

NTN Bower Corporation and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO-CLC. Cases 10-CA-37271, 10-CA-37484, 10-CA-37545, 10-CA-37652, 10-CA-37692, 10-CA-37762, and 10-CA-37820

April 20, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On May 10, 2010, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

¹ The Respondent did not except to the judge's findings of violations set forth in his Conclusions of Law 3(a), 4(a), 5(a) and (b), and (e). Although the Respondent did except to the finding that it violated Sec. 8(a)(1) by engaging in surveillance of employee union representatives (Conclusion of Law 3(c)), neither the exceptions nor brief in support of exceptions allege with any degree of particularity what error the Respondent contends the judge committed, or on what grounds the Respondent believes the judge's decision should be overturned. Accordingly, these exceptions do not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules and Regulations and may be disregarded. See *Conley Trucking*, 349 NLRB 308 fn. 2 (2007).

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

³ We affirm the judge's finding that the Respondent violated Sec. 8(a)(5) by refusing to furnish the Union with the addresses of permanent replacement employees on and after August 22, 2008, 30 days after the strike ended. (There are no exceptions to the judge's recommended dismissal of an allegation that the refusal to provide this information during the strike was unlawful.) The judge properly applied extant law holding that this information is presumptively relevant and must be provided, if requested, unless there is a clear and present danger the information would be misused by the Union. See, e.g., *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006). For the reasons set forth in *Chicago Tribune v. NLRB*, 965 F.2d 244, 247-248 (7th Cir. 1992), Member Hayes would overrule extant Board precedent and adopt the Seventh Circuit's "totality of circumstances" standard in which the legitimate concerns about the harassment and safety of replacements are balanced against the requesting union's legitimate need for this information. Under this standard, an employer does not act unlawfully if it offers reasonable alternatives to accommodate the union's need. In the present case, however, Member Hayes would

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, NTN Bower Corporation, Hamilton, Alabama, its officers, agents, successors, and assigns shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(h).

"(h) Within 14 days after service by the Region, post at its Hamilton, Alabama, facility, copies of the attached notice marked "Appendix."⁶⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2007."

2. Substitute the attached notice for that of the administrative law judge.

affirm the judge's finding of a violation even under the Seventh Circuit's standard. Chairman Liebman and Member Pearce adhere to the "clear and present danger" test but agree that a violation was established under the proposed "totality of the circumstances" standard as well.

In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally modifying the workweek of unit employees, we affirm as well his correction of the transcript by changing from "Yes" to "NO" the response of Union President Tony Perry to a question about whether there was bargaining about a shortened workweek.

⁴ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

We shall substitute a notice which conforms with the judge's recommended Order, thereby eliminating the erroneous inclusion of a general affirmative bargaining provision.

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 had 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 threaten you with the loss of your reinstatement rights if you fail to sign our return to work log.

WE WILL NOT orally promulgate a rule denying employee union representatives access to the company bulletin board.

WE WILL NOT engage in surveillance of union activities, by monitoring the movements of employee union representatives in and around our facility.

WE WILL NOT require employees who were former strikers, as a condition of exercising their reinstatement rights, to sign our return to work log.

WE WILL NOT fail and refuse to offer reinstatement or to reinstate employees who were former strikers to their former or substantially equivalent positions of employment, where those positions have not been filled with permanent replacement employees.

WE WILL NOT verbally implement a rule requiring all former strikers to sign our return to work log.

WE WILL NOT unilaterally, and in the absence of a good-faith bargaining impasse in negotiations, enforce a rule requiring all former strikers to sign our return to work log as a condition of returning to work.

WE WILL NOT unilaterally, and in the absence of a good-faith bargaining impasse in negotiations, implement the following changes with respect to subjects that relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining: (1) relocate the Union's office at our facility, (2) establish rules that impede employees' access to union representatives, (3) orally promulgate a rule restricting employee union representatives' access to the employee break room, (4) deny union representatives' access to our facility, and (5) modify the workweek of the employees in the unit.

WE WILL NOT fail and refuse to furnish International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO-CLC (the Union) with the addresses of permanent replacement employees.

WE WILL NOT fail and refuse to furnish the Union with the information it requested regarding an October 22, 2007 picket line confrontation.

WE WILL NOT fail and refuse to furnish the Union with the employment applications of the permanent replacement employees.

WE WILL NOT fail and refuse to furnish the Union with specified information, including pension documents.

WE WILL NOT fail and refuse to furnish the Union with certain information, including, among other things, documents, communications, letters, and notes regarding our decision to modify our workweek during March 2009.

WE WILL NOT fail and refuse to furnish the Union with documents regarding the employment history of each employee in the bargaining unit at our Hamilton, Alabama facility.

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 reinstate former strikers to the positions into which we would have reinstated them had we displaced all temporary employees on July 23, 2008, and reinstated former strikers into each position worked by temporary employees after that time.

WE WILL make whole with interest, such employees as would have been reinstated sooner but for our unlawful retention of temporary employees after July 23, 2008, as opposed to reinstating former strikers into those positions, for wages and benefits lost on account of our failure to reinstate economic strikers to positions occupied by temporary employees after July 23, 2008.

WE WILL, on request of the Union, rescind the above-described unlawful changes.

WE WILL make each employee, who had his or her work hours reduced as a result of the unlawful, unilateral changes to the workweek, whole, with interest, for any wages or benefits lost.

WE WILL furnish to the Union the above-described requested information.

NTN BOWER CORP.

John D. Doyle, Esq. and Gregory Powell, Esq., for the General Counsel.

Roy G. Davis, Esq. and Richard A. Russo, Esq. (Davis & Campbell LLC), of Peoria, Illinois, for the Respondent.

George N. Davies, Esq. (Nakamura, Quinn, Walls, Weaver & Davies LLP), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Birmingham, Alabama, on June 8–12 and July 14 and 15, 2009. General Counsel's motion to hold the record open in view of additional charges filed against NTN-Bower Corporation (Respondent, NTN, or the Company) was granted. In view of the resolution of those additional charges, the record was closed on November 5, 2009, and a brief date was set. The charges and amended charges in the above-entitled cases were filed by International Union, United Automobile Aerospace & Agricultural Implement Workers of America, AFL–CIO–CLC (Union, UAW or Charging Party) between March 7, 2008 and April 22, 2009. As here pertinent, the fifth consolidated complaint (complaint) was issued on May 20, 2009 (corrected date). It alleges that Respondent violated (1) Section 8(a)(1) of the National Labor Relations Act, as amended, (Act) by threatening its employees, who were former strikers, with the loss of their reinstatement rights if they failed to sign Respondent's Return to Work Log, by orally promulgating a rule denying employee union representatives access to the company bulletin board, and by engaging in surveillance of union activities by monitoring the movements of employee union representatives in or around its facility, (2) Section 8(a)(1) and (3) of the Act by requiring employees who were former strikers to sign Respondent's Return to Work Log as a condition of exercising their reinstatement rights, and by since about July 23, 2008 failing and refusing to offer reinstatement or to reinstate former strikers to their former or substantially equivalent positions of employment where those positions have not been filled with permanent replacement employees, and (3) Section 8(a)(1) and (5) of the Act by verbally implementing and enforcing a rule requiring all former strikers to sign Respondent's Return to Work Log as a condition of returning to work, by unilaterally and in the absence of a good faith bargaining impasse in negotiations, implementing changes with respect to (a) the location of the Union's office in Respondent's Hamilton, Alabama plant, (b) employees' access to Union representatives, (c) Union representatives access to the employee break room, (d) Union representatives access to its facility on or about November 28, 2008, and (e) modifying the work week of the employees in the unit beginning on or about March 6, 2009 and continuing thereafter, and by either failing or refusing to furnish or unduly delaying furnishing the Union with requested information which is necessary and relevant to the Union's performance of its duties as the exclusive collective bargaining repre-

sentative of the unit.¹ Respondent denies violating the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed on December 21, 2009 by General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, manufactures tapered roller bearings at its facility in Hamilton, where, during the 12 months before the complaint was issued, it sold and shipped products valued in excess of \$50,000 directly to customers located outside the State of Alabama. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Craig Allen, who was Respondent's Hamilton plant manager from February 1994 to October 1, 2008, testified that the Hamilton plant makes 4 inch to 8 inch tapered roller bearings which are used in the heavy truck industry, agriculture, and for backhoes and small bulldozers.²

When called by counsel for General Counsel, Stacy Sinele, Respondent's Human Resources Director, testified that there was a collective bargaining agreement between Respondent and the Union which expired in April 2006; that beginning in February 2006 she attended the negotiations for a Union contract; and that she attended 20 to 30 sessions in 2006, another 20 plus in 2007, and 3 or 4 in 2008.

When called by Respondent, Sinele testified on cross-examination that from January 2007 to the beginning of the strike involved herein in July 2007, she did not believe that Respondent used temporaries to do bargaining unit work; and that during negotiations for the current contract there was no agreement with respect to allowing NTN to hire an unlimited number of temporary employees.

Gary Aubry, a consultant who was retained by Respondent to be its chief negotiator to help negotiate a new contract in 2006 for Respondent's Hamilton facility, testified that he, Sinele, and the human resource manager at the Hamilton plant, Gary Franks, represented management during negotiations which began in February 2006; that the number of negotiating sessions in 2006 was in the high twenties; that the 2006 negotiating sessions ended in May 2006 when NTN gave the Union its last, best, and final offer and declared impasse; that he

¹ The complaint alleges that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(c) of the Act:

All production and maintenance employees, excluding all temporaries, office clerical employees, plant clerical employees, technical employees, quality control technicians, laboratory technicians, professional employees, guards, watchmen, and supervisors as defined by the Act.

² Respondent's Exhs. 71 through 74 are aerial views of the Hamilton plant.

thought negotiations resumed in January 2007, and about 20 sessions were held before the parties ceased negotiating in June 2007 when NTN gave the Union its last, best, and final offer; that Respondent implemented its last, best, and final offer at the end of December 2007; that Respondent's Exhibit 67, which is dated July 23, 2007 is NTN's proposal which it gave to the Union when the parties came back and started negotiating in 2007 on July 23, 2007; that in Respondent's Exhibit 67 NTN made proposals regarding the use of temporary employees, namely (1) in the second paragraph of Article I, Section 3, Recognition, which—as here pertinent—reads as follows: "The following employees are excluded from this Agreement: All temporaries", (2) Article XXVII on pages 89 and 90 dealing with not using non-bargaining unit employees to do bargaining unit work when bargaining unit employees are on layoff except in specified situations, and (3) Article XXXIX on page 105 which reads "TEMPORARIES, The Company reserves the right to utilize temporaries," which was new language in this proposal; that Respondent's Exhibit 11 is a document produced by the Union and given to NTN regarding the major points of NTN's proposal that NTN gave to the Union on July 23, 2007; that the Union went through NTN's proposal and summarized each major area as to their interpretation of it; that the Union gave its "MAJOR POINTS OF THE COMPANY'S MOST RECENT PROPOSAL AS OF 7-23-07" on July 24, 2007; that UAW international representative Michael Brown asked management why they would do something of this nature when management's original 2006 contract was not acceptable and this was far worse than management's 2006 proposal; and that the first item on the first page of Respondent's Exhibit 11 reads as follows:

Temporary Employees

- * Not in the Bargaining Unit.
- * Unlimited in Number.
- * Company reserves the right to use on Bargaining Unit work.

Aubry testified further that this is an accurate statement of NTN's proposal of July 23, 2007; that the Union asked if NTN really meant that; that management answered "Yes" [transcript page (Tr.) 1107]; and that when NTN subsequently made its last, best, and final offer to the Union the above-described changes with respect to temporaries were included.

On cross-examination Aubry testified that NTN's proposal of July 23, 2007, Respondent's Exhibit 67, is the first time that NTN inserted Article XXXIX—"TEMPORARIES, The Company reserves the right to utilize temporaries."—in its proposals; that in 2007 the parties had a discussion concerning the supplemental labor pool; that the utility pool was a group of employees that could be reassigned to help for overtime or increase in manufacturing, just to be used like a labor pool; that the utility pool and the labor pool were similar; that he thought that the first discussion of the supplemental labor pool took place "after the Union went on strike and came back" (Tr. 1143); and that when NTN presented its July 23, 2007 proposal to the Union and for the first time it had the language in there in Article XXXIX regarding the use of temporary employees,

Brown objected to the Company's unlimited use of temporary employees.

When called by Respondent, Sinele testified that Respondent's Exhibit 67, which, as noted, is NTN's proposal of July 23, 2007 that was delivered to the Union (on July 23, 2007) when the parties resumed negotiations in 2007, is a regressive proposal in that it was not as good as the proposal that was last made to the Union in 2006. Sinele sponsored Respondent's Exhibit 10, which is a letter from UAW Local 1990 to its members. As here pertinent, it reads as follows:

MAJOR POINTS OF THE COMPANY'S MOST RECENT PROPOSAL AS OF 7-25-07

Temporary Employees

- Not in the Bargaining Unit.
- Unlimited in Number.
- Company reserves the right to use on Bargaining Unit work.
- Company will terminate Temporary Employees before laying off Bargaining Unit Employees.

....

Non Bargaining Unit Employees

- Includes Temporary employees.
- Any/all Non Bargaining Unit employees can be assigned to Bargaining Unit work in cases of casual absenteeism, while awaiting the return of a recalled Bargaining Unit employee, on jobs not timely filled under the recall provisions, and in all other cases in the current Agreement.

Approximately 220 of Respondent's employees at its Hamilton facility went out on strike in July 2007. Respondent's human resource manager at the Hamilton facility, Franks, testified that when the employees went out on strike he telephoned two agencies in Tupelo, Mississippi, namely Key Staffing and Express Personnel Services, to get temporary workers to fill bargaining unit positions; that after the strike commenced NTN started advertising in four newspapers for full-time replacement employees; that Respondent offered good starting wages with benefits, namely a pension plan, Blue Cross insurance, dental and vision converge after a waiting period, vacation pay, short-term disability, retiree life insurance, retirement health care, a \$75 a year allowance for safety shoes, and eight days of holiday pay; that these benefits were not provided by NTN to temporary employees; that drug screening was conducted on permanent replacement employees before they were hired by Respondent; that permanent replacement employees are issued photo identification cards with a bar code when they are hired; that the employees swipe the card in a machine which records the name of the employee, the clock in time and the clock out time; that the card is not used to gain entrance into the plant; that temporary employees have a different employee ID card in that while there is a bar code in the card, there is no name or picture of the individual on the card; that the color of the temporary employees' card is different from the color of the permanent replacement employees' card; that the word "temps" is on the temporary employees' card; that temporary employees are not required to complete a probationary period; that normal-

ly permanent replacement employees worked a particular job, they were given certain assignments, they were assigned to a certain supervisor, and sometimes they floated between departments; that temps could float all of time but they did not necessarily do this; that the temps did not fill out an employment applications at NTN; that temps were not compensated by NTN but rather they were compensated by the agency that employed them; that temps were not issued employee ID cards; that neither he nor Hamilton plant manager Allen ever represented to the temps that their employment would continue if the strike ended; that he and Allen told permanent replacement employees that if the strike ended, their employment would continue; that General Counsel's Exhibit 29 was the typical package that permanent replacement employees had to complete³; that temporary employees did not have to complete this new hire package; that the offers to permanent replacement employees were not made in writing, and he was not aware of any replacement employee accepting Respondent's offer in writing; and that one replacement worker did send him a card thanking him after he was hired.

Allen testified that when its employees went out on strike in July 2007 Respondent hired security people to help during the strike, namely Special Response Corporation (SRC); that he, Franks and assistant plant manager Mike Shotts periodically received written, and verbal reports from the SRC people, generally Jerry Downing, about what was happening; that sometimes it would involve a video and an attempt to establish the identity of the person(s) involved; that to establish the identity, a picture which was taken when the employee was hired was given to SRC as it related to the involved video; that at times local police and/or Alabama State Troopers came to the picket line; that the Company had several complaints about things happening at the homes of some of the replacement workers and returning strikers; that such complaints included tires slashed, nails thrown all over the place, and threats made; and that one employee that Respondent hired, Matt Hughes, quit because of the threats.

On cross-examination Allen testified that in July 2007 about 220 employees went out on strike; that after attempting to operate the facility without employees for about one week, Respondent hired temporary employees from Key and two other companies; that about August 12, 2007 Respondent began hiring permanent replacement employees who had to complete a 90-day probationary period; that in a number of meaningful ways, mostly described above regarding the testimony of Franks, temporary employees were treated differently than permanent replacement employees; that from August through October 2007 Respondent held about six company-wide meetings with employees (Temporary employees did not attend these meetings.) at which he told the permanent replacement employees that it was Respondent's intention to keep them after the strike ended; that temporary employees were not told that their employment would continue after the strike ended; that while NTN paid the permanent replacement employees, the

³ Respondent stipulated that General Counsel's Exhibit 30 describes the relationship between Respondent and Key Staff Source (Key) on August 6, 2007.

temporary employee agencies paid the temporary employees; that the temporary employees worked at Respondent's Hamilton facility on a day-to-day basis and did not work in any particular job classification; and that, with respect to the complaints from some replacement workers regarding certain things that allegedly happened at their homes, he had no evidence that the Union was behind these incidents.

When called by Respondent, Franks testified that he periodically received reports from SRC, mostly verbal, about what was going on about the strike; that subsequently he received written reports; that the Hamilton Police Department, which was called to the plant at various times during the picketing, provided copies of their reports to him, after he asked for them; that named employees reported picket line misconduct to him; that employee Pat Hughes told him that she was quitting allegedly because of phone calls she received (As noted above, Allen referred to a Matt Hughes quitting.); and that employee Trey Fikes told him about a confrontation he allegedly had off Respondent's property with a striker.

On cross-examination Franks testified that all of the employees' pictures were not given to security; that some pictures of employees were given to security regarding specific incidents; that plant rules prohibit violence on Company property; that the Company does not try to regulate conduct that happens off Company property; that one of the three employees who reported picket line misconduct to him, Joe Leonelli, was subsequently terminated when he cursed at him and was insubordinate; and that none of the employees who complained to him identified Union officers as being the cause of the problems they were reporting.

General Counsel's Exhibit 4 is a letter dated September 17, 2007 from UAW international representative Brown to Sinele.⁴ It reads as follows:

The Union is requesting the following information in relation to the ongoing contract negotiations. You are required to provide this information as part of your obligation to bargain with the Union. Your failure to provide this information would violate Section 8(b) of the National Labor Relations Act. The specific information requested is as follows:

1. Has the Company hired permanent replacement workers?
2. For all temporary or permanent replacement workers hired since the strike began, please provide the following presumptively relevant information:

Name
 Address
 Employee ID Number
 Designation of Temporary or Permanent Status
 Copies of any Contracts or Documents that Show
 Temporary or Permanent Status of Replacement
 Workers
 Classification
 Shift
 Hourly Wage
 Fringe Benefits

⁴ See also R. Exh. 16.

Hire Date
 Termination of Employment Date (if termination has occurred)
 Termination of Employment Reason (i.e. quit, discharged for absenteeism, discharge for drugs, etc.)
 Date Hired as Permanent Replacement
 If any replacement workers have been hired through an outside agency or firm, please provide the name and address of the company, as well as a copy of any agreement or contract between NTN and the outside agency or firm governing the hiring, supervision and /or terms and conditions of employment of the replacement workers. If any advertisements were used by an outside agency or firm to solicit replacement workers, please provide a copy of the advertisements.

and address to the Union?

Check one:

Yes
 No

 Your Signature

Please provide this information by September 27, 2007.

....

When called by the Charging Party, Brown testified that he began servicing the bargaining unit at NTN in Hamilton in 2005; that the Union “needed names and addresses of any temporary and permanent replacement employees in order to be able to communicate, send letters, or whatever the case may be” (Tr. 353); that as of the time he testified at the trial herein, June 9, 2009, the Union has received the names but no addresses; and that the Union received the names on a seniority list provided, he thought, in late July 2008 after the Union made its unconditional offer to return to work on July 23, 2008.

When called by Respondent, Franks testified that Respondent’s Exhibit 23 is a September 19, 2007 letter which Respondent gave to 115 replacement employees. It reads as follows:

MEMORANDUM

TO: Hamilton Plant Hourly Employees September 19, 2007
 FROM: Gary Franks

Attached to this Memorandum is a letter we received from the Union asking for certain information. You will note that it requests the names and addresses of all replacement employees working in the plant.

Given the Union’s treatment of employees crossing its picket line, we are concerned about turning this information over to the Union and our first reaction is not to do so. But before we respond to the Union, we thought it would be important to ask for your input. It is possible that some of you have no objection to the Union having your name and address. If that is the case, we will provide the requested information to the Union. However, we also want to respect the wishes of those who would be fearful of having their names and addresses given to the Union.

Please indicate your preference on the bottom of this Memorandum, sign it, and return it to your supervisor at your earliest opportunity.

Thanks for your cooperation.

Do you want the Company to give your name

All of the forms received in evidence as Respondent’s Exhibit 23 are checked “No.”

By e-mail dated September 27, 2007, General Counsel’s Exhibit 5⁵ Sinele advised Brown as follows: “Please see the attached letter and attached enclosures in response to your information request of September 17, 2007.” The attached letter reads as follows:

This is in response to your Information Request of September 17, 2007.

The Company has hired permanent replacement workers. Enclosed is a spreadsheet listing them by clock number, hire date, current status, last day worked for those terminated, and the last four digits of their social security number.

We also enclose an hourly staffing sheet as of September 24, 2007. This reflects the positions held by the permanent replacements and the shifts on which they are employed.

We are paying the permanent replacements the same that we would pay someone hired into the bargaining unit. In other words, we are applying the terms of the expired collective bargaining agreement to them.

Throughout the strike, the Company has periodically obtained temporaries from agencies. The two agencies are Key Staff Source of Tuscaloosa, Alabama and Express personnel Services of Dallas, Texas. Both have local offices in Tupelo. The employees hired through these agencies were, however, not permanent replacements. They were simply temps utilized until we could find a sufficient number of permanent replacements to fill all regular openings. Similarly, we utilized a number of temporaries from Special Response whose services are no longer needed.

We respectfully decline your request for personal identifying information (i.e. name and address) of the permanent replacements. We have a reasonable belief that to supply this information would threaten the safety and security of these individuals. Among other things, the basis for our reasonable belief includes:

1. From the outset of the strike and continuing through this date, the persons the Union has assigned to picket the entrance to the plant have thrown nails under the tires of the automobiles of the permanent replacements.
2. The persons the Union has assigned to picket the entrance to the plant have unlawfully photographed and videotaped the persons of the permanent replacements and their vehicle tags.

⁵ See also R. Exh. 51.

3. The persons the Union has assigned to picket the entrance to the plant have struck the vehicles of the permanent replacements with the picket signs they carry.
4. The persons the Union has assigned to picket the entrance to the plant have shouted threats to the persons and property of the permanent replacements.
5. The persons the Union has assigned to picket the entrance to the plant have followed the permanent replacements as they exited the plant, in some cases following the individual to his personal residence.
6. On one occasion, one of the persons assigned by the Union to picket the entrance to the plant scattered nails on the home driveway of one of the permanent replacements.
7. One or more of the permanent replacements has received anonymous telephone calls containing threats to her person.

In addition to the foregoing, the permanent replacements have made it known to the Company that they do not want their personal identifying information made available to the Union.

We propose an accommodation whereby the Union can verify the information contained on the enclosed documents. We are willing to make available to a certified public accounting firm the information and data required to confirm the accuracy of the information provided herewith. We are also willing to consider any alternative accommodation the Union might advance which addresses the security concerns of the company and the permanent replacements.

....

The attachments consist of (1) a four page list of "HOURLY NEW HIRES" set forth in columns headed by "CLOCK #," "HIRE DATE," "STATUS," (which refers to whether the individual is active, voluntarily quit, or was terminated) "LAST DAY WORKED," (if the individual quit or was terminated) and "LAST FOUR DIGITS SS#"⁶, and (2) a one page list titled "HAMILTON HOURLY STAFFING AS OF SEPTEMBER 24, 2007" which has five columns headed by "DEPARTMENT," "FIRST SHIFT," "SECOND SHIFT," "THIRD SHIFT," and "TOTAL."

When called by Respondent, Sinele sponsored Respondent's Exhibit 18, which is a letter dated October 1, 2007 from Brown to Sinele. It reads as follows:

I am in receipt of your letter date September 27, 2007 in which you refuse to provide the union with basic name, address and payroll information regarding replacement workers. You state in your letter that you are refusing to provide this information because you 'have a reasonable belief that to supply this information would threaten the safety and security of these individuals.'

Although you state that you have 'a reasonable belief' that providing this information would threaten the safety and security of the replacements, your bold allegations are entirely unsupported. I am aware of no incidence in which any striker has been identified, charged or arrested for misconduct involving safety issues, and you have provided no *evidence* that any strikers have engaged in any conduct that would endanger replacement workers.

The Union does not condone violence. At the beginning of the strike, I personally instructed members of the Local Union to picket in a peaceable manner and not to engage in any harassment. The Union has taken steps to ensure that the conduct of strikers—on and off the picket line—is peaceful at all times. Your refusal to provide information regarding the replacement workers based on safety concerns is unjustified and contrary to law.

In addition, my letter requested 'copies of any contracts or documents that show temporary or permanent status of replacement workers.' Your response neither provides these documents nor asserts that they do not exist. If the documents exist, please provide them. If they do not, please state so in writing. Similarly, you fail to address our request for documents related to NTN's use of outside agencies to hire employees. Again, if the requested documents exist, please provide them. If they do not, please state so in writing. Further, you fail to provide any of the specific data requested regarding temporary employees, nor do you state any reason why such information is not provided.

Once again, we ask that you provide the following information for all temporary or permanent replacement workers hired since the strike began:

Name
 Address
 Employee ID Number
 Designation of Temporary or Permanent Status
 Copies of any Contracts or Documents that Show
 Temporary or Permanent Status of Replacement
 Workers
 Classification
 Shift
 Hourly Wage
 Fringe Benefits
 Hire Date
 Termination of Employment Date (if termination has
 occurred)
 Termination of Employment Reason (i.e. quit,
 discharged for absenteeism, discharge for drugs,
 etc.)
 Date Hired as Permanent Replacement
 If any replacement workers have been hired through an
 outside agency or firm, please provide the name
 and address of the company, as well as a copy of
 any agreement or contract between NTN and the
 outside agency or firm governing the hiring, super-
 vision and /or terms and conditions of employment
 of the replacement workers. If any advertisements

⁶ See also R. Exh. 17.

were used by an outside agency or firm to solicit replacement workers, please provide a copy of the advertisements.

As this is the Union's second request for this information, please provide it to us by October 8, 2007. [Emphasis in original]

When called by Respondent, Sinele sponsored Respondent's Exhibit 9. Sinele testified that it is a print out of the news of Region 8 of the UAW. The two-page print out, with "10/03/2007" in the lower right hand corner, is headed "Update on Local 1990 Strike, By Region 8 Servicing Representative Mike Brown." As here pertinent, a portion of the article reads as follows:

....

NTN-BOWER'S PROPOSED TAKEAWAY LIST

-TAKEAWAY: NTN-Bower employees and replace them with Temporary employees.

-TAKEAWAY: NTN-Bower Maintenance, Tool Room, and Tool Crib employees and replace them with Advanced Technology Services employees.

....

By letter dated October 4, 2007, General Counsel's Exhibit 6⁷, Sinele advised Brown as follows:

I assume that you know by now that Gary Roberts, who has accompanied you to all of the negotiation meetings as a member of the negotiating committee for the Local Union, was arrested for unlawfully accosting a female family member of two of the permanent replacements. In addition, there was a gunshot at the plant last night and the night before, and a police report has been filed. That police report is simply one of many which have been lodged with local law enforcement. There have also been reports this week of tires being slashed at the homes of permanent replacements. The police are regularly called to the picket line, and occasionally appear unsolicited, for the purpose of controlling the conduct of the persons assigned by the Union to patrol the plant. Their reports are on file should you care to read them.

No number of disingenuous statements or pious platitudes can cover up the fact that the Union continues to turn a blind eye to the violence, intimidation, and threatening conduct carried on by its agents.

The Company will evaluate the requests contained in your October 1 letter against this background. You can expect a response next week.

By letter dated October 10, 2007, General Counsel's Exhibit 7, Sinele advised Brown as follows:

In response to your information request, I enclose:

1. Copies of the two newspaper ads the Company placed in search of permanent replacements. I am not aware at this time of any other written

materials, other than the expired collective bargaining agreement, utilized by the Company to communicate the status of the permanent replacements.

2. A list of the names of individuals sent by the two temporary agencies to work as temporary replacements at the plant. Note that these were simply temps and none of them work there at this time.

With respect to your request for the names and addresses of the permanent replacements working in the plant, we respectfully decline. Given the increasing threats, violence and acts of hostility directed toward them by the Union's agents, we have a reasonable fear that their persons and property would be placed in greater danger by sharing this information with the Union. We repeat our offer to allow a certified public accounting firm to confirm the employment status of the individuals previously identified. We are also willing to consider any other reasonable alternative the Union might suggest for accomplishing this result while accommodating the Company's concerns.

This exhibit included the above-described attachments.⁸

General Counsel's Exhibit 8 is an October 16, 2007 letter from Brown to Sinele⁹, which reads as follows:

I am in receipt of your October 10, 2007 letter, responding to the Union's second information request regarding replacement workers. You have again failed to provide the names and addresses of replacement workers. In addition, other portions of the information request remain unanswered.

In particular, we requested 'copies of any contracts or documents that show temporary or permanent status of replacement workers.' The Company has provided no response to this request. To be clear, we are requesting any document provided to replacement workers or kept by the employer referencing in any way the terms and conditions under which the replacements have been hired.

In addition, you have failed to adequately respond to the Union's request for information related to the classification and shifts of each replacement worker. The limited information provided is of no use to us because it fails to establish the basic shift and classification information that we are entitled to receive.

Under the National Labor Relations Act, the information we have requested is presumptively relevant, and your failure to provide it is a violation of the law. We are not aware of any factual circumstances that would rebut that presumption.

In your letter, you offer to 'allow a certified public accounting firm to confirm the employment status' of the replacement workers for whom you refuse to provide identifying information. This offer does not in any way address the Union's legitimate information request. We certainly hope that the Company would not fabricate employment

⁷ See also R. Exh. 19.

⁸ See also R. Exhs. 20 and 45.

⁹ See also R. Exh. 21.

information in such a way as to necessitate verification from an outside accounting firm. More to the point, an outside accounting firm cannot produce the presumptively relevant information that is the company's obligation to provide. Therefore, we decline this unsatisfactory attempt to offer an accommodation to the Union's request.

If the requested information is not provided by October 22, 2007, we will be filing an unfair labor practice charge with the NLRB.

By letter dated October 23, 2007, General Counsel's Exhibit 9¹⁰, Sinele advised Brown as follows:

I take this opportunity to bring a couple of issues to your attention.

First, one of the newly adopted tactics of the Union's picketers is to shout racially derogatory epithets toward the black and Hispanic permanent replacements crossing the picket line. As the representative of all bargaining unit employees, the Union is liable under Title VII for the racially discriminatory and harassing conduct of its agents on the picket line. We are certain that the UAW in general does not condone such conduct. Before invoking the protections of the EEOC on behalf of these employees, we wanted to provide you with an opportunity to remind the picketers of the Union's position with respect to racial harassment.

Second, we have had individuals entering the plant with small children in their car. The Union's picketers take that opportunity to shout vulgar and profane language at the child. While this does not necessarily violate any law, we consider it serious picket line misconduct which, if not halted promptly, will result in the permanent loss of employment for persons who engage in it.

We understand that you are not directing the Union's pickets to engage in this conduct. However, we wanted to give you the opportunity to control it before matters escalate.

By letter dated November 9, 2007, General Counsel's Exhibit 10¹¹, Brown advised Sinele as follows:

The Union requests that the company provide it with the information requested below which is necessary for it to carry out its obligations as collective bargaining representative of the employees employed at NTN Bower in Hamilton.

1. Please provide all information related to the incident that occurred on or about October 22, 2007 at approximately 6:30 a.m. at the picket line which involved a striking employee and a person who appeared to be either a replacement worker and/or employee crossing the picket line. This incident, as you are aware, involved an employee who was crossing the picket line exiting his vehicle and hitting a striker with a stick. A confrontation ensued and the company's security service intervened and stopped this confrontation. We are aware that the security service filmed the incident.

2. The information requested includes but is not limited to the names of the individual(s) involved, any and all witness statements, any video or audio tapes of the incident, any written or other discipline issued or proposed to be issued to the non-striking employee/replacement worker involved in the incident, any resolution (whether formal or informal) of the matter by the company, any response by the accused employee to any proposed discipline and any written policy or policies that the company is or may rely on in determining whether to issue discipline in this situation.

Please provide this information within 7 days of your receipt of this letter. Please contact me if you have any questions.

When called by the Charging Party, Brown testified that he learned of the October 22, 2007 incident from then Local 1990 president Jackie Peoples; that the information he sought is relevant to the terms and conditions of employment of bargaining unit members "because of the language that is in the [collective bargaining] agreement that requires consistent application of the rules" (Tr. 355); that the day after this incident he received a letter from Sinele, General Counsel's Exhibit 9, whereby she proposed to discipline up to and including discharge, any strikers who were guilty of misconduct on the picket line; that the collective bargaining agreement which was effective from April 2001 expired in April 2006, Joint Exhibit 2; that while grievances filed after April 2006 could not be taken to arbitration, the Union continued to file grievances regarding conduct that occurred after the expiration of the April 2001-2006 agreement; that the succeeding collective bargaining agreement, which was effective December 31, 2007, was not signed until July 23, 2008; and that Article XXVIII on page 90 of Joint Exhibit 2 pertains to "RULES." That article contains the following language: "Disciplinary action shall be based upon the seriousness of the offense and shall be applied consistently, taking length of service, period of time since last misconduct and mitigating or aggravating circumstances into consideration." Brown testified further that Article XXVIII was discussed during negotiations for the succeeding agreement, which negotiations began in February 2006 and were concluded in July 2008; that Sinele attended all of the negotiations for the successor agreement; that two things in Article XXVIII were changed during the negotiations for the successor agreement but neither side proposed removing or modifying the language that disciplinary action shall be based upon the seriousness of the offense, and shall be applied consistently; that there were discussions about pension plans during negotiations for the successor agreement, and the agreement signed on July 23, 2008 has language regarding pensions; and that there were no negotiations or discussions for a change to the successor agreement from the terms of the 2001 through 2006 agreement as it relates to the work week.

General Counsel's Exhibit 11¹² is a November 16, 2007 e-mail from Sinele to Brown which reads as follows:

This is in response to your letter of November 9, requesting certain information relative to an altercation on the picket line.

¹⁰ See also R. Exh. 22.

¹¹ See also R. Exh. 41.

¹² See also R. Exh. 42.

On its face, the letter does not contain an indication of why this information is necessary to the Union in fulfilling its collective bargaining obligations. I would appreciate a clarification of that point.

When called by Respondent, Sinele testified that she did not receive anything in response to her request for clarification.

When called by Counsel for General Counsel, Sinele testified that "Yes, I did" (Tr. 78) conduct an investigation to determine what happened on October 22, 2007; that she thought she sent something back to Brown "to ask a little more information on what he was wanting this for or how it did apply" (Tr. 78); that she was then going to get with the plant and get the specifics about October 22; that she did not remember if she heard back from Brown on this and so she thought that was the end of the investigation that she did on this one; that SRC was the security firm Respondent retained during the strike; that SRC personnel were out at the picket line and around the facility on a regular basis; that they helped getting people into and out of work; that they video taped picket line activity on a regular basis; and that "I did not review much of the video tapes myself" (Tr. 111). Sinele then gave the following testimony:

Q Do you know if there was ever a video tape that was found of this incident? [the October 22, 2007 incident]

A I believe there was. But again, I have not looked at that recently, and have not looked at the situation recently.

Q When you say recently, when was the last time that you looked at it?

A I am looking at the date of November 2007. It has been awhile. It would be sometime last year.

JUDGE WEST: I'm sorry, so I understand your testimony; you testified that you believe there is a video. You testified, if I'm not mistaken, that you have not looked at that video recently. Did you ever look at that video?

THE WITNESS: I'm sorry. I said that I hadn't looked at this situation recently. I don't ever recall looking at the video.

JUDGE WEST: All right. Then you went on to say that you didn't look at the situation recently?

THE WITNESS: Right. And I don't think that I ever looked at the video.

JUDGE WEST: All right. And so you don't recall ever looking at the video?

THE WITNESS: I don't think so.

JUDGE WEST: You don't think so?

THE WITNESS: No, sir. [Tr. 116-117]

Sinele testified further that Respondent never provided a copy of that video tape to the Union, pursuant to its November 9, 2007 information request.

When called by Respondent, Sinele sponsored Respondent's Exhibit 68. The first page of the exhibit is an e-mail, dated "11/16/2007," from Sinele to Brown which, as here pertinent, reads as follows: "As was requested last week when we met, please find attached the copy of the Company Last Best Final Offer 11-8-07 with changes as a strikethrough for deleted language and bold for new language."

Sinele testified, when called by Counsel for General Counsel, that in November 2007 the prior collective bargaining

agreement between Respondent and the Union had expired, the Union was on strike, and Respondent was operating the plant using some permanent replacement workers, some temporaries, and some employees who did not participate in the strike; that Respondent's chief labor negotiator, Aubry, during negotiations with the Union in November 2007, expressed concern, as here pertinent, about Respondent having to use costly overtime to continue a level of production to cover absenteeism, vacations and spikes in production needs; and that there was a discussion at the negotiations in November 2007 leading up to a supplemental labor pool. See page 76 of Joint Exhibit 1.

Respondent's Exhibit 69 is the Union's counter proposal of December 21, 2007 to NTN's last, best, and final offer. When called by Respondent, Sinele testified that this document was given to the Company at the negotiations on December 21, 2007.

General Counsel's Exhibit 3 is a December 26-27, 2007 e-mail exchange between Sinele and Brown. Sinele advised Brown as follows: "In light of the parties' bargaining impasse, it is the Company's intention to unilaterally implement the terms of its last, best and final offer to the Union. The effective date will be December 31, 2007. Should you desire to discuss this, please feel free to contact me." Brown replied as follows:

I am in receipt of your e-mail in which you state that the parties are at impasse and that [the] Company intends to implement its last, best and final offer on December 31, 2007.

This is to advise you that the Union strongly disagrees that the parties are at impasse. In our recent meetings, there has been substantial movement on issues including wages, employee contributions toward health care cost, grievance procedure, seniority retention, etc.

The Union is ready and willing to meet with the Company and work through the issues in an effort to reach an agreement.

Please be advised that if the Company does implement its last, best and final offer, the Union intends to take all action necessary to protect the interests of the bargaining unit.

When called by Counsel for General Counsel, Sinele testified that on December 31, 2007 Respondent implemented changes in the terms and conditions of employment.

When called by Respondent, Sinele testified that when the Company unilaterally implemented its last, best, and final offer the Union filed an unfair labor practice charge; that the charge was dismissed by the Region; that the Union filed an appeal, Respondent's Exhibit 8, dated June 27, 2008; and that by letter dated July 23, 2008, Respondent's Exhibit 64, the Union accepted the Company's last, best, and final offer which was implemented on December 31, 2007.

When called by Counsel for General Counsel, Franks testified that on December 31, 2007 the probationary period was changed to 120 days from either 60 or 90 days.

When called by Respondent, Franks sponsored Respondent's Exhibit 39, which is an anonymous letter received by the doctor, Carol Grace, M.D., retained by NTN to treat its employees. The envelope is stamped "15 May 2008." Franks testified that

he received a telephone call from the doctor's office that they had received a really ugly, threatening letter; and that the Hamilton Police Department was notified and it was indicated that they would investigate the matter. On cross-examination Franks testified that he did not know who sent this letter; that Respondent still uses this doctor to treat its employees; and that he was not aware of any harm coming to her or her animals.

Brown testified that the Union made its unconditional offer to return to work on behalf of striking employees on July 23, 2008.

Franks testified that on July 23, 2008 Respondent had 15 to 20 temporary employees working at its Hamilton facility; that the 15 to 20 temps would be doing bargaining unit work or non-bargaining unit quality work; that he believed that a majority of the temporary employees would have been doing bargaining unit work; that he thought that Respondent hired temporary employees after the strike ended; that after the strike was over, when people quit or left and needed to be replaced Respondent brought in a temporary employee instead of recalling a former striker because that is what he was told to do because it was only temporary work which sometimes was bargaining unit work; and that plant manager Allen told him to bring in temporary employees.

When called by Respondent, Sinele sponsored Respondent's Exhibit 64, which is a letter dated July 23, 2008 from Brown to Sinele. The letter, mentioned above, reads as follows:

By this letter, the International Union, UAW and its affiliated Local 1990 (collectively 'Union'), hereby informs the company that it has accepted in total, the company's last, best and final offer made and provided to the Union on or about November 8, 2007 and implemented by the company on or about December 31, 2007. By my signature on this letter, it signifies the Union's acceptance of the terms and conditions of employment embodied in the company's last, best and final offer. I will send by overnight delivery the initialed and signed copy of the contract. Accordingly, we have reached agreement with the company on all terms contained in the company's last, best and final offer and have an agreement.

Now that the parties have a successor collective bargaining agreement, the Union hereby notifies NTN Bower that the current strike is immediately terminated and that all striking employees make an unconditional offer to return to work. Please contact me at your earliest opportunity so that we can discuss an orderly return to work by the striking employees.

Joint Exhibit 1 is the current collective bargaining agreement between Respondent and the Union, which was signed on July 23, 2008.¹³ Brown testified that he signed Joint Exhibit 1 on page 48, along with the president of the Local 1990, Peoples, Union negotiating committee members Roberts, Billy Joe Cantrell, and Tony Perry, Respondent's plant manager Allen, Franks, Sinele, and Aubry; that he was chief spokesperson for the UAW during negotiations for this contract; that he has ser-

viced Local 1990 since sometime in 2005; and that a section titled "Supplemental Labor Pool" Employees 11-8-07 appears on page 76 of Joint Exhibit 1. That section reads as follows:

In an effort to allow a higher percentage of employees to be off on vacation, decrease the amount of required overtime and assist with short-term manufacturing fluctuations, a Supplemental Labor Pool of employees has been established. The Supplemental Labor Pool will be used to fill in for absenteeism and short-term manufacturing fluctuations. The Company may reassign employees within their department to accommodate Supplemental Labor Pool employees.

The Supplemental Labor Pool consists of the following two (2) classifications of employees:

1. *Labor Pool Employees will:*

- (a) Be part of the Bargaining Unit
- (b) Be no more than 10% of the hourly workforce, unless mutually agreed to by the parties
- (c) Serve a probationary period of 120 calendar days
- (d) Have a starting wage of \$10.00 per hour
- (e) Not be eligible for Company provided benefits. They will be provided statutory benefits
- (f) Be allowed to bid into a job after attaining 120 calendar days of seniority. Employees bidding into a job will advance to the starting rate of the new Occupation and become eligible for the standard benefit package. Their seniority date will revert back to their date of hire
- (g) Be laid off and recalled in accordance to Article VI—Seniority
- (h) Work overtime in accordance to Article XIV—Overtime Work Scheduled

2. *Temporaries will:*

- (a) Not be part of the Bargaining Unit
- (b) Be no more than 5% of the hourly workforce unless mutually agreed to by the parties
- (c) Not be able to work longer than twelve (12) consecutive months
- (d) Not be on the Company payroll or eligible for Company benefits
- (e) Be able to perform Bargaining Unit work
- (f) Be eliminated before any Labor Pool or other Bargaining Unit employees
- (g) Work overtime in accordance to Article XIV—Overtime Work Scheduled
- (h) Will not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees

Aubry testified that the "11-8-07" in the title is the date of this Company proposal; that the parties never reached a formal agreement on this language; that this was something that NTN unilaterally implemented, along with the remainder of the contract; and that he never advised the Union that the use of temporary employees by the Company would be limited to the supplemental labor pool referred to in Joint Exhibit 1.

¹³ The agreement indicates that it was effective as of December 31, 2007. As noted above, Joint Exhibit 2 is the previous agreement.

On cross-examination Aubry testified that he is a signatory on Joint Exhibit 1; that the Company first submitted its proposal to the Union titled “‘Supplemental Labor Pool’ Employees Proposal 10–17–07” which is the first page of Charging Party’s Exhibit 2, on October 18, 2007; that the “10–17–07” Supplemental Labor Pool Proposal does not have a paragraph 2(h); that, as indicated on the last page of Charging Party’s Exhibit 2 before the “SUMMARY OF HEALTH BENEFITS,” paragraph 2(h) was added, namely “Will not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees” to the page with the heading “‘Supplemental Labor Pool’ Employees Proposal 11–8–07”; that this page is part of “NTN-Bower Corporation Company’s Last, Best and Final Offer November 8, 2007” which is also a Company prepared document; that the Company’s “Last, Best and Final Offer November 8, 2007” was provided to the Union on November 8, 2007; that the “‘Supplemental Labor Pool’ Employees Proposal 11–8–07” is the language that ended up in the contract between the Union and the Company; and that he did not believe and he could not recall that after November 8, 2007 there were any bargaining sessions between the Company and the Union prior to December 31, 2007.

When called by Counsel for General Counsel, Sinele testified that she did not believe that Respondent took any disciplinary action against any strikers for misconduct.

When called by Respondent, Franks testified on July 14, 2009 on cross-examination that since the strike concluded in July 2008, he has not had any problems with people making reports as to threats or confrontations; that he was not aware of anyone being terminated for picket line misconduct; and that it was not reported to him that any of the Union officers or Brown had engaged in any misconduct during the strike.

Allen testified that to his knowledge Respondent did not discharge any former striking employees for alleged strike-related misconduct.

Respondent called a number of witnesses to testify about the strike. As already noted, Respondent did not take any disciplinary action against any strikers for misconduct and it was not reported to Franks that any of the Union officers or Brown had engaged in any misconduct during the strike.¹⁴ One of Respondent’s attorneys explained that evidence regarding the strike was introduced to show “NTN-Bower’s state of mind in deciding whether or not it should be releasing the names and addresses of its replacement workers.” (Tr. 420.)¹⁵ This Respondent’s attorney later gave the following explanations:

This is information, again, that was provided to NTN-Bower and NTN-Bower is here defending itself from a charge that they did not provide the names and addresses of employees. This information is part of foundation as to why NTN Bower

felt there was a clear and present danger to its replacements if they turned over their names and addresses. [Tr. 431]

... all of this information goes towards the state of mind of NTN-Bower’s officials because this is what they were told on a daily basis from Special Response and this was the foundation for the reasons why they did not turn over the names and addresses which is part of the reason we are here today because the Union has said it is a ULP [(unfair labor practice) Tr. 432]

Even after the strike ended Respondent would not give the Union the addresses of the replacement employees. Indeed, almost 1 year after the strike ended Sinele, at the trial herein on July 14, 2009, testified that Respondent still would not give the Union the addresses of the replacement workers. Respondent did not show that there was any misconduct after the former strikers attempted to return to work, let alone misconduct on the part of Union officials. The evidence regarding what allegedly happened during the strike is summarized here.

Brandi Parker, who is an employee of Respondent in assembly and inspection, testified that she started working at Respondent’s Hamilton plant in September 2007 when there was a strike in progress; that she experienced difficulties in crossing the picket line in that comments were made to her of a sexual nature, her picture was taken, her vehicle was surrounded, and she believed that her license plate number was recorded; that on occasion when she was leaving the plant at 11 p.m. she saw pickets hit peoples’ car windows with sticks; that on one occasion, a couple of months after she started working at Respondent, she was followed for a while after she left the plant; that she did not go in the direction of her residence since she did not want the person following her to know where she lived; that at some point she turned left and the individual following her turned right; that she then went to pick up her children; that on October 30 (presumably 2007) she had two flat tires on the vehicle she was driving; that nails had to be removed and the tires plugged; that the following day while she was driving to work the lug nuts on a wheel came loose, and the wheel fell off; that she filed a police report; that “I went and got a pistol license and I went and bought a pistol” (Tr. 636) because she is a single mother and she was afraid; that a female picketer approached her in a grocery store, called her a “scab” (Tr. 648), and told her that she was taking a job and she would not have her job much longer; that she told the security guards at Respondent’s facility about the two flat tires, the loose lug nuts, and being followed, and she gave a written statement; that she gave Respondent the receipt for plugging the two flats; and that she did not discuss these matters with a supervisor or manager at Respondent.

On cross-examination Parker testified that when she went to work for Respondent she knew that there was a strike going on; that she did not know what a “scab” (Tr. 642) was in the context involved here since she had never heard this term before going to work for Respondent; that she watched the work and the two front tires of the vehicle were plugged while the wheels remained on the vehicle; that the front driver’s side wheel fell off the following day; that she guessed that she picked the nails

¹⁴ As noted above, Roberts, who was on the Union’s negotiating committee, was charged with harassment regarding two verbal incidents in a local restaurant. He was sentenced to 14 days in the Marion County Jail, which sentence was suspended upon condition that he not have any contact with the victim within the next 24 months and pay a \$500 fine plus court costs.

¹⁵ Eventually Respondent released the names of the replacement workers to the Union but it never released the addresses.

up going across the picket line but she did not know; that “I didn’t actually buy a pistol, I’m sorry. I actually borrowed it, well, it was my brother’s pistol” (Tr. 648); that she got the pistol license the same day the incident happened with the truck; that she took the pistol to work for a couple of weeks “[u]ntil they told us we could not carry any weapons with us in our vehicles crossing the picket line” (Tr. 648); that she obtained a concealed carry permit; that she did not ask the Company if it was permissible for her to take a gun to work; that she thought it was someone in security who told her she would get in trouble for carrying a gun across the picket line; and that the person knew she was carrying a handgun

[b]ecause I was friends with one of them. I mean, as far as, I mean, like I told them the day I went in and I done my police report at the sheriff’s department, that I also got a pistol license that day, that I was carrying a pistol with me and they just told me that I didn’t need to because you’re not supposed to carry a gun across the picket line for some reason. [Tr. 651]

Parker testified further that for the last 2 years she has lived in Hamilton next to an employee of Respondent’s who went out on strike, Michael Rogers, and his wife called her a “scab” while Rogers was out on strike (Tr. 652 and 653); and that since the strike ended she has not had any difficulty getting into and out of work, and she gets along fine with the strikers who have been recalled.

Aaron Rea testified that he has worked for Respondent since August 2007; that he experienced trouble in getting across the picket line in that people hollered and would not let him through; that during the time he crossed the picket line he had nails on his home driveway between 15 to 20 times; that on October 3, 2007 he had one tire on each of three vehicles in his yard slashed; that he lives with his mother and grandmother, and one of the vehicles belonged to his grandmother and one belonged to his mother; that since the damage was in the sidewalk, three new tires had to be purchased; that diesel fuel and sugar were found in his gas tank and he had to replace his engine, costing about \$1,500; and that 4 months before he testified at the trial herein on June 11, 2009, Bexar Robinson, who is a member of the Union who went out on strike, approached him at a gas station near his home. Rea testified as follows regarding what Robinson, who he had known for a long time, then said:

He [Robinson], what it was, he was telling me, that my grandma’s stuff, he was sorry. So I told him, it was sorry for whoever cut my tires. He said, you’re lucky that’s all I did. I was going to kill you. That’s exact words out of his mouth and I got two witnesses [(Bob Marcus and Sidney Gurst)] that own’s [sic] the store. They’re not here right now, but they can come, if needed. [Tr. 662]

On cross-examination Rea testified that when he told Robinson that it was sorry for whoever cut his tires Robinson said “you better be glad that’s what I did instead of killing you” (Tr. 664); that he has not encountered any more problems after the Union stopped walking the picket line; that he signed General Counsel’s Exhibit 42 indicating on a document dated Septem-

ber 19, 2007 that he did not want the Company to give his name and address to the Union; that the nails being thrown on his driveway occurred before he signed this document and the tire slashing occurred after; that strikers lived near him and they knew where he lived in Hamilton, which is a fairly small community; that he did not have any objection to Brown knowing where he lived either on September 19, 2007 or when he testified at the trial herein on June 11, 2009; that the Company went to working 4 days a week in April 2009 but he worked 5 days a week because he works in heat treat and it takes longer to shut the machines down in heat treat; that when he saw that there was a strike at Respondent’s Hamilton facility he went there and filled out an application; that when he went to work for Respondent he did not know if he had a job there or not when the strike was over but some months later he was told that the Company “couldn’t fire us, but if we quit or got fired, they’d hire someone back out of the Union” (Tr. 673); that he never heard the work “scab” (Tr. 673) before used in the context of someone crossing the picket line; that he did not report his above-described conversation with Robinson to anyone at the Company because he did not want to start any trouble; that he has not had any trouble since the strike ended; that he has not had any trouble with any of the former strikers who have returned to work at Respondent’s Hamilton facility; and that he was advised at the Company that when he crossed the picket line he should keep his windows up, not listen to anything the picketers say or get out of his vehicle, and wait for an opening to drive through.

On redirect Rea testified that he does not know Brown at all; that he did not know Brown was an official with the UAW; and that if Brown is a member of the Union or an officer of the Union, he did not want Brown to have his name and address.

Elicio Jimenez testified that he started working for Respondent as a material handler during the involved strike; that he experienced trouble crossing the picket line in that collectively picketers would call him names, tell him he stole their job, tell him to go back to his country, motion with a slashing hand movement across the throat, hit his car windshield with a picket sign but did not damage it, and followed him three times for a few miles when he left Respondent’s facility; that one of the reflectors at the end of his driveway was missing; that he told security one time about the picketers following him when he left the Respondent’s facility; and that he thought about quitting the job but he did not.

On cross-examination Jimenez testified that he did not have a problem with Brown, who was identified to him during cross examination as an official with the Union who works in Tennessee and goes to a lot of different places, knowing where he lives so Brown can send him a letter; that although he does not read English, he signed General Counsel’s Exhibit 43, which is dated September 19, 2007, after someone read the document to him; that he checked “No” to the question “[d]o you want the Company to give your name and address to the Union”; that he lives about 30 miles from Respondent’s Hamilton facility; and that since the strike ended he has not had any trouble going into or leaving Respondent’s facility.

David Benton testified that he started working as a replacement worker for the Respondent right after the strike started in

2007; that he works in heat treat where the parts are hardened; that he had trouble in crossing the picket line in that, collectively, the picketers temporarily blocked his car, and threatened him; that on one occasion (when his family was in the vehicle) a picketer, described by Benton only as Nathan, invited him to get out of his vehicle, he refused, and the picketer said "I'll come to your house and whoop your ass then" (Tr. 703); that he told the picketer "you don't know where I live" (Tr. 703) and the picketer said "Well, I'll find out" (Tr. 703); that Perry, in effect, told the picketer to stop what he was doing; that he told the security force about the threat to come to his home; that a picketer, who has been called back to work and who has since apologized, had a sign behind him and the picketer hit the hood of his vehicle; that the vehicle was not damaged; that two or three times in a three-week period when he got up in the morning after he came home from work he had a flat tire; that he could not prove the nails were from NTN and he has had his own flats; that the nails had a square 1 inch by 1 inch metal washer fixed (attached between a collar and the head) at the head like Respondent's Exhibit 36, which he had seen in Respondent's plant; and that he reported the nails in his tires to the security guards.

On cross-examination Benton testified that he did not know Nathan personally but he subsequently pointed him out to Franks who told him who it was; that during his verbal exchange with Nathan, Perry hollered at Nathan and said "hey, we don't, that's not necessary" (Tr. 713), and "we don't need none of that" (Tr. 714); that no one else was in the vehicle with him when he had his exchange with Nathan; that he lives in Winfield, which is 17 miles from the Respondent's Hamilton facility; that he has seen the type of nails involved over in the brass area of Respondent's plant in a box under a desk; that he reported the tacks in his tires to Franks; that the anger and emotions during the strike have died down completely since the strike ended; that he signed General Counsel's Exhibit 44 in the office of his supervisor, Jeff Albridge, along with 8 or 10 other employees in the heat treat department; that the instructions were that they needed to read, sign, and mark yes or no regarding whether they wanted to have their name and address given to the Union; that when he signed the document he had already gotten a flat at the house; that he was told at NTN that he was a permanent replacement by Franks; that albeit he was told at NTN to keep his vehicle windows up when he crossed the picket line, he had his vehicle windows down during his verbal exchange with Nathan because the vehicle was hot inside; that he reported his verbal exchange with Nathan to the security guards but he did not fill anything out about it; that he did not know anything about the Union; that he did not understand that his terms and conditions of employment were governed by the collective bargaining agreement; that some striking employees have come back to work and he was notified that the Union had signed a contract regarding the terms and conditions of employment at the plant; that he had absolutely no trouble with any of the strikers who have returned to work; and that he has not had any trouble since the strike ended.

George Reeves testified that he works for Reeves Transportation, Incorporated (RTI), which is in the interstate trucking business; that for the last 25 years RTI sometimes hauls parts

and coiled steel for Respondent's Hamilton, Alabama and Macomb Illinois plants and finished products outbound; that during the strike he hauled material in and out through the picket line at NTN's Hamilton plant; that when he crossed the picket line picketers would call him names, threatened him, invite him to fight, and threatened to burn his house down; that on one occasion when he was coming up to the picket line to go into Respondent's Hamilton plant some object came through the right side of the front truck windshield; that Respondent's Exhibit 38 are pictures of the windshield; that he never found out what the object was; that he could not remember when this occurred; that over the length of the strike his truck had a total of 42 flats all from 1.5 inch roofing nails which are different from those in Respondent's Exhibit 36; that it is not common for an over the road truck to get roofing nails in its tires; that he did not ever have roofing nails in his tires before or after this strike; that he saw nails in the driveway of Howard Emerson's BSH, Inc., which inspects the bearings for NTN, and in the driveways of two facilities owned by RTI; that he did not take the picketers' threats seriously; and that he told the head of the shipping department at Respondent's Hamilton facility about the windshield and the nails in the tires.

On cross-examination Reeves testified that he was subpoenaed; that he never did find out what the object was that hit his windshield, he never looked for it, and the hole in the windshield is still there; that he was driving the vehicle when it happened; that he has been hauling to NTN for 20 to 25 years; that there was a strike about 17 or 18 years ago at NTN and he crossed the picket line then; that crossing the picket line 17 or 18 years ago was a little bit worse than crossing the picket line in 2007 and 2008 at NTN; and that this did not prevent him from crossing the picket line this time.

Subsequently Reeves testified that he did not think he filed a police report with respect to his truck's windshield; that he was concerned that someone sent a projectile through his truck's windshield but he thought he would wait to file the police report; and that before this incident no one had ever sent a projectile through his truck's windshield.

Leonelli testified that he started working for Respondent at its Hamilton plant in September 2007, after the strike started; that he worked in the turning department; that he worked for NTN for about 6 or 7 months; that "[y]es, sir" (Tr. 758) I "quit and went to school" (Tr. 758); that he crossed the picket line; that on October 23, 2007 he was crossing the picket line in his pickup truck to get to work for his 7 a.m. to 3 p.m. shift; that it was about 6:55 a.m. when he was at the picket line with a truck in front of him; that the picketers usually hold up a vehicle for 3 to 4 minutes by walking back and forth so the vehicle could not get through; that when the vehicle in front of him started to go across the picket line he got right up on his bumper, a picketer intentionally tried to walk in front of his truck and when he did not succeed, the picketer stuck his arm out and it hit the truck's mirror; that he had his window down and the picketer reached in and grabbed him by the throat and then let go; that "I opened my door and got out [of the truck]" (Tr. 760); and that at some point he was hit in the forehead with an umbrella. Leonelli testified further as follows:

Q. Did this guy still have his hand around your throat when you . . . [got] out of the truck?

A. No, sir. That was just a second.

Q. Okay.

A. Then they all started, got in front and crowded around, so I couldn't move and all that, pulled me out of the truck.

Q. They pulled you out of the truck?

A. Opened the door.

Q. They opened the door of your truck?

A. Opened the door.

Q. Okay, once they opened the door of your truck, what happened?

A. I guess I got out.

Q. And then what happened after that?

A. Just, little, started a little fight.

Q. Were you punching?

A. Yes I was hit.

Q. Hard?

A. I wasn't like seriously injured or anything afterwards, but I had cuts and scrapes and stuff like that.

....

Q. How did this stop?

A. The guards. [Tr. 761 and 762]

Leonelli testified further that he and his passenger, Jerome Purser, went to the guards' office where a report was written; and that there was a video of it also but he has not seen it.

On cross-examination Leonelli testified that during this incident he was throwing punches also; that he usually had his window up and his radio on but this day he did not; that he had been instructed to keep his window up when crossing the picket line; and that the window was down because he was probably smoking. Leonelli then gave the following testimony:

Q. Okay and when did your employment with NTN-Bower conclude?

A. I couldn't tell you the exact date.

Q. Do you know approximately if it was this year?

A. I would say approximately around April or May 2008.

Q. What were your reasons? Did you go somewhere else or did you quit or were you discharged?

A. That doesn't have anything, that's my business, you know, that's I'm not going to answer that.

JUDGE WEST: You're directed to answer.

THE WITNESS: About why, about what—

JUDGE WEST: Why you left. You left in April or May of 2008, why?

THE WITNESS: I just left. I didn't want to work there anymore.

Q. BY MR. DOYLE: Did you quit, though, or were you fired?

A. Yes.

Q. Quit?

A. Yes. [Tr. 766 and 767]

Leonelli testified further that he did not remember signing a document with regard to whether or not he wanted to release

his name and address to the Union; that it is his signature on General Counsel's Exhibit 45 which he guessed he signed on September 19, 2007; that he does not remember signing it; that he probably would have been in Frank's office when he signed this document; that he lives in Winfield, which is about 20 minutes south of Hamilton; that he believed he quit NTN; that he was not terminated for having an accident and cutting his hand; that he was terminated but he was quitting anyway; that he was terminated over a beer bottle; and that he had an argument with Franks and he left.

Subsequently Leonelli testified that Respondent's Exhibit 28, Bates number (page) 436 is his written statement of the October 23, 2007 incident, page 437 is Purser's written statement, and pages 444 through 455 are pictures of him and his truck, except he was not sure about one picture of what appears to be part of a vehicle.

Dr. Grace, who is a family practitioner, testified that she works for a clinic in Hamilton; that for the last 4 years she, at the behest of its human resources department, has been NTN's company doctor; that she does pre-hire screenings, physical examinations, drug screenings, and she treats emergencies that come up with respect to injuries at work; that she received a letter, Respondent's Exhibit 39, at the clinic; that the letter is postmarked May 15, 2008; that with the letter "I was being threatened not to see NTN patients or they would, I don't know who sent this, said they would run me out of town, burn my practice, hurt [the] alpacas [that she raises]" (Tr. 790); that she telephoned the Hamilton Police Department which sent someone to her office that day and took a report; that she telephoned Franks and he came to the clinic; that she has continued to see NTN patients; that she never received a document like this one before or since; and that she has not had any other threats or intimidation or attempts to make her afraid to see NTN patients.¹⁶

Cathy Ballard, who is a dispatcher and the clerk who is in charge of the records, including patrolmen's and investigators' reports, of the Hamilton Police Department, testified that Respondent subpoenaed her to produce police records from July 2007 to July 2008 for the calls from anyone regarding what happened during the strike at the NTN Hamilton plant, Respondent's Exhibit 24. The exhibit has 338 pages and the report on page 1 involves "1 SILVER ROOFING NAIL." Many of the other pages refer to nails or tacks. Others cover different alleged violations i.e. harassment, assault on picketers or by picketers, damage to vehicles crossing the picket line or in the employee parking lot, theft of striker's property left in the facility, and disorderly conduct. Some of the pages are court documents showing convictions. A number of pages are duplicates of other pages, i.e. 278 is the same as 189, 279 is the same as 178, 280 is 180, 281 is 191, 282 is 192, 324 is 318, and 325 is 317.

¹⁶ One of Respondent's counsel indicated that although there is no showing of attribution to UAW, "the company's responsibility here is ... to show it had some subjective, reasonable basis for concluding that turning over the names and addresses of the striking employees might result in harm to them." (Tr. 793.)

On cross-examination Cathy Ballard testified that she sees the reports which come through even if it is not while she is on duty; that she is familiar with the business of the police department's day-to-day operations; and that she could not think of any incidents at the NTN plant that occurred from mid August 2008 through the day she testified, June 11, 2009.

Jerald Ballard, who works in quality assurance at Respondent's Hamilton facility, testified that during the involved strike he supervised temporaries; that the temps ran machines, moved stock, assembled bearings, and inspected cups and races; that he did not have any difficulties or problems getting across the picket line; that sometimes his vehicle was blocked at the picket line; that five times roofing tacks were scattered on his home gravel driveway; that the first time was a week or so after the strike started; that he lives 8 miles from town; that two times he found tacks in the tire of his vehicle; and that eventually he filed reports regarding the tacks scattered in his driveway and in the county highway with the Marion County Sheriff's Department, and he told SRC.

On cross-examination Jerald Ballard testified that he did not know who scattered the tacks; and that since the strike ended, he has not had any problems with tacks or nails in his driveway.

Sean Gambles, who is an employee of Advanced Technology Services (ATS), testified that he works at Respondent's Hamilton plant rebuilding tooling; that when he started working at Respondent's Hamilton plant, which was after the involved strike began, there were more than 10 ATS employees working at Respondent's Hamilton plant in the tool and die department and in maintenance; that ATS is doing all of the maintenance work in the plant, and ATS takes care of all of the electrical issues, mechanical issues, and all of the hydraulics and pneumatics on every machine in the plant; that he crossed the picket line and he was called names and cursed; that in April 2008 he had three nails in one of the tires on his truck; that he thought the nails were placed in the employee parking lot at Respondent's Hamilton plant; that in April or May 2008 he found galvanized roofing nails scattered the full width of his two driveways; and that he went to the Marion County Sheriff's Department, and he brought the nails to into work and gave them to Downing, who is with SRC.

On cross-examination Gambles testified that his copy of the report he gave to SRC indicates that the incident involving nails in his driveways occurred about March 20–25, 2008; that he did not know who put the nails in his driveways; that four other ATS employees work in Respondent's tool and die department at the Hamilton plant with him; that he has worked for ATS since February 11, 2008; that when he took the job with ATS to work at Respondent's Hamilton plant he knew there was a strike in progress; that the employee parking lot is behind an 8- to 10-foot high fence and strikers were on the outside of the fence and not allowed in the employee parking lot during the strike¹⁷; that during the strike, security maintained watch of the perimeter of the plant; that he became aware of the nails in the tire of his truck as he left the plant and turned onto the highway, and about 500 yards down the road he pulled over into an Auto Zone parking lot; and that the three nails in the tire were

placed in line with the tread and not across the tire from one sidewall to the other sidewall.

Subsequently Gambles testified that Respondent's Exhibit 28, page 162 is his statement, dated March 24, 2008, regarding the nails in his two driveways; and that the three nails in his truck tire occurred a week or two before that.

John Cargile, who worked for NTN for 1 year, testified that he went to work after the involved strike had started in 2007; that when he crossed the picket line he was called names, told that he took their jobs, and there was some swearing; that the picketers were "[h]ostile ... ill-mannered people" (Tr. 863); that he had "some tires cut on ... [his] pick up at home" (Tr. 863); that he filed a report with SRC, Respondent's Exhibit 28, page 277, dated "10-5-07" (The report refers to "tire.") which indicates that he also made a police report; that at the time he lived in Weston, about 6 or 7 miles from Respondent's Hamilton plant; that there was a 20 inch long cut in the sidewall in the right rear off-road tire on his truck; that he had to get a set of tires so that they would match and this cost about \$280; and that he contacted the Hamilton Police Department and they sent the Marion County Sheriff's Department out to his home to take a report.

On cross-examination Cargile testified that he quit Respondent in May 2008; and that four strikers lived around him when he lived in Weston, namely Roberts, Lloyd Riner, Paul Ballard, and Robinson.

Neal Box, who has worked for Respondent for 22 years and is a floor supervisor in roll grind at Respondent's Hamilton plant, testified that he crossed the picket line during the 2007–2008 strike; that on a Saturday prior to the Christmas shutdown in 2007 he was working in the plant with six to eight employees cleaning out return trenches so that machine coolant could be changed, which procedure cannot be done during normal production hours; that there was a problem in leaving Respondent's facility at 1 p.m. that day in that there were 150 to 200 people on the picket line who blocked their exit; that he could not see any police at the picket line; that they decided to use the south gate, drive across a hay field owned by Respondent to a road by which they could access the road, Military Street, which runs in front of the plant; that after they traversed the hay field and were driving on the road, they were blocked by someone driving a blue car; that the person in the blue car forced him and the driver in front him into the ditch when they tried to go around him; that eventually he made it onto Military Street and turned right, driving away from the plant; that the blue car followed him, got in front of him, and stopped abruptly in the middle of the highway where there was no stop sign; that he almost hit the blue car but he drove around it and pulled off to the side of the road; that the individual in the blue car jumped out of his car, came running, and told him that "I'm gonna whoop your damn ass, you scab, son of a bitch" (Tr. 886); that he told the individual that he was not going to whoop anybody and he drove off; that he looked in his rear view mirror as he drove off and he saw that the individual was jerking the door handle of the blue car but the door did not open; that this is the only incident of this kind that he experienced during the strike; and that he reported it to Allen and Franks when they came back after the holidays.

¹⁷ Gambles' diagram of the area was received as R. Exh. 63.

On cross-examination Box testified that there was a state troopers' office where the blue car stopped in the highway but he did not think about going into the office when this happened; that he did not get the tag number on the blue car; that he had a cell phone with him but he did not telephone the police because security tried to get the police to come to the plant that day and nobody came; that he has worked all over the plant during his 22 years with Respondent and he knows Perry, Roberts, Peoples, Ivan Caudle, and Hilda Nolen and none of them was the driver of the blue car; that he knew most of the workers at the plant before the strike and the person in the blue car was not anyone he knew; that he reported the incident to SRC after the holidays but he was not sure if he filled out a report; that there were people from other unions on the picket line that day; that he did not recognize the operator of the blue car as a striker; and that since he is a supervisor, he is not a permanent replacement employee and he is not taking a striker's job but it appears that the operator of the blue car did not know that he was a supervisor.

Shanta Jackson, who works in assembly and inspection assembling bearings at Respondent's Hamilton plant, testified that when she went to work at Respondent's plant in August 2007 there was a strike in progress; that she had to cross the picket line and there was name calling, her vehicle hood was hit by a picketer's fist, chewing tobacco was spit on her vehicle, she had to have one tire plugged when the tire went flat at home, they threatened her that she might be found on the road dead, and they would find out where she lived; and that she did not have any nails in her driveway that she knew about.

On cross-examination Jackson testified that she lives in Vernon, Alabama, which is 35 to 40 miles from Hamilton; that one morning when she woke up she noticed that a tire on her car was flat; that this was the first flat tire she has ever had; that the picketers used a racial slur when she crossed the picket line on one occasion; that she was also called a "scab"; that she did not know who Perry, Roberts, Nolen or Caudle is; that she knows who Peoples is and neither he nor Brown, who stood up for identification purposes while Jackson was on the stand, was the one who uttered the racial slur toward her; that Peoples was not the picketer who said that they would find out where she lived; that she was a permanent replacement employee; that she did not receive a 401(k) plan but she does receive health and dental insurance; that when she first started working at Respondent's Hamilton plant she was working for a temp agency, Key, and after 3 to 4 weeks she became a permanent employee of Respondent in August 2007; that she is paid for holidays; that as a permanent employee she has a white photo ID card that she uses to swipe in and out; that as a temp working at Respondent's Hamilton plant she had an orange card that she swiped but it did not have a photo; that she filled out a shift preference card when she became a permanent employee of Respondent; that after she was hired as a permanent employee no one indicated whether she would remain employed after the conclusion of the strike but "I took it as that you know we ... [were] permanently hired. I was taking it as we were permanently hired" (Tr. 918); that she gets vacation; that she received a \$75 safety shoe allowance the year she was hired as a permanent employee; that on or about September 19, 2007 she and

the rest of her department were called into the office and told to sign and check off a form, after it was read, indicating whether they wanted their names and addresses given to the Union; that she indicated that she did not want her name and address given to the Union, she signed the document and she gave it to her supervisor; that she did not know when she testified on June 11, 2009 at the trial herein that she was represented by the UAW; that as far as she knew there is no union that represents her; that she still did not want her address and name given to the Union because of the problems she had when the strike was taking place; that since the strike ended, she has not had any problems coming or going to work or with employees calling her names or anything like that; that she works with a couple of former strikers who have returned to work at Respondent's Hamilton plant and she has not had any problems; that Brown has never called her a name of any kind; that Key told her there was a strike at NTN; that she did not know that her terms and conditions of employment are governed by a contract between the Union and the Company and no one from the Company explained this to her; that she heard that the Union and the Company settled their dispute and the Union made an offer to return to work; and that she has not seen the involved collective bargaining agreement. On redirect Jackson testified that she spoke with Franks about what happened to her during the strike, namely being called racial names and having various things happen to her car.

Adalberto Corado, who became an employee of Respondent at its Hamilton facility in September 2007 after the involved strike started, testified that he assembles bearings; that a lot of times he had trouble crossing the picket line; that he had to wait to cross the picket line; that one picketer hit his car with a stick denting a panel; that he reported the damage to security; that he was called a "wetback" (Tr. 932) when he crossed the picket line; that "more than twice" (Tr. 933) pickets tried to follow him at the end of his shift; that he lives in Hodges, which is about 25 minutes north; that one time he was followed one half the way home; that when he realized he was being followed he turned around and drove different ways; that on one occasion he found a plastic garbage bag adhered to (melting) his exhaust system; that on one occasion he had a flat tire from a nail; and that he told Franks about the name calling, the damage to his car, the nail, and the muffler. Corado then gave the following testimony on direct:

Q. You went to court one time? Really?

A. They got pictures of my car.

....

A. And they got a video when they do that.

Q. When did you go to court, do you remember?

A. I can't remember the exact date we went to court, but I think it was last year.

....

Q. Do you remember who was involved in that?

A. — F—, or something like. I don't know exactly his name.

Q. One of the picketers?

A. Yeah. I think he's in prison right not.

Q. Tony Perry?

A. Yeah. Tony Perry that him.

Q. Okay. Very good.

MR. DAVIS: That's all I have Your Honor. Thank you. [Tr. 937 and 938.]

It is noted that Respondent's own exhibit, namely Respondent's Exhibit 24, pages 222 (a SRC record), 224 (a SRC record), 230 and pages 245 through 251, which include court documents, show that the alleged perpetrator is identified throughout as Perry Franks and not Tony Perry.

On cross-examination Corado testified that he talked with the police before he went to court regarding the damage to his vehicle when a sign hit it; that he did not know how he got the nail in his tire; that he thought it was Franks who told the people who had to cross the picket line to keep their windows up; that twice he was followed by a Ford Ranger pickup truck after he left Respondent's facility; that he had seen the Ford Ranger pickup truck in the area of the Union hall (which is basically across the street from Respondent's Hamilton plant); that the first time, which occurred about 2 or 3 months after he started at Respondent, he took a left on Highway 43 out of the plant and he took a left onto Highway 187 north toward Hodges, and he noticed the Ford Ranger pickup truck behind him; that he turned off Highway 187 and the Ford Ranger pickup truck did not follow him; that the second time he noticed the Ford Ranger pickup truck following him after he got off from work was about 2 or 3 weeks later; that he made a left out of the plant on Highway 43 and when he came to Highway 187 he made a left; that the Ford Ranger pickup truck did not make a left with him onto Highway 187 so the Ford Ranger pickup truck was behind him just on Highway 43; that he did not remember signing a document regarding whether he wanted his name and address to be given to the Union; that the signature on such document is not his; that he is from Guatemala and Spanish is his first language; that he can read a little English; that he knew that he is represented by a Union and there is a contract that covers his working conditions and gives him certain rights but he has never seen it; that Brown, who stood up to be identified to the witness while the witness was on the stand at the trial herein, never called him a name or hit his car; that prior to going to work at Respondent's Hamilton plant he knew that there was a strike at the facility and there was a picket line; that he filled out his application in a hotel about one block from Respondent's plant; that he knows that the dispute has ended and some of the former strikers have returned to work; that he has not had any trouble in the plant since the strike has ended; that he has not had any trouble with any of the strikers who have returned to work; that at the time he testified he was working 4 days a week and he was aware that the Union filed a complaint with the labor board about the company cutting the work week to 4 days; that he has worked 4 days a week for the last couple of months; and that essentially his pay has been reduced by 20 percent on those weeks that he does not work on Fridays.

Joshua Stephenson, who started working for Respondent at its Hamilton facility in August 2007 while the strike was progress, testified that he is a machine operator who grinds bearings and races; that he had problems crossing the picket line in that his vehicle was blocked, his vehicle was damaged when it

was struck by a picket sign held by Riner who called him a "SOB" (Tr. 964); that he filed a police report and a report with security regarding the damage; that there were several times that he was cursed and a few times a picketer threatened to "whoop" and "stomp" him if he would get out of his truck (Tr. 964) and that he did not report the cursing and threats to anyone at the plant.

On cross-examination Stephenson testified that he knew that the strike ended and the Union and the Company agreed to a contract which established his terms and conditions of employment; that for the last two months he has worked 4 days a week; that he has not had any problems at work since the strike concluded; that as of June 12, 2009, when he testified at the trial herein, he objected to the Union having his home address because of what he went through when there was a picket line; that Brown, who stood up to be identified to the witness while the witness was on the stand at the trial herein, never yelled at him, hit his car with a picket sign or called him names or anything; that he did not want UAW International representative Brown to have his address because he did not know Brown; that he had never seen the involved collective bargaining agreement before testifying at the trial herein; that he filled out the application for employment with Respondent across the street at the Econo Lodge in Hamilton, and at the time he knew that there was a strike in progress; that with respect to his prospects for continued employment if and when the strike ended, he was told that he would be a permanent employee; that he knew that he would be taking the job of a striking employee; that he had never heard the work "scab" (Tr. 977) before this in a labor dispute context; that he understands that "it refers to a person who worked behind a picket line as a strike-breaker" (Tr. 977); that the strike has ended and some of the former strikers have returned to work; that he has not had any trouble with any of them or Perry, who is the president of the Union; and that since the strike has ended, Perry has not threatened him or called him names or anything like that. Subsequently Stephenson testified that Respondent's Exhibit 28, pages 1060 through 1063 refer to the incident involving damage to his vehicle.

Jacinda Terry, who has worked for Respondent since 1998 and is a project engineer with a degree in mechanical engineering, testified that she experienced problems in crossing the picket line during the 2007-2008 strike; that she is a salaried engineer and not in the bargaining unit; that the picketers blocked her vehicle, and in January 2008, Stephen Craig Taylor, who she knew from work and from growing up near her, damaged her vehicle while she was crossing the picket line; that Taylor let his picket sign drop onto her vehicle and it remain there all the way down the side of her vehicle as she drove in; that her vehicle was scratched; that she lives about 7 miles from downtown Hamilton; that on two different occasions she had nails in her driveway; that she could not remember the dates but she filed more than one police report; that on the first incident a total of about 100 nails were found in her driveway, her mother's next door driveway, and in the next door neighbor's driveway; that she turned these roofing tacks into security at NTN; that about two weeks later a total of 75 to 100 more nails were found in her mother's driveway, in her driveway, in

the driveway to the barn, and scattered up and down the highway in front of the house; that she turned these nails in also; that on one occasion, she could not remember the date, when she was driving home from work she passed the residence of striker Bobby Davidson, who was sitting in his vehicle in his driveway; that Davidson got behind her, drove four feet off her bumper while she was doing about 55 miles an hour, and he kept flashing his headlights; that he did this for about 3 miles; that she telephoned her mother and informed her about what was happening; and that she was frightened and she got a hand gun from her father which she still keeps beside her bed.

On cross-examination Terry testified that she does not bring her gun to work with her; that she does not know who put the nails in her driveway; that damages were awarded by the Marion County Court regarding Taylor allegedly scratching her vehicle; that Taylor appealed and the matter is pending; that to her knowledge, Taylor does not hold any office in the Union; that Davidson stopped following her before she arrived at her residence; and that she never had any problems with Davidson before the strike or since this incident.

Larry Taylor, who is a roll grinder set up man at Respondent's Hamilton plant, testified that until a few years ago he was in the Union for 35 years; that he did not guess that he was in the Union because his union dues are not deducted; that he was in the bargaining unit when the strike began and he went out on strike and picketed; that three weeks later he came back to work during the strike; that on three occasions starting in September 2007 he had nails thrown on his driveway; that the first time it was a handful of nails and screws and he turned them into security at the plant; that the second time he found 1.5 inch roofing nails which weighed a total of about 1 pound; that the third time his dog started barking and he saw Riner and Robinson, both of whom are in the Union, in a pickup, throw a total of between one half and a pound of nails in his driveway and on the highway; and that when he crossed the picket line he was called a "scab." (Tr. 998)

On cross-examination, Taylor testified that the one time he saw the nails being thrown Riner and Robinson were in Riner's silver Ford pickup; that there have been other strikes at NTN and he went out on strike and picketed; that the 2007 strike was the first time the Company brought in replacement employees to take the jobs of strikers; and that he has not had any problems in the plant with the strikers who have returned to work, and he has not had any problems since the strike ended with the Union or any former striker.

Anthony McGinnis, who began working at Respondent's Hamilton plant on August 27, 2007, testified that he is a machine operator in the OD cups department; that he crossed the picket line to go to work; that on January 17, 2008 he came to work early, at 3 a.m., and as he walked across the parking lot with co-worker Gerry Brown to go into the plant, he heard something hit a vehicle behind him; that the sound was like metal hitting metal; that he turned around but he did not see anything; that Brown noticed something rolling in front of them "and he pointed it out to me and so we walked over to it and picked it up and it was a little metal ball" (Tr. 1007); that Respondent's Exhibit 34 looks like the one metal ball they found;

and that they took the metal ball to security and both he and Brown filled out reports for security.

On cross-examination McGinnis testified that he signed a document, General Counsel's Exhibit 50, which was given to him in a break room in the presence of four or five people that he did not know; that the individual who passed the document out "kind of just skimmed over it and asked us to check yes or no and then sign it" (Tr. 1012); that he followed these directions and he gave the document back to the supervisor; that when he went to work for Respondent he knew that there was a strike and he would be crossing the picket line; and that on January 17, 2008 at 3 a.m. there were pickets sitting in front of a tent when he drove into the plant.

Subsequently McGinnis testified that Brown saw the metal ball rolling about 20 seconds after the metal on metal sound; and that Brown is the one who picked up the metal ball.

Brown, who began his employment with Respondent at its Hamilton plant in August 2007, testified that he runs a cup OD; that on January 17, 2008 he met McGinnis in the parking lot on the way into the plant at 3 a.m.; that as he walked across the parking lot he heard something hit behind him; that they walked another 10 feet and something hit the ground and rolled 20 to 25 feet and hit a curb; that he went and picked up the object; that the object came from the direction of the road, across the fence; that he thought that the object came from the direction of the picketers' tent; and that he brought the object to security and filled out a report.

On cross-examination Brown testified that although Respondent manufactures tapered bearings, he has seen ball bearings in the plant; that "[t]he ones I picked up that night were round" (Tr. 1023), "the size of a marble" (Tr. 1023) that that he has seen some in a bag in the plant; that the bag was in a Company toolbox; that he could not remember if he picked up one or two ball bearings on January 17, 2008; that McGinnis did not retrieve any ball bearings that night; that Respondent's Exhibit 28, page 926 is his signed statement regarding this incident; that his statement appears to indicate that he picked up one ball bearing; and that the synopsis on page 925 of Respondent's Exhibit 28 indicates that both McGinnis and Brown picked up metal ball bearings (The synopsis portion of the incident report, as here pertinent, indicates "Mr. McGinnis and Mr. Brown both picked up a metal ball bearing and brought them to the security office" Under the "PHYSICAL EVIDENCE . . ." portion of the incident report the following appears: "2 metal Ball Bearings").

Shanta Christopher, who started working at NTN in July 2007 while the strike was in progress, testified that she crossed the picket line; that when she crossed the picket line she was called names and cursed at; that twice she had nails in her tires; that she discovered one flat in the employee parking lot at Respondent's facility, and the other one in the morning at home; that on December 29, 2007 she discovered when she arrived home from work that the rear window of her vehicle was shattered; and that the vehicle had been sitting in the employee parking lot before that.

On cross-examination Christopher testified that she does not know Perry, Peoples, Cantrell, Roberts, Caudle or Nolen; that she could not identify any of these individuals as the picketers

who called her a racial name; that she signed a September 19, 2007 document, General Counsel's Exhibit 51, in a supervisor's office in assembly and inspection; and that she and the supervisor were the only ones in the office at that time.

Robbie Cooper, who started working at Respondent's Hamilton plant on October 4, 2007, testified that he had difficulty in crossing the picket line in that at about 11:10 p.m. one night in February 2008, after he left the plant, he discovered he had a 1 inch gash in his steel belted tire tread when he was about 1 mile from the plant and the tire went flat; that there were pickets that day and he had to stop before he crossed the picket line that day; that he did not see anyone gash his tire; and that he had round headed roofing nails in his tires on two occasions, once when he first started and again right before the strike was over.

On cross-examination Cooper testified that he reported the slit tire to security at the plant; that he did not report the two nail incidents to company security; that he lives about 30 minutes from the plant; that he did not know if he was represented by the UAW; that he knows that there is a contract and it confers certain benefits to certain employees; that he did not know if he is one of the employees who gets benefits under the contract; that at the time he testified at the trial herein (June 12, 2009) he was working 4-day weeks; that he did not know one way or the other whether the contract has any language with respect to the number of days in a work week; that he had worked a 4-day work week for about 1 month; that he worked a 4-day work week for a month in March 2009; that when he works a 4-day work week the shifts are the same length as those for a 5-day work week, namely, an 8 hour shift; that he gets a smaller pay check on a week with 4 days instead of 5 days; that since the strike has ended and some former strikers have returned to work, he has not had any trouble with any of the former strikers; and that he lives in Hacklesburg in Marion county which is about 30 miles from the plant.

Ellis Fikes, who started working at Respondent's Hamilton plant in August 2007, testified that striking employee Randy Bell threatened him; that he was visiting a friend in September or October 2007; that as they were leaving to get something to eat "Bell came over and started threatening me saying he was going to whoop my ass" (Tr. 1062); that Bell "slammed my door and wouldn't let me leave when I tried to leave" (Tr. 1062); that Bell stood between him and his car "[t]hreatening me and putting his finger in my face" (Tr. 1063); that the threatening was Bell saying "he was going to kick my ass and that I was sorry for taking his job" (Tr. 1063); that this lasted for 10 to 12 minutes; that eventually Bell settled down; and that he got in his car and left.

On cross-examination Fikes testified that he did not report this incident to NTN; that this incident occurred before he signed a document which indicated that he did not wish that his name and address be given to the union; that when he signed General Counsel's Exhibit 52 he was on break in a break room with either Shotts or Franks who asked him to look it over and sign it; that he looked it over, checked a box, and signed it; that he had been working 32 hours for a couple of months when he testified at the trial herein (June 12, 2009); that before that he worked 40 hours a week; that he is paid by the hour and, therefore, he receives a smaller pay check when he works 32 hours a

week; that he did not know one way or the other that he was represented by any labor union; that while he knew there was a strike at the Company which has concluded, he did not know one way or the other if the Union that was engaged in that strike entered into a contract with the Company covering certain employees at the Hamilton plant; that he knew that there was a strike at Respondent's Hamilton plant when he filled out an application to work there; that he guessed he knew that when he crossed the picket line to go to work that he was potentially taking the job of a striker; that before the confrontation, "I'd seen ... [Bell] over at my buddies house before. Just like hey how are you, is how I knew him" (Tr. 1069); that he did not report the Bell incident to the law; that this was his only confrontation with Bell; that he has gone back to his friend's house once or twice since the confrontation and he has not seen Bell; that he has not had any problems since the strike ended; that some former strikers have returned to work; and that "[y]es" (Tr. 1070-1071) he has had problems with those strikers who have returned to work.

Downing, who was the custodian of records for SRC at Respondent's Hamilton plant, testified that SRC provides security; that he is a supervisor with SRC; that he was assigned to NTN in Hamilton in July 2007 until July 2008 when the strike ended; that he was at NTN for the entire time of the strike, except for 13 days that he was off; that SRC had 22 officers at NTN at any given time; that SRC maintained an office inside the NTN facility; that SRC had two 12-hour shifts; that the officers wore a uniform and carried either a video camera, a radio and/or a flashlight; that as evidence custodian, he collected the incident reports, videos, evidence, and he secured it; that he locked the evidence in the office at the site; that he reviewed the incident reports and the video tapes and signed off on the reports under supervision; that he locked up everything; that he notified NTN officials on a daily basis of all actions that had taken place within the past 24 hours; that certain of NTN's managers would stop in at SRC's office in the plant and ask what was going on; that Respondent's Exhibit 26 is the incident report form used by SRC at NTN; that SRC created an incident report log at NTN and Respondent's Exhibit 27 is the form; that Respondent's Exhibit 28 is the incident report logs from the incidents for misconduct that transpired at NTN, the exhibit contains all of the incident reports that were prepared at NTN, he reviewed all of the incident reports in this exhibit, and he prepared the incident log contained therein; that the incident reports which were prepared in accordance with a specified procedure at or near the time of the incident are records kept in the regular course of business by SRC¹⁸; that on the picket line he

¹⁸ The exhibit contains 1389 Bates numbers (pages) including 38 pages which are an incident report log. The reported incidents include, inter alia, nails on the ground, blocking, picketers picketing without a picket sign, nails in tires, recording tag numbers, video taping, vehicles being hit by picket signs or otherwise damaged, verbal threats, intimidation, trespass, shots fired from passing vehicle, vandalism, blowing a kiss to Security team, fighting, hitting a replacement employee with an umbrella tip, police refusing to cross the picket line to assist, profanity, racial slurs, lugs nuts removed from wheel, threatening calls at home (the person who called is not named), vehicles hitting picketers, mass picketing, Lieutenant King of the Hamilton Police Department refused

observed harassment, intimidation, nails, fights, and racial slurs; that Respondent's Exhibit 30 is the metal object that was found on the trunk of Christopher's car, a Grand Prix, on or about "12/29/07"; that an incident report dated "6/16/08" states that Caudle, who is an officer of the Union, was on the picket line using a video camera and SRC made a video tape of Caudle using a video camera (Although directed to turn over all original SRC video tapes to opposing counsel with respect to edited for trial DVDs Respondent identified as Respondent's Exhibits 29 and 31, the originals were not produced and Respondent's Exhibits 29 and 31 were not received.)¹⁹; that pages 435, 444, 445, 446, 447, 448, of Respondent's Exhibit 28 and Respondent's Exhibits 32 cover the above-described October 23, 2007 incident involving Leonelli and some picketers²⁰; that with respect to page 944 of Respondent's Exhibit 28 there is a SRC video of Peoples using a video camera while vehicles

to cross the picket line to take a report, State police shining spotlight into the eyes of exiting vehicles, making sexual remarks, and harassment. Most of the incidents involve nails, blocking, and picketing without a sign.

¹⁹ The fact that SRC videos were not made available must be taken into consideration. In testifying about a number of incidents this witness specifically indicated that there was a video of the incident available, ostensibly lending credence to his testimony and SRC documentation. Respondent did not introduce those videos. This is especially problematic in those instances where this witness did not witness the incident but testified that he reviewed the SRC video tape and the SRC videotape accurately reflects what is contained in the synopsis portion of the incident report. The SRC tape he reviewed was not introduced and so we are being asked to rely on the assertion by this witness that it accurately reflects what is contained in the synopsis. At one point during a discussion of Respondent's Exhibit 28, one of Respondent's attorneys indicated as follows:

All of Exhibit 28 is being offered for the effect on NTN-Bower's decision not to release the names and addresses [of the replacement employees]. In addition, it may be offered for the truth of the matters asserted, too.

But seeing there is an objection to that, all of this information goes towards the state of mind of NTN-Bower's officials because this is what they were told on a daily basis from Special Response and this was the foundation for the reason why they did not turn over the names and addresses which is part of the reason we are here today because the Union has said it is a ULP.[Tr. 432]

Subsequently, I indicated that

I don't know that I, in looking at something like this [an SRC report], would be willing to say that what is written here is the truth of the matter. These are observations and there are conclusions drawn by both the individual who originally observed and the supervisors who watched the video but it doesn't necessarily mean that it is factual as to what exactly occurred, what the person was doing.

The person was taking a digital photograph and I think that to that extent someone observing it can testify, this is what I saw, that is fine, but we don't want a conclusion in here

....

that he was actually taking a picture of the ... license plate. [Tr. 433]

²⁰ Page 435 of Respondent's Exhibit 28 indicates that there is a video tape (#159) of this incident. Respondent did not introduce the video at the trial herein.

were entering and exiting from the Company²¹; and that Respondent's Exhibit 35 are "union jacks"²² (and a nail) which were found at the employee entrance to Respondent's Hamilton facility on "2-5-08."

On cross-examination Downing testified that he signed, as supervisor, the incident report at page 418 of Respondent's Exhibit 28, regarding an incident which occurred on "10/22/2007"²³; that he would have made this incident report available to the Company on or about October 22, 2007; that he could not recollect if he gave this incident report to the client (Tr. 473); that he was sure that the Company was apprised of this incident (Tr. 486); that he saw the replacement employee involved in the October 22, 2007 incident, Sonny Cook, at the Respondent's facility throughout the rest of the time SRC was at this facility; that he gave reports to Franks or plant manager Shotts; that the incident reports were maintained in a three-ring binder in the office he worked in toward the front office area at Respondent's facility; that he discussed what went on on the picket line every day with Company officials; that he could not recall if anyone from the company asked to view the video tape of this incident; that the Company has asked to review video tapes, i.e. the one involving Leonelli; that when management reviewed a video it was done in the office utilized by SRC and it was done in his presence so as to preserve custody; that he did not recall whether anyone other than Franks or Shotts reviewed any of the videos; and that he did not know Sinele.

Cedric Hamiel, who is employed by SRC, testified that he was stationed at NTN during the involved strike; that he observed, inter alia, blocking, intimidation, and harassment; that he drafted an incident report, page 290 of Respondent's Exhibit 28, dated October 7, 2007, after he heard a man on the picket line say to an employee "I know where you live" (Tr. 504)²⁴;

²¹ The following exchange occurred at this point in the testimony of this witness:

JUDGE WEST: So I understand the situation, it was standard procedure for your people to be using a video camera when vehicles were entering or exiting the facility?

THE WITNESS: Yes, sir.

JUDGE WEST: And a report is being filed because the Union was using a video camera while vehicles were entering and exiting the facility?

THE WITNESS: Yes, sir.

JUDGE WEST: And the reason for that is?

THE WITNESS: We were using the video camera to document activity. We were not using the video camera to intimidate people. [Tr. 448]

The objection regarding the conclusory statement of this witness with respect to why the Union used a video camera was sustained. As noted above, this witness claims that SRC videos support SRC documentation. Yet Respondent did not provide the SRC videos. Since many of the incidents happen when the picket line was being crossed, there is nothing wrong with both sides using video cameras for the purposes of being in the position to show what happened.

²² A "union jack" is a four-pronged nail which is designed so that no matter how it is placed or thrown one of the four prongs will always be perpendicular (pointed up) to the ground.

²³ The report indicates that a video camera was utilized and the involved tape is "# 160."

²⁴ The report indicates that the individual said "We know where you live."

that he video taped this incident; that he did not know recall the person's name who made the comment "but I know he had a bald head. At that time, I didn't know the faces but I did describe how he looked and he had a bald head and I looked back at the specific point where he was on the line. So if we take a look at the tape we will be able to identify who we are talking about" (Tr. 504 and 505)²⁵; and that a number of the incidents included in Respondent's Exhibit 28 which he observed on the picket line and testified about at the trial herein are on video. Such videos were never introduced by Respondent.

On cross-examination Hamiel testified that while he was on duty assigned to a post he had a video camera with him; that he was told to video tape any misconduct, nail sweeps, and any time the employees came in or left; that SRC had pictures of everyone on the picket line; that the pictures were kept in a binder in the SRC office in Respondent's facility; that the employees were instructed by a SRC supervisor not to get out of their cars, keep their windows up, and do not leave until given proper space to leave, "[s]o they couldn't just drive over anyone" (Tr. 523); and that he was told by his supervisor, Sergeant Valez, that the binder of photographs of employees with their names was provided by NTN to SRC.

Respondent's Exhibit 28 contains an incident report dated "04-03-2008" (See pp. 1177-1179.) and an incident report dated "04-04-2008" (See pp. 1180 and 1181.). The former refers to an unknown person(s) going to the residence of NTN employee, Patricia Lovett, who was hired on August 27, 2007, and shooting and killing her horse. The latter refers to an unknown person(s) going to the residence of Jamey Smith, who worked at NTN during the strike, and shooting and killing his two dogs.

When called by Respondent, Sinele sponsored Respondent's Exhibit 75, which is a "07/24/2008" email Brown sent to Sinele. It reads as follows:

This is to confirm our telephone conversation of July 24, 2008 in which you acknowledged receipt of my letter, telephone calls and voice messages of July 23, 2008. During our conversation, you asked me of my availability to meet next week or the following week. I indicated my availability of any dates next week, except Monday. After you inquired further concerning the following week, I responded again with availability of any dates that week, except Monday, but added that I wanted to do this as soon as possible. You indicated you would followup with when we could meet, probably by email.

²⁵ At this point one of Respondent's attorneys indicated that Respondent had a DVD of the video and he asked if the ruling on the two previous DVDs would also apply to this DVD. As noted above, Respondent was advised with respect to the two other DVDs that it would have to provide the individual, original videos if it wanted to introduce the DVD's which are edited summaries of individual videos. Respondent's attorney was advised that the ruling was the same with respect to the third DVD, which was marked Respondent's Exhibit 37. It appears that Respondent did not make the underlying videos available to opposing counsel. Respondent did not subsequently move for the introduction of the three DVDs, namely R. Exhs. 29, 31, and 37, and they are not part of the record.

In closing of our conversation, I requested certain information as it relates to the company's permanent, probationary and temporary employees at the Hamilton, Alabama facility. After asking if this is something different than what Jackie [Peoples] asked for yesterday, you stated that you would send me this information.

I look forward to meeting, hopefully next week, in order to proceed with the employees returning to work without unnecessary delay.

When called by Respondent, Sinele sponsored Respondent's Exhibit 76. It consists of the following July 25, 2008 e-mail and letter from Sinele to Brown. The email reads as follows: "Please see the attached letter regarding a meeting for July 31, 2008 as well as the seniority listing and temporaries listing you requested." The letter reads as follows:

We will meet with you next week on Thursday, July 31, 2008. We have reserved the meeting room at the Econo Lodge in Hamilton for 9:00 a.m. Thursday, July 31, 2008. Friday, August 1, 2008 is reserved as well, if we need to meet that day also.

I just received your overnight mail today, in which you enclosed two initialed and signed copies of the Company Best Last Final Offer 11-8-07. You requested that the appropriate company representatives initial and sign one of these copies and return to you. We will bring clean copies for both parties to sign when we meet.

Attached is a seniority listing and temporaries listing as of 7-25-08. This also satisfies Jackie Peoples' request to Gary Franks on July 23rd for the seniority list for all current employees. I have forwarded copies to him as well.

A nine-page "SENIORITY LIST," which gives, inter alia, the names and the hire dates of the permanent replacement employees who were hired after the strike began in 2007, and a one-page "TEMPORARIES LIST," with 21 names, is attached to the letter. As indicated, both are dated "7/25/2008."

Brown testified that the Union and the Company first met on July 31, 2008 to discuss an orderly return to work; and that Charging Party's Exhibit 1 is the return to work procedure that was given to the Union by the Company on July 31, 2008. The exhibit reads as follows:

Hamilton Plant
Return to Work Procedure
July 31, 2008

1. Each employee who desires to return to work shall notify the Company by signing the "Return to Work Log". The "Log" will be maintained in the Human Resources Office between the hours of 9:00 a.m. to 11:30 a.m. and 12:30 p.m. to 3:00 p.m. Monday - Friday until August 15, 2008.

Bargaining unit employees who have not signed the "Log" by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company.

2. As bargaining unit job openings develop, the Company will select from the individuals that have signed the "Log" those individuals who's [sic] skills and abilities are best suited for the available employment opportunity.

3. The Company will notify each employee selected to fill an available bargaining unit opening by telephone and by the United States Postal Service. In addition, at the same time the Company will notify the Union by telephone and delivering in person the return to work notice to the office of the local union. Employees notified of their return to work will have five (5) work days from the date of mailing to report to the plant ready to work. An employee who fails to report for the start of their shift at the beginning of the sixth day following the date of the mailing of the notice shall be considered to have abandoned his or her job.

4. Employees selected to return to work will be required to pass a drug screen prior to resumption of work. Eligible employees who fail the drug screen shall be returned to the "Log". Eligible employees who refuse the drug screen and those who fail the drug screen a second time are considered to have abandoned their job.

5. The "Return to Work Log" shall expire at 3:00 p.m. Monday, February 15, 2010. If there are any employees on the "Return to Work Log" on that date, they may apply for employment with the Company as new hires and will be considered as any other applicant with like skills and qualifications.

Brown testified further that he and Local union officials attended the July 31, 2008 meeting; that the Company was represented at this meeting by Aubry, Sinele, and Franks; that Aubry was the main spokesperson for the Company, and he was the main spokesperson for the Union; that during the July 31, 2008 meeting the Company, through Aubry, indicated that the Company needed the employees to sign the return to work log in order to see who wanted to come back to work; and that this meeting lasted several hours.

Franks testified that he was at the meeting on July 31, 2008 when the Respondent presented Charging Party's Exhibit 1 to the Union; that a consultant retained by NTN, Aubry—who was also Respondent's lead negotiator, probably drafted Charging Party's Exhibit 1; that he read Charging Party's Exhibit 1 before it was given to the Union; that the second paragraph of Charging Party's Exhibit 1 indicates "Bargaining unit employees who have not signed the 'Log' by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company," and he did not remember if the Company withdrew this language; and that he was not in the July 31, 2008 meeting all of the time.

Aubry testified that he was involved in the return to work negotiations; that the first return to work negotiation was held in July 31, 2008; that he, Franks, and Sinele represented management; that Brown and his committee represented the Union; that he thought Union attorney Davies was also present; that the parties met at the Econo Lodge in Hamilton, which is across the street from Respondent's plant; that he gave the Company's proposal related to the return to work procedure to Brown; that the parties spent most of the day initialing off the different arti-

cles of the collective bargaining agreement; that the only negotiating regarding the return to work procedure on July 31, 2008 was Brown asking what the return to work process was and was it mandatory; that he told Brown that if the parties agreed to it, it would be mandatory but if the parties did not, they could negotiate; that the only other thing brought up that day was a question concerning why the Company wanted to do drug testing; that Charging Party's Exhibit 1 is the proposal that the Company presented to the Union; that management said that the employees had been off for a year and management wanted to check to make sure that they were still drug free; that the Union indicated that there was a drug program that should be used; that he said if that was the case, management would eliminate that part of the return to work proposal; and that at either this meeting or the next meeting the Union asked why management wanted a log.

When called by Respondent, Sinele testified that she was present for the whole July 31, 2008 session with the Union; that at the outset of the meeting she gave the Union a clean copy of the Company's last, best, and final offer; that the Union was also given a copy of the Company's return to work proposal; that the Union took a break to review what they had been given; that the meeting was recessed from about 9:30 a.m. to 4:30 p.m.; that the parties worked on changes to the collective bargaining agreement that night; and that there were no further discussions of the Company's return to work proposal that day.

Brown testified that there was a second meeting, on August 1, 2008, between the Union and Company representatives regarding return to work procedures; that the same people attended this second meeting; that this meeting and the one on the day before were held at the Econo-Lodge across the street from the plant; that at this meeting the Company continued to insist that the former strikers sign the return to work log in order to be considered for reinstatement; that the Company withdrew item 4 on its list at either the July 31 or August 1, 2009 meeting; that the other items were not withdrawn by the Company at either of these two meetings; and that the Union never agreed that the return to work log was necessary in order for the Company to determine who was to return to work.

Franks testified that he probably attended the meeting on August 1, 2008 between the Company and the Union but he did not recall specifically; and that "To be honest with you, sir, I don't recall" [any Company official at this meeting withdrawing the language in Charging Party's Exhibit 1 that "Bargaining unit employees who have not signed the 'Log' by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company."] (Tr. 238).

Perry testified that he was on the negotiating team for the Union that met with the Company to discuss the return to work procedures in July and August 2008; that he was present for the July 31, 2008 and August 1, 2008 meetings on this subject; and that the Company never withdrew the second paragraph of Charging Party's (Union's) Exhibit 1, namely that "Bargaining unit employees who have not signed the 'Log' by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company."

Aubry testified that the parties met again on August 1, 2008 to negotiate the return to work procedure; that the Union asked

why management wanted a log; that management told the Union “Just to make it orderly, so that the Company knows who is interested in returning. And we wouldn’t have to call a lot of different people and we would like them to come in and we could choose the right people for the right job” (Tr. 1091); that the Union asked if the returning strikers were going to be recalled on a layoff basis; that management said no because they were not laid off employees but rather they were returning strikers; that a change was made in the Company proposal regarding the way the Company was going to notify employees in that it was decided that the Company would utilize the notification procedures in the contract by mail and by phone with certain time limitations; that the Union asked why management wanted to only give people until February 1, 2010 recall rights; that management told the Union that there should be a drop off date “[a]nd 2010 is the end of the contract” (Tr. 1093); that the parties did not reach agreement on a return to work procedure that day; and that he thought the parties were scheduled to meet the following day but the Union choose not to meet the following day. Respondent’s attorney Davis then elicited the following testimony:

Q. And so after the parties met on July 31st and August 1st, were there any other meetings regarding the return to work procedure?

A. . . . I think there was one—I think the next meeting we had there was some discussion concerning that. But that wasn’t until like a week or ten days later.

Q. Okay. It was some time a good distance after the August 1st meeting?

A. Yes.

Q. Do you remember what date it was, off hand?

A. I want to say the 14th. But that could be wrong. August 14th.

Q. Okay. So it is fair to say that you don’t recall what the date was?

A. No. I know that there was a conflict in timing that the mediator couldn’t be there. And it was at least a week, if not more, before the mediator could be there.

Q. Okay.

A. And that’s when the date was scheduled for.

Q. All right. And so there was one more meeting on the return to work procedure?

A. (No response.)

Q. Sometime after—

A. In addition to other things, yes.

Q. Right.

A. But on the return to work procedure.

Q. All right. And were you present at that meeting?

A. Yes.

Q. Was the same group there, representing the Union?

A. I believe so.

Q. And was the mediator also present?

A. I believe so.

Q. Okay. Tell us what you remember happening at that third meeting.

. . . .

A. . . . , just more discussions on how—if the Company would make any more modifications.

Q. To the return to work document?

A. Right.

Q. And did the Company make modifications to the return to work document?

A. We made—yes. It did make modifications.

Q. What did it do?

A. Well, it had already deleted the requirement for drug screening.

Q. Okay.

A. It stated that it was not necessary to sign the log anymore.

Q. Dropped the log requirement?

A. Yeah.

Q. Okay. What else?

A. It maintained its position on how it was going to recall employees.

Q. That’s paragraph two?

A. Yes.

Q. What else?

A. It modified paragraph three on the notification, to go with the contract language.

Q. Okay.

A. On four, that was deleted.

Q. What was four?

A. That was the drug test.

Q. Okay.

A. Five,—

Q. What’s five?

A. It’s the return to work—expiration of the log.

Q. What happened to that?

A. It changed the date. There was an earlier date, prior to that. And it changed the date to the end of the contract.

Q. Okay. Was that eventually deleted also?

A. I don’t remember that.

Q. Okay. Were there any other meetings with the Union regarding the return to work procedure?

A. I don’t think so.

Q. Okay. Did the Union accept—or did the Company and the Union reach agreement with respect to the return to work procedure?

A. Not really.

Q. So there was never any agreement or sign off on that document?

A. No.

Q. . . . The last meeting, Mr. Aubry, where you met with the Union on the return to work procedure, was that the last time you negotiated with the Union on behalf of NTN Bower?

A. I believe so. [Tr. 1095–1099]

On cross-examination, Aubry testified that he believed that number five of the Company’s July 31, 2008 return to work procedure was rescinded by the Company²⁶; that it was changed

²⁶ As noted above, number five reads as follows:

5. The “Return to Work Log” shall expire at 3:00 p.m. Monday, February 15, 2010. If there are any employees on the “Return to Work

from having the length of time that the contract said you would lose seniority if you were off, to the end of the contract date, which was a much greater length of time; that the Union never agreed to this change; that number 1 was rescinded by the Company within a day or two after July 31, 2008²⁷; that number 4, the drug screen, was rescinded by the Company within a day or two after July 31, 2008; that number 2, namely "... the Company will select from the individuals that have signed the 'Log,'" was modified in that there was no longer a requirement to sign the log; that the requirement to sign the log was rescinded on or about July 31 or August 1, 2008; that number 3 was modified to reflect how the Company recalled employees under the terms of the contract; that Allen did not attend the July 31, 2008 return to work procedures negotiation session; that the Union was represented at the July 31, 2008 session by Brown, Roberts, possibly Perry and Peoples, and he thought Union attorney Davies was present; that he was wrong about any attempt to meet on August 2, 2008 since that was a Saturday and they would not meet on a Saturday; that Brown did not decline to meet on August 2, 2008; that the log requirement in the Company's proposal was dropped shortly after July 31, 2008; that he could not say if it was during this two day session, July 31 and August 1, 2008, with the Union, and he did not know if it was before August 4, 2008; that he was the Company's spokesperson and he would have been the one who communicated the Company's position that it was dropping the log requirement but he could not remember the specific date he did this; that this would have occurred across the negotiating table; that "he believe[d] we just said we were going to eliminate it, and crossed through it" (Tr. 1140); that number 5 of the Company's original proposal indicated that the return to work log would expire on February 15, 2010; that he believed that this was tied to the expiration of the contract; that he signed the contract on July 23, 2008; that the duration of the contract is 5 years and so it runs to 2012; and that he did not recall why February 15, 2010 was chosen for the expiration of the return to work log.

On cross-examination when called by Respondent, Franks testified that the only thing that he remembered being withdrawn from the Company's return to work proposal, Charging Party's Exhibit 1, was the drug screen; that "there was a log that did exist, a sign up log, *if you were interested in returning to work*" (Tr. 1207 with emphasis added); and that no agreement was ever reached on this or any other return to work procedures.

Log" on that date, they may apply for employment with the Company as new hires and will be considered as any other applicant with like skills and qualifications.

²⁷ As noted above, number 1 reads as follows:

1. Each employee who desires to return to work shall notify the Company by signing the "Return to Work Log". The "Log" will be maintained in the Human Resources Office between the hours of 9:00 a.m. to 11:30 a.m. and 12:30 p.m. to 3:00 p.m. Monday - Friday until August 15, 2008.

Bargaining unit employees who have not signed the "Log" by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company.

When called by Respondent, Sinele testified that she participated in the meeting with the Union representatives on Friday August 1, 2008; that pages where changes had been made were placed in the collective bargaining agreement; that the parties signed every page of the contract again; that then Brown asked (1) why the Company, under its return to work proposal, wanted a drug test again, (2) where the Company had gotten its proposal to return the employees by their skills and abilities, (3) why did the Company want a log, and (4) why the Company would not be returning the former strikers by seniority as it would with a layoff; that management explained to the Union that (a) it wanted a drug test because the employees had not worked for the Company for some time, (b) employees would be returned by skills and abilities, (c) the log was to find out who is interested in coming back to work, and (d) the employees would not be returned by seniority because it was not a layoff; that she thought that there was a question about the expiration on the Company's return to work log, and she thought management said just to have a break in service of 18 months, kind of similar to what the contract said on break of service of 18 months is termination; that Brown said that the Company needed to get everybody back to work and get rid of all temporaries and permanent replacements; that when the management representatives indicated that this was not the Company's intention, Brown referred to grievances and other possible legal remedies; that Brown said that the employees would be there Monday morning to go to work; that Aubry replied that there would not be any jobs on Monday, there were no vacancies; that Aubry asked if they were going to meet again and Brown replied "I have nothing more to talk about. We're done meeting" (Tr. 1270); and that with respect to the items listed on Charging Party's Exhibit 1, she thought that it was decided that the Company did not have to have the drug screening.

On cross-examination Sinele testified that management rescinded the requirement of a drug screen prior to resumption of work as set forth in Charging Party's Exhibit 1.

Terry Lee Pearce, who has worked in the involved plant since 1973 for Respondent's predecessor and then Respondent, testified that he has been in the UAW since 1977; that he participated in a strike against Respondent which began in 2007; that on August 4, 2008 he and about 150 other people assembled at the Union hall at about 7 a.m., and then they walked across the street to the parking lot of Respondent's Hamilton plant to report to go to work; that they were told by plant manager Allen and then personnel director Franks that Respondent did not have any work available; that he was within 5 feet of Allen and Franks at different times; that Franks "held up a clipboard and said that anybody that wanted to come to work was going to have to sign the clipboard" (Tr. 19); that he saw the clipboard which, as far as he could tell, had blank sheets of paper; that he and the others then returned to the Union hall; and that other company representatives present included David Wiginton and, he thought, James Manscill. Pearce further testified that he and others were advised by Franks that if he did not sign the return to work log by Friday August 15, 2008 at 3 p.m. his employment would be considered terminated.

On cross-examination Pearce testified that on August 4, 2008, before he and the others went from the Union hall to

Respondent's plant, he saw Union president Peoples ride over to the plant from the Union hall with police officers; that he thought Peoples returned to the Union hall with the police officers; that subsequently he and the others went over to Respondent's plant; that he was at the front of the group and the people close to him included Roberts, Gary Cox, and, he thought, Barbara Walls; that when they got to the plant Allen, Franks, Wiginton, and Manscill were there waiting for them; that Allen was the first Company representative to speak; that those assembled said that they were there to come to work and Allen said "There's no work available" (Tr. 27); that Allen then let Franks do the rest of the speaking; that when the employees continued to ask why they were not allowed to go back to work Franks said "No work available" (Tr. 29); that Franks said that if they wanted to return to work, they were going to have to sign a return to work log, they had until Friday at 3:00 p.m. or they would be terminated; that he did not hear Wiginton or Manscill say anything; that Franks told him that he had to go to human resources to sign the document; that Peoples told him that he should go to the plant and sign the return to work log; and that the Union circulated a return to work log of its own, which was discussed at the Union hall, and he thought he signed that log also.

Nolen testified that she began working for the Respondent in 1993; that she is in the UAW, on the board of trustees, and she is a union steward on the second shift; that she was on strike from July 25, 2007 to July 23, 2008; that at 7:00 a.m. on August 4, 2008 about 70 Union members—she did not count them—walked across the street to NTN to go back to work; that the group was not able to go any further than the guard shack; that there was a security guard and a policeman there; that plant manager Allen was also there with Franks, who was from human resources; that she thought Janice Irvin was there; that Franks spoke, saying that they did not have any work for them at that time; that Franks "held up a clipboard and said that if we wished to return back to work, we had to sign a return to work log, is what he called it. And that if we wanted to go back to work, we had to sign that" (Tr. 35); that in terms of the group of former strikers at the plant that morning, she was more in the back than the front; that Franks is a tall man, she could see the clipboard, it looked like there were blank pieces of paper on the clipboard, and she did not see any writing on it; that Franks "told us we had—that was August 4th. He told us we had to August the 15th—I'm pretty sure he said August 15th, 3:00 or 3:30 that afternoon, p.m., to sign it if we wanted to go back to work" (Tr. 36); that Franks did not indicate what would happen to those who did not sign by the designated time on August 15, 2008; that Franks just said "If you want to go back to work you need to sign this log" (Tr. 36); and that she did sign the return to work log (on "8-13-08" on page 4 of General Counsel's Exhibit 2).

Cadle, who has been employed at the involved bearing manufacturing facility in Hamilton, testified that he started working at the plant on May 22, 1978 when it was operated by Mogal Corporation; that he joined the UAW in September 1978; that he subsequently worked at the involved facility for NTN; that he went out on strike in 2007; that he had not returned to work at Respondent's Hamilton plant at the time he

testified herein on June 8, 2009; and that he signed a return to work log to return to work for the Respondent.

When called by Counsel for General Counsel, Franks testified that on August 4, 2008 he attended two meetings regarding union members returning to work; that the Union was represented by Peoples and Perry at the first meeting; that at the first meeting Allen did not tell Peoples that he had to sign the return to work log but rather Allen told Peoples that they needed to sign the return to work log so that NTN would know if they were interested in returning to work and "They did not have to. We never told them they had to" (Tr. 202); that what NTN wanted them to sign was a sheet of paper with "return to work log" (Tr. 202) at the top and lines where they could sign; that he was also present later that day when the approximately 100 former strikers came to the plant; that his assistant, Irvin, and Wiginton were also present at this second meeting, along with plant manager Allen, and safety director Manscill; that General Counsel's Exhibit 2, which is the form that was used when the large group came to the plant, has "RETURN TO WORK LOG" at the top of each page, with two columns headed with "NAME" and "DATE & TIME"; that he was not sure if this was the same form which was shown to Peoples and Perry earlier that day; that he was present every day in negotiations with the Union but he was never present when, before August 4, 2008, the "RETURN TO WORK FORM" was tendered to a Union representative, and he did not know if this ever occurred; that he wrote "Given to Jackie People on 9/8/08" at the top of the first page of the return to work log; that while the employees were signing the return to work log, it was kept in a receptionist room in the human resources office on a clipboard; that regarding Respondent's return to work log which was kept in the human resources office on a clipboard, the former strikers who were interested in returning to work had to sign the log²⁸; that the first signature on the log is dated "8/5-08"; that at the second meeting on August 4, 2008 he thought he was holding a log along with Manscill, Wiginton, Irvin and he was not sure if Allen was holding a log; that some of the employees did not want to sign the log; that no one signed the log that day and the former strikers asked why they needed to sign the log and why there was a need for the log; that at this second meeting with the former strikers on August 4, 2008, neither he nor, to his knowledge, any supervisor or manager indicated to the approximately 100 people gathered by the guards' shack that there was a deadline for signing the log or what the ramifications would be if the log was not signed by the deadline; that if a former striker did not sign the log, he or she would not have lost their job and they would still have been considered an employee at NTN; that he did not hear anyone saying that there was a deadline for signing the log; that he is not testifying that no one said it; that someone could have said it and "I wouldn't

²⁸ One of Counsel for General Counsel elicited the following testimony from Franks:

Q. And so in this—only the former strikers had to sign this, is that correct?

A. The ones that were interested in returning to work. [Tr. 206]

have heard it” (Tr. 240); and that there were a lot of people talking at one time.

Perry, who (a) was vice president of Local 1990 in August 2008, (b) had worked at the involved facility for 34 years, and (c) was a race grind setup operator, testified that he went out on strike in July 2007; that on August 4, 2008 he, Peoples, and about 100 former strikers went to the Respondent’s Hamilton plant; that they were located at the west side of the guard shack, in between the shack and the visitors parking lot; that the former strikers were there to return to work; that present for the Company were Allen, Irvin, Wiginton, Franks, and other unnamed supervisors; that “Franks had a clipboard with lined paper but no kind of heading on it that I could tell, telling everyone that they had to sign this return to work log” (Tr. 277); that he then asked Wiginton, his supervisor on the third shift, if they had to sign and Wiginton said “Yes. If you want to come back to work, you’ve got to sign it” (Tr. 277); that Franks “said we had to sign it if we wanted to come back to work” (Tr. 277 and 278); that Franks had the clipboard held up in his hand and said “everyone, in order to come back to work, you have to sign this return to work log” (Tr. 278); and that this is when he then asked Wiginton if they had to sign and Wiginton said “Yes. In order to come back to work, you have got to sign it.” (Tr. 278)

Regarding the events of August 4, 2008, Allen testified that at about 6:30 a.m. he saw a large number of people gathering at the Union hall across the street from Respondent’s Hamilton plant; that he saw a Hamilton police car arrive at the Union hall; that later the police car transported Peoples and Perry to meet with him and Franks by the parking lot; that Peoples said that they wanted to come back to work; that he told Peoples that the Company did not have any work available for them that day, Franks talked with Peoples for a short time, but he did not remember “exactly” (Tr. 567) what Franks said; that “I told him [Peoples] we did not have ... any openings at the current time but we would like him to sign this [back to work] log” (Tr. 568); that Franks had the log, which was blank sheet of paper with some statement at the top of it about wanting to return to work, with him; that he thought that the log asked for just names; that Perry and Peoples indicated that they would not sign the log; that the police car took Peoples and Perry back to the Union hall; that a large group of between 100 and 150 people then walked to the guard shack by the Company’s parking lot from the Union hall; that he, Franks, Manscill, and Irvin were standing by the guard shack; that the other Company representatives present had copies of the return to work log “in case anyone showed up by design to sign the work log” (Tr. 571); that Roberts said “we are here, we want to work, we are going to work” (Tr. 572); that he said “we don’t have any jobs right now” (Tr. 572); that Roberts said “we signed the contract, we want to come back to work” (Tr. 572); that he said “I don’t have any openings right now, as soon as there is an opening available, I would like you to sign this log” (Tr. 572); that he was asked why the Company wanted them to sign the log; that he told them that management wanted to know who still wanted to come back to work; that he was asked if the Company still had any temps in the building and he replied yes; that he heard Franks tell the people who came from the Union hall that “we would like you to sign this back to work log but we don’t have

any openings right now” (Tr. 573); and that the group went back to the Union hall.

On cross-examination Allen testified that he did not discuss General Counsel’s Exhibit 2, the return to work log, with the Union before it was developed; that General Counsel’s Exhibit 2 could be what was held up by Franks on August 4, 2008 at the guard shack; that he did not see it but he heard it was a blank piece of paper; that he never relied upon the return to work log in making a determination as to which employees to recall; that during the month of August 2008 approximately 25 former strikers were recalled to work; that on pages 2 and 3 of his November 15, 2008 affidavit to the Board, he indicated “I asked him to get with everyone in a supervisory position who had supervised any of the employees on the list and ask them to evaluate them based on whether or not they would want the person back” (Tr. 606); that this statement refers to former strikers who had made an unconditional offer to return to work; that as indicated in the next two lines of his affidavit he was referring to “[i]n relation to their skills, would they help us,” (Tr. 614) and he was not referring to anything else; that on page 3 of his affidavit he said “to either check bring back, no opinion, or don’t bring back” (Tr. 614–615); that he meant with “don’t bring back” that they would not help Respondent but he did not know if this meant ever; that he realizes that former strikers, if they did not engage in strike misconduct warranting their termination, are entitled to reinstatement regardless of whether or not Respondent wanted them back; that on page 4 of the affidavit he indicated that to his knowledge the log was not being used; and that the log was never used to determine who came back.

Respondent’s Exhibit 3 is a letter dated August 4, 2008 from Davies to Sinele which reads as follows:

Our firm represents the UAW in this matter. This letter is to advise you that the employees who have made an unconditional offer to return to work will comply under protest with the company’s request to sign an unlawful “return to work log” that the company unilaterally imposed during its July 31, 2008 meeting with the Union. This should by no means be construed as an agreement by the Union to the company’s “Return to Work Procedure” that it proposed and seeks to impose on the returning employees or a waiver to challenge any and all attempts by the company to impose unlawful return to work procedures. Indeed, the Union intends to avail itself of all available legal and contractual remedies to obtain relief in this matter.

....

When called by Respondent, Sinele testified that on either Monday August 4 or Tuesday August 5, 2008 Mediator Robert Dillard telephoned her in Macomb; that Dillard said that he wanted the parties to get back together and talk about getting some employees back to work; that she asked Dillard if he had talked to Brown; that Dillard said that he wanted to call a meeting later that week; and that she could not leave Macomb that week and so the meeting was arranged for August 26, 2008.

When called by Respondent, Sinele sponsored Respondent’s Exhibit 77, which is an “8/5/2008” e-mail from Sinele to Brown which reads as follows:

Please find attached the listings you requested last Friday.

I have attached an updated Seniority Listing and Temporaries Listing, updated since your last request of 7/25/08.

I have also included the information from your new request for a Listing of Active Employees broken out by Employee Number, Job Title and Shift.

Attached to the e-mail are (a) a nine-page "SENIORITY LIST," (b) a one-page "TEMPORARIES LIST," with 19 names, and (c) a four-page list of "Active Employees by Job Title and Shift." All of the lists are dated "8/5/2008."

General Counsel's Exhibit 13 is an exchange of e-mails between Sinele and Brown during the period from August 5-8, 2008. First, Sinele e-mailed Brown as follows:

We received notice from the NLRB of their receipt and approval of your withdrawal of your appeal in Case No. 10-CA-37271, of the claims of bad faith bargaining, unlawful unilateral implementation, and failure to provide information.

With respect to the two other issues (failure to supply personal identifiers of the personal replacements and failure to supply information regarding the October incident on the picket line), which the Regional Director referred to the Division of Advice, they indicated they have not received your withdrawal.

Please advise.

Second, Brown advised Sinele as follows:

With respect to the two other issues (failure to supply personal identifiers of the personal replacements and failure to supply information regarding the October incident on the picket line), which the Regional Director referred to the Division of Advice, we have not withdrawn those, nor do we intend to at this time. Concerning the updated seniority listing, etc., thank you for providing it, however, you failed to include where the Temporary Employees are working (i.e. Department, Classification, Shift, etc.). Please provide that information for those employees.

And finally Sinele advised Brown as follows:

Temporaries are not assigned to a specific classification ... [and] they are not assigned to a specific department. They are assigned to areas based on production needs.

I have attached the Temporaries listing indicating the shift that the temporaries are on as of 8/7/08, but that can also change based on production needs.

The exhibit includes a one page attachment titled "TEMPORARIES LIST". The list has the names of 19 individuals with their hire dates, which begin on "01/09/08" and end on "07/31/08." When called by Counsel for General Counsel Sinele testified that at the time of these e-mails there were a number of strikers that the Company had not called back to work, and Respondent was utilizing temporary employees; and

that she thought she provided the shift that the temporaries were on but the attachment does not show this.

Respondent's Exhibit 4 are letters from NTN to certain of the former strikers giving them five days to report to the plant ready to work. Collectively, the 28 letters are dated August 7, 8, 12, and 20, 2008. Franks testified that he did not check to see if these 28 former strikers signed a return to work log before calling them to return to work.

When called by Respondent, Sinele testified that vacancies occurred in mid-August 2008 so the Company recalled some of the former strikers because of the demands from Caterpillar and John Deere for more product, especially from the heat treat area.

When called by the Charging Party, Brown testified that when he printed out the attachment to Sinele's August 8, 2008 e-mail, his computer and printer put the date of August 11, 2008 on the attachment.

A letter dated August 6, 2008, General Counsel's Exhibit 12²⁹, from the Union's attorney, George Davies, to Sinele reads as follows:

On behalf of the International Union, UAW and its Local 1990, the Union requests that the company provide it with the following requested information within 7 days of your receipt of this letter. Please provide this information directly to Michael Brown at UAW Region 8. I would appreciate it if you would also provide me a copy of the company's response. The applicable time period for this request is from January 1, 2007 to present.

1) Any and all agreements and/or contracts of any type with temporary employment agencies or companies, recruiters or recruiting services, placement agencies and similar entities for the provision . . . [or] supplying temporary and/or permanent employees to NTN Bower at its plant in Hamilton, Alabama.

2) Any and all agreements for employment, contracts of employment, offers of employment and documents of a similar nature that NTN Bower provided to and/or executed with employees it contends it hired as permanent replacements during the strike by the Union. The Union also requests all documents that were executed by employees the company contends are permanent replacements accepting and/or agreeing to employment with NTN Bower.

For the following request, the applicable time period is from the date of the beginning of the strike on or about July 25, 2007 to present.

1) An inventory and/or accounting of all striking employee[s'] personal tools that were left in the plant at the commencement of the strike and any and all documents that show company efforts designed to safeguard and protect those tools from being stolen, tampered with and/or destroyed. This request also includes any and all documents showing any directives or instructions by the company to employees regarding the

²⁹ See also R. Exh. 43.

use of striking employees personal tools during the strike.

When called by Respondent, Sinele testified that she had a conversation with Davies after this August 6th letter (See below for August 19, 2008.); that she told Davies that she had already provided the temporary agencies, companies, recruiters to Brown; that they talked about employment contracts, applications, letters offering employment, and documents showing that the full-time employees were hired as permanent replacements; and that they discussed the tools and she told Davies she would send him a copy of the posting and the Company did not have the responsibility on all of the tools.

When called by the Charging Party, Brown testified that there was damage with respect to former strikers' tools and tool boxes left in Respondent's plant during the involved strike; that there were missing tools and some were found at a yard sale in the Hamilton area; that the information requested in this letter is relevant to the Union fulfilling its role as collective bargaining representative because (a) the Union needed any agreements the Company had entered into regarding temporaries and regular employees to help determine if in fact they were permanent replacement workers, and (b) it is an obligation of the Union to help the members of the Union protect their personal property where the Company, in his opinion, failed to do so; that the Company did provide copies of the agreements with temporary employment agencies; and that the Company has not provided any information at all with respect to number 2 in the above-described letter, except a list of names that appear on a seniority list.

Franks sponsored Respondent's Exhibit 2 when called by Respondent. This exhibit has a Fax cover sheet of UAW Local 1990 which indicates it is to Franks, from Peoples and is dated "8-12-08." The following appears in the "Comments" section of the Fax cover sheet: "Gary Franks, here is a list of employees that signed the return to work log, also the letter that I showed you." The cover sheet has what purports to be the signature of Peoples. This exhibit also has a letter from Peoples to Franks dated August 12, 2008 which reads as follows:

Enclosed please find a signed return to work log prepared by the Union and signed by former striking employees. This should not be construed by the company as any waiver by the Union of its objection and challenge to the company's unilateral imposition of an unlawful return to work log and other conditions it seeks to impose on the reinstatement of former striking employees who have made an unconditional offer to return to work. Please be advised that we are submitting this log under protest and it should not be construed by the company as a waiver of any former striker's right to recall who has not signed the log. Please advise me immediately if the company will accept the aforementioned log and if it is going to continue to insist that the former strikers sign a return to work log that the company has not provided to the Union despite our requests.

Finally, this exhibit has a 10-page (21 employees per page) "RETURN TO WORK LOG" which has "EMPLOYEE

NUMBER[s]," typed names, hire dates, and what purports to be the signatures of the employee. Some of the employees did not sign the log. Franks testified that Peoples brought him this log at his office in the plant.

General Counsel's Exhibit 14³⁰ is an August 14, 2008 letter from Davies to Sinele which reads as follows:

On behalf of the International Union, UAW and its Local 1990, the Union requests that the company provide it with the following requested information within 7 days of your receipt of this letter. Please provide this information directly to Michael Brown at UAW Region 8. I would appreciate it if you would also provide me a copy of the company's response. The applicable time period for this request is from January 1, 2007 to present unless otherwise stated.

- (1) The name, address, phone number and contact person of any and all security firms retained by the company at its Hamilton, Alabama plant. This information should include the number of security personnel employed on a monthly basis for each month during the applicable period.
- (2) Any and all security and/or incident reports, witness statements, investigative reports whether prepared by the company and/or any security firm or personnel and any photographs prepared by or taken by the company (NTN Bower) and/or its security firm(s) or personnel regarding the theft, destruction or vandalism of striking employees' tools, tool chests or cabinets or other personal items or equipment at its Hamilton, Alabama plant.
- (3) Any and all instructions, directions, memoranda, communication or documents of a same or similar nature provided by NTN Bower to any and all employees or security firms regarding the theft, destruction or vandalism of striking employees' tools, tool chests or cabinets or other personal items or equipment at its Hamilton, Alabama plant.
- (4) Please provide the date upon which NTN Bower first became aware that striking employees' tools, tool chests and/or cabinets had been stolen, vandalized, destroyed or tampered with.
- (5) Please provide any and all documents which list or show which striking employees' tools, tool boxes, cabinets or other equipment was stolen, destroyed or vandalized.
- (6) A breakdown of any and all pay rates and benefits paid to current employees, including that employee's starting pay rate assuming they were hired after the strike began.
- (7) The 2006 and 2007 annual form 5500 and all

³⁰ See also R. Exh. 47.

schedules and/or attachments for the pension plan maintained by the company for the bargaining unit employees at its Hamilton, Alabama plant.

(8) A copy of the current plan document and summary plan description for the pension plan maintained by the company for the bargaining unit employees at its Hamilton, Alabama plant.

(9) For the years 2006 and 2007, a complete copy of any and all actuarial reports regarding the pension plan maintained by the company for the bargaining unit employees at . . . [its] Hamilton, Alabama plant.

(10) Any and all plan documents regarding any 401(k) program or plan that the company provides for the bargaining unit employees at its Hamilton, Alabama plant.

(11) A full and detailed pension history of each bargaining unit employee, including date of hire, credited pension service, rate of pension, payments to pension, breaks in pension service or payments or credits, vesting or non-vesting, date of expected employee vesting and eligibility to receive pension, amount of pension employee will receive upon eligibility, whether or not any of the employees are eligible for an early disability pension, survivors rights, if any, and whether such pension payments by the Employer are current or deficient and in what amount.

(12) For the years 2006 and 2007, any and all Trustee Asset Statement(s)

(13) For the years 2006 and 2007 any and all documents that show the investment performance of the pension plan assets.

(14) Any and all Trusts or Insurance Agreements relating to holding and investment of assets of the pension plan.

(15) Any and all redrafts or amendments to the pension plan document(s).

....

When called by the Charging Party, Brown testified that the pay rates and benefits are relevant so that the Union can make sure that the Company is in compliance with the agreement regarding rates in that there are different rates, benefits, and a pension plan for people were hired prior to December 31, 2007; and that, at the time he testified herein on June 9, 2009, (a) he had not received anything on 1 through 6, and (b) he recently received some information on number seven but not the requested 5500 forms.

Brown testified that he directed former strikers to sign the Company's return to work log under protest as a precautionary matter; and that it was his understanding that most of the former striking employees did go to the Company and sign the return to work log.

Pearce testified that about a week or a week and a half after the strikers agreed to return to work he went to Respondent's

personnel office at the Hamilton plant and signed Respondent's return to work log, General Counsel's Exhibit 2. Pearce's signature appears on the fifth page of the exhibit and it is dated "8-14-08." As indicated on the fifth page of General Counsel's Exhibit 2, Perry also, among others, signed the return to work log on August 14, 2008. Perry testified that he signed the return to work log "[b]ecause I was told if I didn't, I would lose my job" (Tr. 275); that when he signed the log it was in an empty receptionist's office near the main hall at Respondent's Hamilton plant; that former striker Larry Doss, Irvin, and Franks were present when he signed the document; and that he and Doss were in the empty receptionist's office, Franks stuck his head in the door, Doss asked Franks if that was the log they were supposed to sign, Franks replied yes, he and Doss signed the log, and then they left the Hamilton plant.

On cross-examination when called by Respondent, Sinele testified that a couple of weeks after Davies' above-described August 6, 2008 letter they had a telephone conversation concerning this information request; that during this conversation Davies asked for the applications for employment that employees who the Company contended were permanent replacements had filled out; and that Davies told her that if the Company needed to it could redact any personal identifying information, such as social security numbers. Respondent's Exhibit 44, which is a "08/19/2008" e-mail from Sinele to Respondent's counsel Davis, indicates that this telephone conversation occurred on August 19, 2008. In the third paragraph, which begins with "[o]n #2," on page one of her e-mail to Davis, Sinele, as here pertinent, indicates as follows:

....

.... He [Davies] said he assumed the local HR office had to conduct this with more than "Hey, come on in, you're a permanent replacement." He then said, anyway, out of our discussion, he wanted copies of the applications, we could redact out any confidential information, like social security number.

....

When called by Respondent, Sinele testified that she attended a meeting on August 26, 2008 in Hamilton with Aubry and Franks; that the Union was represented at this meeting by Brown, Peoples, and Union attorney Davies; that the mediator met them at the door at the Econo Lodge; that the management representatives stayed in the lobby and the Union representatives stayed in the conference room, with the mediator shuttling between the parties; and that the parties could not come to a meeting of the minds and it was decided that there would not be any further meetings.³¹

On cross-examination Sinele testified that the number 1 proposal of management of its "Hamilton Plant, Return to Work Procedure, July 31, 2008" was rescinded totally, the Company did not use the log, and this requirement was rescinded verbally

³¹ These negotiations were done through a mediator, who for obvious reasons was not called to testify in this proceeding. Without knowing exactly what message the mediator conveyed, it would be inappropriate to make findings regarding the conveyed positions of either side.

through the mediator on August 26, 2008. As noted above, Respondent's number 1 proposal reads as follows:

1. Each employee who desires to return to work shall notify the Company by signing the "Return to Work Log". The "Log" will be maintained in the Human Resources Office between the hours of 9:00 a.m. to 11:30 a.m. and 12:30 p.m. to 3:00 p.m. Monday—Friday until August 15, 2008.

Bargaining unit employees who have not signed the "Log" by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company.

Sinele testified further that some other parts of Respondent's return to work procedure were either rescinded or modified verbally on August 26, 2008 through mediator Dillard; and that she did not advise the Union prior to August 26, 2008 that the Company withdrew number 1 of its return to work proposal, and the Company did not formally issue a withdrawal.

Brown testified that there were some meetings in late August 2008 where the return to work procedure was discussed between the Union and the Company but they were not face-to-face meetings in that they were with a Federal Mediator.

According to the testimony of Brown, on or about August 27, 2008 a grievance meeting was held in the conference room of the front office of Respondent's Hamilton plant. Brown testified that he and Peoples attended for the Union and Sinele and Franks were there for the Respondent; that the purpose of the meeting was to discuss a grievance filed over the Company's process of returning employees to work; that near the end of the meeting the parties got into a discussion concerning temporary employees in that he raised the issue about the Company having temporary employees working in the plant and Sinele said that the Company could use temporaries; that he agreed but asked in what regard or under what circumstances; that Franks said "Five percent, or something like that" (Tr. 142); that he replied "Exactly, but to supplement the labor pool, [a]nd you don't have a labor pool" (Tr. 165-166); that the parties decided to look at the contract language and they referenced Article 1, Section 3 which Sinele concluded did not apply to the situation they were faced with³²; that the parties also discussed that part of the supplemental labor pool on page 76 which references temporaries (which section is set forth above); that Sinele commented that Respondent could use temporaries in accordance with article XXXIX on page 47 of the agreement, Joint Exhibit 1 (This article consists of one sentence, namely "The Company reserves the right to utilize temporaries."); that he then told Sinele that they both knew that article XXXIX was in the agreement in conjunction with the temporaries specified in the supplemental labor pool, and neither Sinele nor Franks replied or disagreed; that when Franks mentioned 5% he was

obviously referencing the supplemental labor pool on page 76 of the agreement since that was the only place in the agreement that this is indicated; that he was involved in negotiations when Article XXXIX was discussed and at that time he asked Respondent's chief spokesperson, Aubry, why it was there; that Aubry said "It made it clearer regarding Company's use of temporaries" (Tr. 145); that he then asked Aubry "In conjunction with the supplemental labor pool? And he said Yes" (Tr. 145); that the Union objected to the use of temporaries without restriction; that during negotiations "[t]he Union did not agree to the use temporaries outside of supplementing the labor pool" (Tr. 167); that the labor pool is defined in the collective bargaining agreement (See the section titled "Supplemental Labor Pool" Employees 11-8-07 which appears on page 76 of Joint Exhibit 1 and which is set forth above.); and that to his knowledge the Company has never established a supplemental labor pool since the Union made its offer to return to work.

When called by Respondent, Sinele sponsored Respondent's Exhibit 65 which is a list of the dates of the negotiating sessions in 2006, 2007, and 2008. Sinele testified that, as here pertinent, the list shows meetings on July 31, and August 1, 26, and 27, 2008; and that she was not certain that the parties met on Wednesday August 27, 2008 in that she thought they ended on August 26, 2008. Sinele testified further that she was involved in a step three grievance meeting in August 2008; that the others present at this meeting were Franks, Brown, and Peoples; that the grievance which prompted this meeting was the allegation that the Company had not returned the former striking employees to work; that Brown said that the Company needed to have all the temporaries, probationary employees, and permanent replacement employees out of there; that the Company representatives said that they did not believe that they were in violation of the contract; that Brown said that the Company was not recalling on a seniority basis as it should; that management indicated that it was not a layoff situation; that Brown asked if they still had temporaries and they told him that they did; that the management representatives told Brown that the Company could use temporaries; that Brown asked how many temporaries did the Company need to use, and Franks replied 10 percent; that Brown asked the management representatives where they got that and she said that they should get the contract out; that they looked at non unit employees, temporaries, and supplemental labor pool, namely the places where temporaries are mentioned; that management then said that they were using temporaries; that Brown disagreed, telling them that the Company could only use temporaries if the Company brought people in from the labor pool, and he thought the Company was not abiding by the contract; that she and Franks said that the Company was abiding by the contract; and that management indicated that it would get in the response like it should after the third step grievance meeting.

On cross-examination Sinele testified that she did not believe that the Company refused to arbitrate this grievance, and she was not aware, she did not recall that the Company refused to arbitrate this grievance.

By letter dated August 29, 2008, General Counsel's Exhibit 15, Davies advised Sinele as follows:

³² The second paragraph of Sec. 3 of article I on p. 3 of Jt Exh. 1, as here pertinent, reads as follows: "The following employees are excluded from this Agreement: All temporaries" The first sentence of Sec. 3 "Recognition" reads as follows: "The Company hereby recognizes the Union as the exclusive representative of all the Company's production and maintenance employees at its plant in Hamilton, Alabama . . ."

On behalf of the International Union, UAW and its Local 1990, the Union requests that the company provide it with the following requested information within 5 days of your receipt of this letter. Please provide this information directly to Michael Brown at UAW Region 8. I would appreciate it if you would also provide me a copy of the company's response.

1) Please provide a list of all former strikers that have been recalled to work by the company from the date the unconditional offer to return to work was made, up to, and including today's date. This information should include the employer's badge number and what shift, classification and department the employee has been assigned to. Please consider this to be an ongoing request and that the company should provide the Union updated information every seven days.

2) Please provide a copy of any and all "return to work" log(s) that the company may be compiling since the unconditional offer to return to work was made including the names of those who may have signed the log and the date(s) the log was signed by the employee.

3) An updated list of all temporary employees with their hire dates, including those hired since the Union made the unconditional offer to return to work. This information should include the job classification, department and shift to which the temporary employees have been assigned.

4) Please provide the name(s) of any bargaining unit employee(s) who have retired or who have applied for retirement since the unconditional offer to return to work was made. Please include the date of the retirement or application for retirement.

Also, as you are aware, the company has failed to respond to the Union's information requests of August 6, 2008 and August 14, 2008. As I explained to you during our phone conversation on August 19, 2008, the Union wants a written response to the information requests regardless of whether or not the company contends it has no information for that request.

If the Union does not receive a full and complete response to both information requests by September 2, 2008, it will seek appropriate relief to obtain the information.

....

When called by the Charging Party, Brown testified that the information requested in his August 29, 2009 letter to Sinele is relevant because the Union needed to officially know which former strikers had been returned to work and which ones had retired since the unconditional offer to return to work so that the Union would know what category its membership is in; that the return to work log was requested because the Company had required the employees to sign it; and that the temporary employees varied from time-to-time so the Union asked for an updated list of temporary employees because there may have

been some permanent employees that had left and were potentially replaced by temporary employees.

When called by Respondent, Sinele sponsored Respondent's Exhibits 78 and 49, which are exchanges of e-mails between her and Davies. Davies "08/29/2008" e-mail to Sinele, Respondent's Exhibit 49, reads as follows: "Please see the enclosed letter [General Counsel's Exhibit 15 as set forth above]. It is also being faxed and mailed to your office. Please contact me if you have any questions." Sinele's "09/02/2008" e-mail to Davies, Respondent's Exhibit 78, reads as follows:

I did receive your fax this morning, as well as your email, as I am back in my office.

I have been tied up with negotiations and safety tours in Hamilton and have not had a chance to get to your requested material, but will do so this week.

Sinele's "09/04/2008" e-mail to Davies, in Respondent's Exhibit 49, reads as follows:

I am mailing you the written response you've requested for our phone conversation we had responding to your request.

In regards to your August 14, 2008 information request, I believe many of the items in your request have been previously provided. I am sorting through your various items to determine if there is any new information you are requesting and will provide that to you as soon as I can. Some information may need to be obtained from our administrators of our benefits plans.

Unfortunately, I will be out of the office today due to a surgery but plan to be back in the office tomorrow if possible.

Perry testified that he was aware that 25 former strikers were recalled to work at the Hamilton plant; that these 25 were recalled in August 2008; and that at the time he testified at the trial herein on June 9, 2009 he was not aware of former strikers other than these 25 being recalled.

General Counsel's Exhibit 16³³ is a letter dated September 2, 2008 from Sinele to Davies. It reads as follows:

As we discussed on the phone last week, please find the following in response to your information request:

1. All agreements and/or contracts of any type with temporary employment agencies or companies, recruiters or recruiting services, placement agencies and similar entities for the provision of supplying temporary and/or permanent employees to NTN-Bower at its plant in Hamilton, Alabama have previously been provided to Mike Brown, and there has not been any additional agencies used.

2. The employment application used for employment with NRN-Bower is enclosed.

3. A copy of a notice that was posted in the plant in regards to theft is enclosed.

³³ See also R. Exh. 46.

A blank employee application form is included in the exhibit. Also included is a notice, signed by Franks, which reads as follows: "During the last several weeks, we have had several reports of theft occurring in the Plant. I want to remind everyone that taking someone else's or Company property without permission will not be tolerated."

On cross-examination when called by Respondent, Sinele testified that in her reply to the Union she only included a blank application for employment form; that she did not provide the individual applications that the Union had asked for; and that she did not explain in her September 2, 2008 letter to Davies either why the Company was refusing to produce these applications or suggest that there was something wrong or inappropriate about the Union's request for the applications of the replacement employees.

General Counsel's Exhibit 24 is a September 10, 2008 letter from Davies to Sinele which reads as follows:

I am in receipt of your pathetic response dated September 2, 2008 (but not mailed until September 6, 2008—see the attached copy of the postmarked envelope) to the Union's August 6, 2008 information request. Not only was your response almost a month late, it was woefully incomplete and clearly an attempt by the company to evade its legal obligations to provide information to the Union. Furthermore, you failed to provide certain documents—the purported replacement workers' applications for employment—that you promised to provide during our phone conversation on August 19, 2008. Instead, you provided without explanation, a blank application for employment that you know was not what was discussed during our phone conversation. I explained to you very clearly what the Union was asking for and why and you claimed to have understood. You did not voice any objection to providing these applications or claim that these documents did not exist. I can only assume from your response, or lack thereof, that the company has no intention of complying with its obligations under the National Labor Relations Act to provide the information.

On cross-examination when called by Respondent, Sinele testified that Respondent did not provide the applications for employment of the replacement employees at any time after Davies above-described September 10, 2008 letter.

When called by Respondent, Sinele sponsored Respondent's Exhibit 79, which is a "09/10/2008" e-mail from Sinele to Davies. It reads as follows:

I trust you received my response mailed to you last Saturday.

Please find attached the following lists you requested:

1. Returned to Work List
2. Previously Provided to Local Union President
3. Updated Temporaries Listing
4. Retirements List

....

I continue to determine which items in your request from August 14th is new information. I will obtain 2007 actuarial information from our benefit administrators;

which I believe had not been requested before, and forward to you as soon as I receive it.

I was not able to return to the office as quickly as I planned after my surgery last week.

Attached are (a) a one-page "Retirements Since Contract Agreement" list, (b) a one-page "Strikers Returned to Work" list, and (c) a "TEMPORARIES LIST," which has 12 names. Sinele testified that each page of the original attachments was dated September 10, 2008. The pages of the attachments received at the trial herein have "9/23/2008" in the upper right hand corner. Sinele testified that the copy of the attachments introduced herein were printed out after the original.

When called by Respondent, Sinele sponsored Respondent's Exhibit 50, which is a September 19, 2008 letter from Sinele to Davies which reads as follows:

In response to your information request:

1. I believe some of the security firm's information has previously been supplied to you, such as the security firm that had been retained by the company for many years (Ban Security & Investigative Services).

Firms that were retained more recently include: (1) Special Response Corporation, . . . (no longer providing services), and (2) Securitas Security Services USA, Inc. . . . In the past we sometimes had two or three per shift, depending on the need.

2. We do not have any witness statements, investigative reports, photographs, etc. regarding the theft, destruction or vandalism of striking employees' tools or tool chests.

3. Previously provided.

4. This was indicated in the notice I provided to you earlier.

5. One employee, Brian Lawhon reported items on February 7, 2008. The police contacted Mr. Craig Allen on July 16, 2008.

6. Previously provided—all employees hired into bargaining unit positions were paid in accordance with either the expired collective bargaining agreement and/or the terms of the Company's last, best and final offer which was unilaterally implemented and subsequently executed by the parties.

7. 2006 annual form 5500 attached. 2007 annual form 5500 will be provided when available (filing October 15, 2008).

8. Previously provided.

9. 2006 actuarial valuation report attached. 2007 actuarial report will be provided when available.

10. Previously provided.

11. Previously provided detailed pension history.

Other requests in this item are not clear (i.e. whether or not any of the employees are eligible for any early dis-

ability pension?). Payments to pension should be covered in #7 and #9 above.

12. Form 5500 and actuarial valuation reports should cover the request for "Trustee Asset Statements."

13. Same as #12 above.

14. Same as #12 above.

15. Amendments previously provided. Prudential was requested to review if there are any amendments since that was provided. Will forward this as soon as response is received.

The exhibit includes referenced attachments.

By letter dated October 23, 2008, General Counsel's Exhibit 36, Perry, who signed as president of Local 1990, advised Franks as follows:

UAW Local 1990 is currently in the process of developing a time schedule for staffing the Union office in the plant. It is our intention to staff the office 2 to 3 days a week for several hours to serve the needs of our members and other bargaining unit members.

A list will be provided to the company indicating the hours of operation.

We will need access to the Union bulletin boards to post the hours of operation.

Perry testified that he hand delivered this letter to Franks on October 23, 2008; that Franks said that he had heard that he, Perry, was the new president of Local 1990; and that Franks said that they needed to work together.

Franks testified that plant manager Allen left Respondent in the fall of 2008; that he was replaced by plant manager Johnny Knight but because Knight, who lives and works at Respondent's facility in Macomb also, is not always at the Hamilton plant, Shotts, who is the assistant plant manager, is the acting plant manager in Knight's absence; and that sometimes Shotts tells him to get temporary employees.

Allen testified that he was reassigned on October 1, 2008 and that technically Knight did not become the Hamilton plant manager but rather Knight was the vice president of operations over both Respondent's Hamilton and Macomb plants.

Regarding the Union's use of the bulletin boards in Respondent's Hamilton plant, Caudle testified that one of his duties as recording secretary is to post notices of Union meetings on three bulletin boards in Respondent's Hamilton plant; that before he went out on strike in 2007 if the posting involved a regular membership meeting, he would go into work 25 to 30 minutes early and just walk around the plant to the different bulletin boards and post the notice; that he did not have to go through any special procedures in order to gain access to the plant even though it was not his work time; that General Counsel's Exhibit 25 is a notice of a regular membership meeting on November 9, 2008³⁴; that with respect to General Counsel's

Exhibit 25, he had to telephone the plant and make an appointment with Franks who escorted him to the three bulletin boards; that he and Union president Perry, who became president of Local 1990 in October 2008 when Peoples had a medical problem and resigned, had gone to Respondent's plant on November 4, 2008 to post General Counsel's Exhibit 25, and they were told by Franks that they would have to make an appointment and come back at a later time to post them; and that once a month since the end of the strike he posts notices for the Union's regular membership meeting and on every occasion either Franks or Irvin, who also works in human resources, has escorted him.

Brown testified that Article XXIX on page 38 of the current collective bargaining agreement, Joint Exhibit 1, indicates that some bulletin boards in Respondent's Hamilton plant are provided for the exclusive use of the Union. That article reads as follows:

BULLETIN BOARD

The Company will make three (3) bulletin boards available for the exclusive use of the Union. The board will not be used to post political, religious, discriminatory, advertising or inflammatory matter. All material must be submitted to the Company for approval before posting, except the following: Union meetings, Union social activities, educational activities, Union elections and results thereof.

Brown further testified that since the parties signed this agreement, they have not met and bargained or negotiated to change Article XXIX in any respect.

When called by Counsel for General Counsel, Franks testified that on or about November 4, 2008 Irvin contacted him and told him that Perry and Caudle wanted to post a Union notice; that on November 6, 2008 Union officer Caudle was allowed to post the Union notice; that he escorted Caudle in Respondent's Hamilton facility to the three Union bulletin boards; that since July 2008 to the time of the trial herein, Respondent had not disciplined any Local 1990 officer for disrupting or hindering production at the Hamilton facility; that on November 4, 2008 Perry and Caudle were instructed to first call him and he would set up a time for the Union representative(s) to come to the Hamilton plant to post materials on the three Union bulletin boards in the plant; that this would include posting anything on the three Union bulletin boards in the plant; that Perry and Caudle are still employees of the Company but they are inac-

NOTICE

Regular Membership Meeting

Date: November 9, 2008

Place: Union Hall

Time: Executive Board - 2:00 PM

Membership - 2:30 PM

Agenda: Regular business

Update on Labor Board charges

Tony Perry, President

UAW LOCAL 1990

³⁴ The document, which is on the Local 1990 letterhead, reads as follows:

tive employees; and that before the strike in July 2007 if employees wanted to post a notice about a regular Union meeting, they did not have to call him to set up a time to post this material on the three Union bulletin boards.

Perry marked the location of the three bulletin boards used by the Union in the Hamilton plant on General Counsel's Exhibit 28, which is the layout of the plant, with red stars. Perry testified that the three 3 foot by 3 foot bulletin boards are used to post Union activities and information pertaining to the bargaining unit employees; that he has seen union representatives post things on these three bulletin boards; that he has posted things on these three bulletin boards, namely regular union membership meetings, advertisements for upcoming events, and mostly information pertaining to union activities; that Article XXIX on page 38 of Joint Exhibit 1 indicates that political, religious, discriminatory advertising or inflammatory matters cannot be posted on the three union bulletin boards; that the posting of news about a regular union meeting would not be inflammatory; that postings about union meetings, union social activities, editorial activities and Union election results can be posted on the three union bulletin boards without first receiving approval from a supervisor; that there is nothing inflammatory or discriminatory in the notice received at the trial herein as General Counsel's Exhibit 25; that on November 4, 2008 he and Caudle went to NTN's Hamilton plant before lunch to post a notice of the Union's regular membership meeting, General Counsel's Exhibit 25; that they went to the guard shack and told the guard that they wanted to see Franks; that the guard telephoned Franks and then asked them why they were there; that they explained to the guard who in turn told Franks; that the guard then told them that Franks said that they had to call Franks and make an appointment before they could come into the plant; that on November 4, 2008 they were not allowed to post General Counsel's Exhibit 25; that prior to the strike of 2007 if he needed to post a notice of a regular Union meeting on the Union bulletin board, he did not first have to receive approval or make an appointment with a supervisor; that Caudle telephoned Franks on November 6, 2008, made an appointment, and posted the notice; that since August 1, 2008 the parties have not met to negotiate changes to Article XXIX ("BULLETIN BOARD") on page 38 of Joint Exhibit 1; and that this article does not require the Union to make an appointment with management before the Union posts a notice about a regular Union meeting.

On cross-examination Allen testified that he did not detect anything inflammatory or discriminatory in General Counsel's Exhibit 25. On cross-examination when called by Respondent, Sinele testified that she did not see anything inflammatory or discriminatory in General Counsel's Exhibit 25, which is a notice about a regular membership meeting.

When called by Respondent, Franks testified that there was an instance in November 2008 when Perry and Caudle came to Respondent's Hamilton plant and wanted to post on the Union bulletin board in the plant. Franks testified that Irvin told him that Perry and Caudle were at the plant when he was in a staff meeting; that he left the staff meeting and told Perry and Caudle that he could not accommodate them at the time and they should call and make arrangements to make sure he was avail-

able; that he told Perry and Caudle that if they came back the next day, he would be happy to let them post it; that Perry and Caudle asked him if someone else could go with them to make the postings; that he told them that he was supposed to go with them and he would be glad to accompany them the next day; that two days later Caudle telephoned him and asked him when he could come to the plant; that he told Caudle that he could come at that time; and that Caudle came to the plant, they went out into the plant, and Caudle made the postings on the Board.

On cross-examination Franks testified that he originally told the Union that if they were coming to the plant they should call him first and make sure he was available when the Union first told management that they wanted to be at the facility Mondays, Wednesdays, and Fridays from 2 to 4 p.m.; that Perry and Caudle could not go out into the plant themselves and put up postings because the Company does not allow visitors to go out in the plant unescorted; that anyone who is not a permanent employee on the active payroll at the time is a visitor; that there is no written plant rule that specifies that individuals who are employees within the meaning of the Act but are not on the active payroll at the time are to be treated as visitors; that there is a rule that a visitor cannot be out in the plant unescorted; that management did not negotiate with the Union about whether former strikers who are not on the active payroll should be treated as employees or visitors; that prior to the strike a Union official who was an active employee who was not scheduled to work would not have to check with him and get his permission to post on the Union bulletin boards, and in such a situation they could just come in, go into the plant, post on the bulletin boards and not have to check in with him; that prior to the strike if a Union official was not scheduled to work and he came into the plant on his day off to post on the Union bulletin board that employee "should have . . . made me aware if he was going to do it on an off shift [b]ecause he was not supposed to be in the plant at that time, posting material on an off shift, if he's not working" (Tr. 1249 and 1250); and that to his knowledge this never came up.

Perry testified that on November 10, 2008 he had a conversation with Franks in the main hallway of Respondent's Hamilton facility with Irvin present; that Franks told him that when he came to staff the Union office he was to stop at the guard shack, sign in, and get a pass before he entered the plant; that the parties had not negotiated about this new sign in rule; that prior to the strike of July 2007 if he needed to represent an employee at the Hamilton facility on a day that he was not scheduled to work, he would come into the plant and go to the department where the problem arose, and meet with the employee and/or foreman; that if the problem could not be resolved on the floor he would take the employee to the Union office, determine if it was a legitimate grievance, write the grievance up, have the foreman or shift supervisor sign it, give whoever signed it a copy, place a copy in the file in the Union office, and then leave the plant; that in this kind of a situation before the strike of July 2007 he did not have to first stop at the guard shack, he did not have to sign in, he did not receive a visitor's pass, and he did not wear a visitor's pass; that before the July 2007 strike he did have to come into the plant at the behest of a steward to deal with an overtime problem with

foreman Linda Eads and shift supervisor Wiginton; and that on that occasion he did not stop at the guard shack and sign in, or receive a visitor's pass to wear.

By letter dated November 11, 2008, General Counsel's Exhibit 37, Perry advised Franks as follows:

This is an update to the letter sent on Oct. 23, 2008 regarding staffing the Union office inside the plant (NTN—Bower, Hamilton, AL). Union representatives will be present at the Union office beginning Nov. 17, 2008. The office will be staffed on Monday, Wednesday and Friday, 2:00 pm till 4:00 pm. This office is being opened to serve the needs of Local 1990 members and other bargaining unit members.

Perry testified that this letter was hand delivered by Local 1990's recording secretary, Caudle; that after the Company received this letter, management did not offer any counter proposal with respect to (a) the Union commencing on November 17, 2008, (b) the Union's proposal to staff the office on Monday, Wednesday, and Friday, and (c) the time, namely 2 to 4 p.m.; that since November 17, 2008 the Union office has been staffed by union steward Nolen, recording secretary Caudle, grievance committeeman Jeff Compton, appointed Local 1990 vice president Allen Stidham, and himself; and that probably 95 percent of the time he is the one who staffs the Union office at the Hamilton facility.

By letter dated November 12, 2008, General Counsel's Exhibit 38. Franks advised Perry as follows:

This is in response to your letter of November 11, 2008.

While your letter does not discuss it, we assume that the Union representatives who intend to staff the office are not current employees of the Company. As you know, the collective bargaining agreement provides:

Authorized representatives of the Union, not in the employ of the Company, if called upon to participate in the resolution of grievances shall, upon application to the Manager of Human Resources, be allowed to enter the Company premises at reasonable times while there are employees at work to transact such business *in the location designated by the Company* and such transaction of business *in the location designated by the Company shall not interfere with production activities.*

Therefore, the Company has designated an office for the purpose of non-employee representatives of the Union to conduct their business. The Union's representatives seeking to conduct business within the plant should contact me upon arrival and I will direct them to the designated location. [Emphasis in original]

As noted above, Article III ("GRIEVANCE PROCEDURES"), Section 9 on page 10 of Joint Exhibit 1 (the collective bargaining agreement in effect in November 2008) reads as follows:

International Representatives

Authorized representatives of the Union, not in the employ of the Company if called upon to participate in the resolution of grievances shall, upon application to the Manager of Human Resources, be allowed to enter the Company premises at reasonable times while there are employees at work to transact such business in the location designated by the Company and such transaction of business in the location designated by the Company shall not interfere with production activities.

Perry testified that Brown is the international representative for Local 1990; that Brown lives in Tennessee (and is not an employee of Respondent); that he, Perry, is an employee of NTN and, therefore, Section 9 does not apply to him; that Section 9 does not apply to Local 1990 Union officials or former strikers of NTN because they are still employees of NTN; that prior to this November 12, 2008 letter from Franks, the parties had not bargained about a post July 2007 strike relocation of the Union's office in Respondent's Hamilton facility; and that he had Caudle add "NTN-Bower has temporarily assigned the Union officials a small office on the south wall of the main office. Hours are 2-4 pm on Monday, Wednesday and Friday" to General Counsel's Exhibit 38. See General Counsel's Exhibit 39

Regarding the location of the Union office in Respondent's Hamilton plant, Nolen testified that before the strike she processed grievances in the Union office which was located in the plant across from the department which is referred to as either the cone grind or race grind department; that the office had a desk, two chairs, and a filing cabinet; that this office was very accessible to production employees; that since the conclusion of the strike, she has staffed the Union office, beginning in November 2008, at Respondent's facility in her capacity as a steward; that after the strike the Union office was relocated to the front office area; that the Union's office hours are from 2 to 4 p.m. Monday, Wednesday, and Friday; that now for employees to go to the Union office they must come out of the production area and go into the front, main office area; that when the Union office was located in the cone grind or the race grind department it was not necessary for production employees to go past any supervisors to get to the Union office; and that now with the relocated Union office, which is in the main office area in the front of the facility, it is necessary for production employees to go past all of the supervisors' offices (five or six) to get to the Union office.

On cross-examination Nolen testified that in order to go to the current Union office in Respondent's facility you have to walk past Frank's office; that the Union office which was utilized before the strike was in the work area of the plant and it had glass all the way around; that supervisors and foreman work out on the floor of the plant; and that before the strike she processed between 10 and 20 grievances. On redirect Nolen testified that after the strike was over while she has been in the relocated Union office in the main office area in the front of the facility no employee has come to the office to meet with her.

Subsequently, Nolen testified, with respect to the Union office on the production floor, that the Union did not have specific hours but rather if an employee had a complaint, the employee would tell their foreman who would call her to meet with the

employee in the Union office; and that the employee had to go through their foreman to call her.

Caudle testified that he became recording secretary of the Local in about 1997; that in 2006, before the 2007 strike, he utilized the Union office in the plant on occasion to do research work for grievances “and stuff like that” (Tr. 125–126); that at that time the Union office was located in the roll grind department out in the plant; that usually he used the plant floor office right before or after a shift but if he was requested to do it, he would use the office during the shift; that he has participated in staffing a Union office at the plant since the Union ended its strike in July 2008; that he had not been recalled to work at the time he testified herein on June 8, 2009; that to staff the Union office after the strike, he has to check in at the guard shack, sign a sign-in log, and get a visitor’s pass; that the office that the Union has had in the facility since the end of the strike in 2008 is located at the south end of the main front office; that at the end of a small hall there is a door through which employees can go out into the roll grind department in the plant; that the door is a two-way door so employees can come through that way; that the office that the Union has been assigned since the conclusion of the 2007–2008 strike is about 200 feet from the office the Union utilized before this strike; and that the office that the Union utilized before the 2007 strike was more accessible to production employees.

Brown testified that section 9 of Article III found on page 10 of Joint Exhibit 1 applies to international representatives such as himself; that he is the only international representative who works at Local 1990; that none of the former strikers work as UAW international representatives, and Local union officers are not UAW international representatives; and that since November 17, 2008 he has not staffed the Union office at Respondent’s facility.

Franks testified that General Counsel’s Exhibit 28 shows the basic layout of NTN’s Hamilton facility; and that the circled “N” on the layout in the front office area indicates where the new Union office is located and the circled “O” on the layout indicates where the Union office was located before the strike which began in July 2007.

Perry testified that he used the old Union office at the west end of the roll grind department before the strike of July 2007 to attempt to resolve grievances and to file grievances; that the Union used the old Union office for 8 years or more; that before the July 2007 strike if he was not scheduled to work and he had to use the old Union office, he would come to the plant, go through the front door, and if he had not been called to any specific department, he would go to the Union office get whatever he had come for and then leave; that he has a key to the old Union office; that he does not have a key to the new Union office, he has been locked out of it several times requiring that someone open it for him, and assistant plant manager Shotts refused to give him a key; that in order to get to the new Union office, you have to walk past the offices of Franks, Irvin, Shotts, and supervisors; that the parties never bargained about the location of the new Union office to the front part of the facility; and that since he became president of Local 1990 management would not let him visit the old Union office.

When called by the Charging Party, Brown testified that not long after he began servicing the bargaining unit at Respondent’s Hamilton plant in 2005 there was a grievance processed relative to safety issues of the location of the Union office before it was located in what is described herein as the old location of the Union office (See the circle with an “O” in it on General Counsel’s Exhibit 28.); that as a resolution of that grievance, the Company agreed to relocate the Union office to where it was located just prior to the strike; that the location of the old Union office in the west end of the roll grind department was the product of negotiations between the Company and the Union in the settlement of a grievance; and that the location of the Union office was discussed at the beginning of contract negotiations in 2006, and the location was finalized when the grievance was resolved.

Allen testified that with respect to people who are not employees coming into the plant, as a general rule Respondent does not allow it unless they have a visitor’s pass, and after checking in with the guard, Respondent has a vendor (It is also given to visitors.) pamphlet, Respondent’s Exhibit 12, that it hands out; that nonemployees are not allowed to wander around throughout the plant unescorted; that nonemployees are escorted in the plant because Respondent has some proprietary things that it does, Respondent does not want anybody just coming in, and Respondent does not want anything disrupting production; that there is a safety issue if people do not have the proper equipment on, and there is an insurance coverage issue; and that “[y]es” Respondent “generally restrict[s] the movement of people who have a right to be there but who are not generally employees” (Tr. 576).

On cross-examination Allen testified that other offices in the area of the new Union office in Respondent’s Hamilton plant include his office, Franks’ office, and Shotts’ office; that Perry is still an employee of NTN Bower at Hamilton; that all of the Union officers who are former strikers and who have not retired have not been terminated by Respondent; that Respondent’s Exhibit 12 (the pamphlet) is generally kept in the guard shack; and that he had no knowledge of whether or not prior to the strike which commenced in July 2007 that Respondent handed out this pamphlet to employees who were off duty but coming to the plant.

When called by Respondent, Franks testified that there are two ways that employees can access the new Union office in Respondent’s Hamilton plant without going past any of the other offices in the front of the plant. On cross-examination, Franks testified that management objects to the Union using the old Union office in the plant “[b]ecause of the disruption in the production [area] of employees, it is right in the middle of production lines” (Tr. 1220); that in 2006 when he was the human resources representative he did not have any objection to the Union using the old Union office in the plant; that before the strike which commenced in 2007 the president of the Union, Peoples, sometimes “[v]ery rarely” (Tr. 1221)] did go to the Union office out in the plant when it was not his shift to do some union work; that the difference between Peoples using the old Union office when it was not his shift, and Perry using the old Union office after the strike ended in 2008 is that Peoples was actively employed at the time; that he objects to the Union

using the old Union office now because “[i]t could cause disruption in the production in the plant, because it is located in the middle of the production lines. And you stop, talking to people as you go in. And it just disrupts. So this is much more less disruptive” (Tr. 1222); that as to whether it is any more likely to cause disruption in 2009 than it was in 2006, “[p]robably so. I don’t know. I can’t answer that and neither can you. Nobody can answer that but the good Lord. I don’t know what could possibly happen” (Tr. 1223); that any time a visitor walks in the plant, people quit working and look to see who it is, ask who it is, and that is disruptive; that Perry coming into the plant to occupy the old Union office would cause a disruption because the employees are primarily all new people who do not know Perry; that there were no negotiations with the Union regarding changing the office used by the Union out of the production area; that, with respect to his testimony that there are two ways to get to the new Union office without going through the main part of the front office, one of the ways would require the individual to go through the roll grind supervisor’s office; that while the door to the roll grind supervisor’s office to and from the plant can be closed, it cannot be locked; and that “I just told them [the Union] that they wouldn’t be using the one [Union office] out in the plant. We had one up front for them.” (Tr. 1258.)

On rebuttal Caudle testified that he has worked at the Hamilton facility for approximately 31 years; that he has gone to the new Union office, which is located on the south wall of the main office in the front of the building; that he has never seen employees access the front main office area by entering through the office of the roll grind supervisor; that if employees in the production area want to access the area where the new Union office is located, they would come in from the main hall where the front door comes in, and come through the area by the Human Resources Department; that if an employee came from the plant production area through the roll grind supervisor’s office into the main office, the employee would still end up going in front of where supervisor’s sit; that years ago he saw people come into the front office area through a short little hallway just south of the roll grind supervisor’s office; that this route is not typically used by production employees to access the main office area in the last year or two, not since he has been going back into the plant; that if an employee used the short hallway route, the employee would still have to pass a couple of desks before getting to the new Union office; that there is an entrance into the involved office area from the main hall through the human resources department; and that, in his experience, the hall that the employees typically use to enter the front office area from the production area is through the Human Resources Department.

On cross-examination Caudle testified that since the strike ended he has been in the plant 15 to 20 times, for usually a couple of hours.

Regarding Respondent’s Hamilton plant, Caudle testified that Respondent’s break rooms are the same as they were in the year before the 2007 strike began; that in 2006 he had conversations with other employees about the Union in break rooms from time to time and he was never told at that time or before by a supervisor or manager that he was not permitted to engage

in conversations in the break room; that in 2006 there was no rule in place as to which restroom he or production employees could use in Respondent’s Hamilton facility; that when he went to post notices or go to the Union office there were no restrictions on bathroom usage during the period before the strike; and that before the 2007 strike he purchased food items from the vending machines in the break room, he consumed the food items in the break room, and he was not aware of any prohibition on consuming food items in the break rooms during that period.

Brown testified that since the Union made its unconditional offer to return to work, and since the parties signed the current collective bargaining agreement, the Company and the Union have not met to negotiate new rules concerning (a) break room or bathroom use at Respondent’s Hamilton facility, (b) the relocation of a new Union office, (c) what can be consumed in a break room, (d) what can be said to employees in a break room, and (e) a new requirement that former strikers have to sign in or check in at the guard shack and wear a visitor’s pass.

On cross-examination, Brown testified that Perry and Caudle are authorized representatives of the Union.

On cross-examination, Allen testified that after the Union made its unconditional offer to return to work in July 2008 he did not bargain with the Union concerning (a) break room use, (b) which rest room could be used at Respondent’s facility, (c) signing procedures once a Union representative arrived at the facility, (d) any changes to the bulletin board use procedure, (e) any kind of rule that prohibited a Union representative from speaking to employees once they were in the break room, (f) the relocation of the Union office, (g) what could be posted on the Union bulletin boards, (h) where food purchased in the break room can be consumed, (i) that former strikers had to get a visitor’s pass before entering the plant, or (j) requiring former strikers to have an escort when they came to the plant.³⁵

When he was called as a witness by Respondent at the trial in this proceeding on July 14, 2009, Aubry testified on cross-examination that since July 23, 2008 he had not met and bargained with the Union about (1) any new sign in procedures such as when former strikers arrive at Respondent’s Hamilton facility they have to stop at the guard shack, sign in, and wear a visitor’s pass, (2) the relocation of the Union office from the roll grind department to its current location, (3) any new procedure whereby Union representatives must make an appointment before they post news on the Union bulletin boards, (4) any days of the week and times of the day that the Union could staff the Union office at the facility, (5) any change to Article XXIX, page 38 in Joint Exhibit 1 which concerns the Union bulletin boards at the facility, (6) what news could be posted on the Union bulletin boards,³⁶ (7) Article III, Section 9, on page 10 of Joint Exhibit 1, which deals with the access of International Representatives to Respondent’s Hamilton facility, (8) any rule that requires Union representatives to first ask Franks before

³⁵ Allen testified that “the only thing we discussed was if you want to come into the building, please let us know, and someone will be available. And for the most part, we did that.” (Tr. 619)

³⁶ Aubry testified that he did not find anything inflammatory or discriminatory in GC Exhs. 25 or 39.

they enter the production area of the facility, (9) any rule that requires Union representatives to use the bathrooms near the front office when they staffed the Union office at the facility, (10) any rule that limited employee access to the break rooms, (11) any rule whereby Union representatives who entered the break room at the facility were not allowed to speak to employees in the break room, (12) any rule whereby employees who purchased food items in the break room could not consume those food items in the break room, (13) a rule whereby local Union representatives were not allowed at the facility unless supervisors and managers were present, (14) any rule whereby Local Union representatives could not use break rooms at the facility, (15) any rules whereby Franks or any other supervisor had to escort a Local Union representative to the break room, (16) any rule whereby Franks or any other manager had to escort Union representatives around the facility when Union notices were posted, (17) any changes to Section 1 of Article XV, viz., "HOURS OF WORK AND COMPENSATION," on page 25 of Joint Exhibit 1, which section concerns the "Normal Work Week,"³⁷ (18) any change to Section 4 of Article XV "Shift Starting Times" on page 26 of Joint Exhibit 1, (19) any changes to Article XXVIII on page 37 of Joint Exhibit 1³⁸, and (20) any changes to the language on page 76 of Joint Exhibit 1 concerning the labor pool.

On cross-examination Allen testified that he did not detect anything inflammatory or discriminatory in General Counsel's Exhibit 39. And, when called by Respondent, Sinele testified on cross-examination that there is no language in General Counsel's Exhibit 39 (or in the original letter, namely General Counsel's Exhibit 38) which is inflammatory or discriminatory.

Franks testified that he gave an affidavit to the National Labor Relations Board (Board) which he signed on November 13, 2008; that in this affidavit he indicated "Today we have two probationary employees" (Tr. 228) and "Today, we have about

sixteen temps here" (Tr. 229); that he could not say that a majority of those 16 temps were doing bargaining unit work because a lot of the employees worked in quality which is not bargaining unit work; that in his November 13, 2008 affidavit he indicated that "When it was time for the employees' return to work, I would call them in. I did not consult our log before I called employees into work" (Tr. 233); that he did not decide who to call back to work, rather he was told by Allen who to call back to work; that the log was kept in his office and not in Allen's office; that he could not recall if Allen asked for it at some point and got it; and that he personally did not know if any other Company official consulted the log.

Perry went to Respondent's Hamilton facility on November 17, 2008. Perry testified that he arrived at 2:00 p.m.; that Franks was waiting for him inside the door; and that when he asked Franks if he could go to the Union office Franks replied as follows:

He said no, that plant superintendent Johnny Knight had instructed him not to let me in the Union office, that I would hinder and disrupt production. He proceeded to tell me that if for any reason that I needed to go into the plant, I was to contact him first and he would go with me. If I needed to go to the bathroom, use the one in the front office, which is located directly across the hall from his office. He said that if I needed anything from the break room, to go to the main cafeteria. And that while I was in there, not to talk to Union employees. [Tr. 300]

Perry further testified that the Union office that he asked Franks if he could go to was the old Union office which was located on the west end of roll grind; that about 3:30 p.m. that day Franks came into the new Union office and he told Franks that he had some information that he wanted to post on the Union bulletin board; that Franks took the information, read it, said he had to review it, and then left the new Union office with the information in hand; that he did not get to post the information that day; that the information was the letter Franks sent him on November 12, 2008, with the three extra lines he had Caudle write on it, General Counsel's Exhibit 39; that the parties never negotiated which bathroom he could use at the facility in November 2008 prior to Franks telling him that he had to use the one in the front office area; that before the July 2007 strike he used whichever of the three bathrooms in the facility he wanted to, except the one up front; that in November 2008 he was told to use the bathroom in the main office up front; that that the parties never negotiated about who he could speak with in the break room in November 2008; that prior to the strike in July 2007, if he saw someone in the break room at Respondent's Hamilton facility, he would talk to them; that the new Union office is located on the south wall, up in the main office area; that the parties did not negotiate about the relocation of the Union office; that hourly and bargaining unit members have occasion to use the break room during their 15 minute break time; that the main break room, which has food dispensing machines, microwaves and tables, is the largest break room in the plant; that he has seen hourly employees, salaried employees, office personnel, and visitors use the main break room; that the blue circle in General Counsel's Exhibit 28 shows where

³⁷ The body of this section reads as follows:

The normal work week consists of eight (8) hours per day, five (5) days per week, Monday through Friday inclusive.

When the phrase "Work Days" is used in this Agreement, it shall be understood to be Monday through Friday. Saturdays, Sundays and paid Holidays are not considered work days.

³⁸ Art. XXVIII reads as follows:

RULES

Rules and regulations established by the Company shall be reasonable and disciplinary action taken to maintain order, efficiency or safety shall be for just cause. Disciplinary action shall be based upon the seriousness of the offense and shall be applied consistently, taking length of service, period of time since last misconduct and mitigating or aggravating circumstances into consideration.

In the event that the Company decides to establish new rules or change existing rules, the Chairman of the Grievance committee will be notified and furnished a copy of the new and/or changed rule. It is recognized that in processing an employee's grievance protesting disciplinary action or discharge, the question of whether a rule is reasonable may be raised by the Union.

Discipline will be corrective rather than punitive and except in cases of gross misconduct, progressive discipline will consist of Counseling, Verbal Warning, Written Warning, 10 day Suspension, and Termination.

the main break room is located; and that prior to his November 17, 2008 conversation with Franks, he did not recall any rule that prohibited employees from talking in the break room, and the parties did not negotiate regarding this rule before Franks spoke to him on November 17, 2008.

When called by Respondent, Franks, in response to questions of Respondent's counsel, testified as follows regarding General Counsel's Exhibit 39:

Q Okay. I am going to show you what has previously been marked as General Counsel's Exhibit No. 39.

....

Q. BY MR. DAVIS: Have you seen that document before, Mr. Franks?

A. Yes, sir.

Q. It is a Union posting?

A. Yes, sir.

Q. Do you remember going to Mr. Perry's office and taking that away from him?

A. No, sir.

Q. Did you take it away from him?

A. No, sir.

Q. Thank you.

A. I had no reason to take it. [Tr. 1178 and 1179, with emphasis added]

Perry went to Respondent's Hamilton plant on November 19, 2008. He testified that he arrived at the facility about 2 p.m.; that he went to the guard shack and saw Franks coming down the sidewalk; that Franks told him to go to the new Union office; that later that day Franks came into the new Union office and told him that he had reviewed the information he wanted to post on the Union bulletin board; that when he went to post it Franks followed him into the plant; that Franks positioned himself so that he was always between him, Perry, and the employees in the plant; that to his knowledge, no Union officer has been disciplined for hindering or disrupting production since the Union started staffing the Union office; that prior to the July 2007 strike when he posted something on the Union bulletin board a supervisor did not escort him around and watch him; and that he was not terminated by NTN in November 2008 nor, to his knowledge, was any other Union officer terminated.

Perry went to Respondent's facility on November 24, 2008. He testified that he arrived at the facility at 2 p.m.; that he went to the guard shack, signed in, and got his pass; that at about 3:10 p.m. he went to the main break room, got a cup of coffee, and sat down at one of the tables; that former strikers Carl Palmer and Gary Childress, who had been recalled, came by and he spoke with them; that Shotts came into the break room, asked him if he was busy, and as they left the break room Shotts asked him if Franks went over the dos and don'ts that he could do while he was in the plant; that Shotts told him that from now on when he went to the break room he should get whatever he wanted, and then return to the new Union office; that Shotts told him that he could not sit in the break room but rather he had to get what he wanted and then return to the Union office; that before this conversation with Shotts, the parties had not negotiated about this change; and that the break room is not considered a working area of the plant.

Perry went to Respondent's facility on November 28, 2008 since it was a scheduled day to staff the Union office. He testified that when he arrived at the facility he went to the guard shack; that the guard paged a supervisor and about 20 minutes later Mike Duvall, the second shift heat treat foreman, called back, spoke to him, and told him that there was no one in the front office and he did not have the authority to let him into the facility; that he asked if employees were working in the facility, Duvall told him what departments were working, he asked Duvall for a list of the employees who were working, Duvall told him that he would have to get that information from plant superintendent Knight; and that he left the guard shack at 2:30 p.m. and did not staff the Union office that day.

When called by Respondent, Franks testified that he believed that November 28, 2008 was the Friday after Thanksgiving; that the plant was not operating that day, except for about nine employees in the heat treat area in the back of the plant; that there was no one in the office area; and that it was a scheduled holiday.

Perry testified that on December 1, 2008 he had a conversation with Franks; that the conversation occurred in the doorway to Franks' office; that he, Franks, Knight, and Shotts were present; that Franks told him that he could no longer go to the break room; that when he asked Franks why, Franks shrugged his shoulder and closed the door in his face; that no manager or supervisor "ever" (Tr. 347) told him why he could no longer go to the breakroom; that the parties had not negotiated about whether or not he could go to the breakroom; that prior to the July 2007 strike he used any break room in the Respondent's Hamilton facility that he wanted to go into; that about 3:10 p.m. he left the new Union office and walked past Franks' office; that Franks got up and followed him outside to where he was smoking; that later when they were going back into the plant Franks told him that he was doing just what he was told about the break room; that Franks then said "If you need anything out of the break room, come and get me and I'll go with you to get it" (Tr. 321); that up to this point the parties had not negotiated about Franks escorting him to the break room; that he has never seen Franks smoke; that when he goes out to smoke Franks goes with him; that in April 2009 he told Franks that some of the former strikers told him that they felt uncomfortable about talking to him in the smoke area at the front of the facility because Franks was out there when he, Perry, was out there; that when he told Franks that former strikers would not talk to him in the smoke area because Franks was out there, Franks told him that it was a free world and he could go outside anytime he wanted to; that Franks still continued to be outside every now and then after this conversation; and that 95 percent of the time Franks was outside with him and on a couple of occasions Franks would be standing inside the front doorway.

Regarding the alleged surveillance, Jerry Lindsey, who worked at the involved facility for 35 years, went out on strike, and was recalled in mid-August 2008, testified that he smokes; that employees smoke just outside the front doors at the main entrance to the facility; that the front doors are glass which you can see through; that the smoking area is about 10 feet from the glass doors and can be seen from the glass doors; that since his return to work he has seen employees smoke outside the main

entrance and he has seen Union President Perry in that smoking area when he gets off from work at 3 p.m. and it is one of the days Perry is at the facility; that he has seen employees standing in the area when Perry is there; that since his return to work in August 2008 he has seen Franks standing just inside the front glass doors when Perry was outside the front doors in the smoking area; that he has not seen Franks smoke and to his knowledge Franks is not a smoker; that sometimes Perry is by himself at the outside smoking area and sometimes employees are there talking with Perry; and that after he returned from the strike he saw assistant plant manager Shotts one time standing just inside the front glass doors when Perry was at the outside smoking area.

Perry testified that he smokes in the smoking area at the front entrance to Respondent's Hamilton facility; that he has seen bargaining unit employees, supervisors, visitors, and salesmen smoking in this area; and that the second shift employees coming in will speak to him and put their cigarettes out in the ash tray in that area before going in to work.

When called by Respondent, Franks testified that he stands outside the door of the main entrance to the plant as employees are going in and out; that he does this "to meet and greet and be available and assessable for employees if they need to see me about something" (Tr. 1179); and that he has done this on almost a daily basis for 4 years while he has been at NTN.

On cross-examination Franks testified that he does not smoke.

Perry went to Respondent's Hamilton facility on December 10, 2008. He testified that Franks told him that he had the list of the employees who worked on November 28, 2008, which list he requested on December 3, 2008; that he asked Franks once again about going to the old Union office and Franks told him that if he went there people would be speaking with him; that he told Franks that he wanted employees to come into the old Union office before and after their shifts to discuss problems and issues; that Franks referred to the November 12, 2008 letter in which management indicated that it had provided an area for the Union to conduct Union business; that at about 2:30 p.m. that day he showed a notice for the regular membership meeting to Franks and told him that he wanted to post it on the bulletin boards; that Franks followed him and positioned himself so that he was between him, Perry, and the production workers; that prior to the July 2007 strike no manager or supervisor ever followed him while he was posting things on the Union bulletin boards; and that the parties had not negotiated that anybody would escort him through the facility as he posted things on the Union bulletin boards.

By letter dated January 6, 2009, General Counsel's Exhibit 17,³⁹ Davies advised Sinele, as follows:

On behalf of the International Union, UAW and its Local 1990, the Union requests that the company provide it with the following information within 7 days of your receipt of this letter. Please provide this information directly to Michael Brown at UAW Region 8. I would appreciate it

if you would also provide me a copy of the company's response.

1) Please provide an employment/jobs worked in the plant history for each employee currently employed in the bargaining unit by NTN Bower at its Hamilton, Alabama plant. The Union believes that this information already exists in the human resources department at the plant in the form of a chart or index and is maintained by Janice Irving. According [to] the Union's information, this chart or index provides [an] . . . entire employment history of where employees have worked in the plant and when.

If you have any questions concerning this request, please contact me immediately.

....

When called by Respondent, Sinele testified that she contacted Irvin who told her that "she did not have a document that would be called this employment jobs worked history in the plant . . . [a]nd she didn't know what they were asking for." (Tr. 1334)

When called by the Charging Party, Brown testified that the information sought in the January 6, 2009 letter is relevant in order to determine places that people had worked in the plant since they had been there, to better enforce who had been recalled and who had been bypassed on the recall; that the Company provided some kind of a response and asked the Union to provide a sample of what it wanted; and that the Company never provided any chart or index.

By letter dated January 14, 2009, General Counsel's Exhibit 18⁴⁰, Sinele advised Davies as follows:

I received your information request to provide an employment/jobs worked in the plant history for each employee currently employed in the bargaining unit by NTN Bower at its Hamilton, Alabama plant.

Please provide a sample of the chart or index that the Union believes already exists in the human resources department at the plant, so that I can be certain to provide you with the information you are requesting in a meaningful manner.

General Counsel's Exhibit 40 is a letter dated February 5, 2009 from Franks to Perry which reads as follows: "We are announcing today that during the month of March we will be required to work shortened work weeks in March 2009." Perry testified that, with respect to Article XV, Sections 1 and 4 (See Joint Exhibit 1.), Franks' letter changes the normal work week, which is considered Monday through Friday, and the shifts, respectively, without sitting down and negotiating or bargaining with the Union about it; and that prior to receiving this letter the parties had not negotiated about this change in the work week.

When called by Respondent, Franks sponsored Respondent's Exhibit 53, which is the same as General Counsel's Exhibit 40 except that it has a handwritten note in the upper right corner,

³⁹ See also R. Exh. 60.

⁴⁰ See also R. Exh. 61.

namely "Given to Union on 2/5/09 2:00 PM Ivan Caudle." Franks testified that he took this letter to the Union hall and gave it to Caudle because Perry was not there.

General Counsel's Exhibit 19 is a letter dated February 10, 2009 from Brown to Franks, which reads as follows:

Inasmuch as you have notified UAW Local 1990 President Tony Perry by a letter dated February 5, 2009 of the company's unilateral decision to work shortened work weeks in March of 2009, please be advised that the Union's position regarding this matter is that the Collective Bargaining Agreement is very clear.

Article 15 (in part) states: "The normal work week consists of eight (8) hours per day, five (5) days per week, Monday through Friday inclusive."

Your letter implies that you intend to unilaterally change the work week in March of 2009. As you know, the Agreement may only be modified by mutual agreement of the parties. We will be glad to discuss this matter with you, should you so choose, however to this point, you have made no such request.

Should you be desirous to discuss this matter with the Union Representatives, it will be necessary for the Union [to] obtain relevant information related to the issue.

In that event, please provide the following information as soon as possible and far enough in advance to allow ample time for the Union to properly evaluate and examine the information prior to any such discussion.

After receipt of the information, we can determine appropriate dates to meet.

Please provide the following information:

(1) Provide any and all correspondences, including letters, emails, any notes of conversations/discussions regarding the contemplation of shortened work weeks at the Hamilton facility.

(2) Provide any and all documentation associated with the reason for the shortened work weeks and the same documentation for the last twelve (12) months to demonstrate a comparative analysis of business decline, etc., which led to the decision to require shortened work weeks.

(3) Provide the results of any analysis conducted by or in behalf of the Company/Management, which lead to the decision as opposed to other considerations, such as a partial layoff, etc.

(4) Please provide any and all such other information, which you or other management employees consider relevant to the decision.

....

Brown testified that article XV, section 1 on page 25 of the current agreement, Joint Exhibit 1, defines the work week. Section 1 reads as follows:

Normal Work Week

The normal work week consists of eight (8) hours per day, five (5) days per week, Monday through Friday inclusive.

When the phrase "Work Days" is used in this Agreement, it shall be understood to be Monday through Friday.

Saturdays, Sundays and paid Holidays are not considered work days.

Brown testified further that since November 1, 2008 the Company and the Union did not bargain about any changes to article XV; that he wrote his February 10, 2009 letter, General Counsel's Exhibit 19, because of a letter Perry sent to him which was signed by Franks regarding changes in the work week; that the parties had not negotiated about changes in the work week; that it was his understanding that there was a change in the work week in March and May 2009; that more specifically it was his understanding that the Company did not allow the majority of the people to work three different Fridays during the month of March; and that prior to implementing that modification the Union and the Company had not bargained about it.

On cross-examination Brown testified that it was his understanding that a guaranteed work week means that employees would receive a certain number of hours or a certain amount of pay, whether they worked or they did not work; and that he has not seen a guaranteed work week provision in the involved contract.

Perry testified that Article XV of the current collective bargaining agreement, Joint Exhibit 1, specifies the normal work week, hours, work days, and shift starting times.

General Counsel's Exhibit 20⁴¹ is a letter dated February 20, 2009 from Sinele to Brown which reads as follows:

In response to your letter of February 10, business conditions are not good which should come as no surprise to you.

Originally, the Hamilton Plant planned to run daily production of \$223,000 per day during February and March for a total production of \$9,366,000 (\$223,000 x 42 work days). The Company's revised forecast is that it will only run \$7,140,000. In order to accomplish the reduction, the Company proposes to run 39 days at \$183,100 per day.

Our hope is that the business will stage a comeback in the relatively near future. However, economic conditions being what they are, we all know there are no guarantees.

Should you desire to discuss this matter, please feel free to contact me.

....

When called by the Charging Party, Brown testified that the Company did not provide the information he requested in his February 10, 2009 letter; and that he received a letter from Sinele on February 20, 2009 which gave some dollar figures and did not make a lot of sense.

Perry testified that in March 2009 the schedule for the Union office at the involved Hamilton facility changed to Monday, Wednesday, and Thursday because the Company went to a short work week; and that in March 2009 NTN eliminated Fridays as a work day.

By letter dated March 4, 2009, General Counsel's Exhibit 21, Davies advised Sinele as follows:

Mike Brown has forwarded to me your February 20, 2009 letter purporting to reply to his letter of February 10,

⁴¹ See also R. Exh. 54.

2009 regarding the company's unilateral change in the work week provisions of the contract. Unfortunately, you provided your usual evasive response to direct questions made by the Union regarding this matter and failed to explain on what basis the company believes that it has the unilateral right to modify the work week despite the provisions in the contract to the contrary. Likewise, you failed to provide the information requested in Mr. Brown's letter and provided no basis to justify the company's refusal to do so.

Since the company did not request to discuss this matter prior to unilaterally taking this action, nor provide the information requested, the Union is left with the inescapable conclusion that the company has no intention of complying with its obligation under the contract and applicable law. Therefore, please be advised that if the company unilaterally changes the hours of work as provided for in the collective bargaining agreement, the Union will pursue all necessary means to remedy this willful and deliberate violation of the contract.

Respondent called Calvin Harris. He testified that he has been employed at NTN for 35 years; that presently he works as a trainer, training people how to set up machines; that the trainer position is not a bargaining unit job; that for 30 years he was a set up person, which is a bargaining unit position; that from 1997 for 6 years he was president of the Local Union at NTN; that one of his duties as president of the Local Union was to talk to management on daily matters that came up; that in 2001 Respondent worked shortened work weeks; that he found out that the Company was going to work shortened work weeks in 2001 when then plant manager Dwight Nixon called him up front in March or April 2001 and asked him if he had a problem with working shortened work weeks; that he told Nixon that he did not have a problem with it; that this approach was taken to avoid having to have a layoff; that eventually there was a layoff in October; that he did not file a grievance or an unfair labor practice over the reduced work weeks; that his grievance committee, Roger Wakefield, Herman Mayes, and Peoples was with him when he discussed the reduced work week with Nixon; that Manscill, who was the head of HR at the time, "sat in on the ... Nixon meetings" (Tr. 1156); and that probably Manscill's assistant, Matt LeDuke, was present.

On cross-examination, Harris testified that he negotiated the 2001 collective-bargaining agreement between the NTN and the International Union UAW and its affiliated Local 1990, and he signed this agreement as Local president, Joint Exhibit 2; that the 2001 contract was executed on April 13, 2001; that sometime after the 2001 contract was executed, Nixon contacted him; that this was before the reduced work weeks were going to go into effect; that rather than telling him that the Company was going to work reduced workweeks, Nixon called him in to talk about it first; that his entire grievance committee was with him when he met with Nixon regarding reduced work weeks; that management said that the reduced workweek was to try to avoid a layoff; that the Union *agreed* to that; that during his meeting with Nixon, management said that they wanted to go to the shortened workweek to try to avoid a layoff; that as

Union president he wanted to avoid a layoff; that the Union committee members had the same interest, namely to avoid a layoff; that avoiding a layoff was the reason he *agreed* to the shortened work weeks because he would rather have people work four days than have people laid off; that the involved contract indicated that a work week is five days a week; that if the work week is now a four day work week, that is a change from a five day work week; that in essence the Union *agreed* to allow the Company to deviate from the work week specified in the contract; and that he did not file a grievance or unfair labor practice charges because the Union had *agreed* in this instance to allow the Company to do that to avoid a layoff.

On redirect Respondent's attorney elicited the following testimony from Harris:

Q. BY MR. DAVIS: Did you consider Mr. Nixon's plan to go to a four day work week a violation of the collective bargaining agreement?

A. I don't really know. I mean, really, I know *we all agreed on it* in the meeting at that point. [Tr. 1163, with emphasis added]

When called by Respondent, Franks testified regarding plant shutdowns that there were shut down weeks in the early part of 2007; that plant manager Allen told him that there was going to be a shut down week since business conditions were down and Respondent did not need the production; that before the shut down Allen asked him to get Peoples and bring him to Allen's office; that he was present at the meeting and Allen told Peoples that due to business conditions management was going to have to make some adjustments in its production schedule, and management was looking at having to take a week off, shut down to reduce some of the production; that Peoples then said "I thank you very much for telling me this. And I appreciate very much you doing this so that we don't have a layoff" (Tr. 1184); and that Allen told Peoples this was why he was having the shut down, namely to avoid having to lay anyone off, and he hoped that it would work.

On cross-examination Franks testified that with respect to the one week 2007 shutdown, then Union president Peoples said that he wanted to avoid a layoff of his members; and that Peoples said that he *agreed* to have a shut down to avoid a layoff.

General Counsel's Exhibit 22 consists of three "EMPLOYEE GRIEVANCE[S]," namely No. 09-01, 09-02, and 09-04, which are dated, respectively, "3-12-09," "3-16-09," and "3-23-09," and two information requests, both dated March 17, 2009, from Perry to Franks. The information requests read as follows:

1. Names, clock numbers, departments and pay scale of all hourly employees that worked Friday March 6, 2009 [March 13, 2009 in the second letter].

2. Names, clock numbers, departments and pay scale of all hourly employees that were precluded from work March 6, 2009 [March 13, 2009 in the second letter].

3. Names, clock numbers, department and pay scale of all hourly employees that worked Saturday March 7, 2009 [March 14, 2009 in the second letter] and Sunday March 8, 2009 [March 15, 2009 in the second letter].

4. Department overtime charts from each department . . . [at] NTN Bower through March 8, 2009 [March 15, 2009 in the second letter].

The Union request[s] the information be provided within the next five working days. A copy of this letter . . . is being sent to all interested parties.

The three grievances filed by Perry all read as follows in the “Detailed Reasons For Grievance” section of the grievance:

This grievance represents protest to the managements violations of Article 15, Section 1, and any other contract violation pertaining to the current labor agreement inasmuch as they precluded employees from working in the Hamilton plant on March 6, 2009 [March 13, 2009 in grievance “No. 09-02” and March 20, 2009 in grievance “No. 09-4”]

All three grievances read as follows in the “Specific Adjustment Requested” section of the grievance: “That all bargaining unit employees be made whole for any and all losses incurred due to these violations.” The first grievance was denied on “3/16/09” and appealed to the second step “3-17-09.” The second grievance was denied on “3/17/09.”

Regarding General Counsel’s Exhibit 22, Franks testified that he signed for the receipt of the first two grievances, he received both requests for information, and his assistant, Irvin, signed for the receipt of the third grievance.

When called by the Charging Party, Brown testified that he did not know if the information requested in the information requests in General Counsel’s Exhibit 22 had been received but he did not receive it.

When called by Respondent, Sinele sponsored Respondent’s Exhibit 40 which is on UAW letterhead, dated March 23, 2009, and opens with “TO: NTN BOWER ELIGIBLE EMPLOYEES, MACOMB, ILLINOIS” and “Dear Friends and Supporters.” Sinele testified that the document on UAW letterhead was something the Union handed out to employees as they were coming into work at the Macomb plant in Illinois on March 23, 2009; that she saw the Union out there hand billing; and that several employees brought the handout to her. Among other things, the handbill indicates as follows:

....

This brings to mind an issue the Macomb employees should be aware of:

Will NTN move work to Alabama and lay you off just to keep the scabs and scab temporary employees working without any reduction in force or lay off at NTN Hamilton?

....

Page two of the handout indicates, among other things, that “The Union attended the OSHA informal hearing on March 11, 2009 (see attached news release).” Sinele testified that she attended an OSHA conference in Birmingham; that also in attendance were, among others, Wes Chism from the Hamilton plant, Johnnie Mayes, Mr. Togagi, who is Respondent’s president, Respondent’s safety person, Davies, Donny Bevis, Brown, Perry, Caudle, Roberts, Roberto Sanchez, who is the

OSHA director, and Mr. Coolie, who was the inspector who came to the plant; that during the meeting Sanchez told Bevis that it was his responsibility for the employees that they represent for their safety, that they work on them to follow the safety procedures in place; and that Bevis then said “[w]e do not represent those employees.” (Tr. 1321)

On cross-examination Sinele testified that the OSHA director told Bevis that it was his responsibility for the safety of those employees that they represented, and Bevis said “we don’t represent those employees” (Tr. 1356); and that she understood this statement to mean that the UAW did not represent the employees at the Hamilton facility. It is noted that in March 2009 a number of former strikers were working in NTN’s Hamilton plant.

By letter dated March 25, 2009, General Counsel’s Exhibit 23⁴², Davies advised Sinele as follows:

I am in receipt of your letter dated January 14, 2009 providing your usual non-responsive response to the Union’s information request of January 6, 2009. I apologize for not responding sooner. Your request that I provide a “sample” of the chart or index requested in my January 6 letter is nothing more than a delaying tactic. Obviously if the Union had a sample of the chart or index it wouldn’t need to request the information from the company. While you may think your reply was clever, it only shows once again that the company has no intention of complying with its obligations under the law. The Union has provided a more than sufficient description of the document or documents requested. If you do not provide the information within five days of your receipt of this letter, the Union will be forced to file another unfair labor practice charge.

....

Sinele testified that since March 25, 2009 she has not made any further response to this information request and she has not referred it to anyone else in the company because “I’m still waiting to determine what sample chart . . . [or] index, so that I can provide what he was asking for.” (Tr. 106)

As noted above Brown testified that it was his understanding that there was a change in the work week in March and May 2009; that more specifically it was his understanding that the Company did not allow the majority of the people to work three different Fridays during the month of March; and that prior to implementing that modification the Union and the Company had not bargained about it.

According to the transcript, on rebuttal, Perry testified “[y]es, sir” when asked by one of Counsel for General Counsel “did you *meet and bargain* with the company, Gary Franks or any supervisors or managers concerning the shortened work weeks that started in March 2009 and continued thereafter.” (Tr. 1386 with emphasis added) According to the transcript, the involved Counsel for General Counsel did not ask any follow up questions notwithstanding the fact that such an answer (namely “[y]es”) is contrary to the record and would be problematic with respect to a part of the government’s case. It is noted that no motion was filed to correct this portion of the

⁴² See also R. Exh. 62.

record. My trial notes indicate that Perry responded “No” when he was asked this question on rebuttal. Moreover, the record, as summarized herein, speaks for itself as to whether the Union met and bargained with NTN regarding shortened work weeks that started in March 2009 and continued thereafter.

Perry testified that in April 2009 the schedule for the Union office at the involved Hamilton facility changed back to Monday, Wednesday, and Friday because the Company went back to the normal work week.

On April 17, 2009 Perry visited Respondent’s Hamilton facility. He testified that he arrived at the facility at 2 p.m.; that at 4 p.m. that day he was leaving the facility and Franks asked him to step into his office; and that Franks told him that:

at 1:45 p.m. that day . . . [he] and . . . Shotts had received a phone call from . . . Knight indicating a sharp decline in sales to look at the possibility of getting rid of the temporaries, to look at the possibility of a two week vacation shut down. [Tr. 332]

Perry testified further he was told that the two week shutdown would occur the last week in June and the first week in July and to look at the possibility of a three to four day work week from May until September, 2009; that he told Franks that there was going to be trouble and they needed to sit down and negotiate or bargain about the short work week; and that Franks said that he would have to contact Sinele.

When called by Respondent, Franks sponsored Respondent’s Exhibit 59, which reads as follows: “On Friday April 17, 2009 Gary Franks gave Tony Perry the payroll attendance sheets for the three weekends that the plant was off in March. You already have the pay scales in the contract.” What purports to be the signature of Tony Perry appears on the document. Franks testified that this exhibit is a receipt signed by Perry; that the attendance sheets show the bargaining unit employees who worked and when they clocked in and out; and that he gave the attendance sheets to Perry in the office.

When called by Respondent, Sinele sponsored Respondent’s Exhibit 7. She testified that this one-page chart shows the number of temporaries and hourly full-time employees the Company had between “5/31/2007,” when the Company had 223 hourly full-time employees in the bargaining unit, and “4/19/2009”; that the temporary staffing agencies listed are Team Works, Express, and Key; that no temporaries were used by the week ending “10/28/2007” because by then the Company had hired 158 hourly full-time employees; that the difference between 223 and 158 can be accounted for by the fact that (a) Respondent’s maintenance tool room and tool crib employees that used to be in the 223 were now employed through ATS or, in other words, these functions were contracted out which resulted in a loss of bargaining unit jobs, and (b) some equipment, which involved a few jobs, was moved to Macomb; that the Union was notified of the equipment move and the Company offered to negotiate it; that the Company started using temporaries again (from Key only) in the week ending “12/23/2007” to cover absenteeism, and she thought that the Company had to get something out quick at the end of the year because the Company was past due on getting some parts to John Deere and Caterpillar; and that after November 30, 2007 the Company

would use 10 to no more than 15 percent temporaries, which was arrived at looking at absenteeism and the practice used in Macomb. At the week ending “7/27/2008” Respondent was using 26 temporaries. This number was reduced to 19 by the week ending “8/31/2008” (when Respondent had 194 hourly full-time employees), 9 by “9/28/2008,” 8 by “10/26/2008,” and 6 by “1/25/2009.” The number is 7 for “2/22/2009” and “3/29/2009,” and 0 for “4/19/2009.”

Perry visited Respondent’s Hamilton facility on April 20, 2009. He testified that he arrived at the facility at 2 p.m.; that at 3:10 p.m. that day he gave Franks an information request regarding OSHA forms and he asked Franks if he had received any information about the short work weeks; that Franks told him that he was still waiting for a response from Sinele; that he told Franks that it was the Union’s position that the Company and the Union should negotiate and bargain on the short work week; and that Franks repeated that he was waiting for Sinele.

When called by Respondent, Franks sponsored Respondent’s Exhibit 55 which is an e-mail which reads as follows:

Gary Franks	To: Stacy Sinele . . .
04/21/2009 08:25 AM	Subject: Conversation with Tony Perry

On Friday April 17, 2009 Gary Franks had a meeting with Tony Perry and explained to him that sales were down at NTN-BOWER and that we were looking at having to go to a short work week starting in May through September. I told him that we might have to take all Friday’s off and a two week shutdown for vacation. I told him that we might need to take an additional 4 or 5 days also. Tony replied that he had already heard this from a temporary employee. I told him that was strange since I had just heard it about 20 minutes ago. He thanked me for letting him know and shook my hand.

When called by Respondent, Franks sponsored Respondent’s Exhibit 80, the first page of which reads as follows: “On April 22, 2009 Gary Franks gave the overtime charts to Tony Perry that he had requested.” What purports to be the signature of Perry appears on this page. Franks testified that the first page of the exhibit is a receipt signed by Perry; that he gave the attached documents, overtime sheets for the bargaining unit employees who worked on those dates, to Perry that day; that he was in his office when he gave this material to Perry; and that he seldom went to the Union office.

On rebuttal Perry testified that it is his signature on the first page of Respondent’s Exhibit 80⁴³; that he did not receive the documents included in Respondent’s Exhibit 80 on or around April 22, 2009; that on or about that time period he received attendance records from Franks in Franks’ office with just the two of them present; that he walked into the office, Franks had a piece of paper to sign, he signed the paper, Franks handed him the paperwork, and he then walked out of Franks’ office; and that he received attendance records. Subsequently, Perry

⁴³ As noted, the first page of Respondent’s Exhibit 80 consists of the following: “On April 22, 2009 Gary Franks gave the overtime charts to Tony Perry that he had requested.” Nothing else appears on the page other than Perry’s signature.

testified that while it is his signature on the first page of Respondent's Exhibit 80, he did not read what he was signing.

On rebuttal Caudle testified that he is recording secretary of the involved Local; that in 2008 and 2009 if the Union received documents from NTN, usually he, the president of the Local, and the Local's financial secretary, Becky Holland, would review the information; that he has never seen the documents before which are included in Respondent's Exhibit 80; and that on or about April 22, 2009 the Company tendered to the Union attendance records, "it's a form, It's just one page that records your attendance for the whole year, they write down every night or day how many hours you work." (Tr. 1391)

On cross-examination Caudle testified that the signature on the first page of Respondent's Exhibit 80 looks like Perry's signature (As noted, Perry testified that it was his signature.)

Perry testified that on April 23, 2009 he was in Haleyville, Alabama talking to a lawyer on a personal issue and he did not go to NTN Bower's facility in Hamilton.

On April 27, 2009 Perry visited Respondent's Hamilton facility. He testified that he arrived at 2 p.m.; that at 3:15 p.m. he went to the break room to get a cup of coffee; that he was looking at the Company's bulletin board and he noticed a printout for the months of May, June, and July which indicated, with shadings, the two week vacation shut down, the short work weeks, and the paid holidays; that on his way back to the new Union office he saw Franks and he told him "Well, I see you've already got your short work weeks posted" (Tr. 335); that Franks said that he had to post them ahead of time so that the employees would be aware of what days they would not be at work; and that at that point the Union and the Company had not negotiated about changing or modifying the work week.

On April 30, 2009 Perry went to Respondent's Hamilton facility. He testified that he went to Franks' office and asked him for a copy of the months that he had posted on the bulletin board; that Franks said "no" (Tr. 335); that he asked Franks if he had any information pertaining to the short work week; that Franks said that he was still waiting for Sinele; and that he told Franks again that they needed to negotiate on the short work weeks.

General Counsel's Exhibit 41 is a letter from Franks to Perry, dated April 30, 2009 which reads as follows:

As per our discussion April 17th, April 20th, and April 23rd; due to the sales decrease that we had just been notified of by our sales department, we proposed going to a shortened work week starting May 1st.

We also talked about the schedule for the summer vacation shutdown for the weeks of June 22nd, and June 29th (July 3rd as the Holiday for July 4th) with a return to work on Tuesday, July 7th.

If you have any questions, please feel free to contact me.

Perry testified that Franks handed this letter to him; that on April 17, 2009 he did not bargain with Franks about the shortened work week but Franks did tell him about the different things that the Company was looking at, namely the shortened work week and doing away with the temporaries; that on April 17, 2009 the Union did not tender the Company a counter pro-

posal; that he did not meet with Franks on April 20, 2009 to bargain about changing the work week; that to his knowledge international representative Brown was not contacted to be present on April 17, 2009 and Brown was not present on April 20 to negotiate about a change to the work week; that on April 23, 2009 he was in Haleyville, Alabama talking to Mr. McNutt, a lawyer, about a personal matter and he did not go to Respondent's Hamilton facility that day; that the Union did not bargain about any changes to the work week on April 17, 20, or 23, 2009; and that he first read about an official change to the work week when he saw the posted notice on the bulletin board in the main break room on April 27, 2009.

When called by Respondent, Franks sponsored Respondent's Exhibit 56, which is the same letter as General Counsel's Exhibit 41, except that the former has a handwritten note at the bottom, namely "Rec. May 4, 09 Tony Perry." Franks testified that he gave this letter to Perry, who signed for it on May 4, 2009. Franks also sponsored Respondent's Exhibit 70 which consists of documents covering a safety tour at Respondent's Hamilton plant on April 23, 2009. The tour is conducted on the fourth Thursday of each month, which in April of 2009 was April 23, 2009. Franks testified that he and Chism attended the safety inspection tour for the Company and Perry and Caudle attended for the Union. The next-to-last page of this exhibit contains the safety inspection notes of Perry which are dated "4-23-09," which lists at the top of the notes, Chism, Franks, Perry, and Caudle, and which has the following signature at the bottom: "Tony." The first page of this exhibit are the typed notes for "1st Shift Tour, Assembly and Inspection, April 23, 2009" also indicates "Members present: Gary Franks, Wesley Chism, Tony Perry, Ivan Caudle."

On May 6, 2009 Perry went to Respondent's Hamilton facility. He testified that he arrived around 2 p.m.; that, as noted above, Franks gave him the April 30, 2009 letter, General Counsel's Exhibit 41; and that at no time had the Company made any offer to negotiate or bargain with the Union about the possibility of a short work week which started May 1, 2009.

General Counsel's Exhibit 26 is a letter dated May 14, 2009 from Brown to Franks, which reads as follows:

Inasmuch as you have notified UAW Local 1990 President Tony Perry by a letter dated April 30, 2009 of the company's unilateral decision to work shortened work weeks starting in May of 2009, please be advised that the Union's position regarding this matter is that the Collective Bargaining Agreement is very clear.

Article 15 (in part) states: "The normal work week consists of eight (8) hours per day, five (5) days per week, Monday through Friday inclusive."

Your letter implies that you intend to unilaterally change . . . the work week in May 2009. As you know, the Agreement may only be modified by mutual agreement of the parties. We will be glad to discuss this matter with you, should you so choose, however to this point, you have made no such request.

Should you be desirous to discuss this matter with the Union Representatives, it will be necessary for the Union [to] obtain relevant information related to the issue.

In that event, please provide the following information as soon as possible and far enough in advance to allow ample time for the Union to properly evaluate and examine the information prior to any such discussion.

After receipt of the information, we can determine appropriate dates to meet. Please provide the following information:

- (1) Provide any and all correspondences, including letters, emails, any notes of conversations/discussions regarding the contemplation of shortened work weeks at the Hamilton facility.
- (2) Provide any and all documentation associated with the reason for the shortened work weeks and the same documentation for the last twelve (12) months to demonstrate a comparative analysis of business decline, etc., which led to the decision to require shortened work weeks.
- (3) Provide the results of any analysis conduct[ed] by or in behalf of the Company/Management, which lead to the decision as opposed to other considerations, such as a partial layoff, etc.
- (4) Please provide any and all such other information, which you or other management employees consider relevant to the decision.

....

Brown testified that the parties never met to discuss this and there was no bargaining ever carried out.

Respondent's Exhibit 57 is a copy of General Counsel's Exhibit 26 with an additional page, namely a May 14, 2009 e-mail from Brown to Franks which reads as follows: "Please see the attached letter [General Counsel's Exhibit 26] regarding your letter dated April 30, 2009 to Tony Perry concerning 'Shortened work week.'"

Perry testified that since May 14, 2009 the parties have not met and bargained about the shortened work weeks in May, 2009.

General Counsel's Exhibit 27⁴⁴ is a letter dated May 19, 2009 from Sinele to Brown, which reads as follows:

In response to your May 14, 2009 letter, we make the following points:

- (1) It is not our practice to respond to any of the self-serving statements made by the Union in its May 14th letter, or in any future statements of this nature it may choose to issue.
- (2) The Company is not interested in modifying the Collective Bargaining Agreement that was negotiated, implemented, and accepted by UAW Local 1990 on July 23, 2008. We like it the way it is.
- (3) The decision to reduce the amount of work available to hourly employees is a management prerogative based upon our view of what the future may

hold. We have provided the Union with the information supporting our position. Mr. Franks had several discussions with Mr. Perry on this proposal prior to the April 30, 2009 letter of notification you requested to have in writing. We in fact invited Mr. Perry to a meeting where that was discussed and he declined to attend.

....

Brown testified that there is no section in the collective bargaining agreement entitled management prerogative.

On cross examination, Brown testified that there is a management's rights clause in the involved agreement. Article II of the involved agreement, which is titled "MANAGEMENT" and appears on page 4 of Joint Exhibit 1, reads as follows:

This Agreement restricts the rights of Management to the extent hereinafter set forth, but not otherwise, it being understood that except as herein otherwise expressly provided, the Company retains all rights it would have had in the absence of this Agreement.

Without limiting the more general application of the foregoing, it is recognized the Company in particular retains the right to maintain order and efficiency in the plant and its operations, to hire, promote, to transfer, temporarily lay off, and assign employees, or discipline for just cause, to reduce the work force for legitimate reason, to determine the products to be manufactured, to purchase or produce any or all of the tools of production, to schedule production, to set the hours, methods, processes, means of manufacturing, to maintain the plant or to provide for such maintenance by other means, to control and select the raw materials, semi-manufactured parts, or finished parts which may be incorporated into the products manufactured, such rights shall not be used in a manner that will violate any of the terms or provisions of this Agreement.

Franks testified that to his knowledge no replacement employee has reached the point of termination for absenteeism and not been terminated; that NTN has not replaced everyone who has left or quit "[b]ecause the need . . . has not been there due to reduction in work" (Tr. 251); and that after the Union made its unconditional offer to return to work on July 23, 2008, Respondent called, he guessed, 12 to 16 temporary employees to work bargaining unit positions.

When she testified at the trial herein on June 8, 2009, Sinele testified that (a) she thought that Respondent would not, even then, give the Union the addresses of the permanent replacement employees, and (b) she believed that Brown did not direct any Union pickets to engage in misconduct; and that over 100 strikers had not been called back to work.

When called by the Charging Party, Brown testified that as of the time he testified at the trial herein, June 9, 2009, the Union has not received (a) the addresses of the temporary employees and the replacement employees, and (b) any of the information requested from the Company regarding the above-described October 22, 2007 incident.

Joint Exhibit 3 is a "SENIORITY LIST" which is dated "6/9/2009." It is a list of all of the former striking employees, the permanent replacements, and the temporary employees who

⁴⁴ See also R. Exh. 58.

have worked at Respondent's Hamilton plant since July 23, 2008. The list consists of a number of columns which are headed with "EMP#, NAME," "HIRE DATE," "STATUS 07/23/08," "STATUS 6/09," and "STATUS CHANGE DATE." Respondent stipulated that all of the temporary employees on the list worked in bargaining unit positions.

With respect to General Counsel's Exhibits 32 through 35, Respondent stipulated that all of the documents contained in these four exhibits were produced by Key in response to a subpoena duces tecum served on them; that these documents are (a) authentic, (b) what they purport to be, (c) are business records maintained by Key in the ordinary course of business, and (d) they pertain to individuals employed by Key who worked at Respondent's facility in Hamilton; that General Counsel's Exhibit 32 are time card reports for employees; that General Counsel's Exhibit 33 are work orders that were filled by Key for work at NTN; that General Counsel's Exhibits 34 and 35 are spreadsheets as to the hours worked by various employees; that with respect to General Counsel's Exhibit 32, this document does not indicate whether the individuals listed performed bargaining unit work or not in that it is not indicated which people worked in quality which is not bargaining unit work; that with respect to General Counsel's Exhibit 33, these are simply phone orders that Key records; that with respect to General Counsel's Exhibit 34 and 35, these show the individuals who worked as temporary employees in the involved plant through this agency; that a number of the documents have a time stamp; and that a number of the documents do not have a time frame.

When called by Respondent, Franks testified on cross-examination that at the time of his testimony, July 14, 2009, about 170 bargaining unit members were working; and that all are permanent replacements, except 13 who crossed the picket line and 25 former strikers who were recalled.

When called by Respondent, Sinele testified on cross-examination that at the time of her testimony, July 14, 2009, she had not since July 23, 2008 met with the Union to bargain about (1) the new sign in procedure implemented by the Company in November 2008, (2) the relocation of the Union office from the roll grind department to its current location, (3) a new procedure whereby Union representatives had to first call Franks or any supervisor to make an appointment before they posted news on the Union bulletin boards, (4) what days the Union would staff the new Union office, (5) a rule that required the Union to first contact Franks before they entered the production areas at the Hamilton facility, (6) a rule that requires Union reps to use the bathrooms in the front office at the Hamilton facility, (7) any rule that limited employee access to certain break rooms, (8) any rule whereby Union representatives who entered breakrooms at the facility could not speak to employees, (9) any rule whereby union representatives who staffed the office and who purchased food items in the break room, could not consume those food items in the break room, (10) any rule whereby Local Union representatives were not be allowed at the facility unless supervisors and managers were present, (11) any rules whereby Local Union reps could not use break rooms at the facility, (12) any rule whereby Franks or any supervisor had to escort Local Union reps to the break room, (13)

any rule that Local Union reps could no longer use the former Union office in the roll grind department, (14) any rule that allows Franks or any supervisor to watch the Local Union representatives as they post materials on the three Union bulletin boards at the Hamilton facility, and (15) any changes to any of the following articles in Joint Exhibit 1: Article XXVIII on page 37, Article XXIX on page 38, Article III, Section 9 on page 10, Article XV, Sections 1 and 4 on page 25 and 26, respectively, and page 76 concerning supplemental labor pool; that since the Company implemented its last, best and final offer it has not had any positions filled in the supplemental labor pool; that, therefore, Respondent has a supplemental labor pool in theory under the terms of the collective bargaining agreement but Respondent does not have anyone in it; that the supplemental labor pool, according to the Company's proposal, would be used to fill in for absenteeism and short term manufacturing fluctuations; and that the supplemental labor pool is not theoretical since it is in black and white in the contract, it is an established classification even though the Company does not have any people in that position.

On rebuttal Brown testified that General Counsel's Exhibit 53 is the initial proposal made by the Company in February 2006; that with respect to Article I, Section 3 ("Recognition") of the proposal found on page 5, on February 20 or 21, 2006 the parties discussed temporary employees as it relates to "Recognition"; that this session was attended by himself, Marshall Blackburn, Roberts, and he thought Peoples for the Union; that management was represented by Sinele, Aubry, Manscill, Danny Skirby, and Franks; that he and Aubry were the chief spokesmen; that he asked what management was trying to accomplish by specifically, in the "Recognition" clause, excluding temporary employees from the Agreement; that Aubry explained that management wanted to use temporary employees to do bargaining unit work to replace absences and overtime work (shift extensions); that if a person was going to be absent on the first shift, the Company would extend a third shift employee's shift by 4 hours and a second shift employee would come into work 4 hours early to make up for the absent employee on the first shift; that this was the existing practice at the time; that Aubry said the Company would use a temporary employee to fill in for that absence as opposed to working bargaining unit people over or bringing them in early; that with respect to Article XXVII on page 70 of the February 2006 Company proposal (This article reads "NON-UNIT EMPLOYEES. The Company shall have the right to assign non-bargaining unit employees to production and maintenance work; however, the total number will not exceed 15% of the active work force, unless agreed to in writing between the parties."), Aubry said that "this was the connection for using temporary employees as outlined Article 1 or 6 and 3 or whatever" (Tr. 1400); that the up to 15% was what management through its chief spokesman, Aubry, estimated that they would need in order to accommodate the absence coverage and overtime extension of shift eliminations and things of that nature; that the parties discussed having a pool of people to fill in for absenteeism, and the people in the pool would be in the bargaining unit but their wages would be lower, and they would have reduced benefits or no benefits; that this pool was to be supplemented

by temporary employees; that the pool discussion probably came up in negotiations later than February 2006; that the temporary employees would be used for “[a]bsenteeism and other things” (Tr. 1402); that Aubry specified absences, short-term absences, bereavement, military, and sick leave; that management was trying to reduce overtime pay to union employees; that in February 2006 the Company did not verbally propose anything not in General Counsel’s Exhibit 53; that General Counsel’s Exhibit 54 is a document which Aubry gave to the Union during negotiations (The one page document has “4-4-06, Co. gave 4-4-06, 11:14 AM” on the upper right hand corner.) which outlined the Company’s major contract issues; and that, as here pertinent, the document reads as follows:

....

2. Overtime

- A. Simplify Scheduling & Equalization
- B. Overtime paid after 40 Hours worked
- C. Temporary Employees
 - 1). 15% of Workforce
 - 2). Cover Absenteeism/Vacation
 - 3). Additional Manpower Needs

....

Brown further testified on rebuttal that the parties discussed what the temporary employees would be used for and the limitation on the numbers but he was not sure if they discussed this on this particular day; that between February 2006 and April 4, 2006 Aubry explained the intended use of temporary employees at least three or four times; that up until April 2006 Aubry said that the intended use was to cover for absenteeism, and additional manpower needs for temporary increases in production requirements, namely if the Company had a customer that needed additional parts or things of that nature; that in February 2006 the Union “expressed very strongly that we did not have an interest in having temporary employees in the plant doing bargaining unit work” (Tr. 1409); that in April 2006 a utility pool was discussed; that as indicated in General Counsel’s Exhibit 55, which is a document that was given to the Union by Aubry on April 20, 2006, the Company proposed to establish a utility pool which would comprise no more than 15% of the workforce; that, inter alia, employees in the utility pool would receive lesser wages and lesser benefits; that the parties discussed this being an alternative to temporary employees; that it was discussed that the utility pool classification would have been a bargaining unit position; that General Counsel’s Exhibit 56 is a document given by Aubry to the Union, which is titled “Negotiations Discussion, April 21, 2006, ‘MUST HAVES’” and which, as here pertinent, indicates “3. Workforce, 15% of Workforce—Utility Workforce or Temporary Employees”; that the parties discussed the proposal that 15% of the workforce would be either utility pool or temporary employees; that at this time the Company was not proposing any use for temporaries other than to cover absences, reduce overtime or manage short term production needs; that General Counsel’s Exhibit 57 is a document, titled “Utility Department,” that was given to the Union by Aubry on May 16, 2006 relative to a utility department; that the Company’s position with respect to this proposal was that there would be a utility department, it would not be

called a pool anymore, it would be made up of no more than 15% of the active, hourly work force, these people would be in the workforce and in the bargaining unit, they would be at a lower grade than normal production people in the plant, they would be hired as bargaining unit people and would serve a probationary period, they would have less benefits, and, in addition to covering absences and things of that nature, they would do some work that is normally sent out of the plant to another location, namely sorting of parts, etc.; that the first proposal on General Counsel’s Exhibit 57 reads as follows: “1. The Utility Department will be no more than 15% of the total plant wide *Bargaining Unit* workforce, *except by mutual agreement. Why limit it to 15%?*” (underlining and italics in original); that General Counsel’s Exhibit 58 is a summary of the Company’s last, best, and final offer which was presented to the Union on May 18, 2006 (The document opens with “Article I, Section 3, Recognition, The Company will create a Utility Department and withdraws its proposal on Temporary employees.”); that there was some earlier discussion regarding the utility department but on May 18, 2006 the Union was given General Counsel’s Exhibit 58 by Federal mediator Charles Griffin; that the Union wanted to meet with the Company in order to go through the proposal and have discussions but the Company, in its response to the Union letter, indicated that if the Union had any questions it could put them in writing; that in 2007 the membership voted on the Company’s last, best, and final offer, which is summarized in General Counsel’s Exhibit 58, and overwhelmingly rejected it on a 90 plus percentage basis; that the Union did not meet with the Company again in negotiations until July 23, 2007; that he received Respondent’s Exhibit 67, the Company proposal, on July 23, 2007 at the Econo Lodge in Hamilton; that up to this time, the last offer from the Company on the table was the one summarized in General Counsel’s Exhibit 58; that article XXXIX (“TEMPORARIES, The Company reserves the right to utilize temporaries.”) in the Company’s July 23, 2007 proposal was discussed in July 2007; that before this, see General Counsel’s Exhibit 58, the Company had withdrawn its proposal on temporary employees and now in July 2007 temporary employees are back in the Company’s proposal; and that he asked Aubry

why he was back on temporaries and explained that we had gone through this process, we had set up a pool to take care of what they wanted temporaries for and he said that if we reach agreement on a pool, then that would go away. [Tr. 1419]

Brown testified further on rebuttal that the Company in July 2007 was again proposing to cover occasional absences and occasional fluctuations in production work by using temporary employees who would be outside the bargaining unit; that the Union was proposing that these issues be addressed by the use of a pool of bargaining unit employees who would be paid a lower wage⁴⁵ and reduced benefits; that General Counsel’s Exhibit 59 is the “NTN-Bower Corporation, Company’s Final Proposal 10-02-07” presented by Aubry to the Union on Octo-

⁴⁵ Brown testified that the Union “had proposed a wage that was compatible with what the company was paying for its temporary employees.” (Tr. 1420.)

ber 2, 2007; that the last page of General Counsel's Exhibit 59 is titled "'Supplemental Labor Pool,' 10-02-07"; that, as here pertinent, the Union discussed with the Company that the Union wanted assurances that the temporaries would not be hired prior to staffing the labor pool employees who would be bargaining unit employees; that as of October 2007 there was no agreement by the Union to the Company's proposal on the last page of General Counsel's Exhibit 59; that the first page of Charging Party's Exhibit 2 (titled "'Supplemental Labor Pool Employees Proposal 10-17-07'") is a proposal that was given back to the Union by Aubry on October 18, 2007 as a single page; that the bold print on this page indicates a change from the earlier proposal; that as indicated by number 2 on this first page, part of the Company's supplemental labor pool was that there would be temporaries but the temporaries would not be used for any purposes other than specifically set forth in this document⁴⁶; that the second page, which is numbered page 1, of Charging Party's Exhibit 2 was given to the Union on November 8, 2007, along with all the remaining pages of this exhibit; that the ninth page of the remaining pages of this exhibit is titled "'Supplemental Labor Pool' Employees Proposal 11-8-07" and, as here pertinent, has a change to "2. *Temporaries will:*" in that "(h) Will not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees" was added; that at a bargaining session between October 18 and November 8, 2007 he expressed concerns about the utilization of temporaries if there was not first a labor pool, and Aubry said "I don't know why we would do that because the pay and benefits are the same either way" (Tr. 1427 and 1428); that he received Respondent's Exhibit 68, "Company Last Best Final Offer 11-8-07," by email on November 16, 2007; that the next bargaining session was on December 4, 2007 at the Econo Lodge in Hamilton; that, with respect to page 105, article XXXIX of the "Company Last Best Final Offer 11-8-07," which reads "TEMPORARIES, The Company reserves the right to utilize temporaries," he asked Aubry "why this language was here after we had, with the labor pool set up, why the language relative to the temporaries was there" (Tr. 1430), and Aubry replied "it's just to make it clear that we can use temporaries" (Tr. 1430); that he then said to Aubry "in conjunction with the supplemental labor pool" (Tr. 1430) and Aubry said "yes" (Tr. 1430); that Aubry did not at any point indicate to him in any way that the Company proposed utilizing temporaries other than as set forth on the very last page Respondent's

Exhibit 68 supplemental labor pool; that Respondent's Exhibit 69 is the Union's counter proposal dated December 21, 2007, which does not include a supplemental labor pool because, while the Union agreed with the supplemental pool proposal, there were some other issues that the Union needed to get resolved relative to seniority and things of that nature; that on July 23, 2008 the Union signed a collective-bargaining agreement with the Company, Joint Exhibit 1; that he initialed page 76 of Joint Exhibit 1, which is the "'Supplemental Labor Pool' Employees 11-8-07" which indicates that the Union accepted this unequivocally; that at no point between December 4, 2007 and the day he initialed page 76 of the collective bargaining agreement did the Company indicate to him that the Company's proposal contemplated using temporaries in any way other than as specified on page 76 of Joint Exhibit 1 (There it is indicated, as here pertinent, "2. *Temporaries will;* . . . (h) Will [sic] not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees"); that after July 23, 2008 the Union filed a grievance "regarding the return of employees and not returning employees which temporaries or use of temporaries was a part of" (Tr. 1434); that he attended a grievance meeting on August 27, 2008, along with Peoples, Sinele, and Franks; that during this meeting he raised the issue about the Company having temporaries working in the plant instead of utilizing former strikers in these jobs, Sinele said they could use temporaries in the plant, he agreed but he asked under what circumstances, Franks said "5% or something like that" (Tr. 1434), he said "but you don't have labor pool employees here" (Tr. 1435), Sinele cited article XXXIX ("TEMPORARIES, The Company reserves the right to utilize temporaries"), he said "you and I both know that Gary Aubry said that that was only to make it clear that they could use temporaries in conjunction with labor pool" (Tr. 1435), and Sinele did not respond; that from the beginning of 2006 until July 23, 2008 what the Company wanted to use temporaries for was probably discussed 15 or 20 times, and the contemplated use was to cover absences, to reduce or eliminate requirements for extensions of shift, temporary increases for temporary manpower needs, increases in production or if they had a bad quality run, and they would do jobs not typically done in the plant including sorting bearings and things of that nature; that after May 2006 the Company did not include the sorting bearings aspect but rather from that point forward it was for absenteeism, vacation, short term absences, temporary increases in manpower needs, and overtime extensions; and that no company representative, other than Aubry, expressed any other contemplated use of temporary employees besides avoiding overtime extensions, cover absenteeism, and short-term increased production needs.

With respect to the return to work procedures, Brown testified on rebuttal that he was involved in discussions with Company representatives on July 31, and August 1, 2008 about the return to work procedures proposed by the Company, Charging Party Exhibit 1, and he attended a meeting in late August 2008 where the parties negotiated through a mediator; that during these discussions the Company withdrew the requirement of a drug screen prior to resumption of work; that the Company did not withdraw the requirement to sign a return to work log; that the Company required employees to sign a return to work log;

⁴⁶ This portion of page one of CP Exh. 2 reads as follows:

2. *Temporaries will:*

- (a) Not be part of the Bargaining Unit
- (b) Be no more than 5% of the hourly workforce unless mutually agreed to by the parties
- (c) Not be able to work longer than twelve (12) consecutive months
- (d) Not be on the Company payroll or eligible for Company benefits
- (e) Be able to perform Bargaining Unit work
- (f) Be eliminated before any Labor Pool or other Bargaining Unit employees
- (g) Work overtime in accordance with the Company's proposed Article XIV—Overtime Work Scheduled (page 54)

that the Company modified number 3 on its return to work procedures in that it changed how long people had to return after they were notified to return to work; and that the Company never withdrew number 5 of the return to work procedures, namely that the log would expire on February 15, 2010, and employees on the log at that date would have to apply for employment and would be treated as new hires.

On cross-examination, Brown testified that the Company implemented its last, best, and final offer on December 31, 2007; that the last meeting on the Company's proposed return to work procedures was on August 26, 2008; that mediator Dillard was present for the last meeting; that the parties were separated and the mediator went back and forth between the two; and that the parties never met face-to-face on August 26, 2008 in that Dillard carried proposals back and forth.

On rebuttal Roberts, who began working at the involved plant in 1973 and retired in April 2009, testified that he has been in the Union since 1977; that when the collective-bargaining agreement was to expire in 2006 he was selected to be on the bargaining team to negotiate with the Company for a successor contract; that Peoples, who at the time was president of the Local and was on the negotiating team, has since retired on disability⁴⁷; that in February 2006 the Company gave the Union negotiating team General Counsel's Exhibit 53, which is the Company proposal which has "COMPANY LANGUAGE #1 02/20/06 4:18 PM" at the top of the first page of the document; that article XXVII on page 70 of this proposal reads the Company proposed using non-unit employees, not to exceed 15% of the active work force, for such purposes as meeting emergencies, instruction and training, and attempting to solve production difficulties; that in February 2006 the Company through Aubry did discuss using temporary employees with respect to limiting the excessive amount of overtime, for spurts in production, and for other reasons; that in April 2006 the Company gave the Union a list of its major concerns, General Counsel's Exhibit 54, and with respect to "2. Overtime, . . . C. Temporary Employees, (1). 15% of Workforce, (2). Cover Absenteeism/Vacation, 3). Additional Manpower Needs" on the single sheet, Aubry, at the time, said that the contemplated use of temporary employees was to cover overtime; that during negotiations Aubry gave an explanation as to the contemplated uses of temporary employees over 20 times; that Aubry indicated that temporaries would be used to eliminate overtime, to fill in for production spurts and for other reasons such as filling in for people out on vacation; that the Union proposed that the Company use a labor pool or utility department instead of temporaries; that some jobs had been shifted to a location outside the facility and the Union wanted to get those jobs back in the plant, back in the workforce; that his pay rate at the time was \$15 an hour so overtime at time and one half would be \$22.50; that if the Company was paying a pool employee \$10 an hour it would be less than one half of the overtime rate it paid him; that all of the benefits packages discussed for pool employees, who would be bargaining unit employees, would be lower than the

standard bargaining unit employees' benefits package; that the two approaches discussed were (1) non-unit temporaries, or (2) bargaining unit labor or utility department pool employees who received lower wages and less benefits than other bargaining unit employees; that in May 2006 the Company proposed a utility department and withdrew its proposal on temporary employees, Article I, Section 3 on page 1 of General Counsel's Exhibit 58; that the Union submitted a last, best, and final offer of the Company which proposed a utility department and no temporaries to the membership for ratification and it was turned down by 97%; that he attended negotiating sessions in July 2007 at which Article XXXIX, "TEMPORARIES, The Company reserves the right to utilize temporaries," on page 105 of the Company's July 23, 2007 proposal was discussed; that the Company had withdrawn its proposal on the utility department and wanted to go with temporary only; that, with respect to what the Company contemplated the temporaries would be used to do in terms of specific jobs and duties, he did not think that there was a discussion about jobs and duties, just generally for overtime and production spurts; that some of Aubry's 20 explanations occurred on or after July 2007; that, with respect to Respondent's Exhibit 68, "Company Last Best Final Offer 11-8-07," it was his understanding that, as set forth on the last page of the document, the Company had incorporated the labor pool language back into its proposal and it had included temporaries as a fill in for the labor pool; that as set forth in 2.(h) on the last page "Temporaries will . . . not be employed until a minimum of 5% of the workforce has been employed as Labor Pool employees"; that it was his understanding that this 5% applied to any use by the Company of temporaries; that he did not attend any negotiation sessions from October 15, 2007 to December 4, 2007; that he received Respondent's Exhibit 67 in advance of attending the December 4, 2007 negotiating session; that he attended the December 4, 2007 negotiating session; that Brown and Aubry were in attendance; that Brown and Aubry had sidebar discussions during this meeting; and that at no point during the December 4, 2007 meeting did he hear Aubry say that temporaries could be used under the Company's proposal in circumstances other than after 5% of the work force had been employed as labor pool employees, and on or after December 4, 2007 he never heard any Company representative make this assertion.

Analysis

Paragraphs 12 and 35 of the complaint collectively allege that on or about August 4, 2008, Respondent, acting through its supervisors and agents, Gary Franks, Craig Allen, David Wiginton, Janice Irving, and Gary Aubry, at the guard shack at the facility, threatened its employees, who were former strikers, with the loss of their reinstatement rights if they failed to sign Respondent's Return To Work Log; and that by this conduct, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Paragraphs 15, 17, and 36 of the complaint collectively allege that since on or about August 4, 2008 and continuing thereafter, Respondent has required employees who were former strikers, as a condition of exercising their reinstatement

⁴⁷ On rebuttal, Brown testified that Peoples resigned as president of Local 1990 in September 2008, he retired from the Company, and he is receiving social security disability benefits.

rights, to sign Respondent's Return To Work Log because the employees formed, joined, and assisted the Union and engaged in concerted protected activities and to discourage employees from engaging in these activities; and that by this conduct, Respondent discriminated in regard to the hire or tenure or terms or conditions of employment of its employees discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

Paragraphs 19 and 37 of the complaint collectively allege that on or about August 4, 2008, Respondent verbally implemented a rule requiring all former strikers to sign Respondent's Return To Work Log as a condition of returning to work; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

Paragraphs 20 and 37 of the complaint collectively allege that since on or about August 4, 2008 Respondent has unilaterally, and in the absence of a good faith bargaining impasse in negotiations, enforced a rule requiring all former strikers to sign Respondent's Return To Work Log as a condition of returning to work; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that Respondent violated Section 8(a)(1), (3) and (5) of the Act in connection with its Return to Work Log; that when economic strikers unconditionally offer to return to work, the employer must promptly reinstate them unless it has permanently replaced them or there is a legitimate and substantial business reason not to reinstate them, *Laidlaw Corp.*, 171 NLRB 1366, 1369-1370 (1968); that requiring former strikers to take steps beyond the union's unconditional offer to return, such as completing additional paperwork violates the Act, *Peerless Pump Co.*, 345 NLRB 371, 375 (2005); that administrative convenience is no justification for requiring employees to notify employers of their interest in returning to work rather than requiring employers to contact reinstated former strikers when work is available, *Giddings & Lewis, Inc.*, 264 NLRB 561, 567 (1982); that Pearce, Nolen, and Perry testified that Franks and Wiginton on August 4, 2008, threatened that the economic strikers who had unconditionally offered to return to work would not be permitted to do so unless they signed the log by an August 15, 2008 deadline; that Respondent did not call Wiginton or explain its failure to do so; that an adverse inference should be drawn that if Wiginton had testified, he would have corroborated Pearce, Nolen, and Perry; that the fact that nearly every former striker thereafter signed the log supports the proposition that employees understood from Franks and Wiginton that in order to be considered for reinstatement, they had to sign the log; that Franks' statement and Wiginton's confirmation of Franks' statement on August 4, 2008 regarding the log were a threat in that they articulated a specific consequence if the former strikers did not sign the log; that the coercive effects are underscored by the fact that several witnesses, includ-

ing Allen, understood what Franks held up was a blank paper, and as was concluded by the administrative law judge in *American Tissue Corp.*, 336 NLRB 435, 449 fn. 70 (2001) "[a] signed blank sheet of paper could be used in many ways, including a resignation or dismissal"; that apart from the 8(a)(1) threat aspect of Franks' and Wiginton's statements, the Respondent's actions violated Section 8(a)(3) of the Act by placing an unlawful condition on striker reinstatement rights, *Peerless Pump Co.*, supra; that the implementation and enforcement of the Return to Work Log constituted an unlawful change, since in *Food Service Co.*, 202 NLRB 790, 804 (1973) the Board held that the imposition of notification and registration requirements for former strikers is a mandatory subject of bargaining; and that Respondent's August 4, 2008 implementation of the Return to Work Log procedure was an unlawful unilateral change in violation of Section 8(a)(5) of the Act, *Atlantic Creosoting Co.*, 242 NLRB 192 fn. 4 (1979).

The Charging Party on brief argues that notwithstanding the Company's claims to the contrary, the Company never withdrew its demand that employees sign a return to work log; that Respondent's imposition of such a requirement is an unlawful infringement upon these employees, *Peerless Pump Co.*, supra; that Respondent already had their contact information and it produced no credible evidence that their information was not reliable or that it needed such a list to recall employees; that Respondent claimed that it did not use the return to work log when it recalled employees; that any attempt by Respondent to impose an expiration date on a former striker's right to be recalled, either by requiring the former strikers to sign a recall list by a date certain, or imposing a date upon which their *Laidlaw Corporation*, supra rights would expire is a violation of the Act; that "[i]t is well established that an employer's procedure 'designed to extinguish the preferential hiring rights of strikers' is 'inherently destructive of employee rights,' and unlawful, unless the employer can prove 'legitimate and substantial business justifications' for its actions," *Pirelli Cable Corp.*, 331 NLRB 1538, 1539 (2000), citing *Giddings & Lewis, Inc. v. NLRB*, 710 F.2d 1280, 1285 (7th Cir. 1983); that even if Respondent withdrew this requirement on August 26, 2008, it was a fait accompli, as the date upon which the company was insisting that former strikers sign the log was August 15, 2008, and obviously that date had passed and virtually all of the former strikers had signed the log by August 26, 2008; that since Respondent's insistence on a rule that would require the former strikers to sign a return log or forfeit their right to reinstatement was unlawful, the Union's decision to not agree to such a rule cannot be turned by the Company into a basis to declare impasse; and that the Company violated Section 8(a)(5) when it insisted upon and then implemented a rule in its return to work procedure that required the former strikers to sign a return to work log.

The Respondent on brief contends that the return to work log was just a Company proposal; that "[i]t is important to note that there is not one scintilla of evidence that the Company 'unilaterally imposed' any part of its Return to Work proposal, including its proposed return to work log, on the Union at either the

July 31 or August 1 meeting” (Respondent’s brief, page 39)⁴⁸; that Franks did not check to see if a former striker signed a return to work log before calling them to return to work; that on August 26, 2008 when the parties met through a mediator, the Company abandoned all of its return to work proposals, except the one referring to reinstatement based on skills and abilities; that while Franks admits “asking” employees to sign the log, he denies that he said that “they would be fired or lose their recall rights if they did not sign” (Id. at 41); that consistent with his denial that he told the employees on August 4, 2008 that they would be fired or lose their recall rights, “Franks began recalling employees before they had signed the return to work log” (Ibid.); that Franks’ testimony about what he told former strikers on August 4, 2008 is more credible than the testimony of Nolen and Pearce “simply because it is the only version consistent with the remainder of the evidence” (Ibid.)⁴⁹; and that it should be inferred that the Union, and not the Company, told employees that they had to sign the return to work log if they wanted to return to work.

An inference is warranted, but not the one sought by Respondent on brief. As noted above, since Respondent did not call Wiginton to deny Perry’s testimony that Wiginton said “Yes. In order to come back to work, you have got to sign it [Respondent’s return to work log]” (Tr. 278), Perry’s testimony on this point is not refuted. Perry’s unrefuted testimony is credited. Additionally, Counsel for General Counsel requests an adverse inference from Respondent’s failure to call Wiginton as a witness, namely an adverse inference should be drawn that if Wiginton had testified, he would have corroborated Pearce, Nolen, and Perry. Under the circumstances extant here, an adverse inference is warranted but only with respect to Perry’s testimony. It is reasonable to assume that third shift supervisor Wiginton would have been favorably disposed toward Respondent. Perry’s testimony about Wiginton is not refuted since Wiginton was not called by Respondent. Perry’s testimony is credited. General Counsel’s request for an adverse inference is hereby granted to the extent that Wiginton, if called, would have corroborated Perry and thereby would not have corroborated Franks.

As noted above, Respondent asserts on brief that consistent with his denial that he told the employees on August 4, 2008 that they would be fired or lose their recall rights, “Franks began recalling employees before they had signed the return to work log” (Respondent’s brief, page 41). The problem with this

⁴⁸ As noted above, all of the allegations regarding the return to work log specify August 4, 2008 and not July 31 or August 1, 2008.

⁴⁹ In making this argument, Respondent fails to indicate that another former striker, Perry, also testified that Franks on August 4, 2008 told the former strikers gathered at the plant guard shack that they had to sign Respondent’s return to work log in order to come back to work. Perhaps this is not an unintentional omission on the part of Respondent in that Perry also testified that when he heard what Franks said on August 4, 2008, he turned to his supervisor on the third shift, Wiginton, and asked him if they had to sign. According to Perry’s testimony, Wiginton replied “Yes. In order to come back to work, you have got to sign it.” (Tr. 278) Respondent did not call Wiginton as a witness to deny that he made this statement. Consequently Perry’s testimony on this point is not refuted.

assertion is that it is not true. According to Respondent’s Exhibit 4, it sent out 28 offers of reinstatement collectively on August 7, 8, 12, and 20, 2008. A comparison of the dates on the offer letters with the dates those employees signed Respondent’s Return to Work Log, General Counsel’s Exhibit 2, demonstrates that only one of the 27 offer letters is dated prior to the date the involved employee signed the Respondent’s return to work log.⁵⁰ And in that instance the date on the offer letter is August 7, 2008 and former striker Roger Palmer signed Respondent’s return to work log on August 8, 2008. It is also interesting that while Respondent’s witnesses testified that Respondent’s return to work log was not consulted in determining which former strikers would get offers of reinstatement, 23 of the first 25 offer letters went to former strikers who signed the first page (of six pages) of Respondent’s return to work log.

As here pertinent, on July 31, 2008, Respondent gave a return to work procedure to the Union which contained the following:

1. Each employee who desires to return to work shall notify the Company by signing the “Return to Work Log”. The “Log” will be maintained in the Human Resources Office between the hours of 9:00 a.m. to 11:30 a.m. and 12:30 p.m. to 3:00 p.m. Monday–Friday until August 15, 2008.

Bargaining unit employees who have not signed the “Log” by 3:00 p.m. Friday August 15, 2008 will be considered to have abandoned their employment with the Company.

None of Respondent’s witnesses testified unequivocally that Respondent’s number 1 proposal in its return to work procedure was rescinded before August 4, 2008. As noted above Sinele testified that she did not advise the Union prior to August 26, 2008 that the Company withdrew number 1 of its return to work proposal, and the Company did not formally issue a withdrawal. It is clear that Respondent’s return to work log procedure language was not rescinded prior to the point in time when about 100 former strikers showed up at the plant’s guard shack on August 4, 2008. Aubry’s testimony about what occurred before August 4, 2008 is equivocal at best and it is not credited. Moreover, Aubry was not present on August 4, 2008 when Franks and Wiginton made their declarations collectively to the approximately 100 assembled former strikers. As noted above, Counsel for General Counsel at one point elicited the following testimony from Franks regarding Respondent’s return to work log which was kept in the human resources office on a clipboard:

Q. And so in this—only the former strikers had to sign this, is that correct?

A. The ones that were interested in returning to work. [Tr. 206]

⁵⁰ An offer letter to Bobby Russell is included in Respondent’s Exhibit 4. Since I could not determine if he signed General Counsel’s Exhibit 2, I cannot determine if or when he signed vis-à-vis his August 8, 2008 offer letter.

Also, as noted above, Franks testified that at meeting with the former strikers on August 4, 2008, neither he nor, to his knowledge, any supervisor or manager indicated to the approximately 100 people gathered by the guards' shack that there was a deadline for signing the log or what the ramifications would be if the log was not signed by the deadline; that if a former striker did not sign the log, he or she would not have lost their job and they would still have been considered an employee at NTN; that he did not hear anyone saying that there was a deadline for signing the log; that he is not testifying that no one said it; and that someone could have said it and "I wouldn't have heard it." (Tr. 240) Franks testimony is equivocal at best. On brief Respondent argues that Franks' testimony should be credited over that of Pearce and Nolen. Respondent overlooks Perry. As concluded above, Perry's unrefuted testimony that Wiginton said that in order to come back to work at Respondent, the former strikers had to sign Respondent's return to work log is credited. Perry's testimony that Franks told the assembled employees on August 4, 2008 that in order to come back to work, the former strikers had to sign Respondent's return to work log is credited. Pearce's testimony that on August 4 Franks told the approximately 100 assembled former strikers that anybody that wanted to come to work was going to have to sign the clipboard, and if they did not sign the return to work log by August 15, 2008 at 3 p.m. their employment would be considered terminated is credited. Pearce was within 5 feet of Franks. And Nolen's testimony that on August 4, 2008, Franks told the approximately 100 strikers that if they wished to return to work, they had to sign the Respondent's return to work log is credited. As noted above, Nolen testified that Franks "told us we had—that was August 4th. He told us we had to August the 15th—I'm pretty sure he said August 15th, 3:00 or 3:30 that afternoon, p.m., to sign it if we wanted to go back to work" (Tr. 36); that Franks did not indicate what would happen to those who did not sign by the designated time on August 15, 2008; and that Franks just said "If you want to go back to work you need to sign this log." (Tr. 36) Also, as noted above, Nolen testified that she was more in the back than the front of the approximately 100 assembled strikers on August 4, 2008. Pearce was 5 feet from Franks during that time. He would have been in a better position to hear what Franks said. Additionally, the fact that Franks specified a deadline would lead a reasonable person to conclude that there would be consequences for not meeting that deadline. Even if Nolen did not hear Franks say that if the former striker did not sign Respondent's return to work log by August 15, 2008 at 3 p.m., his employment would be considered terminated, she did hear Franks say that "If you want to go back to work you need to sign this log" (Tr. 36), and she heard Franks give a deadline. A reasonable person hearing this would conclude that if they did not sign Respondent's log by the deadline, they would not be considered for returning to work. In other words, they would lose their reinstatement rights.

What allegedly occurred on August 26, 2008 is irrelevant regarding the allegations with respect to what occurred on August 4, 2008. It is also irrelevant with respect to Respondent's return to work log in that the August 15, 2008 deadline had already passed and the last of the former strikers who signed Respondent's

log had signed Respondent's return to work log over a week before August 26, 2008.

As correctly pointed out by Counsel for General Counsel on brief, requiring former strikers to take steps beyond the union's unconditional offer to return, such as completing additional paperwork, violates the Act. *Peerless Pump Co.*, 345 NLRB 371, 375 (2005) Administrative convenience is no justification for requiring employees to notify employers of their interest in returning to work rather than requiring employers to contact reinstated former strikers when work is available. *Giddings & Lewis, Inc.*, 264 NLRB 561, 567 (1982) Apart from the 8(a)(1) threat aspect of Frank's and Wiginton's statements, the Respondent's actions violated Section 8(a)(3) of the Act by placing an unlawful condition on striker reinstatement rights. *Peerless Pump Co.*, supra. The implementation and enforcement of the Return to Work Log constituted an unlawful change, since in *Food Service Co.*, 202 NLRB 790, 804 (1973) the Board held that the imposition of notification and registration requirements for former strikers is a mandatory subject of bargaining. And Respondent's August 4, 2008 implementation of the Return to Work Log procedure was an unlawful unilateral change in violation of Section 8(a)(5) of the Act, *Atlantic Creosoting Co.*, 242 NLRB 192 fn. 4 (1979).⁵¹

As correctly pointed out by the Charging Party on brief, "[i]t is well established that an employer's procedure 'designed to extinguish the preferential hiring rights of strikers' is 'inherently destructive of employee rights,' and unlawful, unless the employer can prove 'legitimate and substantial business justifications' for its actions." *Pirelli Cable Corp.*, 331 NLRB 1538, 1539 (2000), citing *Giddings & Lewis, Inc. v. NLRB*, 710 F.2d 1280, 1285 (7th Cir. 1983) Here Respondent did not show that there was a legitimate and substantial business justification for its action.

Respondent violated Sections 8(a) (1), 8(a)(1) and (3), and 8(a)(1) and (5) of the Act as collectively alleged in the paragraphs 12 (through Franks and Wiginton only), 15, 17, 19, 20, 35, 36, and 37 of the complaint as specified above at the outset of the Analysis.

Paragraphs 13 and 35 of the complaint collectively allege that on or about November 4, 2008, and November 17, 2008, Respondent, acting through its supervisor and agent Gary Franks, orally promulgated a rule denying employee union representatives access to the Company bulletin board; and that by this conduct, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Counsel for General Counsel on brief contends that Respondent violated Section 8(a)(1) of the Act by promulgating a rule denying employee union representatives bulletin board access; that the longstanding practice at the facility was that employee union representatives, who were not regularly sched-

⁵¹ In note 4 it is indicated as follows: "... the Board has held that the imposition of notification and registration requirements on former strikers constitutes a mandatory subject of bargaining. *Food Service Company*, 202 NLRB 790, 804 (1973). There is an obligation to bargain even with regard to the unilateral and unlawful implementation of changes in employment conditions. *Aero-Motive Mfg. Co.*, 195 NLRB 790, 792 (1972).

uled for work, could arrive at the facility and post notices on Union bulletin boards without being escorted by Respondent's supervisors; and that this longstanding practice was changed by Respondent.

The Respondent on brief contends that prior to the strike, Union officers who were active employees of the Company were permitted in the production areas of the plant for Union related business, such as posting notices of meetings on bulletin boards reserved for that purpose; that none of the former strikers holding office in the Union is among the former strikers returned to work following the Union's unconditional offer to return to work, and, therefore, they are not active employees of the Company even though they are "employees" within the meaning of the Act; that the Company has a longstanding published policy with respect to persons entering the plant who are not active employees (i.e., visitors) which requires visitors to check in at the guard shack, receive a pass, be escorted at all times within the plant, and to adhere to some fundamental safety rules; and that the only evidence of record is that the Company has uniformly applied its visitor policy in a consistent and non-discriminatory fashion to everyone who is not an active employee.

Perry's unrefuted testimony is that prior to the strike of 2007 if he needed to post a notice of a regular Union meeting on the bulletin board, he did not first have to receive approval or make an appointment with a supervisor. As noted above, on November 4, 2008, Perry and Caudle went to Respondent's facility to post a notice of a regular membership meeting, General Counsel's Exhibit 25, on the Union bulletin boards. They were advised that Franks was busy and they had to call Franks and make an appointment before they could come into the plant to post on the bulletin boards. Franks testified that Perry and Caudle are inactive employees of Respondent; and that before the strike in July 2007 if employees wanted to post a notice about a regular Union meeting, they did not have to call him to set up a time to post this material on the three Union bulletin boards. On November 17, 2008, Perry, who was in the Union office at the front of Respondent's facility at the time, told Franks that he had some information that he wanted to post on the Union bulletin boards. As noted above, Perry testified that Franks took the information, read it, said he had to review it, and then left the new Union office with the information in hand; that he did not get to post the information that day; and that the information was the letter Franks sent him on November 12, 2008, with the three extra lines he had Caudle write on it, General Counsel's Exhibit 39. Franks' denial that he took away from Perry the information that Perry wanted to post on November 17 is not credited. Perry's testimony is credited. Perry showed what was received as General Counsel's Exhibit 39 to Franks. Franks read it, said that he had to review it, and then left the Union office with the information in hand. Perry did not get to post what was received at the trial herein as General Counsel's Exhibit 39 that day. When he was shown General Counsel's Exhibit 39, Franks testified that it was a Union posting. As here pertinent, article XXIX on page 38 of the current collective bargaining agreement, Joint Exhibit 1, indicates as follows:

BULLETIN BOARD

The Company will make three (3) bulletin boards available for the exclusive use of the Union. The board will not be used to post political, religious, discriminatory, advertising or inflammatory matter. All material must be submitted to the Company for approval before posting, except the following: Union meetings, Union social activities, educational activities, Union elections and results thereof.

General Counsel's Exhibit 39 is the November 12, 2008 letter in which Franks quotes part of the collective bargaining agreement and advises Perry that the Company has designated an office for the Union to use in the main office area, with Caudle's short notation at the bottom, namely "NTN-Bower has temporarily assigned the Union officials a small office on the south wall of the main office. Hours are 2-4 pm on Monday, Wednesday and Friday." It appears that if a literal approach is taken, the document Perry wanted to post on November 17, 2008 (which was posted on November 19, 2008) does not fall within any of the exceptions noted above, namely "Union meetings, Union social activities, educational activities, Union elections and results thereof." That being the case, the document was a "material [which] must be submitted to the Company for approval before posting." In my opinion, the record made herein warrants the conclusion that Respondent was trying to limit the Union's access to employees and employees' access to the Union at the facility. Undoubtedly Franks wanted to discuss the posting of this document with other members of management before it was posted. Under the terms of the collective bargaining agreement management had a right to review it. It was not unreasonable for that review to go beyond the business day of November 17, 2008 in view of the fact that Franks received the information at 3:30 p.m. on November 17, 2008. Consequently, technically Franks did not orally promulgate a rule denying employee union representatives access to the company bulletin board on November 17, 2008.

With respect to November 4, 2008, the notice involved dealt with a regular Union meeting, which falls within the above-described exceptions. The reason given by Franks on November 4, 2008 for denying access was not that he had to review the proposed posting. Rather, the reason given was that Perry and Caudle had to call Franks and make an appointment with him to come into the plant. On brief Respondent cites *Tri-County Medical Center*, 222 NLRB 1089 (1976) where the Board declared that a rule denying off-duty employees access to the employer's premises is presumptively valid only if (1) it limits access with respect to the interior of the plant and other working areas, (2) it is clearly disseminated to all employees, and (3) it applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity. After the strike ended, Respondent allowed officers of the involved Local who had not yet been reinstated access to the new union office, a break room (a nonworking area), and the restroom in the front office area. Franks told Perry that while he was in the break room (the main cafeteria) he could not talk to employees. Subsequently, access was limited in that Perry was told that he could not sit in the break

room, he should get whatever he wanted in the break room and then return to the union office. Eventually Perry was told that he could not go into the break room. Perry's testimony that he has seen visitors use the break room was not refuted. Consequently, Respondent was not even treating Perry as a visitor. Later Franks told Perry that if he needed something in the break room, Franks would go with him. Franks did not credibly deny that after the strike ended when he escorted Perry and Caudle to the bulletin boards he walked and stood between the employees and the Union officer. Respondent was not merely limiting access to working areas. Respondent was limiting access to nonworking areas, i.e. breakrooms. More to the point, Respondent, by this conduct, by surveilling Perry when he went outside to smoke or went into the breakroom, and by relocating the union office was not only limiting Union access to employees but it was discouraging employees from accessing Union officers. The credible evidence of record demonstrates that the longstanding practice at the facility was that employee union representatives, who were not scheduled to be at work at that time—who were off duty, could arrive at the facility and post notices on Union bulletin boards without being escorted by Franks or Irvin. Franks originally agreed with this and then he equivocated claiming that this never came up. Franks conceded that there is no written plant rule that specifies that individuals who are employees within the meaning of the Act but are not on the active payroll at the time are to be treated as visitors; and that management did not negotiate with the Union about whether former strikers who are not on the active payroll should be treated as employees or visitors. As noted above, in my opinion, Franks technically did not promulgate a rule denying employee union representatives access to the Company bulletin board on November 17, 2008 since under the collective bargaining agreement management had a right to review that document and the fact that General Counsel's Exhibit 39 was not posted on November 17, 2008 (It was posted on November 19, 2008 by Perry escorted by Franks.) was, I conclude, due to the review and not a denial of access.⁵² As collectively alleged in paragraphs 13 and 35, on November 4, 2008, Franks promulgated a rule denying employee union representatives access to the Company bulletin board.

Paragraphs 14 and 35 of the complaint collectively allege that since on or about November 17 and 24, 2008, and December 1 and 10, 2008, Respondent, acting through supervisors and agents Gary Franks and Michael Shotts (with respect to November 24, 2008) engaged in surveillance of Union activities, by monitoring the movements of employee Union representatives in and around its facility; and that by this conduct, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

⁵² I am not crediting Franks' testimony, elicited by one of Respondent's attorneys, that he did not "take away" General Counsel's Exhibit 39 from Perry on November 17, 2008. Perry gave the document to Franks to look at and Franks kept the document for review. Perry's testimony in this regard is credited. Franks took the document with him on November 17, 2008.

Counsel for General Counsel on brief contends that employers violate Section 8(a)(1) by monitoring or exercising surveillance over union representatives or employees engaged in protected union activities, or giving the impression of such surveillance, *Crown Cork & Seal Co.*, 254 NLRB 1340 (1981); that by escorting employee union representatives to post notices, Respondent restrained, coerced and interfered with employees in the exercise of their rights guaranteed by Section 7, in violation of Section 8(a)(1) of the Act; that the Board in *P.S.K. Supermarkets*, 349 NLRB 34, 38 (2007), determined that an employer's supervisor unlawfully monitored the union activities of its employees who stood smoking in a smoking area; that Perry's testimony concerning Franks surveillance of his union activities in the smoking area was corroborated by a current employee of Respondent, Lindsey; and that Shotts did not testify at the trial herein and consequently Perry's testimony that on November 24, 2008, when he was talking with employees in the break room, Shotts took him out of the break room and told him that he was not allowed to sit in the break room but rather he should get what he needed and return to the union office is not refuted and should be credited.

The Charging Party on brief argues that here Respondent went out of its way to monitor Perry's movements; that Shotts told Perry when he was in a break room talking to employees that he should get what he needed and go back to the Union office; that when Perry wanted to post a notice of Union business on the Union bulletin board, Franks would follow him and position himself between the employees working in the plant and Perry; that Franks, who does not smoke, went with Perry outside the facility which in turn discouraged unit employees from stopping to speak to Perry; and that the law is clear that an employer violates the Act when it engages in surveillance of its employees, *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006).

The Respondent on brief contends that Lindsey did not testify that Shotts, who was standing inside the glass entry doors to the plant, was spying on Perry when he was standing outside the front of the facility near the newspaper stand; and that while

Lindsey and others testified that they observed Gary Franks standing outside of the entrance to the plant when employees and Tony Perry were in the same smoking area, [t]he area where the surveillance was alleged to occur is the main entrance to the plant which employees use to enter and exit, [and] there is no suggestion that it is an area which would reasonably provide an element of privacy. [R. Br. p. 98]

Respondent further contends that neither General Counsel nor the Union proffered a witness to dispute Frank's testimony that it is his practice to frequent the area outside the plant entrance as employees are coming and going; and that he is not required to abandon that practice merely because the Union President has decided to emulate his conduct in an effort to communicate with employees.

Contrary to the assertion of Respondent on brief, the complaint allegation regarding Shotts refers to November 24, 2008 when Shotts, in effect, escorted Perry out of the break room and spoke with Perry about his use of the break room. Shotts did not testify and so the testimony of Perry that he was speaking with employees in the break room on November 24, 2008 is not

refuted. The testimony of Perry is credited. Shotts was monitoring what Perry was doing in the break room on November 24, 2008. Eventually this led to Perry being told he could not even go into the break room. Subsequently this was modified by Franks offering to escort Perry to the break room. This is also what Franks did with respect to Perry's use of the outside smoking area. Franks did not specifically and credibly deny Perry's testimony that about 3:10 p.m. on December 1, 2008 he left the new Union office and walked past Franks' office; that Franks got up and followed him outside to where he was smoking; that he has never seen Franks smoke (As noted above, Franks does not smoke.); that when he goes out to smoke Franks goes with him; that subsequently he told Franks that some of the former strikers told him that they felt uncomfortable about talking to him in the smoke area at the front of the facility because Franks was out there when he, Perry, was out there; that when he told Franks that former strikers would not talk to him in the smoke area because Franks was out there, Franks told him that it was a free world and he could go outside anytime he wanted to; that Franks still continued to be outside every now and then after this conversation; and that 95 percent of the time Franks was outside with him and on a couple of occasions Franks would be standing inside the front doorway. This is not a situation where Franks happened to be in the same area at the same time as Perry. This is a situation where Franks followed Perry to the smoking area just as Franks followed Perry when he posted on the Union bulletin boards. This was not surreptitious surveillance. This was "in-your-face" surveillance designed to preclude, to the extent possible, the Union's access to employees and the employees' access to the Union. As noted above, Franks followed Perry from bulletin board to bulletin board on November 19, 2008 (which is "on or about" November 17, 2008, the date alleged in this paragraph of the complaint.). Franks did not credibly deny that when Perry wanted to post a notice of Union business on the Union bulletin board on December 10, 2008 regarding a regular membership meeting, Franks followed him and positioned himself between the employees working in the plant and Perry. Respondent did not show that it escorted visitors in the cafeteria⁵³ or outside the plant on the grounds of the facility. So the fact that management escorted Perry outside and Franks offered to escort Perry in the cafeteria after he was told he could not enter the cafeteria involved something else beyond Respondent's position that it was treating him as a visitor. Perry worked at the involved facility for 34 years. Under Section 2(3) of the Act, Perry was considered an employee at the time. Respondent's assertion that Franks escorted Perry after the strike was over when he posted on the bulletin boards because management wanted to avoid disruptions is undermined by the fact that Respondent did not show that when Local officials posted on the bulletin boards before the involved strike there were disruptions, and Respondent did not show that there were any disruptions at the facility after the strike due to the presence of any Local Union official. Franks escorted Perry on November 19, 2008 and December 10, 2008 when he posted on the bulletin boards so that man-

⁵³ Respondent also did not show that it precluded visitors from talking with Respondent's employees in the cafeteria, a nonworking area.

agement could monitor Perry. This was unlawful surveillance. General Counsel has demonstrated that Respondent violated that Act as alleged in paragraphs 14 and 35 of the complaint.

Paragraphs 16, 17, and 36 of the complaint collectively allege that since on or about July 23, 2008, Respondent has failed and refused to offer reinstatement or to reinstate employees who ceased work concertedly and engaged in a strike from July 26, 2007 to on or about July 23, 2008, when an unconditional offer to return to work was made on their behalf by the Union, to their former or substantially equivalent positions of employment, where those positions have not been filled with permanent replacement employees because the employees formed, joined, and assisted the Union and engaged in concerted protected activities and to discourage employees from engaging in these activities; and that by this conduct, Respondent discriminated in regard to the hire or tenure or terms or conditions of employment of its employees discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

Counsel for General Counsel on brief contends that temporary employees are temporary and must be replaced by returning former strikers unless an employer has a legitimate and substantial business justification for not doing so; that it is a violation of Section 8(a)(1) and (3) to fail to reinstate former strikers, who have not been permanently replaced, once the Union made an unconditional offer to return to work, *The Laidlaw Corp.*, 171 NLRB 1366, 1369-1370 (1968)⁵⁴; that the burden falls on the employer to prove that strike replacements were indeed permanent by showing that there was a "mutual agreement" with the replacements that they were actually permanent, *Target Rock Corp.*, 324 NLRB 373 (1997); that Respondent relies on article XXXIX of the contract as conferring an unlimited right to it to accomplish production work with temporary employees but the language of this article gives no indication of what conditions or limitations are attached; that in contrast, the parties' Supplemental Labor Pool agreement specifically provides that "Temporaries will . . . (h) not be employed until a minimum of 5 % of the workforce has been employed as Labor Pool employees"; that straightforward contract interpretation dictates that the two sections be read together such that article XXXIX is limited by subsection (h) of the Supplemental Labor Pool Agreement; that to read article XXXIX as conferring an unlimited right to utilize temporary employees would render the limiting language utterly meaningless and, as the Fifth Circuit has observed "the law abhors an interpretation that results in the language of a contract having no meaning at all," *In re Hill*, 981 F.2d 1474, 1487 (5th Cir. 1993); that beyond the plain language of the contract, the bargaining history demonstrates that the parties intended for subsection (h) of the Supplemental Labor Pool Agreement to limit the circumstances where Respondent could use temporary employees; that the testimony of Brown and Roberts was undisputed that Respondent's chief negotiator, Aubry, told them more than 15 to 20 times that the temporary employees were contemplated for use only in limited situations; that Brown's

⁵⁴ Enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

testimony was undisputed that on December 4, 2007, he specifically asked Aubry about the reach of article XXXIX and that Aubry confirmed that it was limited to the use of temporaries “in conjunction with the supplemental labor pool” (Tr. 1430); that the contract did not privilege Respondent to utilize temporary employees, and, therefore, Respondent had no “legitimate and substantial business reason” to utilize temporary employees after the strike ended, as opposed to recalling strikers for those 15 slots, *The Laidlaw Corporation*, supra; that for Respondent to prevail on its claim that article XXXIX conferred an unmitigated right to utilize temporary employees, the standard would be for it to show that the Union clearly and unmistakably waived employees’ *Laidlaw* rights to reinstatement, *Metropolitan Edison Co. v. NLRB*, 460 U.S.693, 708 fn.112 (1983) (a waiver of bargaining rights will be found only in clear and unmistakable conduct); that the Board is reluctant to infer a waiver, and the Union did not clearly and unmistakably waive employees’ *Laidlaw* rights by accepting article XXXIX of the collective bargaining agreement; that Brown testified without contradiction that it was neither the Union’s position nor the Respondent’s proposal to displace bargaining unit members with temporary employees; that since Respondent did not staff the bargaining unit labor pool, once the strike ended Respondent did not have the right to use temporary employees to do bargaining unit work; that Respondent’s contention that there were no jobs for the former strikers is unsupported in that there were temporary replacements that Respondent retained or hired after the Union made the unconditional offer to return on July 23, 2008; and that Respondent violated Section 8(a)(1) and (3) of the Act by failing to terminate and continuing to hire temporary employees while declining to recall former economic strikers to those positions occupied by temporary employees.

The Charging Party on brief argues that Respondent retained as many as 26 temporary employees and hired an additional 17 after the strike ended and the unconditional offer to return was made; that in 1967 the Court held that an economic striker retains his or her status as an employee and is entitled to reinstatement to his or her former position or a substantially equivalent one unless the employer can establish a legitimate and substantial business justification for refusing to reinstate the former striker, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); that a striker who has only temporarily been replaced during the strike is immediately entitled to his or her job back at the conclusion of the strike, and the use of the temporary employee must be terminated; that here Respondent essentially conceded that it had temporary employees in bargaining unit positions; that Respondent’s apparent defense is that it could contractually use temporary employees and the Union somehow waived not only the former strikers’ right to reinstatement but that in negotiations the Union gave the Company the unlimited right to use temporary employees; that waivers of statutory rights are not to be lightly inferred, but instead must be “clear and unmistakable,” *Metropolitan Edison Co. v. NLRB*, supra; that proof of a contractual waiver is an affirmative defense and it is the Respondent’s burden to show that the contractual waiver is explicitly stated, clear and unmistakable, *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000), and *General Electric Co.*, 296 NLRB 844, 857 (1989) enf. w/o op. 915

F.2d 738 (D.C. Cir. 1990); that there is nothing in the record or the testimony at the hearing that would even remotely indicate that the Union agreed to limit the former strikers’ *Laidlaw* rights or “clearly and unmistakably” waived employees’ rights under *Laidlaw*, supra, *Pirelil Cable Corp.*, 331 NLRB 1538, 1540 (2000); that the topic of allowing temporary employees to remain working while former strikers remain unreinstated was never discussed during the three return to work procedure meetings and, therefore, there was no clear and unmistakable waiver by the Union of the employees’ *Laidlaw* rights at these meetings⁵⁵; that during contract negotiations the parties agreed that temporary employees could only be used in conjunction with the supplemental labor pool, if that pool was created; that the Company never created the labor pool and the Union did not give the Company the right to utilize temporary employees to perform bargaining unit work without restriction nor did the Union give the Company the right to use temporary employees in the place of former strikers who had made an unconditional offer to return to work; that Brown testified, without contradiction, that the Company’s chief negotiator, Aubry, confirmed during contract negotiations that the intent was that temporaries would only be used in conjunction with the labor pool; and that Respondent’s continued use of temporary employees to perform bargaining unit work and the failure to reinstate the former strikers who had made an unconditional offer to return to work is a clear violation of Section 8(a)(3) of the Act.

The Respondent on brief contends that a former strikers’ right to return to work extends only to “their former positions or substantially equivalent ones if and when such positions are available,” *Certified Corp.*, 241 NLRB 369 (1979); that “an employer’s obligation to reinstate former economic strikers extends only to vacancies created by the departure of replacements from the striker’s former jobs and to vacancies in substantially equivalent jobs, but not to any other job which a former striker is or may be qualified to perform,” *Rose Printing Co.*, 304 NLRB 1076 (1991); that the existence of a temporary job is not the equivalent of a vacancy to which a striker should have been reinstated; that the temporary agency employees utilized from late December 2007 through April 2009 did not hold positions substantially equivalent to the former strikers in that (a) they had substantially lower rates of pay, (b) they received no Company benefits, and (c) their tenure was short; that the Union bargained away the argument that the jobs taken by the temporary employees were substantially equivalent to the positions held by former strikers when the Union agreed to Respondent’s language excluding temporary employees from the collective bargaining agreement; that the Union’s and General Counsel’s claim that the Company’s right to utilize temporary employees is limited to the Supplemental Labor Pool set forth in the letters of understanding to the collective bargaining agreement is unsupported by the plain language of the Agreement as well as the bargaining history; that even assuming that Respondent’s chief negotiator, Aubry, said during negotiations that the use of temporaries was in conjunction with the supple-

⁵⁵ As noted above, Sinele testified that at the August 1, 2008 return to work procedure negotiating meeting Brown, as here pertinent, said that the Company needed to get rid of all temporaries.

mental labor pool, the question put to the Company's chief negotiator (in conjunction with the supplemental labor pool?) is fatally ambiguous in that the question and answer are susceptible to an interpretation supportive of the Company's position; that the Union's chief negotiator did not ask if, under the Company's proposal, the use of temporaries was limited to the labor pool; that Aubry answered "[n]o" when one of the attorney's for Respondent, Davis, asked him "And did you ever advise the Union that the use of temporary employees by the Company would be limited to the supplemental labor pool referred to in that document?"; and that there was never an agreement to limit temporary employees to the Supplemental Labor Pool.

I found Brown to be a credible witness. I did not find Aubry to be a credible witness. As demonstrated by his testimony regarding Respondent's return to work proposal's, Aubry tried to leave the impression that the requirement that former strikers sign Respondent's return to work proposal by August 15, 2008 or lose their reinstatement rights was rescinded within a day or two of July 31, 2008 or August 1, 2008. None of Respondent's other witnesses who were involved in negotiating Respondent's return to work proposals corroborated Aubry regarding the position he took with respect to the requirement that former strikers sign Respondent's return to work log was rescinded within a day or two of July 31, 2008 or August 1, 2008. Aubry did not testify on surrebuttal and so he did not specifically deny the following rebuttal testimony of Brown:

Q There's some bold language as well, and then on Page 105, Article 39 temporaries is there [in Respondent's Exhibit 68 which is the "Company Last Best Final Offer 11-8-07"]. Did you go over these at that December 4th [2007] meeting, these changes that I just mentioned to you?

A. Not all of them specifically, no sir.

Q. Okay, what about the one, let me ask specifically about the one on Page 105, Article 39 temporaries, did you raise that at the December 4th meeting?

A. Yes, I did.

Q. With whom did you raise that?

A. Gary Aubry.

Q. What did you say?

A. I asked him why this language was here after we had, with the labor pool set up, why the language relative to temporaries was there.

Q. What did he say?

A. He said, it's just to make it clear that we can use temporaries.

Q. Did you respond?

A. I did, I said, in conjunction with the supplemental labor pool and he said yes.

Q. Was there any further discussion about that topic at that moment?

A. No, sir.

Q. Did Mr. Aubry at any point, on December 4, 2007, or after, indicate to you in any way that the company proposed utilizing temporaries other than as ... [set] forth on the very last page of Respondent's Exhibit 68 supplemental labor pool employees?

A No, he did not at any point, that day or any other point. [Tr. 1430 and 1431]

Also, since Aubry did not testify on surrebuttal, he did not deny the rebuttal testimony of Brown, the Union's chief negotiator, and Roberts, who was on the Union's negotiating committee, that during negotiations, which lasted from the beginning of 2006 until July 2008, Aubry said about 20 times that the Company was proposing to use temporaries to reduce or eliminate requirements for extensions of shift to cover absences, temporary increases for temporary manpower needs, increases in production or if they had a bad quality run, and they would do jobs not typically done in the plant including sorting bearings and things of that nature.

Is one of Respondent's attorneys, Davis, playing a word game just as he did with respect to Franks assertedly not "taking away" General Counsel's Exhibit 39 from Perry on November 17, 2008, (which, if Franks were believed, would have resulted in a finding that Respondent violated the law), and just as he did with respect to getting Corado to testify that it was "Tony Perry" who damaged Corado's car while Respondent's Exhibit showed that it was not Tony Perry but rather Perry Franks? As noted above, Aubry answered "[n]o" when Davis asked him during the presentation of Respondent's case "And did you ever advise the Union that the use of temporary employees by the Company would be limited to the supplemental labor pool referred to in that document." (Tr. 1111) Is it Davis' position that in the context involved here "advise" and "answer" are not the same thing? This question of Davis to Aubry on page 1111 of the transcript was leading. Moreover, as indicated above, I do not find Aubry to be a credible witness. I do not credit this testimony. During negotiations Respondent through its chief negotiator, Aubry, agreed that the use of temporaries would be in conjunction with the supplemental labor pool, and Aubry never indicated to Brown in any way that the Company proposed utilizing temporaries other than in conjunction with the supplemental labor pool.

As concluded by the Court in *NLRB v. Fleetwood*, 389 U.S. 375, 378 (1967):

Section 2(3) of the Act ... provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If after the conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by ... the Act. Under §§(a)(1) and (3) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial' business justifications, he is guilty of an unfair labor practice. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.*

As noted above, Sinele testified that from January 2007 to the beginning of the strike involved herein in July 2007, she did not believe that Respondent used temporaries to do bargaining

unit work; and that during negotiations for the current contract there was no agreement with respect to allowing NTN to hire an unlimited number of temporary employees.

Franks, as noted above, testified that on July 23, 2008 Respondent had 15 to 20 temporary employees working at its Hamilton facility; that the 15 to 20 temps would be doing bargaining unit work or non-bargaining unit quality work; that he believed that a majority of the temporary employees would have been doing bargaining unit work; that he thought that Respondent hired temporary employees after the strike ended; that after the strike was over, when people quit or left and needed to be replaced Respondent brought in a temporary employee instead of recalling a former striker because that is what he was told to do because it was only temporary work which sometimes was bargaining unit work; and that plant manager Allen told him to bring in temporary employees.

Attached to Respondent's Exhibit 76 is a nine-page seniority list and a list of 21 temporaries. Both are dated "7/25/2008." Sinele sent this information to Brown in response to his request for information regarding permanent, probationary, and temporary employees. The first person on the temporaries list was hired on "01/09/08" and the 21st person on the list was hired on "07/16/08." The 2nd through the 20th person on the list were hired sometime between these two dates. A comparison with Joint Exhibit 3 shows that collectively these 21 temporary employees worked for Respondent anywhere from over 1 month to over 1 year

As noted above, Sinele testified that at the August 1, 2008 negotiating session regarding Respondent's return to work procedures, Brown, as here pertinent, said that Respondent needed to get the temporaries out of there.

With respect to General Counsel's Exhibit 13, Sinele testified that she attached a list of temporary employees to her August 8, 2008 e-mail to Brown. The exhibit includes a one-page attachment titled "TEMPORARIES LIST." The list has the names of 19 individuals with their hire dates, which begin on "01/09/08" and end on "07/31/08." Sinele testified that at the time of these e-mails there were a number of former strikers that the Company had not called back to work, and Respondent was utilizing temporary employees.

The last page of Joint Exhibit 3, which is dated "6/9/2009," shows that Respondent hired 17 temporary employees after the strikers made an unconditional offer to return to work. As set forth in this exhibit, two were terminated the same day they were hired, one was terminated the day after he was hired, and two others lasted 3 days. The others worked anywhere from days up to almost 8 months.

As noted above, Respondent on brief argues that the existence of a temporary job is not the equivalent of a vacancy to which a striker should have been reinstated in that the temporary agency employees utilized from late December 2007 through April 2009 did not hold positions substantially equivalent to the former strikers since (a) they had substantially lower rates of pay, (b) they received no Company benefits, and (c) their tenure was short. Franks testified that a majority of the temporary employees were doing bargaining unit work. And Sinele, in testifying that temporary employees were being used by Respondent while there were a number of former strikers

that the Company had not called back to work, did not deny that temporary employees were doing bargaining unit work. The fact that an employer uses a temporary employee to do the job of a bargaining unit member does not make that job a temporary job. A case that Respondent cites, *Certified Corporation*, 241 NLRB 369 (1979), dealt with a part-time temporary job. Here, we are not dealing with part-time jobs. When one considers that full-time bargaining unit jobs were being filled by temporary employees, it is clear that the requirement of substantially equivalent is met. The fact that Respondent chose the temporary employee route does negate the fact that the jobs performed by the temporary employees are substantially equivalent. Temporary employees were performing the bargaining unit members' jobs.

Also, as noted above, Respondent on brief contends that the Union bargained away the argument that the jobs taken by the temporary employees were substantially equivalent to the positions held by former strikers when the Union agreed to Respondent's language excluding temporary employees from the collective bargaining agreement. The waiver of a statutory right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, supra. None of the documents received at the trial herein demonstrate that the Union clearly and unmistakably waived the involved statutory right. There is no express mention in the agreement of an intention by the Union to waive the employees' statutory right of reinstatement. NTN has not demonstrated that the Union expressly, at the bargaining table, made a conscious relinquishment, clearly intending and expressly bargaining away the employees' statutory right to reinstatement. The Board indicated in *General Electric Co.*, supra, citing *Columbus Electric Co.*, 270 NLRB 686 (1984) and *Rockwell International Corp.*, 260 NLRB 1346 (1982), that a waiver may also be found when the contract language is not so specific, but the history of contract negotiations demonstrates that the subject was discussed and consciously yielded or the Union clearly and unmistakably waived its interest in the matter. NTN did not make any such showing.

The burden of proving justification is on the employer. Respondent has not met its burden in that it has not shown that its action was due to "legitimate and substantial business justifications." The record does not support NTN's assertion that the jobs done by the temporary employees were not substantially equivalent. With respect to waiver, again the burden of proving this is on Respondent. Again, Respondent has not met its burden. Accordingly, it is concluded that Respondent violated that Act as alleged in paragraphs 16, 17, and 36 of the complaint.

Paragraphs 21, 22, and 37 of the complaint collectively allege that Respondent has unilaterally and in the absence of a good faith bargaining impasse in negotiations, (a) on or about November 13, 2008, relocated the Union's office at the facility, (b) on or about November 17, 2008, established rules that impede employees' access to Union representatives, (c) on or about November 17, 2008, orally promulgated a rule restricting employee Union representatives access to the employee break room, (d) on or about November 28, 2008, denied Union representatives access to its facility, and (e) beginning on or about March 6, 2009, and continuing thereafter, modified the work week of the employees in the Unit; that the subjects set forth in

(a) through (e) above in this paragraph relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that an employer cannot unilaterally change the terms and conditions of employment without bargaining collectively with the Union, unless the parties reach impasse or there is an express waiver in the contract, *Uniserv*, 351 NLRB 1361 (2007), and *New Seasons, Inc.*, 346 NLRB 610 (2006); that if Respondent wanted to treat representatives of the involved Local Union based on the fact that they are reinstated economic striker employees rather than actively working employee Union representatives, it was required to first provide the Union notice and opportunity for bargaining; that the Board in *American Ship Building Co.*, 226 NLRB 788 (1976), determined that a company is not required to collectively bargain with the union when it unilaterally decides to make changes to union office space if the company (a) gives notice to the union of its intentions to move the union office, (b) explains its reasons for doing so, (c) discusses alternate sites for the office with the union and (d) gives adequate time for the union to vacate the office; that here Respondent (1) did not give notice to the Union prior to November 12, 2008 that it was relocating the Union office, (2) failed to articulate any reason in its November 12, 2009 letter why the Union office was being relocated, (3) failed to tender alternative locations for the consideration of employee union representatives, (4) did not give Union representatives adequate time to vacate its previous location, and (5) failed to turn over to the Union the information in the file cabinet in the old Union office, including former grievances, booklets pertaining to insurance and retirees, copies of grievances, temporary loan slips, and other records for bargaining unit members; that Respondent's unilateral relocation of the Union office has had a material, substantial and significant effect on the Section 7 rights of the bargaining unit employees, because employees are not visiting the relocated Union office; that Respondent unilaterally implemented rules impeding employees' access to Union representatives at the facility; that the Board has determined that plant rules are mandatory subjects of bargaining and, therefore, employers cannot unilaterally implement or change such rules, *Schraffts Candy Co.*, 244 NLRB 581 (1979); that rules which prohibit union discussion and solicitation during breaks, lunch periods, and other nonworking time violate the Act, *FMC Corporation*, 211 NLRB 770, 775 (1974); that Respondent denied the Union access to Respondent's facility on November 28, 2008 while there were employees working in the heat treat department; that Respondent's reliance on Article III, Section 9 of the contract, titled "International Representative" is misplaced in that Perry is a representative of the Local Union; that the parties had already agreed that the Union could staff the Union office on Monday, Wednesday, and Friday; that the parties did not negotiate about the changes to the work week beginning March 2009 and continuing thereafter; that it is well

settled that issues affecting employee schedules are mandatory subjects of bargaining, *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006); that during the involved period, Brown and Davies requested on numerous occasions that Respondent bargain with the Union about the work week modification; and that Respondent's modification of the work week beginning in March 2009 and continuing thereafter violated Section 8(a)(1) and (5) of the Act, because the parties did not negotiate about the modifications.

The Charging Party on brief argues that the employer providing an office to the Union for employees and Union officials to use is a mandatory subject of bargaining, *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), and, therefore, unilateral changes made to such privileges without bargaining to impasse is a violation of Section 8(a)(5); that the move of the Union office, like the rules unilaterally promulgated to keep Perry from accessing the break room or talking to employees, was calculated to interfere with the Union's ability to represent the bargaining unit employees after the strike ended; that Respondent did not offer to bargain about any of these restrictive access rules but presented them as a *fait accompli*; that work schedules are mandatory subjects of bargaining; that the Board has held that even in the circumstances involving economic exigency, employers must provide the union with adequate notice and an opportunity to bargain about the change, *RBE Electronics of S.D.*, 320 NLRB 80, 82 (1995); that the Board has limited the circumstances that would qualify as sufficient exigencies as those that are extraordinary events that are unforeseen and have a major economic effect, requiring the employer to take immediate action, *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995); that when economic exigencies are not unforeseen, the Board holds that the exigencies do not permit employers to implement unilateral changes, *Harmon Auto Glass*, 352 NLRB 152 (2008); that Respondent presented no evidence that the economic exigencies that Respondent claimed existed, namely a sharp decline in sales, was unforeseen; that the involved management rights clause rather than granting the Company the broad right to unilaterally change work schedules as it claims, the contract actually limits those rights by other provisions of the agreement; that the Union did not waive its right to bargain over this issue in that the Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers of statutory rights, *Windstream Corp.*, 352 NLRB 44, 50 (2008); that the language in the management rights clause is simply not specific enough to find that the Union clearly and unmistakably waived its right to bargain over this issue; and that even if past Union Local president Peoples had agreed in the past to allow Respondent to reduce the work week schedule, Respondent was not privileged to do the same this time without bargaining with the Union to a good faith impasse since past acquiescence in a unilateral change does not operate as a waiver of its right to bargain over such changes in the future, *Windstream*, *supra*.

The Respondent on brief contends that the Company has a well established visitor rule, applied it uniformly, and enforced it in a nondiscriminatory fashion; that the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), held that such a rule is valid if it (1) limits access solely with respect to the interior

of the plant and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaged in union activity; that after the Union's unconditional offer to return to work, the Company advised the Union that its officers who were not active employees would not be allowed to enter the plant except under the visitor policy; that there is nothing in the collective bargaining agreement giving the Union the right to an office in the plant; that there is a provision in the collective bargaining agreement for non-employee Union representatives to conduct business in the plant, and while it is titled "International Representatives," its express terms do not limit its application to persons employed by the International Union; that, therefore, the parties have agreed that representatives of the Union not in the Company's employ shall be allowed to conduct business on Company premises in the location designated by the Company; that while the Union alleges that it was denied access to the plant on November 28, 2008, that date was a holiday recognized in the collective-bargaining agreement, Joint Exhibit 1, page 30, and, with the exception of a skeleton crew of 6–9 employees in the heat treat area, the entire plant was closed for the holiday; that a decision to partially close a plant or otherwise reduce employees may be taken unilaterally so long as labor costs are not a factor which prompted the change, *Dubuque Packing Co.*, 303 NLRB 386 (1991); that the Company's action was based solely upon entrepreneurial concerns regarding the scope of its business which does not invoke a duty to bargain, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); that article II specifically grants the Company the right to schedule production, *S-B Mfg. Co.*, 270 NLRB 485, 489–491 (1984) (finding that the employer's management rights clause providing the employer with the right to determine the "number of hours and schedules of employment" established a clear and unmistakable waiver of the union's right to bargain over the reduction in employees' hours of work); that the collective bargaining agreement contains a special provision for temporary reductions not exceeding two weeks, Article VI, Section 6 at page 16⁵⁶; that in the early part of 2007 Allen and Franks met with Peoples, "[t]hey had a short conversation wherein Allen informed Peoples that the Company had to schedule a week of shutdown to reduce production [and] [t]he Union did not grieve the matter nor did it file any unfair labor practices (Tr. 1183–1184)" (R. Br. p. 47); that in April 2001 when Respondent's then plant manager Nixon met with then Union president Harris and his grievance committee and informed them that the Company would be reducing work weeks, no grievance or unfair labor practice was filed; and that as demonstrated by the following testimony, the Company met with Perry and informed him of the March 2009 situation:

Q. BY MR. POWELL: Mr. Perry, did you meet and bargain with the company, Gary Franks or any supervisors or managers concerning the shortened work weeks that started in March 2009 and continued thereafter?

A. Yes, sir. [Tr. 1386]

As noted above, Brown testified that not long after he began servicing the bargaining unit at Respondent's Hamilton plant in 2005 there was a grievance processed relative to safety issues of the location of the Union office before it was located in what is described here as the old location of the Union office (See the circle with an "O" in it on General Counsel's Exhibit 28.); that as a resolution of that grievance, the Company agreed to relocate the Union office to where it was located just prior to the July 2007 strike; that the location of the old Union office in the west end of the roll grind department was the product of negotiations between the Company and the Union in the settlement of a grievance; and that the location of the Union office was discussed at the beginning of contract negotiations in 2006, and the location was finalized when the grievance was resolved. Respondent does not deny this testimony. When Respondent unilaterally changed the location of the Union office in November 2008 it did not give the Union notice and an opportunity to bargain. In its November 12, 2008 letter Respondent took the position that officials of the involved Local are not current employees because they had not been reinstated and Respondent, in effect, was going to treat them as International Representatives, not in the employ of the Company, under the collective bargaining agreement. On November 17, 2008 Perry was told that he could not go to the old Union office because he would hinder and disrupt production. This is the same reason Respondent provided at the trial herein. However, it does not withstand scrutiny in that Respondent did not show that there was any hindrance or disruption of production because of the location of the Union office before the strike commenced in 2007. Also, Respondent has not shown that any disruption has occurred on its premises because of the presence of Union officials at Respondent's facility since the involved strike has ended. Respondent made it clear to the Union that this was not a proposal. The change in the location of the Union office was not open to discussion. Officials of the involved Local are not International Representatives. Under the circumstances extant here, the location of the Union office was a mandatory subject of bargaining and when Respondent unilaterally changed the location on or about November 13, 2008, it violated the Act as alleged in the complaint. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985).

With respect to the allegation that on or about November 17, 2008, established rules that impede employees' access to Union representatives, as noted above, when Perry came to Respondent's facility on November 17, 2008 Franks told him that he could not go to the old Union office but rather he had to use the new Union office up front near the management offices. Also, Franks told Perry that if he needed anything from the break room, he should go to the main cafeteria but while he was in this nonworking area he could not talk to Union employees. The parties did not negotiate regarding these November 17, 2008 dictates of Franks dealing with mandatory subjects of

⁵⁶ The section reads as follows:

Temporary Layoff

Temporary reductions in force due to breakdown, material shortages, or due to any reasons known at the time of layoff to be temporary may be made by the Company. In making temporary layoffs, the Company will select those employees in the department or departments affected applying the seniority principle. Temporary layoff is defined as a layoff of two consecutive weeks or less.

bargaining. As alleged in the complaint, Respondent impeded employees' access to Union representatives on November 17, 2008.

In this same conversation Franks, as alleged in the complaint, orally promulgated a rule restricting employee Union representatives access to the employee break room. Franks told Perry that he could only use one of Respondent's break rooms and while he was in that break room, a nonworking area, he could not talk to Union employees. Respondent violated the Act as alleged dictating a rule regarding a mandatory subject of bargaining without first giving the Union notice and an opportunity to bargain.

With respect to denying Union representatives access to Respondent's facility on November 28, 2008, it is noted that, as asserted by Respondent on brief, under the terms of the involved collective bargaining agreement, November 28, 2008 was a designated holiday. But it is also noted that Article III, Section 9 on page 10 of Joint Exhibit 1 referred to by Franks in his November 12, 2008 letter indicates that the International Representative, not in the employ of the Company, would "... be allowed to enter the Company premises at reasonable times while there are employees at work" While November 28, 2008 was a holiday, there were employees working in the facility that day. Consequently, Respondent violated the Act as alleged.⁵⁷

Regarding the allegation that beginning on or about March 6, 2009, and continuing thereafter, Respondent modified the work week of the employees in the Unit without giving the Union an opportunity to bargain with the Company about this mandatory subject of bargaining, Respondent argues on brief that Article II specifically grants the Company the right to schedule production, and in support of its position it cites *S-B Mfg. Co.*, 270 NLRB 485, 489-491 (1984) (finding that the employer's management rights clause providing the employer with the right to determine the "number of hours and schedules of employment" established a clear and unmistakable waiver of the union's right to bargain over the reduction in employees' hours of work).

In *S-B Mfg. Co.* at 490 it is indicated that the management rights clause in that case reads, as here pertinent, as follows:

Except as otherwise limited by a specific provision of this agreement, the management of the plant and the affairs of the Company, and the direction of working forces are vested exclusively in the employer, including, but not limited to, the right to . . . determine the number of employees, the number of hours, and the schedules of employment

The Administrative Law Judge in *S-B Mfg. Co.*, whose rulings, findings, and conclusions were affirmed by the Board, concluded at 490 as follows:

⁵⁷ It is noted that this Section refers to "... if called upon to participate in the resolution of a grievance . . ." Notwithstanding this, Franks used Article III in responding to the Union's November 11, 2008 letter in which it indicated that the Union office would be staffed Monday, Wednesday, and Friday to serve the needs of Local 1990 members and other bargaining unit members. The Union's November 11, 2008 letter does not mention "... if called upon to participate in the resolution of grievances"

The management-rights clause currently in effect appears on its face to give Respondent exclusive control over employee hours. There is nothing unclear or equivocal about the language as I read it. However, even assuming that the language in the management-rights clause is subject to interpretation, I find that throughout negotiations the Union has attempted to modify, eliminate, or reduce management's exclusive control over employee working hours. It has met with repeated failure and has consistently agreed to the language proposed by management. There is little doubt, after reviewing the record evidence that the Union has attempted to have the hours provision in the management-rights clause changed to no avail. The parties have negotiated over this issue for years but the clause has remained the same from its inception.

The management rights clause in the instant proceeding, Article II on page 4 of Joint Exhibit 1, reads as follows:

This Agreement restricts the rights of Management to the extent hereinafter set forth, but not otherwise, it being understood that except as herein otherwise expressly provided, the Company retains all rights it would have had in the absence of this Agreement.

Without limiting the more general application of the foregoing, it is recognized the Company in particular retains the right to maintain order and efficiency in the plant and its operations, to hire, promote, to transfer, temporarily lay off, and assign employees, or discipline of just cause, to reduce the work force for legitimate reason, to determine the products to be manufactured, to purchase or produce any or all of the tools of production, to schedule production, to set the hours, methods, processes, means of manufacturing, to maintain the plant or to provide for such maintenance by other means, to control and select the raw materials, semi-manufactured parts, or finished parts which may be incorporated into the products manufactured, such rights shall not be used in a manner that will violate any of the terms or provisions of this Agreement.

In the instant proceeding, the Union has not unsuccessfully proposed changing that part of the management-rights clause which reads "to schedule production, to set hours, methods, processes, means of manufacturing . . ." Also, it has not been shown that NTN did, before 2009, change the number of hours employees worked in a week (shortened the work week) without first consulting with the Union and without the Union, in the cited instances before 2009, agreeing—in advance of the change—to the change in the hours in order to avoid a layoff.

As noted above, the involved management-rights clause, Article II, contains the following language: "This Agreement restricts the rights of Management to the extent hereinafter set forth, but not otherwise, it being understood that except as herein otherwise expressly provided . . ." Section 1 of article XV of the involved contract reads as follows: "Normal Work Week. The normal work week consists of eight (8) hours per day, five (5) days per week, Monday through Friday inclusive." Page 25 of Joint Exhibit 1. As correctly pointed out by Charging Party on brief, the Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers

of statutory rights, *Windstream Corp.*, 352 NLRB 44, 50 (2008).

Respondent on brief points out that the collective bargaining agreement contains a special provision for temporary reductions not exceeding two weeks, namely Article VI, Section 6 at page 16 of Joint Exhibit 1. That section reads as follows:

Temporary Layoff

Temporary reductions in force due to breakdown, material shortages, or due to any reasons known at the time of layoff to be temporary may be made by the Company. In making temporary layoffs, the Company will select those employees in the department or departments affected applying the seniority principle. Temporary layoff is defined as a layoff of two consecutive weeks or less.

Respondent's reliance on this section is misplaced in that what occurred was not a layoff. In the past instances covered in the record in this proceeding, both Respondent and the Union wanted to avoid a layoff and so the Union agreed to a reduction of hours instead of a layoff. In 2009 Respondent obviously wanted to avoid a layoff. Since contrary to past practice and the law, the Union was not given the opportunity to agree or disagree (or even be in a position to make an informed decision since Respondent did not provide the information requested by the Union) over the 2009 reduction of hours (shortened work weeks), the Union's position is not a matter of record. In my opinion the language that Respondent claims that it relies on does not demonstrate that the Union clearly and unmistakably waived its statutory right to bargain over this issue. As pointed out by the Judge at page 50 in *Windstream Corp.*,

With respect to waiver, the Board and the courts have long held that waivers of statutory rights are not to be lightly inferred, but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); . . . ; *Georgia Power Co.*, 325 NLRB 420 (1998). To establish a waiver by contract, the language must be specific and related to the particular subject or it must be shown that the issue was fully discussed and that the union consciously yielded its interest in the matter. *Georgia Power Co.*, supra. See *Allison Corp.*, 330 NLRB 1363, 1365 (2000). The Board has held that generally worded management rights clauses or zipper clauses will not be construed as waivers of statutory bargaining rights. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992); *Johnson Bate-man Co.* 295 NLRB 180, 184-188 (1989). Finally, with respect to bargaining history, the Board has held that a union's past acquiescence in unilateral changes does not operate as a waiver of its right to bargain over such changes in the future. *Bath Iron Works*, . . . [302 NLRB 898 (1991)] at 900-901, and cases cited therein. See also *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995).

The Judge's findings and conclusions in *Windstream Corp.* were affirmed by the Board.

As noted above, Respondent argues on brief that as demonstrated by the following rebuttal testimony, the Company met with Perry and informed him of the March 2009 situation:

Q. BY MR. POWELL: Mr. Perry, did you meet and bargain with the company, Gary Franks or any supervisors or managers concerning the shortened work weeks that started in March 2009 and continued thereafter?

A. Yes, sir. [Tr. 1386]

Also, as noted above, the pertinent allegation is that Respondent has unilaterally and in the absence of a good faith bargaining impasse in negotiations, implemented modified work weeks of the employees in the Unit, beginning on or about March 6, 2009, and continuing thereafter.

Informing Perry is one thing. It is quite something else to bargain to a good faith impasse. Here there was no impasse. Here, contrary to what the above-cited page of the transcript reflects, Perry did not testify on rebuttal that he bargained with the Company over this matter. Respondent does not argue that the Union through Perry bargained to good faith impasse.

Before this rebuttal testimony, Perry testified that General Counsel's Exhibit 40 is a letter dated February 5, 2009 from Franks to Perry which reads as follows: "We are announcing today that during the month of March we will be required to work shortened workweeks in March 2009"; that, with respect to article XV, Sections 1 and 4 (See pp. 25 and 26 of Joint Exhibit 1.), Franks' letter changes the normal work week, which is considered Monday through Friday, and the shifts, respectively, without sitting down and negotiating or bargaining with the Union about it; that prior to receiving this letter the parties had not negotiated about this change in the work week; that on April 17, 2009 Franks told him that Respondent was looking at the possibility, as here pertinent, of a three to four day work week from May until September, 2009; that he told Franks that there was going to be trouble and they needed to sit down and negotiate or bargain about the short work week; that Franks said that he would have to contact Sinele; that that on April 17, 2009 he did not bargain with Franks about the shortened work week but Franks did tell him about the different things that the Company was looking at, namely—as here pertinent—the shortened workweek; that on April 17, 2009 the Union did not tender the Company a counter proposal; that he did not meet with Franks on April 20, 2009 to bargain about changing the workweek; that on April 20, 2009 he asked Franks if he had received any information about the short work weeks; that Franks told him that he was still waiting for a response from Sinele; that he told Franks that it was the Union's position that the Company and the Union should negotiate and bargain on the short work week; that Franks repeated that he was waiting for Sinele; that on April 27, 2009, after looking at the Company's bulletin board and seeing a printout for the months of May, June, and July which, as here pertinent, indicated—with shadings—the short work weeks, he told Franks "Well, I see you've already got your short work weeks posted" (Tr. 335); that Franks said that he had to post them ahead of time so that the employees would be aware of what days they would not be at work; that at that point the Union and the Company had not negotiated about changing or modifying the work week; that on April 30, 2009 he went to Franks' office and asked him for a copy of the months that he had posted on the bulletin board; that Franks said "no" (Tr. 335); that he asked Franks if he had

any information pertaining to the short work week; that Franks said that he was still waiting for Sinele; that he told Franks again that they needed to negotiate on the short work weeks; that the Union did not bargain about any changes to the work week on April 17, 20, or 23, 2009; that he first read about an official change to the work week when he saw the posted notice on the bulletin board in the main break room on April 27, 2009; that on May 6, 2009 Franks gave him the April 30, 2009 letter, General Counsel's Exhibit 41, which as here pertinent, advised Perry that Respondent proposed going to a shortened work week starting May 1st; that at no time had the Company made any offer to negotiate or bargain with the Union about the possibility of a short work week which started May 1, 2009; and that since May 14, 2009 the parties have not met and bargained about the shortened work weeks in May, 2009.

Add to this (1) Sinele's letter of May 19, 2009, General Counsel's Exhibit 27,⁵⁸ to Brown, in which Sinele indicates that "[t]he decision to reduce the amount of work available to hourly employees is a management prerogative based upon our view of what the future may hold" and (2) Respondent's position on brief that, in effect, it has the right to make this unilateral change without bargaining to a good faith impasse. It is obvious that Respondent never bargained with the Union regarding the shortened work weeks beginning in March 2009 and continuing thereafter. There is no evidence of record that the parties ever actually bargained over this matter and certainly they did not bargain to a good faith impasse over this matter.

In view of this and in view of the fact that my trial notes indicate that Perry answered "[n]o" to the involved question on rebuttal, the following show cause order was issued on April 9, 2010:

According to page 1386, lines 13–17, of the transcript for July 15, 2009 in this proceeding, on rebuttal Tony Perry gave the following testimony:

Q BY MR. POWELL: Mr. Perry, did you meet and bargain with the company, Gary Franks or any other supervisors or managers concerning the shortened work weeks that started in March 2009 and continued thereafter?

A Yes, sir.

This portion of the transcript is not in agreement with my trial notes, which indicate that Perry answered "No" to this question, or, in my opinion, the facts of record.

A conference call was scheduled for April 9, 2010 during which it was expected that the court reporter would play the involved audio tape so that we could resolve this matter. After being advised that the court reporter, notwithstanding a contract clause that required him to retain "all stenographic notes, or their equivalent . . . for a period of one (1) year from the dates of delivery of the transcript," erased and reused the audio tape of this testimony (and apparently the backup audio tape), the call was cancelled since its purpose could not be achieved.

IT IS ORDERED that pursuant to the procedure set forth in *W.B. Jones Lumber Co., Inc.*, 114 NLRB 415, 421 fn. 1 (1955), enfd. 245 F.2d 388 (9th Cir. 1957), the parties are

required to show cause by April 20, 2010 why the transcript should not be corrected in the manner described above.

A copy of the order to show cause was served on each of the parties. General Counsel did not file a response. The Union filed a response in which it indicates that the transcript should be corrected in that its trial notes and recollection is that Perry answered "No" to this question on rebuttal. Respondent filed a response in which it indicates that the transcript should not be changed since changing "Yes" to "No" is not an obvious typographical error. Most importantly, in view of the record, as summarized in the next two preceding paragraphs (not including the show cause order), this correction should be made. Also taken into consideration is the fact that (a) the trial notes of the Union and the judge show that Perry answered "No" to the involved question on rebuttal, and (b) Respondent does not cite its trial notes and, therefore, it does not assert that its trial notes show that Perry answered "Yes." The transcript in this proceeding is hereby corrected on page 1386, line 17 by deleting the "Yes" and substituting "No" therefor. The order to show cause, and the responses filed thereto are hereby made a part of the record.

Respondent violated the Act as alleged in that beginning on or about March 6, 2009, and continuing thereafter it unilaterally modified the work week of the employees in the unit, which was a mandatory subject of bargaining, without according the Union an opportunity to bargain and in the absence of a good faith bargaining impasse in negotiations.

Paragraphs 23, 24, 32, 33, 34(a), and 37 of the complaint collectively allege that since on or about September 17, 2007, the Union, in writing, requested that Respondent furnish the Union certain information, including names and addresses of strike replacement employees; that by letter dated July 25, 2008, Respondent furnished the Union with names of replacement employees; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit; that since on or about September 17, 2007, until July 25, 2008, Respondent unduly delayed furnishing the Union the names of strike replacement employees; that since on or about September 17, 2007, Respondent has failed to furnish the Union with the addresses of replacement workers requested by the Union; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that information about bargaining unit employees, including the names and addresses, is presumptively relevant to a union's representational duties, *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); that the Board has repeatedly found that information regarding strike replacements is presumptively relevant, based on the possibility that replacements may become part of the bargaining unit if they continue to be employed after the end of the strike, *Metta Electric*, 338 NLRB 1059, 1064–1065 (2003), enfd. denied in part sub nom. *JHP &*

⁵⁸ See also R. Exh. 58.

Associates v. NLRB, 360 F. 3d 904 (8th Cir. 2004), *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 (2000), enfd. denied in part 272 F. 3d 1028 (8th Cir. 2001), rehearing denied (2002), *Chicago Tribune Co.*, 303 NLRB 682, 687 (1991), enfd. denied, rehearing denied, 965 F. 2d 244 (7th Cir. 1992); that under extant Board law, relevant information about replacements must be provided unless the employer can establish a clear and present danger that the union will misuse the information to advance the existing violence and harm replacements; that an employer can establish that danger of misuse by showing that replacements were subject to serious incidents of violence, such as property damage and bodily injury, and that the employer reasonably believed providing the information to the union would lead to continuing harassment and misconduct; that some circuits have applied a balancing test based on the totality of circumstances (union's actual need for the information, the employer's claim of harassment, confidentiality or privacy concerns, the existence of alternative means for the Union to achieve its goals, and the employer's offer of an alternative to providing the information) rather than a clear and present danger test; that Respondent has not established a basis for withholding the information under either of these tests; that there is no evidence that Union agents have participated in or condoned violent behavior and Respondent has admitted that the Union is not directing the misconduct; that the Union has a need for the replacement workers personal information now that the strike is over and the replacement workers form a majority of the bargaining unit; that the Union must communicate with these employees so that it can adequately represent them and administer the collective-bargaining agreement under which the replacements now work, *Pearl Bookbinding Co.*, 213 NLRB 532, 534 (1974), enfd. 517 F.2d 1108 (1st Cir. 1975); that here the parties were in active negotiations when the Union requested the information, and the Union's inability to communicate with replacements in the absence of the information interfered with the Union's ability to effectively bargain; that here the Union's need for the information has increased because it now needs to communicate with the employees in order to administer the contract; that here no employees were disciplined for misconduct; that here the Union had no other means of contacting replacements nor did the Respondent offer any alternative that would reasonably accommodate the Union's communication needs; that the Union had no onsite access to the replacement employees during the strike; that Respondent's proposed alternative of a third party verification addressed only the need to corroborate the other employment information already provided by the Respondent, and it did not facilitate Union communication with the replacements in any way; that here the Union's efforts to communicate with employees by other means, such as holding office hours in the plant, have been frustrated by the Respondent's unlawful surveillance and unilateral changes to work rules; that on balance, the Union's need for information about the replacement's terms and conditions of employment outweighs the Respondent's unfounded fear of harassment to strike replacements or potential privacy concerns; that to the extent that there was even any basis for concern, that dissipated when the strike ended in July 2008, Respondent terminated its relationship with SRC, Respondent

resumed its normal operations, and there have been no incidents related to hostilities between former strikers and permanent replacement or other employees since the strike ended; and that Respondent's delay of some 10 months in supplying the names, and its absolute refusal at the trial herein on July 14, 2009, to supply the addresses is a blatant violation of Section 8(a)(5).

The Charging Party on brief argues that in this case, there was no proof that the Union or its agents were involved in or condoned any of the alleged acts of picket line misconduct; that there was no credible evidence that the Union or its agents were involved in or condoned any of the alleged unattributable harassment of replacement workers away from the picket line,⁵⁹ *Diamond Walnut Growers, Inc.*, 312 NLRB 61 (1993) (Employer failed to establish clear and present danger when in many of the alleged acts of misconduct the perpetrator was unknown and when a specific person was named, there is no evidence that said person was a current official of agent of the union); and that Respondent had no basis to refuse to turn over the names and addresses of the replacements after the strike had ended since there were no further incidents of alleged misconduct or harassment of replacement employees.

The Respondent on brief contends that while there is a presumptive relevance to the names and addresses of employees, whether that information is required to be furnished must be evaluated in the context of all of the facts, *Caterpillar, Inc.* 321 NLRB 1130, 1143 (1993)⁶⁰; that Respondent had a legitimate and justifiable basis for refusing to produce the names (during the pendency of the strike) and addresses of replacement workers to the Union; that the Union failed to give adequate assurances to Respondent that the information would not be misused; that Respondent proposed a reasonable accommodation of having a third party confirm the accuracy of the requested information and indicated a willingness to consider any alternative accommodation proposed by the Union; that Respondent had a good faith, reasonable, and well-founded concern about employee safety; that there were approximately 43 documented instances of vehicles being struck by picketers while entering or exiting Respondent's gates, and there were nine or more reported incidents of property damage occurring at employees' residences (other than nails in tires); that due to conduct on and off the picket line, Hamilton police officers prepared over 80 police reports and arrested a dozen or so individuals; that officials

⁵⁹ Roberts, who was on the Union's negotiating committee, was convicted of harassment in an incident which occurred away from the picket line.

⁶⁰ In *Caterpillar, Inc.*, the harassment of those who crossed the picket line continued after the strikers returned to work. Here it did not. In *Caterpillar, Inc.* the Board adopted the judge's dismissal of the complaint allegation that respondent in that case violated Sec. 8(a)(1) and (5) of the Act by refusing to provide the Union with the names of the crossover employees. In note 1 of its decision in *Caterpillar, Inc.* the Board indicated that it took this action on the ground that the Union was not entitled to the requested information in the exact form in which it sought it, in light of the fact that the respondent in that case provided adequate alternative information to enable the Union to perform its representative functions. Here, NTN did not provide adequate alternative information to enable the Union to perform its representative functions.

of Respondent received (a) reports of the incidents from the security firm it utilized, (b) all police reports filed in connection with the strike, and (c) reports directly from employees; that replacement employees requested that Respondent not furnish their names and addresses to the Union; that the Union has ample opportunities to interact with replacement employees in that (1) there are Union bulletin boards in the plant, (2) there is a Union office located inside the Hamilton plant (As indicated above, the Union office is now located in the front office area utilized by management and supervisors. It is no longer located on the plant floor where unit members work.), and (3) replacement employees now work side-by-side with returning strikers; and that the Union has a lingering resentment toward replacement employees as demonstrated by the above-described March 29, 2009 Union leaflet and by the above-described Bevis statement “during an OSHA conference [held in March 2009] that the Union does not represent the permanent replacements at the Hamilton plant (Tr. 1319–1321)”. (Respondent’s brief, page 92)⁶¹

In my opinion, the Respondent was justified in believing during the involved strike that the incidents at the homes of those who worked at NTN during the strike were strike related and presented a clear and present danger to replacement employees and their property. During the strike the Union did not give adequate assurances that the information would not be misused, and the Union did not make a counter proposal when Respondent (a) proposed that a third party confirm the accuracy of the requested information, and (b) indicated a willingness to consider any alternative accommodation proposed by the Union.

There is no specific evidence that the misconduct toward those who crossed the picket line during the strike continued after the strike ended. As indicated above, Respondent took a number of unlawful measures after the strike ended to limit access by Local Union officials to the employees working at Respondent’s facility and to limit access by employees working at Respondent’s facility to officials of the involved Local Union. This leads me to conclude that Respondent’s refusal to provide the addresses of replacement employees to the Union after the strike ended and there was no misconduct against replacement employees is really about access and not protection. This conclusion is supported by the fact that when Sinele testified at the trial herein on July 14, 2009, almost a year after the

⁶¹ Actually Sinele did not testify that Bevis said that he did not represent the permanent replacements at the Hamilton plant. Rather, as noted above, Sinele testified that when the OSHA Director told Bevis that it was his responsibility to work on the employees the Union represents to follow safety procedures in place Bevis then allegedly said “[w]e do not represent those employees.” Sinele gave this testimony on direct (Tr. 1321) and on cross (Tr. 1356). In March 2009 there were about 25 reinstated strikers working in Respondent’s Hamilton plant. The directive did not address only the replacements. And the answer Bevis allegedly gave, according to the testimony of Sinele, was not limited to replacements. Moreover this incident allegedly occurred approximately one and a half years after the Union requested the involved information. Certainly Respondent is not arguing that this is justification for not turning over the information to the Union before March 2009.

strike and the misconduct ended, she indicated that Respondent still would not give the addresses of the replacement employees to the Union.

The continuing resentment argument made by Respondent cites two occurrences in March 2009. One of Respondent’s attorneys pointed out more than once that the reason the evidence regarding what happened during the strike was put on the record was to show the state of mind of NTN’s officials with respect to not providing the names and addresses of replacement employees. Respondent did not provide the names and addresses of replacement employees at the time the Union sought such information in September 2007. While Respondent provided the names after the strike ended in July 2008, it did not provide the addresses. At the time of the trial herein Respondent still had not provided the addresses of replacement employees. The state of mind in question is the state of mind in late 2007 when the request was made, and management’s state of mind shortly after the strike ended in July 2008. Events which occurred in March 2009 do not speak to the state of mind of the management of Respondent in late 2007 or in August 2008.

As pointed out by the Board at 1326 in *Beverly Health & Rehabilitation Services*, supra:

It is well established that the type of information requested by the Union [(as here pertinent, the names and addresses of replacement employees)] is presumptively relevant for purposes of collective bargaining and must be furnished upon request. See *Sanford Hospital & Clinics*, 338 NLRB 1042 (2003), and cases cited therein. The obligation to furnish information includes providing information with regard to permanent strike replacements, unless there is a clear and present danger that the information would be misused by the union. See *Page Litho, Inc.*, 311 NLRB 881, 882 (1993), and cases cited therein, enfd. granted in part and denied in part mem. 65 F.3d 169 (6th Cir. 1995).

And as pointed out by the Board at 1258 in *Grinnell Fire Protection Systems Co.*, supra, “[a] union’s request for presumptively relevant information is presumed to be in good faith unless the contrary is shown.”⁶² Here, Respondent has not shown the contrary. But the Board in *Page Litho, Inc.*, supra, took into consideration up to what point Respondent’s purported fear of harassment was no longer reasonable. In *Page Litho, Inc.* there were no reported incidents of harassment after the strike ended on January 1990. The Board took that and the passage of time into consideration in determining that respondent there had failed to show a clear and present danger that the union would use the names to harass the replacement employees with respect to the Union’s May 1990 request for the names. In the instant case, two days after the Union made an unconditional offer to return to work on July 23, 2008, Respondent provided the Un-

⁶² The Board also pointed out at 1257 in *Grinnell Fire Protection Systems Co.* that “[o]nce the strike has ended . . . any replacements who remain employed assume the same status as other unit employees . . . and the terms under which they work will be governed by any newly bargained contract.” (Footnote omitted.)

ion with the names of replacement employees but not their addresses. In my opinion, in view of the what occurred here and Respondent's purported fear of harassment during the strike, Respondent did not violate the Act in waiting until the strike ended to give the names of replacement employees to the Union. But once the strike ended and the harassment ceased Respondent's purported fear of harassment if it gave the Union the replacement employees addresses was no longer reasonable. At that point the Union was clearly entitled to the addresses of the replacement employees. In my opinion, Respondent did not violate the Act in waiting until July 25, 2008 to give the Union the names of the replacement employees. Respondent violated the Act when it failed and refused to provide the Union with the addresses of replacement employees after the strike ended and a reasonable time passed (in my opinion 30 calendar days) during which Respondent could determine that the harassment had indeed ceased.

Paragraphs 25, 32, 34(a), and 37 of the complaint collectively allege that since on or about November 9, 2007, the Union, in writing, requested that Respondent furnish the Union with certain information regarding an October 22, 2007, picket line confrontation, including the names and addresses of individuals involved, videos/audio tapes and disciplinary action issued; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit; that since November 9, 2007, Respondent has failed and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

Counsel for General Counsel on brief contends that although Respondent asked the Union to explain why it wanted the information, the relevance was obvious in the involved context, namely that the terms and conditions of employment contemplated consistent treatment of employees and the Union was investigating consistency; that the Board has considered information regarding striker misconduct to be necessary and relevant to the Union's implementation of its obligations, *Page Litho, Inc.*, 311 NLRB 881, 891 (1993); that information regarding a misconduct investigation, even of non-unit employees, is relevant to establishing whether there has been disparate treatment of employees, *SBC California*, 344 NLRB 243, 246 (2005), and *United Postal Service*, 307 NLRB 429, 432 (1992); that because this information request concerns disparate treatment of employees, the Union's request concerning information about the picketing confrontation is necessary and relevant to the implementation of the Union's obligations; and that Respondent's failure to provide the information violated Section 8(a)(1) and (5) of the Act.

The Charging Party on brief argues that the Union's request for information related to alleged picket line misconduct is relevant to and necessary for it to carry out its duties as collective bargaining representative, *Page Litho, Inc.* at 891; that Respondent did not offer any alternative means to provide the information, such as the redaction of names of replacement

employees; and that Respondent had no basis to refuse to provide the information after the strike ended.

The Respondent on brief contends that the Company was ready and willing to provide relevant information to the Union regarding a picket line confrontation on October 22, 2007 but the Company was unclear with respect to the relevancy of the information requested by the Union; that the Union failed to respond to the Company's request for clarification, thereby resulting in the Company being unable to respond to the Union's request; that at trial for the first time the Union indicated that it wanted this information to assure that the Company rules were being consistently applied; that had the Union offered such an explanation prior to the hearing, the Company would have been able to show the Union that the rules were being consistently applied by informing the Union that no discipline had been issued against any striking or non-striking employees for picket line conduct; that the Company did not act improperly in not providing witness statements since the Company is not obligated to furnish such statements, *Raley's Supermarkets & Drug Centers*, 349 NLRB 26, 27 (2007); that the Company did not act improperly in not providing documentation regarding disciplinary actions taken or contemplated pertaining to the incident because there were no such documents, *Albertson's Inc.*, 351 NLRB 254, 255 (2007); and that Respondent did not violate the Act where the Union failed to supply a needed clarification for Respondent to provide the requested information, *Dupont Dow Elastomers, L.L.C.*, 332 NLRB 1071, 1085 (2000).

As indicated by the Board at 891 in *Page Litho, Inc.*, supra, information concerning alleged strike misconduct is necessary and relevant to the Union's proper performance of its duties. There was no obligation on the part of Brown to respond to Sinele's November 16, 2007 e-mail purportedly seeking clarification. As pointed out by Respondent on brief, it was not obligated to furnish witness statements prepared by the Respondent or investigatory reports or, obviously, documents which did not exist. Otherwise, Respondent violated the Act as alleged in paragraphs 25, 32, 34(a), and 37 of the complaint.

Paragraphs 26, 32, 34(b), and 37 of the complaint collectively allege that since on or about August 6, 2008, the Union, by letter, requested that Respondent furnish the Union with certain information, including, inter alia, contracts with entities supplying temporary and/or permanent employees, and contracts and all documents executed by those employees Respondent hired as permanent replacement employees; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit; that since on or about August 6, 2008, Respondent has unduly delayed furnishing and/or failed, and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that Davies advised Sinele that he wanted the permanent replacement employees' employment applications and he consented to the re-

daction of the social security numbers; that in reply Sinele forwarded only a single blank application; that when a strike ends the permanent replacement employees are members of the bargaining unit; that information contained in the permanent replacement employees' applications such as telephone numbers, job skills, addresses, and the like are essential for a union that hopes to provide effective representation to the approximately 140 permanent replacement employees with no established lines of communication; that the Board has held that addresses and telephone numbers of unit employees are presumptively relevant information, *Dynatron/Bondo Corp.*, 305 NLRB 574 (1991); that testimony at the trial herein disclosed that a number of permanent replacement employees were unaware that the Union represented them or that they were covered under the collective bargaining agreement; and that Respondent's refusal to provide the employment applications violated Section 8(a)(5) of the Act.

The Charging Party on brief argues that information related to the status of replacement workers, including applications for employment are relevant to the Union's duties as collective bargaining representative, *Detroit Newspapers*, 326 NLRB 700, 708-709 (1998), petition for review granted and reversed on other grounds, 216 F.3d 109 (D.C. Cir. 2000) (Board affirmed Administrative Law Judge's finding that respondent violated the Act by failing to turn over applications of replacements); that the Union's attorney offered to address any confidentiality concerns that Respondent might have; that notwithstanding the Union objection to Sinele's tactic of forwarding only a blank application, Respondent refused to provide the information sought and it failed to provide any basis to claim that the information was not relevant or could not be produced; and that Respondent's refusal to provide this information is a violation of the Act.

The Respondent on brief contends that it provided the information dealing with contracts with entities supplying temporary and/or permanent employees; that with respect to "contracts and all documents executed by those employees Respondent hired as permanent replacement employees," Respondent was not obligated to provide to the Union the completed employee applications in that they were not responsive to the August 6, 2008 information request; that even if the applications were responsive to the request, the Company was not required to provide them because they are not relevant to the Union's bargaining obligations; that Respondent had a right to withhold the applications which contained personal identifiers such as name and address, due to a good faith and reasonable concern for the replacement employees' safety and their request that such personal identifiers not be disclosed to the Union; and that the employment applications are not relevant because "applicants for employment are not 'employees' within the meaning of the collective-bargaining obligations of the Act," *Star Tribune*, 295 NLRB 543, 546 (1989) (holding that applicants are not encompassed within the statutory duty to bargain about terms and conditions of employment of the employer's employees).

As here pertinent, paragraphs 26, 32, 34(b), and 37 of the complaint speak to the employment applications of the replacement employees. As noted above, once the strike ends the permanent replacement employees who continue to work for

NTN are employees in the involved unit who are represented by the Union. Once permanent replacement workers are hired and retained after the strike ends, they are not "applicants" for employment. They are employees under the Act. As Sinele testified, a couple of weeks after Davies' above-described August 6, 2008 letter they had a telephone conversation concerning this information request. Sinele testified that during this conversation Davies asked for the applications for employment that employees who the Company contended were permanent replacements had filled out; and that Davies told her that if the Company needed to it could redact any personal identifying information, such as social security numbers. Respondent's Exhibit 44, which is a "08/19/2008" e-mail from Sinele to Respondent's counsel Davis, indicates that this telephone conversation occurred on August 19, 2008. In the third paragraph (It starts with "On # 2.") on page one of her e-mail to Davis, Sinele, as here pertinent, indicates as follows:

....

He [Davies] said he assumed the local HR office had to conduct this with more than "Hey, come on in, you're a permanent replacement." He then said, anyway, out of our discussion, he wanted copies of the applications, we could redact out any confidential information, like social security number.

Respondent knew what Davies was seeking. It is not a matter of interpretation. Davies verbally explained on August 19, 2008 what, as here pertinent, he was seeking in writing on August 6, 2008. Requests for information can be verbal. And written requests for information can subsequently be explained verbally. It was obvious what Davies was trying to achieve. As pointed out by the Charging Party on brief, Respondent refused to provide the information sought and it failed to provide any basis to claim that the information was not relevant or could not be produced. On brief Respondent argues that it had a right to withhold the applications which contained personal identifiers such as name and address, due to a good faith and reasonable concern for the replacement employees' safety and their request that such personal identifiers not be disclosed to the Union. Apparently, Respondent, in making this argument on brief, fails to take into account that on July 25, 2008 it supplied the names of the replacement workers to the Union. With respect to the addresses, as noted above, Respondent violated the Act by failing and refusing to provide the addresses of permanent replacement employees after the strike ended and a reasonable time had passed for it to determine that the permanent replacement employees were no longer being harassed. Respondent should have provided the addresses of permanent replacement employees on or about August 22, 2008. At that time, Respondent's purported fear of harassment was no longer reasonable and the Union was entitled to this information. The Respondent was obligated to provide the employment applications of the permanent replacement employees who were working for NTN on July 23, 2008 and thereafter. As pointed out by Counsel for General Counsel on brief, information contained in the permanent replacement employees' applications such as telephone numbers, job skills, addresses, and the like are essential for a union that hopes to provide effective representation to the approximately 140 permanent replacement employees with no

established lines of communication. To the extent that Respondent failed and refused to provide these employment applications to the Union on or after August 22, 2008 (30 days after the strike ended) pursuant to the August 6, 2008 written request, which was supplemented verbally on August 19, 2008, Respondent violated the Act.

Paragraphs 27, 32, 34(b), and 37 of the complaint collectively allege that since on or about August 14, 2008, the Union, by letter, requested that Respondent furnish the Union with certain information, including, inter alia, identification of security firms retained by Respondent, incident reports, witness statements, photographs obtained by Respondent or security firms, wage rates and benefits for current employees, and information regarding pension benefits and copies of specified pension documents; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit; that since on or about August 14, 2008, Respondent has unduly delayed furnishing and/or failed, and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

Counsel for General Counsel on brief contends that Respondent has not provided the information sought by the Union in the above-described August 14, 2008 letter; that security and incident reports are relevant and necessary to the Union's execution of its duties, *New England Telephone Co.*, 309 NLRB 196 (1992); that the Union requested the information in order to verify compliance with the terms and conditions of the collective bargaining agreement; and that the Union was also concerned that certain tools owned by bargaining unit members had been destroyed, so the Union was conducting an investigation and the foregoing information would shed light on the matter.

The Charging Party on brief argues that after some of the former strikers had returned to work in mid to late August 2008, there were reports that former strikers' personal tools and equipment left in the plant during the strike had been vandalized, damaged or stolen; that the August 14, 2008 information request sought information related to those issues; that since a number of former strikers were considering retirement, the Union requested updated pension and benefit information; that information related to pension benefits is presumptively relevant, *Republic Tool and Die Company*, 343 NLRB 683, 686 (2004); that the Company's response was not only more than a month late, it generally failed to provide the requested information related to the pensions, but instead, claimed that the information had already been provided; that while the pension information had previously been requested when negotiations began in early 2006, the requests at that time only covered the period of time up through 2005; and that the information requested in the August 14, 2008 letter sought information for the years 2006 and 2007, which had not been provided.

The Respondent on brief contends that the Company timely provided the Union with the identity of security firms and information regarding the alleged thefts; that the Company in-

formed the Union that the Company did not have any witness statements, investigative reports, photographs, etc. regarding the theft, destruction, or vandalism of striking employees' tools or tool chests, and, therefore, the Company did not violate the Act by failing to provide the requested information because it did not exist, *Albertson's Inc.*, 351 NLRB 254 (2007); that until the Union filed an unfair labor practice charge, the Union did not give the Company any indication that the Union believed that the Company's responses were insufficient; and that the Union did not present any evidence or argue that it was prejudiced in any way by the length of time it took for the Company to respond.

With respect to the items listed in the 15 numbered paragraphs of the Union's August 14, 2008 information request to Sinele, Respondent has provided the information sought in paragraph 1. Paragraphs 2 through 5 deal with employees' tools, etc. which were left in the plant during the strike. It has not been shown that Respondent has failed or refused to provide the information that it had on this matter. The information sought in paragraph 6, with respect to pay rates and benefits, was provided according to Respondent. It has not been shown that Respondent has failed or refused to provide the information sought in paragraph 6. The information sought in paragraphs 7 through 15 deals with the 2006 and 2007 pension plans and a 401(k) plan. In her September 19, 2008 letter, Respondent's Exhibit 50, to Davies, Sinele indicated that some of this information would be provided to the Union when available. More specifically, Sinele indicated as follows:

7. 2006 annual form 5500 attached. 2007 annual form 5500 will be provided when available (filing October 15, 2008).
8. Previously provided.
9. 2006 actuarial valuation report attached. 2007 actuarial report will be provided when available.
10. Previously provided.
11. Previously provided detailed pension history. Other requests in this item are not clear (i.e. whether or not any of the employees are eligible for any early disability pension?). Payments to pension should be covered in #7 and #9 above.
12. Form 5500 and actuarial valuation reports should cover the request for "Trustee Asset Statements."
13. Same as #12 above.
14. Same as #12 above.
15. Amendments previously provided. Prudential was requested to review if there are any amendments since that was provided. Will forward this as soon as response is received.

It was not demonstrated on this record that Respondent did in fact subsequently provide to the Union the information Respondent indicated it would provide when this information became available. To this extent, and to the extent that Respondent did not provide to the Union the other information requested in the Union's August 14, 2008 letter, Respondent violated the Act as alleged in paragraphs 27, 32, 34(b), and 37 of the complaint.

Paragraphs 28, 29, 32, 34(c), and 37 of the complaint collectively allege that since on or about February 10, 2009, the Union, in writing, requested that Respondent furnish the Union with certain information, including, inter alia, documents, communications, letters, and notes regarding Respondent's decision to modify its work week during March 2009; that by letter dated February 20, 2009, Respondent furnished the Union its total production costs for February 2009, its projected total production costs for March 2009, and its revised total production costs for March 2009; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit; that since on or about February 10, 2009, Respondent has substantially refused and/or failed and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that the Union requested information regarding the reasons why Respondent modified its work week; that the specific hours and days of the week during which employees work is a mandatory subject of bargaining; that such information is of obvious relevance in terms of the Union fulfilling its obligation to represent employees in connection with Respondent's desire to change the work weeks; that Respondent did not provide information to the Union regarding why it wanted to change the schedules; and that Respondent has failed to advance any explanation for its failure to provide the information.

The Charging Party on brief argues that in response to the Union's information request of February 10, 2009, Respondent provided a bare bones response listing its planned production figure for March 2009 but nothing in response to the Union's request.

The Respondent on brief contends that the Union and General Counsel erroneously assume that the decision to reduce the work schedule to match production is a mandatory subject of bargaining; and that the allegation that the Company refused and/or failed to furnish the Union with information regarding the decision to modify the work week in March 2009 should be dismissed because the Company was not required to furnish information concerning a non-mandatory subject of bargaining, *Piper Electric, Inc.*, 339 NLRB 1232, 1235 (2003).⁶³

As noted, in the situation at hand the specific hours and days of the week during which employees work is a mandatory subject of bargaining. What is involved here is not a layoff. It is not a reduction in force. In the past the Union agreed to the changes in the work schedule to avoid a layoff. Here, the Union should have been given notice and the opportunity to bargain. The Union was not accorded the opportunity to bargain. Since

⁶³ *Piper Electric, Inc.* involved an employee stock purchase plan which is a nonmandatory subject of bargaining. In the instant proceeding, a 20 percent reduction of the hours (and pay) that an employee works in a week is a mandatory subject of bargaining. Here, the Union did not waive the right to bargain over this matter. The involved collective bargaining agreement does not give Respondent the right to unilaterally make this decision.

the Union was not given the opportunity to bargain, it is not known what the Union's position would have been regarding a layoff instead of a reduction in hours. Since the Respondent took the position that it did not have to bargain regarding the reduction in the work week, Respondent did not provide the information to the Union which would have demonstrated whether or not there was an economic justification for the reduction. Respondent's answer to the Union, namely "In response to your of February 10, business conditions are not good which should come as no surprise to you" is not really responsive to the Union's specific requests for information. Contrary to past practice and the law, here Respondent presented the Union with a *fait accompli* and, therefore, Respondent did not provide the information which the Union needed to perform its duties and which, under the law, the Union was entitled to receive. The Respondent violated the Act as alleged in paragraphs 28, 29, 32, 34(c), and 37 of the complaint.

Paragraphs 30, 32, 34(c), and 37 of the complaint collectively allege that since on or about March 17, 2009, the Union, in writing, requested that Respondent furnish the Union with certain information, including, inter alia, documents regarding the identities of and hours worked by hourly employees who worked at the Hamilton facility during March 2009; that this information requested by the Union is necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit; that since on or about March 17, 2009, Respondent has substantially refused and/or failed and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that unit employees' hours worked are a classic category of presumptively relevant information, along with wages, seniority, and benefits; and that Respondent's refusal to provide this information to the Union violates the Act.

The Charging Party on brief argues that the Local Union's recording secretary, Caudle, testified that Respondent has not provided documents responsive to the Union's March 17, 2009 information request; that the information that Respondent did provide were attendance records that record an employee's attendance for the entire year; and that the information provided by Respondent was not the information requested regarding who did not work on March 6 and 13, 2009 because of the Company's shortened work week, and who worked the week-ends of March 7-8 and March 14-15, 2009 as well as the overtime charts for each department through March 15, 2009.

The Respondent on brief contends that on April 17 and April 22, 2009, Franks personally provided the requested information to Perry; that on both occasions Perry signed a receipt indicating his receipt of the requested information; that the April 17, 2009 receipt, Respondent's Exhibit 59, indicates that "[o]n Friday April 17, 2009 Gary Franks gave Tony Perry the payroll attendance sheets for the three weekends that the plant was off in March. You already have the pay scales in the contract"; that the April 22, 2009 receipt, Respondent's Exhibit 80, indicates

that “[o]n April 22, 2009 Gary Franks gave the overtime charts to Tony Perry that he had requested”; that Franks testified that he gave the attendance sheets to Perry and they show when the employees clocked in and clocked out; that he gave the overtime charts to Perry on April 22, 2009, and they are the overtime sheets for the bargaining unit employees who worked on those dates; that Perry testified that he received the attendance records from Franks (which he signed a receipt for on April 17, 2009), and that he signed a receipt on April 22, 2009 indicating that he received the overtime charts; and that Perry’s testimony at trial that he had not received the overtime charts despite signing a receipt for such information is not credible and should be disregarded.

Perry did not deny that he signed Respondent’s Exhibit 59. Perry admitted that he signed Respondent’s Exhibit 80 but he claims that he did not read what he signed. The signatures on Respondent’s Exhibits 59 and 80 appear to be written by the same person. As for the claim that he did not read what he signed on the first page of Respondent’s Exhibit 80, it is noted that what he signed consists of one sentence, namely, “[o]n April 22, 2009 Gary Franks gave the overtime charts to Tony Perry that he had requested.” In my opinion, in the circumstances extant here, a reasonable person would not sign a one-sentence receipt, which was the only thing on the entire page, without first reading it. Perry’s testimony on this point is not credited.⁶⁴ While Caudle, who is the Union’s recording secretary, testified that “usually” he is one of the individuals who reviews documentary information received from NTN and he did not see the documents included in Respondent’s Exhibit 80 before he testified on rebuttal at the trial herein on July 15, 2009, he could not testify unequivocally that the documents in question had not been tendered to the Union after the Union made a request for the information. For the reasons specified by Respondent on brief, as set forth above, it is concluded that Respondent did not violate the Act as alleged collectively in paragraphs 30, 32, 34(c), and 37 of the complaint.

Paragraphs 31, 32, 34(d), and 37 of the complaint collectively allege that since on or about March 25, 2009, the Union, in writing, requested that Respondent furnish the Union with certain information, including, inter alia, documents regarding the employment history of each employee in the bargaining unit at the Hamilton facility; that this information requested by the Union is necessary to the Union’s performance of its duties as the exclusive collective bargaining representative of the unit; that since on or about March 30, 2009 Respondent has failed

and refused to furnish the Union with this information; and that by this conduct, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1), and (5) of the Act.

Counsel for General Counsel on brief contends that the Union requested the employment histories of employees to verify plant and departmental seniority, pay rates, compensation, and to police whether Respondent was complying with the terms and conditions of the collective bargaining agreement; that an employer must provide the information in a timely manner; and that Respondent’s refusal to provide the unit employees’ work histories violated Section 8(a)(1) and (5) of the Act.

The Charging Party on brief argues that on January 6, 2009 the Union requested information related to the employment history of each employee in the bargaining unit at Respondent’s Hamilton facility; that the Union specifically described what it was looking for and described the management person who it believed had the document or documents in her possession; that Respondent replied on January 14, 2009 asking for a sample of the chart or index the Union believed that the Company already had in its possession; that Respondent in its January 14, 2009 letter did not deny that it possessed this information or that it could not supply it, even if not in the form the Union believed existed; that Respondent did not contend that the information was not relevant to the Union’s duties as collective bargaining representative or that it would be unduly burdensome to provide; that the Union reiterated its request on March 25, 2009 and stated that it did not have a sample but it had adequately described what it was looking for; that Respondent failed to provide any further response to the Union after the Union’s March 25, 2009 letter and Respondent never communicated to the Union that the information in the form requested by the Union did not exist; that the information requested concerns the core employee-employer relationship and is presumptively relevant and, therefore, the Union is not required to show the precise relevance of the requested information unless the employer comes forth with some basis why it is either irrelevant or cannot in good faith produce the requested information, *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993); that Respondent did not object to the relevancy, claim that it did not exist in the form described by the Union or claim that it could not produce the requested information in some form; and that since Respondent failed to prove a lack of relevance or a good faith inability to provide the information, it has violated Section 8(a)(5) of the Act by failing to provide the information.

The Respondent on brief contends that Respondent complied with its obligation to request clarification of the Union’s request; that the Union’s failure to provide clarification prevented the Company from providing a further response, and, therefore, the Company did not violate the Act, *Dupont Dow Elastomers L.L.C.*, 332 NLRB 1071 (2000); that the Company searched for the alleged chart or index described by the Union and determined that it did not exist; and that the Company cannot violate the Act by failing to provide the requested history chart or index when the undisputed evidence shows that such document does not exist.

⁶⁴ As pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 at 754 (2nd Cir. 1950) “[i]t is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all.” As indicated above, I found Perry to be a credible witness and I have credited other of his testimony. But here, even if one were to accept his testimony that he did not read the one sentence receipt he signed for the overtime charts, Perry did not even attempt to explain why he would have signed a receipt for attendance records (which receipt referred to overtime charts) on April 22, 2009 when he already signed a receipt for attendance information (payroll attendance sheets for the weekends the plant was off in Marcy 2009) on April 17, 2009.

The language in the original request, the January 6, 2009 Davies to Sinele letter, General Counsel's Exhibit 17, reads as follows:

1) Please provide an employment/jobs worked in the plant history for each employee currently employed in the bargaining unit by NTN Bower at its Hamilton, Alabama plant. The Union believes that this information already exists in the human resources department at the plant in the form of a chart or index and is maintained by Janice Irving. According [to] the Union's information, this chart or index provides an . . . entire employment history of where employees have worked in the plant and when.

The Union was not limiting its request to a chart or index. Rather, the Union requested "an employment/jobs worked in the plant history for each employee currently employed in the bargaining unit by NTN Bower at its Hamilton, Alabama plant." In other words, as indicated by the Union, it wanted "an . . . entire employment history of where employees have worked in the plant and when." Whether this information existed in the form of a chart or index is distinct from the question of whether this information existed in Respondent's records in any form. Before the trial herein Respondent did not specifically advise the Union that such chart of index does not exist. Respondent does not deny that such information is available in its records. Actually, the information request is a simple one, and it would be amazing, with the technology available today, if Respondent did not have the information available at its fingertips. Respondent has demonstrated that it has records with respect to the names of its employees and their hire date. What the Union seeks is where the employees have worked in the plant and when. Respondent's Exhibit 77 includes a four-page printout from Sinele to Brown which is "a Listing of Active Employees broken out by Employee Number, [Employee Name] Job Title and Shift," which printout is dated "8/25/2008." This exhibit demonstrates that Respondent has computerized certain employee information. Whether it can retrieve the information sought by the Union with its computer system or whether Respondent would have to utilize a different approach to provide the information was not made a matter of record. Respondent does not deny that it has such information and that it can access such information. Respondent has elevated form over substance. Respondent has focused on form to the exclusion of substance. What the information request seeks is substance. What the information request seeks is information which is necessary to the Union's performance of its duties as the exclusive collective bargaining representative of the unit. The Union's suggestion of a possible form did not negate the request for substance, and it cannot be used by Respondent as a justification for not providing the information sought. Respondent violated the Act as alleged in paragraphs 31, 32, 34(d), and 37 of the complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Sections 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 engaging in the following conduct, NTN Bower Corporation has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

(a) Threatening its employees, who were former strikers, with the loss of their reinstatement rights if they failed to sign Respondent's Return To Work Log.

(b) Orally promulgating a rule denying employee union representatives access to the Company bulletin board.

(c) Engaging in surveillance of Union activities, by monitoring the movements of employee Union representatives in and around its facility on or about the following dates: November 17 and 24, 2008, and on December 1 and 10, 2008.

4. By engaging in the following conduct, NTN Bower Corporation violated Section 8(a)(1) and (3) of the Act.

(a) Requiring employees who were former strikers, as a condition of exercising their reinstatement rights, to sign Respondent's Return To Work Log.

(b) Failing and refusing to offer reinstatement or to reinstate employees who were former strikers to their former or substantially equivalent positions of employment, where those positions have not been filled with permanent replacement employees.

5. By engaging in the following conduct, NTN Bower Corporation violated Section 8(a)(1) and (5) of the Act.

(a) Verbally implementing a rule requiring all former strikers to sign Respondent's Return To Work Log.

(b) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, enforcing a rule requiring all former strikers to sign Respondent's Return To Work Log as a condition of returning to work.

(c) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, implemented the following changes with respect to subjects which relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining:

(1) On or about November 13, 2008, relocating the Union's office at the facility.

(2) On or about November 17, 2008, establishing rules that impede employees' access to Union representatives.

(3) On or about November 17, 2008, orally promulgating a rule restricting employee Union representatives' access to the employee break room.

(4) On or about November 28, 2008, denying Union representatives access to its facility.

(5) Beginning on or about March 6, 2009, and continuing thereafter, modifying the work week of the employees in the Unit.

(d) Failing and refusing to furnish the Union with the addresses of permanent replacement employees on or after August 22, 2008 (30 days after the strike ended).

(e) Failing and refusing to furnish the Union with the information the Union requested regarding an October 22, 2007 picket line confrontation, including names of the individuals involved, videos/audio tapes, and any disciplinary action proposed or taken (and the basis for such action) regarding the non-striking employee/replacement worker involved in the incident.

(f) Failing and refusing to furnish the Union with the employment applications of permanent replacement employees on or after August 22, 2008 (30 days after the strike ended).

(g) Failing and refusing to furnish the Union with the information specified in the Union's August 14, 2008 letter, including, but not limited to, the 2007 annual form 5500, the 2007 actuarial report, and any amendments to the involved pension plan.

(h) Failing and refusing to furnish the Union with certain information, including, inter alia, documents, communications, letters, and notes regarding Respondent's decision to modify its work week during March 2009.

(i) Failing and refusing to furnish the Union with documents regarding the employment history of each employee in the bargaining unit at Respondent's Hamilton facility.

Respondent has not violated the Act in any other manner.

REMEDY

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

Upon request by the Union, Respondent shall rescind the unilateral changes and restore the unilaterally modified work rules and work weeks to their status before the changes.

Respondent shall make unit employees and former unit employees whole for any loss of wages or other benefits they suffered as a result of Respondent's unlawful failure and refusal to reinstate them, and as a result of Respondent's implementing unilateral changes, specifically the shorter work weeks, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall provide to the Union the information which its failure and refusal to provide thus far has resulted, as set forth above, in the conclusion that it violated Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁵

ORDER

The Respondent, NTN Bower Corporation of Hamilton, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees, who were former strikers, with the loss of their reinstatement rights if they failed to sign Respondent's Return To Work Log.

(b) Orally promulgating a rule denying employee union representatives access to the Company bulletin board.

(c) Engaging in surveillance of Union activities, by monitoring the movements of employee Union representatives in and around its facility.

⁶⁵ 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.

(d) Requiring employees who were former strikers, as a condition of exercising their reinstatement rights, to sign Respondent's Return To Work Log.

(e) Failing and refusing to offer reinstatement or to reinstate employees who were former strikers to their former or substantially equivalent positions of employment, where those positions have not been filled with permanent replacement employees.

(f) Verbally implementing a rule requiring all former strikers to sign Respondent's Return To Work Log.

(g) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, enforcing a rule requiring all former strikers to sign Respondent's Return To Work Log as a condition of returning to work.

(h) Unilaterally, and in the absence of a good faith bargaining impasse in negotiations, implementing the following changes with respect to subjects which relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining: (1) relocating the Union's office at the facility, (2) establishing rules that impede employees' access to Union representatives, (3) orally promulgating a rule restricting employee Union representatives access to the employee break room, (4) denying Union representatives access to its facility, and (5) modifying the work week of the employees in the Unit.

(i) Failing and refusing to furnish the Union with the addresses of permanent replacement employees on or after August 22, 2008.

(j) Failing and refusing to furnish the Union with the information the Union requested regarding an October 22, 2007 picket line confrontation, including names of the individuals involved, videos/audio tapes, and any disciplinary action proposed or taken (and the basis for such action) regarding the non-striking employee/replacement worker involved in the incident.

(k) Failing and refusing on or after August 22, 2008 to furnish the Union with the employment applications of permanent replacement employees:

(l) Failing and refusing to furnish the Union with the information specified in the Union's August 14, 2008 letter, including, but not limited to, the 2007 annual form 5500, the 2007 actuarial report, and any amendments to the involved pension plan.

(m) Failing and refusing to furnish the Union with certain information, including, inter alia, documents, communications, letters, and notes regarding Respondent's decision to modify its work week during March 2009.

(n) Failing and refusing to furnish the Union with documents regarding the employment history of each employee in the bargaining unit at Respondent's Hamilton facility.

(o) 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) Offer reinstatement to any former strikers who have been denied reinstatement as a consequence of Respondent's failure to return striking employees to work after the strike.

(b) Make whole the employees described in the next preceding paragraph for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Decision.

(c) On the request of the Union, rescind the unilaterally implemented changes in terms and conditions of employment, and restore the normal work weeks.

(d) Make whole the unit employees for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, in the manner set forth in the remedy section of the decision.

(e) Rescind all other unilateral changes found herein to be unlawful.

(f) Furnish the Union with the following:

(1) The addresses of permanent replacement employees.

(2) The information the Union requested regarding an October 22, 2007 picket line confrontation, including names of the individuals involved, videos/audio tapes, and any disciplinary action proposed or taken (and the basis for such action) regarding the non-striking employee/replacement worker involved in the incident.

(3) The employment applications of permanent replacement employees.

(4) The information requested in the Union's August 14, 2008 letter, including, but not limited to, the 2007 annual form 5500, the 2007 actuarial report, and any amendments to the involved pension plan.

(5) The information, including, inter alia, documents, communications, letters, and notes, regarding Respondent's decision to modify its work week during March 2009.

(6) The documents regarding the employment history of each employee in the bargaining unit at Respondent's Hamilton facility.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

shown, provide at a reasonable place 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.

(h) Within 14 days after service by the Region, post at its facility in Hamilton, Alabama copies of the attached notice marked "Appendix."⁶⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2007.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

⁶⁶ 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."

Filename: 356141.doc
Directory: H:\VOLUMES\356\UNBIND\Unbind bat3
Template: C:\Documents and Set-
tings\cavent\Application Da-
ta\Microsoft\Templates\Editorial\newD&O.dot
Title: BARBARA COPE, A SOLE PROPRIETOR,
Subject:
Author: cavent
Keywords:
Comments:
Creation Date: 4/21/2011 4:59:00 PM
Change Number: 14
Last Saved On: 12/3/2012 11:19:00 AM
Last Saved By: philliar
Total Editing Time: 282 Minutes
Last Printed On: 7/10/2014 7:37:00 AM
As of Last Complete Printing
Number of Pages: 75
Number of Words: 67,233 (approx.)
Number of Characters: 383,231 (approx.)