

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

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In the Matter of: :
PRATT INDUSTRIES, INC., :
Respondent, : Case Nos. 29-CA-30271
and : 29-CA-20281
INTERNATIONAL UNION OF OPERATING : 29-CA-30382
ENGINEERS, LOCAL 30, :
Charging Party. :
-----X

**MEMORANDUM OF LAW IN SUPPORT OF EXCEPTIONS
OF PRATT INDUSTRIES, INC. TO THE DECISION OF
ADMINISTRATIVE LAW JUDGE LAUREN ESPOSITO**

Dated: New York, New York
October 27, 2011

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PRELIMINARY STATEMENT

After nine months of utterly futile bargaining in which the parties failed to reach agreement on a single meaningful issue, in the midst of a six month hiatus in bargaining, after the Union cancelled two meetings knowing implementation was imminent and did not ask to schedule another, Pratt Industries, Inc.¹ implemented a portion of its offer. From those facts, the Administrative Law Judge (“ALJ”) rejected the contention that the parties were at impasse, necessarily finding that further movement was possible despite the fact that the parties did not meet and no movement could have or did occur.

With testimony by both Union and Company witnesses that the Employer has an extensive, consistent, and contemporaneous history of subcontracting bargaining unit work and that it rarely hires a new employee without first auditioning the employee as a subcontractor’s employee, the ALJ declined to be bound by *Westinghouse Elec. Corp.*, 150 N.L.R.B. 1574 (1965) which permits an Employer to continue its past practice of subcontracting without bargaining.

Finally, the ALJ found that changes in sick leave and call in policies violated the Act; the policies circulated in June, 2010 were consistent with decades of prior written policies, and the changes, if any, were so minor that they involved items like changing the phone number to call if an employee was not coming to work.

¹ Pratt sometimes is referred to as “Visy Paper” or “Visy Industries” and also will be referred to here as “the Employer”. “The Union” is Local 30, IUOE. The August 30, 2011 Decision of Administrative Law Judge Lauren Esposito (“ALJ”) is denoted “ALJD”. Transcript pages are denoted “TR ###”, and General Counsel and Respondent exhibits are denoted “GCX #” and “RX #”.

Pratt respectfully submits that the ALJD is not supported by a preponderance of the evidence, that the Board should decline to adopt it, and that the complaint should be dismissed.

FACTS

1. Background

Prior to 2009, Pratt Industries had a collective bargaining agreement with Local 30 covering paper makers at its Staten Island paper mill and recycling plant. (ALJD 6. n. 4; TR 284). In the summer and fall of 2009, Local 30 organized the maintenance employees who perform electrical and instrumentation work, known as the “E&I group”. Although Pratt voluntarily recognized Local 30 as the representative of the E&I group, Local 30 insisted on an election, which it won.² (ALJD 2, lines 30-41; TR 283, 315, 344). At the time of the hearing there were six employees in the E&I unit. (ALJD 2, lines 48-50).

2. E&I Negotiations

From September, 2009, through the hearing date (March, 2011), the parties had been negotiating a collective bargaining agreement to cover the E&I group. (ALJD 4, lines 8-10; TR 283-84). The parties met nine times in 18 months and seven times prior to implementation.³ In that time they reached two minor agreements: that employees

² This is not a case of anti-Union animus, and none is alleged.

³ Kevin Cruse testified to the following dates of negotiations:

-September 28 and 29, 2009 - First and Second meetings (ALJD 4, lines 15-16; TR 327).

-November 11, 2009 - Third meeting. (TR 327). Although there was no dispute that the parties met on this date (see Union representative Cruse’s own testimony at TR 327), the ALJ overlooked this meeting, finding that December 16 was the

would be paid every week and that beeper pay would increase. (TR 408, 410 and 100; *see also* ALJD 9, lines 25-27). Both of those agreements were reached on or before the April, 2010 seventh meeting. (TR 410). The parties have not reached a single agreement on any major issue on which a proposal has been made, including wages, health and welfare, pensions, sick leave, vacations, referral policy, apprentice training, industry stabilization fund, night differential, sick leave, personal days, medical days, double pay after 16 hours, successorship, six or seven consecutive days of work, company supplied tools, company paid cell phone bills, call-in pay, coverage pay, EZ Pass payment, crane rules, minimum manning, overtime distribution, credit union, shop stewards or any other item on either party's agenda. (ALJD 9, lines 25-27; TR 341-43; RX 6). There was no significant movement on any of these issues in 18 months. (*Compare* GCX 17, 18, 19, 21, 23, 32, 34, 35, 36, 67, 68 and RX 6). The ALJ mentions these facts only in passing, devoting three lines to them. (ALJD 9, lines 25-27).

The parties did not meet at all for the six months between April and October, 2010.⁴ Prior to the April meeting, the parties exchanged dozens of substantive emails about negotiations. (*See, e.g.*, GCX 11, 16, 17, 19, 20, 22, 37-48). After the April meeting, the only substantive email exchange occurred within two days after the April

third meeting. (ALJD 5, line 1). Again, the Union's own negotiator testified that the third meeting was on November 11 and that the fourth was on December 16.

- December 16, 2009 – Fourth meeting. (ALJD 5, line 1; TR 335).
- January 20, 2010 – Fifth meeting. (ALJD 5, line 20; TR 335).
- February 24, 2010 – Sixth meeting. (ALJD 5, line 40; TR 335).
- April 21, 2010 – Seventh meeting. (ALJD 6, line 20; TR 338).
- October 19, 2010 – Eighth meeting. (TR 339). The ALJD does not mention this meeting, which was the first in six months, or any subsequent meetings).
- October 20, 2010 – Ninth meeting. (TR 339).

⁴ TR 327, 335-339. From October, 2010 through the March, 2011 hearing, the parties met only two or three times. (TR 339, RX 6).

meeting. (*See, e.g.*, GCX 48-52). From that date until December 10, 2010, there is no email about any substantive issue; the rare email during this period concerned logistics issues. (*See, e.g.*, GCX 53-66). The ALJ does not mention these facts.

The Union refused to schedule a meeting during the six month hiatus. The Union cancelled meetings in May and June, 2010.⁵ There is no evidence that the Union tried to reschedule those meetings. Finally, in late July, the Employer emailed the Union asking if the parties were going to meet again. (ALJD 8, lines 21-22). The Union did not respond. In August, the Employer followed up with a second inquiry. (ALJD 8, lines 32-35). The Employer then sent a list of specific available dates to the Union. Cruse first accepted some of them, then cancelled every date he had agreed to the day before. (ALJD 8, lines 35-40). The Union eventually agreed to dates in late October, some six months after the last meeting. (ALJD 8, lines 40-42).

Pratt always was willing to meet with the Union. It often prepared proposals or responses to Union proposals in anticipation of the many meetings cancelled by the Union.⁶ (TR 438; GCX 21 and 23). However, those responses and proposals did not reflect or anticipate any significant movement. (GCX 21 and 23)

⁵ The ALJ made contradictory findings about the cancellation of these meetings. She first found that there was “no definitive evidence as to why” the June meeting was cancelled. (ALJD 7, lines 32-35). In fact, there was. Columbus testified without contradiction that the Union cancelled the meeting. (TR 416). Cruse admitted having cancelled the May meeting but could not recall who cancelled the June meeting. (TR 336). Thus, the uncontradicted evidence is that the Union cancelled both meetings.

Later, the ALJ held that “although Respondent claims that the Union canceled the negotiating sessions [sic] in May, the evidence establishes that Columbus was ultimately unavailable to meet on May 12....” (ALJD 13, n. 13). As noted, Cruse *admitted* that he cancelled the May meeting. (TR 336) Columbus never said he was unavailable and was clear that Cruse cancelled the meeting (TR 416).

⁶ As to the Union’s refusal to schedule or cancellation of meetings, *see* GCX 37, 51, 54, 57, 58, 63, and 65.

3. Work Schedules

E&I employees work a schedule that includes a certain amount of fixed overtime. Employees also work additional overtime as needed. (TR 400). Some E&I employees work the day shift consistently while others work round-the-clock shifts to provide coverage 24/7. (TR 511). Prior to the election, from time to time Pratt changed the E&I schedules, each time changing the number of scheduled overtime hours each week. It also changed the number of days that employees worked. (TR 400-402). These facts are not noted in the Decision.

Prior to February, 2009, the E&I group all were scheduled to work 49 hours over four days plus *ad hoc* overtime. (GCX 15, TR 511, 97-98). In February, 2009, before the Union was certified, regularly scheduled hours were reduced to 45 hours per week, except that every other week one employee worked an additional four hours. (GCX 15, TR 511, 97-98). These facts are not noted in the Decision.

In November, 2009, during negotiations, Pratt proposed a different schedule.⁷ Regularly scheduled hours would be reduced from 45 per week to an average of 41.25

⁷ The ALJD finds that this proposal was made in December, 2009, presumably based on the testimony of Kevin Cruse, the Charging Party's Field Representative, its sole official covering the Staten Island Mill and its chief negotiator. (ALJD 5, lines 1-15; TR 286). However, both parties' minutes reflect a discussion of the schedule change proposal during the November 11, 2009 meeting. (GCX 24, second page; RX 6, third page of minutes of November 11). As noted in footnote 5, *supra*, the ALJ appears to have overlooked the November meeting entirely, although she notes that the parties agreed to the date. (ALJD 4, lines 31-32).

Note further that Mr. Cruse's June, 2010 affidavit gives an entirely different chronology, with the schedule proposal first being made in January, 2010 and Mr. Cruse asking the Employer, "not to change the schedule yet", implying that implementation was announced on the same day that the proposal was made. (RX 8, ¶ 11). Given the parties' minutes, the ALJ's confusion as to the dates on which the parties met, and Cruse's contradictory statements on this issue, the only credible evidence is that the proposal first was made in November, 2009, at the meeting overlooked by the ALJ.

hours for day workers and 42.875 hours for shift workers.⁸ (GCX 15, TR 97-98). The Mill hoped to gain flexibility in overtime, which would save money, and to sync the E&I group with the rest of the Mill, especially the non-E&I maintenance employees. The proposal would have aligned the shift schedules of the paper makers, the two maintenance groups, and also a specific supervisor, so that the each combined group and supervisor would work together consistently as a team. (TR 357, 402-31, 207, 290; these facts are not noted in the Decision).

Pratt did not expect this proposal to have any effect on the total earnings of the E&I group. (TR 403-04). For one thing, employees always worked more than the scheduled number of overtime hours. (TR 513). The proposal simply would give Pratt the ability to use overtime hours when it needed them. Additionally, as discussed below, Pratt was prepared to increase beeper pay. These facts are not noted in the Decision.

At the time that it made the proposal, Pratt had seven E&I employees. Three worked the day shift, consisting of four 12-hour shifts per week. Under the proposal they would be scheduled to work five 8-hour shifts. Four other E&I employees worked rotating shifts and those four would work fewer days per week under the proposal (four days one week, three the next, instead of four days every week). (GCX 15, TR 512-13; these facts, including the fact that most employees worked fewer days under Pratt's proposal, are not mentioned in the ALJD).

⁸ The proposed and implemented schedule spanned a four week period in which employees worked different hours in different weeks. Small differences between the numbers on GC 15 and the testimony are due to additional "hand off" time, when incoming and outgoing employees are paid an additional 15 minutes to exchange information. (TR 61, 187, 226, 512).

The parties discussed the schedule proposal at meetings held in November and December. (RX 6). Pratt's Engineering Manager, Mark Mays, provided a detailed spreadsheet explaining how the proposed schedule would work, who would work on which crew, who would work days, who would work rotating shifts, and related information. (ALJD 5, lines 1-10; TR 499-500, 510, 513-14, GCX 15). The parties met again in January and in February and discussed the proposal further. (ALJD 5, lines 19-50). At the February meeting, Pratt asked the Union for its thoughts as to the new schedule and invited it to make a counterproposal. (TR 106-07⁹). The Union did propose a different schedule but it met none of the Employer's objectives; it increased scheduled hours and eliminated the flexibility that was the underpinning of the Pratt proposal. (TR 513-15; *see also* TR 69). Pratt rejected the Union's counter but asked the Union to revise its proposal in light of the parties' discussion. The Union never did so. (TR 289, 107). Except as cited, these facts are not noted in the Decision.

The Union's proposal also included an increase in beeper pay. Beeper pay is pay for being on-call.¹⁰ Prior to June, 2010¹¹ only the three E&I employees who worked day shift received any beeper pay, and that was limited to one hour's pay per day. (TR 407, 516; the ALJ does not mention these facts). As part of its scheduling proposal, the Union proposed to increase beeper pay so that everyone would get it and that it would be two

⁹ The ALJD finds that the Union made its scheduling counterproposal in February, 2010. ALJD 5, lines 40-41). This is contrary to the testimony by the Union's own witnesses. (TR 106-07)

¹⁰ The ALJD is confused about call in pay and beeper pay, believing that the Employer implemented improvements to both when it implemented the schedule change. The Employer only proposed to increase beeper pay and implemented that proposal. (ALJD 7, lines 20-30). They are two names for the same thing.

¹¹ The transcript says June, 2009 (TR 407). It is not disputed that implementation occurred in June, 2010. (Complaint, ¶10). In its brief, the Employer moved to correct the transcript, but the ALJ did not acknowledge that request.

hours per shift, or four hours per day. Pratt agreed to this. (TR 407-08, 518-19). The Union asked that the increased beeper pay be implemented at the same time as the schedule change, and again, Pratt agreed. (TR 409, 519). Pratt's intent was that the employees would not lose pay as a result of the schedule change, and increasing beeper pay was one way in which it intended to accomplish that objective. (TR 432, 451-52). These facts are not mentioned by the ALJ.

In addition, the E&I employees had been paid on a biweekly basis. (TR 410). The parties previously had discussed changing this to a weekly payroll. (TR 425-26). During a meeting held in April, Pratt agreed to implement that change contemporaneously with the schedule change.¹² (TR 410, 525). These facts were not mentioned by the ALJ.

Also at the April meeting, Pratt told the Union that it was planning to implement the new schedule on May 24.¹³ (TR 449-51; RX 6, April 21 minutes, p.2). There were only a few times during the year when the schedule could be changed without some E&I employees losing hours. (TR 411). Shortly after the April meeting, Kevin Cruse called

¹² These were the only agreements on any issue reached by the parties in 18 months.

¹³ Mr. Cruse denied that he was told at the April meeting or at any other time when the Employer would be implementing the schedule change. He testified that he first learned of the implementation on June 10, when Darryl Kologi, a unit employee, called to tell him that the Employer had implemented the new schedule. (ALJD 7, lines 6-10; TR 294-95). This is incorrect. His own handwritten minutes of the April 21 meeting state, "Schedule changing on the 24th". (RX 6, April 21 minutes, p. 2). Mr. Kologi agreed that they were told of the schedule change implementation at the April meeting. (TR 70).

Moreover, Mr. Cruse's June, 2010 affidavit to the Board provides an entirely different scenario, that he heard about the schedule change implementation in an email from Keelie Cruz, the Employer's Regional Human Resources Manager. (RX 9, ¶ 24).

Despite the fact that this testimony was contradicted by his own notes, by his affidavit and by his shop steward (not to mention the Employer's witnesses), Mr. Cruse's testimony was credited by the ALJ, who noted none of the conclusive documentary evidence to the contrary. (ALJD 7, lines 6-10).

Vic Columbus and told him that he wanted to organize an off-the-record meeting between Cruse, employee negotiators and shop stewards Darren Kologi and Joe Hamilton, and Mr. Columbus. Mr. Cruse asked that the schedule change be delayed until after that meeting could be held. Mr. Columbus agreed. (ALJD 7, lines 11-15; TR 413-414). The off-the-record meeting was held on June 8, but the schedule change was not discussed at that time. (ALJD 7, footnote 6; TR 296-97).

As noted, the Union cancelled regular negotiating meetings that had been scheduled for May and June. (ALJD 7, lines 15-20; TR 296, 415-16, 443-44). The Union did not ask to reschedule those meetings. During the two months between the April meeting and the June 21 implementation, the parties did not meet except for the June 8 off-the-record meeting. (TR 338). The next meeting after the April meeting was in October, 2010, six months later. (TR 335-39).

The increased beeper pay proposal and weekly payroll were implemented at the same time as the schedule change. (ALJD 7, lines 25-30; TR 410, 432, 451-52).

John T. ("Jay") Hennessey, the Mill's General Manager, personally prepared a summary of the wages and hours paid to E&I employees in 2009 and 2010. Hennessey determined that in 2009, the average paid hours per E&I employee was 2,639; in 2010, it was 2,718, an *increase* of 79 hours per employee. Similarly, even controlling for incentive awards that are given for factors other than hours worked, E&I average annual wages increased from 2009 to 2010. In 2009 E&I employees averaged \$87,339. In 2010, the comparable number was \$89,549, or an increase of \$2,210 per employee. Only

two of the employees earned less in 2010 than in 2009, and those two decreased less than \$1,000 each.¹⁴ (RX 20; TR 526-31). None of these facts are mentioned by the ALJ.

4. Sick Leave and Call-In Policies

Kellie Cruz has been Pratt's Regional Human Resources Manager since February, 2008.¹⁵ (TR 457). She is responsible for five Pratt facilities, including the Staten Island facility. (TR 458). Ms. Cruz testified that Pratt distributes handbooks to new employees who sign an acknowledgement that they have received it. The Employer retains the copy of the receipt. Most of the E&I employees signed acknowledgements of the 2006 handbook. Ms. Cruz believed that the current attendance policy, which is not physically attached to the handbook, was distributed with it. (TR 493-94). These facts are not mentioned by the ALJ.

The handbook has changed from time to time. The current handbook is bound.¹⁶ (TR 460-61). The facility's HR files have prior handbooks dated 1998 and 1999. (RX 12, 14; TR 462-63, 474). The 1998 handbook contains a 2001 version of the attendance policy. (RX 13). That policy has been in effect since Ms. Cruz started working at the facility. It has not been part of the handbook itself during her tenure, but in the HR file copy of the 1999 handbook, the 2001 policy was inserted on sequentially numbered pages. (RX 13, 14; TR 474-77). Ms. Cruz testified that the handbook and the sick leave

¹⁴ In its brief to the ALJ, the Employer moved to correct page 209 of the transcript in two places where it says "\$5". That number should be \$5,000. (See RX 20, showing that Mr. O'Donnell's income rose almost \$5,000 from 2009 to 2010). The ALJ did not rule on this motion.

¹⁵ The transcript reads "Regional A term manager". (TR 457). In its post-hearing brief, Pratt moved to correct the transcript to "Regional HR Manager", but the ALJ did not rule on that motion, herself referring to Cruz by the nonsensical title, Regional A term manager. (ALJD at 3, line 11).

¹⁶ Cruz located earlier versions of the handbook in her files but in some cases they were photocopies and she does not know if the originals were bound. (TR 461).

policies were revised on different schedules. (474-77, 479). Thus, for a period of years, the most current handbook would have been dated 1999, but at times after 2000, had a 2001 attendance policy inserted in it. These facts are not mentioned by the ALJ.

The most recent attendance policy, dated January 1, 2001 (RX 12), provides, *inter alia*, that employees are entitled to three days of sick leave. Any additional absences are unexcused and require medical verification. After the third day of sick leave, discipline “will” be imposed, specifically two verbal warnings, then termination.¹⁷ (RX 12). These facts are not mentioned by the ALJ.

In June, 2010, during a meeting with the E&I group to discuss a number of issues, Ms. Cruz handed out the attendance policy (GCX 5), which provides for three days of excused sick leave, requires medical verification after those three days, and provides for discipline for absences in excess of three days. (*Id.*) This was the same policy stated in the Employer’s prior policies.¹⁸ (TR 479). This latter fact was not mentioned by the ALJ.

¹⁷ The 1999 policy is essentially the same. (RX 13 and 14).

¹⁸ The GC’s witnesses failed to provide firm denials as to whether the prior policy was given to them. As to the 2001 policy (GCX 7), Kologi testified, “It is possible [that he had seen the 2001 attendance policy], but I don’t recall.” (TR 112). Kologi did sign for the Employer’s handbook in 1998 and was employed by Visy in 1999 and 2001, when the attendance policies were revised. (GCX 7, RX 1 and 13). Mr. O’Donnell denied receiving the 1998 handbook. When shown an acknowledgement that he signed for a handbook on June 6, 2000, Mr. O’Donnell denied being a Pratt employee on that date. (TR 211-212, RX 4). Documents in his personnel file (RX 15) show that June 6, 2000 was his hire date. (TR 478). These facts are not mentioned by the ALJ.

It should be noted that objections to this RX 4 and the discussion that followed were based on Mr. O’Donnell’s incorrect representation that he was not a Pratt employee when he signed for the handbook. (TR 212-216). None of those points pertain now that it has been established that Mr. O’Donnell was a Pratt employee as of that date.

Ms. Cruz is aware of a number of instances in which this policy has been applied during her tenure.¹⁹ This was not mentioned by the ALJ. Documents in E&I employee files also showed compliance with this longstanding policy. E&I employees Kologi and O'Donnell both absolutely denied ever providing doctors' notes prior to June, 2010. Both had done so. (RX 16, 17; TR 76, 188-90, 480-83). Despite documentary evidence proving this testimony false, the ALJ found that employees never were required to provide a doctor's note or a note after a long illness. (ALJD 9, lines 30-40).

When Ms. Cruz first worked at the facility, there was no way for her to determine if employees were taking unpaid days off after three paid sick days. (TR 482). This was because employees worked different schedules and there was no way to know from looking at a time card whether a non-work day was a scheduled day off or an absence. (TR 483-84). In 2009, after the payroll system changed, Ms. Cruz was able to see when an absence was scheduled or unscheduled. (*Id.*). Ms. Cruz noticed that E&I supervisor Kevin O'Rourke had given an employee an unexcused day off without any disciplinary consequences. (*Id.*). Ms. Cruz had a conversation with Mr. O'Rourke in which she told him that there were no unexcused days off, explained the attendance policy, and told Mr. O'Rourke that he would have to follow it. (*Id.*). As far as Ms. Cruz was aware, Mr. O'Rourke followed the attendance policy thereafter. (TR 484-85). These facts are not mentioned by the ALJ.

¹⁹ The Employer was precluded from offering evidence that the attendance policy was enforced in other areas of the Mill. (TR 407-08). These policies were Mill-wide and such evidence would have been relevant to rebut the General Counsel's position that the June, 2010 memorandum represented a change from prior practices or policies. Pratt reiterates its exception to that ruling. These facts are not mentioned by the ALJ.

As to the call-in policy, when employees are going to be absent, they are required to call the Mill before their shift begins. This was true before and after June, 2010. (TR 485). In June, 2010, at the same meeting at which Ms. Cruz distributed the longstanding attendance policy, she also handed out a current list of telephone numbers, including the home and mobile numbers for various supervisors and managers. (TR 479, 486 and GCX 4). Shop Steward Kologi was unable to say that there was any change in call out procedures whatsoever. (TR 115, agreeing with his affidavit statement that, "I am not sure if this procedure was new or if it had always been in effect." RX 3, ¶ 11). Mr. Kologi testified that prior to June, 2010, when he called in sick, he would make a phone call, and that after June, 2010, he followed the same procedure.²⁰ (TR 146-47). These facts are not mentioned by the ALJ.

5. Subcontracting

a. Historic Subcontracting Practices

The Staten Island facility uses contractors to perform many tasks that can be and routinely are done by bargaining unit employees.²¹ These tasks include running conduit,

²⁰ Several employees testified that previously they would leave a message for a supervisor, whereas now they had to actually speak to one. GCX 4 contains home and cell numbers, so that a supervisor could be reached at any time of day or night. Leaving a message or speaking to a supervisor both require making one phone call.

The ALJD found that requiring employees to reach a supervisor was a unilateral change without noting that the memo provided home and cell numbers and in the absence of any evidence that any employee had to make more than one call in the eight months between June, 2010 and the hearing.

Additionally, the June, 2010 memo requires employees to call 45 minutes before the shift begins. The employee witnesses testified that they would call hours before their shifts began. (TR 266, 271, 141).

²¹ Note that Counsel for the General Counsel adduced no facts to contradict the interchangeability of contractors and unit employees or the amount and type of prior subcontracts, despite receiving pursuant to subpoena, "All documents showing or pertaining to Respondent's subcontracting work", including contractor names, dates of

pulling wire, terminating, putting in electrical boxes and control panels, installing level transmitters and related tasks. (ALJD 10, line 49- AJD 11, line 3; TR 501-02). E&I work can be done interchangeably by in-house employees or by contractors, depending on the workload. (TR 502, 148-49). In addition, contractors always are used during monthly and annual shutdowns. (TR 503, 119). Contractors do the same work during shutdowns and non-shutdown periods.²² (TR 520).

Contractors also are used as part of the hiring process. When the Mill needs a new E&I employee, it almost always calls on a contractor to provide one for a try-out. If the employee performs well, s/he is hired onto the Mill's payroll. (ALJD 11, line 3-10; TR 503-04). Of the six in-house E&I employees as of the hearing, Gary Stern, Joe Hamilton, Ramon "Chama" Ceden and John O'Donnell all originally worked at the Mill for months as contractor employees and then were hired onto the Mill's payroll. (ALJD 11, line 3-10; TR 503-04, 116-117). Additionally, Larry Dobson, who had been the

work, nature of work, and related information. (GC2, ¶ 12). The Board therefore must infer that the subcontracting in issue here was consistent with prior subcontracting.

²² Counsel for the General Counsel pressed Engineering Manager Mark Mays to testify that contractors work only during shutdowns, but he clearly and consistently disagreed, as did the General Counsel's own witnesses. (TR 520-21; 118-24, 217-219, 242, 267-269, 273). Further, even Local 30's shop steward agreed that shutdowns occur every month and annually, and are a routine part of the Employer's operations. (TR 273). As shop steward Hamilton testified,

Q So there are a number of different times that contractors are used to do the same kind of work that bargaining unit employees do that isn't during the shutdown, is that right?

A Yes.

Q And even during the shutdown they're doing the same kind of work you're doing, is that right?

A Yes.

(TR 273-74).

In fact, Mr. Kologi, Mr. O'Donnell and Mr. Hamilton all testified that one or two of the three employees who started in June, 2010, had worked in the Mill before. (TR 83, 241 and 199; RX 3, ¶ 20).

None of these facts was mentioned by the ALJ.

seventh E&I employee, also was hired in this manner. Thus, five of the seven most recent E&I employees were hired in this way. (*Id.*)

b. Complaint Allegations

The complaint alleges that, “Since on or about June 20, 2010”, Visy “employ[ed] subcontractors [Jisk and Oxford] to perform work of Unit employees.” (Complaint, ¶10). It is correct that Jisk and Oxford performed work at the Mill in and after June, 2010. It also is correct that Jisk and Oxford performed work at the Mill for years prior to June 2010. It also is correct that these two, as well as many other contractors, performed routine E&I work both before and after June, 2010. (TR 510-11). Counsel for the General Counsel is not alleging that the ongoing, routine use of these same contractors for other bargaining unit work, or that the performance of bargaining unit work by other contractors, violates the act. These facts were not mentioned by the ALJ.

More specifically, Jisk is an electrical contractor routinely used by the Mill since 2005. Oxford is an electrical contractor routinely used by the Mill since 2007. (TR 504-05, 118-19). The only specifics adduced by the General Counsel during the hearing related to Andre Jones and two other Jisk/Oxford employees who worked for two weeks.²³

In February, 2010, Larry Dobson quit without giving two weeks’ notice. (TR 508, 130). For a number of months beginning in March, 2010 (not June), the Mill used

²³ Mr. Cruse insisted that there were five subcontractor employees in the Mill and that he was told this by unit employee Kologi. (TR 324-25; see also Cruse June 28, 2010 affidavit, ¶6, given one week after Mr. Cruse claimed to have been called by Mr. Kologi). There was no testimony whatsoever about a fourth or fifth contractor employee. Kologi testified that there were three contractor employees. (TR 82-83, 117-18). O’Donnell and Hamilton also testified that there were three employees. (TR 199 and 241, 263). This error by Cruse was not mentioned by the ALJ.

Andre Jones, a Jisk and Oxford employee,²⁴ on a trial basis, intending to hire him in-house if he were an acceptable candidate. (TR 506, 118). He was not and eventually he was removed from the Mill. (TR 506). In addition, for reasons set forth below, in the summer of 2010, the Mill used two other Jisk/Oxford employees for two weeks. (TR 506).

On June 16, 2010,²⁵ the parties attended an arbitration involving a paper mill employee covered by a contract between Local 30 and Visy. During a break in the hearing, Vic Columbus and Kevin Cruse had a conversation. Mark Mays and Keelie Cruse overheard at least part of the conversation. (TR 458, 508). Cruse and Columbus were talking about the high quality of the Pratt E&I employees. Mr. Cruse told Mr. Columbus that none of them would have a problem securing other employment, and said that he had gotten a new job for Mr. Dobson. (TR 421, 458-59, 508-10). More to the point, Cruse said that he would be helping the other E&I employees find work elsewhere. (TR 421). Columbus told Cruse that if he intended to “poach” Pratt’s E&I employees, Pratt would have no choice but to bring in subcontractors to start training replacements so that the facility would be prepared when the current E&I employees left. (TR 424). Columbus asked Cruse if he wanted to go back to the facility to discuss this, but Cruse

²⁴ To perform certain work, a contractor has to have a New York City contractor’s license. Oxford had a license but did not have a qualified employee. Jisk had what it thought was a qualified employee (Andre Jones), but no license. Because of this, Oxford contracted with Pratt to provide an employee, and obtained that employee from Jisk. (TR 506).

²⁵ Mr. Columbus initially testified in error that the arbitration occurred in July, 2010. After reviewing the arbitration award, which provides the hearing date, he corrected his testimony accordingly. (TR 418, 420, 422 and EX 11).

had a photo op at City Hall to attend and declined.²⁶ (*Id.*). There is no evidence that Cruse subsequently asked to discuss this work or ever asked to discuss subcontracting generally.

Mr. Cruse's denial that he made the statement is contradicted directly by his own affidavit. Mr. Cruse denied the statements outright, but in his second affidavit to the NLRB (RX 7), admitted not only that he obtained the job for Dobson, but that,

On or about June 1, 2010, I telephoned Darren Kologi, Joe Hamilton, Larry Dobson, and Bob McIntosh, all members of the bargaining unit, and I told them that I had a full-time job opening in New Jersey with a company called Siemens (sp?). I asked the four members of the bargaining unit if any of them were interested in taking the job. Darren, Bob and Larry all expressed interest. Darren and Larry went on interviews to the Employer.

RX 9, ¶ 3. Thus, the ALJ found that this conversation did not occur (ALJD 20 at lines 15-20) ignoring Cruse's sworn admission that he was doing exactly what Employer and Union witnesses testified he said he was doing – looking for other jobs for other E&I employees. The ALJ's finding that it was "inherently implausible" that Cruse would be trying to find other jobs for these employees ignores the fact that Cruse and his members *admit* that this was precisely what he was doing.²⁷

Shortly thereafter, two more Jisk employees were brought to the Mill for two weeks to familiarize themselves with the Mill so that if other employees left on short

²⁶ Testimony by the Union's counsel that this conversation did not occur cannot be credited. Ms. Clarity was not in the hearing room when the attorneys met privately with the arbitrator and at various other times when this conversation might have occurred. (TR 539-41). Curiously, Ms. Clarity said that these statements could not have been made when she was out of the room because the conversation (that did not occur), "happened after the hearing was over". (TR 540).

²⁷ Despite this sworn statement given 28 days after the telephone call described in that paragraph, during the hearing Mr. Cruse denied ever speaking to anyone other than Dobson and Kologi. (TR 321-22).

Mr. Kologi's testimony on this issue similarly is evasive, admitting that Cruse spoke to him about another job but denying any memory beyond that. (TR 129).

notice the Mill would not have a coverage issue. (TR 447, 506-08, 117-18). For the most part, these two employees walked around the Mill taking notes on work that needed to be done. They also changed some light bulbs on safety lights. They organized some equipment in a warehouse. This was not work requiring electrical knowledge. (TR 507). The purpose of their brief time at the Mill was, “getting them familiar with the mill, where electrical equipment was, we call them motor control centers, where the motor control centers, where the PLCs were, where the distributor controls were, learning where different pieces of equipment were located.” (TR 507-08).

ARGUMENT

The complaint involves three allegations:

- Unilateral changes in work schedules: as of the April, 2010 meeting – at the latest – the parties were at impasse. The schedule that was implemented in June, 2010, two months later, was consistent with the Employer’s last proposal to the Union and the Employer lawfully could implement it.
- Unilateral changes in attendance and call-in policies: the same policies were in effect before and after June, 2010, and that any minor differences reflected in the June 2010 memo were *de minimis*.
- Unlawfully subcontracting unit work: the Mill has always used contractor labor to do routine, day-to-day E&I work and to audition new employees. Under the *Westinghouse* line of cases, which control here but which the ALJ declined to follow, the Mill was not required to bargain over a continuation of its longstanding practices.

The ALJ found that the Employer violated the Act in all three respects only by ignoring the overwhelming record evidence to the contrary, and as to subcontracting, by also declining to be bound by long established precedent. The ALJ consistently ignored

facts inconvenient to her conclusion. She found no impasse despite nothing more than a passing reference to the parties' inability to reach a single substantial agreement over nine months of bargaining or the six month hiatus during which implementation occurred; she failed to note uncontested evidence that the Employer used subcontractors interchangeably with its own maintenance employees, specifically employees in this bargaining unit; she failed to note or consider decades of written attendance policies consistent with what she believed to be unilateral changes.

Further, cognizant of the Board's hesitation to overturn a credibility resolution made by an ALJ who was able to observe witnesses directly, Visy urges the Board to do so in this case, where the ALJ credited Union Representative Cruse's testimony even where his own affidavits, bargaining notes and Union negotiating committee members directly contradicted him and were consistent with Employer evidence.

The ALJ's Decision is fundamentally unsound and the Board should decline to adopt it.

I THE EMPLOYER LAWFULLY COULD CHANGE WORK SCHEDULES BECAUSE THE PARTIES WERE AT IMPASSE (EXCEPTIONS 1, 2 AND 3)

The Complaint alleges that the Employer "reduced the hours of Unit employees" and "modif[ied] the work schedules of regular day-shift Unit employees."²⁸ (Complaint,

²⁸ The Complaint speaks only to the day shift employees, not the majority of E&I employees who do not work the day shift, but whose hours and days of work also were changed in June, 2010. Recall that the employees working rotating shifts, which were four of the seven unit members, actually worked fewer days under the new schedule. The General Counsel never sought to amend the Complaint to include the other bargaining unit members. For this reason, although the ALJ's findings and conclusions relate to all unit members generally, only the schedules of the three day shift employees are in issue.

¶¶10(a) and (b)). The first allegation objectively is incorrect and to the extent that the second is accurate, it does not rise to the level of an unfair labor practice. None of these changes violate the Act.

I. The Employer Lawfully Could Implement its Scheduling Proposal Once The Parties Reached Impasse

a. Standards for Impasse and Implementation

"[A]fter bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967); *see also Speedrack, Inc.*, 293 N.L.R.B. 1054, 1055 (1989); *Hydrologics, Inc.*, 293 N.L.R.B. 1060 (1989); *Illinois Coil Spring Co., Milwaukee Spring Div.*, 265 N.L.R.B. 206 (1982), *rev'd*, 268 N.L.R.B. 601 (1984), *enforced sub nom., Int'l Union, UAW v. NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985).

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations all are relevant factors to be considered in deciding whether the parties are at impasse. *Taft Broad. Co.*, 163 N.L.R.B. at 478. In *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enf. denied* 500 F.2d 181 (5th Cir. 1974), the Board stated:

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and,

NLRB v. United Mine Workers, 308 N.L.R.B. 1155, 1158 (1992) *quoting NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987); *see also NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267, 274 (10th Cir. 1980).

despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

The Board readily finds impasse after negotiations far more condensed than these. In *McAllister Bros., Inc.*, 312 N.L.R.B. 1121 (1993), the parties remained far apart after three negotiating sessions. After the last of these three sessions, the parties did not meet again for four months, and only twice more months later. Although the issues were discussed in these three meetings, neither party moved from its position. The Board concluded that the parties had negotiated to an impasse and that implementation was lawful as of the third session, prior to a four month hiatus because “the parties had exhausted all prospects of achieving an agreement. . . .” *Id.* at 1122.

In *Eddie's Chop House, Inc.*, 165 N.L.R.B. 861 (1967), the Board found an impasse after only three meetings. As of the last meeting, the parties “were still apart on wages, pensions, and bonuses, and they adjourned without fixing a definite date for another meeting.” *Id.* at 863. Similarly, in *Hamady Bros. Food Mkts., Inc.*, 275 N.L.R.B. 1335 (1985), the parties held a total of five negotiating sessions over two months. After the fourth session the membership rejected the employer’s proposal. At the final meeting the following day, the union made a new counter-offer that the Employer rejected; the employer announced that it was implementing its last offer. “The meeting ended with the understanding that any further meetings would be arranged through the Federal mediator.” *Id.* at 1336. A week later, the Respondent unilaterally implemented the terms of its final proposal. Despite the fact that the parties met only five times and for less than

two months, the Board found that they had reached impasse and that implementation was lawful.²⁹ *Id.* at 1338.

Finally, in *ACF Indus.*, 347 N.L.R.B. 1040 (2006), the parties held twelve negotiating sessions in two months. The Board found an impasse even where the union told the employer that it had additional proposals to make on health, welfare and pensions, but declined to make those offers at that time. The Board explained that although some progress had been made early on, no movement occurred thereafter and that “the parties were far apart on a number of significant issues when the Respondent declared impasse.” *Id.* at 1041. The Board also noted that the Respondent's economic positions were the essence of hard bargaining, not bad-faith bargaining, and that the Union's unwillingness to accept the proposals left the parties at impasse. *Id.*

Where, as here, the parties are unable to make further progress, and especially where the parties fail to meet for prolonged periods of time, the Board will find an impasse.

b. The Facts Showing Impasse

Through seven meetings during the nine months prior to implementation, the only subjects on which the parties reached any agreement were beeper pay and weekly payroll. The parties did not reach a single agreement on wages, health and welfare, pensions, sick leave, vacations, referral policy, apprentice training, industry stabilization fund, night differential, sick leave, personal days, medical days, double pay after 16 hours,

²⁹ See also *I. Bahcall Steel & Pipe*, 287 N.L.R.B. 1257 (1988) (impasse and implementation after six sessions lawful because, “it is not likely that further negotiation would have produced an agreement since it was clear from the outset that the wage concessions and other economic concessions being sought by Respondent were totally unacceptable to the Union. These factors suggest an impasse.” *Id.* at 1262.)

successorship, six or seven consecutive days of work, company supplied tools, company-paid cell phone bills, call-in pay, coverage pay, EZ Pass payment, crane rules, minimum manning, overtime distribution, credit union, or shop stewards. There was no significant movement on any of these issues, ever.

Both parties' minutes show that the proposal to change schedules was made at the November, 2009 meeting. The parties agree that work schedules were changed effective June 20, 2010. The last meeting prior to implementation occurred in April, 2010, which was the parties' seventh meeting in as many months. There is no dispute that from April, 2010 to October, 2010, the parties did not meet at all except at an off-the-record meeting at a diner at which the scheduling proposal was not discussed. Prior to April the parties had engaged in prolific email discussion of their bargaining positions; those exchanges stopped abruptly immediately after the April meeting, and did not resume until December, 2010.

As shown in both parties' notes and Mr. Kologi's testimony, the Union was told at the April meeting that implementation would occur. Despite this, the Union admitted cancelling a meeting scheduled for May and the undisputed evidence showed that it also cancelled a meeting scheduled for June, 2010. Thus, the parties did not meet at all during the two months prior to implementation because the Union was disinterested in meeting, and did not meet for four months after implementation for the same reason.

Finally, there is no dispute that the schedule change that was implemented on June 20, 2010 was consistent with the Employer's last proposal.

c. An Impasse Existed as of April, 2010

From these facts, there can be no credible dispute that as of April, 2010, at the latest, which was two months prior to implementation, the parties were at impasse. The parties had not reached a single significant agreement in seven months. *Every major issue remained unresolved and there has been no significant movement on anything.* The Union’s cancellation of the May and June meetings when it knew that the Employer was implementing its scheduling proposal demonstrates that the Union did not believe that further movement was possible. The parties’ failure to meet for half a year conclusively establishes the existence of an impasse.³⁰

The Employer implemented two full months after impasse occurred and after the Union cancelled the May and June meetings. Thus, even if the parties were not at impasse when the April meeting ended – although they were – they surely were at impasse after two subsequent months of silence.³¹

2. ALJ Erred in Failing to Find an Impasse

a. The ALJ Erred by Requiring that Both Parties Agree That Further Talks Would be Futile.

Although the ALJ notes the numerous factors set forth in *Taft Broadcasting Co.*, for determining whether or not the parties are at an impasse, she focused primarily on “the parties’ contemporaneous understanding.” (ALJD 12, line 36). Specifically, she adopts dicta in *Monmouth Care Ctr.*, 356 N.L.R.B. No. 29 (2010) holding that, “both

³⁰ While post-implementation events cannot prove an impasse, had the parties had anything to discuss as of April, 2010, they would have met during the ensuing six months. Put another way, we know that no movement was possible during that time because nothing occurred – no meetings, no talks, no email, no progress.

³¹ “[I]t is the state of negotiations at the time of unilateral implementation that controls whether such implementation is a violation of the Act, not the state of negotiations at some earlier moment.” *Caldwell Mfg. Co.*, 346 N.L.R.B. 1159, 1172 (2006) *citing Jano Graphics, Inc.*, 339 N.L.R.B. 251 (2003).

parties must believe that they are ‘at the end of their rope.’” (ALJD 12, lines 25-26.)

The ALJ’s belief that an impasse can exist only if both parties agree contravenes every NLRB case challenging implementation, where the Union necessarily is arguing that the parties were not at impasse.

The Board spoke to this issue in *ACF Indus.*, 347 N.L.R.B. 1040 (2006). After the employer stated that it had nothing further to offer and intended to implement, the union sent *two* letters denying the existence of an impasse and requesting more information and more meetings. The employer informed the union that its request for information should have been made earlier and that the parties could meet post-implementation. The employer then implemented. *Id.* at 1041.

The Board explained that although it had:

[U]sed the term ‘the end of their rope’ in describing circumstances where the parties have reached impasse ... ‘[t]he Board has defined impasse as the point in time of negotiations when the parties are *warranted* in assuming that further bargaining would be futile.’ To that end, an impasse does not necessarily mean that bargaining is at an end. Indeed, if a party makes a new substantive proposal, the impasse can be broken.

Id. at 1042 (Internal citations omitted; emphasis in original).

Although the union’s insistence that the parties continue to bargain indicated that *it* did not believe the parties were at impasse, the Board held that “inasmuch the Union failed to divulge any specifics about its purported new proposals, it gave *the Respondent* no reason to conclude that further bargaining at that time would have been fruitful.” *Id.* at 1042 (emphasis added). In finding that the parties were at impasse at the time of implementation, the Board also stressed that they had not made any movement in the two weeks preceding implementation and were far apart on a number of issues. *Id.* at 1041.

In addition, the Board noted that “the Union showed no interest in post-implementation [sic] bargaining.” *Id.* at 1043.

Put another way, the existence of an impasse is not subjective; it does not depend on the parties’ agreement. It is an objective test – whether a party is justified in believing that impasse exists. Clearly, Pratt’s belief was reasonable here, where the Union cancelled both meetings prior to implementation, even though it knew implementation was imminent when it did so. In *ACF Indus.*, there had been no movement for two weeks before implementation; here, there was no movement for nine months and no meetings at all for two months. Finally, as in *ACF Indus.*, the Union showed no interest in post-implementation bargaining, in the instant case for an additional four months.

Cases in which the Board has found an impasse over a Union’s objection abound. *Richmond Elec. Servs.*, 348 N.L.R.B. 1001 (2006) (impasse despite two letters seeking to continue bargaining where nothing in these letters indicated the union had or would make concessions); *see also ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997); *Rochester Tel., Corp.*, 333 N.L.R.B. 30 (2001) (impasse found despite substantial movement by the Union because deadlock on five key issues precluded a reasonable belief that movement was possible).

Thus, to the extent that the ALJ relied on the Union’s belief that further movement was possible or declined to find impasse where the Union disagreed, she departed from the *Taft* standard. (ALJD 13, line 15). Under controlling authority, the parties indisputably were at impasse.

- b. The Employer’s Continued Willingness to Continue Talks Did Not Preclude Impasse

Similarly, the Employer's willingness to meet during the six months of impasse does not preclude or disturb an impasse. The Employer's willingness was met with Union disinterest, but more to the point, finding that this would break or prevent an impasse would punish the very behavior the Board tries to foster, *i.e.*, a willingness to continue bargaining after impasse is reached.

The ALJ also believed that further movement was possible because the Employer was working on – but never gave the Union -- a new proposal after the April meeting. (ALJD 13, lines 10-14; GCX 23). The proposal was never finalized or given to the Union in the first instance because the Union cancelled the meeting. Moreover, the draft shows no movement whatsoever on dozens of issues. In essence, the draft was a recap of where the parties already were.

Thus, the ALJ mistakenly relied on the Employer's laudable willingness to meet, without looking to the substance behind that willingness.

c. The Fact that Neither Party Declared an Impasse is of No Moment

Similarly, the ALJ's reliance on the failure of either party to use the word "impasse" is misplaced. (ALJD 13, line 9-10). An impasse existed or it did not; there are no magic words or incantations required.

Moreover, Mr. Kologi's testimony and Mr. Cruse's handwritten minutes of the April 21 meeting (the last official meeting prior to implementation), show that Pratt said it would implement on May 24.³² Respondent's statement that it intended to implement is tantamount to declaring an impasse. *See, e.g., ACF Indus.*, 347 N.L.R.B. at 1041

³² Recall that this date was postponed to accommodate the off the record meeting requested by the Union.

(employer had declared an impasse where its negotiator simply stated that it “had nothing further to offer, that he ha[d] his ‘marching orders’ and that ‘I got to implement’”).

d. The ALJ Erroneously Disregarded Cases Cited by the Employer

The Decision attempts to distinguish four of Respondent’s cases because:³³

[1] these cases involve substantial bargaining over economic terms
... [2] the employers there began negotiations with economic proposals based on openly announced cost-cutting imperatives ...
[3] strike and strike voters were also involved and, [4] in most of the cases impasse was declared or a final offer was clearly articulated by the employer.

(ALJD 14, lines 6-22.) However, none of these four grounds is set forth in any Board decision as being determinative of the existence of an impasse. Instead, the factors that the Board consistently has considered are those enumerated in *Taft Broad.*, 163 N.L.R.B. at 478: the good faith of the parties, the length of negotiations, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties. Thus, the Decision’s reliance on the aforementioned factors to distinguish the cases relied on by Pratt contravenes over forty years of Board precedent.

3. Conclusions as to Impasse

The ALJ was able to find that there was no impasse by ignoring the fact that the parties had not met for two months; that the Union had cancelled two meetings knowing that implementation would occur after the second; that at the time of implementation, there had been no movement on any substantive issue, including wages, hours, vacations, pensions, medical, holidays, sick leave or any other important issue; and that the parties would not meet for four months after impasse, and then only after the Employer hounded

³³ The Decision fails to address the fifth case: *Eddie’s Chop House, Inc.*, 165 N.L.R.B. 861 (1967).

the Union to meet. This case meets that *Taft* criteria, in that there is no allegation that the Employer bargained in bad faith, the parties had been trying to reach agreement for nine months, *every* important issue was in dispute, and in actions if not in words, the parties both knew that they were at impasse. The Union's refusal and subsequent lackadaisical efforts to continue talks clearly demonstrated its belief that future meetings would be futile.

Given these facts, the ALJD is not supported by the preponderance of the evidence and the Board should find that the parties were at impasse in June, 2010. Parties cannot and do not take a six month break from negotiations if they are not at impasse. No one could dispute that the parties were at impasse as of September or October, 2010. Because nothing occurred from April to October, it necessarily follows that the parties were at impasse during the entire period, beginning in April after the last meeting, and certainly two uneventful months later when the Employer implemented.

Thus, the parties were at impasse and the Employer was free to implement its scheduling proposal.

4. Alternatively, the Employer Could Implement in the Face of the Union's Dilatory Approach to Negotiations

Normally, impasse requires good faith bargaining. There is no allegation here that either party engaged in bad faith bargaining; however, where, as here, the Union has engaged in dilatory bargaining, the Employer lawfully may implement its last offer even without an impasse. *NLRB v. Auto Fast Freight, Inc.*, 793 F. 2d 1126, 1129 (9th Cir. 1986). "The Board's rule is that when an employer implements upon its decision that further bargaining would be fruitless, especially stemming from alleged dilatory Union conduct, it is permissible to view the facts from the employer's point of view or

perspective.” *Sw. Portland Cement Co.*, 289 N.L.R.B. 1264, 1276 (1988), *citing M & M Contractors*, 262 N.L.R.B. 1472, 1476 (1982); *R. A. Hatch Co.*, 263 N.L.R.B. 1221, 1223 (1982).

The record here is replete with evidence that the Union refused to schedule meetings and cancelled more sessions than it attended. (GCX 37, 51, 54, 57, 58, 63, 65). The fact that the parties met only nine times in 18 months was attributable almost exclusively to the Union’s unwillingness to meet more frequently. Where, as here, the Union consistently delays bargaining, the Employer need not wait for impasse to implement. In this case, there was an impasse and dilatory tactics by the Union, and in either situation, implementation was lawful.³⁴

34 Counsel for the General Counsel has taken the position that the Employer may not rely on these alternative defenses (impasse and dilatory tactics). In numerous cases the Board has considered considers almost the same defenses without finding that either precludes the other. *See, e.g., Expert Elec. Inc.*, 347 N.L.R.B. 18 (2006), *Rochester Tel. Corp.*, 333 N.L.R.B. 30 (2001); and *Master Window Cleaning, Inc.*, 302 N.L.R.B. 373 (1991).

Counsel for the General Counsel also has claimed that the Employer’s defenses somehow are time barred. As the ALJ noted during the hearing these defenses were raised in Pratt’s Answer, but even if they were not, any time bar applies only to conduct Pratt alleges to be unlawful – a claim not made by Pratt – and starts six months before the filing of the charge. “Section 10(b)’s time-bar applies to defenses, as well as to complaints, based on unfair labor practices occurring more than six months prior to the filing of the charge at issue.” *NLRB v. Marin Operating, Inc.*, 822 F.2d 890, 893 (9th Cir. 1987) citing *NLRB v. B.C. Hawk Chevrolet, Inc.*, 582 F.2d 491, 494 (9th Cir. 1978). “While the literal language of § 10(b) refers only to the issuance of complaints, the Board and courts have used the reasoning of *Bryan Manufacturing* to extend the time limitation to prevent a defense to an unfair labor charge based exclusively on conduct which occurred in the pre-10(b) period and which would be barred under § 10(b) if it were alleged as a complaint.” *NLRB v. Triple C Maint. Inc.*, 219 F.3d 1147, 1156-1157 (10th Cir. 2000). *See, e.g., Viola Indus.*, 979 F.2d 1384, 1387 (10th Cir. 1992); *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 673 (9th Cir. 1972); *NLRB v. District 30, United Mine Workers*, *NLRB v.* 422 F.2d 115, 122 (6th Cir. 1969); *Sewell-Allen Big Star, Inc.*, 294 N.L.R.B. 312, 313 (1989), *enforced*, 943 F.2d 52 (6th Cir. 1991). The original charge was filed on June 15, 2010. (Complaint, ¶1). Thus, any conduct occurring after December 15, 2010, indisputably is admissible; however, because the

5. The Union's Conduct Indicated Agreement to the Schedule Change

As noted, the parties discussed the schedule change proposal from November through April, 2010. In connection with the schedule change, the Union made proposals to increase beeper pay four-fold and the simultaneous implementation of a weekly pay schedule. The Union knew that both weekly pay and beeper pay would be implemented contemporaneously with the schedule change and did not protest. It did not protest implementation of these items because it wanted the benefits of weekly pay and increased beeper pay.³⁵

The Union cannot have it both ways. It cannot keep silent and acquiesce in order to gain benefits, then protest selectively the portions it did not want. The Union cannot take the beneficial portion of its deal while labeling the rest an unlawful unilateral change.

**II THE JUNE, 2010 ATTENDANCE AND CALL-IN POLICY
RESTATED EXISTING POLICIES OR WERE
DE MINIMIS CHANGES (EXCEPTION 8)**

The Complaint alleges that the Employer discontinued its prior practice of allowing employees to take unpaid leave after they exhausted their sick leave allowance and requiring them to take vacation days (Complaint, ¶10(d)); required employees to speak to a supervisor when they call in sick (Complaint, ¶10(e)); required employees to submit a doctor's note for absences after their sick leave has been exhausted (Complaint,

Employer does not allege that the Union's sloth rises to the level of a violation of Section 8(b)(3), no time bar applies.

³⁵ Cruse's claims that he protested and said that the schedule change was an unfair labor practice are not corroborated by the two employee negotiators nor by the Union's own minutes.

¶10(f)); and disciplined employees who violated these policies (Complaint ¶¶10(g) and (h)). All of these “changes” were restatements of existing policies or represented the most minor and meaningless changes as to which no bargaining was required.

1. Attendance Policy

The evidence adduced at the hearing shows that in 1998 and 2001, the Employer promulgated attendance and call-in policies that were substantially the same as the policies set forth in the June, 2010 memo. Under all three attendance policies, employees are paid for three sick days; any additional absences are unexcused and require medical verification. After the third day of sick leave, discipline “will” be imposed, specifically two verbal warnings then termination.

While the Union’s witnesses claimed that in the past they were permitted to take vacation or unpaid leave without discipline or that they were not required to bring in doctor’s notes, there is no evidence of the former and the latter is contradicted conclusively. While these employees claimed that they often used unpaid days off, they produced only two paystubs that showed only that two employees were once paid less than a full week’s pay. Counsel for the General Counsel subpoenaed thousands of pages of records including years of payroll records, and could find no further evidence than this. By contrast, Keelie Cruz testified that the policy was enforced except on one occasion in which she learned that supervisor Mike Austin had permitted an unpaid day off. When she learned of it she corrected it.

As to medical verification, despite their adamant denials that they had ever provided a doctor’s note prior to 2010, Kologi and O’Donnell both had doctor’s notes in

their files. Thus, the only credible evidence shows that these policies were in effect for many years prior to the June, 2010 memorandum.

2. Call-in Procedures

Both before and after the June, 2010 memo, employees were required to make a phone call if they were out sick, but claim to have been able to leave a message, rather than reach a supervisor in person. Under the June, 2010 memo, employees still were required to make a telephone call. The memo contained an expanded and updated list of telephone numbers, including cell phones and home numbers. The change in policy, if any, was that employees now had to pick a number likely to reach a supervisor.

Further, while the policy previously required a call 30 minutes prior to the start of the shift, the June, 2010 memo required a call 45 minutes before the shift. The Union's witnesses all testified that they invariably called hours before the shift started. The fifteen minute change was *de minimis* and did not require bargaining.

Thus, what the General Counsel claims to have been a unilateral change was almost entirely a restatement of existing policies. The only changes – new phone numbers and 15 minutes added to the call in time – were *de minimis* changes as to which bargaining was not required. *Success Vill. Apts., Inc.*, 348 N.L.R.B. 579, 580 (2006). To find otherwise places the Board in the position of micromanaging the parties' relationship to a degree that the Board ought to eschew.

III THE SUBCONTRACTING ALLEGED IN THE COMPLAINT WAS CONSISTENT WITH THE EMPLOYER'S PAST AND CONCURRENT PRACTICES AND DID NOT VIOLATE THE ACT (EXCEPTIONS 4 THROUGH 7)

The Complaint alleges that the Employer unilaterally altered terms and conditions of employment by employing subcontractors to perform bargaining unit work.³⁶ (Complaint, ¶10(c)). The General Counsel did not take issue with the everyday, ongoing subcontracting that has occurred since the Mill opened and continues to this day, by the same contractors, including Jisk and Oxford, doing the same work that bargaining unit employees do. Instead, the General Counsel alleged and the ALJ found unlawful only the work done by three subcontractor employees starting in June, 2010. Ironically, two of these same contractor employees had worked in the Mill before, doing the same kinds of work. Thus, the General Counsel took issue with an entirely arbitrary selection of work while ignoring that the same work was being done by the same contractors at this and all prior times.

As will be shown, the Employer lawfully could continue its existing subcontracting practices.

1. Legal Standard

An employer is required to bargain only before making a unilateral change in terms and conditions of employment. Where a company's actions are "...in line with the company's longstanding practice", advance notice and bargaining are not required because the company's actions do not represent a unilateral change but "...a mere

³⁶ The Complaint (¶ 10(a)) also alleges that the Mill "reduc[ed] the hours of Unit employees." No evidence was presented to support this allegation, which in any event was rebutted conclusively by the Employer's evidence showing that average hours and pay have increased. (RX 20).

continuance of the status quo." *NLRB v. Katz*, 369 U.S. 736 (1962); *Markle Mfg. Co.*, 239 N.L.R.B. 1353, 1363 (1979) ("...a company does not violate Section 8(a)(5) in this respect [unilateral change] where there has in fact been no change from the status quo..."); *Gulf Coast Auto. Warehouse*, 256 N.L.R.B. 486, 489 (1981) (no unilateral change because company's actions "...were a continuation of past practices" and "did not constitute a change of past working conditions"). See also, *Shell Oil Co.*, 149 N.L.R.B. 283, 287-88 (1964) (referring to the company's "right to maintain its established practice" subject to *subsequent* bargaining).

Westinghouse Elec. Corp., 150 N.L.R.B. 1574 and its progeny preclude a finding of unilateral change in this case. The issue in *Westinghouse* was whether the Employer violated the Act by failing to notify or bargain with the unions over each subcontract. The Board in *Westinghouse* established five criteria to be considered in determining whether unilateral subcontracting violated Section 8(a)(5) of the Act:

Whether the subcontracting "was motivated solely by economic considerations"; whether it "comported with the traditional methods by which the Respondent conducted its business operations"; whether the subcontracting in question varied "significantly in kind or degree from what had been customary under past established practice"; whether "the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings"; and, whether the subcontracting had any "demonstrable adverse impact on employees in the unit."

Gen. Motors Corp., 257 N.L.R.B. 820, 823 (1981) quoting *Westinghouse*, 150 N.L.R.B. at 1577. "These criteria, the Board has held, are to be weighed and considered cumulatively." *Gen. Motors Corp.*, 257 N.L.R.B. at 823, citing *Gen. Elec. Co.*, 240 N.L.R.B. 703 (1979), *Rochester Tel. Corp.*, 190 N.L.R.B. 161 and *Union Carbide Corp.*, 178 N.L.R.B. 504 (1969). See also *Titus-Will Ford Sales, Inc.* 197 N.L.R.B. 147, 153

(1972), noting that, “The entire factual framework must be considered in order to arrive at a conclusion.”

Noting that the general rule under *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 210 (1964) is that subcontracting is a mandatory subject of bargaining, in dismissing the complaint in *Westinghouse* the Board relied heavily on "the traditional methods by which the Respondent conducted its business" and the Respondent's "past established practice":

[A]n employer's duty to give a union prior notice and an opportunity to bargain normally arises where the employer proposes to take action which *will effect some change* in existing employment terms or conditions within the range of mandatory bargaining. In the *Fiberboard* line of cases, where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has *invariably* appeared that the contracting out involved a *departure from previously established operating practices, effected a change in conditions of employment, or resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit.*

Here, however, there was no departure from the norm in the letting out of the thousands of contracts to which the complaint is addressed. The making of such contracts was but a recurrent event in a familiar pattern comporting with the Respondent's usual method of conducting its manufacturing operations at the Mansfield plant. It does not appear that the subcontracting engaged in during the period in question materially varied in kind or degree from that which had been customary in the past. Nor has it been shown that the subcontracting engaged in had any significant impact on unit employees' job interests.

Westinghouse, 150 N.L.R.B. at 1576, emphasis added. This is nothing more than a restatement of *Katz*, which permits an Employer to continue to maintain the *status quo*, in this case by continuing Westinghouse's practice of contracting out work.

As noted above, in addition to the Respondent's "traditional methods" and "past practices", the Board in *Westinghouse* established three additional criteria to be considered in determining whether unilateral subcontracting violated Section 8(a)(5) of the Act:

[T]hat the recurrent contracting out of work here in question was motivated solely by economic considerations; ... that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meeting.

Westinghouse, 150 N.L.R.B at 1577.

With respect to the "economic considerations" criteria, the Board in *Gen. Elec. Co.*, 264 N.L.R.B. 306, 309 (1982) explained that:

[T]he "economic considerations" with which the Board is and should be primarily concerned might be expressed differently as 'business exigencies.' In enunciating the first criteria, the Board is primarily concerned that Respondent not be motivated by unlawful considerations but rather by business considerations.

In *General Electric*, the Board found that since the General Counsel conceded that, "Respondent was clearly not motivated by any sinister or unlawful motive in subcontracting the work," Respondent had satisfied the "economic considerations" criterion. *Gen. Elec. Co.*, 264 N.L.R.B at 309.

With respect to whether the subcontracting had "demonstrable adverse impact upon" unit employees, the Board has looked to whether it "resulted in a significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit." *Union Carbide Corp.*, 178 N.L.R.B. at 508.

In *Gen. Motors Corp.*, 257 N.L.R.B. at 824, the Board noted that the subcontracting “resulted in the unit's loss of approximately one-half of an employee's work year in production work and perhaps one-quarter as much in such skilled trades work as tool sharpening.” Although no employees lost their job as a direct result of the subcontract, the reduction in hours led to the transfer of one employee to another shift, the reassignment of another to a job at a lower rate of pay and the layoff of a third employee. The Board further noted that the subcontracting may have reduced demand for employees, which resulted in the employer’s decision not to replace retired employees. Despite these effects, the Board found that the detriment to the unit employees “was not sufficiently significant as to mandate notice and bargaining.” *Id.* at 824; *see also Am. Oil Co.*, 171 N.L.R.B. 1180 (1968); *Webel*, 217 N.L.R.B. 815 (1975).

Finally, with respect to the Union’s opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings, the Board has noted that this factor is not controlling³⁷ and that at most, Respondent must show that it has not refused a request to bargain over the subject. *Westinghouse*, 150 N.L.R.B. at 1577; *Equitable Gas Co. v. NLRB*, 637 F.2d 980, 991 (3d Cir. 1981).

2. The Subcontracting Alleged in the Complaint Meets the *Westinghouse* Standard

The subcontracting here is limited to the two weeks in which two Jisk/Oxford employees familiarized themselves with the Mill, and the work performed by Andre Jones while he auditioned as a replacement for Larry Dobson. As will be shown, both

³⁷ *Gen. Elec. Co.*, 264 N.L.R.B. at 309. Instead, it is just “one factor to be balanced in the overall determination of whether this subcontract was a subject of mandatory bargaining.” *Equitable Gas Co. v. NLRB*, 637 F.2d 980, 991 (3d Cir. 1981) *citing Elec. Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977 (3d Cir. 1980) and *Brockway Motor Trucks v. NLRB*, 582 F.2d 720 (3d Cir. 1978).

uses of subcontractors comports with the *Westinghouse* standard and the complaint should be dismissed.

a. The Subcontracting Was Motivated by Business Considerations

No evidence was presented to show that the subcontracts were undertaken for any reason other than business considerations. The complaint alleges only a violation of Section 8(a)(5), not Section 8(a)(3), from which it must be inferred that the subcontracting was not for a discriminatory or impermissible motive. Jones's work in the Mill was consistent with how the Mill hired most of its E&I employees both before and after the election. The other two short-term workers were there because of a threat that employees, like Dobson, would be directed by the Union away from Pratt and leave on short notice. Their tenure was intended only to familiarize them with the layout of the Mill in case they had to start work quickly. In any event, the Employer need only show that the decision to subcontract was based on business considerations, and there is no allegation or evidence to the contrary.

b. The Subcontracting Comported with the Traditional Methods by which the Employer Conducts its Business and Did Not Vary in Kind or Degree from Visy's Past Practices

It could not be more clear that this is precisely how the Employer accomplishes its E&I work. Initially as to Andre Jones, fully five of the seven most recent E&I employees who have worked at the Mill were hired in exactly the same way – through a trial period spanning several months during which they were on the payroll of a contractor. As to the other two subcontractor employees, the Mill uses contractors every day to do the same work done by bargaining unit employees. The employer uses contractor E&I's for overflow, for big projects, or specialty work and during shutdowns. In three of those four

cases, the work performed by the contractor is exactly the work done by the unit employees, and every witness – including the Union’s witnesses – agreed that this was the case.³⁸

There is no evidence whatsoever that the contracting alleged to be unlawful – a small fraction of the Employer’s overall E&I subcontracting – was different in kind or degree from business as usual. As shown, contractors are used extensively in the Mill and this two week stint by two subcontractor employees could hardly have been a significant increase in the use of contractors.³⁹ In short, there has been no change from existing practices.

c. The Union Had the Opportunity to Bargain about Changes in Existing Subcontracting Practices

As Counsel for the General Counsel pointed out on numerous occasions, the parties never bargained about subcontracting; however, this portion of the *Westinghouse* test does not require that the Employer request bargaining. All that is required is that the Union had the opportunity to raise the issue. Having that opportunity, the Union never asked for negotiations about subcontracting, either specific to this work or generally, and there was no refusal to bargain.

³⁸ Contractors are used at all times, but even if their use were limited to shutdown periods – which every Union witness admitted was not the case – shutdowns occur every month and annually. They are part of the day to day operation of the Mill. Moreover, these same two Jisk/Oxford employees had worked in the Mill before doing the same kind of work.

³⁹ To the extent that the two employees familiarizing themselves with the Mill were working for a different reason than other subcontractor employees (to enable them to fill in on short notice if anyone left), there is no allegation that this was anything other than a legitimate reason and in any event, they still did the same routine E&I work as other contractors whose work is not alleged to violate the Act.

d. Subcontracting Had No Impact on Bargaining Unit Employees

Again, despite receiving all documents relevant to the Employer's use of subcontractors, Counsel for the General Counsel was unable to offer any evidence of any adverse impact on the bargaining unit. There was none. There is no evidence that anyone lost a minute's pay because of their presence; in fact, the Union's witnesses took pains to show that they did no useful work at all, and clearly could not have taken work from the unit. Finally, E&I wages increased in 2010.

3. The ALJ's Refusal to Follow *Westinghouse* Was Error

The ALJ declined to follow *Westinghouse* because its applicability, "in the context of a newly certified union engaged in negotiations for a first contract appears to me to be questionable." (ALJD 19, lines 14-17; *see also* ALJD 20, lines 5-10). Although she relied on a number of inapplicable cases in other contexts to bolster her refusal to follow Board precedent, the ALJ also (apparently inadvertently) cited at least one case in which the Board applied *Westinghouse* to a first contract situation.

In *St. George Warehouse, Inc.*, 341 N.L.R.B. 904 (2004) a newly certified union claimed that the employer violated the Act by transferring bargaining unit work to a contractor. The Board accepted the ALJ's analysis, which applied *Westinghouse*. Although the Board found that the Employer had violated the Act, it did so because the subcontracting "had a significant impact on unit employees' job interests. There was an erosion and elimination of unit jobs by the decision to employ agency employees instead of the direct hires. The use of such temporary employees varied significantly in degree from what had been customary under past practice." *Id.* at 924. Thus, the Board found a

violation because the Employer could not meet the *Westinghouse* standards, although it applied that test.⁴⁰

In refusing to follow *Westinghouse*, the ALJ analogized to a variety of inapposite cases. The ALJ relied on *Eugene Iovine, Inc.*, 353 N.L.R.B. 400 (2008) and *Wehr Constructors*, 315 N.L.R.B. 867 (1994) *enf. denied*, 159 F.3d 946 (6th Cir. 1998) for the proposition that in a different context, “where there is no history of acquiescence by the specific Charging Party union representing the particular bargaining unit in question, the employer is not permitted to make unilateral changes.” (ALJD 19, lines 26-28.) In *Eugene Iovine*, the practice in issue was the employer’s right to lay off employees without notifying the union. Although this had been the practice with the prior union, the employer had not engaged in this practice in over five years. The Board explained that a “past practice is not part of the ‘status quo’ because it happened in the past, lay dormant, and an employer seeks to revive it to privilege unilateral changes undertaken years later.” *Id.* at 405. Thus, even in a layoff context, the issue was whether the past practice was consistent and clear; had it been, the Board would not have found a violation.

⁴⁰ See also *Flurocarbon Co.*, 168 N.L.R.B. 629 (1967) (subcontracting while a petition was pending in which the Board held that even if the Employer were obligated to bargain, the subcontracting met the *Westinghouse* standard); *Cnty. Health Servs.*, 342 N.L.R.B. 398 (2004) (subcontracting during prolonged negotiations for a new contract was lawful because it was consistent with the employer’s past practices, which pre-dated the union’s certification. “[A] ‘continuation of past practice is not a unilateral change in working conditions.’” *Id.* at 402 citing *KDEN Broad. Co.*, 225 N.L.R.B. 25 (N.L.R.B. 1976) (change in work scheduled shortly after certification held lawful because consistent with past practice. “[I]f an employer were prevented from operating in its normal routine fashion once a union is certified, it could bring the business to a grinding halt.” *Id.* at 35 (internal citations omitted)); *Kal-Die Casting Corp.*, 221 N.L.R.B. 1068, 1070 (1975). See also *Gulf Coast Auto. Warehouse, Inc.*, at 489; General Counsel Memorandum, Office of the General Counsel, 1991 NLRB GCM LEXIS 34 (NLRB GCM 1991).

The ALJ's reliance on *Wehr Constructors*, 315 N.L.R.B. 867, is puzzling. In that case the Board found that the most recent collective bargaining agreement specifically *prohibited* the employer from subcontracting work, expressly contradicting the employer's claim that subcontracting was permissible based on past practices. *Id.* at 868.

Similarly, in *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 N.L.R.B. 458 (2004), the Board specifically addressed the employer's past practices defense, finding that "the evidence adduced by the Respondent did not establish any consistent past practice of subcontracting that predated the date the Respondent's bargaining obligation arose." *Id.* at 458, fn. 3. In *Brede, Inc.*, 335 N.L.R.B.71 (2001), also cited by the ALJ, the past practice in question—the referral system used for "extra" employees—had not been utilized by the employer in the four years since it had been negotiated out of the contract with the prior union. *Id.* at 71-72. What is curious is that in each of the cases cited by the ALJ, the Employer could not prove a past practice; this would not have been in question unless a proven past practice would have been a viable defense.⁴¹

In this vein, the ALJ cites three cases for the proposition that a "'past practice in effectuating a discretionary employment decision' is not a cognizable defense to unilateral change allegations after the union's certification." (ALJD 19, line 49 - 20, line 4, quoting *Essex Valley Visiting Nurses Assn.*, 343 N.L.R.B. 817, 843 (2004). Each of these cases similarly is inapposite. In *Essex Valley*, the employer had transferred employees on only two prior occasions. These prior "isolated acts" were "insufficient to

⁴¹ Similarly, the General Counsel's reliance on *Acme Die Casting*, 315 N.L.R.B. 202 (1994) was misplaced. That decision involved a limited history of subcontracting only work that the Employer did not have the in-house ability to do, and also involved, "longstanding antiunion animus on the part of this Respondent." *Id.* at 209.

establish ... that the transfer here does not represent a ‘change’ in terms on [sic] conditions of employment.” *Id.* at 842-843. Again, the Board held that there was no consistent past practice, but had there been, plainly, the action would have been lawful; there is no other reason to consider whether the past practice existed.

Similarly, in *Mackie Auto. Sys.*, 336 N.L.R.B. 347 (2001), also relied on by the ALJ, the Board found that there was “no showing that frequent changes in lunchbreaks [sic] and changes in payment for them were normal practice before the advent of the Union, or that such a change was ‘so commonplace as to be a basic part of the job itself.’” *Id.* at 350.

Finally, in *Adair Standish Corp.*, 292 N.L.R.B. 890 (1989), the Board found that the Employer’s action failed different parts of the *Westinghouse* test, specifically that the layoffs had a demonstrable adverse impact on employees in the unit and the employer “continuously refused to accede to the Union’s repeated requests for recognition and bargaining.” *Id.* at 891. Again, the Board applied the *Westinghouse* test.

In all of the cases relied on by the ALJ finding a violation, there was no consistent or recent past practice. It necessarily follows that if there had been, there would have been no violation. In the instant case, virtually every maintenance employee hired at the Mill, and all of the Union’s witnesses, were hired after try-outs as contractor employees. No one disputed that this was how the Employer consistently hired new employees and it could continue to use its longstanding procedure without bargaining.

Similarly as to the two employees who worked for two weeks familiarizing themselves with the Mill, both had worked at the Mill before doing bargaining unit work.

It cannot be gainsaid that using the same contractor to do the same work with the same people is a past practice.

Where an employer *actually* has a past practice that pre-dates its relationship with the union, and the past practice does not contravene the other *Westinghouse* factors, both the Board and the courts have allowed the employer to continue that practice. There are numerous cases in which *Westinghouse* has been applied to subcontracting and similar actions where there is a new Union, generally negotiating an initial contract. For all of these reasons, this portion of the Complaint should be dismissed.

4. The ALJ's Conclusion that the Employer Failed to Show
A Consistent Past Practice was Contrary to the Record Evidence

The ALJ found insufficient evidence that the “June, 2010 subcontracting was consistent with Respondent’s customary business operations and past practices in this regard.” (ALJD 20, lines 32-35). While noting that contractors work during shut downs and on large projects, or on specific pieces of equipment, she believed that the absence of those factors precluded a finding that this subcontracting was the same in kind or type as prior subcontracting. *Id.*

First, as to the two employees working for two weeks to learn the layout of the Mill, the Union’s own witnesses testified that same employees had worked in the Mill doing E&I work previously. Both parties agreed to the overlap between work done by E&I employees and contractor employees. (TR 119, 148-49, 502-03, 520). All parties agreed that there are shutdowns every month and every year, and that they are part of the Employer’s normal routine. Thus, there is no question that contractors have always been used to do bargaining unit work at the Employer’s discretion and are in the Mill on a constant basis.

While noting that most E&I employees were hired by the contractor audition process, the ALJ does not explain why the audition of Andre Jones was anything other than an identifiable past practice. The ALJ's sole rationale as to Jones did not discount that his work was consistent with past practice, but rather, that "...only one of the three subcontractor employees in June 2010 had been brought into the mill for this purpose." (ALJD 21, lines 5-10). This implicitly concedes that Jones was different than the other two employees and that there was a consistent past practice as to him.

Thus, there is a clear, consistent, contemporaneous past practice as to the three employees working in June, 2010. Even if there were minor deviations as to the two men working to familiarize themselves with the Mill, there is no evidence that their employment had an impact on the bargaining unit. In any event, Jones's work at the Mill indisputably was consistent with past practice and was entirely lawful.

5. Conclusions as to Subcontracting

Under every factor to be considered under the *Westinghouse* test, the Employer lawfully could continue its existing subcontracting practices without bargaining with the Union. Subcontracting was undertaken for business reasons; it comported with existing practices and did not differ in kind or degree from prior subcontracts; the Union had (but failed to avail itself) of the opportunity to bargain over subcontracting generally; and there was no adverse impact on bargaining unit employees.

Moreover, it is inconsistent and arbitrary for the General Counsel to allege that these two minor subcontracts were unlawful when daily subcontracting of routine E&I work continued unabated and unchallenged. Under these circumstances, *Westinghouse*

plainly applies and the Employer could continue its existing practice by continuing to subcontract.

CONCLUSION

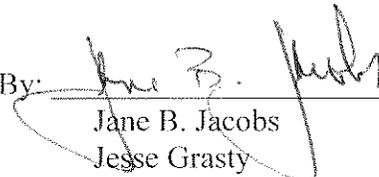
The General Counsel failed to meet its burden as to any of the allegations of the complaint and the ALJD is not supported by a preponderance of the evidence. The parties were at impasse when the Employer lawfully implemented its schedule change; the attendance polices were restated or changed so minimally that no bargaining was required; and subcontracting was consistent with prior practice and met every other aspect of the *Westinghouse* test that permitted the Employer to subcontract without bargaining.

For all of these reasons, the Employer respectfully submits that the Complaint should be dismissed in its entirety.

Dated: New York, New York
 October 27, 2011

RESPECTFULLY SUBMITTED,

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