

All Seasons Climate Control, Inc. and Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO. Cases 08-CA-037931 and 08-CA-038079

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On August 24, 2009, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting 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 exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to

¹ 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. In affirming the judge's crediting of employee James Marino's testimony, however, we do not rely on his statement that Marino's response to being reminded not to use slang when testifying—"I'm sorry. I'm a construction worker."—demonstrated that Marino would not "have had the savvy to initiate the two antiunion petitions on his own."

The judge found that the Respondent's conduct in soliciting and encouraging Marino to circulate decertification petitions, and subsequently withdrawing recognition based on one such petition, ipso facto demonstrated that the Respondent did not meet Sec. 8(d)'s requirement that it "come to the bargaining table with a sincere purpose" of reaching an agreement. *Regency Service Carts, Inc.*, 345 NLRB 671, 671 (2001) (citation omitted). As a result, the judge found it unnecessary to determine whether "other actions of Respondent at the table also reflected bad faith," noting that the complaint did not allege that the Respondent engaged in surface bargaining.

We disagree with the judge's conclusion that, because the complaint does not expressly allege that the Respondent engaged in surface bargaining, the Respondent's conduct at the bargaining table is not at issue. Specifically, we find that such conduct is relevant to the complaint's allegation that the Respondent's overall course of conduct reflected bad-faith bargaining, which the judge did not address. Nevertheless, we find it unnecessary to pass on that allegation, as the finding of a violation would not materially affect the remedy herein. Because we are not passing on this issue, we do not rely on the judge's finding that the Respondent's assistance with the decertification effort ipso facto demonstrated that the Respondent did not bargain in good faith.

In finding that the Respondent unlawfully withdrew recognition from the Union based on a decertification petition that it had solicited and encouraged, the judge cited *SFO Good-Nite Inn*, 352 NLRB 268 (2008). We observe that the Board recently affirmed the two-member decision in that case. See *SFO Good-Nite Inn*, 357 NLRB No. 16 (2011).

modify his remedy,² and to adopt the recommended Order as modified below.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, All Seasons Climate Control, Inc., Norwalk, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(a) Within 15 days of the Union's request, bargain with the Union at reasonable times in good faith until full agreement or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement. Unless the Union agrees otherwise, such bargaining sessions shall be held for a minimum of 15 hours a week, and Respondent shall submit written bargaining progress reports every 30 days to the compliance officer for Region 8, serving copies thereof on the Union."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its facility in Norwalk, Ohio, copies of the attached notice marked 'Appendix.'¹⁰⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, 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, notices 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

² The Respondent excepted generally to the "ALJ's remedies," but it did not except specifically to the judge's grant of an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition. Therefore, we find it unnecessary to provide a specific justification for that remedy. See *SFO Good-Nite Inn*, 352 NLRB at 268 fn. 4 (citations omitted).

We agree with the judge that a 12-month extension of the certification year is appropriate in the circumstances of this case. In addition, we agree that it is appropriate to require the Respondent to bargain with the Union for a minimum of 15 hours per week and to submit periodic progress reports to the Region's compliance officer. We shall, however, revise the judge's remedy to require that the Respondent submit the progress reports every 30 days, rather than every 15 days. See *Gimrock Construction, Inc.*, 356 NLRB 529 (2011).

³ 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). In addition, we shall substitute a new notice to conform to the Order as modified.

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 August 31, 2007.”

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

We recognize Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) as the bargaining representative of our full-time and regular part-time employees in the following classifications: plumbing, pipefitting, electrical, insulating, carpentry, boiler making, laboring, and sheet metal work, truckdrivers/utilitymen, and parts coordinators/utilitymen.

WE WILL NOT solicit or encourage employees to circulate petitions seeking to decertify the Union or cause it to lose its majority status, or assist in such efforts.

WE WILL NOT withdraw recognition from the Union, and refuse to bargain with it, on the basis of such a petition or for any other unlawful reason.

WE WILL NOT fail and refuse to provide the Union with all of the information it requests that is necessary and relevant for the performance of its duties as the bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL, within 15 days of the Union’s request, bargain with the Union at reasonable times in good faith until full agreement or a bona fide impasse is reached, and if an understanding is reached, incorporate such un-

derstanding in a written agreement. Unless the Union agrees otherwise, WE WILL bargain for a minimum of 15 hours a week and submit written bargaining progress reports every 30 days to the compliance officer for Region 8, serving copies thereof on the Union.

WE WILL provide the Union with the information it has requested since on or about June 5, 2008, concerning the names of employees and their contact information, and their wages and fringe benefits.

ALL SEASONS CLIMATE CONTROL, INC.

Cheryl A. Sizemore, Esq., for the General Counsel.
David S. Farkas, Esq. and *Saber W. Vandetta, Esq.* (*Squire, Sanders & Dempsey LLP*), of Cleveland, Ohio, for the Respondent.
Amy L. Zawacki, Esq. (*Allotta, Farley & Widman Co., LPA*), of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The amended consolidated complaint, issued on March 20, 2009, arises from unfair labor practice (ULP) charges that Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) filed against All Seasons Climate Control, Inc. (Respondent or AS), and alleges violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Cleveland, Ohio, on May 11–14, 2009, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. All parties filed helpful posthearing briefs that I have duly considered.

Issues

1. Did Respondent, through attorney David Farkas and owner Bob Stang, in February and in June–August 2008, solicit and encourage employee James Marino to circulate and sign two petitions for the purpose of decertifying the Union and/or revoking the Union’s representative status, and assist him in those efforts?
2. Did Respondent, on about September 17, 2008, unlawfully withdraw recognition of the Union, based on Marino’s second petition?
3. Did Respondent, on September 18, 2008, based on that petition, fail and refuse to provide the Union with information that was necessary for, and relevant to, the Union’s performance of its duties as the collective-bargaining representative of unit employees?
4. Did Respondent engage in bad-faith bargaining during negotiations held from August 31, 2007–August 28, 2008, by its conduct in Paragraph 1 and also by:
 - (a) Failing and refusing to meet for collective bargaining on a sufficient number of days, and for reasonable amounts of time on days that it did meet?

- (b) Statements made by Farkas, Respondent's sole negotiator, that appeared to limit his authority to negotiate on various subjects? The complaint does not allege that Farkas in fact lacked sufficient authority.¹
- (c) Since on about June 5, 2008, failing and refusing to furnish the Union with all of the information it requested that was necessary for, and relevant to, the Union's performance of its duties as collective-bargaining representative?

The General Counsel has not alleged, either in the complaint or posthearing brief, that Respondent engaged in surface bargaining *per se*.

Witnesses

The General Counsel called Matthew Oakes, the Union's director of organizing; Joseph Thayer, union organizer; Marino and Ernest Ebel, former employees; and Robert Earl, Respondent's former operations manager and a stipulated 2(11) supervisor at times relevant.

Respondent called Farkas; Stang; Ken Russ, partner and vice president; Lisa Weaver, administrative assistant; Molly MacNally, Esq.; and Timothy Bettac and Eric Winters, employees.

This case presents a bifurcation as far as credibility. Regarding the almost yearlong series of bargaining sessions, the testimony of Oakes and Thayer, on one hand, and Farkas, on the other, was similar for the most part. Differences in their accounts generally were more in the nature of emphasis or specific details than in substance. Thus, with the exception of one document, discussed below, the parties agreed as to all the proposals and counterproposals that were presented and those on which they reached tentative agreements (TAs).

Farkas testified that he presented Respondent's Exhibit 30, a handwritten proposal on travel, at the April 7, 2008 meeting and that it was orally agreed to but not initialed off in writing because he wanted it first typed up in a more formal format. In this regard, he averred that he stated at the meeting that he would type it up when he got back to his office. However, all parties stipulated to the accuracy of Joint Exhibit 4, as far as where meetings were held. The document gives Farkas' office as the location for this meeting. Consistent with that locale.

Farkas further testified that at the meeting, his secretary made a copy of the handwritten version and provided it to the Union. Farkas offered no explanation for these contradictions.

Thayer, on the other hand, made no mention of the document or any agreement on travel in his account of the meeting. Moreover, the parties had a consistent practice of initialing all TA's. In light of all of these circumstances, I do not credit Farkas' testimony regarding the TA'ing of this exhibit.

Where testimony regarding negotiations diverged, I find that Thayer was the most reliable witness. He attended all meetings, took notes during them that he used to refresh his recollection, and testified in detail about what occurred at each session. I also note that his testimony was consistent with his correspondence with Farkas.

¹ The General Counsel confirmed this position at trial (Tr. 972). Therefore, I will not consider arguments in her brief to the contrary.

Oakes was not as reliable a witness on the specifics of conversations, especially at the 2008 meetings he attended. Thus, he testified that Farkas frequently made statements about his lacking authority and having to take proposals back to Stang. Yet, Oakes also testified—contradictorily—that after making such statements, Farkas went ahead with negotiating particular items and even signed off on some. In short, I believe that Oakes overstated what Farkas said on the subject. I also believe that, although Oakes did complain about the progress of negotiations during those meetings, his testimony exaggerated the extent thereof and the pressure he exerted on Farkas to achieve agreements. In this respect, based on the record evidence and my observations of their demeanor, I am convinced that both of them are forceful advocates, and I am not persuaded that Oakes would have been able to push Farkas into negotiating against his will.

As opposed to Thayer, Farkas was frequently indefinite and/or vague on the specifics of what the parties said at particular meetings. For example, Farkas testified that at the July 22, 2008 meeting, the parties discussed proposals relating to hours of work and travel but could not "recall specifically what we talked about."² He also first testified that he raised in some detail why he objected to the Union's proposal to use a local joint board to hear the final step of the grievance procedure, but later testified, "I just don't remember if I—if I talked specifically about it."³ He could not recall if Oakes talked to him about dates for the next meeting: "He may have—he may have wanted to see dates at that point. I don't remember."⁴

As another instance of his lack of certainty, Farkas first testified he was "pretty sure" that Oakes pushed for more dates for meetings at the August 28 meeting; then, that he could not "recall exactly" whether Thayer or Oakes stated the Union wanted more meeting dates and whether it was at the August 12 or 28 meeting; repeated that he was "pretty sure" it was August 28; and finally stated that he knew it was August 28.⁵

The direct contradictions in Farkas' testimony regarding Respondent's Exhibit 30 also undermined the reliability of his testimony on the bargaining sessions. Accordingly, to the extent that Thayer and Oakes were consistent and more detailed than he was, I find their testimony more trustworthy and credit their versions of events over his.

In stark contrast to testimony on bargaining, testimony on the critical subject of Respondent's involvement in Marino's petitions against the Union was wholly contradictory. Bluntly put, either Farkas and Stang or Marino did not tell the truth.

In making credibility findings, I am cognizant of the fact that Marino, as well as Ebel and Earl, were involuntarily terminated from employment, giving them a potential motive to testify against their former employer. However, this does not necessarily dictate the conclusion that they were not credible—a determination that must be made from the record as a whole, including consideration of their demeanor, the plausibility of their testimony *vis-à-vis* other witnesses, and all of the evi-

² Tr. 1261.

³ Tr. 1265–1267.

⁴ Tr. 1270–1271.

⁵ Tr. 1284.

dence. I note that Stang asked Marino to be the Company observer at the election and that Respondent called both him and Ebel to testify at the hearing on its objections to the election.

I further note that Respondent at trial urged me to admit portions of the hearing officer's report on objections that found Marino and Ebel lacking in reliability and credibility as witnesses.⁶ Without determining how much weight I would afford her credibility findings, I admitted these over the General Counsel's and Union's objections. However, her report in its entirety cuts both ways, because she also found Thayer to be a "forthcoming" witness and credited him, and she concluded that the affidavits Farkas prepared and presented on behalf of Respondent's objections were "identical" and "disingenuous" and contained claims of intimidation that were "at best exaggerated and at worst fabricated."⁷ In any event, I have independently made my own credibility findings.

As far as his demeanor and testimony, Marino reflected lack of sophistication in management-labor relations. At one point, when I repeated my reminder that he needed to answer "yes" rather than "yeah" on the record, he replied, "I'm sorry. I'm a construction worker. . . ."⁸ I do not believe that he would have had the savvy to initiate the two antiunion petitions on his own and without assistance, let alone change the language in the second petition to comport with the legal precision necessary to give an employer a good-faith doubt about a union's majority status.

Marino did not appear to make efforts to embellish or slant his testimony against the Company. On a number of subjects, he testified that he could not recall specifics, but his testimony regarding his conversations with Stang and Farkas about the petitions was detailed and consistent. In this respect, Ebel credibly testified that Marino made statements to him that supported Marino's testimony concerning those conversations. In sum, I do not believe that Marino fabricated his version of what Stang and Farkas told him.

In contrast, Stang's testimony contained a myriad of flaws. Stang was notably vague on when he saw the petitions, stating that he could only "purely speculat[e]" that he saw both petitions in September 2008, 2 weeks apart.⁹ His explanation of why he was so uncertain struck me as wholly unbelievable: "I didn't spend any—a lot of time on any of them because I really didn't know what they were."¹⁰ This professed nonchalance and lack of interest in the petitions was unconvincing. First, other evidence reflects that Stang repeatedly expressed a strong desire to remain union free. Second, Stang also twice admitted that when Marino came to his office and showed him the first petition, he read it over and gave Marino advice.

In this regard, he first testified that he said, "Jim, I really don't know what this is, but it seems like you could use a better—some better verbiage," and later, "Jim, I don't know what this means, but if you're going to file a petition you may want to word it a little differently than saying I don't like some-

one."¹¹ His statements that he did not know what the document was yet advised Marino on what it should say in order to be filed were inherently contradictory. Similarly implausible was his testimony that when he got the second petition from Marino, he did not know what it meant but nevertheless faxed it to Farkas.

Shedding further doubt on Stang's credibility, he made no mention of the NLRB in his initial recitations of his conversations with Marino about the petitions. Only late in his direct testimony did he said he had "instructed [Marino] to call the Labor Board" for any further information.¹² Similarly, only late on did he mention that he told Marino to call Farkas.¹³

Finally, Stang's testimony about his interaction with Marino on the morning the latter was circulating the second petition at the facility was highly improbable. Thus, he testified that when he went out into the shop, Marino stopped him and said, "You don't want to come out here," Stang asked what he meant, Marino said Stang did not want to know and told him, "[J]ust go back in your office," and Stang followed his directive without any further inquiry.¹⁴ Such a conversation is beyond the pale of plausibility, there being nothing in the record to suggest that employees routinely spoke to Stang in such an audacious manner or that Stang regularly listened to employees' orders.

As was Stang, Farkas was suspiciously vague as to when he had his two conversations with Marino about the petitions. He first said that the second was "probably" a few months later and then "I just don't remember."¹⁵ I have to assume that Farkas, as an attorney with an NLRB practice, was aware that his discussions with an employee concerning petitions to get rid of the certified union could potentially cross the line into illegality and that he therefore would have been more careful to document them.

I find another aspect of Farkas' testimony troubling: his summary accounts of his conversations with Marino. Thus, he testified that the first time Marino called, he told Marino to contact the information officer at the NLRB but that the NLRB probably would not help him because the employer was in the middle of bargaining. However, according to his testimony, Marino called him again a few months later and "said he wanted to file a petition. And again I told him to contact the Labor Board."¹⁶ It makes no sense that Marino would have called him a second time with an identical question.

For the above reasons, I credit Marino where his testimony conflicted with that of Stang and Farkas, and in general.

Facts

Based on the entire record, including testimony, my observations of witness' demeanor, documents, and stipulations, I find the following.

Since February 2001, Respondent has maintained an office and place of business in Norwalk, Ohio (the facility), and has

⁶ R. Exhs. 1–2.

⁷ GC Exh. 45 at 3 fns. 3, 6.

⁸ Tr. 796.

⁹ Tr. 995.

¹⁰ Tr. 993–994.

¹¹ Tr. 992, 997.

¹² Tr. 1000.

¹³ Tr. 1000–1001.

¹⁴ Tr. 990–991.

¹⁵ Tr. 1292.

¹⁶ Tr. 1293.

installed HVAC systems in connection with the construction industry. Respondent has admitted jurisdiction, and I so find.

In approximately mid-2008, AS moved its facility from 19 E. Main St. to 178 E. Main St. Respondent has not contended that this changed its bargaining obligations to the Union.

Events Preceding the July 15, 2005 Election

In the first half of 2005, the Union began an organizing drive among Respondent's employees.

Prior to the election, Marino had two or three conversations with Stang in the latter's office. In them, Marino asked the Company's stand, and Stang replied that "he was not going to allow the Union in his company."¹⁷ A few days after the election, in the same location, Marino asked what Stang was going to do. Stang responded, "I am not letting the Union in my company, no matter what."¹⁸

Earl, a former manager, attributed similar preelection statements to Stang. He had an office only a few feet away from Stang's and had a general recollection of overhearing two or three conversations that Stang had with Stang's brother, Farkas, and/or a third nonemployee. In them, Stang stated that he would close down or sell the business before he became a union shop.

The Election and its Aftermath¹⁹

Pursuant to a Stipulated Election Agreement in Case 8-RC-16733, an election was held on July 15, 2005, for the following unit:

All full-time and regular part-time employees who perform plumbing, pipefitting, electrical, insulating, carpentry, boiler making, laboring, and sheet metal work, truck drivers/utilitymen, and parts coordinators/utilitymen that are employed by the Employer at its 19 E. Main Street, Norwalk, Ohio 44857 facility, the sole facility involved herein

Of approximately 14 eligible voters, eight voted in favor of union representation. Respondent filed timely objections, and Hearing Officer Dolores Boda conducted a hearing on September 20. I described her credibility findings earlier. In her October 21 report, she recommended that the objections be overruled in their entirety.²⁰

In mid-August, in protest of what the Union deemed Respondent's ULP's, the Union picketed and "banned" AS at a jobsite in Norwalk, Ohio, at which it was contracted for the heating and air-conditioning. At the time, Russ was the chief project manager for the general contractor on the job. He testified without controversy that in a conversation they had about the picketing, Thayer said that the Union was going to bankrupt AS within a few months. The statement was made in the context of the Union's labor dispute with Respondent and prior to commencement of any bargaining, and I do not conclude that it reflected negatively in any way on the Union's desire to negotiate a contract on behalf of unit employees.

¹⁷ Tr. 770.

¹⁸ Tr. 772.

¹⁹ Hereinafter, the year will be omitted in dates where the context makes it clear.

²⁰ GC Exh. 45; see also R. Exhs. 1-2.

On January 25, 2006, the Union was certified as the exclusive collective-bargaining representative of the above-described unit. On about February 1, the Union requested that Respondent meet and bargain; the Company failed and refused to do so; and on March 22, the Union filed a charge thereon.²¹ The Region issued a complaint on April 5, alleging that Respondent failed to meet and bargain, as well as provide necessary and relevant information that the Union requested on about February 1.²²

On April 21, the General Counsel filed a Motion for Summary Judgment. In response, Respondent admitted its refusal to bargain and to furnish information but contested the validity of the certification based on its postelection objections and denied that the information requested was necessary and relevant. On May 31, the Board rejected Respondent's contentions and granted the Motion for Summary Judgment.²³ As per *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), the Board extended the certification year to start on the date that Respondent began to bargain in good faith with the Union. On May 21, 2007, the court of appeals denied Respondent's request for review and granted enforcement of the Board's decision.²⁴

By fax and letter dated June 4 to Thayer, Farkas advised the Union that AS wanted to continue its past practice of giving wage increases to employees in June but recognized that the Union, by law, had to be extended an opportunity to bargain. He asked Thayer to contact him if he so wished.²⁵ The Union has never averred any illegality in Respondent's issuance of evaluations and conferral of wage increases in 2007 or at any other time, and I therefore will omit further mention of what the parties said thereon in subsequent communications.

Thayer replied by fax and letter dated June 7, in which he requested the start of negotiations. He also requested information including, inter alia, a list of employees with contact information, various documents concerning their remuneration and working conditions, disciplines issued over the last 24 months, and a list of all current projects.²⁶ Because of frequent employee turnover, the Union later repeated at different intervals its request for a list of current employees.

The General Counsel does not aver that Respondent failed and refused to furnish requested information prior to June 2008. Therefore, I need not go into full detail on earlier information requests.

By fax and letter dated June 12,²⁷ Farkas stated that he had spoken to Stang, who was in the process of assembling the requested information. Farkas suggested meeting in Cleveland, alternating between his office and the Union's main office, or meeting somewhere in between. He stated that he was available on June 28.

²¹ Jt. Exh. 1. Respondent stipulated that the Union made attempts to negotiate as early as January 31, 2006 (Tr. 1412). All subsequent correspondence between the parties was through Farkas and Thayer.

²² Jt. Exh. 2.

²³ 347 NLRB No. 19 (2006) (not reported in Board volumes). Jt. Exh. 3.

²⁴ 236 Fed.Appx. 636.

²⁵ R. Exh. 10.

²⁶ R. Exhs. 11-11a.

²⁷ R. Exh. 12.

Farkas sent a fax and letter dated June 20, in which he referenced a phone call with Thayer earlier in the day and attached the AS policy manual (employees' handbook) and employee disciplines over the past 24 months.²⁸

Thayer, by fax and letter of June 25, stated that the Union needed additional information as per his requests of June 7, and renewed his requests for such.²⁹ He also asked about the time and location for the June 28 meeting (which did not take place).

Farkas responded by fax and letter dated July 3, with which he included additional information that the Union had requested concerning employee contact information and remuneration.³⁰ He confirmed their earlier agreement to hold the first bargaining session at the Union's office. By letter of August 24, Farkas confirmed the date of the first meeting as August 31.³¹

In preparation for the start of negotiations, Farkas had an associate look up various wage rates of the various crafts in the unit in early July, and he reviewed the collective-bargaining agreement of a company similar to AS. Further, he spoke with Stang regarding the nature of his authority and where Stang was prepared to make concessions.

Before negotiations, Thayer talked to employees, primarily face-to-face at jobsites but also by telephone, concerning what they wanted. I decline to adopt the Respondent's argument that I draw any adverse inferences against the Union because it did not send out questionnaires to employees, even though it may do so with other bargaining units.

The Bargaining Sessions

The parties stipulated to the accuracy of the information contained in Joint Exhibit 4, except for the persons it names as attending the July 22, 2008 meeting. The document reflects that the parties held 13 meetings, starting on August 31, 2007, and ending on August 28, 2008. The location regularly alternated between the Union's main office in Parma, Ohio, where the first meeting took place, and Farkas' law offices. Thayer and Farkas, who at all times Respondent's sole negotiator, attended all meetings. Oakes attended the first meeting and then returned for the June 19, 2008, and subsequent meetings with the exception of August 12, 2008. Union organizers Coleman and Larson also attended meetings. Oakes was the primary spokesperson for the Union when he was present; otherwise, Thayer served as the Union's chief negotiator. He took notes and brought a portable personal computer and printer to every session, on which he could prepare revised proposals. The Union based some of its proposals on language in existing collective-bargaining agreements. At no time did the parties present or discuss economic proposals.

Thayer testified about all of the meetings at which Oakes was not present; Oakes on the meetings that they both attended. For reasons stated earlier, I am more confident in the accuracy of Thayer's testimony on statements made at negotiations. I

²⁸ R. Exh. 13. The handbook states that the Employer "reserves the right to revise, supplement, or rescind any policies or portions of the handbook from time-to-time as it deems appropriate, in its sole and absolute discretion" GC Exh. 13f.

²⁹ R. Exh. 14.

³⁰ R. Exh. 15.

³¹ R. Exh. 17.

have therefore credited him generally; Oakes and Farkas only partially.

I credit Thayer's and Oakes' substantially similar testimony that at numerous times throughout negotiations, Farkas stated words to the effect that he would have to take union proposals back to Stang before he could agree to them on Respondent's behalf.³² In light of this conclusion, the lack of an allegation that Farkas in fact lacked authority, and my ultimate conclusions in this case, I will not detail all such statements meeting-by-meeting except when they shed light on other matters.

During the period of bargaining, the Union was involved in a campaign to represent a unit of almost 1000 employees of the Ohio Turnpike. Respondent has argued that the Union's primary focus was on that unit and that it had no real interest in representing unit employees. However, Respondent has not contended that the Union engaged in bad faith bargaining per se, and the Union's priorities or other activities in which it was engaged are irrelevant to a determination of any of the issues before me. Therefore, I will not further address evidence relative to the Ohio Turnpike. Nor do I consider probative Oakes' testimony about his experience successfully bargaining to contract in a shorter time with other companies.

August 31, 2007 Meeting—11 a.m.–noon (1 hour)

The primary purpose was to set up the ground rules for negotiations. The parties discussed and agreed to alternate the venue of meetings, described above. As to presentation of proposals, Oakes stated that with an employer such as AS, the Union wanted to negotiate a stand-alone agreement. Farkas said that he typically did not negotiate like that and wanted the Union to give him an entire agreement that he could take back to Stang. Oakes responded that employers varied widely in practices, policies, and employee benefits, and that a newly organized company would not fall into a "cookie-cutter agreement." Therefore, the Union wanted to present individual proposals, which, once agreed to, would be initialed as tentatively agreed to (TA'ed) and ultimately incorporated into a stand-alone agreement. Farkas ultimately agreed, and this was the procedure followed in subsequent sessions. Both Thayer and Farkas signed two copies of each TA and retained one each.

As to frequency and length of future meetings, Oakes said that the Union liked to meet on back-to-back days or multiple times in a short period, and for 4, 6, or even 10 hours. Farkas responded that he did not see the need to meet for more than a couple of hours at a time.

Oakes informed Farkas that Thayer would be the Union's chief negotiator and have full authority. Thayer made a verbal request for information including, inter alia, the amount of AS work that was commercial, as opposed to residential; and current jobs and upcoming work.³³

The one substantive item discussed was the duration of an agreement, with Thayer asking Farkas for thoughts on whether the contract should be for 1, 2, or 3 years.

³² Tr. 309, 370.

³³ See GC Exh. 3, Thayer's contemporaneous notes of the meeting.

Subsequent Communications

By letter of September 5, Farkas stated that he did not favor contracts of under 3 years' duration as a general principle and that he would try to provide the information the Union had requested.³⁴ He referred to both his and Thayer's "heavy schedules" and asked Thayer to contact him to set up the next meeting.

With letter of September 24, Farkas mailed Thayer a package that included some of the requested information, including employee benefits and a summary description of Respondent's current work.³⁵ In October, they had phone communications about scheduling the next meeting and the Union's receiving more information.

By an email of October 18, Thayer set out the dates over the next couple of months that the Union requested to meet.³⁶ Farkas responded by telephone, and they narrowed down the next meeting to a couple of days at the beginning of November.

In a fax and letter of October 30, Thayer referred to their October 26 phone conversation confirming a meeting date of November 8.³⁷ He repeated the Union's request to meet at least twice a month and asked for a second date in November and two dates in December. Thayer also confirmed that in their phone conversation, Farkas had stated that he expected the Union at the next meeting to make proposals, which he would take back to Stang, and that Thayer had wanted assurance that he had full authority to negotiate and sign off on proposals. By fax and letter of November 5, Farkas denied any implications that the Company was delaying bargaining.³⁸

November 8 Meeting—2–3:30 p.m. (1-1/2 hours)

The Union presented three proposals:³⁹

1. Cover page, including duration. The parties verbally agreed to a 3-year term of contract, but Farkas stated that he did not want to sign a blank cover page unless there was a contract with it. He also questioned when the 3-year period would begin.

2. Recognition and scope. Farkas asked why the Union's proposal did not match the description and address as stated in the certification, which was based on the parties' preelection agreement. Thayer responded that he did not think this was a big issue and mentioned that he had heard rumors from employees that AS was considering changing its location.

3. Hours of work. Farkas said that he wanted overtime provisions to reflect the requirements of the Fair Labor Standards Act (FLSA), with overtime after 40 hours a week, as opposed to the Union's proposal of overtime after 8 hours a day and on weekends. He also suggested that the provision on hazardous work be clarified to reflect that "dirty materials" did not apply to routine work, suggesting the qualifier "unusual." Thayer agreed on modification of the language and to work with Farkas to formulate appropriate language. During discussion on

cleanup time, Larson asked Farkas if Stang was planning to attend negotiations. Farkas replied, "Probably not."

As per Farkas' earlier request, Thayer gave him a stand-alone agreement for a smaller company as a sample. The parties scheduled the next meeting for November 27.

November 27 Meeting—10 a.m.—(unknown)

AS presented two counterproposals, and the Union presented a revised version of its earlier proposal on recognition and scope.⁴⁰

1. Union recognition and scope (AS and the Union). Farkas reiterated that the Company wanted to use the unit description and address contained in the certification. Thayer replied that the shop was now located at a different address. Farkas responded that he understood from where Thayer was coming. He also raised the Union's language that concluded with "any other work as defined" and asked how that would impact the Employer's performing work outside of the unit description. Thayer answered that the Union wanted to cover all kinds of sheet metal work. From his laptop and portable printer, Thayer printed a revised union proposal and gave it to Farkas, along with a copy of the International's constitution.

During the discussion, Thayer verbally made a request for the address of the shop and other Stang properties, because the Union had heard the Stang family potentially might move or sell the business and open up at another location. Farkas testified that either at this or the next meeting, he told Thayer that the Company intended the stipulated unit description to allow it the possibility of opening up a double-breasted operation.

2. Hours of work and overtime (AS). Farkas repeated that he wanted overtime after 40 hours as per FLSA, and the Union reiterated its proposal of overtime after 8 hours a day. The parties discussed defining workweek and how that interfaced with overtime. Thayer suggested a guaranteed 40 hours a week, but Farkas did not agree to this. He explained that in his counter nonbargaining-unit employees could perform the work if bargaining unit employees could not. Thayer asked why the Union would agree to that when all AS employees performing the work would be in the unit. He asked if the Company was claiming that overtime after 8 hours would be a financial hardship. Farkas replied no but that the Employer had the right to run his business the way he wanted. Thayer asked how much overtime there was, and Farkas replied that he did not know.

At the conclusion, Thayer and Farkas reviewed their calendars and narrowed the next date(s) to December 18 and/or 21. Thayer testified that he believed he stated that the Union wanted to meet at least twice in December, with one meeting a month being insufficient. Farkas responded that those were his available dates, mentioning his busy schedule and the upcoming holidays.

December 21 Meeting—9:30–11:38 a.m. (2+ hours)

AS presented a counterproposal on hours of work and overtime and, after a caucus, the Union prepared and presented a revised proposal thereon.⁴¹ In Section 1, Farkas wanted "unusually" before "dirty materials" and "dirty environment," as far

³⁴ R. Exh. 18.

³⁵ R. Exh. 19.

³⁶ GC Exh. 30.

³⁷ GC Exh. 31.

³⁸ R. Exh. 21.

³⁹ GC Exhs. 8a1–2.

⁴⁰ GC Exhs. 9a1–b (also R. Exhs. 25a–d).

⁴¹ GC Exhs. 10a–b (also R. Exhs. 26a–c).

as reasonable cleanup time while on the clock. In section 2, he wanted “regular” inserted before definition of workweek as Monday through Friday. The Union agreed, and the parties TA’ed those two sections.

On overtime (sec. 3), Farkas continued to emphasize the FLSA but said that the Employer might consider 1-1/2 overtime after 12–14 hours, rather than after 8 hours, as the Union was proposing. Farkas also asked how “light commercial” and “regular commercial work” differed, since he did not know what the former was, and Larson provided an explanation.

Finally, as to section 4, the Union’s proposal provided for a minimum of 4 hours of showup pay, Farkas said that seemed excessive, but he would return with a counteroffer.

He further stated that he wanted to hold off negotiating on the subject of subcontracting prefabrication work until a pending prevailing wage case was decided.

Thayer testified that he believed he said at this meeting that the Union was not pleased with meeting only once a month and wanted to try to meet at least every other week, to which Farkas replied they should try to get one date at a time.

Farkas provided the Union with a current and future job list, and the last dates of employment for three former employees,⁴² as the Union had earlier requested.

January 17, 2008 Meeting—9:30–10:30 a.m. (1 hour)

The Union presented a revised proposal on subcontracting, and two new proposals, on use of journeymen and apprentice sheet metal workers on jobsites and on the Union’s furnishing of such employees.⁴³ The parties briefly discussed hours of work (secs. 3 and 4), carried over from the previous meeting, but reached no agreement.

On subcontracting, Farkas stated that the Company considered the Union’s proposals too restrictive, effectively preventing AS from ever subcontracting to a nonunion contractor. He raised a situation in which AS made a reasonable offer to a union subcontractor that did not work out. Thayer orally requested information pertaining to work AS subcontracted and to whom. Farkas replied that he did not know and would ask Stang. The parties discussed subcontracting of shop fabrication work, and Farkas again raised a pending prevailing wage case.

Farkas objected to the Union’s proposal for use of journeymen and apprentice sheet metal workers, stating that the Company did not use such classifications. Thayer explained what the Union considered to be the qualifications for those positions. Farkas replied that some AS employees had years in the trade, and he asked if those terms could be redacted. Thayer and Larson responded that they would discuss it. Farkas stated that he would review with Stang the Union’s proposal for furnishing labor but did not see any issues.

At the conclusion, Farkas and Thayer agreed to aim for having the next meeting during the first week of February.

February 8 Meeting—9:15–11:25 a.m. (c. 2-1/4 hours)

The Union proffered a revised proposal on use of journeyman and apprentice sheet metal workers, deleting “journeyman” and “apprentice” before the term sheet metal workers,

and adding language that nothing in the section limited AS’ ability to subcontract work.⁴⁴ The parties TA’ed the proposal. The parties also TA’ed the Union’s January 17 proposal about furnishing duly qualified sheet metal workers.⁴⁵

Farkas presented a counteroffer on subcontracting, providing that any subcontractors it used had to pay the same or substantially the same wages as provided for in the contract.⁴⁶ Thayer stated that the term “substantially” was inherently ambiguous, and Farkas agreed.

Thayer repeated his request for information pertaining to subcontractors. The parties took a recess, after which Farkas told the Union that AS used two named agencies to supply labor and subcontracted shop fabrication work to four named companies. He reiterated that AS did not want to get locked into whom it could subcontract. In the course of discussion of subcontracting, the pending case again came up.

At the conclusion, the parties agreed to another meeting on about March 6.

March 7 Meeting—9:15–10:45 a.m. (2-1/2 hours)

The Union made a first proposal on union security, providing in section 1 that employees sign up for union membership within 8 days following the beginning their employment.⁴⁷ Farkas first pointed out that the proposal had nothing about employees’ *Beck* rights (as per *Communication Workers v. Beck*, 487 U.S. 735 (1988)). He also stated that 8 days did not seem long enough and mentioned 30 days or possibly more in light of the Company’s probationary period. Thayer replied that the 8 days was dictated by the Act and, during a short recess, he called the Region and confirmed this understanding.

As to section 4, the Company’s deduction of union dues from paychecks, Farkas stated that employees had a right to know their rights regarding union membership. Thayer replied that Farkas was inconsistent when it came to putting legal language in the contract. Farkas repeated his statement and said he would come back with a counteroffer.

The Union presented a revised proposal on employee travel.⁴⁸ Farkas described the Company’s current policy regarding travel outside of a certain radius and questioned why there was language concerning work outside the United States and Canada. Thayer provided examples of why the Union wanted particular language. Farkas responded that he would return with a counteroffer after he was certain of the existing policy.

Finally, the Union presented a new proposal on classifications and work covered.⁴⁹ Thayer stated that the Union wanted to hold off on negotiating section 1 (minimum wage rate) until the parties negotiated economic terms. Larson provided an explanation concerning section 3, which provided that work on certain items would be treated differently as far as wage rates.

At the conclusion, Thayer stated that he had rumors that Respondent was moving or considering making a move or opening another company, and he asked if Stang, his wife, and/or

⁴⁴ GC Exh. 24a.

⁴⁵ GC Exh. 24a1.

⁴⁶ GC Exh. 24b1.

⁴⁷ GC Exh. 25a1.

⁴⁸ GC Exh. 25a2.

⁴⁹ GC Exh. 25b.

⁴² R. Exh. 27.

⁴³ GC Exhs. 11a–b.

AS had other businesses. He and Farkas agreed to try to meet by the end of the month or the beginning of April, but they set no date certain. He mentioned at some point that he did not feel that the parties were meeting enough.

Subsequent Communications

Farkas, by letter of March 14, enclosed a counterproposal on union security (as promised), with union membership within 30 days, and stated that Stang had no plans or intentions of opening any company that would be performing the same or similar work as AS.⁵⁰

Thayer, by fax and letter of March 21,⁵¹ requested that:

[W]e set a minimum of one (1) meeting day a week or four (4) meeting dates a month. Even though some minimal progress has been made in our previous meetings I believe it's nowhere near what it should be. Also with Mr. Stang refusing to come to a meeting it makes it hard to further our progress without taking twice as long as it should to wait for his approval on proposals.

After saying, "Understanding both of us have demanding work schedules," he listed a number of dates that he was available in April and said that May was "very open."

Farkas replied by letter of March 27, stating that he was available on April 4 and 9, and pointing out that he, but not Thayer, was available during the next week or so.⁵² He called the Union's contention about Stang not attending negotiations a "straw man" and placed the blame for any lack of progress on the Union's conduct in not providing a comprehensive set of proposals at the outset and in not timely responding to the Employer's counterproposals.

In a subsequent phone call, Farkas and Thayer set the next meeting date as April 7.

April 7 Meeting—9:30 a.m.–12:10 p.m. (c. 2-3/4 hours)

The Union provided Farkas with a statement of the law pertaining to union security in the building and construction industry.⁵³ Farkas responded that he still thought 8 days too short a grace period but appreciated Thayer getting the information. He repeated that he wanted employees to know their *Beck* rights but would be agreeable to giving a website link in lieu of spelling out those rights in the agreement itself. Thayer said he would take the suggestion back to Oakes.

Farkas proffered a counterproposal on travel and, after a caucus, Thayer returned with a revised proposal thereon.⁵⁴ The parties discussed use of MapQuest to calculate mileage, as proposed by AS, and the Union repeated various travel scenarios. Farkas asked whether employees who used their personal conveyances would receive regularly hourly rate and mileage and whether travel pay would be one way or roundtrip. He mentioned the possibility of a 40-mile radius, which was between the Union's proposal of 30 miles and his proposed 50, stating that he would return with a counteroffer.

The last document exchanged was the Union's initial proposal on tools.⁵⁵ Farkas stated that he was not familiar with the hand tools that AS employees were required to have and that he would need to talk to Stang.

At the conclusion, Thayer stated that they needed to try to meet at least one more time by the end of the month, and he and Farkas agreed to meet again on April 29.

Subsequent Communications

With a letter of April 10, Farkas sent a written counterproposal on travel, reflecting what he had proposed at the previous meeting and adding the Union's request for mileage.⁵⁶

Thayer later had to cancel the April 29, due to his being off from work for over 2 weeks following a family death on April 21.

On June 4, Thayer sent Farkas an e-mail, asking to schedule a new negotiating date, asking that they try to meet at least twice in the month, and saying that he was available to meet on all subsequent days in June with six specified exceptions.⁵⁷

By letter of June 5, Thayer requested the following: a list of all jobs that AS was currently performing, with locations of projects and employees working at each; and an updated employee list with addresses and dates of hire.⁵⁸

June 19 Meeting—9:25 a.m.–1:15 p.m. (c. 3-3/4 hours)

Oakes began by stating that he was taking over as lead negotiator because he was not satisfied with the progress of negotiations and wanted to get them moving. He presented several proposals prepared for the meeting:⁵⁹

Cover page and duration.
Recognition and scope.
Hours of work.
Subcontracting.

Oakes reviewed all of the union proposals one-by-one and any corresponding counterproposals, and he and Farkas agreed on their status.

On cover page and duration, Oakes asked for the Company's objections. Farkas responded that he had agreed to a 3-year contract duration and had no objection to the provision as long as it contained a notation that the 3 years would be from the final signed agreement. Oakes agreed, the notation was added, and the parties TA'ed the provision.⁶⁰

As to unit scope, Oakes stated that the Union wanted to include specific categories of craftwork in addition to sheet metal work, rather than only HVAC, because AS said that it did them all. Farkas replied that he was concerned about how this would affect the AS work sheet metal workers did not typically perform. Oakes stated that the Union's proposal referred to work set out in the International's constitution and that the certification was what it was. Oakes raised the possibility of a side agreement or side letter regarding definition of sheet metal

⁵⁰ R. Exhs. 28a–e.

⁵¹ GC Exh. 32.

⁵² R. Exh. 29a.

⁵³ GC Exh. 26(a).

⁵⁴ GC Exhs. 26a1–b.

⁵⁵ GC Exh. 26c.

⁵⁶ R. Exh. 31.

⁵⁷ GC Exh. 33.

⁵⁸ GC Exh. 43.

⁵⁹ GC Exhs. 4a1, 4b–c, 4g.

⁶⁰ GC Exh. 4a2.

work, rather than putting in the agreement a full and lengthy description from the constitution.

On recognition, Farkas repeated the Company's objections to the address stated in the Union's proposal and to the reference to the International's constitution. He explained that he had a problem with the language, not with the statement that the Union was the authorized collective-bargaining representative through an NLRB election. Perhaps tellingly, Farkas asked what would happen if during the term of the agreement, employees no longer wanted a union.⁶¹ Thayer brought up the Employer's move (a few months earlier) to 178 E. Main Street. Farkas replied this was a good point, and he would consider it, but he still wanted "sole facility" language. Oakes and Thayer discussed Board decisions pertaining to recognition and the construction industry.

Regarding hours of work, Farkas asked for clarification of "dangerous" or "hazardous" in relation to employee cleanup time. Oakes replied that this referred to cleanup required by the Environmental Protection Agency or similar situations. He and Farkas also discussed workweek vis-à-vis overtime pay. Farkas asked what "notify" meant in the provision requiring the Employer to notify the Union and the employee in advance of any change in regular starting or quitting times. Larson responded that the Union was not looking for anything specific. The parties reached agreement on sections 1 and 2 of the Union's proposal on hours of work (regular hours of work and workweek), and the Union printed out a document showing such agreement and providing its proposals on overtime and call-in pay (secs. 3 and 4, respectively).⁶²

Oakes asked whether the Company's overtime was seasonal and when during the day it was performed. Farkas responded that he did not know. Oakes repeated the Union's position that overtime be paid at a rate of 1-1/2 for hours outside the regular 8-hour day. Farkas responded that AS currently had to comply only with Federal law (1-1/2 after 40 hours/week), and he would not expand that. The Union's proposal provided for 1-1/2 pay after 8 hours/day for commercial work, and 1-1/2 pay after 40 hours/week for specified light commercial, residential, and service work.⁶³ Farkas asked what the reason was for the distinction. Oakes answered that commercial work typically involves schools and government office buildings, large projects where the prevailing wages are less competitive than the light commercial, residential, and service markets; therefore, the Union is more stringent on commercial work.

Oakes asked Farkas what percentage of the employees' work fell into the various categories and which employees, if any, performed refrigeration work (agreements various on whether it is classified as service work). Farkas responded that he could not answer.

After discussion, the Union agreed to add language requiring supervisory permission for overtime on weekends and holidays, and to delete the provision that overtime be assigned on a rotat-

ing basis. Further, the Union's proposal on double-time pay applied it to work performed on Sunday or any holiday, but the Union agreed to limit such pay to Sunday. The parties TA'ed on those provisions.⁶⁴ Other than for double time on Sunday and a paid holiday being included in the employee's scheduled 40-hour week, no agreement was reached on when employees would receive overtime pay.

On subcontracting, Farkas said that the Company currently had no restrictions, and his job was to protect the Employer. Oakes asked what kind of work AS typically subcontracted and to whom. Farkas replied that he believed the Company was subcontracting shop work. Oakes asked why type, and Farkas responded that he did not know and would check with Stang.

After discussions on the above items, Oakes repeated that he was not happy with the progress of negotiations and that the process needed to be moved along. He further said that their discussions showed how important it was that Stang be present at negotiations to provide reliable information. Farkas responded that he doubted Stang would ever attend.

Oakes also stated that the parties needed to meet more frequently, at least twice a month. Farkas then suggested that proposals be submitted ahead of time, to which Oakes responded that the Union had 11 proposals on the table, on which no agreement had been reached. Farkas stated that he was used to negotiations in which the Union gave an entire proposed contract, and the employer reviewed it and sent it back. Oakes answered that Farkas was used to negotiating production or factory-type agreements that were not feasible in the construction industry.

At the conclusion, Oakes stated that hereinafter he would be the chief negotiator but Farkas could continue to communicate with the Union through Thayer, who would handle setting up the next meeting.

Subsequent Communications

By fax and letter dated June 23, Thayer stated that he had information that AS had terminated at least two employees and recently hired another. He requested: (1) the names of all employees, with their addresses, phone numbers, dates of hire, title or classification, and starting pay rate and benefits; and (2) the names of all employees who had been terminated, laid off, quit, or were no longer employed for any reason since November 27.⁶⁵ He also requested paperwork concerning the recent pay raises and documentation showing the total wage and benefit costs for each employee.

Farkas responded by letter of June 27, saying that he would provide the requested information after Stang returned from vacation in early July.⁶⁶ He did provide in the letter information the Union had requested in negotiations concerning the Company's current projects (six), with cities but not street addresses, together with the employees working on them (four, total). As to bargaining, he stated, "I once again ask that you come prepared with proposals. We have only received about eleven proposals thus far."

⁶¹ Credited testimony of Oakes.

⁶² GC Exhs. 4d-e.

⁶³ Light commercial projects involve use of residential equipment, which is smaller than that used for commercial jobs. Service work entails repair or replacement of existing equipment.

⁶⁴ GC Exh. 4f.

⁶⁵ GC Exh. 34.

⁶⁶ GC Exh. 35 (also R. Exh. 35a).

Thayer, by a July 1 fax, acknowledged receipt of Farkas' June 27 letter but questioned the accuracy of its information, asserting that AS had many more than four employees.⁶⁷ He asked for information on "ALL" current projects.

Further, in response to Farkas' statement that Thayer come prepared with proposals, Thayer pointed out that agreement had been reached on only two of the Union's 11 proposals. He complained about Farkas' lack of information during bargaining and his frequent statements that he had to take proposals back to Stang. He concluded by accusing Farkas of engaging in surface bargaining. By a July 1 letter, Farkas responded that Thayer's comments were "groundless."⁶⁸

July 2 Meeting—9:30 a.m.—1:30 p.m. (4 hours)

Farkas provided counterproposals on union recognition and scope, subcontracting, and hours of work.⁶⁹ The Union brought revised proposals on subcontracting, hours of work, and travel.⁷⁰

On recognition and scope, Farkas opened by saying that he had researched the matter and, from his understanding, the Union's position at the previous meeting lacked merit. Oakes said that he did not agree with Farkas' interpretation but there was no point arguing. Farkas stated that as far as union recognition, he would not agree to language that did not contain the Employer's address. Oakes replied that he did not believe it was important in the unit description. Farkas asked if the Union would claim to represent employees if the Company opened a nonunion operation. Oakes opined that the location of the Employer did not affect the bargaining unit as it was certified.

The Union agreed to put in the language of the certification and the 19 E. Main Street address. Oakes stated that with respect to work listed in the International constitution, he had no problem with a letter of understanding or with making it an exhibit to the agreement. Farkas replied that he did not consider that necessary, and he and Thayer signed off on recognition and scope.⁷¹

The parties exchanged proposals on subcontracting. Oakes asked Farkas if he had spoken to Stang about the Company's subcontracting. Farkas replied no but that AS adhered to the position that it could subcontract, and he again referenced the pending case. Oakes responded that he did not feel the parties were far apart. After stating the Union's position, apparently that jobsite work included both service and installation, Oakes asked if the Company's proposal covered service or was limited to installation. Farkas replied that he did not know. Oakes responded that AS needed to have somebody present at negotiations; if the Union could get basic answers to simple questions, the parties could move more quickly through some of the outstanding items and proceed to new proposals.

Oakes pointed out that the parties' respective provisions about subcontracting to companies in compliance with law

were not very different ("legally bonded or insured as required by law"—AS; "meet[ing] all Federal, State and, [sic] Local laws"—Union). Farkas replied that the Company would be willing to make certain that subcontractors were bonded or licensed but did not want to have to take the time to check their compliance with all laws. Section 1 of the Union's proposal provided that AS subcontract only to companies paying the same or substantially the same wages and benefits as those provided in the agreement. Farkas stated that determining benefits would create a paper nightmare for AS, and Oakes agreed to limit the section to wages. Oakes suggested that a provision that the Company provide prior notification to the Union of subcontracting work might be beneficial. Farkas replied that he was not necessarily opposed to that. The Union prepared a revised proposal.⁷²

Oakes' testimony on the particulars of what was said at the meeting about call-in pay (hours of work, Sec. 4) was confusing, because some of the concerns he attributed to Farkas were already addressed in the Union's revised proposal. Further, although Oakes testified that Farkas stated he did not know the Company's existing on-call policies and would have to check with Stang, Farkas TA'ed the subject at the meeting. Farkas could not recall what was said on the matter at this meeting.

In any event, the Union's proposal provided for 4 hours' pay and benefits if the employee reported to work at the Employer's direction but was not placed to work, excluding conditions over which the Employer had no control; further, the section would not apply to on-call employees who were called out for service calls. The Company proposed a minimum of 3 hours' pay where the employer knew in advance that the job would not be for a full day's duration and that service calls would be excluded. Oakes agreed to those modifications, and he and Farkas then TA'ed the section.⁷³

Regarding the Union's revised proposal on travel, Oakes testified that Farkas responded it was lengthy and detailed and that he did not have the authority to negotiate it right then but would take it back to Stang and get back to the Union. However, Oakes further testified that, at his urging, Farkas went ahead and TA'ed certain sections of the proposal—inconsistent with his stating that he did not have authority to negotiate. I therefore do not find as a fact that Farkas made such a statement at this meeting.

Oakes said that their respective proposals on sections 1–2 were very similar (as far as providing travel pay and private-vehicle mileage for employees employed outside of a 40-mile radius from the facility). Farkas apparently wanted travel pay for one way only, and the Union agreed, as reflected in their TA's on these sections.⁷⁴

Farkas stated that sections 3–4 of the Union's proposal (separate computation of travel pay from regular pay, and per diem allowance for employees traveling outside of the Union's jurisdiction) were not in the Company's proposal. Oakes replied that they were fairly straightforward matters, and explained why the Union wanted separate travel checks. He inquired

⁶⁷ GC Exh. 36.

⁶⁸ R. Exh. 36.

⁶⁹ GC Exhs. 5a–a1, e, and i.

⁷⁰ GC Exhs. 5f, h, and k.

⁷¹ GC Exh. 5d. Although Farkas testified that he agreed to remove the "sole facility" language (Tr. 1235), it is contained in the TA'ed provision.

⁷² GC Exh. 5g. Notification was set out in a new sec. 1.2.

⁷³ GC Exh. 5j.

⁷⁴ GC Exh. 5l.

what the Employer paid for travel, whether employees were currently working out of town, and whether they had done so in the past. To each of these questions, Farkas answered that he did not know but would take the sections back to Stang. He said at some point that the Company provided vans to its employees.

On section 5, calculating mileage, the Union proposed using MapQuest. At Farkas' request, "or another agreed-upon program" was added, and the parties TA'ed that section.

After the parties had TA'ed the last item, Oakes asked Farkas if the Union would be receiving any management proposals, and Farkas replied, "probably not."

Subsequent Communications

By fax and letter of July 15, Farkas furnished the names of terminated employees and of new hires, and he enclosed a current employee roster list that included addresses, phone numbers, and job titles.⁷⁵

July 22 Meeting—9:35 a.m.–1:06 p.m. (c. 3-1/2 hours)

Oakes testified that he first asked if Farkas had the requested information on subcontracting and travel or any proposals, Farkas replied that he had not talked to Stang and had no proposals, and Oakes stated that he was not happy and did not feel as though Farkas was prepared to negotiate.

The Union gave Farkas a copy of the provisions relating to hours of work, in which the portions agreed upon were in red, and the remaining provisions in black.⁷⁶ Farkas agreed that it was accurate. Oakes presented him with the Union's proposal on several of those sections, pertaining to overtime, which substantially mirrored the Union's proposal on June 19 as far as pay rates.⁷⁷ Farkas responded that the Company adhered to its earlier position and that he did not have authority to go further than what AS had already proposed.

Nevertheless, they continued discussing overtime pay. Oakes asked what the problem was with a 1-1/2 overtime rate. Farkas replied that overtime after 40 hours was law, and the Company was sticking to that. They again discussed distinctions between commercial, light commercial, residential, and service work. Oakes again asked what the bulk of Respondent's work was, and Farkas repeated that he did not know and would have to talk to Stang before he could answer. Oakes responded that Farkas was supposed to be talking with Stang about negotiations and this was why Stang needed to be present.

They next discussed other unresolved sections and reached "something of an agreement" on double pay for Sundays and holidays; i.e., Farkas stated that the provision looked "okay" in theory.

Oakes said that the Union would agree to overtime after 40 hours/week, instead of after 8 hours/day, provided: (1) AS agreed that it would not schedule employees to work from Tuesday though Saturday; and (2) if the Company had work available during the normal weekwork but the employee did not

work such, the employee would be entitled to 1-1/2 pay for Saturday work.

Oakes also presented Stang with the Union's prior proposals on travel, showing the four sections on which they had signed off, and the two that remained outstanding (separate paychecks for travel, and room and board outside of the Union's geographic jurisdiction).⁷⁸

Oakes testified that Farkas twice stated that he did not have authority to proceed further on negotiating travel until he talked with Stang but that Oakes pressured him into doing so. For reasons stated earlier, I do not credit this aspect of Oakes' testimony. The parties engaged in further discussion, and Farkas in fact signed off on the two remaining sections as proposed by the Union with minor changes in nomenclature but not substance.⁷⁹ Thus, even crediting Oakes, this rendered moot any preceding statements that Farkas made.

The Union presented a revised proposal on grievances.⁸⁰ Farkas read it over, said it was lengthy, and stated that he would take it back to Stang. Oakes responded that in most of the Union's negotiations, the company's attorney reviewed the grievance proposal, and Farkas was an attorney. Farkas replied that he could see a couple of problems at the outset; the first, allowing a grievance to be filed within 90 calendar days of first knowledge was way too long; AS was probably looking for 3 or 4 days. Oakes asked how the Employer paid, and Farkas replied that he could not answer. He asked why it was relevant, and Oakes explained its impact on grievances relating to overtime pay, adding that the Union was not locked into 90 days.

The Union's proposal had the final step of the grievance procedure as going before the local joint adjustment board (JAB), a panel comprised of three union representatives and three contractors. Farkas stated that, from his experience and in his opinion, the board was biased in favor of employees, and he therefore preferred the Triple A (American Arbitration Association) or FMCS (Federal Mediation and Conciliation Service). Oakes replied that the Union had contracts with both JAB and Triple A but preferred the former because of its understanding of the construction industry. Farkas repeated that he preferred an arbitrator but would get back to the Union on the proposal.

Oakes testified that at the end of the meeting, he brought up subcontracting again and asked if Farkas he had gotten information on the percentage of work AS did that was residential, commercial, etc., and whether AS subcontracted and to whom. This is inconsistent with his prior testimony that he asked this of Farkas at the outset of the meeting and that Farkas replied he had not gotten such information from Stang.

In describing their subsequent discussion, Oakes testified that Farkas mentioned a few companies, one of two of which Oakes recognized as union. Oakes further testified that as to subcontracting labor to temporary agencies, "I believe we had a little bit of discussion . . . , not really detailed because Mr. Farkas responded to the majority of my questions that he hadn't

⁷⁵ R Exhs. 39a–b.

⁷⁶ GC Exh. 6a.

⁷⁷ GC Exh. 6a1.

⁷⁸ GC Exh. 6e.

⁷⁹ GC Exh. 6g.

⁸⁰ GC Exh. 6h.

spoke [sic] with Mr. Stang fully. He had checked on a couple of little things.”⁸¹

Because Farkas did not testify specifically on what was said on subcontracting at this meeting, and Oakes’ testimony was not fully consistent, I make no findings of fact thereon.

The next meeting was scheduled for August 12. Oakes said that he would not be able to attend and that Thayer would serve as lead negotiator.

Subsequent Communications

With letter of August 8, Farkas sent in advance of the scheduled meeting, a proposal regarding management rights, a counterproposal regarding the grievance procedure, and questionnaires that four employees had completed.⁸² Consistent with what he had stated at the previous meetings, the grievance procedure proposal provided, *inter alia*, for 3 working days for an aggrieved employee to file a grievance after occurrence or after the employee should have known of it, and for Triple A to be the final step in discharge grievances, with the Employer being the last level for review of nondischarge grievances.

August 12 Meeting—9:35–11:30 a.m. (c. 2 hours)

Toward the beginning, Thayer presented a handwritten revised proposal on hours of work, providing overtime for all hours worked in excess of 40, and double pay for Sundays and holidays, and Farkas TA’ed it.⁸³

Farkas gave the Union copies of the management-rights proposal and grievance procedure counterproposal that he had sent on August 8.⁸⁴

Thayer responded that 3 days was too short a time, and they also discussed using Triple A and limitation of arbitration to discharges, a provision that Farkas stated he had in other contracts. He explained that he did not want the Employer to have to go through arbitration over something such as a reprimand. During a caucus, Thayer and Larsen discussed Respondent’s proposals. Thayer returned with a handwritten counter, providing that a grievance be filed by an aggrieved employee and/or duly authorized representative within 30 working days rather than 3.⁸⁵ Farkas responded that he still considered 30 days too long.

The parties also briefly discussed the Company’s management-rights proposal, with Farkas stating that he was of the school in favor of broad management-rights language in an agreement.

August 28 (Last) Meeting—10:10 a.m.–1:05 p.m.
(c. 3 hours)

Oakes began by recapping where the parties stood on proposals and confirmed that agreement had been reached on hours of work. The Union provided Farkas with a revised proposal on subcontracting.⁸⁶ Although Oakes testified that Farkas responded that the Union already had the Employer’s position and he would not discuss it, and that Oakes pushed him into

negotiating further, I believe this was not an entirely accurate portrayal of what took place (Farkas, as was often the case, testified that he could not recall specifics). In any event, section 1 of the proposal provided that “The Employer will only subcontract work to a contractor or subcontractor who pays the same or substantially the same wages as those provided for in this Agreement.”

Farkas insisted that the Employer have unlimited subcontracting rights in the shop, and the Union agreed to limit coverage of the subcontracting article to jobsite work, provided it included all installation and service work. Farkas agreed.

Section 3 provided that the Employer not subcontract work to any company not complying with all Federal, State, and local laws. Farkas stated that he still preferred language that subcontractors be properly licensed and bonded. According to Oakes, they had a “pretty long” discussion on the matter. Farkas asked, for example, if the Union would file a grievance if a subcontractor did not comply with the requirements of the ADA (Americans with Disabilities Act). Oakes assured him that the Union only wanted to ensure that AS subcontracted to reputable companies.

I credit Oakes’ un rebutted testimony as follows (Farkas did not directly or indirectly deny Oakes’ version). Farkas stated that “it looked good,” and he signed off on the article.⁸⁷ Oakes commented that it was good they had subcontracting out of the way, but Farkas then stated he had meant only to sign off on Section 1, not all four provisions.

The parties had a long discussion on notifying the Union (sec.1.2). Farkas stated that he had agreed to some kind of prior notification to the Union of subcontracting, but he raised a number of hypotheticals. Oakes responded that they could never negotiate a contract covering every conceivable possibility.

As to section 2 (no employees being laid off due to subcontracting), Oakes asked if any employees had ever been laid off for that reason. Farkas replied that he did not know and would have to talk to Stang.

Regarding the Union’s revised proposal on section 3, Oakes stated that the Union would agree to the Company’s language (licensed, bonded, and insured subcontractors), provided they also had workers’ compensation insurance. Farkas responded that he was not certain about workers’ compensation. Oakes explained why the Union wanted it as far as for the protection of employees and AS. Farkas replied that it was not the Employer’s job to police other businesses. Oakes said that the Union would have some flexibility. Farkas told him to make a revise proposal, and the Union did so.⁸⁸

Oakes testified that after this, Farkas started gathering up his documents and stated he was leaving, and that Oakes directed him to stay. I find this difficult to believe, especially when the parties next exchanged already-prepared counterproposals on grievance and arbitration procedures.⁸⁹ It defies logic to believe that either Oakes or Farkas would have held back presenting them.

⁸¹ Tr. 223 (emphasis added).

⁸² R. Exhs. 41a–j.

⁸³ GC Exh. 27a.

⁸⁴ GC Exhs. 27a1, 27b.

⁸⁵ GC Exh. 27c.

⁸⁶ GC Exh. 7a.

⁸⁷ GC Exh. 7a1.

⁸⁸ GC Exh. 7b.

⁸⁹ GC Exhs. 7c, d.

The Company's proposal changed the step 1 time limit for an employee to present a grievance from its originally proposed 3 to 5 days. It also changed after the "aggrieved Employee should have discovered that it occurred or existed" to after the "alleged grievance should have been ascertainable." Further, the time limit to proceed to step 2 was changed from 3 to 5 days. The Union's proposal changed the step 1 time limit from its earlier-proposed 30 to 10 days.

Oakes stated that he thought step 3 of the Employer's proposal—that final resolution of nondischarge grievances be in the hands of Stang or his designee—was illegal and might even constitute a possible violation of Section 8(a)(2) of the Act. Farkas replied that he disagreed and that an employer was not even obligated to agree to a grievance procedure.

Oakes asked to resume negotiating on subcontracting, but Farkas said that he was done for the day. Oakes was adamant that they schedule the next meeting, and Farkas provided about five or six dates that he was available over the next 4 or 5 weeks, the first being September 19. Oakes stated that the Union wanted to meet earlier, in a week or two. Farkas responded that his first available date was September 19. Oakes said that the Union wanted September 19 and 22 or 23. Farkas replied that he would meet only one of those dates. Oakes insisted on both September 19 and 22. Farkas agreed, adding that he did not like going over 1 day and would probably end up cancelling the second date. He stated that he did not see the reason to meet that close together and that it did not give him time to meet and discuss proposals with Stang because of the latter's busy schedule.

Following this meeting, Oakes and Thayer decided to file ULP charges alleging bad-faith bargaining, and Thayer did so on September 4.

Respondent's Withdrawal of Recognition

By letter of September 17, Farkas advised the Union that:

[T]he Employer . . . has been made aware that a majority of the bargaining unit members do not wish to be represented for purposes of collective bargaining by Local 33. Accordingly, the employer withdraws recognition from the union. Naturally, the next two scheduled bargaining sessions, for September 19 and September 26, must be cancelled. . . .⁹⁰

Farkas apparently faxed a copy, which Thayer received late on September 17. He called Farkas the next morning. Thayer testified about the conversation as a whole; Farkas did not. I credit Thayer's un rebutted account.

Thayer asked what was going on. Farkas replied that Marino had presented the Employer with a withdrawal petition, and that the latter now questioned whether the Union represented a majority. Thayer asked for a copy of the petition and for a list of employees with contact information. Farkas responded that based on the petition, Respondent was withdrawing recognition and was not obliged to provide any information or to meet.

On cross-examination, the General Counsel asked Farkas if he offered the Union a buyout, and he said no. The General

Counsel then requested that a surreptitious tape recording that Thayer made of the conversation be admitted solely to impeach Farkas' credibility. For that purpose only, I overruled Respondent's objections and had the tape played into the record. I note that Respondent has not cited any authority for the proposition that the tape recording was inadmissible under any Federal or State law.

On the tape, Farkas stated, "I once heard there's a concept called a buyout, but I don't—I don't exactly know how that works."⁹¹ In agreement with Respondent, I conclude that this statement (although perhaps disingenuous) was not tantamount to an "offer" and therefore did not necessarily contradict his earlier testimony.

Phone Conversation Between Farkas and Thayer, February 2009

In about late February 2009, Thayer returned a telephone call from Farkas. Farkas asked what it would take to settle the case. He stated that the Employer had no intention of bargaining but asked if the Union would be willing to take a monetary settlement.

The parties at trial disagreed on whether such statement came under an exception to the bar under Federal Rule of Evidence 408 against admitting of statements made during settlement discussions. Regardless, the conversation is not alleged in the complaint, it occurred 5 months after Respondent withdrew recognition, and the General Counsel does not contend that Farkas made any admissions against interest as far as the matters before me. Accordingly, I conclude that consideration of any such statements is unnecessary in deciding the merits of the allegations herein.

The Petitions

At Stang's request, Marino was the Respondent's observer at the election on July 15, 2005. In the year following, he periodically went on his own volition to Stang's office and asked what AS was doing about the Union. Stang replied that the Company was appealing and would not let the Union in his company.⁹² On cross-examination, after saying that he could not recall Stang's exact words, Marino affirmed the statement in his December 13, 2008 affidavit that Stang said, "even though the Union had won, the Company had no intentions on [sic] negotiating with the Union,"⁹³ an even more empathic expression of animus toward the Union and the bargaining process.

In February 2008, Marino was at a jobsite in the morning when Stang called his cell phone and said he needed Marino to do him a favor and call Farkas. He gave Marino Farkas' phone number.

Marino called Farkas a few minutes later. Farkas told him that Stang considered him a valued employee and that "they needed me to do something about circulating a petition to call for another vote to vote the Union out."⁹⁴ Marino said he would. Farkas explained what he should do, and Marino scribed

⁹¹ Tr. 1347.

⁹² Tr. 772–773.

⁹³ Tr. 859.

⁹⁴ Tr. 777–778.

⁹⁰ GC Exh. 28. Whether the second date was September 22 or 26 is immaterial.

bled it down. He told Marino not to have employees sign it until May or June because, as Marino testified, “[I]t had something to do with a year being up.”⁹⁵ At the end of the conversation, Farkas stated, “[R]emember, we didn’t have this conversation, and don’t call me from a cell phone again.”⁹⁶

On a Monday either the first or the second week of June, following a bimonthly staff meeting, Marino called Farkas from Russ’ office. He asked for an address where to send the petition. Farkas replied that he had to wait a little longer.

Marino could not remember the specifics of what Farkas said about what the petition should say. Therefore, he composed a petition based on his recollection. It read:⁹⁷

We the employee’s [sic] of [the Company] are signing this petition because we do not like Sheet Metal Union Local #33 in the way they have handled the whole process and we are requesting a new vote. (Emphasis in original.)

On the morning of about Thursday, July 10, or Friday, July 11, Marino went into Stang’s office. He could not recollect whether he had prepared the petition yet. He asked Stang if he should let John Johnson (a leading union supporter) see or sign it. Stang replied no, “Don’t let him see it. I don’t want the Union to get a head’s up of what we’re trying to do.”⁹⁸ Marino said that he agreed.

On about that day, some employees signed the petition at jobsites; the other signatories signed at around the time of the bimonthly staff meeting on Monday, July 14. After that, he wrote in, “We have nine out of ten employees.” Only Johnson did not sign. Marino readily answered “no” to my question of whether Stang was ever in the immediate vicinity when employees signed, a reflection of his candor.

At about 8:30 or 9 a.m., Marino went to Stang’s office, gave Stang the completed petition, and asked him the address of where to send it. Stang responded that “I worded it wrong. . . . I couldn’t say anything like we did not like Local 33 . . . and that it should say something like we did not want Union Local 33 to represent us.”⁹⁹ Marino stated rhetorically that he would have to get another one, and Stang said yes. Marino took the petition back.

Based on that conversation, Marino composed a second (undated) petition, which stated, “The following individuals do not want Local 33 to be their bargaining representative.”¹⁰⁰ He circulated it for signature among employees within 15–20 minutes after a bimonthly staff meeting on a Monday in August. Although Stang and Russ ran the meeting, they were not around when employees signed. Some of them asked why they had to sign again, and he responded that the first petition had been wrongly worded. Bettac and Winters, Respondent’s witnesses, recalled Marino’s stating this, as did Ebel.

⁹⁵ Tr. 778.

⁹⁶ Id.

⁹⁷ GC Exh. 37, dated July 14, 2008. The document fades off at the bottom.

⁹⁸ Tr. 789.

⁹⁹ Tr. 798–799.

¹⁰⁰ GC Exh. 38.

I credit Ebel’s further testimony that Marino related to him that “Bob Stang and Mr. Farkas had to explain to him how to word it right” and told him that “they could have nothing to do with it.”¹⁰¹ This testimony is admissible for nonhearsay credibility purposes and supports Marino’s depiction of management’s role in the petition. The same holds true for Ebel’s testimony that Marino earlier stated that Stang had instructed him to circulate the petition.

Within half an hour, Marino brought the signed petition to Stang in the latter’s office. He asked Stang where to send it. Stang replied that he would take care of it, and Marino never again saw the petition until this trial.

The Company terminated Marino’s employment in about the second week of September 2008. His discharge is not alleged as a ULP, and whether it was justified or unjustified is not an issue before me.

In late November, Marino called Thayer, who returned his call the following week. Marino told Thayer of his termination from AS and asked if the Union could assist him in finding work. They, along with Larson, met for breakfast at a restaurant the following Saturday. Larson explained the current work situation and the procedure for Marino to become a union member and be referred for employment. Through the Union, Marino received a 2-week job in the last week of December 2008 and the first week of January 2009. He has not obtained any employment from the Union since then. I draw no inferences from his applying for re-employment with AS on December 2, 2008.¹⁰²

Analysis and Conclusions

The Petitions and Withdrawal of Recognition

The most critical issue before me is whether Respondent, during negotiations, unlawfully solicited and participated in petitions on which it could rely to withdraw recognition of the Union and refuse to bargain. If so, regardless of what Farkas said and did at meetings, one has to draw the conclusion that Respondent engaged in negotiations without a genuine intent to reach agreement. Similarly, if the petition on which Respondent based its withdrawal of recognition and refusal to further bargain was tainted by employer misconduct, those actions were akin to fruits of the poisoned tree and similarly unlawful. To hold otherwise would be to allow Respondent to benefit from its own illegal actions.

The law is clear that an employer may not solicit employees to circulate or sign decertification petitions or provide more than ministerial aid in their preparation. *Armored Transport, Inc.*, 339 NLRB 374, 377 (2003); *Harding Class Co.*, 316 NLRB 985, 991 (1995). Withdrawal of recognition based on such any such petition is also unlawful. *SFO Good Nite, LLC*, 352 NLRB 268, 270 (2008); *Wine Products Mfg. Corp.*, 326 NLRB 625, 640 (1998).

Here, both Farkas and/or Stang, over a period extending from February to August, expressly solicited and encouraged Marino to distribute such a petition and gave him advice on what it should say and when it should be circulated. In fact,

¹⁰¹ Tr. 917.

¹⁰² R. Exh. 56.

when Marino incorrectly worded the first petition, Stang told him how to reword it.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by soliciting and encouraging Marino to circulate petitions for the purpose of decertifying the Union and/or revoking the Union's representative status, and by assisting him in those efforts.

Because Respondent based its withdrawal of recognition and refusal to bargain on about September 17–18, 2008, solely on the second petition, I further conclude that such actions also violated Section 8(a)(5) and (1) of the Act.

Respondent's Conduct in Negotiations

Section 8(d) requires an employer to come to the bargaining table with a "sincere purpose to find a basis of agreement." *Regency Service Carts, Inc.*, 345 NLRB 671, 671 (2005), citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

The above conclusions ipso facto, lead to the further conclusion that Respondent did not do so: Respondent engaged in conduct away from the bargaining table that demonstrated its real intention of getting rid of the Union before negotiation of a first contract, regardless of its conduct at meetings. This conclusion would be the same even if Farkas had met with the Union daily, furnished all requested information immediately, and never said a word that suggested lack of authority to negotiate, because partial good faith is a non sequitur. Stang's statements at the facility both before and after the election strongly suggest that even before the start of negotiations, his aim was to get the Union out rather than fulfill his lawful obligations to bargain. Respondent's prior ULP's also give rise to this inference.

Therefore, I find it unnecessary to address whether other actions of Respondent at the table also reflected bad faith. As I noted at the outset, the complaint does not allege that Respondent engaged in surface bargaining or that Farkas in fact lacked authority.

Nonetheless, as opposed to number and length of meetings and statements about Farkas' authority, Respondent's obligation to timely provide requested information extended beyond the context of contract negotiating per se. I will now address the Union's written requests for information, noting that the Board found as a violation Respondent's previous failure to provide information.

Failure to Provide Information

An employer is obliged to supply information requested by a collective-bargaining representative that is relevant and necessary to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Although an employer need not automatically comply with a union's information request, with its duty to provide such turning on the circumstances of the particular case, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979), requested information that relates directly to the terms and conditions of represented employees is presumptively relevant. *Beverly Health & Rehabilitation Services*, 328 NLRB 885, 888 (1999); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). The Board applies a liberal, discovery-type standard in determining what

requests for information must be honored. *Raley's Supermarket*, 349 NLRB 26, 27 (2007); *Postal Service*, 337 NLRB 820, 822 (2002); *Brazos Electric Power Co-op*, 241 NLRB 1016, 1018 (1979). Thus, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

By letter of June 5, 2008, Thayer requested, inter alia, a list of all jobs that AS was currently performing, with locations of projects and employees working at each. By letter dated June 23, Thayer requested, inter alia, the names of all employees, with their addresses, phone numbers, dates of hire, title or classification, and starting pay rate and benefits. I conclude that all of the above requested information was presumptively relevant, and Respondent has never raised any arguments to the contrary.

Farkas provided some of the requested information in his letters of June 27 and July 15. Although the Union disputed the completeness of the information Respondent provided concerning current projects, no evidence was introduced at trial to show the validity of this contention. However, it is clear that Respondent never supplied information pertaining to wages, raises, and employee benefits.

On September 19, Thayer requested an updated list of employees and their contact information. Farkas' replied that it would not be furnished because Respondent no longer recognized the Union as a representative of a majority of employees—a stance that I have found unlawful.

I therefore conclude that on and after June 5, 2008, Respondent violated Section 8(a)(5) and (1) by not furnishing to the Union all of the information it requested that was relevant and necessary for the Union as the representative of unit employees, in particular, current employees with their contact information and their wages and fringe benefits.

CONCLUSIONS OF LAW

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

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

3. By the following conduct, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act:

(a) Solicited and encouraged an employee to circulate two petitions for the purpose of decertification of the Union and/or revoking the Union's majority status, and assisted him in those efforts.

(b) Withdrew recognition of the Union and refused to engage in further bargaining based on the second such petition.

(c) Failed and refused to provide the Union with all of the information it requested that was necessary and relevant to the performance of its duties as representative of unit employees; more specifically, current employees with their contract information and their wages and fringe benefits.

REMEDY

Because I have 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.

The General Counsel requests extraordinary remedies: first, an extension of the certification year as per *Mar-Jac Poultry*, supra; and second, that Respondent be ordered to bargain on request within 15 days of a Board Order for a minimum of 15 hours a week until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining; to prepare written bargaining progress reports every 15 days and submit them to the Regional Director, and also serve the reports on the Union to provide the Union with an opportunity to reply; and to make whole employee negotiators for any earnings lost while attending bargaining sessions.

Mar-Jac held that the certification year can be extended because of an employer's ULP's that impacted bargaining. The Board, as a matter of discretion, can extend the certification year for up to a full 12 months, but the record must show the need for extension and its appropriate length. *American Medical Response*, 346 NLRB 1004, 1005 (2006), in which the Board set out the governing criteria as: (1) the nature of the violations; (2) the number, extent, and dates of collective-bargaining sessions; (3) the impact of the ULP's on bargaining; and (4) the conduct of the union during negotiations. See also *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004).

Here, the Board, affirmed by the D.C. Circuit Court of Appeals, previously ordered an extension of the Union's certification year owing to Respondent's prior ULP's. It logically follows that the Respondent should not now be rewarded for its commission of further ULP's. See *Metta Electric*, 349 NLRB 1088, 1089 (2007). Further, Respondent engaged in a deliberate and planned scheme to get rid of the Union even as Farkas was participating in negotiations sessions, and then used a petition that Respondent itself had initiated and sponsored to withdraw recognition and cease further bargaining. In these circumstances, I conclude that the 12-month maximum extension is warranted.

It is well established that the Board, in appropriate circumstances, may order unusual remedial relief to rectify particular ULP's. *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corp.*, 229 NLRB 4, 4 fn. 1 (1977).

In ordering an employer to negotiate with a union, the Board has traditionally been reluctant to impose any specific obligations regarding the frequency or duration of bargaining sessions. In *Professional Eye Care*, 289 NLRB 1376, 1378 fn. 3 (1988), the Board declined to adopt the judge's recommendation that the respondent be ordered to bargain a minimum of 15 hours per week and to send bargaining reports to the Region every 15 days, stating that it would not impose standards for the respondent's compliance with its bargaining order. See also *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980), enfd. 658 F.2d 1 (1st Cir. 1981), wherein the Board did not adopt the judge's recommended order that respondent bargain 15 hours per week.

In two recent decisions, the Board specifically addressed the imposition of such special remedies. In *Monmouth Care Center*, 354 NLRB No. 21 fn. 3 (2009) (not reported in Board volumes), the Board deleted that portion of the judge's recommended order that required two respondents to bargain jointly

with the union at least once a week. The Board noted that the General Counsel had not requested this remedy or alleged the respondents were a single employer or joint employer. However, Chairman Liebman observed that "such a remedy may be worthy of consideration in a future case."

In *Myers Investigative & Security Services*, 354 NLRB 367, 367 fn. 2 (2009), the Board denied the General Counsel's exception to the judge's failure to include as a remedy that respondent meet with the union not less than 6 hours per session or any other mutually agreed-upon schedule until a collective-bargaining agreement or good-faith impasse was reached. The Board stated that there was a lack of support for such a remedy in current law, but the Chairman repeated her observation in the *Monmouth Care Center* case, supra.

In light of Chairman Liebman's comments, I consider it appropriate to determine whether the special remedies sought by the General Counsel are warranted in the circumstances of this case. Because of Respondent's egregious misconduct, I conclude that they are, as far as frequency and duration of meetings and filing reports with the compliance officer. However, inasmuch as the Union never had any employee representatives at past bargaining sessions, I will not order Respondent to reimburse any who might attend future negotiations.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁰³

ORDER

The Respondent, All Seasons Climate Control, Inc., Norwalk, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and encouraging employees to circulate petitions among unit employees to decertify Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) or cause it to lose its majority status, or assisting in those efforts.

(b) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of unit employees, and failing and refusing to bargain with it, based on any such petition or other unlawful considerations.

(c) Failing and refusing to furnish all of the information the Union requests that is necessary and relevant for the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees.

(d) 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) Within 15 days of the Union's request, bargain with the Union at reasonable times in good faith until full agreement or a bona fide impasse is reached, and if an understanding is reached, incorporate such understanding in a written agreement.

¹⁰³ 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.

Unless the Union agrees otherwise, such bargaining sessions shall be held for a minimum of 15 hours a week, and Respondent shall submit written bargaining progress reports every 15 days to the compliance officer of Region 8, serving copies thereof on the Union.

(b) Provide the Union with all of the information it has requested since on about June 5, 2008.

(c) Within 14 days after service by the Region, post at its facility in Norwalk, Ohio, copies of the attached notice marked "Appendix."¹⁰⁴ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous

places including all places where notices to employees are customarily posted. 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 August 31, 2007.

(d) 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.

The certification year shall be extended 12 months from the date that the Respondent commences bargaining in good faith.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

¹⁰⁴ 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."