

Kerry, Inc. and Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL-CIO. Cases 07-CA-052965 and 07-CA-053192

August 31, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 27, 2011, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent and the Charging Party each filed exceptions and a supporting brief, the Acting General Counsel filed a brief answering the Respondent's exceptions, and the Respondent filed a brief answering the Charging Party's exceptions.

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 record¹ in light of the exceptions and briefs,² and has decided to affirm the judge's rulings, findings,³ and conclusions⁴

¹ The Charging Party (the Union) has filed a motion to supplement the record with newly discovered evidence, and the Respondent has filed an opposition to the motion. The Union seeks to introduce a 2002 memorandum from the Respondent to the Union and the unit employees, which the Union did not introduce at the hearing. The Union argues the memorandum supports its interpretation of a contractual overtime-pay provision as it relates to a complaint allegation dismissed by the judge. The Union acknowledges that the memorandum has been in its possession since 2002, but asserts that it did not come to the Union's attention until after the judge's decision issued. We deny the Union's motion for the following reasons.

First, the 2002 memorandum does not qualify as newly discovered evidence. Under Sec. 102.48(d)(1) of the Board's Rules and Regulations, "[n]ewly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Fitel/Lucent Technologies, Inc.*, 326 NLRB 46, 46 fn. 1 (1998), quoting *Owen Lee Floor Service*, 250 NLRB 651, 651 fn. 2 (1980). The 2002 memorandum was in existence at the time of the hearing, but the Union has not established that its ignorance of the memorandum was excusable. Excusable ignorance may be found where the movant shows "facts from which it can be determined that the movant acted with reasonable diligence to uncover and introduce the evidence." *Id.* Here, the Union contends simply that its business agent happened upon the memorandum during his review of an unrelated matter after the judge's decision issued. That explanation is insufficient.

Second, we reject the Union's additional contention that the memorandum, if adduced and credited, would require a reversal of the judge's dismissal. See Sec. 102.48(d)(1) of the Board's Rules. The 2002 memorandum does not address the collective-bargaining agreement in this case, but rather predates both that agreement and the prior agreement; indeed, the collective-bargaining agreement to which the memo does refer is not in the record.

² The Respondent excepted only to the judge's finding that it unlawfully changed the application and payment of contractual work shift-premium pay. The Union excepted only to the judge's dismissal of the allegation that the Respondent unlawfully changed the calculation of contractual overtime pay. We adopt the remainder of the judge's decision in the absence of exceptions.

³ The Respondent has not excepted to the judge's finding that it unlawfully changed the number and length of unit employees' work

and to adopt the recommended Order as modified and set forth in full below.⁵

We agree with the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally altering its application and payment of shift premiums under the parties' current collective-bargaining agreement. As more fully detailed in the judge's decision, the agreement established a 10 cents per hour shift differential for second-shift employees and a 15 cents per hour differential for third-shift employees. First-shift employees were not entitled to any contractual shift-premium pay. Midway through the contract, the Respondent changed from a daily work schedule of three 8-hour shifts to, essentially, a daily schedule of two 12-hour shifts. This change led to the shift-premium issue in this case.⁶

The complaint alleged that the Respondent, following the schedule change, unilaterally altered the application and payment of shift-premium pay under the contract. In its answer, the Respondent admitted that it did change its payment of shift premiums "with regard to some, but not all Unit employees." The judge found the violation, relying in part on the Respondent's admission and in part on the credited testimony of Bernard Kowalski, formerly a third-shift worker, who stated that he did not receive shift-premium pay after the Respondent changed the work schedule.

The Respondent excepts to the judge's finding, arguing that he erroneously credited Kowalski over Director of Human Resources Tasha Milburn, who testified that all employees received shift-premium pay after the schedule change. We find it unnecessary to pass on the judge's credibility resolution. Instead, we affirm the judge's unfair labor practice finding based on the Respondent's admission and undisputed record evidence establishing that, after the Respondent changed the shift schedule, it began paying shift premiums to *all* unit employees, including former first-shift employees who had

breaks. The Union has not excepted to the judge's dismissals of various complaint allegations, apart from the allegation referred to in fn. 2, *supra*.

⁴ Because we have adopted the judge's conclusion that the Respondent made unlawful midterm contract modifications regarding both shift-premium pay and the number and length of work breaks, we find it unnecessary to address his conclusion that the Respondent's actions also constituted unlawful unilateral changes under Sec. 8(a)(5). See *Des Moines Cold Storage, Inc.*, 358 NLRB 488 (2012).

⁵ The judge's remedy is modified to provide that backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971).

We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found. We shall also substitute a new notice that reflects those changes.

⁶ There are no exceptions to the judge's finding that the Respondent's change in the work schedule was lawful.

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not previously received premium pay.⁷ That evidence, along with the Respondent's admission, fully supports the judge's finding that the Respondent unilaterally altered the payment of shift premiums in violation of Section 8(a)(5) and (1).

Finally, we find it necessary to modify the judge's remedy. The judge ordered the Respondent to rescind its changes to the application and payment of shift premiums.⁸ Former first-shift employees, however, may have benefitted from the Respondent's unlawful action. In addition, the record does not clearly establish to what extent former second- and third-shift employees experienced changes in their contractual shift-premium pay, whether beneficial or detrimental. In those circumstances, we shall order a return to the status quo ante if the Union requests it, leaving to compliance the determination of the full impact of the Respondent's unlawful conduct.⁹ We will modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Kerry, Inc., Kentwood, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Local 70, Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO (the Union) by unilaterally changing terms and conditions of employment of bargaining unit employees.

(b) Failing to continue in effect the terms and conditions of its 2008–2013 collective-bargaining agreement with the Union by changing, without the Union's consent, contractual provisions concerning the number and length of work breaks and the application and payment of shift premiums.

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

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

(a) On request of the Union, rescind the unlawful changes it made to the number and length of work breaks and the application and payment of shift premiums.

(b) Make the unit employees whole for any loss of earnings and other benefits attributable to its unlawful conduct, with interest, in the manner set forth in the remedy section of the judge's decision, as modified above.

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

(d) Within 14 days after service by the Region, post at its Kentwood, Michigan facility, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2010.

(e) 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 the Respondent has taken to comply.

⁷ The Respondent itself recounts this evidence in its brief in support of exceptions.

⁸ He also ordered rescission of the Respondent's unlawful modification of the contractual provision concerning the number and length of work breaks.

⁹ See, e.g., *HTH Corp.*, 356 NLRB 1397, 1402–1403 (2011); *Children's Hospital*, 312 NLRB 920, 931 (1993), *enfd. sub nom. California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996); *Stroehmann Bakeries*, 287 NLRB 17, 20–21 (1987).

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to bargain with Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL–CIO (the Union) by unilaterally changing terms and conditions of employment of bargaining unit employees.

WE WILL NOT fail to continue in effect the terms and conditions of our 2008–2013 collective-bargaining agreement with the Union by changing, without the Union’s consent, contractual provisions concerning the number and length of work breaks and the application and payment of shift premiums.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request of the Union, rescind the unlawfully implemented changes we made to contractual provisions concerning the number and length of work breaks and the application and payment of shift premiums.

WE WILL make the unit employees whole for any loss of earnings and other benefits attributable to our unlawful conduct, with interest.

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Joseph P. Canfield, Esq., for the General Counsel.
Andrew S. Goldberg, Esq. and *Jeremy L. Edelson (Laner, Muchin, Dombrow, Becker, Levin & Tominberg, Ltd.)*, of Chicago, Illinois, for the Respondent.
Edward M. Smith, Esq. (Pinsky, Smith, Fayette & Kennedy, LLP), of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. The Government alleges that Respondent, Kerry, Inc., changed the work

schedules and certain other terms and conditions of employment of its bargaining unit employees without affording the Union an opportunity to bargain over the changes and their effects, and that it breached certain terms of its collective-bargaining agreement, thereby failing to bargain in good faith within the meaning of Section 8(d) of the Act. The Government further alleges that Respondent engaged in direct dealing with employees, and that all of these actions violated Section 8(a)(5) and (1) of the Act. I conclude that Respondent lawfully implemented a 4-day workweek, but violated the Act by failing to adhere to contractual provisions regarding breaks and shift premiums.

Procedural History

This case began on June 3, 2010, when the Charging Party, Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, AFL–CIO (the Union or Charging Party) filed the initial unfair labor practice charge in Case 07–CA–052965. The Union amended this charge on July 21, 2010.

After an investigation, the Regional Director for Region 7 of the Board issued a complaint and notice of hearing on August 6, 2010. Respondent filed a timely answer.

On September 30, 2010, the Charging Party filed the original charge in Case 07–CA–053192. The Charging Party amended this charge on January 19, 2011.

On November 9, 2010, the Regional Director for Region 7 issued an order consolidating cases, consolidated amended complaint and notice of hearing which, for brevity, I will refer to simply as the “complaint.” Respondent filed a timely answer.

On January 25, 2011, a hearing opened before me in Grand Rapids, Michigan. At the beginning of the hearing, the General Counsel orally amended the complaint on the record.

The parties presented testimony and other evidence on January 25 and the next day. On January 26, 2011, the hearing closed. Thereafter, the parties submitted briefs, which I have read and considered.

Admitted Allegations

Respondent’s answer admits the allegations in complaint paragraphs 1(a), (b), and (c), 2, 3, 4, 5, 7, 8, 9, and 10(b)(iii) and (b)(iv). Based on those admissions, I find that the unfair labor practice charges were filed and served as alleged in the complaint.

Further, based on Respondent’s admissions, I find that it is a corporation with a place of business at 4444 52nd Street SE, Kentwood, Michigan, has been engaged in the manufacture, nonretail sale and distribution of food products, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Additionally, I find that it satisfies the Board’s standards for the exercise of its jurisdiction.

Moreover, I find that the following individuals are Respondent’s supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Director of Human Resources Tasha Milburn; Business Unit Human Resources Manager Brenda Brandt; Human Resources Representative Michelle Kundert; and Plant Manager Joe Scalzitti.

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Based on Respondent's admissions, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. Further, I find that the following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All employees in the production department as set forth in Section 6.1 of the collective bargaining agreement between Respondent and the Charging Union which is effective for the period of September 1, 2008 until August 31, 2013 [general production I, general production II, sanitation, machine operator I, machine operator II, machine operator 111, and hi lo operator], at its Kentwood, Michigan, but excluding all office clerical employees, sales employees, guards, maintenance, quality assurance, shipping and supervisors/foremen as defined in the Act.

Respondent's answer admits, and I find, that since about 2000, and all material times, the Charging Party has been the designated exclusive collective-bargaining representative of the bargaining unit described above (the unit) and has been recognized as such representative by Respondent. This recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective by its terms from September 1, 2008, until August 31, 2013. Respondent further admits, and I find, that at all material times, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the unit.

Respondent's answer also admits portions of the allegations raised in complaint paragraphs 6, 10(a) and (b), 11, and 13. These admissions will be discussed further in connection with the contested allegations.

Facts

Before February 11, 2006, bargaining unit employees worked 5 days in a row, Monday through Friday. The work often extended into Saturdays. On February 11, 2006, Respondent began requiring new employees to work other 5-day schedules, with one group having Monday and Tuesday off and another group having Wednesday and Thursday off. The Union filed a grievance alleging that the changes violated portions of the 2004–2008 collective-bargaining agreement then in effect. This agreement also included an extensive management-rights clause, which Respondent raised as a defense.

The grievance proceeded to an arbitration hearing, in which the Union participated. In his January 4, 2007 award, Arbitrator Elliott H. Goldstein defined the issues to be decided as follows:

Did the Employer violate the Collective Bargaining Agreement when it unilaterally instituted work schedules for new hires which included Saturdays and/or Sundays as part of the regular work week?

If so, what shall the remedy be?

Arbitrator Goldstein stated that Respondent and the Union had agreed, at the hearing, that the collective-bargaining agreement did not include an "express mandate" that Respondent maintain a Monday-through-Friday work schedule for all employees. The arbitrator rejected the Union's argument that

the absence of such a requirement rendered the contract ambiguous.

The arbitrator examined article 6.7 of the existing contract, which concerned wages. It provided that the Respondent would pay an employee at 1-1/2 times his regular hourly rate for all hours actually worked on the employee's "sixth consecutive work day" in a workweek, and at double time for all hours worked on the "seventh consecutive work day." The parties' use of this language, instead of the simpler "Saturday" and "Sunday," supported a conclusion that the parties had not intended to prescribe an unchangeable Monday-through-Friday schedule.

In his opinion and award, Arbitrator Goldstein considered it "crucial" that the parties actually had bargained over use of the words "Saturday" and "Sunday" rather than "sixth consecutive work day" and "seventh consecutive work day." The arbitrator noted that in such negotiations, the Union could not get Respondent to agree to the language it sought.

The arbitral award also discussed the management-rights language appearing in article 13 of the collective-bargaining agreement. Arbitrator Goldstein concluded that the language in article 6.7 "has neither contractual nor implied impact on management's article 13 right to 'determine the schedule of work' and control production pursuant to market demands. . . ."

As noted above, the arbitrator rejected the Union's argument that the contract was ambiguous because it did not specify that the workweek extended from Monday through Friday. The Union's ambiguity argument supported the Union's further contentions that the arbitrator could, and should, look to past practice, and that such past practice established a Monday-through-Friday workweek.

However, Arbitrator Goldstein rejected the Union's argument that past practice locked Respondent in to a Monday-through-Friday work schedule: "I find no side letter, side agreement, or amendment to the Collective Bargaining Agreement supporting a conclusion that a meaningful meeting of the minds to that end has, in fact, occurred, I note."

The arbitrator cited another arbitration decision which distinguished a "past practice" from "merely present ways, not prescribed ways, of doing things." Quoting from that decision, *Ford Motor Co.*, 19 LA 237 (1952), the arbitrator stated that "the law and policy of collective bargaining may well require that the Employer inform the Union and that they be ready to discuss the matter on request. But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character." (Underlining in original.)

Arbitrator Goldstein's award further stated, "Neither does the Union's reliance on other sections of this agreement persuade me that Management either abandoned its managerial right to schedule regular shifts on Saturdays and Sundays, or intentionally negated that right elsewhere in the agreement."

The arbitrator's construction of the collective-bargaining agreement's management-rights provisions provided the parties guidance in later negotiations. Although the award specifically concerned only Respondent's right to schedule regular shifts on Saturdays and Sundays, and did not mention some other scheduling change (such as shifting to a 4-day, 42-hour workweek), the arbitrator did not couch his holding in narrow terms. In-

stead, the arbitrator observed that Respondent remained free “to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks” and the agreement imposed no limits on this scheduling freedom.

Union Business Agent Orin Holder read the arbitrator’s decision when it came out. Holder later became the Union’s chief negotiator during the bargaining which resulted in the parties’ 2008–2013 agreement. On cross-examination, Holder acknowledged that the arbitrator had held that the collective-bargaining agreement did not bind Respondent to any particular scheduling practice, and that he was aware of this fact before the 2008 negotiations began.

Four months after Arbitrator Goldstein issued his decision, the Respondent and the Union entered into a memorandum of agreement, signed by both parties on May 11, 2007. At this time, the existing collective-bargaining agreement, which the arbitral award interpreted, had not expired and would not for another 15 months. The memorandum of agreement modified a contractual provision on “bumping rights” and the calculation of vacation time earned. Significantly, the memorandum of agreement closed with the following sentence:

If the Company decides to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks, it will notify the Union at least 10 days prior to implementation to discuss the details with the Union and any impact on the employees.

The language in this quoted sentence echoes the language in the arbitrator’s decision that “the law and policy of collective bargaining may well require that the Employer inform the Union and that they be ready to discuss the matter on request.” However, the arbitrator’s decision had continued with a further point not stated in the memorandum of agreement, namely, that there was no requirement of mutual agreement “as a condition precedent to a change of a practice of this character.”

The memorandum of agreement did not state that Respondent had a legal duty to bargain before making such a change. Thus, it did not alter the arbitrator’s holding that the collective-bargaining agreement afforded Respondent the right to make such a change unilaterally.

During the summer of 2008, the Respondent and the Union negotiated concerning a collective-bargaining agreement to replace the one interpreted by the arbitrator. On July 11, 2008, the Union and Respondent exchanged proposals. None of the Union’s proposals referred to the issue of management’s unilateral discretion to make changes in the scheduling of the regular workweek. One of the union proposals did seek pay at the overtime rate for work in excess of 8 hours in 1 day.

The proposal which Respondent tendered to the Union on July 11 did raise the subject of Respondent changing the scheduled workweek. Specifically, it included the following language:

13. Allow Company to implement alternative work week schedules as follows:

The Company may implement an alternative work week schedule, such as 4-10s or 3-12s upon three (3) weeks prior notice. If the Company implements such a

schedule, the overtime premium of time and one-half will be paid in excess of the new regular daily scheduled hours and, in excess of forty (40) hours in a work week, but not both.

Business Agent Orin Holder, who was the Union’s chief negotiator, credibly testified about the Union’s reaction to this proposal: “We told them no, we could not agree to that proposal, and we were happy with the language that was in the current contract.”

On August 7, 2008, the Respondent provided the Union a modified version of the proposals it had tendered on July 11. Instead of the language quoted above, it stated as follows:

13. Employer withdraws proposal under position that it has the right to implement alternative work schedules under the current contract language. [Underlining in original.]

On October 20, 2008, the Union and Respondent executed a new collective-bargaining agreement, effective for the period September 1, 2008, until August 31, 2013. This agreement included the following management-rights clause:

ARTICLE 13

MANAGEMENT RIGHTS

Section 13.1 Except as specifically provided in this Agreement there shall be no limit to the right of management to exercise its regular and customary functions. Such functions shall include but not be limited to the management of the plant and the direction of the working force, including the right to hire, to suspend or to discharge for just cause, to assign work, to transfer employees, to increase or decrease the working force, to let contracts for work or material to others, to determine the products to be produced or manufactured, the schedule of work and production, and the methods, processes and means of production. In addition, the Company shall have the sole discretion to transfer work to other plants whenever it is considered by the Company, in its sole discretion, to be in the Company’s best interests. Further, the Company has the sole right to decide who is to perform any or all of the work in the plant, whether such work is or has been or could be performed in or out of the plant by past, current or new employees covered by this agreement.

This language is identical to the management-rights clause in the previous collective-bargaining agreement, which had been effective from May 25, 2004, until August 31, 2008. When Arbitrator Goldstein denied the Union’s grievance, he relied on this language, stating, “The specific and unambiguous language of Article 13, Section 13.1 is what controls, I hold.”

Alleged Unfair Labor Practices

Summary of Facts Relevant to Complaint Allegations

Complaint Subparagraphs 10(a) and (b)(i) and 12

Complaint paragraph 10(a) alleges that in about May 2010, Respondent announced that it had decided to change the hours of work of bargaining unit employees and also announced “its unwillingness to bargain collectively with the Charging Union about this subject.” Complaint paragraph 12 alleges that Respondent engaged in this conduct without affording the Union a

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meaningful opportunity to bargain with Respondent with respect to this conduct and its effects.

Respondent admits that it announced changes in working hours, but denies that it had a duty to bargain with the Union before announcing the changes. Specifically, Respondent's answer states:

The Respondent admits that in about May 2010, Respondent announced its decision to change the schedule of work at the facility in Kentwood. The Respondent admits that this would result in a change in the regularly scheduled hours of work in some or all weeks for some or all employees. The Respondent denies that the Changed Schedule violated any provision of the then in effect [collective bargaining agreement] between the parties. The Respondent affirmatively states that the [collective bargaining agreement] specifically allows the Respondent to have employees work more than eight hours per day and less than eight hours a day. The Respondent denies the remaining allegations set forth in Paragraph 10(a).

The changes affected how many days each week an employee would work, and for how many hours the employee would work on a particular day. Instead of working 5 8-hour days per week, employees would work 3 12-hour days and 1 6-hour day each week, for a total of 42 hours.

Based upon the admissions in Respondent's answer, I find that in May 2010 it did announce a change in its work schedule.

Union Business Agent Holder sent Respondent a June 3, 2010 letter which stated:

There is a CBA [collective-bargaining agreement] in effect between B.C.T.GM Local 70 representing hourly employees and Kerry Sweet Ingredients which expires August 31, 2013, there is also a MOA [memorandum of agreement] which dictates processes to follow. As the sole bargaining agent for the members, Local 70 *demand*s bargaining over your proposed changes in work week and *demand*s bargaining over this change in work conditions. [Emphasis in original.]

Respondent's human resources director, Tasha Milburn, replied by June 4, 2010 email to Business Agent Holder. It stated:

Kerry cannot agree to your demand bargaining over the proposed changes in the work schedule for the Kentwood location.

As you correctly point out, the production workers at the Kentwood facility are represented by the B.C.T.GM Local 70 under the terms of a collective bargaining agreement dated September 1, 2008.

The CBA specifically gives Kerry the right "to determine . . . the schedule of work and production."

This right was affirmed under the previous CBA (which contained identical language) in an arbitration brought by the union.

While we don't recognize the Memorandum as being a part of the current agreement, even if it were, Kerry's only obligation would be to notify the Union at least 10 days prior to implementation and to discuss the details and any impact on the employees. Kerry has already done this.

Kerry remains willing to informally discuss the proposed changes, but any such discussion will not be part of formal bargaining under the CBA.

Based upon this email, I find that sometime in late May 2010, Respondent announced its decision to change to a 4-day workweek, and on June 4, 2010, informed the Union that it was unwilling to bargain about the change. Thus, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 10(a) and the allegation, raised in paragraph 12 that Respondent engaged in this conduct without affording the Union a meaningful opportunity to bargain with respect to it.

Further, I find that Respondent actually implemented this work schedule change on about August 22, 2010. Therefore, I conclude that the Government has proven the allegations raised in complaint paragraph 10(b)(i). Additionally, I find that Respondent engaged in this conduct without offering to bargain about it with the Union. Therefore, I conclude that the General Counsel has proven one of the allegations raised in complaint paragraph 12.

Respondent has not contended that the change to a 4-day workweek which included 3 12-hour workdays was not a material, substantial, and significant modification in the terms and conditions of employment. Considering the impact such a change would have on employees' lives, I conclude that it was quite material, substantial, and significant.

Complaint paragraph 12 also alleges that Respondent changed the employees' work schedule without affording the Union a meaningful opportunity to bargain about the *effects* of this change. The credited evidence does not support this allegation and I find that the government has not proven it.

In making this finding, I especially rely on the testimony of Michael Konesko, an International vice president of the Bakery, Confectionery, Tobacco Workers and Grain Millers Union. He attended a June 30, 2010 meeting of local union officials and management.

Konesko had received reports about Respondent's announced intention to implement a 4-day workweek unilaterally. He telephoned Andrew Goldberg, the Respondent's chief negotiator as well as its counsel. It appears that Goldberg's schedule prevented him from discussing the matter with Konesko at that particular moment, so he transferred Konesko to another lawyer in the firm. This attorney told Konesko that "they were having trouble talking to the local" about this matter. Konesko proposed a meeting and the lawyer agreed.

Although Konesko lives in the Saginaw area, a considerable distance from Respondent's Kentwood facility near Grand Rapids, he traveled there to attend the June 30, 2010 meeting. The local union representatives at the meeting included Local President Bill Arends and Business Agent Orin Holder. Respondent's representatives included Human Resources Director Tasha Milburn and one of the Respondent's lawyers. Although Konesko could not recall the attorney's name, I surmise from the record that it was Robert Letchinger.

International Vice President Konesko's testimony on cross-examination included the following:

Q. At the June 30th meeting, there were two issues that were discussed. One is the issue to bargain over the decision, and one is the issue to bargain over the effects, right?

A. I would characterize it to talk about the decision that the Company announced they were going to 12 hours, and the Company wanted to talk about how they could make that decision work.

Q. And Rob Letchinger asked you repeatedly to bargain about the effects of their decision to go to the 12-hour shifts, right?

A. That's what he called it.

Q. And he even said to you that the parties could enter into an agreement where you wouldn't waive your right to contest the Company's decision, that you could still file charges or what have you, that it wouldn't be a waiver, but we could still bargain over the effects. He asked you to do that?

A. Yes.

Q. And you said no?

A. I did not agree.

Q. And then, actually, when he asked you about the waiver, the Union then took a caucus. Do you recall that?

A. We took a number of caucuses. That's not unbelievable.

Q. And then, but after that caucus, you came back and said that the Union did not want to spend any more time on this, and there was no point in continuing the meeting?

A. I probably did.

Q. And then Rob said that the Union had already presented a list of concerns regarding the impact and that the Company was prepared to discuss those concerns?

A. My recollection is that discussion took place earlier in the meeting. Again, we took a number of caucuses.

Q. Okay. But he—

A. I don't think that was the time—that discussion did take place.

Q. All right. He then repeated, though, after—it took place before, but then did he repeat that, and he said, "I came from far away to attend the meeting"?

A. Yes.

Q. He asked if there was some creative way that we could sit down and talk about this?

A. Yes.

Q. That he said, if we were somehow missing something that should cause us pause or should suggest we reconsider our position, then the Union should please state what we were missing? Did he say that to you?

A. Yes, and we believed we restated our position.

Q. And you said you would check through the contract and see if there was something that would change your position?

A. Correct.

Q. *And that your position was that you would not engage in any discussion over the effects of the decision to change the work schedule?*

A. Correct, because we did not believe they had the right to change the schedule. [Italics added.]

Based on this testimony, which I credit, I find that on June 30, 2010, the Respondent offered to bargain about the effects of its decision to implement a 4-day workweek, and that the Union specifically declined to bargain about the effects of this decision. Respondent made this offer to bargain over the effects almost 2 months before it implemented the 4-day workday. Therefore, I conclude that Respondent afforded the Union a meaningful opportunity to engage in such effects bargaining and that the Union turned it down.

One further twist in the facts requires mention. At some point, the Union tendered to Respondent a document dated June 16, 2010. Although Business Agent Holder could not recall the date of the meeting at which he gave this letter to management, I infer from the record that it was the meeting on June 30, 2010, discussed above.

The June 16, 2010 letter listed articles of the collective-bargaining agreement which, the Union believed, would be affected by the Respondent's change to a 4-day workweek. For example, section 2.6 of the 2008–2013 agreement provided that under certain circumstances, an employee who was injured at work and sent home by a physician would, nonetheless, receive a full 8 hours pay. The Union's June 16, 2010 letter stated that this provision needed to be changed to 12 hours pay.

Although, at the June 30, 2010 meeting, the Union said it would not engage in effects bargaining, Respondent still adopted some of the changes suggested by the Union in its June 16, 2010 letter. However, I do not conclude that the Union engaged in bargaining over these changes. Rather, I find that Respondent adopted the changes unilaterally after the Union refused to engage in bargaining about them.

Based on these facts, I recommend that the Board dismiss the allegation that Respondent violated the Act by refusing to bargain about the effects of its decision to institute a 4-day workweek.

Complaint Subparagraphs 10(b)(ii)–(iv)

As already discussed, complaint subparagraph 10(b)(i) alleges that on August 22, 2010, Respondent changed the bargaining unit employees hours of work, and I have found that the General Counsel has proven this allegation. Complaint paragraph 10(b), as amended, also includes four other subparagraphs. They allege that on about August 22, 2010, Respondent changed: **(ii)** the accrual and use of vacation time of its unit employees; **(iii)** the number and length of breaks of its unit employees; **(iv)** the application and payment of shift premiums of its unit employees; and **(v)** the payment of overtime of its unit employees.

Accrual and Use of Vacation Time

Respondent's answer denies that it changed the accrual and use of vacation time of its unit employees.

Based on the testimony of Diana Mazariegos, Nikki Miller, and Edras Rodríguez-Torres, which I credit, I find that before the August 22, 2010 scheduling change, employees could not take vacation for less than 4 hours but were allowed to request to take vacation time in 4- or 8-hour increments. After the change, Respondent no longer honored requests for only 4 hours of vacation time and required employees to request at

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least 6 hours. The Respondent thus changed the increment to 6 hours.

Bargaining unit employee Bernard Kowalski credibly testified that on one occasion, management wanted him to go home because more employees were working than needed at that particular time. Kowalski credibly testified that he said, "Well, I'll just put in for the amount of time that I need," meaning that he would only use accrued vacation hours for the remaining time left on his shift. According to Kowalski, his shift supervisor would not allow him to use only that amount of vacation time but instead required him to take 12 hours.

Thus, Kowalski had to spend more of his accrued vacation time than necessary to be off work for the rest of his shift. It is not clear whether Kowalski actually stayed off work for the entire 12 hours of vacation time he had to use. However, even if he stayed absent from work for the entire 12 hours, he still was required to spend accrued vacation hours he might otherwise have accumulated and used for a true vacation.

In its June 16, 2010 letter, which it tendered to the Respondent on June 30, 2010, the Union stated that changes needed to be made in contract section 5.4, which pertained to vacation pay. Respondent's July 20, 2010 letter to the Union stated that it had made a change which the Union had suggested, and would pay 42 hours of straight time pay for each full week of vacation.

Neither the Union's June 16, 2010 letter nor Respondent's July 20, 2010 letter referred to a limitation on the use of vacation time, that is, to the requirement that such vacation be taken in 4-hour increments. Additionally, article 5 of the collective-bargaining agreement, which concerns vacations and specifies how much vacation time an employee would accrue based on that worker's seniority, makes no mention of any requirement that an employee had to take vacation time in a particular increment.

In other words, the vacation increment requirement had its roots in past practice rather than contract language. Changing the increment from 4 to 6 hours therefore did not breach any specific requirement in the collective-bargaining agreement.

However, the change from a 4-hour increment to a 6-hour increment clearly constituted a change in the accrual and use of vacation time. I so find. Moreover, I conclude that the change was material, substantial, and significant.

The Number and Length of Breaks

Respondent admits that it changed the number and length of breaks of its unit employees, as alleged in complaint paragraph 10(b)(iii). I so find.

Shift Premiums

With respect to complaint subparagraph 10(b)(iv), Respondent admits that it changed the application and payment of shift premiums "to some, but not all Unit employees." Based on Respondent's admission, I conclude that it changed the application and payment of shift premiums with respect to at least some of its bargaining unit employees.

Overtime Pay

Answering complaint subparagraph 10(b)(v), Respondent has denied that it changed how it paid overtime to unit employ-

ees. The Government bears the burden of proving that the change alleged in the complaint actually occurred.

To constitute a change, conditions after the alleged change must differ in some way from those before the change. If the "after" is identical to the "before," there has been no change. With respect to the "after," the record is clear: Respondent now pays overtime for hours worked in excess of 40 per week. The dispute here concerns the "before."

When the parties negotiated the 2008–2013 collective-bargaining agreement, they left unchanged the language in section 6.4 of the previous agreement. Thus, section 6.4 of the present agreement and its predecessor states:

All employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week but not for both. However, to qualify for daily overtime rates, the employee must work all of his scheduled hours in the week unless prevented by proven sickness or other similar reason satisfactory to his Supervisor.

At the time the parties first negotiated this language, the regular work schedule (not including overtime) consisted of 5 8-hour days per week. So long as this work schedule remained in effect, it made little if any difference whether overtime consisted of hours worked in excess of 8 per day or of hours worked in excess of 40 per week. For example, if an employee worked 8 hours on Monday, 8 hours on Tuesday, 10 hours on Wednesday, 8 hours on Thursday and 8 hours on Friday, it would not matter whether overtime was defined as hours in excess of 8 per day or 40 per week. Either way, the employee would be entitled to 2 hours overtime pay.

However, when Respondent changed to a schedule of three 12-hour days and 1 6-hour day, the way overtime was defined did make a substantial difference. For example, if overtime were defined as hours worked in excess of 8 per day, then an employee working his regularly assigned hours would be entitled to 4 hours of overtime for each of the 3 12-hour days, for a total of 12 hours of overtime that week. On the other hand, if overtime were defined as hours worked in excess of 40 per week, the employee would be entitled only to 2 hours overtime.

The evidence establishes, and I find, that after it adopted the new work schedule, Respondent paid overtime for hours worked in excess of 40 per week, but not hours worked in excess of 8 per day.

Although the collective-bargaining agreement provides that overtime will be paid for "all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week but not for both," it doesn't specify who would choose whether to apply the "in excess of 8 hours per day" or the "in excess of 40 hours per week" definition. There would have been little need for such specific language when a regular workweek consisted of 5 8-hour days because either definition of overtime likely would result in about the same number of overtime hours. However, as discussed above, in a workweek consisting of 3 12-hour days and 1 6-hour day, the definition affects the outcome significantly.

Before deciding whether Respondent changed the status quo, it is necessary to ascertain what conditions actually existed before Respondent implemented the 4-day, 42-hour workweek.

Specifically, I must determine whether, before this change, the Respondent had paid overtime for hours “in excess of 40 hours per week,” or for hours “in excess of 8 hours per day.” If Respondent’s practice had been to pay overtime for hours in excess of 8 per day, then its payment of overtime for hours in excess of 40 per week would constitute a change in working conditions. On the other hand, if Respondent previously had calculated overtime based on hours exceeding 40 per week, then it made no change.

As discussed above, under the old workweek, the amount of overtime would be about the same using either definition. Therefore, the amount of overtime, by itself, gives no indication as to which definition Respondent had used to calculate it. The Government must rely on other evidence to establish Respondent’s past practice. The General Counsel’s posthearing brief states, in part, as follows:

Respondent contends that it never paid overtime on a daily basis. Rather, it paid overtime only when employees worked more than 40 hours a week. The only evidence Respondent presented in support of this contention was hearsay testimony by Goldberg (Tr. 225) and payroll records for employees who worked more than eight hours in a day, but did not receive overtime pay for the extra hours. [R. Exh 13, 14, and 15.]

....

During the hearing, Respondent asked Holder, Arends, and Rodriguez-Torres if they were aware that employees worked daily overtime and were not paid for it, presumably attempting to argue a waiver by the Union failing to object. Each of the Union agents testified that as far they knew, employees were paid daily overtime when they worked more than eight hours a day. [Tr. 80, 155, 352.]

Initially, it may be observed that even if the witnesses testified that employees were paid daily overtime “as far as they knew,” that disclaimer renders the testimony rather vague and unconvincing. Moreover, my review of the cited testimony, in context, leads me to quite a different interpretation of its import. For example, Union Business Agent Holder testified, in part, as follows:

Q. Okay. Thank you. Now, you testified about the first grievance regarding overtime was after the 12-hour day schedule was implemented. Why was that? Why didn’t you file grievances over overtime before that regarding overtime?

A. Because no one came forward and told us they were not getting paid overtime for anything over 8.

Holder’s testimony that no one complained to the Union about not receiving overtime after 8 hours cannot warrant an inference that employees were receiving such overtime and therefore had no reason to complain. It would seem just as likely that they did not complain because the Respondent had no practice of paying such overtime and the employees, therefore, did not expect it.

Indeed, Holder’s further testimony is consistent with such a conclusion. During the bargaining which resulted in the 2008–2013 agreement, the Union made, then withdrew, a proposal that overtime be paid after 8 hours. Thus, Holder testified:

Q. Okay. Thank you. Now, on Respondent’s Number 1, this is a proposal to you?

A. This is a Union proposal to the Company.

Q. A Union proposal to the Company. Thank you. Number six says—what does it mean with ones that are slashed out? What does that mean with a slash through the number?

A. That they were withdrawn.

Q. Withdrawn. So you proposed any work over 8 hours per day be paid time and a half time. Why’d you withdraw that?

A. Because we had it already in the contract language.

Q. Okay. So why’d you make it, if you already had it?

A. What we do at a proposal meeting is we take all the proposals that the members give us and we give it to the Company. We do not exclude any proposals.

Q. I see.

A. And that’s why all these proposals are here. They came directly from the members.

It seems unlikely that a union member would have suggested such a proposal if employees already were receiving overtime for hours worked in excess of 8 per day. If the union member actually were receiving overtime for hours in excess of 8 per day, she would have felt no need to propose a modification to the contract. Therefore, I conclude that the Union did not receive complaints about a failure to receive overtime after 8 hours because the employees were not getting such overtime and were not expecting it.

Holder’s testimony, that the Union withdrew the daily overtime proposal “[b]ecause we had it already in the contract language” does not withstand scrutiny. The language in article 6.4 of the 2004–2008 agreement clearly stated, “All employees will be paid time and one-half for all hours actually worked in excess of eight (8) hours per day or forty (40) hours per week *but not for both.*” (Italics added.)

On its face, this language allows but does not require the payment of overtime for hours worked in excess of 8 per day. Therefore, it does not support Holder’s assertion that the contract already required such a payment. Moreover, it seems implausible that the union negotiators would propose language they knew was in the contract already. That would make them look foolish.

Imagine a situation in which the Union proposed language already in the collective-bargaining agreement and the Respondent’s negotiators then asked why the Union was doing this unnecessary act. The Union would have to reply, “We’re presenting this proposal because we present all proposals suggested by Union members, regardless of whether the language already is in the contract.” Then, the obvious question arises, “Why didn’t you just tell the member that the language already was in the agreement rather than wasting time now?”

This hypothetical exchange suggests the implausibility of Holder’s testimony. Absent some sort of corroborating evidence, I simply cannot believe that union negotiators have a practice of proposing language which they know is already in the contract.

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The General Counsel also cites the testimony of Edras Rodriguez-Torres. He worked for Respondent from February 2006 to November 2010 and became the Union's chief shop steward in about March 2007. He testified that he was scheduled to work 6 days a week, Monday through Saturday. He further testified as follows:

Q. In fact, you generally worked more than 40 hours a week, didn't you?

A. We were scheduled to work 48 hours a week.

Q. And how much of that was overtime?

A. The whole sixth day of work, whatever that would be.

This testimony does not establish that Respondent ever paid overtime for hours worked in excess of 8 per day because it does not suggest that Rodriguez-Torres worked more than 8 hours per day. To the contrary, it suggests that he began receiving overtime only after he had worked 40 hours.

On cross-examination, Rodriguez-Torres testified, in part, as follows:

Q. . . . Just so we're clear on the overtime issue, no member has ever come to you and said, "I was denied daily overtime," right?

A. Daily overtime as in over 8 hours?

Q. Correct.

A. No.

Q. All right. And to your knowledge, you're not aware of any time where the Company has paid out daily overtime pay, as opposed to overtime after 40?

A. I don't think I would have that information.

Rodriguez-Torres, as steward, did not receive any complaints about not receiving overtime for hours worked in excess of 8 per day. This testimony is consistent with the conclusion that employees did not expect to receive such overtime.

Further, based upon his answer, "I don't think I would have that information," I find that Rodriguez-Torres did not know whether employees had been paid daily overtime. Therefore, I conclude that Rodriguez-Torres' testimony does not establish that Respondent ever paid overtime for hours worked in excess of 8 hours.

The General Counsel also cited the testimony of Union President William Arends to support the argument that Respondent had, in the past, paid overtime for hours worked in excess of 8 hours in 1 day. However, Arends' testimony does not warrant such a conclusion. On cross-examination by Respondent's attorney, Andrew Goldberg, Arends testified in part as follows:

Q. Now, I'm confused as to how you answered the question so I have to ask it again. You're not aware of any grievance being filed regarding the denial of daily overtime prior to the Company's changing to the 12-hour schedule, correct?

A. No, I am not.

Q. And no bargaining unit member has come up to you and said, "I've been denied daily overtime by the Company," prior to the Company switching to a 12-hour schedule, correct?

A. No, they haven't.

Goldberg represented Respondent during the 2008 collective bargaining, in which Arends participated on behalf of the Union. The two men faced each other at the bargaining table. During cross-examination, Goldberg asked Arends about the Union's proposal that overtime be paid for hours worked in excess of 8 in 1 day:

Q. Well, let me ask you this: What did I say [at the bargaining table] after the statement was made that the daily overtime proposals related to the language in 6.4 about working the full schedule?

A. Your response was, "Why would I want to do that because that would just prompt people to call in after they had enough overtime built up?"

Q. Okay. And ultimately what did the Union do with that proposal?

A. Ultimately we withdrew it.

The words which Arends attributed to Goldberg—"Why would I want to do that . . ."—make no sense if Respondent already calculated overtime as hours worked in excess of 8 per day. If Respondent had, in fact, been paying overtime on that basis, its negotiator would have said something like "We're doing that already."

Moreover, Goldberg's rhetorical question identifies a reason why it would not be in Respondent's interest to calculate overtime based on hours worked in excess of 8 per day. The record does not reveal any reason why Respondent would have followed such a practice if not required to do so by the collective-bargaining agreement. Considering that Respondent had no apparent motivation to compute overtime in this manner, in the absence of credible evidence that it did have such a practice, I conclude that it did not.

It should be noted that the General Counsel bears the burden of proving that there was a past practice of paying overtime for hours worked after 8 per day. Unless the Government first establishes that such a practice existed, it cannot prove that Respondent had changed such a condition of employment unilaterally, without first affording the Union a meaningful opportunity to bargain.

Credible evidence does not establish that Respondent ever calculated overtime as hours worked in excess of 8 per day. Likewise, credible evidence does not prove that Respondent ever paid overtime on this basis. To the contrary, I conclude that it did not. Therefore, Respondent's computation of overtime as hours worked exceeding 40 per week did not constitute a change in terms and conditions of employment.

To summarize, with respect to complaint paragraph 10(b)(ii), Respondent denies that on about August 22, 2011, it changed the accrual and use of vacation time of its bargaining unit employees. However, based upon the evidence discussed above, I find that Respondent did change the accrual and use of vacation time, as alleged. Accordingly, I find that the General Counsel has proven the allegations in complaint paragraph 10(b)(ii).

With respect to complaint paragraph 10(b)(iii), Respondent's answer admits that on about August 22, 2011, it changed the number and length of breaks of bargaining unit employees.

Therefore, I find that the General Counsel has proven the allegations in complaint paragraph 10(b)(iii).

With respect to complaint paragraph 10(b)(iv), Respondent's answer admits that on about August 22, 2011, it changed the application and payment of shift premiums of some of the bargaining unit employees. Accordingly, I find that the General Counsel has proven the allegations in complaint paragraph 10(b)(iv).

With respect to complaint paragraph 10(b)(v), Respondent's answer denies that on about August 22, 2011, it changed the payment of overtime to the bargaining unit employees. For the reasons discussed above, I conclude that credible evidence does not establish that Respondent made such a change. Therefore, I find that the General Counsel has not proven the allegations raised in complaint paragraph 10(b)(v).

Complaint Paragraph 11

Complaint paragraph 11 alleges that the changes described in complaint paragraph 10 concerned mandatory subjects of bargaining. Respondent's answer states, in relevant part:

The Respondent admits that work schedules relate to wages and hours. The Respondent denies that such is a mandatory subject of bargaining between the parties.

Section 8(d) of the Act states, in part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages, hours, and other terms and conditions of employment* . . . [Italics added.]

Employees' work schedules fall within the meaning of "hours . . . of employment," as that term is used in the Act. Respondent's answer admits this obvious fact but "denies that such is a mandatory subject of bargaining between the parties." It appears that Respondent is referring to its defense that the Union waived the right to bargain. The issue of waiver will be discussed later in this decision.

Both vacation time and the length and scheduling of breaks also fall within the category "hours," and clearly are mandatory subjects of bargaining. Shift premiums and overtime pay plainly fall within the category of wages. They, too, are mandatory subjects of bargaining. In sum, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 11.

Complaint Paragraph 12

Complaint paragraph 12 alleges that Respondent made the changes described in paragraph 10 without affording the Union a meaningful opportunity to bargain with Respondent over the changes and their effects. For the reasons discussed above, I have concluded that Respondent did not afford the Union a meaningful opportunity to bargain about its decision to implement a 4-day workweek, but did make a timely offer to bargain with the Union about the effects of that change.

Complaint paragraph 12 also alleges that Respondent failed to give the Union a meaningful opportunity to negotiate concerning the other changes described in complaint paragraph

10—the changes described in subparagraphs 10(b)(ii), (iii), (iv), and (v), and the effects of those changes.

Before discussing whether the Respondent gave the Union a meaningful opportunity to discuss these changes, it may be helpful to summarize my findings regarding those allegations:

Vacation time: I have concluded that Respondent did change how vacation time would be accrued and used, as alleged in complaint subparagraph 10(b)(ii). As discussed above, employees previously could use vacation time in 4-hour increments. After the change, employees had to take vacation time in 6-hour increments.

Breaks: Respondent has admitted that it changed the number and length of breaks of its bargaining unit employees, as alleged in complaint subparagraph 10(b)(iii).

Shift premiums: Respondent has admitted that it changed the application and payment of shift premiums to some of its unit employees, as alleged in complaint subparagraph 10(b)(iv). Based on those admissions, I have found that Respondent made the changes alleged.

Overtime: Respondent has denied that it changed how it calculated and paid overtime, as alleged in complaint subparagraph 10(b)(v). For the reasons discussed above, I have concluded that the Government has failed to prove that Respondent made any such change.

Did Respondent afford the Union a meaningful opportunity to bargain before implementing the changes? The answer to that question may depend on how the changes are characterized. Are these changes merely "effects" of the shift to a 4-day workweek, or do they stand on their own?

For reasons discussed above, particularly the testimony of International Union Vice President Michael Konesko, I have concluded that Respondent offered to bargain concerning the effects of implementing a 4-day workweek, and that the Union declined to engage in such negotiations. If these other changes, described above, are considered to be merely effects of implementing the 4-day workweek, then Respondent did afford the Union a meaningful opportunity to bargain, and Respondent failed to do so.

On the other hand, the record does not indicate that Respondent offered to bargain about each of these changes individually. For example, the evidence does not support a finding that the Respondent informed the Union that it contemplated requiring employees to take vacation time in 6-hour increments, and offered to negotiate about that decision. Rather, it appears that Respondent assumed that when the Union declined to bargain about the effects of implementing a 4-day workweek, that refusal was sufficient to cover the other changes.

Did Respondent's failure to identify the specific contemplated changes deny the Union a *meaningful* opportunity to bargain? The answer to that question depends upon the specific change. Was the specific change compelled by the implementation of the 4-day workweek? In other words, was it an effect of the workweek change and, if so, was it so obviously an effect that the Union would recognize it as such? I would hesitate to conclude that the Union's refusal to bargain about the effects of the workweek change constituted a refusal to bargain about each of the individual matters—vacation use, breaks, and shift premiums—unless the Union plainly knew, or reasonably

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should have known that the particular matter should be categorized simply as an “effect.”

Strictly speaking, the change which required employees to take vacation in 6-hour increments, rather than 4-hour increments, may not have been compelled by the 4-day workweek, but without this change, employees would have suffered a disadvantage. One day of the week, they work only 6 hours rather than 12. Without the change, an employee wanting to take vacation for the entire day would have had to take two 4-hour increments, or 8 hours, to be off 6 hours of work.

This disadvantage clearly would have been an effect of the change to the new work schedule unless the vacation policy changed. Moreover, there would have been no reason to make such a change if Respondent had not implemented the 4-day workweek. Therefore, I conclude that negotiations about this change fell within the meaning of “effects bargaining,” and when the Union declined to engage in effects bargaining, it gave up the right to bargain about this change.

Before focusing on other changes, one other fact should be noted about the change in vacation use. The collective-bargaining agreement does not mention, let alone mandate, that vacation time be taken in any particular increment. Therefore, the change in the length of the increment does not violate any specific provision of the collective-bargaining agreement. Although the Government has alleged that certain other changes—concerning the break schedule and shift premium pay—were contract breaches in violation of Section 8(d) of the Act, it has not alleged that the vacation increment change constituted such a breach.

With respect to the Respondent’s changes in the break schedule, section 10.6 of the collective-bargaining agreement provides that “[e]ach employee will be allowed a fifteen (15) minute relief period during the first four (4) hours of his shift and a twenty (20) minute relief period during the second four (4) hours of his shift, provided he works the full shift. The first break will start no sooner than thirty (30) minutes after the shift start time. Anyone who works more than two (2) hours after his regular shift will be entitled to an additional fifteen (15) minute break.”

This provision obviously contemplated the 8-hour workday in effect at the time the parties negotiated the contract. The change to a workweek of 3 12-hour days and 1 6-hour day renders the previous scheduling of breaks a bad fit, something like a size 9 left shoe and a size 11 right shoe for size 10 feet. It might be possible to keep the old break schedule but it wouldn’t be comfortable.

No change in the break schedule would have been needed absent the change in the workweek. Therefore, I conclude that negotiations about changing the break schedule fall within the category of effects bargaining. However, for reasons discussed later in this decision, I conclude that the Union’s unwillingness to engage in effects bargaining did not allow the Respondent to change the break schedule.

Turning to the issue of shift premiums, changing to a 4-day workweek did not eliminate shifts, and a specific provision of the collective-bargaining agreement, section 6.7, mandated the payment of an additional amount for work performed on the second and third shifts. The credited evidence establishes that

some employees did not receive this extra pay when they performed work on a shift other than the first shift.

Discontinuing payment of shift premiums is not an effect compelled by the change to a 4-day workweek. This change did not eliminate shifts. Therefore, when the Respondent offered to engage in effects bargaining, that offer would not place the Union on notice that a subject would be the discontinuation of the shift premiums specified in the collective-bargaining agreement. Union negotiators had no reason to believe that a refusal to engage in effects bargaining would allow the Respondent to stop such payments or give the Respondent discretion in making such payments.

In this regard, discontinuation of a shift premium should be distinguished from the discontinuation of a shift itself. The shift premium language in section 6.9 of the collective-bargaining agreement did not mandate that Respondent establish or maintain second and third shifts but only stated that employees actually working such shifts must receive the additional pay specified.

Even assuming for the sake of analysis that the implementation of a 4-day workweek would cause an alteration in the scheduling or existence of second and third shifts, it would not affect how much pay an employee should receive while actually working such a shift. As noted, section 6.9 of the 2008–2013 collective-bargaining agreement specified this additional pay.

Moreover, in section 14.2 of this contract, the parties agreed that during the term of the agreement, neither party would have the right to require the other to “enter into negotiations or to entertain demands on any subject, whether or not expressly referred to in this Agreement, except alleged violations of an express provision of this Agreement or the rate for any new job classification which the Company may hereinafter create.” Even if changes in shift premiums were considered to be merely “effects” of the workweek change, the Union’s refusal to engage in effects bargaining did not privilege Respondent’s unilateral action because the contract itself did not allow such a change.

Stated another way, a waiver of the right to engage in effects bargaining certainly does not constitute an agreement to modify the terms of the collective-bargaining agreement midterm. Respondent did not ask the Union to agree to such a midterm modification and, because of the language in section 14.2 of the contract, the Union did not have to agree to such a midterm modification.

In sum, I conclude that at the June 30, 2010 meeting, the Respondent offered to bargain with the Union about the effects of its decision to implement the 4-day workweek and the Union declined to do so. Based on what Respondent’s representatives said at that meeting, the Union reasonably should have known that effects bargaining would concern the topics of how vacation time would be accrued and used and how breaks would be taken. However, Respondent’s offer to bargain about the effects of the 4-day workweek would not reasonably convey to the Union that the shift premiums specified in the collective-bargaining agreement would be open to renegotiation.

Respondent’s human resources director, Tasha Milburn, sent a July 20, 2010 letter to Union Business Agent Holder. It stated, in part:

We have attempted to come to agreement with the Union on the effects of the decision to change the shift schedules. At our meeting on June 30, 2010, the Union affirmatively refused to enter into effects bargaining. It is our position that the Union has, thus, waived any claim that at least from that date forward the Company had an obligation to bargain over the effects of its decision. Nevertheless, we offer the Union the opportunity once again to enter into discussions with us over the terms of the new schedule. Below sets forth our position as to how the Company proposes to administer the new schedule. If you would like to discuss these matters, please let me know. Again, the schedule will go into effect August 22, 2010.

Legal Analysis

Unilateral Change Allegations

As stated above, resolution of the 8(a)(5) unilateral change allegations depends on whether the Union waived its right to bargain concerning the changes which Respondent made unilaterally. The Board long has held that “a waiver of a statutory right is not to be lightly inferred but must be ‘clear and unmistakable.’” *New York Mirror Division*, 151 NLRB 834, 839 (1965). See also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

In *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), the Board adhered to its “clear and unmistakable waiver” standard, rejecting the respondent’s argument that an alternative test articulated by the United States Court of Appeals for the District of Columbia Circuit, the “contract coverage standard,” should be applied. Under the Board’s test, evidence must show that subject was consciously explored in bargaining or that the union intentionally relinquished its right to bargain. The Board, citing *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), held that, in the absence of “either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining,” the employer was not authorized to change, unilaterally, a term or condition of employment which was a mandatory subject of bargaining. With these principles in mind, I will turn to the individual allegations.

Complaint Paragraphs 10(a) and (b)(i)

Complaint paragraph 10(a) alleges, and I have found, that in about May 2010, Respondent announced its decision to change the hours of work of its unit employees and its unwillingness to bargain collectively with the Charging Union about this subject. (For the reasons stated above, I have found that Respondent made the announcement of its unwillingness to bargain on about June 4, 2010.)

Complaint paragraph 10(b)(i) alleges, and I have found, that on about August 22, 2010, Respondent changed the hours of work of its bargaining unit employees. In doing so, Respondent implemented the change it had announced in late May 2010. Therefore, it is appropriate to consider together the allegations raised by complaint paragraphs 10(a) and (b)(i).

Respondent argues that the Union, by agreeing to the language in the collective-bargaining agreement’s management rights clause, waived its right to bargain regarding this matter.

It further asserts that Arbitrator Elliott H. Goldstein so held in his January 4, 2007 opinion and award, discussed above.

The management-rights clause, quoted in full above, provided in part that “there shall be no limit to the right of management to exercise its regular and customary functions” including “the schedule of work and production.” (Additionally, sec. 6.5 of the collective-bargaining agreement allowed Respondent to “cancel scheduled workdays upon proper notice,” and sec. 10.2 permitted it to “change the reporting time of employees.”)

In arguing that the collective-bargaining agreement did not permit Respondent unilaterally to change the scheduled workweek, the General Counsel cites *Johnson-Bateman Co.*, 295 NLRB 180 (1989). There, the Board held that a union’s agreement to a generally-worded management rights clause did not waive its right to bargain concerning the employer’s implementation of a drug testing program. Although the waiver of a statutory right may be evidenced by bargaining history, the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.¹¹

The General Counsel also relies on *Owens-Brockway Plastic Products*, 311 NLRB 519 (1993), in which the Board held that a management-rights clause lacked the “clear and unmistakable” language required to signify waiver of the union’s right to bargain concerning work relocation. However, for reasons discussed later in this decision, I conclude that *Johnson-Bateman Co.* and *Owens-Brockway Plastic Products* can be, and should be, distinguished.

Rather, I conclude that the present facts are similar to those in *Provena St. Joseph Medical Center*, above, *Cincinnati Paperboard*, 339 NLRB 1079 (2003); *Good Samaritan Hospital*, 335 NLRB 901 (2001); and *United Technologies Corp.*, 300 NLRB 902 (1990), and that these precedents are controlling. In *Provena St. Joseph Medical Center*, the Board held that the employer had violated Section 8(a)(5) by implementing, unilaterally, an incentive policy, but had not violated the Act by implementing an attendance disciplinary policy. With respect to the latter, the Board stated:

Application of our traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent’s unilateral action. Specifically, the clause provides that the Respondent has the right to “change reporting practices and procedures and/or to introduce new or improved ones,” “to make and enforce rules of conduct,” and “to suspend, discipline, and discharge employees.” By agreeing to that combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.

350 NLRB at 815.

¹¹ In the same case, the Board held that contractual language stating that the specified wage rates were minimums and not to be construed as preventing the employer from paying, or an employee from accepting, additional pay, were sufficiently specific to waive the union’s right to bargain about an attendance incentive bonus plan.

In *Cincinnati Paperboard*, above, the Board considered whether an employer could change, unilaterally, an established policy which allowed employees to trade their shifts, or portions of their shifts. Without bargaining with the union, the employer modified the policy by eliminating the privilege of employees to change *portions* of their shifts. The revised policy only allowed employees to exchange whole shifts.

The Board concluded that language in the collective-bargaining agreement gave the employer the right to change this policy unilaterally. One section of the agreement conferred on the employer the “sole responsibility” to operate the plant and direct the work force, including “[t]he righ[t] to . . . schedule, and assign work.” Clearly, whether or not two employees could exchange shifts fell within the scheduling and assignment of work. Thus, the contract had conferred on the employer the power to change the shift exchange policy unilaterally.

Significantly, in *Cincinnati Paperboard*, another provision of the collective-bargaining agreement had defined when the employer was required to negotiate with the union before making certain “major changes” in working conditions. Specifically, the employer had to bargain with the union before changing existing hourly wage base rates, and if the parties could not agree on such change, the issue would be submitted to arbitration.

Clearly, making a change in the shift exchange policy did not entail a change in hourly wage rates. Indeed, the Board concluded that modifying the shift exchange policy did not even fall within the collective-bargaining agreement’s definition of a “major change.” Thus, the contract language left little doubt that the union had ceded its right to bargain over changes in this particular condition of employment.

In *Good Samaritan Hospital*, 335 NLRB 901 (2001), the Board found that the employer could act unilaterally in changing the “staffing matrix,” which determined how many employees would be assigned to work on a particular shift. The union, by agreeing to certain language in a management rights clause, had given the employer the authority to act unilaterally. The management rights clause had provided, in part, as follows:

Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital’s right to determine and direct the policies, modes, and methods of providing patient care, to decide the number of employees to be assigned to any shift or job, or the equipment to be employed in the performance of such work, to employ registry or traveling nurses when necessary to supplement staffing, to float employees from one working area to another working area within the division in which they are qualified to work, or to determine appropriate staffing levels. Thus, the hospital reserves and retains, solely and exclusively, all the rights, privileges and prerogatives which it would have in the absence of this Agreement, except to the extent that such rights, privileges and prerogatives are specifically abridged by express provisions of this Agreement. . . .

335 NLRB 901. The Board found that the management-rights clause “operated as a clear and unmistakable waiver of the Union’s right to bargain over the Respondent’s decision to

implement new staffing matrices for bargaining unit employees in all five hospital units at issue.” 335 NLRB at 902.

In *United Technologies Corp.*, supra, the Board held that the union’s agreement to certain language in a management functions clause waived its right to bargain over the employer’s decision to increase a Saturday overtime shift from 5 to 8 hours. The clause stated, in part, that “[T]he company has and will retain the sole right and responsibility to direct the operations of the company and in this connection to determine . . . shift schedules and hours of work.” The Board stated:

Unlike our dissenting colleague, we find no ambiguity in the language of the management functions clause pertaining to “shift schedules and hours of work.” Because it is without qualifying language, it plainly authorizes the Respondent to determine the hours of scheduled shifts whether they occur on Saturday, when employees are paid at a premium rate, or on a weekday.

300 NLRB 902.

The management-rights clause in the present case has significant similarities to the its counterparts in *Good Samaritan Hospital* and *United Technologies Corp., Hamilton Standard Division*, quoted above. Thus, article 13 of the collective-bargaining agreement states, in part, as follows:

Section 13.1 Except as specifically provided in this Agreement there shall be no limit to the right of management to exercise its regular and customary functions. Such functions shall include but not be limited to the management of the plant and the direction of the working force, including the right to . . . determine . . . *the schedule of work and production*, and the methods, processes and means of production. [Italics added.]

Just as the Board, in *United Technologies Corp., Hamilton Standard Division*, found “no ambiguity in the language of the management functions clause” pertaining to “shift schedules and hours of work,” here I find no ambiguity in the management rights language pertaining to “the schedule of work and production.” Clearly, the action which Respondent took here, changing to a workweek consisting of three 12-hour days and one 6-hour day, falls within the plain meaning of “the schedule of work and production.”

Indeed, the words “schedule of work” fit Respondent’s action so comfortably it would be difficult to find another equally apt description. Moreover, like the management-rights clause in *United Technologies Corp., Hamilton Standard Division*, the present one is without qualifying language which would limit the meaning or scope of the phrase “schedule of work.” As the Board observed in *United Technologies*, “because it is without qualifying language, it plainly authorizes the Respondent to determine the hours of scheduled shifts. . . .” 300 NLRB 902.

Stated another way, although the change to a 4-day workweek which included three 12-hour shifts may have struck the Union as a departure from usual industry practice or as extraordinary, the Union had agreed to language giving Respondent the discretion to schedule work without qualification or limitation.

Moreover, at the time the parties negotiated the 2008–2013 collective-bargaining agreement, the Union was well aware of Arbitrator Goldstein’s award, which held that the management-rights language permitted Respondent to change shift schedules. The arbitrator’s interpretation of this management-rights language did not mention any limitation to Respondent’s authority to make such changes. Additionally, the arbitrator specifically found that other language in the contract did not constitute such a limitation.

The arbitrator’s decision prompted the Union and Respondent to enter into negotiations which resulted in a May 11, 2007 memorandum of agreement. The Union, well aware of the arbitrator’s holding that the management-rights clause allowed Respondent to change shift schedules, presumably could have sought to place a limitation on this discretion. Rather than including any constraint on such authority, the memorandum of agreement implicitly recognized that management had retained the authority to schedule shifts unilaterally. Thus, it stated:

If the Company decides to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks, it will notify the Union at least 10 days prior to implementation to discuss the details with the Union and any impact on the employees. [Italics added.]

Respondent cross-examined Union Business Agent Holder about this language in the memorandum of agreement:

Q. And at the bottom, continuing on in paragraph three, there’s a sentence about what would happen if the Company decides to modify the regularly scheduled work weeks, and in that sentence, it talks about giving the Union 10 days prior notice, correct?

A. Correct.

Q. And it says in here that it’ll be prior to implementation—the 10-day notice, correct?

A. Correct.

Q. And that it will discuss the details with the Union and any impact on employees, correct?

A. Correct.

Q. It does not use the word “negotiate,” correct?

A. Correct.

Q. And you understand what the word “negotiate” means?

A. Yes, I do.

Q. And you understand that negotiation means two sides bargain and attempt to reach an agreement?

A. Correct.

Q. And “discuss” doesn’t have that same meaning, does it, correct?

A. Correct.

Business Agent Holder’s testimony is consistent with the conclusion that, at the time the Union entered into the memorandum of agreement, it recognized that, under the arbitral award, Respondent retained the right to act unilaterally in scheduling shifts. By signing the memorandum of agreement, the Respondent did not give up this authority, but only agreed to discuss the decision it had made. From Holder’s testimony, I

conclude that the Union appreciated the difference between “negotiate” and “discuss.”

Going into the 2008 negotiations, the Union was fully aware that, under the terms of the existing management-rights clause, Respondent had authority to act unilaterally in scheduling shifts. It therefore could have sought to change this language, but instead, it agreed to the very same language. In light of Arbitrator Goldstein’s award interpreting that language, the Union could have little doubt about its import.

That is particularly true because, during the 2008 bargaining, the Respondent initially had proposed language stating that the “Company may implement an alternative work week schedule, such as 4-10s or 3-12s” but then withdrew that proposal. In doing so, the Respondent stated, in writing, “Employer withdraws proposal under position that it has the right to implement alternative work schedules under the current contract language.” The Union well knew, or should have known, the basis for that position because it had been party both to the arbitration and to the subsequent memorandum of agreement.

Thus, it was aware that Arbitrator Goldstein had found that language in the management-rights clause permitted the Respondent to set work schedules unilaterally. The Union also knew that the subsequent memorandum of agreement had not changed this interpretation but essentially accepted it.

The Union therefore knew that the Respondent had a bonafide basis, grounded in the arbitrator’s decision, for its position that existing contract language authorized the Respondent to schedule work unilaterally.

Moreover, the Union had submitted the grievance to arbitration pursuant to section 7.3 of its 2004–2008 collective-bargaining agreement with Respondent. In that section, the parties had agreed that the arbitrator’s decision “shall be final and binding upon the Union, employees and the Company.” Therefore, the Union had reason to understand that the arbitrator’s interpretation of the management-rights language was authoritative.

The Respondent’s August 7, 2008 written statement, submitted to the Union during negotiations, asserting that Respondent “has the right to implement alternative work schedules under the current contract language” put the issue squarely on the table. The Union could have challenged that position or have proposed language to modify the management-rights clause. It did neither.

The Board, in *Johnson-Bateman Co.*, above, held that waiver of a statutory right may be evidenced by bargaining history, but the matter at issue must have been fully discussed and consciously explored during negotiations and the union must have consciously yielded or clearly and unmistakably waived its interest in the matter. In *Johnson-Bateman Co.*, the Board noted that “the bargaining history of the instant contract does not establish that drug/alcohol testing was discussed in contract negotiations.” The Board also stated:

Nor is there anything in the bargaining history of the contract to show that the meaning and potential implications of the Management-Rights clause in general, or drug/alcohol testing in particular, were “fully discussed and consciously explored” during negotiations, or that the Union “consciously yielded or

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clearly and unmistakably waived its interest” in regard to bargaining about the drug/alcohol testing requirement. Indeed, there is nothing in the record to show that drug/alcohol testing was even mentioned, much less discussed, during contract negotiations.

295 NLRB at 186 (footnote omitted).

In the present case, however, during the 2008 negotiations the parties did discuss Respondent’s authority to determine the work schedule unilaterally. The discussion was brief, but was it too brief? In other words, was the discussion complete enough to satisfy the Board’s requirement that the matter was fully discussed and consciously explored?

Stated another way, how much discussion is necessary to constitute a “full” discussion within the meaning of *Johnson-Bateman Co.*? The answer must be, in general terms, sufficient discussion to assure that the waiver is clear and unmistakable rather than inadvertent. (Indeed, the phrase “inadvertent waiver” would appear to be a contradiction in terms.) A waiver can’t lurk in the mud. It must be evident to the union.

To determine whether the Union knew, or should have known, that its agreement to certain language would constitute a waiver, it is necessary to consider the past dealings of the parties because the Union’s understanding of the proposed contract language will be affected and informed by those previous events. More specifically, during the 2008 bargaining, Respondent proposed that the Union agree to the same management rights language to which the Union had agreed during the 2004 contract negotiations. Moreover, Respondent informed the Union that the existing collective-bargaining agreement already gave it the unilateral right “to implement alternative work schedules under the current contract language.”

It is true that Respondent made this claim in a brief written statement provided to the Union. Although the statement itself did not elaborate, the Union already possessed a full exposition in the opinion and award of Arbitrator Goldstein. The arbitrator’s decision put the Union on clear notice that agreeing to the same management rights language as in the 2005–2008 would give the Respondent discretion in scheduling the workweek. For example, the arbitral award stated:

The Employer . . . argues that the manifest absence of an express definition of a “regular work week” [in the collective-bargaining agreement] should be interpreted to mean that management’s right to “schedule work” pursuant to Article 13 is contractually unfettered, and stands as written.

The arbitrator then ruled in favor of Respondent in an opinion which did not recognize or identify any such fetters. The arbitrator’s decision rejected the Union’s position in its entirety and thus constituted a significant loss to the Union, a loss the Union would not quickly forget.

The Union’s actions after the arbitral award also suggest that it fully understood its import. It entered into a memorandum of agreement which implemented the arbitrator’s decision, and this agreement acceded to the arbitrator’s holding that Respondent could act unilaterally in scheduling the workweek. Specifically, the memorandum of agreement included the fol-

lowing language: “*If the Company decides to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks, it will notify the Union at least 10 days prior to implementation to discuss the details with the Union and any impact to the employees.*” (Italics added.)

Certainly, by entering into this memorandum of agreement, the Union did not forever relinquish its right to bargain about the Respondent’s authority to make schedule changes unilaterally. Rather, the memorandum of agreement is significant because it implemented Arbitrator Goldstein’s award and therefore constitutes evidence of the Union’s understanding of the arbitrator’s holding. The provision quoted above (“If the Company decides. . .”) is consistent with the arbitrator’s decision that the collective-bargaining agreement permitted Respondent to act unilaterally in deciding whether to modify the workweek.

Indeed, the record clearly reflects that the Union understood the gravamen of Arbitrator Goldstein’s award and the reasoning discussed in that award. Therefore, I find that when Respondent, during the 2008 negotiations, notified the Union that the contract language already gave it the authority to change to a 4-day workweek, the Union fully understood the basis for this assertion.

The Union’s brief does not specifically argue that its negotiators failed to appreciate the significance of Respondent’s statement that the contractual language already gave it authority to make the work schedule change. However, it seems to hint at such an argument.

As already noted, at one point during the 2008 negotiations, Respondent tendered a proposal seeking authority to change to a 4-day workweek but then promptly withdrew the proposal with the statement, quoted above, that the contract already gave it authority to do so. The Union’s brief refers to this withdrawn proposal as evidence that Respondent was incorrect when it claimed that existing contract language already permitted it to make this change. Thus, the brief states:

If Kerry had the right to implement, why would it request the Union to allow it to implement the schedule. Local 70 points out that Kerry when it withdrew proposal 13 claimed it had the right to implement based on the language of the contract. It made no reference to the 2007 Memorandum of Agreement, GC Ex. 3, the earlier arbitration Opinion and Award of January 5, 2007, GC Ex. 4, and past practice.

The last sentence of the Union’s argument—stating that Respondent did not refer to the arbitrator’s award or to the memorandum of agreement—apparently presumes that the Respondent’s statement is unclear and would not become clear unless Respondent also mentioned these two documents. However, I must reject any assertion that the Union would not understand the Respondent’s position unless the Respondent explicitly mentioned the arbitral award and memorandum of understanding. The award constituted a significant defeat for the Union and a defeat of this magnitude is not likely to be forgotten or ignored.

Moreover, the Union negotiated the memorandum of understanding to implement the arbitral award. It strains belief to assume that the union negotiators simply forgot about this document. Indeed, no union representative testified that he or she

had forgotten either about the memorandum of understanding or the arbitral award. Accordingly, I conclude that it was not necessary for Respondent to refer explicitly to either when it informed the Union that existing contract language gave it the right to implement a 4-day workweek.

Determining whether the Union *consciously* yielded depends on whether the Union's negotiators were aware, or reasonably should have been aware, of the likely effect of the management rights language to which they ultimately agreed. Clearly, the union negotiators were aware of Arbitrator Goldstein's award, in which he interpreted the same management-rights language and concluded that Respondent was free "to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks."

Considering the Union's extensive participation—filing the grievance, participating in the arbitration hearing, entering into an agreement to implement the arbitral award—any claim that the Union did not comprehend the arbitrator's ruling would strain belief. Therefore, I conclude that the union negotiators well understood the arbitrator's interpretation of the management-rights clause. They knew that this language had permitted Respondent to modify the regularly-scheduled workweek. They also were aware, from the award itself, that the arbitrator had placed no limits or qualifications on Respondent's exercise of this authority. The Union clearly understood that the management rights language in the 2004–2008 agreement allowed Respondent to modify its regularly scheduled workweeks.

The Union's brief also argues that the management-rights clause "uses typical broad language without specific mention of the right to change the normal work week or hours in a work day. . . ." That is not correct. The management-rights language specifically gave Respondent the right "to determine . . . the schedule of work and production. . . ." Moreover, Arbitrator Goldstein had definitively interpreted this language to permit Respondent "to modify its regularly-scheduled work weeks and/or additional regularly-scheduled work weeks."

Although I believe the management-rights language itself is sufficiently clear to permit Respondent to change its work and production schedule to a 4-day workweek, even if it were not that clear, standing alone, it gains additional specificity when interpreted by the arbitrator in a decision binding upon both the Union and Respondent.

In sum, I find that during the 2008 bargaining, the union negotiators knew that the existing management-rights language allowed Respondent to modify the regularly scheduled workweek. They also knew that Respondent claimed that this language permitted it to change to a 4-day workweek, a not-implausible assertion considering that Arbitrator Goldstein's award expressed no limitation on management's authority to change the work schedule.

Even though the union negotiators were conscious that the management-rights clause had permitted Respondent to modify the work schedule, and even though they were conscious of Respondent's facially reasonable claim that the existing contract allowed it to institute a 4-day workweek, the Union did not pursue the matter but instead agreed to the very same management rights language. I conclude that the Union thereby consciously yielded its interest in the matter.

To summarize, the Union had before it (1) the management-rights clause in the 2004–2008 contract, with its language that Respondent could determine the schedule of work and production, (2) the arbitrator's award stating that this language meant Respondent had discretion to establish a workweek not beginning on a Monday, (3) its memorandum of agreement with Respondent which recognized Respondent's right to modify the workweeks ("If the Company decides to modify its regularly-scheduled work weeks. . .") and (4) Respondent's assertion, during bargaining, that the existing management-rights language allowed it to act unilaterally in establishing a 4-day workweek.

If the Union disputed the Respondent's interpretation of the management-rights language it could have voiced the dispute during bargaining, negotiated new language in lieu of the existing management-rights language, or refused to sign an agreement which included the existing management-rights language. Rather than doing any of these things, the Union accepted the existing management-rights language without discussing it or contesting the Respondent's interpretation of it. Therefore, I conclude that the Union clearly and unmistakably waived the right to bargain concerning a schedule change resulting in a 4-day workweek.

The analysis above has assumed that the words in the management rights clause, giving Respondent authority "to determine . . . the schedule of work and production. . . ." carry the meaning which I would consider plain and ordinary. In other words, I have assumed that determining "the schedule of work and production" means making up a schedule that specifies when employees are to report for work and when they are to stop work.

We already know that these words, allowing Respondent to schedule work and production, give Respondent authority to specify on which day the workweek begins. Arbitrator Goldstein specifically held that Respondent could set the workweek to begin on a day other than Monday.

A question not before Arbitrator Goldstein concerns whether the authority to determine the schedule of work also includes the power to define the number of days in a workweek and the number of hours in a shift. For the reasons discussed above, I believe that the words "to determine the schedule of work and production" plainly include setting the days of the week on which work will be done and the number of hours per day. Indeed, scheduling work implicitly requires specifying the days and hours.

However, the General Counsel argues to the contrary. Thus, the Government's brief states, in part:

The language in Sec. 13.1 entitles Respondent to schedule work and production, and gives Respondent the right to determine what work will be performed and when it will be performed. It says nothing about the number of days employees will work in a week or the hours the employees will work per shift or per week, or the amount of overtime they will work each week. It says absolutely nothing about giving Respondent leave to change employees' work shifts from six 8-hour shifts to three 12-hour and one 6-hour shift, dramatically decreasing the number of days employees work in a week and

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increasing the hours employees work in a day. Accordingly, Respondent cannot rely on the management rights clause to allow the August 22 changes. *Owens-Brockway Plastic Products*, 311 NLRB 519, 525 (1993).

In *Owens-Brockway Plastic Products*, the Board considered whether the following language in a management-rights clause authorized the employer to make a permanent transfer of production and equipment from one plant to another:

[I]t is recognized and agreed that the management of the plant and the direction of the working forces is vested in the Employer. Among the rights and responsibilities which shall continue to be vested in the Employer *shall be the right to increase or decrease operation*, the types of products made, methods, processes, and means of production . . . *remove or install machinery and increase or change production equipment, introduce new and improved productive methods and facilities, relieve employees from duty because of lack of work*, and to discipline or discharge employees for just cause [Emphasis added.]

The Board noted that the management-rights language did not specifically address the permanent transfer of production and equipment from one plant to another. Therefore, the employer did not and “cannot argue that the management-rights clause explicitly grants it unilateral authority to transfer unit work.” Instead, the employer contended that the unstated right to transfer production flowed from the stated right to increase or decrease operations, remove or install machinery, and relieve employees because of lack of work. The Board rejected this asserted management right by inference:

The critical question is not, however, whether such a right might reasonably be inferred from the management-rights clause; it is whether that interpretation is supported by “clear and unmistakable language.” *Universal Security Instruments*, 250 NLRB 661, 662 (1980). The language in the management-rights clause—granting the Respondent unilateral authority with respect to increasing or decreasing operations but without any reference to work relocation—does not meet the clear and unmistakable standard governing the waiver of statutory rights. *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989).¹⁷

¹⁷ We note that the Respondent has not suggested that the parties’ bargaining history demonstrates that the Union “consciously yielded or clearly and unmistakably waived its interest” with regard to bargaining about work relocation. *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).

311 NLRB at 525.

Unlike *Owens-Brockway Plastic Products*, the present facts do not involve an assertion that an unstated management right should be inferred from language which does not specifically refer to it. To the contrary, in this case, the collective-bargaining agreement explicitly gives Respondent the right “to determine . . . the schedule of work and production. . . .” A schedule ordinarily specifies both the time and the day. There-

fore, the plain meaning of “determining the schedule of work” includes setting both the day to be worked and the hours during that day.

Additionally, in *Owens-Brockway Plastic Products*, the Board specifically noted that “the Respondent has not suggested that the parties’ bargaining history demonstrates that the Union ‘consciously yielded or clearly and unmistakably waived its interest’ with regard to bargaining about work relocation.” 311 NLRB at 525 fn. 17. However, in the present case, for the reasons discussed above, I have found that the Union did consciously yield and clearly waived its interest with regard to determining work schedules. For these reasons, I conclude that *Owens-Brockway Plastic Products* is inapposite.

In sum, applying the Board precedents in *Cincinnati Paperboard*, above, *Good Samaritan Hospital*, above, and *United Technologies Corp., Hamilton Standard Division*, above, I conclude that the Union clearly and unmistakably waived its right to bargain regarding the change to a 4-day work schedule.

Apart from a finding of waiver, there is another reason to conclude that Respondent did not violate the Act when it changed the production schedule to a 4-day workweek. Doing so involved solely a matter of contract interpretation and Respondent had a sound arguable basis for interpreting the management rights language to allow it to change the work schedule unilaterally.

The Board stated in *Vickers, Inc.*, 153 NLRB 561, 570 (1965), when “an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,” the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” See also *NCR Corp.*, 271 NLRB 1212, 1213 (1984).

Here, I conclude that Respondent had a sound arguable basis for interpreting the management-rights clause language to allow it to change the workweek schedule unilaterally. Arbitrator Goldstein’s award clearly held that the management-rights language permitted Respondent to determine the work schedule.

Moreover, the testimony of Business Agent Holder suggests that the Union recognized that the issue involved a matter of contract interpretation. Holder described his conversation with Respondent’s human resources director, Tasha Milburn, which took place on or about May 25, 2010. When Holder insisted that the Union’s membership would have to vote on the proposed change in the workweek, Milburn disagreed. Holder testified:

Q. And what did Tasha say in response to that?

A. She said they didn’t have the right to vote, that we lost the arbitration, and she referred back to the arbitration award that we had lost.

Q. Did you have response to that?

A. And I told her that we were not contesting the right to schedule, but what we were telling them, that they didn’t have the right to change and go to the schedule they had, *that it would be in violation of the contract and several provisions of the contract.* . . . [Italics added.]

As I understand this testimony, the Union took the position that the management-rights clause did, in fact, give Respondent the right to determine the work schedule but that other provisions of the collective-bargaining agreement limited the scope of Respondent's discretion in changing the schedule. Rejecting a similar argument, Arbitrator Goldstein found no such limitations in the contract.

However, the issue before Arbitrator Goldstein concerned whether the management-rights clause allowed Respondent unilaterally to select the day on which the workweek began. Although the arbitrator found no limitation in other terms of the agreement, he was not looking for language that might prevent the Respondent from implementing a 4-day workweek. Moreover, the parties did not argue this specific issue because the grievance did not present it.

In any event, Business Agent Holder's testimony, quoted above, indicates that the Union regarded its dispute with Respondent as a disagreement over the meaning and effect of the language in the collective-bargaining agreement, that is, with how the agreement should be interpreted. Such a dispute raises the sort of issues normally resolved by an arbitrator.

Arbitrator Goldstein's opinion, finding that no other contract language limited the scheduling authority accorded to Respondent by the management rights clause, might not be dispositive, because adopting a 4-day workweek involved a different kind of scheduling change. However, the fact that Arbitrator Goldstein had rejected the Union's arguments, and had discerned no limitation on the Respondent's right to schedule work, surely provided Respondent a sound arguable basis for its position.

Further, I find that Respondent was not motivated by union animus or acting in bad faith. Therefore, I conclude that Respondent did not violate Section 8(a)(5) of the Act by making this change. See *NCR Corp.*, above, *Bath Iron Works Corp.*, 345 NLRB 499 (2005), see also *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529 (2000)

Because the change itself was lawful, Respondent did not violate the Act by announcing it. Therefore, I recommend that the Board dismiss the allegations raised in complaint paragraph 10(a) and complaint paragraph 10(b).

Complaint Paragraph 10(b)(ii)

Complaint paragraph 10(b)(ii) alleges that on about August 22, 2010, Respondent unilaterally changed the accrual and use of vacation time by its bargaining unit employees. For the reasons stated above, I have found that Respondent did make such a unilateral change. Before the change, Respondent allowed employees to take vacation time in 4-hour increments. After the change, employees had to take vacation time in 6-hour increments.

However, for the reasons stated above, I have concluded that the change in vacation policy was an obvious effect of Respondent's implementation of a 4-day workweek. The Union expressly declined to bargain about the effects of this change.

Moreover, the collective-bargaining agreement itself did not refer to vacation increments and thus did not create a condition of employment which would remain in effect throughout the contract's term. In other words, the issue here concerns only

the Respondent's right to change the increment unilaterally. There is no allegation that such a change breached the contract.

In these circumstances, I conclude that the Union's refusal to engage in effects bargaining constituted a waiver of its right to bargain about the change to a 6-hour vacation increment. Therefore, I conclude that the Union waived its right to bargain about this change.

Complaint Paragraph 10(b)(iii)

Complaint paragraph 10(b)(iii) alleges that on about August 22, 2010, Respondent changed the number and length of breaks of bargaining unit employees. Respondent's answer admits that it made this change.

Complaint paragraph 12 alleges that Respondent did so without affording the Charging Union a meaningful opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct on the unit. Respondent's answer denies that it had an obligation to bargain and therefore denies this allegation.

For the reasons discussed above, I have concluded that changes in the break schedule were effects of the change to the 4-day workweek. Respondent offered the Union an opportunity to bargain about the effects of the work schedule change and the Union declined.

However, in the particular circumstances of this case, I do not conclude that the Union's refusal to engage in effects bargaining constituted a waiver. The change to a 4-day workweek appears to have prompted the change in breaks, but the evidence does not establish that implementation of a 4-day workweek compelled a change in breaks to the same extent that it necessitated a change in the vacation increment.

Moreover, it is not clear that Respondent's general offer to engage in "effects" bargaining would place the Union on notice that a subject of the bargaining would concern the scheduling and duration of breaks. In this regard, the credited evidence does not establish that Respondent specifically asked the Union to bargain concerning modification of the break schedule, but only that it requested to bargain about the effects of the change to a 4-day workweek.

Because the Union did not have clear notice that Respondent's offer to engage in effects bargaining amounted to a request to revisit the settled language in the collective-bargaining agreement, it would not be fair to deem the Union's refusal to engage in effects bargaining a conscious yielding on the subject of breaks. Therefore, I do not conclude that the Union's refusal to engage in effects bargaining constituted a clear and unmistakable waiver of the right to bargain about this subject. Accordingly, I conclude that by changing the break schedule, Respondent violated Section 8(a)(5) and (1) of the Act.

Moreover, as noted above, language in the collective-bargaining agreement established specific breaks and relieved the Union of any requirement to bargain further on the subject until the agreement expired in 2013. Section 10.6 of the agreement explicitly provided for both the duration and scheduling of breaks. In section 14.2, the parties agreed that neither could require the other to enter into negotiations during the term of the agreement. The Union's refusal to engage in effects bargaining certainly did not waive section 14.2 of the collec-

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tive-bargaining agreement and did not grant the Respondent permission to disregard the finality of the contract on the subject of breaks.

Considering that the collective-bargaining agreement included specific language regarding breaks, and that Respondent had no right to require the Union to renegotiate these provisions during the contract's term, the union representatives had reason to believe that this issue was settled and would not arise until the agreement expired in 2 more years. In other words, the existence of specific contract language makes present facts quite different from the simpler situation involving a unilateral change in a past practice.

In the simpler situation, uncomplicated by the existence of a collective-bargaining agreement, an employer seeking to change a term of employment would propose the change to the union representing its employees. If the Union agreed to the proposed change, or if it waived the right to bargain, or if the parties bargained to impasse, the employer lawfully could implement the change. In other words, once the employer sought to bargain about the proposed change, the "ball was in the union's court," and the union's refusal to bargain would permit the employer to act unilaterally.

However, in the present case, the existence of the collective-bargaining agreement changes the situation. In it, the Respondent and Union had agreed that neither party would have the right to require the other to "enter into negotiations or to entertain demands on any subject" during the term of the agreement. The contract did not expire until 2013. Even if the Respondent "put the ball in the Union's court," the Union had no present duty to return the serve.

Section 8(d) of the Act establishes some of the basic "rules of the game" by defining the bargaining obligation. It includes the following proviso:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice

is given or until the expiration date of such contract, whichever occurs later. . . .

29 U.S.C. § 158(d) (italics added).

At hearing, the General Counsel amended the complaint to allege that Respondent also violated Section 8(d) of the Act by changing the breaks. For reasons discussed below, I conclude that Respondent's changes in the break schedule constituted a breach of the collective-bargaining agreement in violation of Section 8(d) as well as an unlawful unilateral change.

Complaint Paragraph 10(b)(iv)

Complaint paragraph 10(b)(iv) alleges that on about August 22, 2010, Respondent changed the application and payment of shift premiums of its bargaining unit employees. Respondent's answer admits this allegation "with regard to some, but not all Unit employees."

The testimony of forklift driver Bernard Kowalski is consistent with Respondent's admission. Before Respondent changed to the 4-day week, Kowalski worked the third shift, from 11 p.m. to 7 a.m., and received 15 cents per hour premium pay for that work. After Respondent's change to a 4-day workweek, Kowalski began working 7 a.m. to 7 p.m. 3 days a week and 1 to 7 a.m. on the remaining day. Kowalski testified, in part, as follows:

Q. What is your hourly rate?

A. I believe it's \$14.82.

Q. Does that include any shift premium, do you know?

A. Not that I'm aware of.

Later in his testimony, Kowalski again was asked about whether he received a shift premium, or differential:

Q. . . . And it's your understanding you don't get any shift differential at this time?

A. Not in my paycheck I don't see anything different.

To the extent that Kowalski's testimony conflicts with that of Respondent's human resources director, Tasha Milburn, I credit Kowalski. The admission in Respondent's answer—that it changed the application and payment of shift premiums "with regard to some, but not all Unit employees"—gives credence to Kowalski. Accordingly, I conclude that the General Counsel has proven the allegations raised by complaint paragraph 10(b)(iv).

Complaint paragraph 12 alleges that Respondent did not afford the Union a meaningful opportunity to bargain about the change in shift premiums. Respondent's answer to complaint paragraph 12 does not specifically address whether or not it afforded the Union a meaningful opportunity to bargain over the change in shift premiums. Rather, this portion of Respondent's answer states as follows:

The Respondent denies that it had an obligation to bargain with the Union over the decision regarding the hours of work to schedule employees. The Respondent denies that it did not offer to bargain with the Union over the effects. Thus, the Respondent denies the remaining allegations set forth in Paragraph 12.

This portion of Respondent's answer does not respond to the allegation that it failed to offer the Union a meaningful opportunity to bargain with respect to the change in shift premiums. However, in answering complaint paragraph 11, Respondent did refer to shift premiums.

Complaint paragraph 11 alleged that various subjects described in complaint paragraph 10 were mandatory subjects of bargaining. One of these subjects concerned shift premiums. Respondent's answer to complaint paragraph 11 stated, in part, as follows:

The Respondent admits that vacation accrual and use, breaks, shift premiums and over-time are terms and conditions of employment and a mandatory subject of bargaining. The Respondent affirmatively states that it attempted to bargain over vacation accrual and use, breaks, shift premiums and overtime and the Charging Union refused to do so.

Even though Respondent was answering complaint paragraph 11 with the language quoted above, I conclude that it effectively denies the allegation, in complaint paragraph 12, that Respondent failed to give the Union a meaningful opportunity to bargain about the shift premiums. Respondent appears to be saying that it offered the Union such an opportunity but the Union declined it.

Based on the credited evidence, I cannot find that Respondent ever "attempted to bargain" about the subject of shift premiums at any time after 2008, when it agreed to the shift premium language in the current contract. Similarly, based on the credited evidence, I cannot find that the Union refused to bargain about shift premiums.

Just as a nonspecific offer to bargain about the effects of the 4-day workweek does not place the Union on notice that Respondent was seeking to reopen and renegotiate the contractual provisions concerning breaks, it also does not inform the Union that Respondent was seeking to reopen and renegotiate the contractual provisions concerning shift premiums. To the contrary, I find that the Respondent did not attempt to bargain about the subject of shift premiums and that the Union did not refuse to bargain.

In making these findings, I am interpreting the phrase "attempted to bargain" to mean that Respondent specifically notified the Union that it wanted to change the shift premiums and sought to negotiate about the change. In my view, it would be disingenuous for Respondent to claim it "attempted to bargain" about shift premiums, and even more disingenuous to claim that the Union refused to bargain about shift premiums, if the Respondent failed to make clear to the Union that shift premiums were the subject to be discussed.

It is possible that Respondent is conflating its offer to bargain over the effects of its change to a 4-day workweek with an offer to bargain about changes in the shift premiums. However, if Respondent merely offered to bargain about the effects of the workweek change, without identifying one of those effects as a change in shift premiums, then, in my view, it never actually offered to bargain about shift premiums.

Moreover, when the Respondent and the Union negotiated the 2008–2013 collective-bargaining agreement, they treated the scheduling of the workweek and the payment of shift pre-

miums in quite different ways. Although this contract vested discretion in the Respondent to determine the schedule of work, it set in stone the provisions related to the payment of shift premiums.

Further, I conclude that ceasing to pay the shift premium constitutes a material, substantial and significant change in terms and conditions of employment. Moreover, I find that Respondent made this change without notifying the Union in advance and affording it a meaningful opportunity to bargain.

In these circumstances, the Respondent's action breached its duty to bargain in good faith with the Union and thereby violated Section 8(a)(5) of the Act, unless the Union waived its right to engage in such bargaining. The present record affords no basis for finding such a waiver.

The management-rights clause of the collective-bargaining agreement did not refer to the payment of shift premiums, and thus could not form the basis for any finding of waiver. However, section 6.9 of the contract, quoted above, provides for the payment of shift premiums of specified amounts to employees working on the second and third shifts.

Moreover, section 14.2 of the collective-bargaining agreement states, in part, "It is further agreed that neither party, during the term of this Agreement, shall have the right to require the other to enter into negotiations or to entertain demands on any subject, whether or not expressly referred to in this Agreement, except alleged violations of an express provision of this Agreement or the rate for any new job classification which the Company may hereinafter create."

In other words, when the parties negotiated the contract in 2008, they reached a specific agreement on the exact amounts to be paid for work on the second and third shifts, and also agreed, in section 14.2, that neither party had the right to reopen the matter until the contract expired, which would not occur until 2013. If Respondent had approached the Union and asked to reopen the bargaining to provide different shift premium rates, the Union could simply have said no and that would have ended the matter. It would be unfair and illogical to allow the Respondent to avoid these express terms of the contract by calling the shift premium change merely an "effect" of the change to a 4-day week.

In these circumstances, I conclude that the Union did not waive its right to bargain. Respondent's answer admits, and I find, that shift premiums are a mandatory subject of bargaining. Moreover, I conclude that any change in shift premiums is material, substantial and significant because it would affect employees' pay.

Respondent has no sound arguable basis for making such a change. Indeed, the contractual language is so precise that it is difficult to imagine a none frivolous argument to justify such a change. Therefore, I conclude that Respondent's unilateral change in the payment of shift premiums violated Section 8(a)(5) and (1) of the Act. For the reasons discussed further below, I also conclude that Respondent breached the collective-bargaining agreement in violation of Section 8(d) of the Act.

Complaint Paragraph 10(b)(v)

Complaint paragraph 10(b)(v) alleges that on about August 22, 2010, Respondent changed the payment of overtime. How-

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ever, as discussed above, credited evidence does not establish any changes in the payment of overtime. Therefore, I recommend that this allegation be dismissed.

The 8(d) Allegations

At hearing, the General Counsel amended the complaint to allege that the conduct described in complaint subparagraphs 10(b)(iii), (iv), and (v) also violated Section 8(d) of the Act. Here, I will examine the facts described in each of these subparagraphs to determine whether there is an 8(d) violation.

In *Bath Iron Works Corp.*, above, the Board explained the difference between a unilateral change violation of Section 8(a)(5) and a breach of the contract under Section 8(d) of the Act. The Board held that the two theories of violation were fundamentally different in terms of principle, possible defenses, and remedy:

In terms of principle, the “unilateral change” case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a *failure to bargain*. In the “contract modification” case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

345 NLRB at 501 (italics in original). The Board further explained that in the analysis of an 8(d) violation, the “only issue presented is whether the Respondent modified the contract within the meaning of Section 8(d). Phrased differently, the issue here [in analyzing an 8(d) allegation] is whether the contract forbade the conduct. In the unilateral change cases, the issue is whether the contract privileges the conduct.” *Bath Iron Works Corp.*, 345 NLRB at 502.

As discussed above, complaint subparagraph 10(b)(iii) alleges that on about August 22, 2010, Respondent changed the number and length of breaks of bargaining unit employees, and Respondent’s answer admits that it made this change. However, section 10.6 of the collective-bargaining agreement, quoted above, specified when breaks were to be taken and how long they must be.

The issue here is “whether the contract forbade the conduct.” *Id.* I conclude that it did. The contract’s management-rights clause, section 13.1, does not specifically refer to breaks. It does, as discussed above, give Respondent the authority to determine the schedule of work and production, but I conclude that the specific language of section 10.6 trumps this more general language.

Indeed, the management rights clause itself begins “Except as specifically provided in this Agreement. . . .” Therefore, its general language regarding management’s right to determine

the schedule of work cannot override the specific provisions relating to breaks.

It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing and current collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). Respondent did not have the Union’s consent to change breaktimes, and the Union’s refusal to engage in effects bargaining, discussed above, did not constitute such consent.

In sum, I conclude that by changing the breaks during the term of the 2008–2013 collective-bargaining agreement, Respondent violated Section 8(d), (a)(5), and (1) of the Act.

At hearing, the Government also amended the complaint to allege that Respondent violated Section 8(d) of the Act by changing the application and payment of shift premiums. Respondent admitted it had done so with respect to some, but not all, bargaining unit employees. For the reasons discussed above, I have concluded that Respondent thereby made a material, significant and substantial unilateral change in a mandatory subject of bargaining, which violated Section 8(a)(5) and (1) of the Act. Here, I consider whether this conduct also violated Section 8(d).

As quoted above, section 6.9 of the collective-bargaining agreement provides that employees on the second shift would receive a shift premium of \$.10 per hour and employees on the third shift would receive a shift premium of \$.15 per hour. The management-rights clause makes no reference to shift premiums.

The contract language sets forth Respondent’s specific obligation respecting the payment of shift premiums. Respondent has admitted and the record establishes that it changed shift premiums with respect to at least some employees. I conclude that the contract forbade Respondent from doing so. Therefore, I further conclude that Respondent thereby violated Section 8(d), (a)(5), and (1) of the Act.

At hearing, the General Counsel also amended the complaint to allege that Respondent violated Section 8(d) of the Act by the conduct described in complaint subparagraph 10(b)(v). That subparagraph alleged that Respondent, on about August 22, 2010, changed the payment of overtime.

For the reasons discussed above, I have found that Respondent did not make a unilateral change in the payment of overtime. No credited evidence established that Respondent previously had paid overtime for hours worked exceeding 8 in one day. Therefore, I concluded that Respondent did not engage in the conduct alleged in complaint subparagraph 10(b)(v) and did not thereby violate Section 8(a)(5) and (1) or Section 8(d) of the Act.

Direct Dealing Allegations

Complaint Paragraph 13

Complaint paragraph 13 alleges that on or about May 27, 2010, Respondent, by its agents Brenda Brandt and Michelle Kundert, at its Kentwood facility, bypassed the Union and dealt directly with unit employees regarding the change in the hours

of work by soliciting employee suggestions and input. Respondent's answer states, in pertinent part, as follows:

The Respondent admits that on or about May 28, 2010, Brenda Brandt and Michelle Kundert met with bargaining unit employees and solicited input on schedules employees desired. The Respondent admits that Brandt and Kundert acted as Respondent's agents for that limited purpose. The Respondent affirmatively states that it invited the Union to participate in the meetings. A Union representative attended some meetings. The Respondent denies the remaining allegations set forth in Paragraph 13.

Notwithstanding Respondent's admission that two representatives met with employees "on or about May 28, 2010," some testimony indicates that these meetings actually took place very early in June 2010. However, there is no dispute that Respondent's representatives conducted a number of meetings with groups of bargaining unit employees. At these meetings, management representatives explained the contemplated 4-day workweek schedule, answered employees' questions about it and wrote down employees' comments and suggestions.

The Union's chief shop steward, Edras Rodriguez-Torres, attended the first of these meetings. Respondent did not object to the presence of union representatives at any of the meetings.

Based on my observations of the witnesses, I credit the testimony of Respondent's divisional human resources manager, Brenda Brandt. She testified that Respondent specifically encouraged union representatives to attend these meetings. This testimony is consistent with that of Human Resources Director Tasha Milburn. I conclude that the Respondent invited union representatives to attend these meetings with employees and did not try to exclude them.

According to Chief Shop Steward Rodriguez-Torres, at the meeting he attended, Human Resources Manager Brandt spoke and a human resources representative, Michelle Kundert, took notes. Rodriguez-Torres further testified as follows:

Q. BY MR. CANFIELD: Did she talk about what the change would be?

A. Yes.

Q. What did she say?

A. She put up the information on the board, which she had already given the Union.

Q. That what? That she had already given the Union?

A. Yeah.

Q. And what do you remember the information saying?

A. It was the schedule change. It was the shifts, how long they would be, the days the people would work.

Q. Did she pass anything out at the meeting to employees? Do you remember?

A. I don't remember.

Q. Do you remember, in response to her saying—asking what it would take—do you remember employees saying things or asking things?

A. Yes.

Q. What do you remember about that?

A. There was a couple ideas that people brought out. One of them was people could work alternating weekends.

Q. Who said that? Do you remember?

A. I don't remember.

Q. And did Brenda respond to that?

A. Yes.

Q. What did she say?

A. She said that Michelle was taking down ideas and that they would get back to the person somehow.

Q. Okay. What else do you remember being asked?

A. What days off people would have. If they could sign up for work on their days off.

Q. And what, if anything, did Brenda say to that?

A. She said that the way it looked is it would be plenty of overtime available for those who wanted it.

Q. What else do you remember being asked?

A. Duane Barfield asked how could they do this without getting—without having the Union vote on it.

Q. And did Brenda respond to that?

A. Yes, she did.

Q. What do you remember her saying?

A. She said that it was the Company's position at the time that they had the right to change the schedule, and that's what they wanted to do, but that it was going to happen regardless of what the Union did, that it was within their right.

Before starting to analyze whether the Respondent's conduct here constituted unlawful direct dealing, it may be helpful to review the essential theory of a direct dealing violation. Obviously, should an employer ignore a union which was the employees' exclusive representative and enter into negotiations with the employees themselves, this action would constitute more than an impolite slight. It would challenge the union's basic and exclusive authority to speak on behalf of the bargaining unit employees and would undermine the union's ability to serve as their representative. Therefore, it would breach the duty to bargain in good faith and would constitute a violation of Section 8(a)(5) of the Act.

That is the obvious and extreme case, but the Board's theory of "direct dealing" violations is considerably more subtle. Conduct which falls far short of bypassing the exclusive representative can breach the duty to bargain in good faith because of the potential harm it could cause to the union's effectiveness. *Allied-Signal, Inc.*, 307 NLRB 752 (1992) ("Direct dealing need not take the form of actual bargaining. As the Board made clear in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987), the question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode "the Union's position as exclusive representative.")

The Board has held that an employer violates the Act merely by seeking information from bargaining unit employees about whether they like or dislike a proposed term or condition of employment. In *Obie Pacific, Inc.*, 196 NLRB 458 (1972), the employer sought in bargaining to eliminate a contract provision which management considered costly and unnecessary. At an employee meeting, a district manager polled employees concerning how they felt about this particular contract clause. The manager did not consult with the union before the meeting, and

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conceded at the hearing that he conducted the poll to obtain information which could be presented to the union.

The way in which the employer's action departed from good faith bargaining merits examination because it illustrates that unlawful "direct dealing" is not limited to the situation in which an employer simply ignores the union and negotiates terms and conditions of employment with one or more of the bargaining unit employees. In *Obie Pacific, Inc.*, the employer's interaction with employees simply gave management an improper advantage when it met the union at the bargaining table. Thus, the management negotiators could tell the union, "we talked to the employees and they really don't want this particular contract provision. Why aren't you willing to remove it from the agreement?"

Likewise, the intelligence which management obtained directly from the bargaining unit employees could be used to devise a more effective bargaining strategy. Knowing that the rank and file employees were not enamored of a particular contract provision, management could decide that it need not offer a large concession to obtain the union's agreement to remove it.

In *Obie Pacific, Inc.*, the Board left no doubt that it condemned such a practice:

While, under appropriate circumstances, an employer may communicate to employees the reasons for his actions and even for his bargaining objective, he may not seek to determine for himself the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent. If we were to sanction such efforts, we would impede effective bargaining.

196 NLRB at 459.

The Board's decision in *Obie Pacific, Inc.* also seemed to equate, or at least did not distinguish, an employer spying on the union activities of employees and an employer asking employees how they felt about a subject of bargaining. The Board similarly appeared to suggest that the employer's very act communicating with its employees about a subject of bargaining could constitute evidence of improper motive or absence of good faith. Thus, the Board stated:

Part of the task facing a negotiator for either a union or a company is effectively to coalesce an admixture of views of various segments of his constituency, and to determine, in the light of that knowledge, which issues can be compromised and to what degree. *A systematic effort* by the other party to interfere with this process by either surreptitious espionage or open interrogation constitutes clear undercutting of this vital and necessarily confidential function of the negotiator. *It is indeed designed to undermine the exclusive agency relationship between the agent and its collective principals.* [Italics added.]

196 NLRB at 459.

In the workplace, however, supervisors and employees frequently discuss matters which are also mandatory subjects of bargaining. In its *Obie Pacific, Inc.* decision, the Board did include the qualifying phrase "a systematic effort," which leads me to conclude that the Board did not intend to outlaw every instance when a foreman asks a worker how he feels about a

particular matter—the scheduling of a shift or a break, for example—which happens to be addressed in the collective-bargaining agreement or which is up for discussion during bargaining. To make it unlawful under all circumstances for a supervisor to ask an employee if he likes the work schedule would seem rather extreme.

Clearly, though, the Board has considered it off limits for an employer, acting with a bargaining purpose, to solicit employees' opinions about matters subject to negotiation. In decisions after *Obie Pacific, Inc.*, the Board reiterated that an employer "may not seek to determine for himself the degree of support, or lack thereof, which exists for a position that it seeks to advance in negotiations with the employees' exclusive bargaining representative." *Harris-Teeter Super Markets, Inc.*, 310 NLRB 216, 217 (1993) (internal quotation marks omitted). Such language might suggest that every conceivable instance of an employer's questioning of employees to gain such information violates the basic spirit of collective bargaining and is illegitimate.

However, recent Board precedent reflects a nuanced analysis. In *Permanente Medical Group, Inc.*, 332 NLRB 1143 (2000), the Board panel majority wrote:

This case presents the issue of whether the employer, in formulating its proposals for bargaining, can consult with a very important resource—its own employees. Our colleague has concluded that the National Labor Relations Act forbids such consultation in this case. We disagree.

332 NLRB at 1144.

The respondent in *Permanente Medical Group* operated hospitals and medical clinics. It decided to develop a new model for delivering medical services called "member focused care" or "MFC." Respondent notified the unions that it would be conducting "focus group" sessions with employees. At these meetings, management would provide employees with information about the new program and would receive employee comments about the feasibility of the MFC model. It would use this information to make changes in the model.

After some of these meetings, one of the employees' unions notified the employer that it demanded to bargain immediately. The respondent replied that it recognized its duty to bargain, but that it had not yet decided on a final proposal and that it would bargain after it formulated such a proposal.

Thus, the respondent was soliciting the opinions of its employees, drawing on their experience and expertise, to help develop and "fine-tune" its new health care delivery model. Ultimately, after it had finalized its MFC system, that model would form the basis for a proposal which respondent would make to the unions. Although, in one sense, it could be said that the respondent was asking its employees for information it could use to formulate bargaining proposals, such a characterization would misapprehend the basic purpose of the focus group meetings.

The respondent indeed had made a "systematic effort," but it was an effort to develop new operating procedures, not an effort to undermine the union or interfere with the collective-bargaining process. Seeking to draw on the employees' experi-

ence and expertise for this proper purpose did not violate the Act. The Board stated, in part:

Although the Respondent communicated with its employees, that discussion was not for the purpose of establishing or changing terms and conditions of employment or undercutting any Union efforts to negotiate. The record emphatically demonstrates that throughout the process of developing and refining its MFC model, the Respondent never excluded the Unions. To the contrary the Respondent kept the Unions informed before and during the design phase. And, most importantly, Respondent made it clear that the design phase would ultimately yield only a proposal to be presented to the Unions for bargaining. With respect to this last aspect the Respondent reiterated its commitment to bargain. It did so in every communication with the Unions, as well as in its communication with volunteer employee participants. It clearly stated that, during the design phase, participants would not be engaged in bargaining or setting any working conditions, and that the design phase was not intended to be a substitute for negotiations with the Unions.

332 NLRB at 1144.

The present facts bear marked similarities to the facts in *Permanente Medical Group*. Respondent decided to adopt a new operating model based on a 4-day workweek consisting of 3 12-hour days and 1 6-hour day, a significant departure from the existing 5-day workweek. Because of great demand for the Respondent's products, employees frequently worked 6 days instead of 5, or even more. The new 4-day workweek would, at least in theory, afford employees more time for their families and personal lives.

However, any change of this magnitude would cause unforeseen difficulties, and even apart from those complications, could affect employees in ways which management had not contemplated. Thus, the Respondent here, like the respondent in *Permanente Medical Group*, conducted meetings with employees—"focus groups"—to discuss the contemplated plan. These meetings served the twin purposes of informing employees about the new workweek and obtaining information needed to fine-tune the plan and avoid problems which management had not anticipated.

The present facts differ from *Permanente Medical Group* in one significant respect. In *Permanente Medical Group*, the employer contemplated negotiating with the unions after it had finished working on the plan and had arrived at a final model. At that point, the respondent would have to obtain the unions' agreement to certain changes before the plan could be implemented.

Here, the Respondent possessed authority, under the management rights clause, to determine the scheduling of work unilaterally. By agreeing to that clause, the Union had waived its right to bargain over the change to a new work schedule. Therefore, the Respondent did not contemplate bargaining with the Union about the change and, in fact, consistently took the position that it did not have to and would not bargain about it.

On the other hand, Respondent did have an obligation to bargain over the effects of the changes. Management's meetings with employees could be characterized as attempts to ob-

tain information about employee likes and dislikes which the Respondent could use in formulating its effects bargaining proposals and in devising its negotiating strategy. However, I believe that such a characterization would be as inaccurate here as it would have been in *Permanente Medical Group*. The record clearly shows that Respondent conducted the employee meetings to impart information about the new work schedule and to obtain information which could be used to make the change more efficient and better for employees. The information provided by employees certainly included their sentiments about the new work schedule, but Respondent was not soliciting that information to give it an advantage at the bargaining table.

The information offered by employees also allowed Respondent to tailor the new schedule to fit employees' needs more comfortably, for example, by ending the day shift in time for employees to attend activities at their children's schools. The broad management-rights clause, to which the Union had agreed, allowed Respondent to make some of these changes without first bargaining with the Union. Thus, the Respondent could determine when the day shift would end without having to negotiate with the Union, because of the management-rights language allowing it to determine the schedule of production.

Other changes could not be made without negotiating with the Union. However, the fact that management learned about the need for these changes by consulting with employees does not mean Respondent had set out to solicit information for use in bargaining. The logic required to reach such a conclusion would likewise posit that the tail wags the dog.

The Board has established three criteria for determining whether an employer has engaged in direct dealing with employees in violation of Section 8(a)(5) of the Act: (1) The respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *Permanente Medical Group, Inc.*, above; *Southern California Gas Co.*, 316 NLRB 979 (1995).

Clearly, the first criterion has been satisfied. The Respondent communicated directly with bargaining unit employees.

Determining whether the second criterion has been met poses a more difficult problem. This second criterion concerns an employer's reasons for starting the discussion, but it focuses on two reasons that do not always point in the same direction.

The first reason is that management sought employees' opinions in furtherance of establishing or changing terms and conditions of employment. Such a reason points towards a violation *if* the employer plans to disregard the union's authority and role as exclusive bargaining representative or use the information to weaken the union. However, as the present case illustrates, indeed, as *Permanente Medical Group* demonstrates, a purpose of establishing or changing terms and conditions of employment doesn't necessarily signify an intent to undermine or circumvent the union. An employer may have every intention of dealing with the union and honoring the bargaining relationship but still need insight from the employees' perspective to illuminate the blind spots in its planning. In *Permanente Medical*

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Group, the Board states that an employer indeed “can consult with a very important resource—its own employees.”

The second criterion also focuses on a clearly illegitimate motive: Undercutting the union’s role in bargaining. That reason is the taint which renders the consultation with employees illegitimate. If the present facts do not establish the existence of this improper purpose, I will conclude that the second criterion has not been satisfied.

The present record leaves no doubt that Respondent already had decided to implement the 4-day workweek and did not intend to negotiate about it with the Union. However, in this particular instance, a lack of intent to negotiate with the Union about this specific matter does not suggest any motive to circumvent, undermine or weaken the Union. It merely means that Respondent decided to exercise the discretion it had won at the bargaining table when the Union agreed to the detailed management rights clause giving the Respondent explicit authority to determine the work schedule.

Moreover, the Respondent’s precise objective in conducting the employee meetings actually was *not* to establish or change hours of employment—Respondent already had made that decision and displayed unwavering resolve in implementing it—but rather was to learn how to make this change in a manner most comfortable to the employees. Switching to a 4-day workweek certainly was not like buying a suit off the rack and finding it ready to wear. Some tailoring would be necessary. A management representative attended the focus group meetings with pen in hand, if not pins in mouth.

Clearly, the Respondent was not trying to undercut the Union’s role in bargaining. To the contrary, the evidence demonstrates that the Respondent respected the Union’s authority and function as exclusive bargaining representative. Thus, the Respondent invited a union representative to attend the meetings with employees, the chief shop steward did attend such a meeting, and the Respondent asked the Union to bargain about the effects of the change. Indeed, more than once, the Respondent offered to bargain with the Union.

In these circumstances, I would conclude that the second factor weighs against finding unlawful direct dealing.

The third factor also militates against finding a violation of the Act. As already described, Respondent did not try to exclude the Union but rather invited the Union to attend the meetings and engage in effects bargaining.

In sum, I conclude that the Respondent did not engage in unlawful direct dealing with its employees and recommend that the Board dismiss this allegation.

REMEDY

For the reasons discussed above, I have concluded that Respondent breached its duty to bargain with the Union in good faith, by changing the number and length of breaks and the application and payment of shift premiums to its unit employ-

ees without first affording the Union a meaningful opportunity to engage in collective bargaining about those matters. Respondent thereby violated Section 8(a)(5) and (1) of the Act.

These same changes also breached specific provisions of Respondent’s 2008–2013 collective-bargaining agreement with the Union, thereby violating Section 8(d), (a)(5), and (1) of the Act.

As the Board stated in *Bath Iron Works Corp.*, above, the remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

To remedy its violations of Section 8(d) and (a)(5) of the Act, Respondent must conform its practices to the terms of its collective-bargaining agreement with the Union. It must also make the affected employees whole for all losses they suffered because Respondent breached the contract. The backpay and other monetary awards shall be paid with interest compounded on a daily basis. *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent must also post the Notice to Employees attached to this decision as Appendix “A.” If the Respondent customarily communicates with its employees electronically, it also shall distribute the notice electronically, such as by email, posting on an intranet or internet site, and/or other electronic means. *J. Picini Flooring*, 356 NLRB 11 (2010).

CONCLUSIONS OF LAW

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

2. The Union, Local 70, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By changing the number and length of breaks and the application and payment of shift premiums to its employees in the bargaining unit represented by the Union, without affording the Union a meaningful opportunity to bargain about those changes and their effects, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By failing to adhere to the contractual provisions, pertaining to the number and length of breaks and the application and payment of shift premiums, in its collective-bargaining agreement with the Union during the term of that agreement and without the Union’s consent, Respondent breached that agreement and its duty to bargain in good faith, within the meaning of Section 8(d), and thereby violated Section 8(a)(5) and (1) of the Act.

5. Except for the violations described in paragraphs 3 and 4, above, Respondent did not violate the Act in any manner alleged in the complaint.

[Recommended Order omitted from publication.]