

General Die Casters, Inc. and Teamsters Local 24 a/w International Brotherhood of Teamsters. Cases 08-CA-037932, 08-CA-038277, 08-CA-038278, 08-CA-038306, 08-CA-038358, 08-CA-038390, 08-CA-038464, 08-CA-038523, 08-CA-038546, 08-CA-038549, 08-CA-038568, 08-CA-038600, 08-CA-038623, 08-CA-038707, 08-CA-038916, and 08-CA-039165

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

On May 2, 2011, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions¹ and a supporting brief. The Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as

¹ The Respondent did not except to the judge's findings that it violated Sec. 8(a)(5) of the Act by unilaterally implementing a new work rule requiring all machine operators to rotate among various machines, by directly dealing with employees regarding shift schedules, and by failing to provide the Union with the names of laid-off employees who did and those who did not receive vacation pay.

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

We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally recalling three laid-off unit employees in June 2009. In adopting the judge's finding, Member Hayes relies on *Toma Metals, Inc.*, 342 NLRB 787, 787 (2004) (holding that "the recall of laid-off employees is . . . a bargainable matter"). He does not rely on *Adair Standish Corp.*, 292 NLRB 890 (1989), enf. in pertinent part 912 F.2d 854 (6th Cir. 1990), cited by the judge.

We adopt the judge's findings that the Respondent violated Sec. 8(a)(5) by unilaterally laying off employees at its Twinsburg, Ohio facility on March 9, 2009; unilaterally shutting down its Twinsburg facility on March 5, 2009; and unilaterally shutting down its Twinsburg and Peninsula, Ohio facilities on April 10, 2009. In adopting these findings, Member Hayes observes that the Respondent failed to present any evidence to support its claim that these actions were consistent with its past practice.

We adopt the judge's finding that the Respondent, on September 10, 2009, violated Sec. 8(a)(5) by unilaterally implementing its proposal on recalling employees without first reaching a valid impasse. In doing so, we rely on the judge's finding that, immediately prior to the Respondent's unilateral change, there had been significant movement in bargaining over employee recall rights. Chairman Pearce and Member Block also rely on the judge's finding that the Respondent's prior un-

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

1. As more fully set forth in the judge's decision, prior to the Union's certification the Respondent maintained an employee handbook that included a provision prohibiting the "[d]estruction or damage of property belonging to the Company." The handbook provision did not specify that posting personal items such as stickers and outside advertisements on company property was prohibited. Indeed, as the judge noted, there was a long history of employees posting sports-related and other kinds of stickers on lockers, toolboxes, and other company property without incident.

In April 2009, without bargaining with the Union, the Respondent circulated a memorandum titled, "Defacement of Company Property." This memorandum explained that destruction of company property would now include the placement of "any personal items (example stickers, outside advertisements) of any kind, on any General Die Casters property. . . ." In September 2009, the Respondent applied the rule set forth in the April 2009 memo and discharged employee Kevin Maze for placing union stickers on a coffee machine and other company property.

The judge found, and we agree, that the April 2009 "memo is a clear change from the rule contained in the Respondent's employee handbook" and that by unilaterally implementing the memo containing the new rule and discharging Maze for violating it, the Respondent violated Section 8(a)(5). Although the Respondent had a preexisting rule prohibiting destroying or damaging

lawful unilateral recall of laid-off employees, just 3 months earlier, contributed to the breakdown in negotiations over this issue and to the unlawful implementation of its September 10 proposal. To the extent the judge's decision can be read as implicitly finding that the Respondent's August 5, 2009 declaration of impasse violated the Act, we disavow any such finding; the Acting General Counsel did not so allege.

The judge inadvertently stated that the Respondent, by Supervisor Chuck Long, unlawfully threatened employee Jerome Ivery on September 22, 2010. Long threatened Ivery on September 20. The judge also inadvertently stated that the Respondent, through its attorney, Ronald Mason, coercively interrogated Ivery on September 20, 2011, rather than 2010. These inadvertent errors do not affect our disposition of this case.

In its Motion to Stay Appeal, the Respondent argues that Members Block and Griffin should be disqualified from ruling in this proceeding on the ground that their recess appointments to the Board by the President were invalid. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB 161 (2012), we reject this argument.

³ We amend the judge's remedy to provide that for those of the Respondent's violations of the Act that did not involve "cessation of employment status or interim earnings that would in the course of time reduce backpay," backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), rather than *F. W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

company property, its conduct before April 2009 demonstrated that it did not consider placing stickers on company property to violate that rule. The Respondent does not dispute the judge's finding that, prior to Maze's discharge, it never disciplined, much less discharged, any employee for placing stickers on company property. The April 2009 memorandum, for the first time, identified "defacement" and the placing of stickers on company property as grounds for discipline. We thus agree with the judge that the Respondent violated Section 8(a)(5) when it unilaterally promulgated the April 2009 rule, see *Toledo Blade Co.*, 343 NLRB 385, 387 (2004), and that it further violated Section 8(a)(5) by discharging Maze for violating the rule, see *Consec Security*, 328 NLRB 1201, 1201 (1999). For the reasons stated by the judge, we further agree that Maze's discharge also violated Section 8(a)(3).⁴

2. We adopt the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally withholding unit employees' merit wage increases in 2009. The Respondent does not except to the judge's finding that its established practice is to grant periodic merit wage increases. As its sole defense, the Respondent claims it has a past practice of freezing wages when economic conditions warrant.

We reject this defense. As the party asserting the existence of a past practice, the Respondent had the burden to establish by record evidence both the specific circumstances of the practice, *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), enfd. mem. 1 Fed. Appx. 8 (2d Cir. 2001), and that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or [recur] on a regular and consistent basis." *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010), enfd. mem. 2011 WL 2555757 (D.C. Cir. 2011).

The Respondent failed to meet this burden in both respects. First, other than the brief general testimony of the Respondent's CEO that merit increases were withheld in the past during difficult economic times, the Re-

⁴ Member Hayes does not find the Respondent's April 2009 memorandum to have constituted the promulgation of a new rule. The existing rule forbid destruction and damage to company property; the April 2009 memorandum simply clarified that destruction and damage included defacement. Even prior to April 2009—in November 2008—the Respondent placed employees on notice that defacement was prohibited by removing all of the stickers from employee lockers and other places in the plant and advising at least some of the employees that they could be disciplined if they placed stickers on its property. Because the Respondent did not implement a new rule but merely clarified its existing rule, no bargaining obligation attached. Accordingly, Member Hayes would reverse the judge and find that the Respondent did not violate Sec. 8(a)(5) either by issuing the April 2009 memorandum or by relying on it as a basis for discharging Maze. He agrees, however, that Maze's discharge violated Sec. 8(a)(3).

spondent failed to present sufficiently specific evidence regarding this assertion or the circumstances underlying the withheld raises. Nor did the Respondent present any evidence documenting the claim of its CEO that the 2009 merit increases were withheld due to a significant drop in business. Second, the Respondent failed to establish that its asserted past practice satisfied the "regularity and frequency" requirement. The Respondent concedes that until 2009, it withheld merit increases only two other times since 1995—in 2000 and 2007. Under these circumstances, where merit increases were so seldom withheld, we find that employees would reasonably have expected that, consistent with almost every past year, the Respondent would have awarded them their 2009 merit increases.

In sum, we find that the Respondent has failed to prove a past practice defense justifying its failure to bargain about the cessation of the 2009 merit increases. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(5).⁵

3. As more fully set forth in the judge's decision, the Respondent sent written "Notification Updates" to unit employees in April and May 2010, which, among other things, expressed the Respondent's opinion that the Union was not living up to its obligation to negotiate a contract, urged employees to sign the "decertification petition," stated that "the only real option is to throw the Union out" and that "[w]e fully support the decertification of this Union and hope that in an NLRB election you will all be given a chance to vote the Union out." The "decertification petition" referred to in these communications was prepared by Supervisor Daniel Owens,⁶ who

⁵ In Member Hayes' view, the record shows that the Respondent's past practice was to grant periodic merit wage increases when economic circumstances allowed, and to withhold them when they did not. The Respondent's CEO, James Mathias, testified that no raises were given in 1995 for a 6–7-month period because of economic conditions, for a 3–4-month period in 2000 because of a drop in orders, and for 7 months at its Peninsula facility in 2007 because of a catastrophic flood. The Respondent's 2009 decision to temporarily cease merit wage increases due to the undisputedly grave economic circumstances it was facing at that time was consistent with this past practice, given Mathias' testimony (which the judge failed to note) that orders then had declined by "nearly 40 percent." In Member Hayes' view, Mathias' uncontradicted testimony is sufficiently specific to establish the Respondent's defense, and he does not dismiss it simply because it was not further supported by documentary evidence. He would thus find that the Respondent did not violate Sec. 8(a)(5) by temporarily withholding merit wage increases in 2009.

⁶ We adopt the judge's finding that Daniel Owens is a supervisor within the meaning of Sec. 2(11) based on his authority to discipline and effectively recommend discipline of employees. As to the latter, we note Plant Manager Brian Lennon's admission that he relied on Owens' recommendations when issuing discipline to employee Dennis Ormsby. We do not pass on the judge's finding that Owens is an agent of the Respondent. In adopting the judge's 2(11) finding as to Owens,

solicited employees to sign it and contemporaneously informed employees that the Respondent would be more willing to address wages with employees if the Union no longer represented them. In addition, the Respondent, through Supervisor Chuck Long, contemporaneously threatened employees with plant closure and job loss if the Union continued to represent them. For the reasons stated by the judge, we adopt his findings that the Respondent, by Owens' and Long's actions, violated Section 8(a)(1).⁷

The complaint alleged that these actions, taken together, constituted a "course of conduct designed to undermine employee support for the Union." In her opening statement, counsel for the Acting General Counsel explained that these violations, including the Negotiation Updates, all pertain to the Respondent's "unlawful involvement in and promotion of a Decertification Petition that circulated" in 2010, i.e., the petition prepared and circulated by Owens. Consistent with the Acting General Counsel's theory, we find that the "Negotiation Updates" were unlawful because they solicited employees to support a tainted decertification petition and, considered in context, reasonably would be viewed by them as part of the Respondent's unlawful campaign in furtherance of the decertification effort. See *Wire Products Mfg. Corp.*, 326 NLRB 625, 626–627 (1998), *enfd.* 210 F.3d 375 (7th Cir. 2000).⁸

4. The judge found that the Respondent violated Section 8(a)(5) by failing to provide the Union with the names of nonunit employees laid off by the Respondent in April and May 2009. The record shows, however, and counsel for the Acting General Counsel acknowledges in her answering brief, that the Respondent furnished this

Member Hayes relies solely on Owens' authority to effectively recommend discipline.

⁷ The Respondent's exceptions to the judge's finding that Owens unlawfully informed employees that the Respondent would be more willing to address wages if the Union no longer represented them are based solely on the judge's credibility resolutions, which we have adopted in full.

⁸ In finding the Respondent's "Negotiation Updates" unlawful, Member Hayes rejects any implication in the judge's decision that an employer is not privileged, under Sec. 8(c), to communicate with its employees concerning its position in collective-bargaining negotiations, the status of negotiations, or its view of the causes leading to a breakdown in negotiations. *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), *enfd.* sub nom. *NLRB v. Pratt & Whitney*, 789 F.2d 121 (2d Cir. 1986). Member Hayes further disagrees with any implication in the judge's decision that an employer does not have the privilege, after a union has been certified, to express views, arguments, or opinions on unionization, including an opinion disfavoring a union or supporting a decertification petition after it has been filed with the Board. See *Flying Foods*, 345 NLRB 101, 106 (2005), *enfd.* 471 F.3d 178 (D.C. Cir. 2006).

information to the Union on August 24, 2009. We thus reverse the judge's inadvertent finding.⁹

5. We adopt the judge's finding that the Respondent violated Section 8(a)(3) by refusing to pay employee Emil Stewart for attending an OSHA meeting during worktime in November 2009. Shortly before the meeting, Plant Manager Brian Lennon told Stewart that the Respondent needed a representative from the Union to be present at the meeting, which concerned fines levied against the Respondent after an OSHA investigation. Stewart agreed to be the union representative, but was docked 45 minutes of pay for attending.

Applying *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the judge found that the adverse effect of the discriminatory pay differential was "comparatively slight." No party disputes that finding. Under this standard, the Supreme Court explained that if employer conduct has a comparatively slight impact on employee rights, an affirmative showing of antiunion motivation must be made to establish an 8(a)(3) violation, "if the employer has first come forward with evidence of a legitimate business justification for its conduct." *KFMB Stations*, 343 NLRB 748, 752 (2004), citing *Great Dane*, *supra* at 34.

We agree with the judge that the Respondent failed to establish its business justification defense that its refusal to pay Stewart was consistent with its practice of not paying employees for union work on company time. In rejecting this defense, the judge found that the asserted practice pertains to employees "who voluntarily conduct union business during working time,"—a "critical difference" from a "work assignment" to attend an OSHA meeting. The Respondent argues on exception that it merely asked Stewart to attend the meeting and did not instruct or assign him to attend.

We find no merit in this argument. The Respondent stated that *it* needed a union representative to attend the meeting. Therefore, it is irrelevant whether Stewart was asked or assigned to be the union representative; if not Stewart, the Respondent would have had to send some other union representative to the OSHA meeting. By contrast, there is no evidence that the Respondent needed to have union representation at the other OSHA-related activities that our dissenting colleague mentions, all of

⁹ We shall amend the judge's conclusions of law consistent with this finding, make conforming modifications to the judge's recommended Order, and substitute a new notice to conform to the Order as modified.

The Acting General Counsel contends in her answering brief that the Respondent violated Sec. 8(a)(5) by its unreasonable delay in complying with this information request. We reject this contention because the complaint does not allege, and the parties did not litigate, an unreasonable delay theory.

which were attended voluntarily by union representatives. We conclude that because the Respondent has failed to come forward with a business justification for docking Stewart's pay, the 8(a)(3) violation is established without proof of an antiunion motive. *Great Dane Trailers*, supra at 34.¹⁰

6. We adopt the judge's finding that during a meeting with employee Jerome Ivery on September 20, 2011, the Respondent's attorney, Ronald Mason, interrogated Ivery in violation of Section 8(a)(1) by failing to satisfy the requirements set forth in *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964).¹¹ The Board in *Johnnie's Poul-*

¹⁰ Even if proof of unlawful motive was required, it is demonstrated by the Respondent's numerous other unfair labor practices. See, e.g., *Dresser-Rand Co.*, 358 NLRB 854 fn. 1 (2012).

Member Hayes would take Stewart at his word. Stewart testified that Lennon asked him if he *wanted* to attend the OSHA meeting. He further testified that he responded, "Yeah, I'll attend it. Sure." And he admitted that he "agreed" to attend. No doubt Lennon preferred that Stewart attend, and that Stewart understood as much; but Stewart's own testimony demonstrates that he attended voluntarily. Moreover, another employee, Mark Albright, participated in two OSHA plant walk-throughs as a union representative; Stewart did as well in one of those walk-throughs; and neither Albright nor Stewart were paid for that time. Even assuming that some union representative was required (presumably by OSHA) to attend the meeting, there is no showing that the meeting could not have been postponed had Stewart declined to attend and the Respondent been unable to persuade anyone else to do so. Thus, the deduction from Stewart's pay was consistent with the Respondent's settled practice of not paying employees for union work—whether collective bargaining or representing the Union in OSHA-related activities—on company time. That practice constituted a legitimate and substantial business justification for the differential pay treatment of Stewart, who represented the Union at the meeting, and Lennon and Owens, who attended for the Respondent; and there is no contention that the differential treatment was actuated by an anti-union motive. Accordingly, Member Hayes would reverse and dismiss the judge's 8(a)(3) finding.

¹¹ Member Hayes would find no violation. It is undisputed that Attorney Mason furnished Ivery with the assurances required under *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). According to the judge, Mason's questioning was nonetheless coercive on two grounds: Mason inquired into Ivery's subjective state of mind, and the questioning did not occur in a context free from employer hostility to union organization. These findings do not withstand scrutiny.

Taking the second ground first, the judge apparently was referring generally to the Respondent's violations of the Act. That is how my colleagues understand his rationale, and they agree with it. I do not. If commission of unfair labor practices suffices to create a context of hostility to union organization negating the effectiveness of *Johnnie's Poultry* assurances, only innocent employers (and those few whose violations target only concerted but not union activity) can interview employees in preparing a defense.

As for the judge's other basis for finding the questioning of Ivery unlawful, the judge found that Mason inquired into Ivery's subjective state of mind because the interview resulted in an Ivery affidavit stating, in relevant part, that he "no longer believe[d]" certain things. But the judge failed to consider the relevant circumstances. Among the multitude of charges it faced, one charged the Respondent with assigning Ivery more onerous work assignments in retaliation for his union

try established safeguards designed to minimize the coercive impact of an investigatory interview by an employer, while allowing the employer to investigate facts concerning issues raised in a charge or complaint in preparation of its defense. Among the *Johnnie's Poultry* safeguards are that (1) the employee's participation must be obtained "on a voluntary basis" and (2) the employer's questioning "must occur in a context free from employer hostility to union organization." *Id.* at 775.

Mason's questioning failed to satisfy either of these requirements. Just prior to Mason's interview with Ivery, Supervisor Long violated Section 8(a)(1) by impliedly threatening Ivery with retaliation if he did not agree to meet with Mason. In such circumstances, Ivery's participation cannot be deemed to have been voluntary. *Network Dynamics Cabling*, 351 NLRB 1423, 1426 fn. 12 (2007). As to the second requirement, Mason's questioning occurred in a context of numerous, pervasive, and substantial unfair labor practices that included expressions of hostility by the Respondent towards union activities and its employees, some of which were committed by the Respondent's CEO. *Adair Standish Corp.*, 290 NLRB 317, 331 (1988). Accordingly, Mason's questioning of Ivery on September 20 failed to adhere to the rules set forth in *Johnnie's Poultry* and violated Section 8(a)(1).¹²

activity. In support, Ivery gave the Region affidavits. Later, Ivery told Respondent's HR administrator, repeatedly, that his affidavits contained untrue statements and that he no longer felt he had been treated unfairly. These admissions led to his interview with Mason. Thus, when Mason asked Ivery whether he "no longer believed" that he had been singled out or given assignments because of his union activity, he was simply asking Ivery to confirm his repeated, unsolicited, voluntary disavowals of his earlier sworn statements. In Member Hayes' view, that is not the sort of inquiry into subjective states of mind that the Board in *Johnnie's Poultry* meant to preclude.

In addition to the judge's rationale, the majority finds that Mason's questioning did not meet the *Johnnie's Poultry* requirement of voluntariness. On this point, Member Hayes would find Long's implied threat too mild to negate Mason's subsequent express assurances to Ivery that he was free to decline the interview.

¹² In light of this finding, we need not pass on whether the Respondent violated Sec. 8(a)(1) during a meeting with Ivery on September 17, 2010, as such a finding would be cumulative.

Because he would dismiss the September 20 interrogation finding, Member Hayes must reach the merits of the judge's September 17 8(a)(1) finding. Doing so, he would reverse and dismiss. The *Johnnie's Poultry* requirements are triggered when an employer seeks information "on matters involving [employees'] Section 7 rights" in preparation for a Board proceeding. *Johnnie's Poultry*, supra at 774–775. On September 17, Ivery was not questioned on matters involving his or his coworkers' Sec. 7 activities. He was merely asked whether he would be willing to meet with the Respondent's attorney to be so questioned. He did so and was questioned on September 20, after receiving all necessary assurances. Because the requirements of *Johnnie's Poultry* were not triggered during the September 17 meeting, the Respondent did not violate Sec. 8(a)(1).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2(n).

"(n) Failing to provide relevant and necessary information to the Union regarding the names of the laid-off employees who received vacation pay and those who did not."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, General Die Casters, Inc., Peninsula and Twinsburg, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(l).

"(l) Failing to provide relevant and necessary information to the Union regarding the names of the laid-off employees who received vacation pay and those who did not."

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

"(p) Provide to the Union the information it requested regarding the names of the laid-off employees who received vacation pay and those who did not."

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally cease merit wage increases and delay the granting of wage increases after a merit review. The appropriate unit represented by Teamsters Local 24 a/w International Brotherhood of Teamsters (the Union) is:

All full-time and regular part-time production and maintenance employees, including all cast set-up employees, cast operators, re-melt employees, trim set-up

and stock employees, trim and utility process technicians, toolroom employees, quality assurance employees, truck drivers, janitorial employees, machine operators, sanders/blasters, shippers, safety coordinators, and all shift leads employed by the Employer at its facilities located at 2150 Highland Rd., Twinsburg, Ohio, and 6212 Akron Peninsula Road, Peninsula, Ohio, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

WE WILL NOT unilaterally lay off employees.

WE WILL NOT unilaterally shut down our facilities for 1 day.

WE WILL NOT unilaterally expand our work rule on the defacement/destruction of company property.

WE WILL NOT enforce the unilaterally expanded work rule regarding the defacement/destruction of company property by discharging employees pursuant to this rule.

WE WILL NOT unilaterally implement a new work rule requiring all machine operators to rotate working on different machines.

WE WILL NOT unilaterally recall employees in the absence of a lawful impasse.

WE WILL NOT unilaterally establish terms and conditions of employment regarding the payment of health insurance premiums for recalled employees.

WE WILL NOT bypass the Union and deal directly with employees regarding shift schedules.

WE WILL NOT unilaterally employ temporary employees while unit employees are laid off.

WE WILL NOT fail to provide relevant and necessary information to the Union.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in union activity.

WE WILL NOT fail to pay employees for attending assigned meetings because they engaged in union activities.

WE WILL NOT solicit employees to sign a petition to decertify the Union.

WE WILL NOT inform employees that we would be more willing to address wages with them if the Union no longer represents them.

WE WILL NOT threaten employees with plant closure and the loss of jobs because of their support for the Union.

WE WILL NOT sponsor a decertification petition by posting, and mailing to employees, letters encouraging a decertification effort.

WE WILL NOT coercively interrogate employee witnesses in NLRB proceedings in violation of their rights guaranteed by Section 7 of the Act.

WE WILL NOT impliedly threaten employees with retaliation if they do not agree with our request to meet with our attorney regarding an NLRB proceeding.

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

WE WILL give notice and an opportunity to bargain to the Union regarding a cessation of wage increases and any delay in the time period for granting wage increases after a merit review.

WE WILL make whole employees for any losses suffered as a result of our unilateral cessation of wage increases and delay in granting wage increases after a merit review, with interest.

WE WILL, on request, bargain with the Union regarding the decision to lay off employees, including but not limited to Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland at the Twinsburg facility, who were laid off on or about March 9, 2009.

WE WILL, within 14 days from the date of the Board's order, offer employees including but not limited to Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole employees including but not limited to Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland for any loss of earnings and other benefits suffered as a result of our unlawful action against them, less any net interim earnings, plus interest.

WE WILL make whole employees for any loss of pay or other benefits suffered by them by reason of our unilateral action in shutting down our facilities for 1 day, with interest.

WE WILL rescind the April 3, 2009 expansion of our work rule on the defacement/destruction of company property, and bargain with the Union about any future implementation of any such rule.

WE WILL, on request by the Union, rescind the work rule requiring all machine operators to rotate among different machines, and bargain with the Union about any future implementation of any such rule.

WE WILL, on request by the Union, bargain with it regarding the employees unilaterally recalled in June and September 2009.

WE WILL make whole any adversely affected employees for any loss of pay or other benefits they may have

suffered by reason of our unilateral action in recalling employees in June and September 2009, with interest.

WE WILL notify and, on request, bargain with the Union regarding collecting money from recalled employees for an outstanding balance for insurance premiums.

WE WILL void the payroll deduction forms that recalled employees executed in June 2009 regarding the payment of health insurance premiums.

WE WILL make whole the employees recalled in June 2009 for any money they paid for health insurance premiums pursuant to the payroll deduction forms they executed, with interest.

WE WILL give notice and an opportunity to bargain to the Union before employing temporary employees while unit employees are laid off.

WE WILL make whole any employees adversely affected for any loss of pay or other benefits they may have suffered by reason of our unilateral action in employing temporary employees while unit employees were laid off in October 2009, with interest.

WE WILL provide to the Union the information requested regarding the names of the laid-off employees who received vacation pay and those who did not.

WE WILL, within 14 days from the date of the Board's Order, offer Kevin Maze and Willie Smith full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kevin Maze and Willie Smith whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Maze and Smith, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL make Emil Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

GENERAL DIE CASTERS, INC.

Susan Fernandez and Gina Fraternali, Esqs., for the General Counsel.

Ronald Mason and Aaron Tulencik, Esqs. (Mason Law Firm Co. L.P.A.), of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This consolidated case was tried in Cleveland, Ohio, on October 18–19, November 8–10, November 15, 17–19, and December 15–16

2010.¹ On October 1, 2010, a third order consolidating cases, second amended consolidated complaint, and notice of hearing issued against General Die Casters, Inc. (the Respondent), based on charges and amended charges filed by Teamsters Local 24 a/w International Brotherhood of Teamsters (the Union), or at times as Teamsters, Local 24.²

As finally amended at the hearing, the second amended complaint (the complaint) alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) in the following respects on or about the following dates: on March 21, 2008, assigned more onerous job duties to employee Jerome Ivery; on September 4, 2009, terminated employee Kevin Maze; on October 9, 2009, suspended employee Willie Smith and then terminated him on October 17, 2009; on November 10, 2009, withheld wages from employee Emil Stewart for time spent, at the Respondent's directive, attending a meeting as a union representative; and since January 1, 2010, has employed employees at its Peninsula facility provided by employment agencies while, at the same time, refusing to consider hiring the following bargaining unit employees who were laid off in 2009 for those positions: Christopher Long; Maurice Caldwell; Evan Parker; Clarence Marshall; Paul Kucinic;

¹ On March 16, 2011, pursuant to the Respondent's unopposed motion, the record in this proceeding was reopened for the limited purpose of admitting an audio recording of a meeting held on September 17, 2010, as R. Exh. 20. A transcript of this recording had previously been admitted into evidence as R. Exh. 19.

² The charge in Case 08-CA-037932 was filed on September 4, 2008, the first amended charge was filed on October 14, 2008, and the second amended charge was filed on December 31, 2008. The charge in Case 08-CA-038277 was filed on April 21, 2009, and an amended charge was filed on June 15, 2009. The charge in Case 08-CA-038278 was filed on April 21, 2009. The charge in Case 08-CA-038306 was filed on April 28, 2009, and an amended charge was filed on June 1, 2009. The charge in Case 08-CA-038358 was filed on June 1, 2009, and an amended charge was filed on June 12, 2009. The charge in Case 08-CA-038390 was filed on June 15, 2009. The charge in Case 08-CA-038464 was filed on July 27, 2009, a first amended charge was filed on August 13, 2009, a second amended charge was filed on September 3, 2009, and a third amended charge was filed on September 29, 2009. The charge in Case 08-CA-038523 was filed on August 25, 2009, and an amended charge was filed on September 29, 2009. The charge in Case 08-CA-038546 was filed on September 8, 2009, and an amended charge was filed on September 29, 2009. The charge in Case 08-CA-038549 was filed on September 9, 2009, and an amended charge was filed on September 29, 2009. The charge in Case 08-CA-038568 was filed on September 18, 2009, and amended charge was filed on October 28, 2009. The charge in Case 8-CA-38600 was filed on October 2, 2009, and an amended charge was filed on January 19, 2010. The charge in Case 08-CA-038623 was filed on October 16, 2009, a first amended charge was filed on January 22, 2010, and a second amended charge was filed by the Union on January 25, 2010. The charge in Case 08-CA-038707 was filed on December 14, 2009, a first amended charge was filed on December 23, 2009, and a second amended charge was filed on January 22, 2010. The charge in Case 08-CA-038916 was filed on April 29, 2010, a first amended charge was filed on May 4, 2010, a second amended charge was filed on June 21, 2010, a third amended charge was filed on July 23, 2010 and a fourth amended charge was filed on July 28, 2010. The charge in Case 08-CA-039165 was filed on September 24, 2000, and an amended charge was filed on September 30, 2010.

George Guthrie; Rahsad Evans; Houston Bass; Melvin Yates; J. W. Watkins; Mike Moody; Arthur Brown; Nora Hammons; Craig Greczek; Terrance Hemphill; Raymond Ferry; Brandon Asberry; Walter Wood; Jerry Durenda; and Nathan Holland.

The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in unilateral changes in the following respects on or about the following dates: on January 1, 2009, changed the employee evaluation procedure, altering when employees are eligible to receive wage increases; since January 1, 2009, instituted a wage freeze, denying employees customary wage increases; since February 1, 2009, changed its policy with regard to employees using vacation days to excuse short notice call offs from work; since February 1, 2009, disciplined employees, including Emil Stewart, as a result of the change in policy regarding vacation days; on March 5, 2009, and again on April 11, 2010, shut down its facilities for 1 day; on March 9, 2009, laid off employees from its Twinsburg, Ohio facility including, but not limited to the following named employees: Terrance Hemphill; Raymond Ferry; Brandon Asberry; Walter Wood; Jerry Durenda; and Nathan Holland; on March 16, 2009, changed the work hours of the day-shift janitor; on September 17, 2009 denied employee Harry Lane the opportunity to be temporarily recalled as a result of the change in hours of the day-shift janitor; on April 3, 2009, expanded its work rule on defacement timely destruction of company property; on April 6, 2009, promulgated a new work rule which required all machine operators to rotate working among the various machines; on June 15, 2009, recalled three bargaining unit employees to its Peninsula, Ohio facility; on June 25, 2009, required three bargaining unit employees recalled to the Peninsula facility to reimburse it for certain health care insurance costs; on July 27, 2009, assigned two employees to work at the Peninsula facility during the annual plant shutdown; from August 17, 2009, to September 29, 2009, changed the work hours of Jeff Miktuk, a quality assurance employee who works at the Peninsula facility; on September 8, 2009, implemented its proposal on recall rights and procedure; on September 15, 2009, resumed third-shift operations at its Peninsula facility and recalled approximately 10 employees; and since about September 15, 2009, secured the services of employees from employment agencies to work in bargaining unit positions at its Peninsula facility at a time when bargaining unit employees remained laid off from employment.

The complaint further alleges that since April 22, 2009, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide to the Union the following information: for those employees laid off from employment, copies of their personnel records relating to discipline, attendance, training, skill levels, and work histories; the work history for employees who are displaced or bulk due to the layoff; and the names and titles of any managerial supervisory, clerical, or others who are affected by layoff from employment that occurred in 2009. The complaint also alleges that from May 6, 2009, through June 9, 2009, the Respondent delayed in providing the Union with relevant information requested by it.

Finally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act in the following respects on or about the following dates: on September 7, 2009, by Chuck Long, at

its Peninsula facility, bypassed the Union and dealt directly with employees concerning a change to their work hours; since April 26, 2010, by John Norton, at its Peninsula facility, solicited employees to sign a decertification petition and threatened them with plant closure and/or sale of the plant; in April and May 2010, through Dan Owens, at its Peninsula facility, solicited employees to sign a decertification petition and coercively informed employees that it would be more willing to negotiate with employees over wage increases if they did not have union representation; in April and May 2010, by Chuck Long, at its Peninsula facility, threatened employees with unspecified reprisals, plant closure and/or the sale of the plant if the Union continued to represent the employees; on April 15 and May 21, 2010, by James Mathias, at its Peninsula facility, solicited employees to support the decertification effort and informed employees that the Respondent supported and encouraged that effort; on September 20, 2010, by Ronald Mason, at the Akron Municipal Airport, coercively sought to induce an employee to assist in a campaign to decertify the Union; on September 22, 2010, by Ronald Mason, prematurely ended collective-bargaining session so that Respondent could engage in conduct that interfered with employees' Section 7 rights; on September 17, 2010, by Douglas Hicks, Chuck Long, and Brian Lennon, at the Peninsula facility, coercively requested that an employee meet with the Respondent's attorney concerning his testimony at the hearing; on September 20, 2010, by Chuck Long, at the Peninsula facility, impliedly threatened employees with retaliation in the event that they did not meet with the Respondent's attorney; on September 20, 2010, by Ronald Mason, at the Akron Municipal airport, coercively interrogated an employee about his current views of these unfair labor practice charges filed with the Board compared to his views at the time he filed charges; on September 20, 2010, by Ronald Mason, at the Akron Municipal Airport, coercively sought to create a sense of futility about the Union and about the employee's testimony before the Board, by falsely stating that the Union's president had told Mason that the Union intended to disclaim its interests in the unit once the hearing was over; on September 20, 2010, by Ronald Mason, by cell phone, coercively requested an employee provide the Respondent with a copy of an affidavit that the employee had provided to the Board; on September 21, 2010, by Douglas Hicks, at the Peninsula facility, coercively asked an employee to provide the Respondent with a copy of the affidavit that the employee had provided to the Board; on September 22, 2010, by Ronald Mason, at the Akron Municipal Airport, coercively offered to arrange for an employee to have legal counsel with respect to the hearing while stating that the employee need not speak with counsel for the General Counsel and implying that the employee might not be called as a witness by counsel for the General Counsel if he did retain independent counsel.³

³ On October 22, 2010, the Regional Director for Region 8, on behalf of the National Labor Relations Board (the Board), filed a petition for injunction under Sec. 10(j) of the Act in the United States District Court, Northern District of Ohio, Eastern Division in Case 1:10-CV-02421 with regard to the allegations in par. 15 of the complaint. (GC Exh. 87.) Specifically, the Regional Director sought 10(j) relief regard-

The Respondent's answer denied the material allegations of the complaint and raised certain affirmative defenses which will be discussed below. On the entire record,⁴ including my observation of the demeanor of the witnesses,⁵ and after con-

ing the following complaint allegations: Since about April 26, 2010, Respondent, by John Norton, at its Peninsula facility, solicited employees to sign a decertification petition and threatened them with plant closure and/or sale of the plant. In April and May 2010, the exact dates being unknown, Respondent, through Dan Owens, at its Peninsula facility, solicited employees to sign a decertification petition and coercively informed employees that the Respondent would be more willing to negotiate with employees over wage increases if they did not have union representation. In about April and May 2010, the exact dates being unknown, Respondent, through Chuck Long, at its Peninsula facility, threatened employees with unspecified reprisals, plant closure, and/or the sale of the plant if the Union continued to represent employees. On or about April 15 and May 21, 2010, Respondent, through correspondence from James Mathias to its employees, at its Peninsula facility solicited employees to support the decertification effort and informed employees that it supported and encouraged the decertification effort. On or about September 20, 2010, Respondent by its Attorney Ronald Mason, at the Akron Municipal Airport, coercively sought to induce an employee to assist in a campaign to decertify the Union. On or about September 22, 2010, Respondent, by its Attorney Ronald Mason, prematurely ended a collective-bargaining session so that Respondent could engage in conduct that interfered with employees' Sec. 7 rights. On January 11, 2011, Judge Solomon Oliver Jr. granted the Board's petition for 10(j) relief in its entirety.

⁴ On January 7, 2011, the Acting General Counsel filed a motion to reopen the record in the instant consolidated case and consolidate it with the consolidated complaint that had issued in Cases 08-CA-039211, 08-CA-039228, 08-CA-039252, 08-CA-039256, 08-CA-039266, and 08-CA-039272 on January 6, 2011. In an order dated January 13, 2011, I denied the motion. On January 14, 2011, I denied the Acting General Counsel's motion for reconsideration. On March 16, 2011, I denied the Respondent's motion to consolidate the cases on the record. In summary, in denying these motions, I considered the Board's policy that the question of consolidation or severance of proceedings is within an administrative law judge's discretion and the factors to be considered are the risk that matters litigated in the first proceeding will have to be relitigated in the second and the likelihood of delay if consolidation or severance is granted. *Service Employees Local 87 (Cressleigh Management)*, 324 NLRB 774, 775-776 (1997). As set forth above, on January 11, 2011, Judge Oliver granted the 10(j) petition for an injunction that had been filed by the Regional Director with respect to certain allegations of the complaint in the instant consolidated case. In denying the motions to consolidate the instant case with the later issued complaint, I have been guided by the provisions of Sec. 102.94(a) of the Board's Rules and Regulations which mandate that I give priority to deciding the instant case over all other cases, since a 10(j) injunction has been issued. In my view, to consolidate the instant case with the later issued complaint would inevitably delay the issuance of the instant case and thus not comport with the requirements of Section 102.94(a). I conducted the trial in Case 08-CA-039211, et al., on March 14, 15, and 16, 2011, and the case is presently pending before me. The trial in that case was conducted in a manner so as to avoid the relitigation of matters litigated in the instant proceeding.

⁵ In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry*

sidering the briefs timely filed by the parties on February 10, 2011, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, at its facilities located in Twinsburg and Peninsula, Ohio, is engaged in the manufacture of aluminum die castings where it annually sells in ships products valued in excess of \$50,000 directly to points located outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background and Overview

The Respondent is engaged in the manufacture of aluminum die castings for a variety of customers at both its Twinsburg and Peninsula, Ohio locations. The two facilities are located approximately 12 miles apart. Approximately 90 employees are employed at the larger Peninsula facility while approximately 35 are employed in Twinsburg. The Respondent's owner and CEO is James Mathias; Thomas Lennon was the Respondent's president until August 2010, when he retired; Brian Lennon is the plant manager at the Peninsula facility; Keith Kish is the plant manager at the Twinsburg facility; and Charles Long is the Peninsula die cast superintendent. During the material time, the following individuals have served as the Respondent's human resources administrator: SeAnna Huberty (until approximately October 31, 2008); Judy Varner (from approximately November 1, 2008, to approximately June 2009; and Douglas Hicks (from approximately June 2009 to the present).

In December 2007, several of the Respondent's employees, including Mark Albright and Emil Stewart, met with Travis Bornstein, the president of the International Brotherhood of Teamsters, Local 24 to discuss organizing the Respondent's two facilities. In the beginning of 2008, the Union began to conduct meetings for employees and gave employees authorization cards to pass out to other employees. Employee Kevin Maze solicited approximately 20 employees to sign authorization cards or on behalf of the Union. Union supporters also passed out leaflets to other employees at the plant and began to

wear union hats and pins. Some employees, including Kevin Maze, began to place union stickers, about the size of a half dollar, at various places in the plant, including on employee lockers.

The Respondent learned of the organizing campaign shortly after it started. According to the credible testimony of current employee Jerome Ivery, in January 2008, James Mathias, the Respondent's president and CEO, had a meeting with first-and second-shift employees at the Peninsula plant. Thomas Lennon, SeAnna Huberty, and other members of management were present. According to Ivery, at this meeting Thomas Lennon said the employees did not need a union and asked how could the employees "do this to them." Lennon also stated that he was trying to help employees and remarked this is how they were "repaying him." Mathias also stated that the employees did not need a union. He indicated that with a union his hands would be tied as far as helping employees and that if things came up "there would be nothing he would be able to do" (Tr. 192).

Harry Lane, who had been laid off by the Respondent in March 2009, testified that he also attended the meeting held by Mathias and Tom Lennon shortly after they had learned of the Union's campaign. This meeting was held immediately before the second-shift started. All of the second shift employees were present and some from the first. Lane testified that Lennon stated, "[H]ow can we do this to him" as his door had always been open. Mathias stated that if he could help it, there would never be a union in the shop. (Tr. 404.)⁶

According to the credible testimony of Ivery, after the meeting at Peninsula, Thomas Lennon and Mathias spoke privately to Ivery. They told him that because he worked for the Respondent a long time, he should have used his influence to try and persuade employees not to get a union. They indicated once again that the Respondent did not need a union. Ivery was asked if he was for the Union and he replied that he was not.

Ivery testified he attended a second meeting held by the Respondent's management with employees that was also attended by a management consultant. After this meeting, Brian Lennon, Thomas Lennon, and Mathias spoke again to Ivery. Tom Lennon told Ivery that since Ivery had been working for the Respondent for 30 years, he should use his influence to try and

Ryce Builders, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951) See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). A substantial majority of the Acting General Counsel's witnesses were current employees of the Respondent at the time that they testified. The Board has long held the testimony of current employees which is adverse to the interests of their employer is not likely to be false. The Board has noted that when employees testify against the interest of their employer, they subject themselves to the possibilities of recrimination and the perils would be even greater if such testimony was false. *Bloomington-Normal Seating Co.*, 339 NLRB 191 (2003). See also *Flexistee Industries*, 316 NLRB 745 (1995); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). I have considered these principles when considering the credibility of such witnesses.

⁶ I find that Ivery and Lane testified credibly with respect to this meeting as their testimony was detailed, consistent and mutually corroborative. It is also inherently plausible as there is objective evidence in the record establishing that Mathias clearly indicated his desire that the employees not have a union. (See GC Exhs. 14 and 15, discussed in detail later.) I credit their testimony to the extent it conflicts with that of Mathias. I note, moreover, that Mathias confirmed much of the testimony of Ivery and Lane regarding this meeting. Mathias acknowledged that he held meetings with employees at both the Twinsburg and Peninsula facilities in late January 2008 after learning of the Union's organizing campaign. With respect to the meeting at Peninsula, Mathias testified he told employees that with a "petition circulating" the Union would be the representative of the employees and that he could not deal with them directly anymore. He also told employees at this meeting that "you already tied my hands because I really can't say anything." (Tr. 2092.) Mathias also indicated that, he told employees that he did not believe a union was required.

persuade employees to vote against the Union. Brian Lennon indicated that if the Union came in, their hands would be tied. He added that “they wouldn’t be able to help people” and that “it would be a lot worse if the Union came in” (Tr. 199). Ivory did not respond to their requests.⁷

Ivery testified that a couple of weeks later he admitted to Long that he was a supporter of the Union. The day afterwards Ivery also spoke to Brian Lennon. When Lennon asked Ivery how things were going out on the shop floor regarding a shift rotation, Ivery responded that there were still “labor problems.” When Lennon stated that he sounded like he was for the Union, Ivery responded that he did support the Union.

After obtaining a sufficient showing of interest, the Union filed a petition filed in Case 08–RC–016940. The parties entered into a Stipulated Election Agreement and an election was held on March 14, 2008. The tally of ballots showed that 62 ballots were cast for and 48 against the Union, with 11 challenged ballots, an insufficient number to affect the results. Thereafter, the Employer filed objections to the election. On August 28, 2008, the Board overruled the objections (GC Exh. 75) and certified the Union as the bargaining representative in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including all cast set-up employees, cast operators, re-melt employees, trim set-up and stock employees, trim and utility process technicians, tool room employees, quality assurance employees, truck drivers, janitorial employees, machine operators, sander/blasters, shippers, safety coordinators, and all shift leads employed by the Employer at its facilities located at 2150 Highland Rd., Twinsburg, Ohio and 6212 Akron Peninsula Road, Peninsula, Ohio but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

On May 18, 2008, the Union took a photograph of Bornstein and some of the Respondent’s employees who supported the Union, including Albright, Stewart, Ivery, Willie Smith, and Maze (GC Exh. 18). The photograph and an article regarding the organizing campaign appeared in the July/August 2008 issue of the International Teamsters magazine. Maze placed

⁷ Mathias denied ever speaking with Ivery individually. I credit the testimony of Ivery regarding these matters. His testimony was more detailed than that of Mathias. In addition, his recall of the private meetings that he had with Mathias and other members of management was clear and distinct. As a current employee of the Respondent, I doubt he would testify as to having such a meeting with the Respondent’s CEO if it were not true. I also note that Thomas Lennon did not testify at the trial and that while Brian Lennon testified, he did not testify regarding this meeting. There are no complaint allegations regarding the two meetings held by management or the conversations with Ivery that occurred afterward. At the hearing, counsel for the Acting General Counsel specifically indicated she was not seeking to amend the complaint to allege additional unfair labor practices based upon these conversations, but rather was eliciting such evidence as background to establish animus in support of the 8(a)(3) allegations of the complaint, particularly the allegation that in March 2008 Ivery was assigned more onerous working conditions. I admitted, and have considered, this evidence on that basis. Accordingly, I have not made any findings that such conduct constituted unfair labor practices.

copies of the magazine in the breakrooms of the Respondent’s Peninsula facility after it was published.

On October 9, 2008, Bornstein sent a letter (GC Exh. 80) to Ronald Mason, the Respondent’s attorney and chief negotiator. This letter states, in relevant part:

Under current Board law you know that your client (General Die Casters) may not make unilateral changes after the date of the election without affording Local #24 the opportunity to bargain. Any such unilateral changes would become unfair labor practices.

Therefore, I’m putting you on notice, I insist that from henceforth that your client (General Die Casters) make no unilateral changes with respect to terms and conditions of employment of any employee or any without affording an opportunity to Local #24 to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes. No discipline should be imposed without affording employees the *Weingarten* rights we hereby demand. No employee should be warned, counseled, disciplined or terminated without bargaining. No employee shall have his/her hours changed without bargaining. No one should be hired without bargaining over the person who should fill the position.

No employee should be laid-off without bargaining.

No changes in the method and manner by which work is being performed may be made without bargaining.

No introduction of any new work techniques without bargaining.

No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.

The parties held their first bargaining meeting on October 13, 2008. Bornstein has been the principal spokesman for the Union throughout the negotiations. In October 2008, the Union’s bargaining committee was composed of employees Albright, Stewart, Maze, Dennis Ormsby, and Arthur Brown. The composition of the Union’s committee has changed over the course of negotiations. Rick Kepler, a representative of Teamsters Joint Council 41, began to attend some of the negotiation sessions on April 7, 2009.

Mason has been the Respondent’s chief negotiator throughout the course of negotiations and has normally been accompanied by an associate in his law firm. Various members of management have attended the bargaining sessions throughout the negotiations.

By the conclusion of the hearing in December 2010, the parties had held approximately 65 bargaining meetings but had been unable to reach an agreement. The last bargaining session noted in this record was held in October 2010. At the commencement of negotiations the parties agreed to first bargain over noneconomic issues for turning to economics. By the time of their last bargaining session in October 2010, the parties had not yet begun to bargain regarding economic issues.

A substantial portion of the complaint in this case involves

the Acting General Counsel's contention that the Respondent began to engage in a series of unilateral changes in violation of Section 8(a)(5) and (1) of the Act in January 2009, and continuing through September 2009. The complaint alleges that the discharge of employee Kevin Maze in September 2009 violated Section 8(a)(5) and (1) of the Act as it was effectuated pursuant to a unilaterally established rule. The complaint further alleges that the discharge of Maze also violated Section 8(a)(3). On October 9, 2009, the Respondent suspended union supporter Willie Smith and discharged him on October 17, 2009. On November 10, 2009, the Respondent withheld wages from union supporter Emil Stewart for time spent attending an OSHA meeting, at the Respondent's directive. The complaint claims these actions are violative of Section 8(a)(3) and (1) of the Act. The complaint also alleges that since January 1, 2010, the Respondent has refused to consider hiring certain laid-off employees at the Peninsula facility while at the same time employing temporary employees in violation of Section 8(a)(3) and (1) of the Act.

On December 7, 2009, a decertification petition was filed in Case 08-RD-002178 which is blocked by the present unfair labor practice proceeding.

On April 29, 2009, the Union requested certain information regarding laid-off employees and on May 26, 2009, requested information regarding employees who had received vacation pay. The complaint contends that the Respondent has refused to provide this information in violation of Section 8(a)(5) and (1) of the Act. The complaint further alleges that the Respondent delayed the provision of relevant information from May 6, 2009, to June 9, 2009, in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that during April and May 2010, shift leader John Norton and safety coordinator Daniel Owens circulated decertification petitions and engaged in other conduct violative of Section 8(a)(1). The Respondent denies the supervisory status of both Norton and Owens. This necessitates a determination of whether they are supervisors within the meaning of Section 2(11) or agents within the meaning of Section 2(13) of the Act before the merits of those allegations are addressed.

During the same period, the complaint alleges that Respondent's CEO, Mathias, solicited employees to support a decertification effort and informed the employees that the Respondent supported it in violation of Section 8(a)(1) of the Act. Finally, the complaint alleges that from September 17, 2010, through September 22, 2010, the Respondent's attorney, Mason, and Supervisors Douglas Hicks, Chuck Long, and Brian Lennon engaged in a series of encounters with employee Jerome Ivery that violated Section 8(a)(1) of the Act. All of these allegations will be discussed in detail.⁸

⁸ The Respondent also filed a number of unfair labor practice charges against the Union since it has been certified. On August 31, 2009 the Respondent filed a charge in Case 08-CB-011183 against Teamsters, Local 24 alleging that it had violated Sec. 8(b)(1)(B) and (3) of the Act (Jt. Exh. 7). On the same date the Respondent filed identical charges against Teamsters Joint Council 41 (Jt. Exh. 4). On January 29, 2010, the Regional Director dismissed the 8(b)(1)(B) allegations

A. The Alleged Unilateral Changes in Violation of Section 8(a)(5) and (1) of the Act and the Related 8(a)(5) (3) and (1) Allegations Regarding the Discharge of Kevin Maze

The Evaluation Procedure and Wage Freeze

Paragraph 12(a) of the complaint alleges that on or about January 1, 2009, the Respondent unilaterally changed the evaluation procedure, altering when employees are eligible to receive wage increases.

According to the Respondent, whether an employee receives a merit increase and when the employee is subject to its discretion.

Counsel for the Acting General Counsel called several witnesses in support of this allegation. Arthur Brown testified that he was employed at the Respondent's Twinsburg plant from October 1999 to May 1, 2009, when he was laid off. Brown testified that he normally received an annual performance evaluation in February. At times, he would not receive a wage increase based upon an evaluation, but on other occasions he was given a wage increase of up to 4 percent. On February 18, 2009, he met with his supervisor, Keith Kish, who informed him that the Respondent had shifted evaluations back to the month of an employee's original hire date. In Brown's case, his evaluation would then be deferred until October 2009. Since he was laid off in May 2009, he did not receive an evaluation in 2009.

Current employee Dennis Ormsby testified that he received an evaluation in February 2009 from Chuck Long and Judy Varner, the then human resources director. Ormsby indicated this was a 6-month evaluation because he had transferred from the machining department at the Twinsburg plant to the die casting department at Peninsula 6 months prior to this meeting. The record demonstrates that the company has a consistent practice of evaluating employees 6 months after they changed classifications. At the time of his evaluation in February 2009, Ormsby was informed that he was getting a 25-cent-per-hour wage increase. When he informed Long and Varner that he was disappointed because he only received a quarter and had not had a raise in 6 years, he was told that he would be getting another evaluation in a couple of months because the evaluations were going to be changed back to the month of his hire date. Ormsby testified that his hire date was March 31. Long

and a number of the 8(b)(3) allegations in both charges. The Regional Director also indicated however, that absent settlement, he would issue a complaint against both Teamsters Local 24 and Teamsters Joint Council 41 alleging that both entities violated Sec. 8(b)(3) of the Act by failing to meet at reasonable times and places and by conditioning bargaining on the presence of a federal mediator. (Jt. Exhs. 6 and 9.)

On February 1, 2010, both Teamsters Local 24 and Joint Council 41 entered into informal settlement agreements with respect to the issues on which the Regional Director had indicated that a complaint was warranted (Jt. Exhs. 10, 11, 12, and 13). On September 3, 2010, the Acting General Counsel denied the Respondent's appeal from the Regional Director's approval of the unilateral settlements and partial refusal to issue complaint in Cases 08-CB-011183 and 08-CB-011184 (Jt. Exh. 14). On December 16, 2010 Regional Director issued a letter in both cases indicating that he was refusing to issue a complaint based on the above-noted settlements entered into by both Teamsters Local 24 and Teamsters Joint Council 41. (Jt. Exh. 15.)

and Varner also told Ormsby that the Respondent was going to change the evaluation procedure. They explained that after an employee was evaluated, the evaluation would be given to Jim Mathias, who would have 30 days to decide whether or not an employee received a raise. Ormsby indicated that in the past, any raise that resulted from an evaluation would be given immediate effect. Ormsby further testified that he did not receive another evaluation in 2009.

Current employee Leonard Redd testified that in early February 2009 he received an annual evaluation from his immediate supervisor, Michael Jordan, and Chuck Long. Redd was told at his evaluation that he would be informed in about 8 weeks as to whether he would receive a raise based on his evaluation. Redd was informed that the policy had changed from a prior policy of informing employees at the time of an evaluation what raise, if any, they would receive.

Employee Mark Albright testified that he had worked for the Respondent since November 1994. At the time of his testimony in November 2010, Albright was employed as a process control employee on the first shift at Peninsula. Albright was one of the employees who first contacted the Union and served as one of the union observers at the election. He has been on the union negotiating committee since its inception. Albright testified that in November 2009, Chuck Long evaluated him and informed him that whether he would receive a raise was under review. Approximately 2 months later, Albright received a 10-cent-an-hour wage increase. Prior to this evaluation, Albright had always been informed of any wage increase he would receive at the time of the evaluation.

Employee Robert Jay Quarterman testified that he received an evaluation from Long in November 2009. At this meeting Long told him he would have to wait up to 2 months to learn if he was going to receive a wage increase. Quarterman testified in the past, employees were told at the time of their evaluation if they were going to receive a wage increase.

The record establishes that while at times, employees would not receive a wage increase after an evaluation, when the wage increases were given, they would range up to 4 percent. If a wage increase was given, it was made effective as of the date of the evaluation. Both Bornstein and Albright testified, without contradiction, that the Union was not informed of any changes in the evaluation process during negotiations.

Paragraph 12(B) of the complaint alleges that since about January 1, 2009, the Respondent instituted a wage freeze, denying employees a customary wage increase.

Respondent contends that it was privileged to act unilaterally with respect to instituting a wage freeze because such action was consistent with its past practice of freezing wages under adverse economic conditions prior to the Union's certification.

In February 2009, the Respondent's CEO, James Mathias, decided that normal wage increases would not be given during 2009 because of the poor economic conditions that existed. Mathias testified that in February 2009 customers began to delay and cancel orders. Under these conditions, Mathias decided that it would not be prudent to grant customary wage increases (Tr. 2078–2079).

Mathias testified that there was a past practice of not granting wage increases when the Respondent determined that eco-

nomical circumstances did not warrant granting them. He pointed to a period in 1995 when, because of economic conditions, no raises were given for a 6- to 7-month period. In 2000, because of a drop in orders, no raises were given for approximately 3 to 4 months. In July 2007, because of a catastrophic flood at the Respondent's Peninsula facility, wage increases were not granted for approximately 7 months.

Mathias acknowledged that the Respondent did not give prior notice and an opportunity to bargain with the Union of its decision not to give wage increases before the Respondent implemented the decision in February 2009. Mathias indicated that no prior notice was given because the Respondent was merely applying its past practice of suspending wage increases under adverse economic conditions (Tr. 2082).

According to the Respondent's minutes of the bargaining session held on June 16, 2009 (R. Exh. 187, p. 421), the Union was not informed of this decision until that date.⁹ At this meeting, Rick Kepler, a representative of Teamsters Joint Council 41, who appeared on behalf of the Union at some of the bargaining sessions, asked Mason, the Respondent's chief negotiator, whether raises were being given that year. When Mason responded, "no", Kepler asked why that was so. Mason indicated that the Respondent had decided not to give wage increases because of economic conditions and, in the past, had not given raises under certain circumstances. Mason further indicated that the inability to pay was not an issue and he acknowledged that this issue was subject to bargaining. Albright testified that at this meeting, Mason indicated that there would be no raises given in 2009 because of the economic situation. (Tr. 1015–1016.)

The record contains documentary evidence reflecting that a substantial number of employees had received raises based on their performance review for the years 2005, 2006, and 2007 (GC Exh. 67).

At the bargaining meeting held on January 14, 2010, the Respondent informed the Union that the Respondent had resumed giving employees annual wage increases in December 2009. The Union was informed the raises would vary anywhere from 1/2 percent to 3 percent. (Tr. 1131–1133.)

I find that prior to the Union's certification in August 2008, the Respondent had an established practice of evaluating the performance of all its unit employees on an annual basis. The appraisals were typically performed on the employee's anniversary date or 6 months after an employee changed job classifications. Any raises that were given as a result of the appraisal was based on merit and was determined that the discretion of the Respondent. The amount of the raise, if any, an employee was given ranged up to 4 percent. In 2006 and 2007 almost all of the employees received a wage increase based on their performance review (GC Exh. 67).

In *NLRB v. Katz*, 369 U.S. 736 (1962), the employer, during negotiations for an initial contract unilaterally put into effect a new sick leave plan and granted across-the-board wage increas-

⁹ The Respondent took detailed notes of each bargaining session. I find these notes to be an accurate reflection of what occurred at the meetings and have relied on them throughout this decision to find what transpired at bargaining sessions.

es and discretionary merit increases to a number of employees. The Court found the employer's unilateral action with respect to such mandatory subjects of bargaining to constitute a violation of Section 8(a)(5) and (1) of the Act. In so finding the Court held:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. [Id at 747.]

Applying the principles of *Katz*, the Board has long held, with court approval, that after a union is selected as the bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases to its employees. *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003); *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996); *Allied Products Corp.*, 218 NLRB 1246 (1975), *enfd.* 548 F.2d 644 (6th Cir. (1977)). The fact that the Respondent utilized discretion with respect to the amounts and, to some degree, the timing of appraisals that resulted in wage increases does not privilege the Respondent's unilateral action. The record establishes that the Respondent's merit review program was an established practice and thus a condition of employment that required bargaining before it could be changed. *Daily News of Los Angeles* and *Allied Products Corp.*, *supra*. Accordingly, I find that the Respondent's unilateral cessation of merit wage increases from February to December 2009 violated Section 8(a)(5) and (1) of the Act as alleged in paragraph 12(B) of the complaint.

I also find that the Respondent's unilateral change in delaying the granting of wage increases from the date of the merit review to a time approximately 2 months afterwards also violated Section 8(a)(5) and (1) of the Act. In *Oneita Knitting Mills*, 205 NLRB 500 *fn.* 1 (1973), the Board noted that an employer with a past practice of merit increases violated Section 8(a)(5) by unilaterally discontinuing such a program. The Board explained that once an exclusive bargaining agent is selected, an employer may no longer exercise unilateral discretion with respect to such increases. The Board further noted:

What is required is a maintenance of pre-existing practices, i.e., the general outline of the program, however the implementation of the program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

It is clear therefore that Board law requires the Respondent to bargain with the Union the timing of any wage increase following a merit review. By failing to do so, the Respondent has violated the Act as alleged in paragraph 12(A) of the complaint.

Short Notice Call-Offs and Related Discipline

Paragraph 12(C) of the complaint alleges that since about February 1, 2009, Respondent changed its policy with regard to employees using vacation days to excuse short-term notice call offs from work. Paragraph 12(D) alleges that since about Feb-

ruary 1, 2009, employees, including Emil Stewart, were discipline for absenteeism as a result of the unilaterally change work rule in paragraph 12(C).

Albright, Stewart, and Maze all testified with respect to this allegation. A composite of their testimony indicates that for some period of time through the end of 2008, the Respondent had a policy regarding employees calling off work with less than 1 week's notice. Their testimony indicates that if an employee called in to notify the Respondent, in advance of a scheduled workday, of the need to have the day off, when the employee returned to work he would fill out a request for a vacation day which would be given to supervision for approval. The employee would then receive vacation pay for the day off. Such days off, however, would not count toward the Respondent's attendance bonus program.

Albright also testified that, for a substantial period of time, the Respondent had an attendance bonus program that provided that if an employee had no absences for a quarter, the employee would receive an additional vacation day and a cash bonus. Albright testified that in late 2008 he attended a meeting held for all first-shift employees at the Peninsula plant, conducted by Seanna Huberty, the Respondent's then human resources administrator. Brian Lennon was also present at this meeting. Huberty announced a minor adjustment in the attendance bonus. She indicated that if an employee did not miss any work-days during a quarter, the employee would no longer receive an additional vacation day but would continue to receive a cash bonus. She indicated that employees could call-off at short notice up to twice a month and it would not be considered an unexcused absence.

According to Albright, employees told him in early January 2009 that Judy Varner, the human resources administrator who succeeded Huberty, had issued written warnings to employees for attendance that included short-term notice call-off dates that were formerly not considered an unexcused absence. On cross-examination, Albright testified that he called Bornstein at some time prior to January 12, 2009, and told him about the allegedly changed policy (Tr. 1112-1113).

Maze testified that on May 18, 2009, he received a verbal written warning for attendance (GC Exh. 39). The warning indicates that Maze was absent on February 15, March 31, April 1, and May 18, 2009. Maze testified that two of these dates were short notice call-offs.

On June 8, 2009, Stewart received a verbal written warning for attendance (GC Exh. 32) which noted absences on March 6, April 20, and June 8, 2009. When Brian Lennon gave the warning to Stewart, Stewart explained he used vacation days for the absences. Lennon responded that it did not matter. Stewart also indicated that sometime during the period from January 2009 to April 2009, three other employees were given written warnings for attendance when they had used vacation days for short notice call-offs (See R. Exh. 188).

Brian Lennon also testified regarding the Respondent's short notice call-off procedure. He indicated that all vacation days must be scheduled a week in advance, Lennon indicated that with respect to short notice call-offs, an employee could submit a vacation request form when the employee returned to work and would receive vacation pay for that day. He further indi-

cated, however, that the day was still considered an unexcused absence if the request was submitted less than a week before the day off. Lennon testified this policy was in existence before the union campaign and had not been changed.

Lennon further testified regarding the meeting that Huberty held in the latter part of 2008. According to Lennon, Huberty explained that the attendance bonus program was being changed so that if an employee had perfect attendance for a quarter, the employee would receive a bonus of an additional day's pay, but would no longer receive 1 additional day off. Specifically with respect to the notice call-offs, Huberty stated that such days would count against an employee's attendance record, as well as counting against having perfect attendance for purposes of the bonus. Lennon testified that this policy is clearly stated in the Respondent's handbook.

The Respondent's current employee handbook was apparently promulgated on August 22, 2005 (GC Exh. 2, p. 2). The relevant portions of the vacation provision states:

Only one person per department and shift may be off at a time. Vacations will be granted on a first-come, first-serve basis, determined by the date of submission for approval. If an employee has requested a vacation day after another employee in his or her department has been approved for vacation, his or her vacation request may be denied. Employees may take a maximum of 2 days per month, one day at a time.

All one-day vacations should be approved by the supervisor at least one week in advance. Employees who request vacation days with pay for days called off or missed due to illness are not eligible for the attendance reward for that quarter.

The attendance policy in the handbook has an effective date of October 2007 (GC Exh. 2, p. 12). It provides in relevant part:

Occasionally, it is necessary to be absent from work due to illness or circumstances beyond your control. When you have an unscheduled absence from work, you must notify your supervisor. You are responsible for calling your supervisor within one hour or the Human Resources Administrator personally. It is also your responsibility to keep your supervisor and Human Resources administrator informed every day as to when you expect to return to work.

For absences due to sudden illness or circumstances beyond your control, employees may be required to use any available vacation time.

In her brief, counsel for the Acting General Counsel moved to withdraw paragraphs 12(C) and (D) of the complaint on the basis that evidence produced at the trial established that they are barred by Section 10(b) of the Act. The Respondent also contends that these allegations are barred by Section 10(b) of the Act. As noted above, Albright's cross-examination testimony, which I credit, establishes that he informed the Union's president, Bornstein, prior to January 12, 2009, about the alleged change in policy. Counsel for the Acting General Counsel notes that on July 27, 2009, the Union filed the charge in Case 08-CA-038464, which alleges that the Respondent unilaterally changed its short-term vacation policy. Thus, the

charge was not filed within 6 months of the time that the Union obtained knowledge of the alleged change. Under these circumstances, I approve the Acting General Counsel's motion to withdraw paragraphs 12 (C) and (D) of the complaint.

The 1-Day Shutdowns and the March 9, 2009 Layoffs at the Twinsburg Facility

Paragraph 12(E) of the complaint alleges that on or about March 5, 2009, and again on April 10, 2009, Respondent shut down its facilities for 1 day without giving notice to the Union or an opportunity to bargain. Paragraph 12(F) of the complaint alleges that on or about March 9, 2009, the Respondent laid off employees from its Twinsburg facility including but not limited to the following named employees; Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Nathan Holland.

The Respondent contends that both the March 9, 2009 layoff at the Twinsburg facility and the 1-day shutdowns did not violate the Act because they were consistent with its past practice prior to the union certification. It also contends that the 1-day shutdowns were consistent with a provision in the Respondent's handbook which states, "In situations where the Company must shut down for lack of work, at the discretion of the plant manager, employees may be permitted to split vacation time to cover days not paid" (GC Exh. 2).

On the morning of March 5, 2009, Mason faxed the following letter (GC Exh. 85) to John Sivinski, an attorney who, at that time, represented the Union:

Due to a sudden downturn in work at General Die, my client is forced to have a reduction in force.

Attached is a copy of that document we have prepared that we propose to be the general outline of the layoff procedures we are going to follow.

We are estimating that the layoffs will be somewhere in the range of 20% of the work force but those numbers are not yet fully finalized. We do not know how long the layoff will be in duration. Hopefully short but nobody knows, General Die is simply running out of work so we would like to discuss this with your client first thing today.

Attached to the letter was a document the relevant portions of which indicated:

Layoff and Recall procedures: (Last Layoff in 1995)
Past Practices

Layoffs will be handled in production in the following manner:

1. Production seniority.
2. Production capability to bump to another production job.
3. Seniority receives first choice on shifts.
4. Peninsula production departments include, Leads, Set up, Cast operators, Trim, Utility, Sanding/Blasting, Stock, Remelt, Process Techs.
5. Twinsburg production departments include, Leads, CNC operators, Machining/Sanding.

When General Die Casters only had one facility, the machin-

ing department never cross trained in the casting Department, nor the casting department cross trained in the machining (CNC) department.

An employee with seniority could transfer (bump) to a different position within their department, if they had the capability and experience with General By Casters and the personnel files document that experience. Layoffs due to economic issues, recall date is unknown.

According to the Respondent's bargaining notes for Thursday, March 5, 2009 (R. Exh. 174), the parties began the meeting at 3:30 p.m. Mason was the chief negotiator for the Respondent and Varner was also present. Bornstein was the Union's chief spokesman.

Mason began the meeting by saying that he was sorry that the Union's attorney did not get the letter to Bornstein that Mason had faxed earlier in the day. Bornstein was then given a copy of the above-noted letter and attachment. Mason indicated that the attachment reflected the Respondent's proposal. Mason stated that it was the same procedure the Respondent had used in its last layoff in 1995. Mason also gave the Union a document that reflected the names of employees by department at the Twinsburg plant that was titled "Before layoff." (GC Exh. 54.) Mason further indicated that the Respondent had reports from customers of a 20-percent dropoff in orders. Finally, Mason indicated that he did not know how long the layoffs would last. Bornstein indicated that the Respondent had the Union's proposal on layoff and transfer as contained in its proposed article 19.¹⁰ Mason replied that the Union had just been given what the Respondent proposed to do and added that this is what the Respondent had done in the past and "this is what we are going to do."

When Bornstein asked how soon the layoff would occur, Mason replied that the layoff would occur at the Twinsburg facility on Monday, March 9. Varner said that the Respondent may notify employees of their layoff on Friday, March 6. Mason indicated that possibly five to seven employees would be laid off. He further stated that the Respondent would use seniority by department. Employees with seniority could choose to bump into another shift in order to avoid layoff. Bornstein stated that the Union's position was that the layoff should be conducted by seniority on a plantwide basis and that an employee should be able to bump into another department if the employee had the essential skills of that job. Mason responded that "we need to pull the trigger at Twinsburg" tomorrow.

Bornstein asked if the Respondent considered "Twinsburg and Peninsula to be different plants or are they considered one." Mason responded that Twinsburg and Peninsula are different. Bornstein indicated he did not agree with that as employees transferred back and forth between the two plants and it was his

¹⁰ The Union's first proposal to the Respondent was made on October 28, 2008. (R. Exh. 385.) Art. 19 provides, in relevant part, that "Layoff will be by affected job classification within a department with the most junior employee(s) (using plant-wide seniority) being laid off first. Persons being laid off will be given the opportunity to use plant-wide seniority to bump avoid the layoff provided that the employee is able to perform the job with training."

position that companywide seniority should be used for the layoff. Mason replied that the Respondent understood the Union's position but that the Respondent had used departmental seniority in the past and that is what it was proposing to do now. He further indicated that the parties could discuss the layoffs at Peninsula at the bargaining session to be held the next day but that the Respondent needed to inform the employees at Twinsburg of the layoff the next day (March 6). Mason stated that the Respondent would give the employees at Twinsburg the option to change shifts or be laid off. When Bornstein asked when the Respondent knew of the necessity of a layoff at Twinsburg, Mason replied, "a week or so" before the meeting.

After some further discussion, the Union proposed that layoffs be conducted by seniority in a combination of departments of employees who could perform the same work. The Union's proposal included a 5-year recall right provision. Mason discussed this proposal telephonically with the Respondent's high-level management but then informed the Union that the proposal was rejected. Mason indicated that the Respondent would use the procedure that it had given to the Union that day. He stated that it was in the handbook and that it had been used in the past.

The parties met again on March 6. The Respondent's bargaining notes (R. Exh. 175) establish that the bulk of that meeting was devoted to the upcoming layoff at the Peninsula facility. With respect to Twinsburg, Mason gave the Union a list of the employees who would be laid off and their seniority dates (GC Exh. 55). The employees named on this document were T. Hemphill; R. Ferry; B. Asberry; J. Durenda; and W. Wood.¹¹ Mason indicated that the employees getting laid off had been hired in 2008. When Bornstein asked if any of the laid-off employees had enough seniority to bump into Peninsula, Mason replied "[N]o."

After reviewing the specifics of the layoffs at Twinsburg, Bornstein indicated the Union did not agree with the Respondent's proposal. Mason replied that the Respondent understood that the Union did not agree. Mason indicated that the parties could not reach agreement so that they were at an impasse. Bornstein replied that there had been limited discussion of the Twinsburg layoffs the day before and "10 minutes today." Mason replied that the Union had made a proposal and the Respondent had rejected it. The meeting ended without an agreement between the parties regarding the method to be used for layoffs at the Twinsburg facility.

The Respondent shut down its facility in Twinsburg for 1 day on March 5, 2009. Brown testified that Plant Manager Keith Kish notified employees on March 4, 2009, that the entire Twinsburg facility would be shut down on March 5 for economic reasons. Employees were informed that they could take a vacation day or take a day off without pay (Tr. 345). The Respondent did not notify the Union of the 1-day shutdown at the Twinsburg facility at the bargaining session held on March 5.

The Respondent shut down both the Twinsburg and Peninsula plants on April 10, 2009. On April 7, 2009, the parties held a

¹¹ The same employees were issued letters by the Respondent informing them of their layoff. (GC Exhs. 68-73.)

bargaining session. Bornstein was not present and Teamsters Joint Council 41 representative, Rick Kepler, was the Union's chief spokesman. At this meeting Mason informed Kepler that there would be a 1-day shutdown at both Peninsula and Twinsburg on April 10 (R. Exh. 177). Mason indicated that the Respondent had previously estimated a 20-percent drop in business and had tried to adjust the work force accordingly but that orders continued to drop. Kepler stated that he wanted verification that customer orders were declining and that he would send a request in writing. On April 14, 2009, Kepler sent the Respondent a letter requesting cancellation orders which precipitated the shutdown of the plants on April 10. The letter also advised the Respondent that the Union would be filing an unfair labor practice charge regarding its refusal to bargain over the shutdown on April 10. (GC Exh. 116.)

Mathias testified that the Respondent did not bargain with the Union over these 1-day shutdowns because the Respondent was acting consistent with its past practice (Tr. 2086).

Mathias testified that the shutdowns were due to a loss of approximately 40 percent of the Respondent's orders. Mathias stated that, consistent with the Respondent's shutdowns in the past, it notified the employees in advance and offered them the option of a paid vacation day or an unpaid day off (Tr. 23–24).

Mathias indicated that in the past the Respondent had shut down facilities at the end of the year and on at least two Good Fridays when business was slow. Employees had always been given the option of taking a paid vacation day or an unpaid day off. In this connection, Mathias testified that for a number of years the Respondent posted a holiday schedule near the end of each year. These schedules set forth the holidays for the upcoming year and further indicated that shutdowns will be determined at a later date. The Respondent produced the holiday schedule postings for the period from 2008 to 2011 which corroborates this testimony (R. Exh. 80).

Generally, an employer is precluded from changing wages, hours, or terms and conditions of employment-mandatory subjects of bargaining without giving the employees' bargaining representative notice and a meaningful opportunity to bargain about the proposed change. *NLRB v. Katz*, 369 U.S. 736 at 743. In *Alpha Associates*, 344 NLRB 782, 785 (2005), the Board noted:

It is axiomatic that an employer's decision to lay off employees is a mandatory subject of bargaining; thus in the absence of an agreed-upon contractual provision on the subject, an employer is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such layoff. See *Farina Corp.*, 310 NLRB 318, 320 (1993). That an employer's determination to lay off employees is motivated by economic considerations does not relieve an employer of its bargaining obligation.

While the 1-day shutdowns that occurred at the Respondent's facilities may be viewed as something less than a layoff, since employees were given the option of taking 1 of their paid vacation days instead of not being paid for the day, I find that shutdowns were nonetheless a mandatory subject of bargaining. The Board has held that changes in conditions of employment that are "material, substantial and significant" are mandatory

subjects of bargaining. *Millard Processing Services*, 310 NLRB 421, 425 (1993); *Southern California Edison Co.*, 284 NLRB 1205 (1987). I find that the closure of the plants which resulted in either a loss of a paid vacation day or an unpaid day off had a "material, substantial and significant" effect on conditions of employment and is thus a mandatory subject of bargaining.

As noted above, the Respondent's primary defense to both the complaint allegations regarding the March 9, 2009 layoffs at Twinsburg and the 1-day shutdowns is that its conduct was privileged because the Respondent had a practice of brief plant shutdowns and that the layoff at Twinsburg was conducted consistent with the procedure it utilized in a prior layoff in 1995. (R. Br., pgs. 92–93 and 105.)

The Board, with court approval, has clearly rejected such an argument. In *Adair Standish Corp.*, 292 NLRB 890 (1989), *enfd.* in relevant part 912 F.2d 854 (6th Cir. 1990), the Board observed:

The Respondent argues that because of its past practice of instituting economic layoffs due to lack of work, it had no obligation to bargain with the Union over such layoffs. However, because of the intervention of the bargaining representative, the Respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs. See, e. g., *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986). Instead, the Respondent was obligated to bargain with the Union over the layoffs, which are mandatory subjects of bargaining. *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to bargain with the Union over the layoffs. [*Id.* at fn. 1.]

The Board reached the same conclusion regarding layoffs in a preceding case involving the same employer, *Adair Standish Corp.*, 290 NLRB 317, 337 (1988), *enfd.* in relevant part 912 F.2d 854 (6th Cir. 1990), and in *Bob Townsend/Colerain Ford*, 351 NLRB 1079, 1083 (2007). In *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001), the Board noted that it was well settled that an employer's past practices prior to the certification of a union did not relieve an employer of the obligation to bargain about the subsequent implementation of those practices that entail a change in mandatory subjects of bargaining. The Board held that adherence to past practice does not privilege unilateral conduct.

In the instant case, prior to the March 9, 2009 layoffs at Twinsburg, the Respondent had only one previous layoff in 1995. The Respondent nonetheless contends that because it followed the procedures utilized in that one 1995 layoff, it was privileged to act unilaterally with regard to the March 2009 layoff. As explained above, the primary impediment to that argument is that the Board has clearly rejected the notion that an employer can act unilaterally with respect to an economically motivated layoff after the selection of a bargaining representative, even if the employer acts consistent with that practice. Moreover, one prior layoff does not establish a consistent past practice. I note in this connection that the Board has also held that as many as three prior layoffs for varying reasons did not establish a consistent practice that privileged an employer

to act unilaterally with respect to layoffs. See *Tri-Tech Services*, 340 NLRB 894, 895 (2003), and *Taino Paper Corp.*, 290 NLRB 975, 978 (1988).

In the instant case, the Union specifically advised the Respondent in writing at the beginning of bargaining in October 2008, that the Union expected to be given notice and an opportunity to bargain regarding the layoff of employees. However, with respect to the layoff at Twinsburg that was effectuated on or about Monday, March 9, 2009, the Union was not notified until Thursday, March 5, 2009, the day before the Respondent began to notify the affected employees. When Mason gave the Respondent's proposal to Bornstein on the afternoon of March 5, Bornstein objected to the Respondent's proposed method of laying employees off by departmental seniority and reminded Mason of the Union's outstanding proposal which proposed that layoffs be made through the use of plantwide seniority. The Respondent's own bargaining notes establish that Mason replied that the Union had received what the Respondent proposed to do; that is what it had done in the past and "this is what we are going to do." Mason also indicated that the Respondent needed to begin notifying the affected employees at Twinsburg the following day and that the Respondent had known of the need to effectuate layoffs at Twinsburg for approximately 1 week.

Bornstein reiterated that plantwide seniority should be used for layoffs. Mason responded that he understood the Union's position but suggested the parties discuss the impending layoffs at Peninsula since the Respondent needed to inform the affected employees at Twinsburg of the impending layoffs the next day. Bornstein made one last attempt to reach an agreement by proposing that a combination of departments of employees who performed similar work should be considered for purposes of layoff by seniority. This proposal was rejected. At the end of the March 5 meeting, Mason informed the Union that the Respondent would use the procedure he had given the Union that day.

On March 6, 2009, Mason gave Bornstein the list of employees who were to be laid off at Twinsburg. Once again Bornstein objected to the Respondent's proposal. Mason replied that he understood and since the parties could not reach an agreement they were at an impasse on this issue.

The Respondent began to inform employees at Twinsburg of their layoffs on March 6. Even though the Respondent had decided to lay off employees at Twinsburg a week earlier, it did not inform the Union until the day before the layoff was announced to employees. Mason made it abundantly clear at the March 5 meeting that the Respondent's proposal would be implemented the following day. On March 6, the Respondent presented the Union with a list of the employees that were to be laid off and on that day began to notify the employees of their layoff.

I find that, under the circumstances, the Respondent presented its proposal for the layoffs at Twinsburg without giving the Union meaningful notice and an opportunity to bargain over the matter. It is clear that the Respondent was committed to implementing the layoff in the manner it had decided regardless of the Union's response to its proposal. On March 5, 2009, the Respondent made it clear from the outset that it was merely

informing the Union of the course of action it would effectuate the next day. As such, it presented the Union with a fait accompli, as it did not comply with its obligation to give meaningful notice and opportunity to bargain in good faith regarding this issue. *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994); *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983).

The record contains generalized claims by the Respondent that a lack of orders caused the necessity of the layoffs at Twinsburg and 1-day shutdowns. In this connection, the Respondent's bargaining notes reflect on March 5, 2009, Mason informed the Union that there was a 20-percent drop in orders. On April 7, 2009, before the 1-day shutdowns on April 10, Mason indicated that orders had continued to decline since March 2009. At the hearing, Mathias made reference to a 40-percent drop in orders. No documentary evidence regarding the decline in orders was introduced into evidence at the hearing.

In *Seaport Printing & AD Specialties, Inc.*, 351 NLRB 1269 (2007), the Board indicated that an exception to the obligation to bargain over the layoff of employees for economic reasons required that the employer demonstrate that "economic exigencies" compelled prompt action. The Board noted that it has "consistently maintained a narrow view of the economic exigency exception" to "extraordinary events which are an unforeseen occurrence having a major economic effect requiring the employer to take immediate action." *RBE Electronics of S. D.*, 320 NLRB 80, 81 (1995) (citations omitted). The Board further noted that "[A]bsent a dire financial emergency, . . . economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *Id.* (footnotes omitted).

Applying that stringent standard to the instant case, the generalized claims by the Respondent regarding a lack of orders certainly do not meet the Board's requirements. Rather, the circumstances surrounding the Respondent's decision to lay off employees and shutdown its facilities for 1 day was motivated by a desire to reduce labor costs in response to a decrease in orders and is thus similar to the type of economically based decision to lay off as part of the normal business cycle and subject to the duty to bargain. See *Pan American Grain Co.*, 351 NLRB 1412, 1414 (2007).

On the basis of the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act with regard to the layoff of employees at Twinsburg on or about March 9, 2009, and the 1-day shutdowns that occurred at the Twinsburg facility on March 5 and April 10, 2009, and the Peninsula facility on April 10, 2009.

Changes in Work Hours and Schedules

Paragraph 12(G) of the complaint alleges that on or about March 16, 2009, the Respondent changed the work hours of the day-shift janitor at the Respondent's Peninsula and Twinsburg facilities.

The record establishes that prior to the layoffs that occurred in March 2009, Joseph Casteel was the Respondent's first-shift janitor. His work schedule was from 7 a.m. to 3 p.m. On March 13, 2009, the second-shift janitor at the Peninsula plant, Harry Lane, was laid off. After Lane's layoff, the Respondent

changed Casteel's work hours to 8 a.m. to 4 p.m.

According to the testimony of Brian Lennon, Respondent took this action because in order to have coverage between the first and second shift, as it needed an employee to clean the locker rooms after the first-shift employees had left. Lennon acknowledged that the Respondent did not give notice and opportunity to bargain with the Union over Casteel's change of hours. He testified that the Respondent followed the provision of its handbook that permitted it to change employee schedules. He also testified that this action was consistent with what the Respondent had done prior to the advent of the Union with respect to changing employee schedules as needed. There is no contrary record evidence on this matter.

Paragraph 12(M) of the complaint alleges that on or about July 27, 2009, the Respondent assigned two employees to work at the Peninsula facility during the annual plant shutdown.

Brian Lennon testified that the Respondent historically has engaged in annual shutdowns to perform maintenance work at the end of July or the beginning of August. He indicated that the Respondent does not typically engage in production work during the maintenance shutdown, but if customer orders needed to be filled, it would arrange to have production work done to meet the orders.

A week prior to the scheduled late July 2009 shutdown, a customer called with an order. The Respondent assigned two employees, Paul Shaver and Dan Krukemeyer, to perform production work. The Respondent selected these employees because they were the most senior employees on their shift and each had the skill and ability to perform the work.

Lennon indicated that the Respondent did not bargain with the Union over the assignments since it was merely the normal scheduling of production work. He testified that the Respondent had utilized the same procedure to schedule production work during maintenance shutdowns in the past. (Tr. 1788–1789.) There is no record evidence to the contrary.

Paragraph 12(N) of the complaint alleges that from about August 17, 2009, through September 29, 2009, the Respondent changed the work hours of Jeff Miktuk, a quality assurance employee who works at the Peninsula facility.

Lennon testified that Miktuk is the Respondent's quality assurance technician on the second shift at its Peninsula plant. Miktuk's normal hours were from 3 to 11 p.m. His hours were changed to 11 a.m. to 7 p.m. for approximately 1 month in August and September 2009. He explained that the reason for the change in hours was that the Respondent had obtained a new customer which had very stringent quality requirements. The Respondent assigned Miktuk to work a portion of the first shift so that he would be able to work with engineers and quality managers to learn the requirements of the new customer, which had quality standards of a higher level than those that the Respondent was accustomed to.

Lennon indicated that the Respondent did not bargain with the Union prior to making this assignment because it was following its employee handbook which permitted it to change employee schedules. He also indicated that in the past the Respondent had made schedule changes of this order. There is no record evidence to the contrary.

The record establishes that routine changes were made to the

schedule of employees with frequency prior to the selection of the Union as the bargaining representative. This is hardly surprising given the nature of the Respondent's manufacturing operations. A change in assignment must be "material, substantial and significant" to be considered a mandatory subject of bargaining. *Alamo Cement Co.*, 277 NLRB 1031 (1985). The Board has also held that schedule changes made in a normal, routine fashion in the operation of an employer's business that is consistent with its prior practice are not violations of the Act. *KDEN Broadcasting Co.*, 225 NLRB 25 (1976); *Kal-Die Casting Corp.*, 221 NLRB 1068 fn. 1 (1975). I find the instant case to be clearly distinguishable from the Board's decision in *Georgia-Pacific Corp.*, 275 NLRB 67 (1985). In that case, the Board found that the employer's unilateral change to a four-shift schedule from a three-shift schedule constituted a fundamental change in the workweek for all employees. The Board found that the employer's unilateral institution of such a schedule violated Section 8(a)(5) and (1) of the Act. Here, the routine changes that the Respondent instituted did not constitute a fundamental change in employees working conditions. On the basis of the foregoing, I find that the Respondent's conduct in making changes to the schedules of Casteel and Miktuk and assigning two employees to perform production work rather than maintenance work during the 2009 annual shutdown do not constitute violations of Section 8(a)(5) and (1) of the Act. Accordingly, I shall dismiss paragraphs 12(G), (M), and (N) of the complaint.

The April 3, 2009 Work Rule Regarding the Defacement/Destruction of Company Property and the Discharge of Kevin Maze

Paragraph 12(I) of the complaint alleges that on or about April 3, 2009, the Respondent unilaterally expanded its work rule on the defacement/destruction of company property. In a related allegation, paragraph 8(C) of the complaint alleges that the Respondent terminated employee Kevin Maze pursuant to this rule on September 4, 2009. Finally, paragraphs 8(A) and (B) allege that the Respondent also terminated Maze because of his union activities in violation of Section 8(a)(3) and (1) of the Act. Because of the related nature of these allegations I will consider them together.

In defense to these allegations, the Respondent argues that Maze was lawfully disciplined pursuant to its progressive disciplinary policy for affixing union stickers to its property in violation of the Respondent's conduct and discipline policy set forth in its employee handbook. The Respondent also argues that the Union was put on notice in November 2008 of the allegedly unilaterally changed work rule regarding defacement/destruction of company property and that therefore the complaint allegations regarding the rule and its application to the discharge of Maze are barred by Section 10(b) of the Act.¹²

The record establishes that prior to the election in March 2008; there was a longstanding history of employees posting

¹² On September 8, 2009, the Union filed a charge in Case 08–CA–038546 alleging that the Respondent discharged Maze in violation of Sec. 8(a)(5), (3), and (1) of the Act (GC Exh. 1ee). On September 9, 2009, the Union filed a charge in Case 08–CA–038549 alleging that the new work rule violated Sec. 8(a)(5) and (1) of the Act. (GC Exh. 1gg.)

stickers of various kinds throughout the Respondent's facilities including employee locker rooms, toolboxes, towmotors, and machines. The stickers included phrases from the Bible, jokes, and sports emblems such as the Cleveland Browns and NASCAR. When the union campaign started in the beginning of 2008, some employees, including Kevin Maze, placed union stickers on employee lockers, toolboxes, and machines. At times such stickers were also posted on the walls and ceilings in such areas as the quality assurance and tool rooms.

After the Union won the election in March 2008, some employees continued to place stickers including union stickers, on employee's lockers, toolboxes, and machines in the plant. In November 2008, the Respondent removed all the stickers, including union, sports, and religious phrases, from employee lockers and other areas of the plant. According to the testimony of Brian Lennon, the Respondent removed the stickers because there was not supposed to be any stickers placed on "Company Property" (Tr. 1799). Lennon testified that around the time that the stickers were removed, employees were notified that placing stickers "on company property was considered destruction or damage to company property" at employee meetings on each shift (Tr. 1799-1800). The Respondent called current employee witnesses, Dickerhoof, Pietrocini, Collins, Bradley, Miktuk, and Supervisor Ohler who testified that they recalled stickers being removed from employee locker rooms in other areas of the plant in November 2008. These individuals also recalled being told by either Brian Lennon or their supervisor that employees could be disciplined for placing stickers on company property in the future. Based upon this evidence, I find that the Respondents removed all the stickers from its facilities in November 2008 and orally informed at least some unit employees that stickers should not be placed on its property in the future and that employees may be disciplined for doing so.

On April 3, 2009, a memo to all employees from Brian Lennon and Varner entitled "Defacement of Company Property" **Message: Work Place Conduct and Discipline Policy** (emphasis in the original) was posted at both the Peninsula and Twinsburg facilities. In relevant part, the memo (GC Exh. 16) states:

General Die Casters has listed below some examples of offenses that are outside the scope and course of your employment and may be considered to be serious enough to result in disciplinary action, up to and including termination. Specific situations covered here may lead to disciplinary action, up to and including termination when, in the company's judgment, they are harmful to the rights of other employees, safety, or the efficient operation of the Company. Leniency in any instance will not be a waiver to impose discipline at any other time.

Destruction or damage of property belonging to the Company, (emphasis in the original) or its employees, customers, or visitors; also, careless waste of materials.

Stealing, misappropriating, or **intentionally damaging property belonging to the Company**, (emphasis in the original) or any of its employees, customers or visitors

Please note that placing any personal items (example stickers,

outside advertisements) of any kind, on any General Die Casters property will be viewed as defacement/destruction of company property and disciplinary action be taken up to and including termination. Any questions please see Human Resources.

Lennon testified that the reason for posting this memo was that a substantial number of stickers were being posted throughout the plant on company equipment and he wanted to make it very clear that whoever was doing this needed to stop (Tr. 1794). Lennon stated that employees had reported to him that Kevin Maze was the individual posting union stickers throughout the plant. Lennon further testified that putting these stickers throughout the plant was against the current company policy that was in the handbook and he wanted to emphasize that continuation of this action could result in disciplinary action. Lennon admitted that the Respondent did not give notice and an opportunity to bargain with the Union before the April 3, 2009 memo was posted. Lennon indicated that the reason for the Respondent's unilateral action was because the policy was an existing one as the language came "right out of our current Employee Handbook." (Tr. 1796.)

The employee handbook (GC Exh. 2) has been effective since October 2007 and does not contain the fourth paragraph of the April 3, 2009 memo noted above that explains that stickers and outside advertisements of any kind will be considered as defacement or destruction of company property subject to disciplinary action up to and including termination. Bornstein credibly testified that since the Union was selected as the bargaining representative in March 2008, until after the April 3, 2009 memo had been posted at the plant, the Respondent never gave the Union notice and an opportunity to bargain about its expanded work rule regarding defacement of company property.

Kevin Maze, the subject of the reports given to Brian Lennon regarding the placement of union stickers in the plant, worked for the Respondent from 1984 to 1994 when he was discharged for his attendance record. He was rehired in 2002, and worked for the Respondent until he was again discharged on September 4, 2009. At the time of his 2009 discharge he was working on the second shift at the Peninsula plant. While Maze had previously been working on the third shift, he was transferred to the second shift at the time of the spring 2009 layoffs. Maze was employed as a "metal man." In this position, he would carry molten aluminum in a large metal basket on a towmotor from furnace to furnace in order to keep them filled.

Maze was an ardent supporter of the Union since the campaign began in December 2007. In this connection, he solicited approximately 20 employees to sign authorization cards on behalf of the Union. Before the election in March 2008, he wore a hat to work with approximately 30 small union pins in it. After the election he continued to hand out leaflets to employees announcing union meetings. He was one of the employees whose picture appeared in the Teamsters magazine and placed copies of that issue in the employee breakrooms at the Peninsula plant. In October 2008 he became a member of the union negotiating committee and regularly attended meetings through the date of his discharge and afterwards.

Maze confirmed that prior to the union campaign a number of stickers referring to NASCAR and other matters were placed on toolboxes, machines, and on employee lockers at the Peninsula facility. Maze indicated that from the beginning of the union campaign until the time he was discharged, he placed union stickers at various places in the facility including the locker room. I credit Maze's denial that he placed hundreds of these stickers throughout the plant. I also credit his testimony that he observed other employees place union stickers in the plant. Maze testified that he obtained union stickers that were approximately the size of a 50-cent piece at union meetings. He recalled that one of the stickers reflected the statement "Respect is a Teamsters contract" but that others had different statements.

Maze testified that on September 4, 2009, he was taken by his supervisor to Brian Lennon's office to meet with Brian Lennon and Hicks. Lennon told Mays that he was being discharged for placing a sticker on the coffee machine and on other equipment. Lennon did not elaborate on what the other equipment was. Mays indicated he did not respond to Lennon's notification that he was discharged.

Maze testified that at some point prior to September 4, 2009, he had placed a union sticker on the front of the coffee vending machine. He stated that there was a video surveillance camera placed right in front of the machine where he placed the sticker.

When called as an adverse witness by counsel for the Acting General Counsel, Brian Lennon testified that Mays was terminated on September 4, 2009, for defacement and destruction of company property because he placed pronoun stickers on company property, including the coffee machine. Lennon indicated that Maze was the only employee who had been terminated by the Respondent for this reason. (Tr. 76-77.)

Hicks testified regarding the discharge of Maze when called as a witness by the Respondent. According to Hicks, the decision to discharge Maze was made collectively by himself, Mathias, Brian Lennon, and Mason after a review of Maze's disciplinary record. Hicks testified that Maze was terminated pursuant to the Respondent's progressive discipline policy because he received another written discipline after being placed on suspension. He also testified, however, that Maze would have been discharged for placing the union stickers on company property even if it had been his first disciplinary offense. Hicks indicated this was so because the response policy regarding defacement of company property "calls for termination." (Tr. 2158-2159.)¹³

On September 4, 2009, Maze was given a document regarding his termination signed by Brian Lennon and Hicks which reflected the following, in relevant part (GC Exh. 83):

Violations:

On 8/27/09 Kevin Maze placed Teamster's stickers on the coffee machine and several other pieces of company property.

Prior Violations

7/16/09 Not wearing safety glasses in the zinc foundry

6/3/09 Unsafe work practices

8/19/09 not wearing head and face protection.¹⁴

On 7/16/2009 Kevin was placed on a Final Written Warning with 3 days of suspension. It stated that any further violations would result in Termination.

The Acting General Counsel does not allege that the warnings given to Maze on July 16, 2009; June 3, 2009, and August 19, 2008, were discriminatory.

I first address the issue of whether the issuance of the Respondent's April 3, 2009 memo regarding defacement/destruction of company property is an unlawful unilateral change. It is well settled that an employer has an obligation to give notice and an opportunity to bargain with a union regarding work rules, especially those that involve the imposition of discipline. *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006); *Toledo Blade Co.*, 343 NLRB 385 (2004); *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994); *Robbins Door & Sash Co.*, 260 NLRB 659 (1982). As I have indicated above, the April 3, 2009 memo is a clear change from the rule contained in the Respondent's employee handbook. Unlike the rule contained in the handbook, the April 3, 2009 memo unequivocally informed employees that placing any personal stickers or outside advertisements of any kind on the Respondent's property would be viewed as defacement or destruction of the Respondent's property and result in disciplinary action up to and including termination.

The Respondent contends that the April 3, 2009 memo was not a new rule but was "merely delineating examples of what had always been considered a violation of long-standing policy" (R. Br., p. 88). This is clearly not the case as the testimony of all the witnesses who testified regarding this issue testified that until at least November 2008, stickers of various types were regularly posted on lockers and in other areas in the Respondent's facilities. As noted above, I find that in November 2008, the Respondent removed all of the stickers from employee lockers and other places in the plant. At the same time Lennon and other supervisors advised at least some of the employees that stickers should not be placed on the Respondent's property and that discipline could be imposed if it were. It is clear, however, that in November 2008, the Respondent did not give notice to the Union of the removal of the stickers or that there was any prohibition of their placement in the future. The Respondent took this action despite the fact that the Union had been selected as the bargaining representative in March 2008 and certified by the NLRB in August 2008.

Admitting it took such action unilaterally, the Respondent contends that the Union had notice of this action and thus asserts a 10(b) defense with respect to the complaint allegations regarding the issuance of the April 3, 2009 policy. As noted previously, the Union filed a charge in Case 08-CA-038549 on September 9, 2009. Section 10(b) of the act provides that "no complaint shall be issued based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board." However, the 10(b) period does not begin to

¹³ Although called as a witness by the Respondent, Mathias did not testify regarding the reasons for Maze's termination.

¹⁴ The actual date of this warning was August 19, 2008 (R. Exh. 146).

run until the charging party has received clear and unequivocal notice of the violation and the burden of showing such notice is on the party raising Section 10(b) as an affirmative defense. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004).

Applying these principles to this case, I find that the Respondent has not established a valid 10(b) defense. In the first instance, there is no evidence that the employees who were told that, placement of stickers could result in some form of discipline, ever reported that to the Union. The only evidence supporting the Respondent's defense is the testimony of Supervisor Ohler that he had spoken to Kevin Maze in the fall of 2008 after he had heard rumors that Maze had continued to place union stickers in the plant. According to Ohler, he told Maze "he shouldn't be doing that and that he could be in trouble if he's caught doing it." Ohler also testified that in the "Spring of 2009" he had heard rumors that Maze was continuing to put up union stickers and told him that he could be disciplined or fired for doing so. (Tr. 1821.) Maze generally denied that he had been aware in 2008 that stickers were not to be placed on company property (Tr. 642). To the extent the testimony of Ohler and Maze conflicts, I credit Ohler on this point as his testimony appears more plausible under all the circumstances. However, I find that Ohler's amorphous 2008 statement to Maze that he could be in trouble if he continued to post stickers, even if I were to attribute knowledge of it to the Union, does not establish the clear and unequivocal notice that is required to bar the Union's action in filing a charge over the April 3, 2009 memo. With respect to the statements Ohler made to Maze in the "Spring of 2009" there is no evidence to establish that the statement was made prior to March 9, 2009, which is the applicable 10(b) period. Ohler's vague testimony on this point does not establish clear and unequivocal notice to the Union prior to the 10(b) period. The fact that whatever the Respondent told employees in November 2008 was not as clear as the definitive statement that discipline, up to and including discharge, could be imposed for the placing of stickers on company property contained in the April 3, 2009 memo, is supported by Lennon's testimony that he issued the memo to emphasize that continued placement of stickers could result in disciplinary action. I find that Brian Lennon viewed his earlier statements on this issue to be vague and insufficiently promulgated to employees. I conclude that the issuance of the detailed April 3, 2009 expansion of the work rule regarding the defacement/destruction of company property to include the placement of stickers on company property and clearly specifying the penalty for its violation is a newly instituted rule and not a continuation of anything that preceded it. Accordingly, the Respondent has not established that the complaint allegations regarding the issuance of the April 3, 2009 memo and its application to the discharge of Maze is barred by Section 10(b).

Finally, I do not agree with the Respondent's assertion that the Board's decision in *Timken Co.*, 331 NLRB 744 (2000), supports its unilateral right to establish a new rule prohibiting the placement of union stickers with attendant disciplinary rules at its facility. In *Timken*, the Board found that the General Counsel had not established that the employer violated Section 8(a)(1) of the Act by disparately removing union materials from "cubbyholes" that the employer considered its property. *Id.* at

755. The facility at issue was a nonunion plant and therefore no issues regarding the obligation to bargain over mandatory subjects of bargaining were considered by the Board. Accordingly, I find *Timken* to be inapposite to the instant case. On the basis of all of the foregoing, I find that by implementing the April 3, 2009 memo regarding defacement/destruction of company property without prior notice to the Union, the Respondent violated Section 8(a)(5) and (1) of the Act.

It is clear that the unilaterally implemented April 3, 2009 memo was a factor, indeed the critical factor, in the discharge of Maze. As noted above, while Maze had valid warnings issued to him on July 16, 2009, June 3, 2009, and August 19, 2008, the document indicating the reasons for his termination reflects that the last violation of the Respondent's progressive disciplinary policy was placing union stickers on a coffee machine and other pieces of equipment on August 27, 2009. Brian Lennon testified that Kevin Maze was discharged because he placed union stickers on company property. In addition, Hicks testified that he would have been discharged for placing union stickers on company property even if it had been his first offense.

Under clearly established Board law, if an employer's unilaterally imposed rule was a factor in discipline or discharge, the discipline or discharge violates Section 8(a)(5) and (1) of the Act. *Behnke, Inc.*, supra at 1139; *Equitable Gas Co.*, 303 NLRB 925, 931 fn. 29 (1991). Since the Respondent's unilaterally implemented rule regarding the destruction/defacement of company property was the primary factor in Maze's discharge, his discharge violated Section 8(a)(5) and (1) of the Act.

With regard to the allegation that the Respondent's discharge of Maze also violated Section 8(a)(3) and (1) of the Act, I note that the Acting General Counsel established a prima facie case under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In *Wright Line*, the Board established a framework for deciding cases turning on employer motivation. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision, the elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and at times, antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Ferguson Enterprises, Inc.*, 355 NLRB 1121 (2010).

The evidence establishes that Maze was a known union supporter and that the Respondent possessed animus toward the Union. Thus, the Respondent must establish that it would have discharged Maze in the absence of any union activity on his behalf. The Respondent does not meet that burden in this case. Lennon testified that the reason that he issued his April 3, 2009

memo regarding the prohibition of stickers was because of reports that were made to him that Maze was placing union stickers in the plant. Thus, the rule itself was issued to emphasize that continuation of such conduct could result in disciplinary action. Prior to the discharge of Maze, there is no evidence that any employee had ever been discharged by the Respondent for defacement of its property. Under the circumstances, the Respondent has not established that it would have discharged Maze in the absence of his union activities and therefore his discharge also violates Section 8(a)(3) and (1) of the Act.

The Work Rule Regarding the Rotation of Machine Operators

Paragraph 12(J) of the complaint alleges that on April 6, 2009, the Respondent promulgated a new work rule which required all machine operators to rotate working among the various machines.

On April 6, 2009, Brian Lennon had the following memo (GC Exh. 17) posted at the Peninsula facility:

We are going to begin rotating operators on physically demanding jobs in an effort to reduce operator fatigue and prevent injury. This will be done by scheduling different operators on these jobs at least 2 to 3 times per week. All operators will be expected to participate in the rotation. If you feel that you can not meet the requirements of these jobs please notify your supervisor.

The credible testimony of Ivery and current employee Leonard Redd established that, prior to this memo being posted; employees normally operated the same machine for months. Only occasionally would employees be rotated to another machine. There is no evidence, however, that assignments to a different machine had an economic impact on an employee.

Brian Lennon admitted that he had the memo posted without first giving the Union notice and an opportunity to bargain over this issue. Lennon testified that after the layoff that occurred in March 2009, the Respondent's work force was smaller and was composed of the more senior, and hence typically older, employees. Some employees had approached supervisors and expressed concerns over performing heavier work than they had previously been performing. The Respondent's intention in posting this memo was to notify employees that it would rotate employees from the larger machines to smaller ones on a regular basis in an effort to avoid injuries. Lennon testified that, while in the past the Respondent "unofficially" tried to rotate employees, the memo was posted in order to give official notice to employees about the Respondent's position on this issue. (Tr. 1792-1793.)

In its brief, the Respondent admitted that the April 6, 2009 memo regarded rotating assignments and that it did not bargain with the Union over this new work rule.

The Board has held that a change in assignments is a mandatory subject of bargaining if the new duties are a "material, substantial and significant" change in the employees' terms and conditions of employment. *Bohemian Club*, 351 NLRB 1065, 1066 (2007). The Board has also held that a change in the method of assignments for drivers from the seniority to a rotational basis without consulting the union violated the Act. *Cap-*

itol Trucking, Inc., 246 NLRB 135 fn. 1 (1979). Finally the Board has held that assigning drivers to different trucks that were materially and substantially different than the trucks they had previously been assigned was a mandatory subject of bargaining. *Armour Oil Co.*, 253 NLRB 1104, 1123-1125 (1981).

Applying these principles to the instant case, I find that rotating die cast operators to different machines is a mandatory subject of bargaining. The record establishes that much of the work in the Respondent's foundry is of the physically demanding nature. It is also clear, however, that operation of some of the larger die cast machines is more physically demanding than other smaller machines. Under these circumstances, the assignment to a particular machine is a condition of employment and a change in assignment has a "material, substantial and significant" impact on working conditions, even though the assignment does not have an economic impact.

As noted above, the Respondent admits that it implemented the rotation system unilaterally. However salutary this change in the manner of assignments is to employees, it is a matter that the Respondent was obligated to give notice of and an opportunity to bargain to the Union. By acting unilaterally with respect to this matter, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Recall of Three Employees in June 2009 and their Reimbursement to the Respondent of Health Insurance Costs

Paragraph 12(K) of the complaint alleges that on or about June 15, 2009, the Respondent recalled three bargaining unit employees to its Peninsula facility. Paragraph 12(M) of the complaint alleges that the Respondent required the three bargaining unit employees recalled to the Peninsula facility to reimburse it certain health insurance costs.

Current employee Sam Tomsello testified that at the time of the hearing he was a die cast operator at the Peninsula facility and was working on the third shift. He held the same position on April 29, 2009, when he was informed that he was laid off effective on May 4, 2009. In a letter from Judy Varner, the Respondent's human resource manager (GC Exh. 30) informed him of his layoff, he was also notified of the following:

In accordance with the Layoff procedure, you have the right of recall in order of seniority to any active position in the department for which you qualify that is within the same classification as your position at the time of layoff. As an employee, your right to recall extended for (two) months from the effective date of layoff (please refer to handbook). . . . Your insurance coverage will end on May 31, 2009 you will be eligible to continue your health and dental coverage through General Die Caster's Cobra program.

The Respondent's minutes of the bargaining session held on June 10, 2009 (R. Exh. 184), reflect that Mason informed the union committee that the Respondent would be recalling the three most senior diecast operators: Sallaz, Tomsello, and Black. When Bornstein asked if the Respondent had already recalled them, Mason replied that he was in the process of doing so. Bornstein indicated that he would like to negotiate the procedure and asked whether the employees had been contacted by phone or by letter. Mason indicated that they had been

called. When Bornstein asked if a call was followed by a letter, Mason replied, "no." Bornstein indicated that those are the type of things that the parties needed to negotiate. He gave as examples of matters to be negotiated, the mechanisms by which employees were to be contacted and the amount of time they had to respond to the Respondent's offer. Mason indicated that if the Union wanted to put forth a written proposal regarding those issues, the Respondent would consider it. Bornstein indicated that in the Union's last proposal regarding recall rights those issues were addressed.

Current employee Samuel Tomsello testified that on June 12, 2009, he received a call from Judy Varner, who informed him that he could return to work on June 15, 2009, to the second shift at the Peninsula facility (Tr. 68). Employees Jason Black and Jason Sallaz were also recalled to the second shift at the same time he was.

On June 25, 2009, Tomsello was called to Hick's office. When Tomsello arrived, Hicks informed him that he needed to give the Respondent a check for his health insurance or sign a form authorizing the Respondent to deduct the appropriate amounts from his paycheck. According to Tomsello, Hicks told him that someone had forgotten to remove him and the other employees who had been laid off from the Respondent's medical insurance plan. Tomsello was also told that he had to reimburse the Respondent for the insurance premiums that had been paid. He was given the following letter (GC Exh. 8 (b)) which states, in relevant part:

This letter is to inform you that General Die Casters, Inc. needs payment of (One Hundred Fifty-Seven Dollars and Fifty Eight Cents) \$157.58, to insure there'll be no laps [sic] in your health and dental insurance coverage.

On your 6/26/09 check we deducted for \$45 for health and \$17.58 for dental. The monthly amount due for June Medical is \$180 and \$40.16 for June Dental. The balance due for June is \$135.00 for Medical and \$22.58 for Dental insurance.

Going back to when you were laid off we kept your coverage in place (per company policy) until the end of the month of May. You were brought back in the middle of June (June 15), therefore your employee contribution of the monthly premium for June is due to General DieCasters, and to ensure there'll be no laps [sic] in coverage, here are (two) 2 payment options listed below:

1. You can submit a personal check, or money order to General Die Casters, Inc. (Please submit check, money order within 7 days of receipt of this notice)
2. You can authorize General Die Casters, Inc. to payroll deduct this amount from your paycheck by increasing your deductions with the month of July.

If you would prefer that General Die Casters, Inc. payroll deduct the total amount \$157.58 from your July pay-checks, please sign below.

I authorize General Die Casters, Inc. to payroll deduct the above stated amount from my paychecks in July. The weekly amount for the month of July will be \$72 for medical insurance and \$14.55 for dental insurance.

Tomsello executed the document authorizing payroll deductions. The record also reflects that both Black (GC Exh. 8c) and Sallaz (GC Exh. 8a) executed authorizations to deduct health insurance premiums that differed from Tomsello's only in the amounts deducted.

Brian Lennon admitted the Respondent recalled Tomsello, Black, and Sallaz in June 2009 without giving notice to and an opportunity to bargain with the Union over their recall. Lennon testified that the Respondent basically used the same procedure as it did for the layoff in that it recalled employees by seniority within their department. He noted that Respondent's recall procedure was consistent with the procedure it utilized when recalling employees from layoff in 1995.

With respect to the claim that the Respondent unilaterally dealt with the three employees regarding health insurance premiums for June 2009, Hicks testified that the Respondent offered the employees the opportunity to pay their portion of the June premiums so that they could have coverage for that month. Hicks further testified, "We pay our insurance on a pre-funded basis. If they would not have done it they would have had a gap in coverage, and they would have had to wait until July 1 to get back on." (Tr. 2178.) According to Hicks, the three employees decided to pay the premiums for June and avoid a gap in insurance coverage. Hicks testified that as the Respondent's benefits coordinator, he regularly speaks with employees with regard to participation in the Respondent's health insurance plan and the types of coverage.

The Respondent gave no prior notice to the Union before it began the process of recalling in June 2009 the three employees who had been laid off in early May 2009. The Respondent contends it was privileged to act unilaterally regarding this recall because it recalled the three die cast operators by departmental seniority in accordance with the procedure it utilized in recalling employees in 1995.

In *Allen W. Bird II, Caravelle Boat Co.*, 227 NLRB 1355, 1357 (1977), the Board noted that "It is axiomatic that unilaterally changing the method of recalling employees is violative of the Act." (Citation omitted.) It is clear, therefore, that the recall of employees is a mandatory subject of bargaining. In the instant case, unlike the employer in *Allen W. Bird*, the Respondent used the same recall procedure that it had previously utilized in 1995. As I have noted above, however, the Board in *Adair Standish*, supra, rejected the argument that an employer is privileged to unilaterally lay off employees once a union has been selected as the collective-bargaining agent, even if the layoff is consistent with prior practice. In the instant case, it would be an anomaly to permit the Respondent to unilaterally recall employees when it must bargain about their layoff. Accordingly, I find that by failing to give the Union notice and an opportunity to bargain regarding the recall of the three die cast operators the Respondent violated Section 8(a)(5) and (1) of the Act.

I next turn to the related allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally requiring the three employees to reimburse it for their health insurance premiums for the month of June 2009. In the first instance, I credit the testimony of Tomsello over that of Hicks regarding

this issue, to the extent there is a difference. I found Tomasello's testimony to be more plausible since the document he signed clearly reflected that it was to reimburse the Respondent for an expenditure that had already been made. I was also favorably impressed by his demeanor. Accordingly, I find that Hicks informed the three employees on or about June 25, 2009, that they were obligated to pay their share of the entire June 2009 premium and had to reimburse the Respondent as it had paid the premium for the entire month. The employees were given the option of paying the Respondent by check or money order in order to reimburse it for the premium or to have the appropriate amounts deducted from their July paychecks.

It is well settled that health insurance benefits for unit employees is a mandatory subject of bargaining, *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), *Larry Geweke Ford*, 344 NLRB 628 (2005). The Board has also found that directly dealing with employees regarding health insurance premiums, and the choice of paying an increased premium or dropping coverage, violates Section 8(a)(5) and (1) of the Act. *European Parts Exchange, Inc.*, 270 NLRB 1244 (1984).

In the instant case, the Respondent's implementation of the procedure to have the employee's reimburse it for their portion of the entire June 2009 health insurance premium is part of its unilaterally implemented recall procedure for these employees. Under the circumstances, I find that the Respondent was obligated to bargain with the Union regarding the manner in which the health insurance coverage for the recalled employees was to be implemented. By failing to bargain over this matter, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Implementation of the Respondent's September 8, 2009 Proposal on Recall Rights

Paragraph 12(O) of the complaint alleges that since on or about September 8, 2009, the Respondent unilaterally implemented its proposal on recall rights at a time when the Union and the Respondent had not reached a lawful impasse.

In its initial proposal dated in October 2008, the Union proposed that laid-off employees have recall rights for 5 years. Consistent with its existing policy, the Respondent's initial proposal was that employees have recall rights for 60 days. At the bargaining session held on May 26, 2009, the Union changed its position on the length of recall rights after layoff from 5 years to 3. The Respondent adhered to its position that employees had recall rights for 60 days after a layoff. (R. Exh. 181; GC Exh. 102.)

At the meeting held on June 5, 2009, the Union again reduced the time it was seeking for employees to have recall rights after layoff from 3 years to 2. When Bornstein asked if Mason was going to move from 60 days, Mason said that because it was near the end of the bargaining session he doubted that he would get back to the Union with a counteroffer that day (R. Exh. 183).

As noted above, at the bargaining session on June 10, 2009, Mason announced that the Respondent was in the process of recalling three employees. At the meeting held on June 11, 2009, Bornstein asked Mason if he had a response to the Union's proposal of June 5 reducing the recall right period to 2

years. Mason replied, "[N]ot yet." Mason did, however, give the Union a new written proposal on recall from layoff. (R. Exh. 185.) This proposal (GC Exh. 104) included the following language regarding recall:

For employees to be recalled from layoff, they will be recalled by seniority by departmental layoff, and they will be placed into any opening for which they are qualified by seniority. There will be no bumping of people who have held their position in the layoff. Employees will be given a reasonable time to report back to work, no later than 7 days from the notice of recall.

The Union canceled a meeting scheduled for June 12. The parties met on June 16, June 18, July 13, July 20, and July 22 but did not discuss the issue of recall from layoff. At the meeting held on July 23, 2009, the Union made a new proposal regarding recall rights, limiting them to 1 year (GC Exh. 110). The Union also included the following language in its proposed article 19:

Recall shall be by seniority to any available work which the employee is able to perform. Once notice of recall is given, the employee must report for work within seven (7) working days after the day of notification except where the employee is unable to return to work because of sickness or injury.

The Respondent made the following counterproposal, "Agree to the Union language on Recall in Article 19 except add the words 'by departmental layoff' after the word 'seniority' in the first sentence. Change able to qualified." (GC Exh. 111.) When Bornstein asked what the Respondent's position was regarding the length of recall rights, Mason replied, "60 days. We haven't changed it." (R. Exh. 192.)

At the meeting held on August 5, Mason indicated that the Union had been given the Respondent's proposal on recall and reiterated the Respondent's position on the length of recall rights was 60 days. When Mason asked if the Union had a proposal on recall, Bornstein replied that the Union did not have anything prepared. Mason then declared an impasse on the issue of recall and indicated that the proposal of July 23 was the one that the Respondent would use. (R. Exh. 193.) The next bargaining meeting was scheduled for August 18.

The Union canceled the August 18 meeting. On the same date, Kepler, on behalf of the Union sent a letter to Tom Lennon and Mathias "temporarily suspending negotiations" because of what he perceived to be the Respondent's unlawful conduct during bargaining (R. Exh. 40).

On August 19, 2009, Mason sent a letter by fax to Bornstein replying to Kepler's letter of August 18. Mason's letter (R. Exh. 44) stated, in part, the following:

In negotiations we were to have yesterday, we had hoped to try and reach an agreement with you on the time for recall from layoff before loss of seniority. As of right now, everyone who is on layoff status under the Company's policy lost their recall rights because they have been laid off more than 60 days. Your last proposal was a one-year recall rights. We had hoped you to yesterday reach some sort of middle ground because we are expecting to need workers in September. We hope to recall some of the laid-off workers under our new re-

call procedure. Without your presence to negotiate this time period, you have abandoned those people on layoff that could otherwise be recalled.

Therefore, we are once again declaring an emergency and requesting that you advise us in writing that you will in fact attend negotiations currently scheduled on August 25 and 27, 2009 in order to work out the time period for those people on layoff before their seniority rights are cut off. To that end, we propose to extend the recall rights of all employees on layoff from the current 60 days to 5 months from date of layoff under our new recall procedure.

In a letter dated August 20, 2009, from Kepler to Tom Lennon and Mathias (R. Exh. 45), Kepler indicated, in relevant part:

The workers at General Die Casters, Inc. represented by Teamsters Local 24 will discuss the issue of returning to the bargaining table at the regularly scheduled a meeting, which will take place at this Sunday, August 23. Until a decision is reached by the Teamsters working at GDC, the negotiations will remain suspended due to the legalities of your hired union-buster. Should the workers at GDC desire to return to the bargaining table, it will be with a recommendation from Teamster officials that such a return be accompanied by a Federal mediator, who can then personally witness the illegal behavior of your hired union-buster.

The Teamsters will notify you on Monday, August 24, of the decision undertaken by the workers at GDC.

On August 21, 2009, Kepler sent another letter (R. Exh. 47) to Tom Lennon and Mathias indicating that if the employees voted to lift a temporary suspension of negotiations at the meeting scheduled for August 23 the Federal mediator was available on September 2 and September 8. Kepler further indicated, "There will be no further negotiations without the presence of the Federal mediator. . . ."

On August 23, 2009, Kepler sent another letter (GC Exh. 136) to Tom Lennon and Mathias stating in relevant part:

The General Die Casters workers, who attended the Sunday Teamsters meeting in the largest show of support yet to date, have voted to allow their negotiating committee to return to negotiations for the purpose of negotiating the recall of workers, who were laid off at GDC.

You have been notified of the September 2 and 8 dates of availability of the Federal mediator. Please notify the Teamsters if those dates are acceptable, and if not the Federal mediator will have to give us other days.

The Respondent agreed to the rescheduled dates proffered by the Union. At the bargaining session held September 2, 2009, the parties did not meet face to face. Mason represented the Respondent while both Bornstein and Kepler were present for the Union. The Federal mediator who was present acted as an intermediary between the parties. At this meeting, the Union submitted a proposal to the Respondent regarding recall rights. In article 18 of its proposed contract entitled "Seniority," the Union adhered to its position that recall rights after a layoff

would be for 1 year. The Union also made a proposal on recall in article 19 of its proposed contract which stated:

Recall shall be by seniority to any available work which the employee is qualified (bold in the original) to perform. Once notice of recall is given, the employee must report for work within seven (7) working days after **written notification is received**, (bold in the original) except where the employee is unable to return to work because of sickness or injury.

The Respondent's counterproposal (GC Exh. 113) limited recall rights to 6 months and reiterated its position that recall rights should be by departmental seniority.

On September 4, 2009, Mason sent a letter (GC Exh. 136) by facsimile to Bornstein stating, in part, the following:

I am writing this letter to you to explain the necessity of reaching an agreement at our next meeting with respect to the recall of employees who are laid off.

Because you unlawfully canceled negotiations on August 25 and August 27, 2009, you have pushed back further than we had hoped the time period in order to reach an agreement for the return of workers to be recalled from layoff. This delay in negotiations caused by the Union is now reaching the breaking point and I want to explain why.

The simple fact is that the Peninsula facility has fallen behind in production as we receive new orders. We have worked overtime on weekends in order to try to keep up with the increase in orders, but we cannot. The plain and simple fact is we need to either hire new workers or recall some workers who were laid off.

At this point in time it would appear we are only two issues apart for an agreement to bring people back to work. One issue is under the recall procedure where we modified our unilaterally implemented procedure in response to your new proposal on September 2, 2009. That issue now before us is do we follow the layoff procedure and recall by department seniority or, as the Union proposed, by plant wide seniority. The second issue is the length of time a person can be on layoff before he loses his seniority rights. The current handbook is 60 days. (Emphasis in the original.) Under the current handbook, everyone laid off to date have lost their rights to be recalled. In response to your proposal for one year, we initially raised the time period in my letter to you on August 19, 2009, to 5 months. Your proposal on September 2, 2009, did not move on that issue. I again countered on September 2, 2009, with a 6 month proposal which is 3 times the current time period set forth in the handbook. I am hopeful that you will realize the importance of an agreement on this issue and would like an agreement to our proposal on September 8, 2009.

At the September 8 meeting Mason was Respondent's chief negotiator. Bornstein was not present and Kepler was the Union's chief negotiator. A Federal mediator was also present at this meeting. At the meeting, Kepler presented a new proposal to the Respondent regarding recall from layoff. (GC Exh. 125.) In relevant part, this proposal provided:

On an interim basis, and until such time as a final agreement

is reached, the Teamsters will agree to the recall of laid off employees on the following basis:

- A. The Employer will recall laid-off employees by department seniority.
- B. The Employer will recall laid-off employee so that no laid-off employee will lose their acquired seniority that they had prior to the layoff.

Kepler explained to Mason that the Union's proposal for an interim agreement on recall rights was designed to get the employees laid off earlier in the year, back to work without loss of seniority. He indicated that 1-year recall rights with the Union's position on the final contract and that the International Union would not approve anything less than that. Mason indicated that the Respondent had made a proposal for recall rights lasting for 6 months on an interim basis until there is a final contract. He indicated that the Union could propose any changes but that the Respondent was seeking a definite time for recall rights. Kepler indicated that the Union would agree to recall rights that extended until January 1, 2010, on an interim basis (Tr. 1479; R. Exh. 195). When Mason asked what would happen on January 1, 2010, Kepler responded that the parties could talk about another interim agreement. Mason replied that the Union's proposal was unacceptable as the Respondent wanted a date certain for an interim period and did not want to have to negotiate another interim procedure. Mason indicated he was making a last and final offer extending recall rights for up to 7 months. Mason asked that the union representatives let him know their decision on that issue.

Approximately 20 minutes later the mediator brought a handwritten note (GC Exh. 114) that Kepler had drafted to Mason. This note provided in relevant part:

The Interim agreement will be discussed at the next session, which will allow the Teamsters president to be in attendance.

The Union will entertain the 7 month proposal last offered by the employer, but with some modifications. We are prepared to discuss this issue until an interim agreement is reached.

When Mason told the mediator that he wished to meet personally with the Union in order to determine the next bargaining dates, the mediator reported that the union committee had left.

On September 10, Mason faxed a letter to Bornstein (GC Exh. 82) setting forth his views of the bargaining that occurred regarding recall of employees from layoff from August 5, 2009, to the present. Importantly, his letter noted, "On August 5, 2009, after attempts to negotiate a recall procedure failed to Company unilaterally implemented a recall procedure." His letter concluded by indicating:

As a result of this inability on our part to reach an agreement, I am declaring another impasse and we will unilaterally implement our last and final verbal offer on both the recall language we changed on September 2, 2009, as well as seniority rights for recall. I have attached for you a copy of the changes we gave your committee verbally and I have also highlighted that part of the document that we have implemented.

Attached to Mason's letter was a document reflecting, in part,

the following:

An employee shall cease to have seniority rights and be on any seniority list if:

- D. He does not return to work or notify the Company within seven (7) days after he is called to work or after written notification is mailed.
- E. He has been continuously laid off for work for a seven (7) month period.

Recall:

Agree to the union proposed language dated September 2, 2009, language on "Recall" in Article 19 except add the words "by departmental layoff" after the word seniority in the first sentence. Add the words "verbal notification or within seven (7) working days after written notification is mailed" after the word after in the Union's proposal. Also add the following sentence, "If the Company notifies the employee verbally, it will also send a written letter to the last known address the employer has on file."

On or about September 10, 2009, the Respondent recalled approximately 10 employees using the procedure that it had unilaterally implemented on September 10, 2009.

As a general rule, when parties are engaged in negotiations for a collective-bargaining agreement, an employer has an obligation to refrain from implementing a change on a particular issue, absent an overall impasse on an agreement as a whole, however, there are two exceptions to the general rule: when union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), and *RBE Electronics of S. D.*, 326 NLRB 80, 81 (1995).

In the instant case, the Respondent does not claim that there was an overall impasse on bargaining but rather contends that it reached a lawful impasse on September 10, 2009, regarding the issue of the procedures to be used in recalling employees. The Respondent asserts that a lawful impasse was reached on this issue because time was of the essence regarding this issue and the Union "was stalling trying to avoid an agreement." (R. Br., p. 106.) In effect, the Respondent contends that its conduct falls within the exceptions to the general rule noted above.

In contending that the Respondent implemented its recall procedure on September 10, 2011, without reaching a valid impasse, the Acting General Counsel argues that a lawful impasse could not be reached on this issue in the presence of unremedied unfair labor practices. *Titan Tire Corp.*, 333 NLRB 1156 (2001). The Acting General Counsel asserts, inter alia, that the unilateral wage freeze and change in employee evaluations, the failure to bargain over the March 2009 layoffs at the Twinsburg facility and the 1-day shutdowns at Peninsula and Twinsburg, and the unilateral recall of the three diecast employees on June 10, 2009, impacted the bargaining process to the degree that a lawful impasse was not established on September 10, 2009. (Acting GC Br., p. 71.)

In *EAD Motors Eastern Air Devices*, 346 NLRB 1060, 1063 (2006), the Board discussed the factors in determining whether a valid impasse has occurred as follows:

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf. sub. nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board to find an impasse is a situation where “good-faith negotiations have exhausted the prospects of concluding an agreement.” See also *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974), as follows:

A genuine impasse in negotiations is synonymous with the deadlock: the parties have discussed the subject or subject in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [Fn. Omitted.]

The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), enf. in part 86 F.3d 227 (D.C. Cir. 1996). The question whether a valid impasse exists is a “matter of judgment” and among the relevant factors are “[t]he bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the stated negotiations.” *Taft Broadcasting Co.*, supra at 478

The Board has also recognized that the commission of serious, unremedied unfair labor practices may preclude a finding of a valid impasse. *Titan Tire Co.*, supra; *Royal Motor Sales*, 329 NLRB 760, 762 (1999); *Great Southern Fire Protection*, 325 NLRB 9 (1997); and *Noel Corp.*, 315 NLRB 905, 911 (1994), enf. denied on other grounds 82 F.3d 1113 (D.C. Cir. 1996).

Applying these principles to the instant case, I find that the Respondent implemented its September 10, 2009 proposal regarding the recall of employees without reaching a valid impasse and consequently violated Section 8(a)(5) and (1) of the Act.

As discussed in detail above, by the time the Respondent unilaterally implemented its recall procedure on September 10, 2009, the Respondent had committed a series of unfair labor practices involving its obligation to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. In this connection, the Respondent had unlawfully imposed a wage freeze in February 2009 and delayed the granting of wage increases following an evaluation; it unilaterally laid off employees at the Twinsburg facility in March 2009 and unilaterally shut down both Twinsburg implements of facilities for 1 day in March and April 2009; it unilaterally imposed the work rules involving effacement and destruction of company property and the assignment of diecast operators in April 2009; and unilaterally recalled three employees in 2009. It is within this context that I must consider the Respondent’s argument that it reached a valid impasse regarding the recall of employees in September 2009.

With respect to the substance of bargaining on this issue, at the meeting held on May 26, 2009, the Union, which sought the recall of employees by seniority on a plantwide basis, modified its position on the length of recall rights after layoff, by reducing it from 5 years to 3. The Respondent adhered to its position

that recall rights should be for 60 days. At the June 5 meeting, the Union again reduced its proposal for recall rights from 3 years to 2. Although Bornstein invited Mason to do so, Mason did not make a counteroffer at that meeting.

At the meeting held on June 10, even though the parties had been discussing the issue of recall, Mason announced that the Respondent was already in the process of unilaterally recalling three employees. On June 11, when Bornstein asked Mason if he had a response to the Union’s June 5 proposal regarding reducing recall rights to 2 years, Mason indicated that he did not yet have a response to that aspect of the recall issue. Mason did make a new written proposal on recall procedure which provided, consistent with its prior position, that employees would be recalled by departmental seniority.

Although the parties met on June 16, June 18, July 13, July 20, and July 22, there was no discussion of the issue of recall from layoff at these meetings. On July 23, the Union made a new proposal regarding recall rights, limiting them to 1 year but indicating that employees should be recalled by seniority when there is available work which the employee is able to perform. Mason’s counterproposal adhered to the Respondent’s position that recall should be on the basis of departmental seniority and maintained the position that recall rights should be limited to 60 days.

At the meeting held on August 5, Mason stated that the Union had been given the Respondent’s proposal on recall and asked if the Union had a proposal to present. Bornstein replied that the Union did not have anything prepared at that time. Mason then precipitously declared an impasse on the issue of recall and indicated that the Respondent would implement its proposal of July 23.

After Mason’s declaration of impasse regarding the issue of recall rights, the Union canceled the scheduled August 18 meeting. On August 18, Kepler wrote a letter to the Respondent indicating that the Union was suspending negotiations for what it viewed as the Respondent’s unlawful conduct during bargaining. On August 19, Mason faxed a letter to Bornstein indicating, for the first time, that the Respondent was expecting to recall employees in September. Mason also proposed extending the recall rights of the laid-off employees from 60 days to 5 months.

On August 23, Kepler advised the Respondent that the Union would return to negotiations but not until September 2 and September 8 when the Federal mediator the Union had asked to participate in the meetings was available.

At the meeting held on September 2, the Union adhered to its position that recall rights should be for 1 year and further proposed that recall should be by seniority to work for which an employee is qualified to perform. The Respondent maintained its position that recall should be by departmental seniority for available work and increased the time period for recall rights to 6 months.

On September 4, Mason wrote to Bornstein and indicated the necessity of reaching an agreement at the meeting scheduled for September 8. Mason’s letter stated that production had fallen behind at Peninsula facility and that the Respondent needed to either recall laid-off employees or hire new employees. Mason’s letter correctly identified the disputed issues as whether

the recall procedure would be by plantwide or departmental seniority and the length of time before recall rights expired. Mason acknowledged his earlier declaration of impasse by indicating “we modified our unilaterally implemented procedure in response to your new proposal on September 2.”

At the September 8 meeting, Kepler was the Union’s chief negotiator as Bornstein was unable to attend. The Union proposed that on an interim basis the Respondent could recall employees by departmental seniority. This was obviously a major concession on the Union’s part. The proposal also indicated that the Respondent would recall laid-off employees so that no laid-off employees would lose the seniority they had prior to the layoff. Kepler indicated that the interim proposal was designed to get the employees who were laid off earlier in 2009 back to work without the loss of seniority. He also indicated, however, that the Union’s position on the final contract would be for 1 year recall rights and that the International Union would not approve anything less than that. When Mason indicated that the Respondent was seeking a definite time period for recall rights in an interim agreement, Kepler indicated that the Union would agree to recall rights that extended until January 1, 2010, on an interim basis. In effect this would extend recall rights for 9 months as the initial layoffs had occurred in late March 2009. When Mason asked what would happen at that point, Kepler replied they could discuss another interim agreement. Mason indicated this was unacceptable as the Respondent did not want to have to negotiate another interim procedure. Mason indicated that he was making a last and final offer to extend recall rights to 7 months. He also asked Kepler to apprise him of the Union’s response. The union representatives left the meeting without meeting personally with Mason, but the mediator delivered a note from Kepler indicating that the Union would entertain the Respondent’s 7 month proposal “with some modification” at the next session, when Bornstein would be in attendance.

On September 10, 2009, Mason advised Bornstein by letter that he was “declaring another impasse and we will implement our last and final verbal offer on both the recall language we changed on September 2, as well as seniority rights for recall.” Mason attached a document reflecting that recall from layoff would be by departmental seniority and that recall rights would expire after a 7-month period. On or about September 15, 2009, the Respondent implemented its proposal by recalling approximately 15 employees to its third shift at Peninsula facility using these criteria.

As noted above, the Respondent has the burden of establishing that a valid impasse existed regarding the issue of recall rights for laid-off employees. On the basis of this record, I find that the Respondent has not sustained that burden. In making this finding, I considered the background of unremedied unfair labor practices in which the Respondent’s declaration of impasse must be viewed. In *Titan Tire Corp.*, supra at 1158, the Board noted that:

[A]n employer that has committed unfair labor practices cannot “parlay an impasse resulting from its own misconduct into a license to make unilateral changes.” *Wayne’s Dairy*, 223 NLRB 260, 265 (1976). However, not all unremedied unfair

labor practices committed during negotiations will give rise to the conclusion that impasse was declared improperly, thus precluding unilateral changes. *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).

In *Titan Tire*, the Board found that only “serious unremedied unfair labor practices” that affect the bargaining will preclude a finding of a lawful impasse. Id. The Board further noted that in *Alwin*, 192 F.3d at 139, the court identified:

[A]t least 2 ways in which an unremedied ULP can contribute to the parties’ inability to reach an agreement. First, a ULP can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties expectations about what they can achieve, making it harder for the parties to come to an agreement.

In *Titan Tire*, the Board applied the standard the court utilized in *Alwin* and found that the conduct of the employer moved the baseline from which the parties were bargaining and thus contributed to the parties’ inability to reach an agreement. Accordingly, the Board found that the employer violated Section 8(a)(5) and (1) of the Act.

In applying the *Alwin* principles adopted by the Board in *Titan Tire*, I find that the Respondent’s conduct from February 2009 to September 2009, which involved a series of unilateral changes that were violative of Section 8(a)(5) and (1) of the Act, substantially increased friction at the bargaining table. In addition to the series of unfair labor practices committed by the Respondent, another critical event that caused the Union to cancel the August 18 bargaining session and temporarily suspend negotiations was the Respondent’s August 5 premature declaration of impasse on the issue of recalling employees from layoff. By that date, the parties had discussed the issue of recall at meetings held on May 26, June 5, June 10, June 11, and July 23. Of course during this period, the Respondent announced on June 10, that it was unilaterally recalling three employees. On June 5 when the Union reduced its position on recall rights from 3 years to 2 and invited Mason to make a counteroffer, Mason did not do so. On June 11, when Bornstein asked Mason again to respond to the Union’s reduction of the length of recall rights, Mason indicated he did not have a response to that proposal. On July 23, the Union maintained its position on plantwide seniority but again reduced its recall right period to 1 year. Mason finally responded to the Union’s position on recall rights by indicating that departmental seniority should be used and that recall rights should remain at 60 days. On August 5, Mason asked if the Union had a proposal on recall, Bornstein indicated he did not have anything prepared at that time. Mason then declared an impasse and indicated the Respondent would implement its July 23 proposal.

During the period from May 26 to July 23 the Union had substantially moved from its position on the length of recall rights from 5 years to 1. Although asked to do so on several occasions, Mason did not make a proposal on length of recall from May 26 to July 23. On August 5, the first occasion that the Union had indicated that it was not prepared to respond to Mason’s reaffirmation of the Respondent’s position on recall, Mason seized on that to declare an impasse. In my view, the

bargaining from May 23 to August 5 indicates the Union's flexibility on a significant issue and suggests that further bargaining might have produced additional concessions. Rather than explore this possibility, however, the Respondent rushed to declare an impasse and indicated it would implement its July 23 proposal. It is certainly not the case that on August 5, the Respondent established that a valid impasse existed on the issue of recall, applying the standard that "good-faith negotiations have exhausted the prospects of concluding an agreement." *EAD Motors*, supra at 1003. On the basis of the foregoing, I find that the first part of the standard applied by the Board in *Titan Tire* was met in that the Respondent's unlawful conduct clearly increased friction at the bargaining table.

In making this finding I have considered the conduct of Kepler in using profane and demeaning language toward Mason during this period of negotiations. I have also considered the Union's conduct in suspending negotiations and refusing to meet without the presence of a Federal mediator. I do not, in any way, condone these actions, none of which assisted in furthering the bargaining process. On the other hand, I do not find that the Union's conduct, which was responsive to the Respondent's unfair labor practices, sufficient to privilege the Respondent to unilaterally implement its proposal on recall rights.

Applying the second prong of the *Alwin* test, I find that the Respondent's prior unfair labor practices, particularly the unilateral recall of employees, moved the baseline on the issue of recall rights and made it more difficult for the parties to reach an agreement. In this regard the Respondent announced its unilateral action regarding the recall of employees on June 10, in the midst of bargaining a procedure for recall rights. This demonstration of the Respondent's propensity to take unilateral action on the very issue that the parties were bargaining about, made it harder for the parties to come to an agreement on this issue. This situation was greatly exacerbated by the Respondent's premature declaration of impasse on recall rights that was made on August 5.

Under the circumstances of this case, I cannot agree with the Respondent's argument that it was privileged to unilaterally implement its September 8, 2009 final offer regarding the recall of employees on September 10, 2009, because time was of the essence and the Union was attempting to avoid reaching an agreement. In *RBE Electronics*, supra, the Board indicated that when an employer is confronted with an economic exigency compelling prompt action, it can satisfy its bargaining by providing adequate notice and an opportunity to bargain over the issue. While the bargaining must be in good faith, it need not be protracted. Under these conditions the employer can act unilaterally regarding the subject if the parties reach a valid impasse. *Id.* at 82.

In the instant case, the Respondent first identified a need to recall employees in Mason's August 19 letter to Bornstein wherein he indicated that the Respondent expected to need additional employees "in September." I find that the Respondent did have a need to recall employees in September and was therefore justified in seeking expedited bargaining over this issue. The problem for the Respondent, however, is that it cannot establish that a valid impasse existed prior to its imple-

mentation of its final offer on September 10. As I have noted above, the Union's suspension of bargaining from August 5, 2009, through September 2, 2009, was because of the Respondent's series of unfair labor practices and Mason's August 5 premature declaration of impasse and threat to implement a unilateral procedure to recall employees. While the Union's conduct in refusing to meet during the remainder of August, obviously made reaching an agreement somewhat more difficult, as I have noted earlier, this action was precipitated by the Respondent's unlawful conduct.

When bargaining did resume on September 2, the Union maintained its position on a 1-year period for recall rights and further proposed that recall should be by seniority for work which the employee is qualified to perform. While maintaining its position that laid-off employees should be recalled based on their department seniority, the Respondent increased the time period for recall to 6 months. On September 4, when Mason wrote to Bornstein stressing the importance of reaching an agreement on September 8, he specifically indicated that the Respondent modified its unilaterally implemented procedure on recall in response to the Union's September 2 proposal. At the September 8 meeting, the Union made a significant concession and indicated a willingness to further consider the Respondent's offer of recall rights for 7 months at the next meeting. Rather than further exploring the Union's position, on September 10 Mason again declared an impasse regarding this issue. Although I recognize that Respondent had a legitimate reason to try and reach an agreement quickly after notifying the Union on August 19 of its need to recall employees, declaring impasse after only 2 meetings, particularly after there had been significant movement by the Union at the September 8 meeting, does not support the finding of a valid impasse. The evidence establishes that the Union was willing to negotiate a further compromise on the issue of length of recall. Mason's frustration with the Union's pace in agreeing to what the Respondent was seeking is not the equivalent of a valid impasse, nor does it indicate that a negotiated agreement was not possible. In making this determination, I give significant weight to the fact that on August 5, Mason precipitously declared an impasse on the same issue without any valid basis for doing so.

I also find that the Union did not engage in tactics designed to delay bargaining which would privilege the Respondent's unilateral implementation of its proposal on recall rights. As I have discussed earlier, the Union's conduct in suspending negotiations while it did not advance the bargaining process, cannot be viewed in a vacuum, as that conduct was in response to the Respondent's unlawful conduct in negotiations. This is not a situation akin to those in which a union may attempt to delay bargaining when an employer is seeking concessions from existing terms and conditions of employment. In the instant situation, the Union's interest was to obtain the longest period of time for recall rights that was possible. The only way to attain this with certainty was through continued bargaining that would result in a negotiated agreement. The Union indicated a willingness to do so on September 8, but the Respondent, for the second time, prematurely declared an impasse. Accordingly, on the basis of the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its pro-

posal on recalling employees on September 10, 2009, without reaching a valid impasse.

Soliciting Employees Regarding Shift Preference
Before the Recall of Employees

Paragraph 14 of the complaint alleges that the Respondent, by Chuck Long, at its Peninsula facility, bypassed the Union and dealt directly with employees concerning a change to their work hours.

Before the third shift was recalled to work at the Peninsula facility, Chuck Long, the die cast superintendent, testified he approached employees on the first and second shifts and asked them about their shift preference when the third shift returned. Long indicated that he tried to speak to each employee and that the information obtained from the employees was later taken into account when Respondent made decisions about what shift employees would work. (Tr. 1918.) Several employees confirmed they were asked by Long if they wanted to move to a different shift. Long explained that the reason for soliciting the views of employees regarding shift preference was that some employees had been moved to different shifts when the layoffs occurred in March 2009.

Stewart and Kepler testified, without contradiction, that the Union was not notified in advance that the Respondent wished to directly discuss with employees changing shifts. Kepler testified, again without contradiction, that after he found out about Long's discussions with employees, he informed the Respondent at a bargaining session that it had an obligation to bargain over shift changes.

The Board has held that a change in the number of shifts is a mandatory subject of bargaining *Georgia-Pacific Corp.*, 275 NLRB 67 (1985). The Board has also held that seeking to determine employee sentiment regarding a proposed change in employees' schedules prior to giving notice to the union and opportunity to bargain is direct dealing in violation of Section 8(a)(5) and (1) of the Act. *Harris-Teeter Super Markets*, 310 NLRB 216 (1993). In the context of the instant case, where the Respondent was recalling employees to the newly instituted third shift pursuant to the unilateral implementation of a recall procedure, I find that the Respondent's solicitation of the views of employees as to their shift preference was direct dealing in violation of Section 8(a)(5) and (1) of the Act.

The Recall of Employees Pursuant to the Unilaterally
Implemented Recall Procedure

Paragraph 12(P) of the complaint alleges that on or about September 15, 2009, the Respondent resumed third-shift operations at its Peninsula facility and recalled approximately 10 employees.

The Respondent began to recall employees to its resumed third-shift operation on or about September 17, 2009, pursuant to the procedure it unilaterally implemented on September 10, 2009. Fourteen employees were recalled in September and one was recalled in October (GC Exh. 58). Since I have found that the recall procedure was unilaterally implemented without the parties reaching a valid impasse, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by recalling employees pursuant to this procedure.

Employing Temporary Employees While Unit Employees
were on Layoff

Paragraph 12(Q) of the complaint alleges that since on or about September 15, 2009, the Respondent has secured the services of workers from employment agencies to work in bargaining unit positions at its Peninsula facility at a time when bargaining unit employees remain laid off from employment.

The Respondent's primary defense to this allegation is that it had a practice of using temporary employees before the Union was selected as the bargaining representative and it merely continued that practice.

After the recall of employees in September 2009, approximately 20 unit employees remained on layoff. After employees reported to Kepler that the Respondent was using temporary employees, he sent a letter dated October 15, 2009, to the Respondent, which, inter alia, objected to the use of temporary employees. The Respondent's records reflect that beginning on October 12, 2009, it used a limited number of temporary employees to perform unit work (GC Exhs. 50 and 51). The record indicates that one of these employees, Terry Carpenter, worked as a quality assurance employee on a consistent basis for a number of months afterwards.

At a bargaining meeting held on November 18, 2009, while Bornstein was the Union's chief negotiator, Kepler was also present. As usual, Mason was the Respondent's chief negotiator. At this meeting, Mason indicated that he wanted to talk about temporary employees and added that he wanted to talk about this issue 6 weeks ago but the Union canceled and "snuck out" of meetings. Bornstein, using derogatory language, objected to Mason's claim.¹⁵ Mason indicated that at times, the Respondent needed someone to work for 1 day or on a short-term basis. Bornstein indicated that the Union's position was that if temporary employees were needed, the Respondent should contact laid-off employees by seniority that were qualified to do the work. When Bornstein asked how long the Respondent had been using temporary employees, Mason responded by saying, "on and off." Bornstein then indicated that the Union's position was that for short-term work, the Respondent should contact the most senior qualified employee and if the Respondent could not reach the employee or if the employee declined the offer, the Respondent could then use temporary employees. Mason said he would take that under advisement (R. Exh. 197).

The Board has held that a decision to employ temporary employees when unit employees are laid off is a mandatory subject of bargaining, even though the employer had occasionally

¹⁵ The parties had a meeting on September 22, 2009, where the issue of temporary employees was not discussed (R. Exh. 198). The parties held another meeting on October 26, 2009. The Respondent's bargaining notes (R. Exh. 196) indicate that Kepler was the Union's principal spokesman at this meeting. According to the bargaining notes, the Union refused to meet face-to-face and insisted that all proposals be made through the mediator. The bargaining notes further indicate that the Respondent asked the mediator to inform the Union that the Respondent wished to discuss temporary employees. Mason objected to the Union's refusal to meet face-to-face and after an argument ensued between the parties on this issue, the meeting broke down and the parties left without discussing any substantive issues.

used temporary employees in the past. *Storall Mfg. Co.*, 275 NLRB 220, 239 (1985); see also *St. George Warehouse, Inc.*, 341 NLRB 904, 924 (2004).

The evidence establishes that at least since October 12, 2009, the Respondent had been utilizing a limited number of temporary employees. Even if I were to find that the Union was given notice at the meeting scheduled for October 26, 2009, such notice would have been after the fact and as such a *fait accompli*. The only evidence of clear and unequivocal notice given to the Union occurred at the bargaining meeting held on November 18, 2009. It is clear that there was no notice given to the Union prior to the Respondent's reinstatement of the use of temporary employees on October 12, 2009. Accordingly, by unilaterally employing temporary employees while unit employees were laid off, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Temporary Recall of Harry Lane

Paragraph 12(H) of the complaint alleges that on or about September 17, 2009, the Respondent denied Harry Lane the opportunity to be temporarily recalled to work as a result of a unilateral change described above in paragraph 12(G) (the March 16, 2009 change in the work hours of the day-shift unit janitor).

On September 17, 2009, Hicks sent a letter to laid-off employee Harry Lane (GC Exh. 33). The letter offered Lane temporary employment as a janitor from 8 a.m. to 4 p.m. It further advised him that he had 7 days from the date of the letter to return to work and report to his supervisor. Finally, it indicated "Failure to do so results in General Die accepting your permanent resignation, and forfeiture of your seniority."

Lane testified that the day after he received the letter, he spoke to Hicks who informed him that he would be working as replacement janitor for another employee, Casteel, who would be off from work for approximately 30 days. Hicks also indicated the hours for the position were from 8 a.m. to 4 p.m. The following Monday, Lane reported to the Peninsula facility at 7 a.m., but did not clock in. He spoke to Long who informed Lane that he had spoken to Brian Lennon and that the hours for the position were from 8 a.m. to 4 p.m. Lane replied that he could not do that because he did not drive and getting to work at that time would be difficult.¹⁶ Long replied that he could come in at 7 a.m. and wait until 8 a.m. to start work. Lane did not accept the offer of temporary employment because of his transportation difficulties in getting to work at 8 a.m.

The Acting General Counsel contends that but for the unilateral change in Casteel's hours, Lane would have been able to replace him. The Acting General Counsel contends that the unilateral change in Casteel's work hours had the effect of denying Lane the opportunity for temporary recall. Since I have found that the Respondent did not violate the Act as alleged with respect to the change in Casteel's hours, I do not find that the Respondent unlawfully denied Harry Lane the

¹⁶ At the hearing Lane explained that when he worked from 11 p.m. to 7 a.m. before his layoff in March 2009, he paid coworkers to drive him to work. He explained that if he could have started at 7 a.m., he could have made similar arrangements.

opportunity to be recalled as a day-shift janitor.¹⁷

B. The 8(a)(3) and (1) Allegations Regarding the Work Assignments of Jerome Ivery; the Suspension and Discharge of Willie Smith; the Withholding of Wages from Emil Stewart; and the Respondent's Alleged Refusal to Consider Hiring Employees on Layoff

The Work Assignments of Jerome Ivery

Paragraphs 7(A) and (B) of the complaint allege that on or about March 21, 2008, the Respondent assigned more onerous job duties to employee Jerome Ivery in violation of Section 8(a)(3) and (1) of the Act.

The Acting General Counsel specifically contends that after Ivery's support for the Union became known to the Respondent, it began to assign to him the setup of large dies on a more frequent basis. The Respondent contends that such assignments were always a part of Ivery's duties and that his assignments were not changed because of his support for the Union.

Ivery has been employed by the Respondent at its Peninsula facility for 31 years. For approximately 3 years in the 1990s Ivery was a supervisor but was demoted back to a unit position. At the time of the hearing he worked as a cast trim developer. His duties included writing programs for the robotics on various machines and performing setup work on die cast machines.

The Respondent makes aluminum die castings. To make those castings it uses a die cast die, which is a large steel mould. Setup work involves the placement of a die into a die cast machine. After the die is properly set up in the machine, the production process can begin and molten aluminum is placed into the die in order to make the particular casting.

As noted above, sometime in February 2008, Ivery admitted to Long and Brian Lennon that he was a supporter of the Union. Ivery testified that soon after the union election held on March 8, 2008, he noticed a change in some of his work assignments. Ivery indicated that normally smaller dies are set up by one employee but that larger dies are typically set up by two employees. Ivery estimated that some of the larger dies weigh approximately 11,000 pounds. The record establishes that on the larger jobs the old die is removed from a die cast machine by chaining it to an electrical hoist and carefully lifting it out. The new die would then be placed into the die cast machine using the same equipment. When two employees are assigned to install a large die, one can be on each side of the machine to ensure it is installed properly. Ivery explained that when an employee sets up large die by himself, the employee has to go from one side of the machine to the other in order to make sure the die is being inserted properly. Ivery testified that the die is chained to the hoist with eye bolts and at times the die will tilt or even fall because of the failure of an eye bolt.

¹⁷ Since the record is unclear as to the basis for the Respondent's statement in the September 17, 2009 letter it sent to Lane that his failure to accept this offer would result in the forfeiture of his seniority, I will leave to the compliance phase the determination of whether Lane may have had a right to be recalled to another position without a loss of his seniority, by virtue of the Respondent's unlawful implementation of its recall procedure on September 10, 2009.

Ivery testified that beginning in March 2008, and continuing until approximately November 2009, he was more frequently assigned to set up larger dies by himself. Ivery spoke to his immediate supervisor, Mike Jordan, about these assignments. According to Ivery, Jordan told Ivery that he would see if he could assign another setup man to work with him, but never did make such an assignment. Ivery also spoke to Plant Superintendent Chuck Long, who told Ivery he would look into it but that Ivery had to follow the instructions of his immediate supervisor. When Ivery still received assignments to set up larger dies by himself he spoke to Plant Manager Brian Lennon, who responded in the same fashion as Long. Ivery also testified, however, that at times during this period, Jordan did assign a second setup man to work with him. Ivery further indicated that at times, the second set up man would be given another assignment and be taken off the machine before the setup was complete. Ivery indicated, "And every time this went on, you know, I make sure—I make sure somebody knew in case something happened, where I was at, and what I'm doing" (Tr. 210).

Ivery testified in approximately November 2009 he told Long that he no longer supported the Union. According to Ivery, after this another employee was assigned to work with him when he was assigned to set up larger dies. Mark Albright, who also works at Peninsula facility, testified that after the union election in March 2008 until near the end of 2009, he observed Ivery doing setup work by himself on a number of occasions.

Brian Lennon testified that Ivery spoke to him in March 2008 about doing setup work alone. Lane testified that he told Ivery that, with his long experience, Ivery knew what jobs required two employees and what could be safely performed by one person. Lennon told Ivery that if he needed help, he should ask his supervisor and that he would get help. Lennon explained that very large dies, those that are more than 10,000 pounds, often require two employees to maneuver it into a machine. He indicated that most setups can be done by one employee, although it takes longer than if two employees perform the setup. If a setup is needed to be done quickly, two employees would be assigned to it. On the first shift at the Peninsula facility, in addition to Ivery, employees Marshal Hamrick and Mark Cooper also perform setup work. Lennon testified, without contradiction, that these employees also perform setup work by themselves as a regular part of their duties. Lennon explained that the first-line supervisor make a determination as to whether to assign one or two employees to set up a machine, depending upon the size of the die and other production requirements. Lennon denied that Ivery was given certain work assignments because of his support for the Union.

Long has been the Respondent's diecast superintendent at Peninsula plant for approximately 5 years. Long testified that he has worked with Ivery for approximately 12 years and that he is a very skilled and capable employee. He recalls Ivery speaking to him in approximately 2008 about concerns Ivery had in performing some setup work by himself. Long indicated that over the years, Ivery has varied in his opinion about doing setup work alone. He testified that the other setup men on the first shift also perform setup work alone. Finally, Long indicated that Ivery's support for the Union had no role in work

assignments that were given to him. He said setup assignments are based on efficiency and safety.

The Acting General Counsel presented a prima facie case under *Wright Line*, supra, regarding the assignment of more onerous duties to Ivery. In this regard, early in the Union's campaign, Ivery became a supporter of the Union. According to his credited testimony on this point, he indicated his support for the Union to both Long and Brian Lennon in February 2008. As I noted above, shortly after learning of the Union's campaign in January 2008, the Respondent's top officials, Mathias and Tom Lennon held meetings with employees in which they expressed their opposition to the Union. As I will discuss later, there is additional evidence of the Respondent's animus toward the Union. Thus, the burden shifts to the Respondent to establish it made work assignments to Ivery without regard to his support for the Union. I find that the Respondent has met that burden and I shall therefore dismiss this complaint allegation.

The Acting General Counsel's complaint allegation is based on an alleged increase in frequency of sole assignments to set up larger dies, as the record establishes that, prior to the advent of the Union, Ivery was at times assigned to perform setup assignments by himself, including those involving larger dies. Thus, the allegation turns on the degree of frequency of such assignments. This is not a matter of Ivery having been assigned more difficult work that he had never performed before. Ivery admitted that during the period, question, March 2008 to November 2009, his immediate supervisor, Jordan, did at times assign another employee to work with him in setting up larger dies. Ivery claimed, however, that on occasion the second employee would be reassigned before the completion of the job. Given the frequently changing production demands of the Respondent's operation, this does not appear to be an unusual circumstance. Importantly, there is no objective documentary evidence to establish that Ivery was assigned to work on the larger dies by himself with greater frequency during this period. I find Ivery's testimony to be unclear with respect to the alleged increase of frequency of solo assignments on the larger dies. Albright's testimony was in the nature of anecdotal observations while he was performing his own work and has limited value. The Respondent's undisputed evidence establishes that two other employees also perform setup work by themselves as a regular part of their duties both before and after the advent of the Union. Under all the circumstances, I am satisfied that the solo assignments given to Ivery from March 2009 to November 2009 were done in the normal course of the Respondent's business and were not discriminatorily motivated. Thus, I find that the Respondent has rebutted the prima facie case of the Acting General Counsel. Accordingly, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act with respect to the work assignments made to Ivery and I therefore dismiss this allegation of the complaint.

The Suspension and Discharge of Willie Smith

Smith was hired by the Respondent in December 1980. He was employed as a supervisor from 2000 to 2004. From 2003 to 2008 he worked at the Twinsburg plant but was then transferred to the Peninsula facility. At the time of his October 17,

2009 discharge he was working at the Peninsula facility on the first shift as a sander and blaster. This job entailed standing the rough edges from cast parts.

In March 2008, while still working at the Twinsburg facility, Smith became an active union supporter. From that time forward he attended all of the union meetings. He also spoke to other employees in the plant about the benefits of a union. After the election in March 2008, he wore a Teamsters hat and badge to work. Smith appeared in the photograph of union supporters that was taken in May 2008 and appeared in July/August 2008 edition of Teamsters magazine.

On October 9, 2009, Smith was informed by the Respondent that he was suspended for threatening Daniel Owens and on October 16, 2009, was informed he was discharged for the same offense. (GC Exh. 35.)

Smith testified that he had known Owens for 29 years and had a friendly relationship with him. Smith testified that he spoke to Owens daily while they both worked at Peninsula facility. According to Smith, on October 8 at about 2 p.m. he was speaking to employee Robert Jay Quarterman when Owens approached Smith and spoke to him. Smith testified he could not remember specifically what was said in the conversation between him and Owens, but it was “just regular shop talk.” Smith indicated that his typical conversations with Owens involved cars, sports, or topics in the news. Smith recalled this conversation lasted about 5 minutes. Smith recalled Quarterman speaking during his conversation but could not recall what he said. Smith specifically denied he threatened Owens on that day or any other day.

Owens had distinctly different recollection of the October 8, 2009 conversation that he had with Smith. According to Owens, he spoke to Smith in the sanding area as Owens was going to the restroom. Owens also did not recall the specifics of the initial conversation they had before he entered the restroom. On the way out of the restroom, Smith told Owens that he had heard something that he did not like. When Owens asked him what he had heard, Smith told Owens that he had heard that Owens was passing around a petition to decertify the Union. Owens responded that he did not know what Smith was talking about, but that Owens had signed such petition. As Owens started to walk away, Smith said, “That’s not healthy.” Owens responded by asking, “What?” Smith replied, “That’s not healthy. Me and my union brothers will mess you up.” (Tr. 1738.) Owens replied that Smith knew his position on the Union and stated, “[W]hy wouldn’t I sign a petition”. Owens then walked away from the conversation. Owens did not recall anyone else being present during the conversation.

Owens testified that he reported Smith’s statements to Brian Lennon. Owens was asked to write down the report of the incident. Owens’ statement (R. Exh. 145), which he testified was written the day the incident occurred, indicates:

On 10/08/09 at approximately 1:50 PM I was walking to the restroom, Willie Smith called me over to his work area (He was working in the sanding area sanding some Dana parts and putting them in a steel basket). At this time the conversation was normal chit chat and I then continued to the restroom. After a few minutes, I came out the restroom heading back to

my office. This time Smith called me over to the area and said to me “I HEARD SOMETHING I DID NOT LIKE.” I said “what”. He said “I HEARD THAT YOU (Dan Owens) WAS ASKING PEOPLE TO SIGN A PETITION TO GET RID OF THE UNION”. I said “I don’t know what you are talking about but I did sign a petition” Willie then said to me “THAT’S NOT HEALTHY”. I asked him “What did you say? He said “THAT’S NOT HEALTHY, ME AND MY UNION BROTHERS WILL MESS YOU UP”. I said to him, “You know my stance, why wouldn’t I sign it” and left for my office. (Capitalization in the original)

Owens testified that after he reported the incident to Lennon, Owens told Smith that “someone heard him threaten me and that Mr. Lennon knew about it” (Tr. 1739). When asked at the hearing why he did not tell Smith that he was the individual who had informed Lennon, Owens replied “[B]ecause he just threatened me, and I didn’t want him coming after me for—turning him in.” (Tr. 1739.)

According to Owens, the next morning he again spoke to Smith near the supply cage. Smith approached Owens and said, “[A]nything that was said between us stays between us. And that he did not have to remind me of the last man that he killed that did not.”¹⁸ Owens testified that he also reported this conversation to Tom Lennon. He was again instructed to write down what occurred during the incident. This statement (R. Exh. 144) states:

Friday morning 10/9/09, In the cage at approx. 7:00 am Willie Smith came up to the cage. He said with reference to the incident on 10/8/09, and I don’t remember exactly all the words but remember this statement. He said “anything that was discussed between the two of us is to be kept between the two of us”. I should tell anyone else to keep their nose out of it. Then he went on and stated about the last man he killed that didn’t, which is something he always says. I felt it added something to the statements on the previous day or else why did he feel he had to say anything. He rarely comes to the cage in the morning.

Smith testified that while he and Smith were friendly at work, he took Smith’s statements seriously, based primarily on his demeanor, and thus reported Smith’s statements to management.

Current employee Quarterman also testified regarding the conversation between Owens and Smith on October 8. As a stockman and towmotor driver, Quarterman delivered needed materials and equipment to employees. Quarterman testified that he was in the sanding area of the plant and asked Smith if he needed anything when Owens approached them. Quarterman, who wears a hearing aid, did not hear any of the comments made by Smith in his conversation with Owens. He only heard Owens make a reference to a “big fat cow” and that Smith and Owens were laughing.

As part of the Respondent’s investigation into this incident,

¹⁸ On cross-examination, Smith denied that on October 9, 2009, he told Owens that the conversation that they had the previous day was just between the two of them. He also denied that he ever made a statement to Owens about a man that he killed.

Hicks interviewed Smith. Hicks' notes of the interview reflect that it took place on the afternoon of October 9 (GC Exh. 140). During this interview, Smith admitted that he spoke to Owens in the sanding area the previous day but denied making any threatening statements to Owens. According to Hicks' uncontroverted testimony, when he asked Smith about approaching Owens at the supply cage on October 9 and making threatening statements toward Owens, Smith denied being at the supply cage. At the end of this meeting, Hicks gave Smith a corrective action form (R. Exh. 96) and a memo (R. Exh. 143) informing Smith he was indefinitely suspended pending further investigation of the statements he made to Owens.

Pursuant to Smith's request, on the following Monday, October 12, Hicks also interviewed Quarterman regarding the conversation between Owings and Smith that occurred on October 8. At the trial, Quarterman testified that he told Hicks at this interview that during the time he was present during the conversation he saw Owens and Smith laughing and that he heard Owens make a comment about a "big fat cow." Hicks testified that at this interview, Quarterman claimed that he did not hear anything and did not know anything about the incident. Hicks' notes of his interview with Quarterman reveal that Quarterman made mention of the comment noted above that he overheard Owens make. I find that Hicks' notes of the interview are consistent with Quarterman's testimony, and are more reliable than Hicks' testimony regarding his interview with Quarterman. (GC Exh. 141.) Even though I credit Quarterman's testimony, I find that he had little to add to the investigation of this matter since he heard only one brief statement that was made by Owens and did not hear what Smith said.

Hicks testified that as part of his investigation he also reviewed videotapes, without sound, from the Respondent's surveillance cameras which, in his view, supported Owens' version of the conversations he had with Smith on October 8 and 9.¹⁹

The record contains additional notes made by Hicks on October 13 (GC Exh. 142). These notes reflect:

My concerns regarding terminating Willie:

Dan and Willie have a history of verbally teasing each other, how might this play out.

What course of action must I take if we get an outburst from union supporters alleging that Company supporters/managers are harassing them.

Hicks testified that after he completed his investigation he concluded that Smith had made threatening remarks to Owens. Hicks indicated that he then presented the information he had gathered to Mathias, Mason, Brian Lennon, and Thomas Len-

non. Hicks testified that it was a collective decision to terminate Smith. The reason Hicks advanced for the termination was that the punishment for threats to do bodily harm at the Respondent's plant was immediate termination as the foundry was a dangerous place to work. Finally, he testified that Smith would have been terminated regardless of his support for the Union. Although, as discussed below, Mathias was called as a witness to discuss another incident relevant to Smith's discharge, he was not questioned by the Respondent's counsel about the reasons for Smith's discharge. Brian Lennon also did not testify regarding Smith's discharge.

I find that the evidence is sufficient to establish that the Respondent had a reasonable belief that Smith made the statements attributed to him by Owens. With respect to the conversations between Smith and Owens on October 8 and 9, I credit Owens. Owens testimony regarding statements made to him by Smith was detailed and plausible. In addition, it was consistent with contemporaneous signed statements that Owens had prepared shortly after the conversations occurred. I find it hard to believe that Owens made such detailed recitations of these events out of thin air, particularly regarding someone he had been friendly with for 30 years. Smith's denial of the statements attributed to him was terse and implausible under all the circumstances. His demeanor was not impressive while testifying regarding these conversations. Quarterman was present for only part of the conversation on October 8 and was able to hear only a portion of what Owens said and nothing that Smith said. I find his testimony to be of extremely limited value in resolving the conflicting testimony.

The Acting General Counsel contends that an incident involving former employee Dennis Ormsby and another employee, Michael D. Williams established disparate treatment regarding the discharge of Smith. Ormsby testified that in 2007, while he was employed at the Respondent's Twinsburg facility, Michael D. Williams would play computer games on the computer. On one occasion, Williams forgot to take the game off of the computer and another employee reported to Ormsby that "they couldn't get the computer off, and they looked on the camera and seen Mike had been playing the games." (Tr. 480.) When Ormsby saw Williams he told Williams about what had been reported to Ormsby. Later Williams spoke to Ormsby at his machine and told him that if he "lost his job, that he knew where people lived. He didn't care about them, their wives or their kids." (Tr. 481.) Another employee, who was being trained for supervision, overheard Williams' statement to Ormsby and told Ormsby that he would speak to the plant manager, Keith Kish, about it. Ormsby testified that a couple of days later, Ormsby met with Kish, Mathias, and Williams in Mathias' office. Ormsby told Mathias about the threat that Williams had made to him about what would happen if he lost his job over the incident involving the computer. Ormsby also complained about arguments that Williams would have with his girlfriend over the phone while he was at work. After hearing Ormsby's complaints about Williams, Mathias told Ormsby that Williams was "young and learning" and that Ormsby and Williams needed to shake hands and get along (Tr. 486). Ormsby testified that Williams was not disciplined for the threat that he had made to him.

¹⁹ The parties entered into the following stipulation regarding the tapes that Hicks viewed: Two videotapes were provided to counsel for the Acting General Counsel, one shows two separate conversations. One conversation was with Dan Owens, Jay Quarterman, and Willie Smith. The second conversation on the same tape shows a conversation between Dan Owens and Willie Smith alone. The second tape is one of the next day in the cage area where Dan Owens works and shows Willie Smith talking to Dan Owens. The tapes were in fast-forward mode and there was no audio recording.

Mathias also testified regarding the incident between Ormsby and Williams. Mathias testified that the Twinsburg plant manager, Keith Kish, had reported to him that Ormsby and Williams were “trading accusations at each other” (Tr. 2097). Mathias testified that he told Kish, “[W]ell, you’re the plant manager. And—and then he said, well, I—I think you just need to hear what they have to say, and blah, blah, blah.” (Tr. 2098.) Mathias, however, agreed to meet with Kish, Ormsby, and Williams. Mathias testified that at the meeting Ormsby told him Williams was “playing games at the computer at the CNC machine” and that he was on the phone all the time arguing with his wife or girlfriend (Tr. 2099). According to Mathias, at some point during the meeting Ormsby said, “[Y]ou know, I don’t like something about threats.” According to Mathias, when he asked Ormsby who was threatening him, he never identified Williams. Mathias testified he then asked Ormsby, “I said, well, have you been directly threatened or not? He said no. And then he goes on and on.” (Tr. 2099.) Mathias testified that at the end of the meeting he asked if Ormsby and Williams could work together and they both replied they could. Mathias then stated they could shake and to get back to work. According to Mathias, at the end of the meeting he stated, “[I]f anyone is making direct threats on anybody, they will be terminated.” (Tr. 2100.)

I credit the testimony of Ormsby regarding this matter. His demeanor while testifying was forthright and sincere. He testified consistently regarding both direct and cross-examination. On cross-examination, he was confronted with a pretrial statement that he had given to the Respondent’s counsel that indicated “the statement that Williams made was a general statement not directed only to me.” On cross-examination, Ormsby denied that the statement made by Williams was not directed only to him. I find Ormsby’s pretrial statement to be of little consequence. Even if Williams’ statement was not directed only to Ormsby, the threat was made in a conversation between Williams and Ormsby alone and Ormsby could reasonably construe the statement of Williams as a threat against him and his family. I do not find any material inconsistency between Ormsby’s trial testimony and his affidavit.

On the other hand, Mathias testified in a manner that convinces me that he was attempting to bolster the Respondent’s defense. In the first instance, he seemed dismissive of the fact that as the Respondent’s CEO, he would have to be involved in the matter that, in his view, could and should have been handled by a plant manager. Thus, his testimony regarding this matter is somewhat generalized. In addition, it does not strike me as plausible that having gone as far as having a meeting with the Respondent’s CEO regarding his dispute with Williams, Ormsby would deny that any threatening statements were made to him. Accordingly, I credit the testimony of Ormsby to the extent it conflicts with that of Mathias.

I find that the Acting General Counsel has established a prima facie case regarding the discharge of Smith under *Wright Line*, supra. Smith was an active and open supporter of the Union and the Respondent’s investigation of the conversations between Collins and Smith establishes that the Respondent was aware of his support for the Union before he was discharged. Accordingly, the burden then shifts to the Respondent to estab-

lish that it would have discharged Smith even if he had not been a supporter of the Union. I find that the Respondent has not met its burden to establish that it would have discharged Smith for statements he made to Owens, absent his union activity. In this connection, there was no evidence that the Respondent has discharged or even disciplined another employee for making threats of physical harm against another. I find that the credible evidence establishes that prior to the advent of the Union, Ormsby brought to the attention of Mathias, a threat of harm that was made not only to him but included his spouse and children. While the threat made by Williams was not as explicit as that made by Smith, it was broader in that it included Ormsby’s spouse and children. In addition, the Respondent discharged Smith even though he had a friendly relationship with Owens for 30 years and the Respondent’s own investigation revealed that they were known to have a teasing relationship with each other. In order to meet the *Wright Line* burden, an employer must establish that it has consistently and evenly applied its disciplinary rules. *Septix Waste, Inc.*, 346 NLRB 494, 495–496 (2006). Rather than a consistent application of its disciplinary rules, I find that the Respondent has applied them in a disparate fashion to Smith as opposed to the manner in which they were applied to Williams. Since the Respondent has not established that it consistently applied its disciplinary rules regarding a threatening statement made by one employee to another, I find it has not rebutted the Acting General Counsel’s prima facie case with respect to the discharge of Smith. Accordingly, I find that the Respondent’s discharge of Smith violates Section 8(a)(3) and (1) of the Act.

The Withholding of Wages from Emil Stewart

Steward works at the Respondent’s Peninsula plant as a trimmer. Steward was active in the Union’s organizing campaign and regularly served on the Union’s negotiating committee since its inception in October 2008.

In early November 2009, the Respondent had a meeting with two representatives from OSHA to discuss fines that had been levied against it after an inspection. Shortly before the meeting took place, Brian Leonard instructed Stewart to attend the meeting as the Respondent needed a representative from the Union to be present. When Stewart received his paycheck for the payroll period ending November 8, 2009, 45 minutes of pay was deducted from his check (GC Exh. 34). When Stewart asked about the shortage of pay, Brian Lennon told him that the wages were deducted because of the time he spent attending the OSHA meeting. However, Brian Lennon and Owens, who also attended the meeting with OSHA, were paid for the time they spent attending the meeting. At a later bargaining session the Union objected to the Respondent instructing Stewart to attend a meeting and then refusing to pay him for the time he spent attending. The Respondent refused to reconsider, relying on its position that it would not pay employees for performing “union business” on “Company time.” In its brief, the Respondent continues to rely on that position in defending the allegation of the complaint (R. Br., pp. 89–90).

Since Brian Lennon and Owens were paid for attending the meeting, it is clear that Stewart was treated differently by the Respondent because he supported the Union. Under these cir-

cumstances I find it is appropriate to determine whether the Respondent's action in assigning a prounion employee to attend a meeting and failing to pay him for attending, when the other participants were paid, is inherently destructive of Section 7 rights within the meaning of the Supreme Court's decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). In *International Paper Co.*, 319 NLRB 1253, 1267 (1995), the Board indicated that in *Great Dane Trailers*, the Supreme Court expressed the following principles to determine whether conduct that facially discriminates against employees who exercise their Section 7 rights violates the Act:

First, if it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminate conduct on employee rights is "comparatively slight" in antiunion motivation must be proved to sustain the charge if the employee has come forward with evidence of legitimate and substantial business justifications for the conduct. *Great Dane Trailers*, 388 U.S. at 34.

In the instant case, since the adverse effect of the discriminatory conduct, a loss of 45 minutes in pay, is "comparatively slight" it is necessary to determine if the employer was motivated by legitimate business considerations. The Respondent's defense for failing to pay Stewart is based upon the fact that it made it clear to the Union in negotiations that it would not pay employees for conducting union business on "company time." The most salient example is Respondent's refusal to pay employee members of the negotiating committee for time spent at bargaining meetings. There is a critical difference, however, between an employee serving on the bargaining committee and one being assigned to perform a specific task by an employer. The Respondent's employees who served on the bargaining committee chose to do so, they were not compelled to do so by the Respondent. Stewart was given a work assignment to attend a meeting. He did not volunteer. The Union did not seek to have a representative present at the meeting. When the Union was informed, after the fact, of what occurred, it demanded that Stewart be paid for the time he spent at the meeting. I find that the Respondent's position of refusing to pay employees who voluntarily conduct union business during working time, such as engaging in collective-bargaining negotiations, is not a legitimate business justification to refuse to pay Stewart for performing an assigned task. Assigning employees to perform work and not paying them because of the employee's status as a union supporter clearly interferes with Section 7 rights. It sends a clear signal to employees that the exercise of such rights could cost them economically. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to pay Stewart for attending the OSHA meeting.

The Alleged Discriminatory Refusal to Hire Employees on Layoff

Paragraphs 11(A) and (B) of the complaint allege that since about January 1, 2010, the Respondent has used workers at its

Peninsula facility provided by employment agencies while at the same time refusing to consider hiring former bargaining unit employees for those positions, including those that were laid off since the Union was certified in violation of Section 8(a)(3) and (1) of the Act.

The Acting General Counsel's brief limits this 8(a)(3) and (1) allegation to employees on layoff²⁰ who were not considered for hire by the Respondent for the three die cast operator positions that were filled in January 2009. (Acting GC Br., p. 93 fn. 51.) Accordingly I will consider only the complaint allegation as amended in the Acting General Counsel's brief.

The Acting General Counsel correctly asserts that the test used by the Board in determining whether an employer has violated Section 8(a)(3) and (1) of the Act for refusing to hire, or consider for hire, employees is set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), *enfd.* 301 F.2d 83 (3d Cir. 2000). As noted above, under *Wright Line* the General Counsel has the burden of establishing that employees were supporters of the Union and that the employer had knowledge of that support. In *FES*, the Board indicated that in order to establish a discriminatory refusal to hire or consider for hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, supra, also establish the following:

(1) [T]hat the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show at the hearing on the merits, that they did not possess the specific qualifications the positions required or that others (who were hired) had superior qualifications and that it would not have hired them for that reason even in the absence of their union support or activity. *FES*, 331 NLRB at 12 [footnotes omitted].

In January 2009, the Respondent hired three employees as die cast machine operators who had been working as temporary employees. Brian Lennon testified that when the Respondent made the decision to fill those positions, it considered laid off employees, but there were not any die cast operators there that were still on layoff. On February 15, 2010, the Respondent sent letters to all of the remaining laid-off employees advising

²⁰ As amended at the hearing, par. 11 alleges the following laid off employees to be discriminatees: Christopher Long, Maurice Caldwell, Evan Parker, Clarence Marshall, Paul Kucinic, George Guthrie, Rashad Evans, Houston Bass, Melvin Yates, J. W. Watkins, Mike Moody, Arthur Brown, Nora Hammons, Craig Greczek, Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Nathan Holland. (GC Exh. 1 RRRR.)

them of available positions at the Respondent's Peninsula facility. Consistent with its position that the recall rights of laid-off employees expired 7 months after their layoff, the letter was addressed to "Former Employees of General Die Caster."

Applying the principles of *Wright Line* and *FES*, supra, to the three die cast machine operator positions that the Respondent filled at its Peninsula facility in January 2009, I find there is no evidence in this record to establish that the laid-off employees whose names were listed in paragraph 11 of the complaint as amended were supporters of the Union, except for Arthur Brown. I am not willing to adopt the Acting General Counsel's theory that merely because these employees were represented by the Union, the Respondent refused to recall them for a discriminatory motive. With respect to Brown, while he was a known union supporter, there is no evidence that he had experience or training relevant to a position as a die cast operator. Accordingly, I find that the Acting General Counsel has failed to establish a prima facie case of a discriminatory refusal to hire or consider for hire, the employees named in paragraph 11 of the complaint, as amended. Accordingly, I shall dismiss the Section 8(a)(3) and (1) allegations contained in that paragraph.²¹

C. The Refusal to Provide Information Allegations in Violation of Section 8(a)(5) and (1)

Paragraphs 13(A), (E), and (F) of the complaint allege that since April 22, 2009, the Respondent has failed to provide the Union with the following requested information: for those employees laid off from employment, copies of their personnel records relating to discipline, attendance, training, skill levels and work histories; the work history for employees who are displaced due to the layoff and names and titles of any managerial, supervisory, clerical, or others who are affected by layoff from employment that occurred in 2009.

Paragraphs 13(B), (C), (E), and (G) allege that from May 6, 2009, to June 9, 2009, the Respondent delayed in providing the Union with requested information regarding the addresses of all laid-off employees and the letter the Respondent provided to employees at the time of their layoff.

Paragraphs 13(D), (E), and (H) allege that since June 2, 2009, the Respondent has failed to provide the Union with information it requested on May 26, 2009, regarding the names of bargaining unit employees who had received vacation pay and the names of those employees who did not receive vacation pay.

On April 22, 2009, Kepler submitted a written request seeking, inter alia, information regarding laid-off unit employees, set forth above in more detail, and the names and titles of non-bargaining unit employees who are affected by the layoffs that occurred earlier in April 2009 (R. Exh. 9). On May 6, 2009, Kepler sent another letter to the Respondent requesting that it provide a "complete list, including addresses of all laid-off employees, including any managerial employees at both the Twinsburg and Peninsula worksites." The letter also requested

²¹ This finding has no effect on any remedy these employees may be entitled to by virtue of the Respondent's unilateral implementation of its recall procedure in violation of Sec. 8(a)(5) and (1) of the Act.

any correspondence that the Respondent had given to laid-off employees. Finally, the letter also explained that the Union needed "the total number (including non-bargaining unit) of laid-off employees" so that the Union could determine if the Respondent had complied with the requirements of the WARN Act regarding layoffs (R. Exh. 14). On May 26, 2009, Kepler sent another letter to the Respondent in which he repeated his request for some of the information sought in his April 22 and May 6 letters. In addition he made a new request for a list of every laid-off employee who was given vacation pay and a list of those laid-off employees who were not given vacation pay. (GC Exh. 121.)

On June 9, 2009, Mason sent a letter to Bornstein indicating that six individuals who were not members of the bargaining unit had been laid off. The letter also indicated that attached to it was the correspondence that the Respondent had given to all employees at the time of the layoff and a new list of bargaining unit employees and their current addresses. Mason's letter concluded by stating, "We are preparing for you copies of the personnel files of all the employees in the bargaining unit that were laid off. With the production of the personnel files, this should bring us up to date with all the documents and information you have requested. If there are any other documents you have requested or information you have sought that we have not provided, please let me know what it is." (R. Exh. 24.)

On July 9, 2009, Mason sent a letter (R. Exh. 29) to Bornstein which states, in part:

This is a follow-up to my letter to you dated June 9, 2009, with respect to your request for information. In that letter, I stated to you that we were going to copy all the personnel files of the bargaining unit members and provide these to you. We have now copy all these documents and reviewed them and Bate stamped them. Enclosed is a CD disk with all this information on it. There are 5,489 documents on this disk.

Mason's letter further indicated that the Respondent had not provided the specific names of the individuals who had been laid off that were not in the bargaining unit and the personnel files for those individuals because the Respondent did not believe that information was relevant to collective bargaining.²²

Mason testified that in a later negotiation session a union representative stated that the Union needed the names of the nonbargaining unit personnel that were laid off in order to verify the number of such individuals that the Respondent had given them. Mason indicated that after receiving this explanation, the Respondent later gave the Union the names of the nonunit personnel who had been laid off. Mason testified he believed

²² At the hearing Kepler testified that the Union had not received the personnel files of bargaining unit members. I do not credit this testimony. I doubt that Mason's letter would have the specificity of the number of documents included on the CD disk, if such a disk was not in fact submitted. At the hearing Mason also testified regarding the practice of his office in mailing such letters. I find that the evidence is sufficient to establish that the Union did, in fact, receive the information Mason's July 9, 2009 letter indicates was sent to it. I also note that there is no evidence that the Union continued to seek the production of the personnel files after that date.

that this information was contained in the letter to the Union from his then associate, Matt Austin (Tr. 1998–1999).

Kepler denied that the Union had received the names of the nonunit personnel who had been laid off. I find that the Respondent did not, in fact, provide the names of the nonunit personnel who had been laid off to the Union. More than Kepler's denial, I rely on the fact that the record contains no letter from Austin submitting that information to the Union and the Respondent's other submissions regarding requested information were always accompanied by such a letter. Without objective evidence establishing that the names of the nonunit individuals laid off were submitted, I believe Mason's recollection on this point was faulty.

At the hearing, Mason testified that, through inadvertence, the Respondent had not furnished to the Union the information it had requested on May 26, 2009, regarding laid-off employees and their vacation pay.

Mason also testified regarding the reason for the delay between the Union's May 6 request for the names and addresses of all laid-off employees and the letter that the Respondent gave to employees at the time of their layoff, and the June 9 submission of that information. Mason testified that the Respondent had just finished furnishing 1000 pages of documents that were responsive to a substantial portion of the Union's April 22, 2009 request for information. He also indicated that the Respondent had a substantial layoff on May 1, and that this event had consumed a substantial portion of time for the Respondent's managers. He further indicated that the human resources manager was the sole individual responsible for preparing the responses to the Union's request for information. Mason testified that the human resources manager left during this period and that Hicks did not replace her until June 14 (Tr. 2010).

It is clearly established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is necessary and relevant to the union's function as the collective-bargaining representative. The obligation exists not only for the purpose of contract negotiations but also for the purpose of administering a collective-bargaining agreement. Relevancy is determined by broad discovery type standard and is necessary only to establish the probability that the information sought would be useful to the union in carrying out its statutory duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1965). The Board has long held that information concerning unit employees' terms and conditions of employment is deemed to be presumptively relevant to a union's duty to represent the employees. *Pavilion & Forestal Nursing & Rehabilitation*, 346 NLRB 458, 463 (2006); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *Cowles Communication, Inc.*, 172 NLRB 1909 (1968).

A union seeking information from an employer regarding individuals outside of the bargaining unit must demonstrate the relevancy and necessity of such information to its representation of unit employees before an employer is obligated to provide it. *Frito-Lay Inc.*, 333 NLRB 1296 (2001).

It is clear that the information requested by the Union on May 6 regarding the addresses of all unit employees and the

letter of the Respondent given to the employees at the time of the layoffs was presumptively relevant. As noted above, this information was provided to the Union on June 9, but the Acting General Counsel argues that there was delay in providing this information that constitutes a violation of Section 8(a)(5) and (1) of the Act. In support of this position, the Acting General Counsel relies on *Assn. of D. C. Liquor Wholesalers*, 300 NLRB 224, 229 (1990) (delays of 7 and 8 months); *Postal Service*, 308 NLRB 547, 550 (1992) (delay of 7 weeks); *Postal Service*, 308 NLRB 530, 536 (1993) (delay of 2 months).

In determining whether an employer has unlawfully delayed in responding to an information request, the Board has noted that it considers the totality of the circumstances and that there is no per se rule regarding a time period for production. The Board requires that an employer make a reasonable good faith effort to respond to the request as expeditiously as possible. *West Penn Power Co.*, 339 NLRB 585, 587 (2003); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In the instant case, unlike the cases relied on by the Acting General Counsel, the Respondent had a legitimate explanation for the time it took to produce the requested documents. In this regard, the Respondent was in the process of complying with a voluminous request for information that had been made on April 22. The Respondent also points to the fact that the human resources manager was involved in issues associated with the layoff that occurred in early May. In the circumstances of this case, I find that the Respondent's explanation for the 4-week time period it took to comply with the Union's request was reasonable. I find the cases relied on by the Acting General Counsel are distinguishable and I shall therefore dismiss the allegation in paragraphs 13(B), (C), (E), and (G) of the complaint that the Respondent violated Section 8(a)(5) and (1) of the Act by not providing the requested information until June 9, 2009.

With respect to the information requested on April 22, 2009, I find that the Respondent did supply all of the requested information to the Union regarding unit employees on July 9, 2009. Thus the issue is once again whether the Respondent violated Section 8(a)(5) and (1) of the Act by not providing until that date. I find that the Respondent has a reasonable explanation for producing the information on that date. As noted above, the Respondent had complied with other parts of the Union's information request earlier and the information produced on July 9 involved over 5000 pages of documents. Importantly on June 13, Mason had written to the union indicating that the Respondent was in the process of preparing copies of the personnel files of all the employees laid off. There is no evidence that the Union objected to the pace of the production of documents at that point. Under all the circumstances, I find that the Respondent's production of the personnel files on July 9 was based on a good faith effort and I shall therefore dismiss that portion of the complaint.

I find, however, that the Union established that it was relevant and necessary for it to receive the number and names of nonunit individuals laid off by the Respondent in April and May 2009. While the Union received the number of such individuals, I find that it did not receive the names of such individuals. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act in this respect.

With respect to the information sought in the Union's letter of May 26, regarding those employees who received vacation pay and those that did not, I find that this information is presumptively relevant and that the Respondent was obligated to provide it. Given the Respondent's admission that this information was not provided, I find that it violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 13(D), (E), and (H) of the complaint.

D. The Alleged Conduct Undermining Employee Support for the Union

The Allegations Regarding John Norton

The complaint alleges that John Norton is a supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act. Paragraph 15(A) of the complaint alleges that since about April 26, 2010, Respondent, by John Norton, at its Peninsula facility, solicited employees to sign a decertification petition and threatened them with plant closure and/or sale of the plant. The Respondent contends that Norton is neither a supervisor nor agent within the meaning of the Act and that any conduct he engaged in regarding a decertification petition is not attributable to it.

In April 2010, approximately 20 to 25 employees worked on the third shift at the Respondent's Peninsula facility. The hours of this shift were from 11 p.m. to 7 a.m. Approximately 15 employees worked as die-cast operators and trimmers, while the remaining employees worked as setup men, a tow motor operator referred to as a "metal man," maintenance employees and tool room employees. Brian Ohler was the supervisor on the third shift while John Norton was the third-shift leader. The third shift operated 6 nights a week. Ohler does not typically work the Friday/Saturday shift. Norton is always present on the Friday/Saturday shift if Ohler is not and is also present on other nights when Ohler is not working.

One night in late April 2010, on a Sunday/Monday shift, Ohler was not present but Norton was. Third-shift employees have a break at 1 a.m. On this particular night, Norton approached every employee on the third shift and told them that he wanted to have a meeting at the 1 a.m. break in the lunchroom. All of the employees working on the third shift that night attended the meeting. There is no evidence that Norton spoke to any acknowledged supervisor about this meeting before it was held.

Several witnesses testified about this meeting. Current employees Samuel Tomsello and Michael Masl testified on behalf of the Acting General Counsel. Norton, Dennis Lemon, Edward Deckerhoof, Walter Wood, Daniel Petrocini, Dave Wiggins, Frank Kovach, Arthur Diecheck, and Jim Hawley testified on behalf of the Respondent. While some of the facts regarding the meeting are undisputed, there is a conflict in the testimony regarding what Norton said during the meeting. I credit Tomsello and Masl to the extent that their testimony conflicts with that of the Respondent's witnesses. In addition to the fact that Tomsello and Masl are current employees who testified against the interests of their Employer, their testimony regarding what Norton said was detailed and their demeanor reflected no hesitancy regarding what was said. The testimony was also mutually corroborative on critical points. When testifying about this

meeting, Norton's testimony was generalized and lacked detail. The testimony of the other employees called by the Respondent was vague and lacking in detail.

At the beginning of the meeting, Norton used a broom to push a surveillance camera up and said that this was "between them" and he did not want the "Company" looking in. He stated that anybody who did not want to participate in the meeting was free to leave and take their break, but only one employee left. Norton stated that he was holding the meeting to talk about the Union and how things had gotten better in the shop. Norton said that he wanted to keep food on the table and keep his job and that he wanted to make sure that everything stays the same. During the meeting, Norton mentioned that employees may have "seen the stakes outside on the ground of the facility, stating that the shop may be up for sale or sold already." Norton then stated that the machines would be sold and the plant would not stay intact. Other employees at the meeting spoke against the Union, while some employees, including Masl, spoke in favor of the Union. At the end of the meeting Norton told employees that he had a petition for them to sign to get rid of the Union because it was not negotiating or doing the employees any good. Norton placed a petition on the table in front of him, and, except for four or five employees, the employees present at the meeting signed the petition. The meeting lasted between 45 minutes and 1 hour.

The next day, Norton told Long about the meeting that he had held. On April 30, 2010, the Respondent issued a verbal, written warning to Norton for holding the April 26, 2010 meeting. The warning states that Norton overstepped his authority by holding an unauthorized meeting with the third-shift employees, without permission. (R. Exh. 78.) There is no evidence that the Respondent communicated to employees that it disavowed Norton's meeting.

Whether Norton is a Supervisor and/or Agent Within the Meaning of Section 2(11) and (13) of the Act.

The Acting General Counsel's brief contends that Norton is a supervisor within the meaning of Section 2(11) of the Act based on his authority to assign work and responsibly direct employees and that he is a 2(13) agent based upon his apparent and actual authority to act on the Respondent's behalf. The Respondent contends that while Norton is a leadman, he has no supervisory or agency authority and is a member of the bargaining unit.

Section 2(11) of the Act defines "supervisor" as

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This provision is to be read in the disjunctive; thus any of the enumerated powers is sufficient to confer supervisory status, so long as the authority is held in the "interest of the employer" and exercised with the use of "independent judgment." *NLRB v.*

Kentucky River Community Care, 532 U.S. 706, 713 (2001). The burden of proving supervisory status rests on the party asserting it. *Id.* at 711–712.

Norton was hired as a trimmer by the Respondent in 2007. After working as a die cast operator he became a “shift lead” at Peninsula plant in late 2008.²³ The job description for the “shift lead” position (GC Exh. 6) reflects that such an individual:

Plans, coordinates, and assist with their assigned shift operations of the Die Casting plant by ensuring that the quality production of products consistent with established standards by performing the following duties through the Shift Supervisor, Plant Manager and/or Die Cast Superintendent”

The essential duties and responsibilities set forth in the job description include:

Understands Die Casting machine fundamentals and process operations.

Educates and/or trains coworkers with Die Casting, quality and process operations

Communicates w/Shift Supervisor, Plant Manager and Die Cast Superintendent and other operators on the status of the job running

Keeps the machines running efficiently and communicates any operation problems to the Shift Supervisor, Plant Manager and Die Cast Superintendent.

Norton is an hourly paid employee. He punches a timecard, and receives the same benefits as unit employees. He wears the blue uniform that unit employees wear, rather than the light brown uniforms of knowledgeable supervisors. Norton spends a substantial part of his time working with the newer die cast operators on the third shift. He also testified that he facilitates the work of the experienced diecast operators, but there are no specific examples of how he may do that.

The record establishes that Long, Brian Lennon, and the production scheduler determine the order of priority for die cast jobs to be performed on the third shift. At the beginning of the third shift, Ohler consults with the second-shift supervisor regarding the status of production or whether any particular problems exist. Ohler will similarly impart the status of production to the first-shift supervisor at the conclusion of the third shift. When Ohler is not present, Norton performs this task.

The record contains an example of the production schedule that Ohler, or, when he is not present, Norton uses to assign diecast employees to particular machines. (R. Exh. 42.) This particular example is dated December 7, 2010, and was used for the third shift from 11 p.m. on Monday, December 6, 2000, to 7 a.m. Tuesday, December 7, 2010. Ohler was not present the entire week of December 6, 2010, so Norton was the individual who utilized the production schedule in making assignments for that week. He testified, without contradiction, that he

²³ Although “shift leads” are included in the stipulated unit, the ballots of “shift leads” were challenged by the Union at the election, based on their alleged supervisory status. The challenged ballots were not determinative, however, and thus the status of “shift leads” was not resolved at that time.

utilizes the form in the same manner on all occasions when he fills in for Ohler. As noted above, this normally occurs once a week. On the left side of the form is a printed listing of machines in descending order, according to the priority of the work being performed on that machine. This printed portion of the production schedule is prepared as a result of the meeting held by Long, Brian Lennon, and the production scheduler. In the middle of the form is an entry labeled “status.” Norton testified that in this area he writes notes regarding information about particular machines. Under the column entitled “operator” Norton places the names of employees next to a particular machine number. At the hearing, when Norton was asked how he determined which employee would work on a particular machine, he indicated that he was familiar with “which casters run which jobs” he also considers, when making this decision, the fact that experienced employees can perform any of the work and that less experienced employees are not able to do so. He also considers the physical condition of employees since some of the work is more physically demanding than other work. (Tr. 1841, 1854–1856.) Some of the jobs on the production schedule for December 7, 2010, required a trimmer to assist the operator of the die-cast machine. Norton wrote the name of the trimmer on the line of the machine number that he would be working on. On this particular shift, two trimmers were also assigned to work on machine 16. Norton testified the supervisor on the previous shift told him that the operator on machine 16 would need help during the shift because the robot on that machine was not working properly.

When Ohler is present, he will make the assignments of die-cast operators and trimmers to particular machines using the same production form described above. After the list is prepared he writes the names of employees on a large dry erase board which is a larger version of the production sheet. When employees arrive in the production area, they look at the board to know which machines they are assigned to. When Ohler is not present, Norton writes the information on the dry erase board.

When machines break down during a shift and Ohler is not present, Norton will reassign employees to different machines based on his knowledge of the experience and capabilities of the various die-cast operators and trimmers.

There is no evidence that Norton has the authority to require third-shift employees to work overtime or to transfer employees to another shift.

The other employees on the third shift include tool room employees, setup employees, and maintenance employees. These employees perform their work by the order of priority of particular machines as they are listed on the printed portion of the production schedule that, as noted above, is prepared by acknowledged supervisors and the scheduler. Norton has no role in the assignment or direction of the regular work of these employees. I credit Samuel Tomsello’s uncontroverted testimony, however, that if setup employees complete their regular tasks and have no other work to do, when Norton is filling in for Ohler, Norton can assign a setup man to do production work on a machine. There is no evidence, however, regarding how often this occurs.

Ohler testified, without contradiction, that if difficulties arise

on the third shift, Norton can call him, but there are no specific examples of this occurring.

There is no evidence that Norton exercises any supervisory authority within the meaning of Section 2(11) of the Act, other than his role in the assignment and direction of work as set forth above. There is no evidence that he is held accountable, in any way, for an employee's mistakes or has been told by an acknowledged supervisor that he could be held accountable for the errors of others.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006), the Board noted that with regard to the meaning of the term "assign" in Section 2 (11) of the Act:

[W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing) appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g. restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g. restocking toasters before coffee makers) would not be indicative of exercising the authority to "assign."

In *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006), the Board summarized the definitions of "responsibly to direct" and "independent judgment" as they were set forth in its decision in *Oakwood Health Care*, supra, as follows:

The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shopfloor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible,' . . . and carried out with independent judgment." "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take the steps." (Internal citations omitted.)

"[T]o exercise 'independent judgment,' an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or valuation by discerning and comparing data." "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." "On the other hand, the mere exist-

ence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that "[t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or valuation by discerning and comparing data], and the judgment must involve a degree of discretion and arises above the 'routine or clerical.'" (Internal citations omitted.)

In *Alstyle Apparel*, 351 NLRB 1287 (2007), the Board found that a shift leader did not possess the authority to assign work within the meaning of Section 2(11) under circumstances very similar to those present here. In *Alstyle Apparel*, the employer's general manager prepared a preprinted form entitled "Machine Assignment Form" which listed the machines that were to be used on a shift. The shift leader in dispute used the form and his knowledge of employees' capabilities to assign an employee to work on a particular machine. The judge, whose opinion was adopted by the Board, found that the shift leader's machine assignments were analogous to the rotation of different tasks described in *Croft Metals*, supra, and more closely resembled ad hoc instruction rather than a work assignment and thus did not reflect the authority to "assign" as described in *Oakwood Healthcare* and *Croft Metals*, supra.

In determining that Norton's status as a supervisor within the meaning of Section 2(11) of the Act, it is important to note that there is no evidence that Norton exercises any supervisory authority when acknowledged Supervisor Ohler is present on the third shift. The Acting General Counsel's argument rests on whether Norton exercises supervisory authority on the 1 day a week he fills in for Ohler and the authority he exercised during Ohler's absence of the week of December 6, 2010, and other sporadic occasions. With respect to Norton's authority to assign work, there is no evidence that Norton has any role in assigning employees to a certain department or a particular shift. With respect to his authority to assign significant overall tasks, Brian Lennon and Long determine which machines are to be used on the third shift and the relative priority of the work done on each machine. This is done by virtue of the printed production sheets. Norton utilizes the production form and his knowledge of the capability of the employees to determine which employees work on which machine. However, the evidence establishes that certain employees operate a particular machine on a regular basis. In my view, the various die cast machines used on the third shift are discrete components of the overall work assignment of an employee. Directing an employee to perform a discrete task within an overall assignment does not establish the authority to assign work under *Oakwood Healthcare*, supra at 689-690. Accordingly, I find that Norton's assignment of employees to individual machines does not reflect the authority to "assign" employees as that term has been defined in *Oakwood Healthcare*, supra, and utilized in *Croft Metals* and *Alstyle Apparel*, supra. I further find that Norton may, on occasion, direct a setup employee to work on a die cast machine, if all of the setup work is completed, is also merely assigning a discrete task in the production process.

I next must consider whether Norton “responsibly directs” employees through the use of “independent judgment.” As noted above, Norton makes the original assignment of die cast employees and trimmers to a particular machine when Ohler is not present. When machines break down during a shift, Norton will also direct employees to other machines pursuant to the priority established by the production sheet and his knowledge of employee capabilities. Thus, he clearly directs employees in the determination of “what job shall be undertaken next or who shall do it.” *Oakwood Healthcare*, supra at 691. The question then becomes whether such direction is responsible and whether it is carried out with independent judgment. With respect to his direction being responsible, there is no evidence that Norton is held accountable for his actions in directing other employees. In the first instance, there is no evidence that Norton has experienced any material consequence, either positive or negative, as a result of his performance in directing die cast employees.²⁴ There is also no evidence that the Respondent ever informed Norton of any material consequences that might result from his performance in directing die cast employees. The Board has found that the lack of evidence establishing that a lead person is held accountable for his/her direction of other employees precludes a finding of responsible direction. *Alstyle Apparel*, supra; *Golden Crest Healthcare Center, Inc.*, 348 NLRB 727, 730–732 (2006). Accordingly, I find that Norton does not responsibly direct employees within the meaning of Section 2(11) of the Act.²⁵

The Acting General Counsel also asserts that Norton should be found to be a statutory supervisor because, if he is not, the third shift has no statutory supervisor present when Ohler is absent. In this regard, the Board has noted that being the highest ranking employee on site during the shift falls within the secondary indicia of supervisory authority and that where an alleged supervisor is not shown to possess any of the primary indicia of supervisory status under Section 2(11), secondary indicia are insufficient to establish supervisory status. This factor is given even less weight when acknowledged supervisors are available for consultation after hours. *Golden Crest Healthcare Center*, supra at 730 fn. 10, and cases cited there. In the instant case, as noted above, Norton can contact Ohler if the need arises. Accordingly, on the basis of the foregoing, I find that the Acting General Counsel has not established that Norton possesses supervisory authority within the meaning of Section 2(11) of the Act.

The Acting General Counsel also contends that Norton is an agent of the Respondent within the meaning of Section 2(13) of the Act. In the *D & F Industries*, 339 NLRB 618, 619 (2003),

²⁴ I do not find that the verbal written warning given to Norton on April 30, 2010, for conducting a meeting regarding a decertification petition was related to his performance in directing the diecast employees. This warning was for exceeding his authority by conducting such a meeting and not because of a deficiency in the manner in which he directed employees in the performance of their production duties.

²⁵ In view of my finding that Norton does not responsibly direct employees within the meaning of Sec. 2(11), I do not reach the issue of whether he uses independent judgment in his direction. The Board has taken this approach in both *Alstyle Apparel* and *Golden Crest Healthcare Center*, supra.

which is relied on by the Acting General Counsel, the Board reiterated its policy that in determining whether an employee is an agent of an employer, the Board applies common law agency principles. The Board held that:

If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct. “Apparent authority results from manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” [Id. at 619, internal citations omitted.]

The Board also noted that an employer may be responsible for employee’s conduct if the employee is “held out as a conduit for transmitting information [from the employer] to the other employees.” Id. at 619, internal citation omitted.

In *D & F Industries*, the employer, on a daily basis relied on the two employees alleged to be agents to convey information and decisions pertaining to production work to employees. The employees were told repeatedly by an acknowledged supervisor that one of the individuals was their supervisor. The two individuals also administered the employer’s policies regarding overtime and time off for use in emergencies. They also enforced the employer’s rules regarding attendance. In this connection, the two employees informed their supervisor of rules infractions and responded to his inquiries regarding employee work performance. Under these circumstances, the Board found that the two employees acted as agents of the employer in interrogating employees about their union activities and engaging in other conduct violative of Section 8(a)(1) of the Act.

In the instant case, there is no evidence that Norton had any involvement in employee discipline or the enforcement of any of the Respondent’s work rules. While he gives direction to employees as discussed above, he is certainly not held out generally as an individual who transmits information from the employer to the other employees. Under the circumstances present in this case, I do not find that employees would reasonably believe that Norton was speaking and acting for management in his solicitation of employees to sign a decertification petition. I find the evidence insufficient to conclude that he is an agent of the Respondent within the meaning of Section 2(13) of the Act. Accordingly, on the basis of all of the foregoing, I conclude that Norton’s conduct at the meeting of April 27, 2010, cannot be attributed to the Respondent and therefore I shall dismiss this paragraph of the complaint.

The Allegations Regarding Daniel Owens

The complaint alleges that Owens is a supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act. Paragraph 15(B) of the complaint alleges that in April and May 2010, the Respondent, through Owens, at its Peninsula facility, solicited employees to sign a decertification petition and coercively informed employees that the Respondent would be more willing to negotiate with employees over wage increases if they did not have union representation. The Respondent denies that Owens is a supervisor or agent within the meaning of the Act and contends that it is not responsible for his conduct regarding the circulation of a decertification

petition or any statements he made to employees.

In April and May 2010, Owens solicited employees to sign a decertification petition he prepared. Acting General Counsel's witnesses Ivery, Chuck Smith, Dave Smerk, Leonard Redd, Jess Kreinbrook, and Jay Quarterman all testified that Owens approached them to sign the petition. Owens admitted that he solicited employees to sign a decertification petition during this period (Tr. 97, 1748–1749). He contends that he asked employees on both the first and second shifts at the Peninsula facility to sign the petition either before the start of their shift or after they had punched in. However, I credit the testimony of current employees Smith, Kreinbrook, and Quarterman that Owens approached them while they were working and asked them to sign a decertification petition.

Smith testified that Owens first approached him to sign the petition in late April 2010 while Smith was working in the foundry. At that time Smith declined to sign it. About 2 or 3 days later, Smith testified that, after he had punched in, Owens approached him in the supply cage and again asked him to sign the petition. Smith again refused to sign. A day or two later, Owens again asked Smith to sign the petition and on this occasion Smith signed it. On one of these occasions, testified that Owens told him that Mathias would be more willing to negotiate wages with employees if the Union was not there (Tr. 829).²⁶

Whether Owens is a supervisor and/or agent within the meaning of Section 2(11) and (13) of the Act.

The Acting General Counsel contends that Owens is a 2(11) supervisor because he has the authority to discipline and effectively recommend the discipline of employees. As noted above, the Acting General Counsel also contends that Owens is also an agent of the Respondent.

Owens is the Respondent's safety coordinator with responsibility for both the Peninsula and Twinsburg facilities. He has held this position for approximately 15 years, but has worked for the Respondent for over 30 years. As the safety coordinator, Owens performs no production work and shares an office with the production scheduler. Owens punches a timeclock and is hourly paid and receives the same benefits as unit employees. The job description for the safety coordinator dated October 9, 2007, indicates that an essential duty of safety coordinator is to "ensure and enforce safety and health standards." The job description also indicates, however, that there are no supervisory responsibilities in this position (GC Exh. 5).²⁷

Owens regularly conducts safety training for both new and

experienced employees. In 2009, Owens conducted mandatory training sessions for employees on lockout/tag out (safety procedures for working on the die-cast machines) towmotor safety and, use of fire extinguishers. The Respondent's employee handbook advises employees that safety rules are governed by its disciplinary policy (GC Exh. 4, Bates no. 00081).

Current employee Chuck Smith testified that he attended a mandatory meeting on towmotor safety for the entire first shift in the Peninsula facility in 2009. Plant Manager Brian Lennon, Casting Superintendent Long, and first-shift supervisor Mike Jordan attended the meeting but Owens conducted it. During the meeting, Owens told employees that if they were not wearing a seatbelt while operating a towmotor, he would write them up.²⁸

In 2009, Owens conducted a lockout/tag out safety meeting with first-shift employees at Peninsula at which, Brian Lennon, Long, and Jordan were again present. After reviewing the new safety procedures with employees, Owens stated that employees would be disciplined if they failed to follow the safety procedures he outlined. Owens also conducted a lockout/tag meeting for the third-shift employees at Peninsula in 2009. Brian Lennon, Long, and all third-shift employees were present. After reviewing the new procedures, Owens told employees that failure to follow the new procedures would result in discipline including termination, depending upon the severity of the violation.

Owens is also responsible for auditing employee performance and safety procedures and reporting the results to management. Indicative of his responsibility in this area is an email that Owens sent to Brian Lennon and Long on March 5, 2010 (GC Ex. 76). In the email, Owens reported that the lockout audit he performed on March 4, 2010, was satisfactory; in this regard he reported he viewed several actual lockouts and interviewed all the operators regarding safety procedures.

In fulfillment of these important responsibilities regarding safety in both plants, Owens patrols the plans in order to monitor employee safety procedures. In this regard on July 9, 2008, Owens sent the following email to SeAnna Huberty, the human resources administrator, indicating the following:

Jerome Ivery was issued a verbal warning 7/9/08 for PPE Not wearing his safety glasses. He was observed by me at 11:45 AM in the foundry standing at the term cell (#6) talking to Emil Stewart with his safety glasses off, he was informed along with Mike Jordan of this verbal warning.²⁹

The record also contains documents reflecting a written notice of a violation of safety rules and a verbal warning that were

²⁶ On direct examination, Chuck Smith testified that he had a conversation with Chuck Long during the same period and that Long had stated that Mathias would be more willing to negotiate wages if the Union was not present. On cross-examination, however, he corrected himself and recalled that it was Owens who had made this statement. I find that, in this instance, Chuck Smith's testimony on cross-examination is the more reliable recollection. In crediting this testimony, I note that it is uncontroverted as Owens did not testify regarding the statement attributed to him.

²⁷ The position of safety coordinator is included in any unit stipulated to by the parties. However, Owens, ballot was challenged at the election by the Union. Since the challenged ballots were not determinative his status remained unresolved.

²⁸ Owens denied making this statement. I credit Chuck Smith's testimony over that of Owens. Chuck Smith is a current employee who has no motive for testifying untruthfully and his demeanor was forthright when testifying about this matter. As will be further noted, Owens tended to downplay his authority when testifying about his duties as safety coordinator, and I do not find his testimony on this issue to be reliable.

²⁹ Even though the clear language of the email establishes that Owens issued a verbal warning to Ivery, at the hearing Owens denied that he had ever done so and testified it was up to Huberty to take any disciplinary action. (Tr. 100, 102.)

issued to employees Jason Sallaz on August 19, 2008 (GC Exh. 40); Joanne Cutright on July 18, 2008 (GC Exh. 48); and Leonard Redd on August 26, 2009 (GC Exh. 49). On all three documents Owen's signature appears next to the printed word "supervisor" and there are no other signatures on the document other than the employee who received the warning. These documents were submitted to the human resources department and were placed in the employee's personnel file. A verbal warning constitutes the first step of the Respondent's progressive discipline policy as set forth in its employee handbook. (GC Exh. 2, p. 16.) At the hearing, Owens attempted to explain that these documents were not what they appeared to be. In this regard, when questioned with respect to the warning given to Sallaz (GC Exh. 40), he testified generally he fills out the information as to the nature of the violation and gives the document to the employee's supervisor without a recommendation as to what should be done regarding corrective action. When Owens was asked if he knew what the supervisor did with it, Owens testified:

He takes whatever corrective action that it says there. Now on this one, I'm assuming he just told me that he gave him a verbal warning. So I kind of wrote, "yes" and then I wrote that he gave him a verbal warning." [Tr. 107.]

Owens gave a similarly unpersuasive testimony in trying to explain that he did not issue the warnings to Culright and Redd, even though only his signature and not that of any other supervisor appears on the form. I do not credit Owens' implausible explanation regarding how these warnings were filled out and find that they are exactly what they appear to be, a written verbal warning given to the employees by Owens. In making this finding, I note that no other supervisor testified to corroborate Owens' explanation as to how these warnings were filled out.

Chuck Smith credibly testified that in 2009 Owens observed him without his safety helmet on him while he was operating a machine. When Owens asked him where his helmet was, Smith replied that it was in his locker. Owens told him he was "in trouble." Approximately an hour later, Owens handed Smith a written warning for safety violation. Smith testified that no one in management had questioned him in the period between when Owens observed him not wearing his helmet and his receipt of the warning from Owens.³⁰

The mutually corroborative testimony of Ivery and Albright establish that in August 2008, Ivery's safety glasses fell off, hit the floor, and got grease on them. While Ivery was wiping his glasses off, Owens came by the area and observed Ivery holding his safety glasses. Shortly thereafter Supervisor Ohler approached Ivery and informed him that Owens had told him to give Ivery a warning for not wearing his safety glasses. Ivery told Ohler what happened and that Albright was a witness to it. Ohler spoke to Albright, who corroborated that Ivery was merely cleaning the grease from his safety glasses when Owens observed him. Ivery testified that, after speaking to Albright, Ohler said that he had returned the warning to Owens. Accord-

³⁰ I do not credit the cursory denial of this incident by Owens. Objective evidence establishes that he was not a credible witness when testifying regarding his alleged supervisory authority.

ing to Ivery, Ohler told him that he had informed Owens that another witness had confirmed the reason that Ivery had taken off his safety glasses and that if Owens wanted to give Ivery a warning, he would have to do it himself. Later in the day, Brian Lennon approached Ivery and asked him if he was going to sign the warning. Ivery attempted to explain that the glasses had fallen off but that Owens had not asked him what had happened. Lennon indicated he still wanted Ivery to sign the warning, but Ivery refused.³¹

Finally, Ivery testified that in October 2011, employee Jim Pruney, cut a hydraulic line while operating a towmotor, spraying hydraulic oil on Ivery. Afterwards, Owens told Ivery that he had directed engineer Gail Stansbury to issue a warning to Pruney for this accident.

Owens is also responsible for investigating all accidents in both plants in reporting to management regarding the circumstances of the accident and his view as to how and why it occurred. Owens also makes recommendations to Plant Manager Brian Lennon regarding the appropriate action for him to take regarding the accident.³²

An example of Owens' role in the handling of accidents is contained in the Respondent's investigation into an accident involving employee Dennis Ormsby and the discipline that was issued to him as a result of the accident (GC Exh. 9). On March 3, 2009, Ormsby was hit in the ankle by a towmotor. Both Ormsby and his supervisor, John Walter, filled out incident report forms. Consistent with written constructions contained in the supervisors incident report form, both reports were submitted to Owens. On March 4, 2009, Owens completed an "Accident Analysis Report" and submitted it to Brian Lennon (GC Exh. 9, Bates nos. 00188-00191). After a detailed analysis, Owens indicated the following in his report:

- 1) Dennis should not have been in the area
 - a) S.O.P. safety rule states, Do not reach more than 3 hooks to clear parts
 - b) Dennis was walking past 10 hooks to get parts
- 2) Even though backup alarm was functioning, Dennis did not yield and fork lift truck operator did not look before backing

With respect to the part of the report that asks what additional action should be considered, Owens wrote:

1. Violation of Safety Rules-To Dennis Ormsby
2. Violation of safety rules-To Dave Earlwine

On March 4, 2009, Brian Lennon issued a written warning to Ormsby reflecting the following violations:

³¹ I do not credit Ohler's testimony that he gave the warnings to Ivery after Owens reported the incident to him. The testimony of Albright and Ivery has the detail associated with truthful testimony and I find it more reliable than Ohler's version of this event. Owens and Brian Lennon did not testify regarding this incident.

³² I credit Ivery's testimony over Owens' denial of this incident. As I have indicated, I find Owens' testimony to be generally unreliable with regard to his alleged supervisory authority.

a. Not abiding by the Standard Operating Procedures (removing parts from the carousel beyond the safety/work rule “Do Not Reach Beyond 3 Hooks”)

b. Safety Rule # 5(u) Pedestrian traffic shall yield to lift trucks in a dominant lift truck area.

Lennon testified that he relied on Owens’ report in issuing the discipline to Ormsby (Tr. 57–58). I note that the warning issued to Ormsby by Brian Lennon is precisely in accord with the recommendation made by Owens in his report.

I find that the evidence establishes that Owens possesses the authority to issue verbal warnings and to effectively recommend disciplinary warnings and that he exercises such authority through the use of independent judgment. Accordingly, I find that he is a supervisor within the meaning of Section 2(11) of the Act.

The record establishes that the Respondent has a progressive disciplinary system and that verbal warnings are the first step in that process. Owens possesses and exercises the authority to issue verbal warnings regarding safety matters. This is demonstrated by his email to Huberty in July 2008 advising her of the verbal warning he had issued to Ivery. In his email, Owens indicated that Ivery’s supervisor, Mike Jordan, was informed of the warning, thus establishing that Jordan had no role in the decision to issue it. In addition, Owens issued verbal written warnings to employees Sallaz, Cutright, and Redd, without any credible evidence of the involvement of any other supervisor. These documents establish that Owens possesses the authority to issue this discipline by the use of independent judgment. His authority in this regard is further established by Chuck Smith’s testimony that he received a written verbal warning from Owens in July 2009.

Owens’ authority to effectively recommend the issuance of discipline is established by the written recommendations he made regarding the warning Brian Lennon issued to Ormsby. Lennon admitted he relied on Owens’ recommendation in issuing the discipline and there is no evidence that Lennon independently investigated the incident. Owens’ authority to effectively recommend discipline is also shown by the warning that Ivery was issued in August 2008, by Brian Lennon for not having his safety glasses on. According to the credited testimony, Owens recommended a warning be given to Ivery, but after Ohler spoke to Albright about the incident, Ohler returned the warning to Owens. Later that same day, Ivery was issued the warning by Brian Lennon. The only reasonable inference to be drawn is that Owens recommended to Lennon that the discipline be issued and Lennon followed that recommendation.

I find that the authority to issue verbal warnings to employees and to effectively recommend the imposition of discipline establishes the authority of Owens as a supervisor within the meaning of Section 2(11) of the Act. *Progressive Transportation Services*, 340 NLRB 1044 (2003); *Venture Industries*, 327 NLRB 918, 919–920 (1999).

I do not agree with the Respondent’s argument that the “Notice of Safety Rules and/or Procedures” issued by Owens to employees are merely reportorial and do not reflect true supervisory authority. All of the notices of safety violations introduced into evidence reflect that a verbal warning was given to

the employee, as does the email sent by Owens to Huberty regarding the verbal warning Owens issued to Ivery in July 2008. As noted above, there is no credible evidence of any other supervisor being involved in the issuing of these warnings, which are kept in employees’ personnel files and are consulted with respect to the imposition of later discipline. Without question, the effective recommendation to discipline Ormsby, which Owens submitted to Lennon was much more than merely a report of the accident. Under these circumstances I find the cases relied on by the Respondent to be distinguishable. In *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999); *Ten Broeck Commons*, 320 NLRB 806 (1996); and *Passavant Health Center*, 284 NLRB 87 (1987), the purported supervisors’ reports regarding employee conduct were independently reviewed by acknowledged supervisors before discipline was imposed.

In addition to finding that Owens is a supervisor within the meaning of the Act, applying the test utilized by the Board as set forth above in *D & F Industries*, supra, I also find that he is an agent of the Respondent within the meaning of Section 2(13) of the Act. In so finding, I have also considered *NLRB v. Thermon Heat Tracing Services*, 143 F.3d 181 (5th Cir. 1998), enfg. 320 NLRB 1035 (1996). In that case, the court found that the employer’s “safety professional” whose “duty was to assist in promoting, providing and maintain a safe work environment,” was reasonably seen by employees as the employer’s agent, and thus the employer was responsible for the safety professional’s actions. 143 F.3d at 186.

In the instant case, the Respondent relies on Owens as a conduit for transmitting information regarding safety issues to employees. Given the nature of the Respondent’s business, attention to safety matters is of critical importance as serious injuries can occur if proper safety procedures are not followed. The Respondent places great importance on following safe procedures and Owens is a critical part of that program as he coordinates the entire effort. The Respondent’s safety handbook specifically states that Owens acts as the representative of the plant manager for purposes of implementing the Hazard Communication Program, which deals with the manner in which employees should handle hazardous chemicals (GC Exh. 4, p. 19).

Owens often conducts safety training meetings for both experienced and new employees. He has informed employees at the lockout/tagout and towmotor safety meetings that they were subject to discipline for failing to comply with the proper safety procedures. Owens performs no production work and when not in his office, patrols the plant to ensure that employees are adhering to the mandated safety procedures. Owens writes detailed reports regarding plant accidents and will recommend that an employee be disciplined if he determines that an employee did not follow safety procedures in causing the accident. As noted above, Owens is involved in disciplining employees who have violated the mandated safety procedures. Owens has also told employees that he has recommended to supervisors that employees be disciplined for violating safety procedures and causing an accident.

Under the circumstances, I find that employees have a reasonable basis to believe that Owens acts with the apparent au-

thority of the Respondent. I find that Owens is an agent of the Respondent within the meaning of Section 2(13). In sum, I find the Acting General Counsel has carried his burden of establishing that Owens is a supervisor within the meaning of Section 2(11) of the Act. I also find that the evidence is sufficient to establish that Owens is a 2(13) agent of the Respondent. It is well established that a supervisor's solicitation of signatures for a decertification petition violates Section 8(a)(1) of the Act. *Sociedad Espanola De Auxilio Mutuo y Beneficia de P.R.*, 342 NLRB 458, 459 (2004); *Fritz Cos.*, 330 NLRB 1296, 1300 (2000). It is also well established that an employer is responsible for the actions of its agent. *Uniontown Hospital Assn.*, 277 NLRB 1298, 1299 (1985). Accordingly, I find that the Respondent, through Owens, violated Section 8(a)(1) of the Act by soliciting employees to sign a decertification petition.

The Respondent also violated Section 8(a)(1) of the Act by Owens' statement to Smith that Mathias would be more willing to address issues such as wages with employees if the Union no longer represented the employees. *Del Ray Tortilleria, Inc.*, 272 NLRB 1106, 1113 (1984), *enfd.* 787 F.2d 1118 (7th Cir. 1986).

The Alleged Threat Made by Chuck Long

Paragraph 15(C) of the complaint alleges that in April and May 2010, the Respondent, through Chuck Long, at its Peninsula facility, threatened employees with unspecified reprisals, plant closure and/or the sale of the plant if the Union continue to represent the employees.

Chuck Smith testified that in late April 2010 he was working on machine 15 in the afternoon when Long approached him and told him that Mathias was "getting mad" about spending money for his lawyer and that hopefully Long and the employees would not lose their jobs. (Tr. 811-812.) Without specific reference to speaking to Smith, Long generally denied making any statements of job loss to employees. I credit Chuck Smith's detailed testimony over Long's general denial. As noted above, he is a current employee testifying against the interest of his employer and I was impressed with his demeanor while testifying.

Current employee David Smerk testified on behalf of the Acting General Counsel pursuant to a subpoena. Stewart testified that he has been employed by the Respondent for 30 years and works as a tool and die maker at the Peninsula plant. According to Smerk, in late April 2010, he and Chuck Long were walking down an aisle between the production office in the supervisor's office. Long was shaking his head and then said, "[I]t's unbelievable." When Smerk asked him what was going on, Long replied, "[D]on't people realize that Jim Mathias said he close the doors before he let the Union in?" When Smerk asked Long is that what the surveyors stakes were for, Long replied, "[I]t very well could be." (Tr. 118.)

According to Long, Smerk approached him and initiated the conversation. Long testified that Smerk stated that if the Union gets in, Jim Mathias would shut the plant down. Long merely responded that he had no idea what Mathias would do. Long also testified that when Smerk asked him what the surveyors stakes were for, Long replied that he had no idea.

I credit Smerk's testimony over Long regarding this conversation. Smerk as a long-term current employee, has no motive

to be untruthful. He testified in a clear and concise manner regarding this conversation. Long's testimony was somewhat rambling and his demeanor did not impress me when testifying about this incident.

Based on the credited testimony, I find that the Respondent, through Long, threatened employees with the closure of the plant and the loss of jobs in violation of Section 8(a)(1) of the Act. *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 (2003).

The Letters from Mathias

Paragraph 15(D) of the complaint alleges that on or about April 15, 2010, and May 21, 2010, the Respondent through correspondence from James Mathias to employees, at its Peninsula facility, solicited employees to support the decertification effort and informed employees that it supported and encouraged the decertification effort.

On April 15, 2010, Mathias issued a document entitled "Negotiations Update." (GC Exh. 14 B.) This document was posted at both plants and mailed to the homes of unit employees. In this document Mathias expressed the opinion that the Union was not living up to its obligation to negotiate a contract. He indicated that the Union's objective appeared to be an attempt to make the Respondent's "costs so high that continuing in operation is no longer an option. In doing so, the Union hopes that we will capitulate to it as a last resort to keep the doors open. The Union wants us to kneel down before it and give it whatever he wants."

After indicating that the Respondent would not give in to those types of "extortion tactics," Mathias closed the document with the following:

Therefore I say to you, what we have said to the Union, if you want a contract, then the Union is going to have to do something that to date it has failed to do. The Union must actually negotiate for a contract.

To those employees who want the Union to be decertified and who signed the decertification petition, we will continue to support you and encourage your efforts to convince the undecided voters that the employees have given the Union two years to get a contract and it has failed miserably.

Therefore, the only real option left is to throw the Union out.

On May 21, 2010, Mathias issued another "Negotiations Update." Once again this document was posted at both facilities and mailed to the homes of unit employees. In this document Mathias claimed that union supporters were telling employees that the Respondent was going to 12-hour shifts and/or closing the plant. Mathias denied such rumors. The document also set forth the Respondent's proposal regarding the shift hours of work. The document closed by indicating:

Therefore, it is quite clear to us that the Union is running scared about the petition that is circulating and the Union supporters are now trying to spread lies to you in order to generate support that does not exist through fear and lies. You now know how desperate to the Union is getting, when they know they can be so easily proved to be lying to you, and yet, they tell you these lies anyway.

We fully support the decertification of this Union and hope

that in an NLRB election you will all be given a chance to vote the Union out.

Relying on the Board's decision in *Armored Transport, Inc.*, 339 NLRB 374 (2003), the Acting General Counsel contends that the two "Negotiations Update" letters issued by a Mathias solicited and encouraged employees to decertify the Union and thus violate Section 8(a)(1). The Respondent contends that it is entitled to communicate with its employees concerning its position in collective-bargaining negotiations and that the two letters are protected by Section 8(c) of the Act.

In *Armored Transport*, the employer issued several letters disparaging the union and invited the employees to rid themselves of the union. In its decision, the Board noted at 377:

The law is clear that an employer may not solicit its employees to circulate or sign decertification petitions and may not threaten employees in order to secure their support for such petitions. An employer may not provide more than ministerial aid in the preparation or filing of the petition. The decision regarding decertification and the responsibility to prepare and file a decertification petition belongs solely to the employees. "Other than to provide general information about the process on the employees' unsolicited inquiry, an employer has no legitimate role in the activity either to instigate or to facilitate it." *Harding Glass Co.*, 316 NLRB 985, 991 (1995), and cases cited therein.

The Board found that by questioning the union's intentions and inviting its employees to get rid of the union, the employer interfered in the relationship between the employees and their representatives in violation of Section 8(a)(1). In so finding the Board noted that:

Although the letters did not expressly advise the employees to get rid of the Union, such express appeals are not necessary to establish that an employer effectively solicited decertification and thereby violated Section 8(a)(1) of the Act. (Citation omitted.) [Id. at 378.]

In *Process Supply, Inc.*, 300 NLRB 756 (1990), the Board found that an employer violated Section 8(a)(1) by sponsoring and assisting in the circulation of a decertification petition. In its decision the Board noted at 758:

The law is clear that an employer must stay out of any effort to decertify an incumbent union. After all, the employer is duty-bound to bargain in good faith with that union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such petition where the employees would reasonably believe that it is sponsoring or instigating the petition.

In the instant case, Mathias did, in fact, expressly encourage employees to decertify the Union and made it clear that the Respondent was completely and unequivocally supportive of the decertification effort and therefore sponsored it. Applying the principles expressed above, I find that by actively encouraging employees to decertify the Union and thus sponsoring the effort, the Respondent violated Section 8(a)(1) of the Act. In so concluding I find that *United Technologies Corp.*, 269 NLRB

1069 (1984), relied on by the Respondent, to be distinguishable. In that case, the employer issued bulletins to employees criticizing the union's demands and tactics and setting forth its own version of the progress of negotiations. In finding that the employer's bulletins were protected by Section 8(c) the Board expressly noted that there was nothing in the bulletins which indicated an attempt to bargain directly with employees or encouraging them to abandon their representation. The Board further noted that the employer acknowledged the union's rightful role as the employee's representative by urging them to discuss the course of negotiations with union representatives. *United Technologies Corp.*, supra at 1074. In the instant case, the Respondent's letters contained much more than merely the employer's version of what was occurring at bargaining, but rather also included an express appeal to employees to rid themselves of union representation.³³

E. The Alleged Johnnie's Poultry Violations

Paragraphs 16(A through G) the complaint allege that the Respondent, through its attorney, Ronald Mason, and supervisors Douglas Hicks, Chuck Long, and Brian Lennon engaged in a series of actions from September 17–22, 2010, which violated Section 8(a)(1) of the Act. In summary, the Acting General Counsel alleges that the Respondent's conduct did not comply with the Board's policy regarding the interrogation of witnesses as set forth in the seminal case of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), and its progeny. The Respondent contends that its conduct complied with the safeguards of *Johnnie's Poultry*.

In July and August 2010, Jerome Ivery had four or five conversations with Doug Hicks regarding the Union and the ongoing unfair labor practice investigations. According to Hicks, on these occasions Ivery approached him and complained about the Union and the lack of progress in negotiations. Ivery also mentioned that statements in affidavits that he had given to the NLRB Regional Office were false and inaccurate. According to Hicks, Ivery told him that he had come to realize he had not been treated unfairly by the Respondent. Long also testified in the months before September 2010, Ivery told him that he had made false statements in affidavits that he had given to the NLRB (Tr. 1903).

Ivery testified that he did not tell Hicks in these conversations that the affidavits he had given to the NLRB were not true. Ivery indicated that he told Hicks that he felt different about things at that time as compared to when he had given the affidavits and also stated, "[M]aybe I could have handled things differently." Ivery also denied telling Long and he made statements that were not true in his affidavits. Ivery admitted telling Long that he could have handled things differently. When asked about his conversations with Long on cross-examination,

³³ The Acting General Counsel has alleged the conduct in par. 15 of the complaint to violate Sec. 8(a)(5) of the Act, in addition to violating Sec. 8(a)(1). As I have noted above, I have found that the Respondent's conduct in pars. 15(B), (C), and (D) violate Sec. 8(a)(1) of the Act. The cases I have cited in finding those violations make it clear that the Board traditionally views such conduct to violate only Sec. 8(a)(1). Accordingly, I dismiss the complaint allegations that such conduct also violates Sec. 8(a)(5).

Ivery stated:

You know, maybe some of the things that I, you know, that I said, you know, didn't take place as far as you know, as far as being discriminated, when I looked back at, you know when I looked back at it now, to back then. [Tr. 254–255.]

I credit the testimony of Hicks and Long regarding these conversations to the extent that their testimony conflicts with that of Ivery. In reaching this conclusion, I rely on the fact that an audio recording of a meeting held between Brian Lennon, Hicks, Long, and Ivery on September 17, 2010, establishes that Ivery admitted that some of the information contained in his NLRB affidavits was not true (R. Exh. 19, pp. 3–4). In addition, as noted above, on cross-examination Ivery gave rambling testimony that appears to indicate that during his conversations with Long, Ivery admitted that some of his claims of discrimination “didn't take place.”

After speaking with Long and Brian Lennon about what Ivery had said regarding his NLRB affidavits, Hicks asked Ivery to attend a meeting with the three supervisors on September 17, 2010. As noted above, an audio recording of this meeting was made by Hicks.³⁴ According to the transcript of the recording, Hicks began the substantive part of the meeting by telling Ivery:

All right I'll tell you what we asked you in here for. And I'll be straight forward to you about it. It would like to meet with Ron Mason. Um, he's got some questions he would like to ask you. And, um, you can pick the day, if you want it and we will do it during the day—um, aah off-site. We will pay you for the day as if you were here working. Um, and are you willing to do that.

Ivery then indicated that he had received a subpoena and did not even want to talk to Susan Fernandez, the NLRB attorney. Hicks stated that if Ivery agreed to meet with Mason, Ivery did not have to answer certain questions if he chose not to. Hicks also stated that Ivery could end the meeting anytime he wanted to. Ivery expressed concerns about meeting with Mason and making conflicting statements. Specifically Ivery stated:

But what I am saying is what I said on, what I said in the affidavit and what they are going to ask me on the stand, or whatever, I mean. You know cause like I said, some of the stuff like I said, honestly, I mean you know, it wasn't true. You know what I'm saying. Like I said I was kind of—that is going to kind of like put me into a spot as far as perjury or something, isn't it?

Hicks indicated that he could not answer that. Ivery then asked if he could think about their request that he meet with Mason. All three supervisors agreed that Ivery could give some thought to their request. Long stated:

And I think one being important thing to remember I think

³⁴ A copy of this recording was given to counsel for the Acting General Counsel. The Respondent prepared a transcript of the recording and the parties stipulated to the accuracy of the transcript that was introduced into evidence as R. Exh. 19. The tape recording was also introduced into evidence as R. Exh. 20.

what the whole thing is what I said are not going to be forced to answer anything. You know what I mean. As far as if you do meet with him and he has a question if it is something that you want to write it down or think about it or something and answer later or something like that or whatever, you know that kind of thing. I mean, obviously you are not obligated to do any, do anything. I mean it's not that your, you know, this is, this is all voluntary from your end. You know what I'm saying, so, um, one thing you know if he has a question that you're just not comfortable with answering then, like Doug said, you know, you just say hey, you know I don't know if I want to get into that, and you know, whatever, think about it or whatever until a later date or something, you can always do that, so . . . [R. Exh. 19, p. 4.]

Hicks indicated that Ivery could take the weekend to think about it and let him know the following Monday. Ivery replied, “I really don't even want to deal with none of this crap. Man.”

Near the conclusion of the meeting Brian Lennon stated:

It's, it's important, Jerome, we've all been here a long time. We all worked really hard. We have all put a lot of work into this place and made at one of the best diecast shops in the world. You know, and uh we want to keep going in that direction, you know. So we want to we want to make this, want to make this a good place. But, it's important, you know I'm not going to lie to you we obviously certainly want you to do it, but um, you know it's your decision but it's, it's an opportunity for you to definitely make a difference in all this. [R. Exh. 19, p. 6.]

On the following Monday, September 20, 2010, Ivery met with Long in his office. According to Ivery, Ivery asked if he did not want to speak to Mason whether it would be held against him. Ivery testified that Long replied, “[N]o, I wouldn't hold it against you personally, but I don't know—don't know what other people would do, you know.” (Tr. 152.) Ivery then told Long that he would meet with Mason.

Long confirmed that when Ivery spoke to him on September 20, Ivery asked him if it would be held against him if he did not meet with Mason. According to Long, he told Ivery that it would not be held against him.

On this particular point I credit Ivery. Throughout this decision, I have found the testimony of both Ivery and Long to be credible regarding certain incidents and not credible regarding others. On this point, however, I find Ivery's version more believable. The transcript of the September 17 meeting reflects the substantial desire of the participating Respondent supervisors, particularly Lennon, to have Ivery cooperate with their request to meet with Mason. I find it more plausible that Long answered Ivery's question about whether there would be any repercussions if he refused to meet with Mason, in the manner in which Ivery relayed it. In addition, Ivery's demeanor while testifying on this point reflected certainty. Long's demeanor while testifying regarding this issue was not as impressive.

Later in the afternoon on September 20, 2010, Ivery met with Mason, Mason's associate Aaron Tulencik, and Hicks at

the Akron Municipal Airport.³⁵ At the beginning of the meeting, Mason read to Ivery his “*Johnnie’s Poultry’s*” rights. Mason then gave Ivery a document entitled “*Johnnie’s Poultry Assurances*” (R. Exh. 115) which set forth the following:

1. It was communicated to the witness that Mr. Mason and Mr. Tulencik were conducting a fact-finding investigation on the employer’s a behalf and in preparation to defend against the unfair labor practice charge(s) filed against the employer.
2. It was communicated to the witness that the witness did not have to talk to Mr. Mason and Mr. Tulencik if he/she did not want to, and if the witness chose to talk, he/she could refrain from answering any particular question if he/she did not want to answer that question.
3. It was communicated to the witness that answering questions and engaging in dialogue with Mr. Mason and Mr. Tulencik was strictly voluntary.
4. It was communicated to the witness that no reprisal would occur to the witness if he/she chose not to answer any of the questions.
5. It was communicated to the witness that the questioning must occur, and that it is both Mr. Mason’s and Mr. Tulencik’s intent that questioning occurs in a context free from employer hostility to union organizing and that said questioning cannot be coercive in nature.
6. It was communicated to the witness that the questions by Mr. Mason and/or Mr. Tulencik cannot exceed the necessities of the legitimate purpose of the investigation by prying into other union matters, eliciting information concerning an employee’s subjective state of mind, or otherwise interfering with the statutory rights of the employees.

Ivery signed and dated the document after the acknowledgment section indicating that he had read and understood the assurances and had been given an opportunity to discuss them. Before Mason began taking an affidavit from Ivery, Mason told Ivery that this was not the first time that he had taken an affidavit from an employee who had recanted previous testimony and that, in his experience, three things could occur.³⁶ The first possibility would be that counsel for the Acting General Counsel could possibly decide not to call Ivery as a witness. The second was that Ivery may be called as a witness only to introduce the affidavits he had already given and the third was that Ivery may be asked to give another affidavit.

While giving his affidavit, Ivery had some difficulty re-

³⁵ Tulencik, Mason, and Hicks all testified in a mutually corroborative manner regarding this meeting and I credit their testimony to the extent it conflicts with Ivery’s. In particular, I found Tulencik’s testimony to be persuasive. He testified in a concise and straightforward manner and his demeanor was forthright and sincere. On the other hand, Ivery’s testimony regarding this meeting was somewhat disjointed and, while I believe he made a sincere effort to be truthful, I find the recollection of the Respondent’s witnesses to be more reliable.

³⁶ Mason testified that prior to the meeting he had listened to the audio tape of the September 17 meeting and was aware that Ivery was concerned about the truthfulness of some of the statements in his prior NLRB affidavits.

calling dates. Mason told Ivery that he could not ask him for his prior affidavits, but that he asked Ivery to review those affidavits in order to verify dates. Ivery volunteered to give Mason his NLRB affidavits.³⁷

Ivery’s affidavit of September 20, 2010 (R. Exh. 115), covered some circumstances regarding his work assignments after March 2009. The affidavit concludes with the following two paragraphs:

There were many people put in other jobs just to try to help get the work done. In reflection upon all these other people who were doing different assignments, I no longer believe that I was singled out or treated differently than any other employee. I no longer believe that these changes to my work were in any way related to the Union

After Ivery finished his affidavit, he asked Mason what the NLRB could do with the petition that Dan Owens was circulating. Mason told Ivery that it did not matter what the NLRB did with Owens petition because there was already a decertification petition that had been filed with the NLRB. Mason added that the Respondent could not stop employees from circulating a petition. Then Ivery stated, “not me” and laughed. Ivery also mentioned that he had heard a rumor that the Union was going to “pull out” after the trial because support had died. Mason said that the Respondent had heard the same rumor but had no direct knowledge of it. Mason told Ivery that at the last negotiation session, Bornstein had laid some union hats on the table and said employees would no longer wear them and that support was dying.

Mason also told Ivery that because he had given conflicting affidavits, Mason strongly suggested that Ivery retain an attorney to represent him before the NLRB as an attorney would “stand in between” Ivery and the NLRB. Ivery replied that he was sick and tired of all of this and he did not want to speak with anyone, including counsel for the Acting General Counsel.

After Ivery left, Tulencik reviewed the complaint in this proceeding and determined that the dates in Ivery’s affidavit did not match the complaint allegations regarding more onerous work being assigned to him. Hicks called Ivery and then handed the phone to Mason. Mason told Ivery that a review of the complaint revealed that the dates in his affidavits and those in the complaint did not match. Ivery again offered to give Mason his prior NLRB affidavits. Mason asked Ivery to give the NLRB affidavits to Hicks who would then furnish them to Mason.

According to Ivery’s uncontroverted testimony, on September 21, 2011, Hicks asked Ivery if he had brought in his NLRB affidavits. Ivery replied that he was unable to find them. On Wednesday, September 22, 2010, Long advised Ivery that Mason wished to speak to him again. When Ivery asked, “what’s wrong” Long said Mason wanted to verify the dates. Ivery agreed to meet with Mason again. Ivery testified he left work at 2:30 p.m. before the end of his shift at 3 p.m. Long told Ivery that the Respondent would pay him for the rest of the shift.

Ivery met again with Mason on September 22, 2010, at the

³⁷ Ivery’s testimony confirms that he volunteered to produce his prior NLRB affidavits to Mason.

Akron Municipal Airport at approximately 3 p.m. Tulencik and Hicks were present at this meeting but neither of them testified at the hearing regarding what occurred; rather only Ivery and Mason testified regarding this meeting. It is uncontroverted that at the beginning of the meeting, Mason again read Ivery his “*Johnnie’s Poultry* rights” and Ivery again signed a written form that recited those rights. Mason then took another affidavit from Ivery regarding the allegation in the complaint regarding more onerous work duties being assigned Ivery.

Mason testified that while taking the affidavit, he learned from Ivery that Fernandez had spoken to Ivery after the September 20 meeting between Ivery and Mason. According to Mason, Ivery told him that Fernandez asked Ivery whether he had spoken to Mason and Ivery indicated to her that he had spoken to Mason on the phone. Mason further testified that Ivery relayed to him that Fernandez had asked whether Mason had given him his “rights” and Ivery had told her “no.” Mason testified that Ivery told him that when Ivery was asked by Fernandez if he had a conversation with Mason before he was called on the telephone by Hicks, Ivery told Fernandez that he had not.

Ivery testified that while Mason was taking his statement, Mason asked him how he now felt about the unfair labor practice charge regarding his work assignments. Ivery testified that he told Mason that at the time the charge was filed he felt that he was being assigned harder work duties, but that at the present time, he felt that “maybe they was just trying to run the company” (Tr. 178). Ivery testified that Mason had asked him whether he had spoken to Ms. Fernandez since the September 20 meeting between Ivery and Mason, and Ivery indicated that he had. Ivery testified on cross-examination at the hearing that he has spoken to Fernandez about both the in-person meeting between Mason and Ivery on September 20 and the phone conversation that he had with Mason shortly after the meeting.

With regard to the conflict in the testimony between Ivery and Mason regarding the September 22 meeting, I credit Ivery for the most part. His testimony on the major parts of this meeting was consistent on both direct and a vigorous cross-examination.³⁸ Importantly, his testimony is more inherently plausible. As noted above, Mason testified that Ivery relayed to him that Ivery had told Fernandez that Mason had not given him his “*Johnnie’s Poultry* rights” at the September 20 meeting. Ivery struck me as being a reasonably intelligent individual and I simply do not believe that he told Mason that he denied to Fernandez that he had been apprised of those rights, when he had signed a document where those rights were clearly set forth the day before.

In *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), the Board noted that despite the inherent danger of coercion, the Board and the courts have

³⁸ On direct examination, Ivery testified that Mason mentioned the possibility of retaining a lawyer at the September 22 meeting. On cross-examination, however, Ivery indicated this discussion had taken place on September 20. Since his cross-examination testimony is in accordance with that of all three of the Respondent’s witnesses, I find, as indicated above, that this discussion took place at the meeting held September 20.

permitted an employer the privilege of interrogating its employees on matters involving their Section 7 rights. As germane here, this right is limited to the investigation of facts regarding issues raised in the complaint when it is necessary in preparing an employer’s defense. *Id.* at 774–775. In *Johnnie’s Poultry*, the Board established the following specific safeguards to minimize the coercive impact of such employer interrogations:

[T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters or eliciting information concerning an employee’s subjective state of mind, or otherwise interfering with the statutory rights of employees.

In defining the area of permissible inquiry the Board has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent. (Citations omitted.) [*Id.* at 775.]

Applying these principles to the instant case, I find that at the September 17, 2010, meeting held between Hicks, Long, Brian Lennon, and Ivery, the Respondent coercively requested Ivery to meet with Mason regarding Ivery’s upcoming testimony. A review of the transcript of this meeting reveals that the Respondent supervisors did not comply with some of the basic provisions of the Board’s decision in *Johnnie’s Poultry*. At this meeting it was not clearly communicated to Ivery that the purpose of requesting him to meet with Mason was because it was necessary for the preparation of the Respondent’s defense at trial. In addition, the transcript of the meeting does not reflect that Ivery was specifically advised that no reprisals would take place if he refused the request to cooperate. In *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001), the Board noted that it has generally taken a bright-line approach in enforcing the requirement of *Johnnie’s Poultry* that an employee be assured that no reprisals would take place for refusal to cooperate. Finally, since by the time this meeting took place in September 2010, the Respondent had committed a number of violations of Section 8(a)(5), (3), and (1) of the Act as set forth earlier. Thus, the interview with Ivery did not occur in a context free of employer hostility to the Union. The record in this case establishes that the Respondent harbored substantial animosity toward its employees’ exercise of their Section 7 rights. Accordingly, I find that the Respondent’s September 17, 2010 request for Ivery to meet with Mason violated Section 8(a)(1) of the Act as alleged in paragraph 16(A) of the complaint.

As noted above, I have found that Long told Ivery on September 22, 2010, in response to Ivery’s question regarding what would happen if he did not cooperate with the Respondent’s request, that Long would not personally hold it against him, but he did not know what other people would do. It is clear that by the statement, Long implied that he could not be sure that Brian Lennon or Hicks would not hold a refusal to cooperate against Ivery. Accordingly, I find that the Respondent, through Long, violated Section 8(a)(1) of the Act, as alleged in paragraph

16(B) of the complaint, by impliedly threatening Ivery with retaliation if he did not accede to the Respondent's request that he meet with Mason.

Paragraph 16(C) of the complaint alleges that on September 20, 2011, Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee (Ivery) "about his current views of his unfair labor practice charge with the Board compared to his view at the time he filed a charge." It is clear from the portion of Ivery's affidavit quoted above that he was asked about his subjective state of mind about the events in question during the interview. *Johnnies Poultry* specifically precludes questions that elicit information concerning an employee's subjective state of mind. In addition, Mason's interrogation of Ivery also did not occur in the context free from employer hostility to union organization. In *Johnnie's Poultry*, the Board used mandatory language in describing this particular safeguard by stating, "the questioning must occur in the context free from employer hostility to union organization. . . ." Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act in conducting the September 20, 2011 interrogation of Ivery.

Paragraph 16(D) of the complaint alleges that the Respondent, through Mason, at the September 20, 2010 meeting sought to create a sense of futility about the Union and the employee's testimony before the Board by falsely stating that the Union's president told Mason that the Union intended to disclaim its interests in the unit once the hearing was over.

According to the credited testimony, at the September 20, 2010 meeting Ivery mentioned that he had heard a rumor that the Union was going to "pull out" after the trial because support had died. Mason replied that the Respondent had heard the same rumor but had no direct knowledge of it. Mason added that at the last negotiating meeting, Bornstein had laid some union hats on the table and said that employees were no longer wearing them and that support was dying.

I find that Mason's statements did not violate Section 8(a)(1) of the Act and I shall dismiss this allegation of the complaint. Mason's statement is neither a threat nor promise. At most, it is a misrepresentation of a statement made by Bornstein and misrepresentations do not violate the Act.

Paragraphs 16(E) and (F) of the complaint allege that the Respondent coercively requested that an employee (Ivery) provide the Respondent with a copy of the affidavit that he provided to the Board. It is an undisputed fact that Ivery was not asked to provide his Board affidavit to the Respondent but rather volunteered to do so. Accordingly, I shall dismiss this allegation of the complaint.

Paragraph 16(G) of the complaint alleges that "on or about September 22, 2010, Respondent, by its attorney, Ronald Mason, at the Akron Municipal Airport, coercively offered to arrange for an employee to have legal counsel with respect to the administrative hearing in these matters by stating that the employee need not speak with counsel for the General Counsel and implying that the employee might not be called as a witness by counsel for the General Counsel if he did not retain independent counsel."

Based on the credited testimony, I find that it was at the meeting held on September 20, 2010, that Mason suggested to Ivery that he retain an attorney to represent him before the

NLRB because of the conflicting statements in his affidavit. I find that Mason's suggestion to Ivery did not violate the Act. At the time Mason's statement was made, Ivery appears to have given somewhat conflicting statements regarding his work duties and had clearly indicated concerns regarding his differing accounts. Under these circumstances, I do not find Mason's suggestion to be coercive. I find *S. E. Nichols, Inc.*, 284 NLRB 556 (1987), relied on by the Acting General Counsel, to be distinguishable. In that case, one of the employer's managers told employees that a Board agent might want to interview them and that if they needed protection, he would get his lawyer to sit in on the meeting. The Board noted that the action of the employer created the implication that employees might need protection. The Board noted that there was no way that the interview could result in any legal detriment to any employee. The Board found that the employer's indication that the employees might need counsel would tend to dissuade them from cooperating with the Board's investigation. The Board also noted that the employer offered the services of its own attorney. Under these circumstances, the Board found the employer's action to be a violation of Section 8(a)(1). *Id.*, at 580-581. In the instant case, Ivery himself had indicated some concerns about conflicting statements he had made and whether or not this would cause him some form of legal jeopardy. In addition, Mason did not offer to represent Ivery himself but merely advised him that he may want to secure independent counsel. Accordingly I shall dismiss this allegation of the complaint.

F. Additional Allegations Regarding the September 2010 Meetings with Ivery

Paragraph 15(E) of the complaint alleges that on September 20, 2010, the Respondent, through Mason, violated Section 8(a)(5) and (1) by coercively seeking to induce an employee to assist in the campaign to decertify the Union.

According to the credited testimony, on September 20, 2010, Ivery asked Mason what the NLRB would do with the petition that Dan Owens was circulating throughout the plant. Mason stated to Ivery that it did not matter what the NLRB did with Owens' petition as a prior petition had been filed. Mason added that the Respondent could not stop employees from circulating the petition. Ivery stated "not me" and laughed. I find that Mason's statement, viewed objectively, is insufficient to base a conclusion that he was seeking to induce Ivery to assist in decertifying the Union. Accordingly I shall dismiss this allegation of the complaint.

Paragraph 15(F) alleges that on September 22, 2010, the Respondent violated Section 8(a)(5) and (1) by prematurely ending the bargaining session so that the Respondent could engage in conduct that interfered with an employee's Section 7 rights.

The parties' September 22, 2010 bargaining meeting began at approximately 10:30 a.m. and was scheduled to last until 5 p.m. At approximately 2:30 p.m. Mason advised Bornstein that something had come up and he would not be able to stay until 5 p.m. (R. Exh. 198). Mason left the meeting to meet with Ivery to take a second affidavit in preparation for the upcoming trial.

The parties have had over 60 bargaining meetings. There is no evidence of the Respondent canceling meetings or leaving meetings early on a regular basis. Mason's leaving one meeting

early to take another affidavit from Ivery does not constitute a separate violation of the Act. The Board has held that the cancellation of one meeting during the course of lengthy negotiations does not establish a violation of Section 8(a)(5) and (1) of the Act. *SCA Services of Georgia, Inc.*, 275 NLRB 830, 834 (1985). Accordingly, I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Union is, and at all material times, was the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including all cast set-up employees, cast operators, re-melt employees, trim set-up and stock employees, trim and utility process technicians, toolroom employees, quality assurance employees, truck drivers, janitorial employees, machine operators, sanders/blasters, shippers, safety coordinators, and all shift leads employed by the Employer at its facilities located at 2150 Highland Rd., Twinsburg, OH, and 6212 Akron Peninsula Road, Peninsula, Ohio, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) Unilaterally ceasing merit wage increases from February to December 2009.

(b) Unilaterally delaying the granting of wage increases.

(c) Unilaterally laying off employees at its Twinsburg Ohio facility on or about March 9, 2009.

(d) Unilaterally shutting down its Twinsburg, Ohio facility on March 5 and April 10, 2009 and its Peninsula facility on April 10, 2009.

(e) Unilaterally implementing an expansion of its work rule on the defacement/destruction of company property on April 3, 2009.

(f) Enforcing the unilaterally expanded work rule regarding the defacement/destruction of company property, including discharging Kevin Maze pursuant to this rule.

(g) Unilaterally implementing a new work rule which required all machine operators to rotate working on different machines.

(h) Unilaterally recalling employees in June 2009.

(i) Unilaterally establishing terms and conditions of employment regarding the payment of health insurance premiums.

(j) Unilaterally implementing its proposal on recalling employees on September 10, 2009 in the absence of a lawful impasse.

(k) Bypassing the Union and dealing directly with employees regarding shift schedules;(l) unilaterally recalling employees on or about September 15, 2009, in the absence of a lawful impasse.

(m) Unilaterally employing temporary employees while unit employees were laid off.

(n) Failing to provide relevant and necessary information to the Union regarding the names nonunit employees who were laid off in April and May 2009, and the names of the laid-off

employees who received vacation pay and those that did not.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Enforcing the expanded work rule on defacement/destruction of company property by discharging Kevin Maze, because Maze and other employees engaged in union activity and in order to discourage employees from engaging in that activity.

(b) Discharging Willie Smith because Smith and other employees engaged in union activity and in order to discourage employees from engaging in that activity.

(c) Failing to pay Emil Stewart for attending a meeting during working hours that the Respondent directed him to attend because Stewart and other employees engaged in union activity and in order to discourage employees from engaging in that activity.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Soliciting employees to sign a petition to decertify the Union.

(b) Informing employees that it would be more willing to address wages with the employees if the Union no longer represented them.

(c) Threatening employees with plant closure and the loss of jobs because of their support for the Union.

(d) Sponsoring and actively encouraging employees to decertify the Union.

(e) Coercively interrogating employee witnesses in upcoming NLRB proceedings in violation of their rights guaranteed by Section 7 of the Act.

(f) Impliedly threatening employees with retaliation if they did not accede to its request to meet with the Respondent's attorney regarding an upcoming NLRB proceeding.

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

6. The Respondent has not otherwise violated the Act.

REMEDY

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

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withholding wage increases from approximately February to December 2009 and by delaying the granting of wage increases from the date of a merit review until a time approximately 2 months afterward, the Respondent must make whole the affected employees in the bargaining unit described above for the increases they would have received, by payment to them of the difference between their actual wages and the wages they would have otherwise received. The amount shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees, including, but not

limited to Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Duenda, and Walter Holland at its Twinsburg, Ohio facility, on or about March 9, 2009, it must offer those employees immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights. The Respondent shall also make whole these employees for any loss of earnings and other benefits they may have suffered by reason of its unilateral action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally shutting down its Twinsburg Ohio facility on March 5 and April 10, 2009, and the Peninsula facility on April 10, 2009, the Respondent must make employees whole for any loss of earnings and other benefits they may have suffered by reason of its unilateral action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally recalling employees in June and September 2009, it must make whole any adversely affected employees for any loss of earnings or other benefits they may have suffered by reason of its unilateral action. See *Allen W. Bird II, Caravelle Boat Co.*, 227 NLRB 1355 (1977). Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally establishing the terms and conditions of employment with regard to the payment of health insurance premiums for the three employees recalled in June 2009, the Respondent must void payroll deductions forms that those employees executed in June 2009. In addition the Respondent shall reimburse the employees for any amounts they paid pursuant to the execution of such forms. The reimbursement to employees shall be as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally employing temporary employees while unit employees were laid off, it must make whole any adversely affected employees for any loss of earnings and other benefits they may have suffered by reason of which unilateral action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky Riv-*

er Medical Center, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(5) (3) and (1) by unlawfully and discriminatorily discharging employee Kevin Maze and violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Willie Smith, I shall order it to offer them full and immediate reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Since the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to pay employee Emil Stewart for attending an assigned meeting, it must make him whole for any loss of earnings or other benefits he may have suffered by reason of its discriminatory action. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); with interest at the rate prescribed in *New Horizons for Retarded, Inc.*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In both the complaint and the brief, the Acting General Counsel seeks the additional remedy “that any Notice to Employees issued in this matter that addresses paragraph 15 of the Complaint be read to employees by Respondent’s president.” (Acting GC Br., p. 93 *fn.* 52.) While the Respondent’s unfair labor practices are serious, the Board has typically ordered that the notice be read by an employer’s president when that individual was directly and personally involved in many of the unfair labor practices. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007); *Domsey Trading Corp.*, 310 NLRB 777, 779–780 (1993). In the instant case, the record establishes that the Respondent’s president during the material time, Thomas Lennon, retired in August 2010. There is no evidence of his involvement in any of the unfair labor practices I have found were committed based on the allegations contained in paragraph 15. The only unfair labor practice that he was personally involved with was the discharge of Willie Smith. I further note that the record does not indicate who presently occupies the position of the Respondent’s president. The allegations of paragraph 15 of the complaint involve principally the Respondent’s involvement in the decertification petition that was circulating at its facilities in April and May 2010. The Board utilizes the traditional remedies to address violations of this type. *Armored Transport, Inc.*, 339 NLRB 374 (2003); *Process Supply, Inc.*, 300 NLRB 756 (1990); *Fritz Cos.*, 330 NLRB 1296 (2000). After considering all the circumstances, I find that the Board’s traditional remedies are sufficient to address the violations found in this case. See *Alstyle Apparel*, 351 NLRB 1287 (2007). Accordingly, I deny the Acting General Counsel’s request.

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

ORDER

The Respondent, General Die Casters Inc., Peninsula and Twinsburg, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from
 - (a) Unilaterally ceasing merit wage increases.
 - (b) Unilaterally delaying the time period for the granting of wage increases after a merit review.
 - (c) Unilaterally laying off unit employees.
 - (d) Unilaterally shutting down its facilities for 1 day.
 - (e) Unilaterally implementing an expansion of its work rule on the defacement/destruction of company property.
 - (f) Enforcing the unilaterally expanded work rule regarding the defacement/destruction of company property by discharging or otherwise disciplining employees pursuant to this rule.
 - (g) Unilaterally implementing a new work rule requiring all machine operators to rotate among different machines.
 - (h) Unilaterally recalling employees in the absence of a lawful impasse.
 - (i) Unilaterally establishing terms and conditions of employment regarding the payment of health insurance premiums for recalled employees.
 - (j) Bypassing the Union and dealing directly with employees regarding shift schedules.
 - (k) Unilaterally employing temporary employees while unit employees are laid off.
 - (l) Failing to provide relevant and necessary information to the Union regarding the names of nonunit employees who were laid off in April and May 2009, and the names of the laid-off unit employees who received vacation pay and those that did not.
 - (m) Discharging or otherwise discriminating against employees for engaging in union or other protected concerted activities.
 - (n) Refusing to pay employees for attending an assigned meeting because they engaged in union or other protected concerted activities.
 - (o) Soliciting employees to sign a petition to decertify the Union.
 - (p) Informing employees that it would be more willing to address wages with employees if the Union no longer represented them.
 - (q) Threatening employees with plant closure in the loss of jobs because of their support for the Union.
 - (r) Sponsoring a decertification petition by posting, and mailing to employees, letters encouraging a decertification effort.
 - (s) Coercively interrogating employee witnesses in NLRB proceedings in violation of their rights guaranteed by Section 7 of the Act.
 - (t) Impliedly threatening employees with retaliation if they do not agree to its request to meet with the Respondent's attorney regarding an upcoming NLRB proceeding.
 - (u) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Give notice and an opportunity to bargain to the Union regarding the cessation of wage increases and any delay in the

time period for granting wage increases after a merit review. The appropriate unit is:

All full-time and regular part-time production and maintenance employees, including all cast set-up employees, cast operators, re-melt employees, trim set-up and stock employees, trim and utility process technicians, toolroom employees, quality assurance employees, truck drivers, janitorial employees, machine operators, sanders/blasters, shippers, safety coordinators, and all shift leads employed by the Employer at its facilities located at 2150 Highland Rd., Twinsburg, OH, and 6212 Akron Peninsula Road, Peninsula, Ohio, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

(b) Make whole employees for any loss of pay suffered by them by reason of the Respondent's unilateral action in ceasing wage increases from February to December 2009, and delaying the time period for granting wage increases after a merit review in the manner set forth in the remedy section of the decision.

(c) On request, bargain with the Union regarding the decision to lay off employees, including but not limited to Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland at its Twinsburg, Ohio facility, who were laid off on or about March 9, 2009.

(d) Within 14 days from the date of the Board's order, offer employees including, but not limited to, Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make whole employees, including but not limited to, Terrance Hemphill, Raymond Ferry, Brandon Asberry, Walter Wood, Jerry Durenda, and Walter Holland for any loss of earnings and other benefits suffered as a result of the unilateral action against them, in the manner set forth in the remedy section of the decision.

(f) Make whole employees for any loss of pay or other benefits suffered by them by reason of the Respondents unilateral action in shutting down its facilities for 1 day, in a manner set forth in the remedy section of the decision.

(g) Rescind the April 3, 2009 expansion of its work rule on the defacement/destruction of company property, and bargain with the Union about any future implementation of any such rule.

(h) On request by the Union, rescind the work rule requiring all machine operators to rotate among different machines, and bargain with the Union about any future implementation of any such rule.

(i) On request by the Union, bargain with the Union regarding the employees recalled in June and September 2009.

(j) Make whole adversely affected employees for any loss of pay or other benefits they may have suffered by reason of the Respondent's unilateral action in recalling employees in June and September 2009, in the manner set forth in the remedy section of the decision.

(k) Notify and, on request, bargain with the Union regarding collecting money from recalled employees on any outstanding

balance for insurance premiums.

(l) Void the payroll deduction forms that recalled employees executed in June 2009, regarding the payment of health insurance premiums.

(m) Make whole the three employees recalled in June 2009, for any money they paid for health insurance premiums pursuant to the payroll deduction form they executed, in the manner set forth in the remedy section of the decision.

(n) Give notice and an opportunity to bargain to the Union before employing temporary employees while unit employees are laid off.

(o) Make whole any employees adversely affected for a loss of pay or other benefits they may have suffered by reason of the Respondents unilateral action in employing temporary employees while unit employees were laid off in October 2009, in the manner set forth in the remedy section of the decision.

(p) Provide to the Union the information it requested regarding the names of nonunit employees who were laid off in April and May 2009, and the names of the laid-off employees who received vacation pay and those that did not.

(q) Within 14 days from the date of the Board's Order, offer Kevin Maze and Willie Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(r) Make Kevin Maze and Willie Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(s) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Kevin Maze and Willie Smith, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(t) Make Emil Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(u) 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.

(v) Within 14 days after service by the Region, post at facilities in Peninsula and Twinsburg, Ohio, copies of the attached notice marked "Appendix."³⁹ Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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 any 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 February 1, 2009.⁴⁰

(w) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(x) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

GENERAL DIE CASTERS, INC.

³⁹ 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."

⁴⁰ See *J. Picini Flooring*, 356 NLRB 11 (2010).