, utility employees, welders, diesel mechanics, and commercial helpers employed by the Employer at its facility located in Quebradillas, Puerto Rico; but excluding all other employees, guards, and supervisors as defined in the Act.” (GC Exh. 1rr).

⁹ Unit F is defined as: “All full-time drivers, driver helpers, and transfer trailer drivers employed by the Employer at its facility located in San German, Puerto Rico; but excluding other employees, supervisors and guards as defined in the Act.” (GC Exh. 1rr).

¹⁰ I note that the General Counsel did not allege that the shutdown of Respondent’s operations in Puerto Rico constituted an unfair labor practice; nor did he seek, as a remedy, a return to the status quo ante.

3. Article XXVIII of the collective-bargaining agreement covering Unit C employees addresses sick leave. Specifically, it requires Respondent to pay employees for accumulated unused sick leave hours, up to 88 hours total, at the end of the year [Jt. Exh. 16 p. 75].
- 5 4. Article XVI of the collective-bargaining agreements covering Unit A and Unit C employees provides for hours and pay. It specifies that “[p]ay day will be weekly, every Friday between 11:59 p.m. on Thursday and 11:59 p.m. on Friday.” [Jt. Exh. 16 p. 50 and Jt. Exh. 17 p. 50].
- 10 5. Article XVII of the collective-bargaining agreements covering Unit A and Unit C employees addresses the supply of uniforms. Specifically, Section 17.8 requires Respondent to provide uniforms to employees and lays out a timetable in which to do so [Jt. Exh. 16 p. 57 and Jt. Exh. 17 p. 57].
- 15 6. Article XIX of both collective-bargaining agreements obligates Respondent to provide a bulletin board [Jt. Exh. 16 p. 60 and Jt. Exh. 17 p. 60].
- 20 7. Article XXIV is entitled “General Provisions.” Within that article of both agreements, under Section 24.7, Respondent agreed to provide “functioning” air conditioners in all vehicles [Jt. Exh. 16 p. 66 and Jt. Exh. 17 p. 67].
- 25 8. Article XXXI of both collective-bargaining agreements obligates the employer to provide a medical plan to employees. Section 31.1 states that Respondent “will provide a medical plan to employees” and further obligates Respondent to “contribute the amount of two hundred forty-eight dollars (\$248.00).” [Jt. Exh. 16 p. 79 and Jt. Exh. 17 p. 80]. It also allows for the “the remaining, if any,” to be paid by the employee [Jt. Exh. 16 p. 79 and Jt. Exh. 17 p. 80]. It does not specify the manner in which this “remaining” is to be paid.

30 Respondent maintains an employee manual covering all employees at all locations (Jt. Exh. 13). Among the matters covered in this manual are rules of conduct for employees and discipline for infractions of the rules (Jt. Exh. 13 pp. 7-9). The manual enumerates 51 offenses, averring that this is not necessarily an exhaustive list of “disciplinary offenses.” (Jt. Exh. 13 p. 7-8).¹¹ A violation of a “disciplinary offense” is potentially subject to disciplinary action, including termination. The imposition and severity of any such discipline is left to the discretion of Respondent (Jt. Exh. 13 p. 10). The manual contains 13 factors to consider in determining the nature of any discipline (Id.).

B. Repudiation of the Collective-Bargaining Agreement

40 Respondent concedes it failed to fulfill certain obligations under the collective-bargaining agreements with the Union. Specifically, Respondent admits failing to pay bonuses; failing to pay employees for unused accumulated sick leave; deducting health insurance premiums from

¹¹ The manual defines “disciplinary offense” as “any action or omission that violates any rule or regulation contained in this manual or any procedure or policy approved by the company or implies any deviation or violation regarding desirable behavior expected from anyone or any way that endangers any employee or company interest.” (Jt. Exh. 13 p. 7).

the wages of three employees; failing to timely pay wages to employees in unit A and unit C; failing to provide uniforms to employees in unit A and unit C; failing to provide a bulletin board; and failing to ensure proper operation of air conditioning units in vehicles used by employees (GC Exh. 1(vv) and Jt. Exh. 1). Additionally, Respondent admits failing to pay employee health insurance premiums, resulting in the cancelation of the plan (GC Exh. 1(vv)). However, prior to doing so, Respondent contacted the Union.

In fact, Respondent contacted the Union on four occasions beginning in late 2012. By letter dated October 29, 2012, Respondent notified the Union it was unable to pay bonuses for security and attendance for employees of unit A from March through October, and to provide uniforms for the second period of 2012 (Jt. Exh. 2). In its letter, Respondent provided three dates in November that it was able to meet with the Union. The record is silent as to whether the Union responded. Next, by letter dated December 10, 2012, Respondent notified the Union of its inability to pay bonuses to unit C employees for July through December 2012, and to pay for unused excess sick leave for unit A and unit C employees. Again, Respondent provided three specific dates in December it was able to meet with the Union (Jt. Exh. 3), but again, the record is silent as to whether the Union responded. On January 29, 2013, Respondent wrote the Union stating its intention to bargain over the four issues raised in its two previous letters with regard to unit A and proposed four dates in February to meet. In this letter, Respondent also mentioned pending agreements for the Yauco Landfill, Quebradillas, and San German units (Jt. Exh. 18). On February 14, 2013, Respondent wrote the Union a final letter proposing three dates in March 2013 on which to meet (Jt. Exh. 4). In this last letter, Respondent noted the Union had previously agreed to provide dates on which to meet in response to prior letters, but had failed to do so.

Around this same time in February 2013, “First Bank”¹² seized 80 percent of Respondent’s accounts, hindering Respondent’s ability to pay its bills (Tr. 24). It was at that point Respondent was no longer able to pay its health insurance premiums, having already been delinquent in paying past months’ premiums (Tr. 27). Aponte testified the insurance carrier had notified Respondent it would cancel the plan if the account was not brought up to date prior to March 2013 (Tr. 27-28). Aponte testified Respondent tried to reach an agreement with the insurance carrier, but was unable to do so (Tr. 24). In addition, Respondent solicited quotes from other health insurance providers, but none were low enough for Respondent to cover the costs (Tr. 25).

On March 1, 2013, Respondent’s health insurance carrier canceled its plan (Jt. Exh. 1 par. 6; Tr. 24). Respondent concedes it did not notify the Union of the lapse in payments or the cancelation of the health insurance plan until after March 1, 2013 (Jt. Exh. 1 par. 7).

Also on March 1, 2013, Francisco Grillo, attorney for Respondent, and Luis Mangual, business agent for the Union, had a telephone conversation in which Grillo informed Mangual the company could not meet that day’s payroll (Jt. Exh. 18). Mangual sent a letter to Grillo confirming the conversation that same day. The letter confirms that Mangual had been informed of the impending delinquency and Respondent had agreed not to discipline employees who refused to work as a result. The letter does not express acquiesce on the part of the Union.

¹² The complete name of the bank was not specified in the record.

Respondent and the Union met on March 3, 2013. Mangual was the only person present at the meeting to provide testimony about these discussions. According to Mangual, the parties had only this one “official” meeting at which health insurance and uniforms were discussed (Tr. 11-12). However, Mangual later testified other matters had been discussed at this meeting, including Respondent’s failure to pay signing bonuses, excess sick leave, timely paying of wages, providing a bulletin board, and air-conditioner repair (Tr. 16-18). Mangual testified Respondent conceded it had these outstanding obligations, but did not have the money to pay for them (Tr. 16).

With regard to providing uniforms, Mangual testified Respondent proposed a plan under which it would provide something less than the exact terms of the collective-bargaining agreement (Tr. 12). According to Mangual, he understood that, although a total of 10 uniforms were owed, employees only needed 5 (Tr. 12). No written proposal was presented to the Union; rather, Respondent represented to the Union it would create a plan to provide the five uniforms (Tr. 12). According to Mangual, this was part of larger plan that Respondent was attempting to implement that would address all of its delinquencies (Tr. 13).

Further, at this meeting, Respondent offered a compromise with regard to health insurance (Jt. Exh. 1 par. 8; Tr. 19). According to both Mangual and Aponte, Respondent offered to reimburse employees for any medical expenses incurred as a result of medical emergencies during the lapse in insurance coverage (Tr. 19, 25). Such reimbursement would include deductions for any co-pays the employee would have otherwise had to pay under the insurance plan (Tr. 19).

Mangual testified the Union did not agree to any of Respondent’s proposals (Tr. 19-20). However, Aponte testified the Union did agree to the proposal to reimburse employees for medical expenses (Tr. 25). Aponte conceded he was not at the March 2013 meeting, and, therefore, had no firsthand knowledge regarding any agreements. Other evidence suggests the reimbursement proposal was presented to employees, as employees submitted requests for reimbursement of medical expenses and Respondent did reimburse those employees (Jt. Exh. 18; Tr. 25-26).¹³ However, Aponte also conceded that he did not know whether all employees were reimbursed for out-of-pocket medical expenses (Tr. 28).

I credit Mangual’s testimony that the Union did not agree to any of Respondent’s proposed compromises. Although Mangual equivocated regarding the number and timing of meetings and was unable to provide specific testimony, his demeanor suggested more indifference than evasiveness. His testimony is uncontroverted by firsthand knowledge of what transpired in the March 3 meeting. And, there is no other evidence that contradicts his assertion.

C. Unilateral Changes

Respondent admits it took certain unilateral actions with regard to the terms and conditions of employment of employees with whom it has a collective-bargaining relationship, but has not yet arrived at a collective-bargaining agreement.

¹³ What is not clear is when and how employees were informed of this opportunity.

1. Timely payment of wages

Respondent concedes, and I find, it has not paid employees of units B, D, E, and F on Fridays on a regular and consistent basis since January 2013 (Jt. Exh. 1 par. 20). Additionally, Respondent concedes it has not paid all wages due to employees of units B, D, E, and F (Jt. Exh. 1 par. 21). Respondent notified the Union on March 1, 2013, that it would not meet its regular payroll. This was documented in a letter from Mangual to Grillo, which establishes only that Grillo informed Mangual of Respondent’s inability to meet that week’s payroll and agreement not to discipline employees if they refused to work as a result of not being paid (Jt. Exh. 18). Otherwise, Respondent provided no notice to the Union regarding its inability to timely pay its employees prior to March 1, 2013.

2. Holiday pay to Colon and Cordero

Pablo Colon and Rolando Cordero were employees of unit F, not covered by a collective-bargaining agreement, during relevant times (Jt. Exh. 1 par. 10). It is undisputed neither was paid for January 7, 2013, an official Monday holiday; although both worked that week from Tuesday, January 8 through Saturday, January 12 (Jt. Exh. 1 par. 10). Throughout 2011 and 2012, Colon and Cordero were paid for holidays that fell on a Monday, notwithstanding Monday being their regular day off (Jt. Exhs. 1, 5, 6, 7, 8, 9, 10, and 11). Respondent presented no evidence it gave notice or bargained with the Union over its decision not to pay Colon or Cordero for the January 7, 2013 holiday.

3. Layoff of Cruz

It is undisputed that from January 7 through February 11, 2013, Respondent laid off Luis A. Rivera Cruz (Jt. Exh. 1 par. 18). Respondent’s manager of residential routes, Julio Torres Torres, testified Cruz was a transfer trailer driver for the San German unit (unit F) (Tr. 30-31). Torres testified that on January 2, 2013, Cruz’ truck was damaged and had to be taken out of service. The truck was out of service for 6 months (Tr. 31). Torres testified it was company practice when a vehicle assigned to an employee broke down the employee would be given other assignments if the repairs took only a day or two (Tr. 32). However, if the repairs took “a long period,” the employee was suspended or temporarily laid off (Tr. 32). Cruz was laid off, according to Torres, because there was no other work for him to do in his unit. Cruz was brought back before the truck was repaired to cover for other employees during their days off (Tr. 33). Respondent concedes it did not give notice to or bargain with the Union about its decision to lay off Cruz prior to doing so (Jt. Exh. 1 par. 19).

4. Disciplinary actions against Flores and Mercado

On December 6, 2012, Respondent issued a 3-day suspension to Jose O. Rivera Flores for violation of three company conduct rules. Specifically, Respondent wrote in Flores’ employee disciplinary report he violated conduct rules prohibiting: (1) stopping work during duty hours without authorization; (2) “service abandonment;” and (3) inducing another employee to participate in a rule violation (Jt. Exh. 14). The report specifies, on that same day, Flores was

assigned to cover pickups on two routes outside of his normal route with two other employees unfamiliar with those routes. Flores failed to cover one of the two routes and Respondent found this violated three specific rules, each of which is contained in the employee manual (Jt. Exh. 14; Jt. Exh. 13 pp. 7-9).

5

On December 20, 2012, Respondent issued a 5-day suspension to employee Raul Toro Mercado (Jt. Exh. 15). According to the Employee Disciplinary Report for Mercado, he had, on more than one occasion, failed to complete daily pickups. The report specified the conduct violated rule 9 of the Employee Manual which prohibits negligence or disinterest in the performance of one’s work (Jt. Exh. 15; and Jt. Exh. 13 p. 7).

10

There is no further record evidence regarding these two disciplinary actions. Neither Mangual, nor any company official testified regarding these disciplinary actions.¹⁴ Both Flores and Mercado are employees of unit F and no collective-bargaining agreement covering Flores or Mercado was in effect at the time of the disciplinary actions. Respondent concedes it did not provide notice to or bargain with the Union about the disciplinary actions issued to Flores and Mercado (Jt. Exh. 1 par. 27).

15

5. Health insurance coverage

20

As previously noted, the collective-bargaining agreement covering employees of unit A and unit C required Respondent to maintain health insurance coverage for those employees. It also required the insurance premium, up to \$248, be paid by Respondent and the “remaining” be paid by the employee. During the period of July 1 to September 30, 2012, Respondent deducted \$15.83 from the weekly pay of unit C employees Angel Cordero Lucian, Hiram Rodriguez, and Jason Lopez (Jt. Exh. 1 par. 9). These deductions were to be applied to the health insurance premium. Respondent made these deductions without first notifying the union or providing it an opportunity to bargain (Jt. Exh. 1 par. 9).

25

Respondent’s health insurance policy also covered employees in units B, D, E, and F. As noted elsewhere herein, Respondent failed to pay premiums on the policy, resulting in the lapse of the policy on March 1, 2013. Respondent admits it failed to make the payments and did not provide notice of the cancelation of the policy to the Union until the March 3, 2013 meeting. Respondent admits it failed to notify the Union or provide an opportunity to bargain over either its failure to pay the policy premiums or the cancelation of the policy (GC Exh. (vv)).

30

35

III. Analysis

It is well established that an employer violates Section 8(a)(5) and (1) of the Act when it makes substantial and material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining, namely wages, hours or terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Such unlawful unilateral changes may involve both “contract repudiation” and “unilateral change.” Those two theories of

40

¹⁴ The General Counsel does not contend that the disciplinary actions themselves constituted unfair labor practices, but alleges only that the failure to provide notice and the opportunity to bargain over them was unlawful.

violation were explained and distinguished by the Board in *Bath Iron Works Corp.*, 345 NLRB 499 (2005). In order to show a violation under a “contract repudiation” theory, the General Counsel must establish first that a contract provision existed and second, that the employer modified or failed to comply with the provisions without consent of the Union. *Id.* If, however, the employer has both a “sound arguable basis” for its interpretation of the contract and is not “motivated by union animus or acting in bad faith,” the Board ordinarily will not find a violation. *Id.* In contrast, in order to show a violation for an employer’s “unilateral change” of a term or condition of employment, the General Counsel must show that “there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining.” *Id.* at 501. Such a violation may occur at anytime during the collective-bargaining relationship.

A. Contract Repudiation

Sections 8(a)(5) and (1) and 8(d) prohibit an employer who is a party to an existing collective-bargaining agreement from altering or modifying the terms and conditions of employment covered by that agreement without the consent of the union. *C & S Industries*, 158 NLRB 454, 457 (1966); *Rapid Fur Dressing*, 278 NLRB 905 (1986); *Fort Pierce Jai-Alai*, 310 NLRB 862 (1993); *St. Vincent Hospital*, 320 NLRB 42 (1995); *New Mexico Symphony Orchestra*, 335 NLRB 896 (2001); and *Republic Die & Tool Co.*, 343 NLRB 683 (2004). Moreover, the Board has consistently held a party has no obligation to discuss changes proposed by the other party during the duration of the existing contract. *C & S Industries*, 158 NLRB at 457. In other words, although a union may consent to changes in the terms of a collective-bargaining agreement, it is under no obligation to do so.

The General Counsel alleges that Respondent repudiated and/or modified certain provisions of the collective-bargaining agreement with regard to unit A and unit C. Specifically, the complaint alleges Respondent failed to pay safety, attendance and punctuality bonuses for employees in unit C; failed to pay signing bonuses to employees in unit C; failed to pay excess sick leave balances to employees of unit C; changed pay dates and delayed payment of wages to employees of units A and C; deducted health insurance premiums from the wages of employees in unit C; failed to provide uniforms to employees of unit C; failed to provide a bulletin board; failed to repair air conditioning equipment on trucks used by employees of unit C; and failed to maintain a health insurance plan for employees of units A and C. (GC Exh. 1(rr)).

Respondent argues these matters should be deferred to the grievance-arbitration procedure set out in the two collective-bargaining agreements in effect at the time of the alleged violations. I note, however, allegations with regard to unilateral changes as well as failure to meet and bargain related to employees of units B, D, E, and F are not covered by these provisions of the two contracts. The consolidated complaint raises issues related to those employees covered by contracts and those not covered. “Board policy . . . disfavors bifurcation of proceedings that entail related contractual and statutory questions.” *Avery Dennison*, 330 NLRB 389, 390 (1999). Consistent with Board policy, and in as much as all issues were fully litigated at the trial, I find inappropriate Respondent’s request for deferral and inconsistent with Board precedent. In *New Mexico Symphony Orchestra*, 335 NLRB 896 (2001), the Board rejected Respondent’s assertion that its failure to make contractually required wage payments or

to make late payments, was a matter that should be deferred to arbitration. See also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). In *New Mexico Symphony Orchestra*, the Board found there was no question of contract interpretation because the contract language was clear and unambiguous on its face and the employer did not allege that the contract gave it the right to make changes in the timing or amount of wages. Thus, the Board held, deferral to arbitration was not warranted. Similarly, here Respondent does not argue the contract provisions are ambiguous, subject to varying interpretation, or provided it discretion with regard to any of the matters at issue. Therefore, I find no basis for a deferral to arbitration.

In the instant case, I find, with one exception, that the collective-bargaining agreements contain provisions that obligate Respondent to provide the benefits specified. Article XXXV of the collective-bargaining agreement covering unit C employees requires Respondent to pay bonuses to employees with “no absences, tardiness, or accidents” (Jt. Exh. 16 p. 85); Annex A to the collective-bargaining agreement covering unit C employees requires Respondent to pay a \$100-signing bonus to “all regular employees who are active members” of the Union on the date the agreement is signed (Jt. Exh. 16 p. 90); Article XXVIII requires Respondent to pay employees for accumulated unused sick leave hours, up to 88 hours total, at the end of the year (Jt. Exh. 16 p. 75); Article XVI of the collective-bargaining agreements covering unit A and Unit C employees provides for weekly wage payments “every Friday.” (Jt. Exh. 16 p. 50 and Jt. Exh. 17 p. 50)¹⁵; Article XVII of the collective-bargaining agreements covering Unit A and unit C employees requires Respondent to provide uniforms to employees (Jt. Exh. 16 p. 57 and Jt. Exh. 17 p. 57); Article XIX of both collective-bargaining agreements obligates Respondent to provide a bulletin board (Jt. Exh. 16 p. 60 and Jt. Exh. 17 p. 60); Article XXIV requires Respondent to provide “functioning” air-conditioners in all vehicles (Jt. Exh. 16 p. 66 and Jt. Exh. 17 p. 67); and Article XXXI of both collective-bargaining agreements obligates the employer to provide health insurance to employees (Jt. Exh. 16 p. 79 and Jt. Exh. 17 p. 80).¹⁶ Respondent does not contend any of these provisions provide for discretion with regard to compliance and admits that it did not comply.

I do not find, however, that either collective-bargaining agreement contained a provision expressly prohibiting deduction of health insurance premiums from employee wages. Article XXXI of the collective-bargaining agreement covering the employees at issue obligates Respondent to provide a medical plan to employees and to contribute the amount of \$248 (the frequency is not specified) (Jt. Exh. 16). It further states that the “remaining [costs], if any, will be by the employee.” (Jt. Exh. 16 p. 79.) Nothing in the collective-bargaining agreement section on payment of wages or salary prohibits or even addresses deductions (Jt. Exh. 16 pp. 50-52). The General Counsel presented no evidence the \$15.83 Respondent deducted from the wages of three unit C employees was not the “remaining” portion of premiums due the insurance carrier. Nor did he present evidence Respondent was not meeting its obligation, under article XXXI, to

¹⁵ The Board has long held that failure to make timely contractually required payments to employees constitutes a unilateral modification of the terms of the collective-bargaining agreement. *New Mexico Symphony Orchestra*, 335 NLRB at 897, citing *R. T. Jones Lumber Co.*, 313 NLRB 726 (1994).

¹⁶ The Board has also found as a violation failure to make employer required health insurance premium contributions. *R. T. Jones Lumber*, 313 NLRB at 727, citing *Everlock Fastening Systems*, 308 NLRB 1018 (1992), and *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).

5 pay \$248 toward these employees' premium payments at the time alleged. Finally, contrary to the General Counsel's assertion in his brief, Respondent did not stipulate these deductions were not authorized under the collective-bargaining agreement. (See Jt. Exh. 1 par. 9.) Therefore, Respondent had a "sound arguable basis" for interpreting the collective-bargaining agreement as allowing these deductions. For this reason, I dismiss the allegation in the complaint alleging Respondent failed to continue in effect the terms of the collective-bargaining agreement by deducting health insurance premiums from employee wages (GC Exh. 1(rr) par. 8(a)). This finding does not resolve whether Respondent had a duty to bargain over this issue.

10 There is no dispute regarding the existence of these express obligations, nor of Respondent's failure to fulfill them, thus the gravamen of the matter is whether the Union consented to these modifications of the terms of the collective-bargaining agreements. I find it did not.

15 I note that Respondent contends only that the Union consented to the proposals for providing fewer uniforms and for coverage of employee emergency medical expenses during the lapse in insurance coverage, in lieu of providing health insurance coverage. However, the thread upon which that argument hangs is very thin. Respondent did not notify the Union that the insurance premiums had not been paid, resulting in cancelation of coverage, until it was a fait accompli. I am persuaded there can be no finding of consent under such circumstances. *Tri-Tech Services*, 340 NLRB 894, 895 (2003). Mangual testified without controversion the Union did not agree to this alternative. The only evidence of consent was that Respondent had reimbursed employees for some medical expenses. I am not persuaded the evidence demonstrates the Union agreed to this as an alternative, as it is equally likely that employees, when given the opportunity, independently availed themselves of the offer to be reimbursed for medical expenses, rather than cover the entire cost themselves.

20
25
30 With regard to providing uniforms, Respondent presented no evidence to support its contention the Union agreed to employees receiving fewer uniforms than required by the collective-bargaining agreement. Mangual testified, without contradiction, to the contrary. Moreover, Respondent admits it never even provided the reduced number to the Union (GC Exh. 1(vv)). I find no evidence the Union consented to any proposed changes to the collective-bargaining agreements.

35 The only other defense raised by Respondent for its failure to meet its obligations under the collective-bargaining agreement is that it was unable to do so due to its dire financial circumstances. The Board has held that neither a claim of economic necessity, hardship, nor infeasibility, even if proven, is a valid affirmative defense to unilateral modifications to an existing collective-bargaining agreement. *Tammy Sportswear Crop.* 302 NLRB 860 (1991), citing *Raymond Prats Sheet Metal Co.*, 285 NLRB 194, 196 (1987); *International Distribution Centers*, 281 NLRB 742, 743 (1986); and *Hiysota Fuel Co.*, 280 NLRB 763 (1986). I find Respondent's defense in this regard without merit.

40
45 In summary, I find Respondent violated Section 8(a)(5) and (1) of the Act when it failed to pay safety, attendance and punctuality bonuses to unit C employees; failed to pay signing bonuses; failed to reimburse employees for unused sick leave; did not meet its payroll schedule;

failed to provide uniforms; failed to provide a bulletin board; failed to maintain air-conditions in vehicles used by unit C employees; and failed to maintain health insurance for employees of units A and C without the consent of the Union.

5

B. Unilateral Changes

I next turn to the allegations Respondent made unilateral changes to the terms and conditions of employment for employees not covered in a collective-bargaining agreement. It is well settled that an employer violates Section 8(a)(5) and (1) of the Act when it makes substantial and material unilateral changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Mandatory subjects of bargaining include those delineated in Section 9(a) as “rates of pay, wages, hours of employment, or other conditions of employment” and in Section 8(d) as “wages, hours, and other terms or conditions of employment.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Respondent admits, and I find, that changes to payment of wages, holiday pay, layoff, discipline, health insurance premium deductions, and the maintenance of health insurance are all mandatory subjects of bargaining. See *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). Moreover, I find Respondent made changes with regard to these mandatory subjects of bargaining without providing notice and the opportunity to bargain to the Union.

20

Respondent conceded it did not notify or bargain with the Union over the layoff of Cruz, the discipline of Flores and Mercado, or the deduction of health insurance premiums from the pay of Luciano, Rodriguez, and Lopez (Jt. Exh. 1). Further, Respondent presented no evidence it notified the Union of the failure to pay holiday pay to Colon and Cordero. Finally, the evidence establishes Respondent did not notify the Union of the late payroll or the cancelation of its health insurance coverage. The evidence establishes the only time Respondent notified the Union employees would not receive their March 1, 2013 paycheck was in a telephone call from Respondent’s counsel, made on March 1, 2013, informing the Union Respondent would not meet that week’s payroll. Similarly, the Union was not given notice of the cancelation of the health insurance policy until it had been canceled.¹⁷ Simply put, notice after the fact is not notice. *Lapeer Foundry*, 289 NLRB 952 (1988).¹⁸ I find Respondent did not provide notice or the opportunity to bargain to the Union with regard to these mandatory subjects of bargaining.

25

30

Respondent raises several defenses. First, it contends certain of its actions were not deviations from past practice and did not constitute unilateral changes. It further avers, to the extent unilateral changes were made, they were not material or substantial, and did not trigger an obligation to provide notice or a duty to bargain. Finally, Respondent asserts all changes made were necessitated by its dire financial condition. I will address each of these defenses separately.

35

¹⁷ I note as well, that Respondent concedes that it was well aware of the impending cancelation, as Aponte admitted as much in his testimony.

¹⁸ The only matters that Respondent raised with the Union prior to implementation were the four matters specifically enumerated in its letters of October 2012, December 2012, January 2013 and February 2013. Those letters only gave the Union notice of Respondent’s inability to meet its existing obligations under the collective-bargaining agreements already in place. Because I have found these actions constituted a repudiation of the contract, it is not necessary to address whether they also violated Respondent’s duty to provide notice and the opportunity to bargain. *Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004).

1. Did Respondent Deviate from Past Practice?

Respondent contends it had no duty to bargain over payroll changes, holiday pay, and layoff of employees because it was simply following its past practice. Respondent’s argument is factually and legally incorrect. The Board in *Eugene Iovine, Inc.*, 353 NLRB 400, 400 (2008), outlined the burden of proof to establish a showing of a past practice. The party asserting the existence of a past practice bears the burden of proving the practice occurred “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Id.*, quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); also citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), *enfd.* mem. 112 Fed. Appx 65 (D.C. Cir. 2004). But an employer’s duty to provide a union with notice and the opportunity to bargain exists even with respect to matters over which the employer, prior to certification of an exclusive bargaining representative, exercised unlimited discretion, where such matters are mandatory subjects of bargaining and there is no agreement setting forth the procedures for making such changes. *Eugene Iovine, Inc.*, 328 NLRB 294 (1999).

a. Payroll changes

Respondent concedes, and I find, it did not pay employees of units B, D, E, and F on Fridays beginning in January 2013 but paid those employees on an irregular basis (Jt. Exh. 1). Moreover, Respondent has not paid all wages owed to those employees (Jt. Exh. 1). Although Respondent contends that it did not “change” its customary payroll date, I am not persuaded by its semantic argument. I am not persuaded by Respondent’s argument that a change must somehow meet some level of formality or permanence. Such is not the case. Rather, what is at issue is whether Respondent deviated from a past practice with regard to a mandatory subject of bargaining. The undisputed evidence establishes it did. Respondent’s own payroll records show employees were paid every Friday (Jt. Exhs. 5, 6, 7, 8, 9, 10, and 11). No evidence in the record suggests any other payment schedule for wages. Respondent presented its accountant who gave no testimony of any such practice. Moreover, circumstantial evidence suggests that the failure to pay employees on Friday was a change from prior practice, as Grillo contacted the Union when Respondent realized it would not be able to make a specific Friday payment. I find, therefore, Respondent’s contention it had anything other than a weekly payroll, with paychecks issued to all employees on Friday, is without factual support.

b. Holiday pay

Respondent alleges its failure to pay holiday pay to Colon and Cordero was consistent with past practice. Again, Respondent failed to demonstrate a past practice of not paying employees for holidays that fell on their regular day off. The facts establish just the opposite. Respondent’s payroll records substantiate that throughout 2011 and 2012, these two employees were paid for holidays falling on their regular day off (Jt. Exhs. 1, 5, 6, 7, 8, 9, 10, and 11). I find Respondent’s failure to pay holiday pay on this occasion unmistakably deviated from its past practice. Respondent’s contention to the contrary is without merit.

c. Layoff

5 Regarding the layoff of Cruz, Respondent contends it was following its past practice of laying off employees when their vehicles broke down, for the duration of time the equipment was out of service. The only evidence presented of such a past practice was the uncontroverted testimony of Manager of Residential Routes Torres.

10 In *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), the Board rejected similar evidence as insufficient to meet the burden of establishing a past practice. The employer in *Eugene Iovine* presented only the testimony of its president who enumerated various reasons that layoffs had occurred in the past. This, the Board held, was insufficient to establish a past practice. *Id.* The Board held that “[a]bsent evidence of when or how frequently or under what circumstances” layoffs had occurred in the past, it could not find the employer’s actions were consistent with an established past practice. See also *Garment Workers Local 512 v. NLRB*, 795 F.2d 705, 711 (9th Cir. 1986), abrogated on other grounds by *Hoffman Plastics Compounds v. NLRB*, 535 U.S. 137 (2002) (affirming the Board’s holding because the employer’s layoffs are “inherently discretionary, involving subjective judgments” such could not be found to be past practice).

20 In the instant matter, I find Respondent failed to present evidence that layoffs resulting from equipment breakdown occur with a sufficient degree of certainty to establish a past practice. Rather, Torres testified whether an employee was laid off or given other assignments depended on whether the repair took a short or a long time. If there was other work for the employee to perform, the employee may not be laid off at all, or for a shorter period than the actual repair period, as was done in the case of Cruz. Given the level of uncertainty and apparent discretion to the process, I find it does not meet the criteria necessary to constitute a past practice Respondent could implement without notice and bargaining.

d. Disciplinary actions against Flores and Mercado

30 The Board held in *Alan Ritchey*, 359 NLRB No. 40 (2012), that under *Katz*, discretionary discipline is a mandatory subject of bargaining. Where, as here, an employer’s existing disciplinary system remains the same, it must, nevertheless, bargain over the imposition of discipline if it involves an exercise of discretion. *Id.* As noted, Respondent’s employee manual provides discretion, not only to determine what offenses may warrant discipline, but what discipline to administer (Jt. Exh. 13). I find the imposition of disciplinary actions against Flores and Mercado were matters over which Respondent had a duty to bargain but, admittedly, failed to do.

2. Were the unilateral changes material and substantial?

40 Respondent contends that, if unilateral changes were made, none were material or substantial. I find this contention without merit. Whether a change in the terms or conditions of employment is material or substantial is not amenable to a bright line test and the Board has declined to fashion one. Rather the Board looks at whether allowing the unilateral change undermines the union’s status as the employees’ bargaining representative or is otherwise

destructive to the bargaining process. *Carpenters Local 1031*, 321 NLRB 30, 32 (1996). A showing of bad faith is not required. *U. S. Gypsum Co.*, 155 NLRB 1216, 1219 (1965). It is immaterial that the impact was limited to one or a few employees because such would allow an employer to escape its bargaining obligation by making a series of unilateral changes.
 5 *Carpenters Local 1031* 321 NLRB at 32; see also *Bloomfield Health Care Center*, 352 NLRB 252, 256 (2008), citing *Carpenters Local 1031*, supra. 32. The Board has found changes that result in only “minor inconveniences” or eliminates mere “token” items are not material or substantial but also that what is a token to one may have meaning to another.¹⁹

10 With regard to the payment of wages, it is hard to imagine a situation in which the timely payment of wages would be found a minor inconvenience or a mere token event. Indeed, the Board has held the “establishment and maintenance of a viable agreement on wages” as “one of its principal functions.” *New Mexico Symphony Orchestra*, 335 NLRB at 898 (2001). The same is true with respect to the failure to pay holiday pay to Colon and Cordero and the deduction of
 15 health insurance premiums from the pay of Luciano, Rodriquez, and Lopez. The effect of each of these actions by Respondent was to reduce the wages paid to the employees. Colon and Cordero, for example, lost a day’s pay. Luciano, Rodriquez, and Lopez were denied wages they had earned. I find such loss of wages material and substantial and not mere token amounts.

20 The Board has found disciplinary actions, such as suspensions, have an “inevitable and immediate impact on employees’ tenure, status or earnings.” *Allen Ritchey*, 359 NLRB No. 40, slip op. at p. 4 (2012). Thus, the Board has held bargaining is required for disciplinary actions due to the impact on the employee as well as the impact on the union’s effectiveness. Here, Flores and Mercado lost multiple days of pay which I find had more than a de minimus impact
 25 on their wages and/or terms of employment and was, therefore, a material and substantial change in the terms and conditions of employment.

As to the layoff of Cruz, the Board has consistently held that the layoff of even one employee is a material and substantial change in the terms and conditions of employment for
 30 which the employer has a duty to bargain. *Carpenters Local 1031*, 321 NLRB at 32. Respondent offered no factual or legal support for a finding to the contrary. I find the layoff of Cruz was a material and substantial unilateral change in the terms and conditions of employment and violates the Act.

35 **3. Were Respondent’s actions necessitated by economic exigency?**

Respondent contends its actions were necessitated by economic exigency. In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board found as one of two limited exceptions to the
 40 general rule prohibiting unilateral change by the employer, situations where economic exigencies compelled prompt action. *Id.* at 374. Relying on its prior holding in *Bottom Line*, the Board

¹⁹ Compare *United Parcel Service*, 336 NLRB 1134 (2001) (finding an additional 20 minutes added to a commute due to a change in parking rules was material and substantial) to *Success Village Apartment, Inc.*, 348 NLRB 579 (2006) (finding a parking rule that resulted in employees having to walk an additional 200 yards was de minimus); and *Benchmark Industries*, 270 NLRB 22 (1984) (finding holiday food offerings or other one time gifts of nominal value to be token items) to *Wald Mfg. Co. v. NLRB*, 426 F.2d 1328 (6th Cir. 1970) (enforcing a Board order finding that elimination of an annual picnic was material and substantial).

held in *RBE Electronic of S.D., Inc.*, 320 NLRB 80 (1995), in order to establish such an affirmative defense, an employer must show either that the circumstances required implementation at the time action was taken or the existence of a business “emergency that requires prompt action.” *Id.* at 81. The Board further held the employer’s burden to establish a compelling business justification is a heavy one. *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992). Moreover, the Board requires the employer show, not only that the changes were “compelled,” but also that the exigency was “caused by external events,” beyond its control, or “not reasonably foreseeable.” *RBE Electronics*, 320 NLRB at 82.

Here, I find Respondent failed to meet that burden. The only evidence of Respondent’s financial condition was the testimony of its accountant, Aponte. Aponte testified Respondent had been experiencing financial problems since 2011, belying any claim Respondent’s dire financial situation was not previously known to it or somehow “unforeseeable.” Since at least October 29, 2012, when Respondent sent its first letter to the Union, Respondent was aware that it was unable to meet certain of its financial obligations. Aponte testified its bank accounts were seized in March of 2013, which may have resulted in Respondent’s inability to meet its March 1 payroll. I find this to be mere speculation, as Aponte did not testify to that effect. Even if the seizing of Respondent’s bank accounts resulted in its inability to meet the March 1 payroll, this only provides some consideration as to this single unilateral action. I find it does not provide justifying any of the other unilateral changes made by Respondent.

I find significant that Respondent presented no documentary evidence regarding its financial condition. Its failure to present even the most basic of financial documents raises questions as to the veracity of its assertions and the basis for its decision-making with regard to meeting its financial obligations. Indeed, the failure to submit such evidence clearly within its possession or control leads to the inference that such evidence would not support its position. See *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Thus, I find, based on the record evidence, Respondent failed to establish its unilateral actions were necessitated by economic exigencies.

In summary, I find Respondent violated of Section 8(a)(5) and (1) of the Act by making material and substantial changes to the terms and conditions of employment of unit employees when it failed to pay Pablo Colon and Rolando Cordero holiday pay for January 7, 2013; laid off Luis A. Rivera Cruz; suspended Jose O. Rivera Flores and Raul Toro; deducted health insurance premiums from the pay of Angel Cordero Luciano, Harim Rodriguez, and Jason Lopez; failed to pay health insurance premiums resulting in the cancelation of the health insurance plan for employees of in units B, D, E, and F; and made changes to the schedule for payment of wages for employees of in units B, D, E, and F without providing the Union notice and an opportunity to bargain.

CONCLUSIONS OF LAW

1. 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. By failing to make contractually required bonus payments consistent with the schedule set out in article XXXV of the collective-bargaining agreement covering unit C employees, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By failing to make contractually required signing bonus payments to unit C employees, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing to make contractually required payments for unused sick leave hours consistent with article XXVIII of the collective-bargaining agreement, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing to make contractually required wage payments consistent with the schedule set out in article XVI of the collective-bargaining agreement, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By failing to supply employees with uniforms consistent with the requirements of article XVII of the collective-bargaining agreements, Respondent violated Section 8(a)(5) and (1) of the Act.

8. By failing to provide employees with a bulletin board, Respondent violated Section 8(a)(5) and (1) of the Act.

9. By failing to make contractually required repairs to air conditioners in vehicles used by employees, Respondent violated Section 8(a)(5) and (1) of the Act.

10. By failing to make contractually required premium payments for health insurance, thereby causing the cancelation of its employee health insurance plan, Respondent violated Section 8(a)(5) and (1) of the Act.

11. By implementing changes to the schedule for payment of wages for employees not covered by a collective-bargaining agreement, but for whom the union was their designated bargaining representative, without notice to the Union and without affording the Union an opportunity to bargain collectively and in good faith regarding these changes, Respondent violated Section 8(a)(5) and (1) of the Act.

12. By failing to pay employees Pablo Colon and Rolando Cordero for January 7, 2013 (a holiday), without notice to the Union and without affording the Union an opportunity to bargain collectively and in good faith regarding these changes, Respondent violated Section 8(a)(5) and (1) of the Act.

13. By laying off employee Luis A. Rivera Cruz for the period January 2 through February 11, 2013, without notice to the Union and without affording the Union an opportunity to bargain collectively and in good faith regarding these changes, Respondent violated Section 8(a)(5) and (1) of the Act.

14. By issuing disciplinary suspensions to employees Jose O. Rivera Flores and Raul Toro Mercado, without notice to the Union and without affording the Union an opportunity to bargain collectively and in good faith regarding these changes, Respondent violated Section 8(a)(5) and (1) of the Act.

15. By deducting health insurance premiums for the period July 1, 2013, through September 30, 2012, from the pay of employees Angel Cordero Luciano, Harim Rodriquez, and Jason Lopez, without notice to the Union and without affording the Union an opportunity to bargain collectively and in good faith regarding these changes, Respondent violated Section 8(a)(5) and (1) of the Act.

16. By failing to make premium payments for health insurance, thereby causing the cancelation of its employee health insurance plan for employees of units B, D, E, and F Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

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

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act.

Having found Respondent repudiated its obligations under the collective-bargaining agreement, it is ordered Respondent shall rescind its actions and make whole employees affected by its unilateral actions. Specifically, it shall make whole for any losses those unit A and unit C employees whom Respondent failed to pay bonuses, failed to pay for unused sick leave, and failed to pay wages in a timely manner and to whom it owes wages. These amounts are to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Having further found Respondent repudiated its obligations under the collective-bargaining agreement by failing to maintain its health insurance plan, it is ordered Respondent shall reinstitute the health insurance plan and make employees whole for any expenses they may have incurred as a result of the Respondent’s failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, above, with interest at the rate prescribed in *New Horizons for the Retarded*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Having found Respondent repudiated its obligations under the collective-bargaining agreement, it is ordered Respondent shall provide employees with uniforms; a bulletin board;

and functioning air conditioning units in all vehicles used by employees, in accordance with the collective-bargaining agreements to employees in Respondent's Juana Diaz Operations Unit and Yauco Operations Unit.

5 Having found Respondent failed to bargain collectively and in good faith by unilaterally
failing to pay wages to employees of unit B, D, E, and F; failing to pay holiday pay to Pablo
Colon and Rolando Cordero for January 7, 2013; laying off Luis A. Rivera Cruz from January
7through February 11, 2013; suspending without pay Jose O. Rivera Flores and Raul Toro
10 Rodriquez, and Jason Lopez from July 1through September 30, 2012, it is ordered to bargain in
good faith with the Union, and on request by the Union rescind its unilateral actions. Further,
Respondent shall make whole for any losses the above-referenced employees. These amounts are
to be computed in accordance with *Ogle Protection Service*, above, with interest at the rate
prescribed in *New Horizons for the Retarded*, above, compounded daily as prescribed in
15 *Kentucky River Medical Center*, above.

 Having further found Respondent failed to bargain collectively and in good faith by
unilaterally failing to maintain health insurance for employees of units B, D, E, and F, I shall
20 order Respondent to bargain in good faith with the Union, and on request by the Union rescind
its unilateral action and make employees whole for any expenses they may have incurred as a
result of the Respondent's failure to maintain health insurance, as set forth in *Kraft Plumbing &
Heating*, above, the amounts to be computed in the manner set forth in *Ogle Protection Service*,
above, with interest at the rate prescribed in *New Horizons for the Retarded*, above, compounded
daily as prescribed in *Kentucky River Medical Center*, above.

25 In accordance with *Latino Express, Inc.*, 359 NLRB No. 44 (2012), Respondent shall
compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum
backpay awards, and file a report with the Social Security Administration allocating backpay to
30 the appropriate calendar quarters for each employee.

 On these findings and conclusions of law and on the entire record, I issue with following
recommended²⁰

ORDER

35 The Respondent, L M Waste Service Corporation, San Juan, Puerto Rico, its officers,
agents, successors, and assigns shall

- 40 1. Cease and desist from
- a. Repudiating and failing to continue in effect all terms and conditions of its
collective-bargaining agreements with Union de Tronquistas de Puerto Rico, Local 901, IBT.

²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

b. Failing and refusing to bargain collectively and in good faith by unilaterally implementing changes to the terms and working conditions of its employees of the Juana Diaz; Juana Diaz (Landfill); Yauco; Yauco (Landfill); Quebradillas; and San German units.

5

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

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

a. Rescind the actions taken that have been found herein to constitute repudiation of the collective-bargaining agreements and give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union.

15

b. Make whole any employees denied contractually required bonus payments, payments for unused sick leave, or any other wage payments in the manner set forth in the remedy section of this decision.

20

c. Make whole any employee for losses incurred as a result of Respondent's failure to maintain a health insurance plan in the manner set forth in the remedy section of this decision.

25

d. On request by the Union, rescind the above mentioned unilateral changes to the wages, hours, and other terms and conditions of employment of unit employees.

30

e. Make whole Pablo Colon and Rolando Cordero for any losses incurred as a result of Respondent's failure to pay holiday pay for January 7, 2013, in the manner set forth in the remedy section of this decision.

35

f. Make whole Luis A. Rivera Cruz for any losses incurred as a result of Respondent's unilateral decision to lay him off from January 7 through February 11, 2013, in the manner set forth in the remedy section of this decision.

40

g. Make whole Jose O. Rivera Flores and Raul Toro for any losses incurred as a result of Respondent's unilateral decision to suspend them, in the manner set forth in the remedy section of this decision.

45

h. Make whole Angel Cordero Lucian, Hiram Rodriguez, and Jason Lopez for any losses incurred as a result of Respondent's unilateral decision to deduct health insurance premiums from their wages from July 1 through September 30, 2012, in the manner set forth in the remedy section of this decision.

50

i. 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 and other adjustments of monetary benefits due under the terms of this Order.

5 j. Within 14 days after service by the Region, mail copies of the attached
notice marked appendix²¹ in both English and Spanish, at its own expense, to all employees in
units A, B, C, D, E, and F (specified herein) who were employed by the Respondent at its Juana
Diaz Operations; Juana Diaz Landfill; Yauco Operations; Yauco Landfill; Quebradillas; and San
10 German sites at any time from the onset of the unfair labor practices found in this case until the
completion of these employees' work at that jobsite. The notice shall be mailed to the last known
address of each of the employees after being signed by the Respondent's authorized
representative.

15 k. 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.

Dated, Washington, D.C. January 17, 2014

20

25

Heather A. Joys
Administrative Law Judge

²¹ 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."

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 and in good faith with the Union De Tronquistas De Puerto Rico, Local 901, IBT as the exclusive collective-bargaining representative of the employees in the Juana Diaz Operations; Juana Diaz Landfill; Yauco Operations; Yauco Landfill; Quebradillas; and San German units.

WE WILL NOT fail and refuse to recognize and adhere to the collective-bargaining agreement dated August 31, 2012, through July 1, 2015, with the Juana Diaz Operations unit and the collective-bargaining agreement dated June 4, 2012, through June 4, 2014 with the Yauco Operations unit by failing to pay bonuses, failing to pay for unused sick leave, and failing to pay wages in a timely manner.

WE WILL NOT fail and refuse to recognize and adhere to the collective-bargaining agreement dated August 31, 2012, through July 1, 2015, with the Juana Diaz Operations unit and the collective-bargaining agreement dated June 4, 2012, through June 4, 2014, with the Yauco Operations Unit by failing to maintain health insurance for unit employees.

WE WILL NOT unilaterally change the terms and working conditions of our employees in the Juana Diaz Operations; Juana Diaz Landfill; Yauco Operations; Yauco Landfill; Quebradillas; and San German units without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL make whole any unit employees denied contractually required bonus payments, payments for unused sick leave, or any other wage payments.

WE WILL make whole any unit employee for losses incurred as a result of Respondent's failure to maintain a health insurance plan.

WE WILL, on request by the Union, rescind the unilaterally implemented changes to the terms and conditions of employment.

WE WILL make whole Pablo Colon and Rolando Cordero for any losses incurred as a result of Respondent's failure to pay holiday pay for January 7, 2013.

WE WILL make whole Luis A. Rivera Cruz for any losses incurred as a result of Respondent's unilateral decision to lay him off from January 7 through February 11, 2013.

WE WILL make whole Jose O. Rivera Flores and Raul Toro for any losses incurred as a result of Respondent's unilateral decision to suspend them.

WE WILL make whole Angel Cordero Lucian, Hiram Rodriguez, and Jason Lopez for any losses incurred as a result of Respondent's unilateral decision to deduct health insurance premiums from their wages from July 1 through September 30, 2012.

LM WASTE SERVICE CORPORATION
(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.

La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Ave., San Juan, PR 00918-1002
(787) 766-5347, Hours: 8:30 a.m. to 5:00 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, (787) 766-5377.