Alan Ritchey, Inc. *and* Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO. Cases 32–CA–018149, 32–CA–018459, 32–CA–018526, 32–CA–018601, and 32–CA–018693

December 14, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The central question posed by this case is one the Board has never adequately addressed in its broader doctrinal context under Section 8(a)(5) of the National Labor Relations Act: whether an employer whose employees are represented by a union must bargain with the union *before* imposing discretionary discipline on a unit employee.[1] This question will usually arise only during the period after the union has become the employees' bargaining representative, but before the parties have agreed upon a first contract, and only if the parties have not agreed upon an interim grievance procedure. We hold today that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline unilaterally. Nevertheless, based on the unique nature of discipline and the practical needs of employers, the bargaining obligation we impose is more limited than that applicable to other terms and conditions of employment.[2] We will apply today's holding prospectively.

Background

The United States Postal Service (USPS) contracts with the Respondent for, among other things, the inspection and repair of nonmotorized mail-handling equipment. The Respondent performs these services at several facilities, including, as pertinent here, its Richmond, California facility, which it opened in August 1999, and where it employed approximately 250 employees at all relevant times. On April 13, 2000,[3] a majority of the Respondent's employees in an appropriate bargaining unit voted in favor of representation by Warehouse Union Local 6, International Longshore and Warehouse Union.

The General Counsel alleged that, following the employees' selection of the Union as their bargaining representative, the Respondent committed multiple violations of Section 8(a)(5), (3), and (1) of the Act. No exceptions were filed to the judge's dismissal of a number of these allegations.[4]

I. THE DISCRETIONARY IMPOSITION OF DISCIPLINE

As stated above, the primary question raised in this case is whether an employer has a duty to bargain before unilaterally disciplining individual employees, when the employer does not alter broad, preexisting standards of conduct but exercises discretion over whether and how to discipline individuals. The issue arises in this case, as it typically will, after the employees voted to be represented by the Union, but before the parties entered into a collective-bargaining agreement or other binding agreement governing discipline.

[1] Member Hayes is recused from participating in this case, and he took no part in the consideration or disposition of this case.

[2] On April 19, 2002, Administrative Law Judge Burton Litvack issued the attached decision. In addition to the exceptions and briefs filed by the parties, amicus briefs were filed by the Employers Association of the Northeast and by LPA, Inc., both urging reversal of the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain before imposing discipline on individual employees. A third amicus brief urging affirmance of the judge's finding in this regard was filed jointly by the AFL–CIO; the American Postal Workers Union, AFL–CIO; and the Newspaper Guild-CWA, AFL–CIO. The Charging Party filed a brief in response to LPA's amicus brief. Sec. I of this decision addresses this issue in depth. Sec. II of this decision addresses the other issues before the Board on exceptions.

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

On September 25, 2009, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB 628 (2009). Thereafter, the Charging Party filed a petition for review in the United States Court of Appeals for the Ninth Circuit. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Sec. 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

In the two-member decision, the Board severed and remanded to the judge the question of whether the Respondent made a change in the enforcement of its efficiency standard and in the sanctions for failing to meet that standard that constituted a substantial and material change in terms and conditions of employment sufficient to require preimplementation bargaining with the Union. We adopt and incorporate by reference only that portion of the two-member decision severing and remanding the above-specified question. On February 4, 2010, the judge issued a supplemental decision and recommended Order concluding that no such change in enforcement had occurred. On April 27, 2010, the Board adopted the judge's supplemental decision in the absence of exceptions.

We adopt the judge's finding, for the reasons stated in his initial decision, that the Respondent did not violate Sec. 8(a)(3) in its enforcement of its efficiency standards.

[3] All dates are in 2000, unless otherwise indicated.

[4] In addition, on July 18, 2003, the Board approved the parties' joint motion to remand a portion of the case to the Regional Director for approval of settlement and partial withdrawal of charges concerning the judge's finding that the Respondent violated Sec. 8(a)(5) by reducing the work hours of mechanics in the container repair department.

The Board has held in a variety of other contexts that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment—even where it has previously done so routinely or at regularly scheduled intervals. If the employer has exercised and continues to exercise discretion in regard to the unilateral change at issue, e.g., the amount of annual wage increases, it must first bargain with the union over the discretionary aspect. See, e.g., *Oneita Knitting Mills*, 205 NLRB 500 (1973). The Board has never clearly and adequately explained whether (and, if so, to what extent) this established doctrine applies to the unilateral discipline of individual employees. We now conclude that it does, and that an employer must provide its employees' bargaining representative notice and the opportunity to bargain with it in good faith before exercising its discretion to impose certain discipline on individual employees, absent a binding agreement with the union providing for a process, such as a grievance-arbitration system, to resolve such disputes. Nevertheless, because we apply this rule prospectively only, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) when it refused to bargain with the Union over certain disciplinary actions here.

A. Facts and Judge's Decision

The Respondent imposed the discipline at issue for absenteeism, insubordination, threatening behavior, and the failure to meet efficiency standards. The sanctions ranged from a formal warning to discharge, and were imposed pursuant to the Respondent's five-step progressive disciplinary system—consisting of counseling, verbal warning, written warning, suspension, and termination—which had been in effect since the Respondent began operations at the Richmond facility in August 1999.

Prior to the arrival of the Union on the scene, the Respondent maintained various efficiency standards and guidelines. On January 18, 2000, new Plant Manager David Williams announced that inspectors would be expected to achieve a minimum performance level of 80 percent of the USPS's efficiency standard.[5] From the April 13 union election to the end of September, the Respondent issued performance-related discipline to approximately 41 inspectors, consisting of 22 verbal warnings, 29 written warnings, 22 suspensions, and 14 discharges. The Respondent also maintained absenteeism standards pursuant to which a specific number of unexcused absences resulted in a specific level of discipline. For any 12-month period, the rule prescribed the following disciplinary actions: 2 to 4 unexcused absences, counseling; 5 or 6, verbal warning; 7 or 8, written warning; 9 or 10, suspension; and 11 or more, termination. In addition, the Respondent maintained an employee handbook containing general rules of conduct enforceable by discipline. "[I]nsubordination (refusal to follow management's instructions)" was among the handbook's examples of inappropriate conduct or behavior, "for which corrective counseling or other disciplinary action, including termination, may be taken." In a separate section addressing violence and weapons, the handbook "expressly prohibit[ed] acts or threats of violence by or against any employee" and stated that the Respondent "may immediately terminate the employment of any employee who threatens or engages in any act of violence."

The Respondent's progressive disciplinary system applied to all four causes of discipline at issue here except, possibly, to discharge for threatening behavior. Nevertheless, in all four areas, the Respondent admitted that it exercised its discretion in deciding whether to impose discipline and what form of discipline to impose. Indeed, the handbook expressly reserved to the Respondent the right to exercise discretion in the enforcement of its policies, stating in its introductory section that violations of the handbook's policies and procedures, or reasonable suspicion of such violations, "may result in disciplinary action," but that "[f]rom time to time, situations may arise which warrant consideration and flexibility on the part of management." In discussing the progressive disciplinary system, the handbook expressly reiterated, and arguably enlarged, the Respondent's discretion in the application of the system, stating:

> . . . . [I]n certain circumstances, and at management's sole discretion, it may be necessary to impose an action, up to and including termination of employment, without prior notice or counseling and without progressing through each stage of the disciplinary guidelines. *Determination of appropriate action will be*

[5] According to Williams, based on extensive time studies, USPS established Standards of Work setting the expected inspection rates for the various sizes and types of mailbags, trays, sleeves, and lids. R. Exh. 7 lists the USPS processing standards for 18 different items, ranging from inspecting 130 "#1 canvas mailbags" per hour to inspecting 706 small plastic trays per hour. Williams testified that the Respondent's contract with USPS required the Respondent to attain at least 95-percent compliance with the USPS efficiency standards overall in order to receive the compensation set in the contract. By setting a minimum efficiency standard of 80 percent for all employees while expecting many inspectors to achieve higher efficiencies, Williams intended the inspectors to reach an overall efficiency standard above 80 percent, and, by subsequently increasing the minimum efficiency standard, to meet or exceed the USPS standards.

made on a case-by-case basis based on the nature and severity of the occurrence. [Emphasis added.]

The Respondent's witnesses admitted that discretion was exercised in making the disciplinary decisions at issue. With regard to the Respondent's enforcement of its efficiency standards, Plant Manager Williams acknowledged that application of the performance standards was not "hard and fast," stating: "You reviewed each employee and just dealt with the circumstances . . . [;] nothing in life is ever straight numbers." Williams testified regarding three inspectors who were treated leniently when their performance fell short: Francis Young, because her husband died; Amelia Santos, because she was unable to work consecutive days in a particular position; and Anita Benjamin, because she worked in a low-volume area where it was difficult to maintain rhythm.[6]

The Respondent similarly exercised discretion in applying the attendance guidelines. Two employees with nine unexcused absences each were given a verbal warning and a written warning, respectively. An employee with 62 unexcused absences received a verbal warning, while another with 10 unexcused absences was discharged. Again, Williams acknowledged that discretion was exercised in applying the absenteeism guidelines, testifying that "every single case is going to be different based on the circumstances . . . [;] there is always discretion involved." Human Resources Manager Brandee Chorro agreed that "we use discretion," adding that she has "never come across any attendance policy that has been set in stone and so rigid without using some type of discretion."

The Respondent's discharge of LaTachianna Pontiflet for insubordination on May 31 and of Mandrell Miller for threatening behavior on October 13 were also admittedly exercises of discretion. Regarding inappropriate conduct such as insubordination, the Respondent's employee handbook stated that "[t]he nature and severity of an offense will be considered in determining disciplinary action to be taken." Consistent with the handbook, Williams testified that there was "discretion in the insubordination policy as to whether an employee was terminated or not." Chorro agreed that there was "discretion as to . . . insubordination," but she also testified that threatening behavior was "usually grounds for termination."[7] Nonetheless, as stated above, the employee handbook provided that the Respondent may immediately terminate an employee who engages in threatening conduct, and it further reserved for the Respondent the discretion whether to involve law enforcement in relation to any particular violation of the policy.[8]

On May 26, the Union notified the Respondent by letter that it was protesting the Respondent's unilateral disciplinary actions. In the letter, the Union stated that the Respondent was required by law to afford the Union "prior notice, and an opportunity to bargain, before taking disciplinary action against bargaining unit employees." The Respondent, however, did not provide the Union with notice or an opportunity to bargain about any of the disciplinary actions at issue.

The General Counsel argued that each act of discipline was a unilateral change because it did not represent an automatic execution of established policy (e.g., a standard wage increase on the anniversary of an employee's employment). The judge agreed with the General Counsel, finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify the Union and afford it an opportunity to bargain before disciplining inspectors for failing to meet minimum efficiency standards, disciplining employees for absenteeism, and discharging employees Pontiflet (for insubordination) and Miller (for threatening behavior).[9] The judge relied heavily on the Board's decision in *Washoe Medical Center, Inc.*, 337 NLRB 202 (2001). The Respondent excepted to the judge's decision.

B. Discipline Unquestionably Works a Change in Employees' Terms and Conditions of Employment

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court approved the Board's determination that an employer violates Section 8(a)(5) of the Act by making unilateral changes to represented employees' terms and conditions of employment. *Katz* held that such a change "is

[6] Although Williams' testimony indicated that USPS had extensive control over the work that the Respondent's employees performed and the overall pace at which they were required to perform it, USPS did not control the means by which the Respondent achieved the required overall efficiency. Williams expressly acknowledged that USPS had no input regarding any discipline of the Respondent's employees.

[7] Although Chorro testified that employees' threats against coworkers or supervisors were usually grounds for immediate discharge, the judge found that the decision to terminate involved "some determination as to the severity of [the] threatening behavior" and, thus, also involved discretion. We add that discretion is also exercised in classifying particular actions or statements as threats.

[8] Regarding threats and violence, the handbook stated, "[t]he Company may take additional action against employees and nonemployees who engage in such behavior, such as notifying the police or other law enforcement personnel and prosecuting violators of this policy to the maximum extent of the law."

[9] Although the complaint alleged both decision and effects bargaining violations, the judge addressed and found a decision bargaining violation only. The General Counsel did not except to the judge's failure to make a finding regarding effects bargaining. Thus, the issue is not before us.

a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal" to bargain. Id. at 743 (footnote omitted).[10]

In the present case, all parties agree that the imposition of discipline on individual employees that alters their terms or conditions of employment implicates the duty to bargain if it is unconstrained by preexisting employer policies or practices. That conclusion flows easily from the terms of the Act and established precedent. When an employee is terminated—whether for lack of work, misconduct, or other reasons—the termination is unquestionably a change in the employee's terms of employment. As the Board has held:

> Under Sections 8(a)(5) and 8(d),[11] it is unlawful for an employer to refuse to bargain with respect to mandatory subjects of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209–210 (1964). Termination of employment constitutes such a mandatory subject.

N.K. Parker Transport, Inc., 332 NLRB 547, 551 (2000).[12] Similarly, when an employee is demoted or suspended without pay, the action represents a change in terms and conditions of employment. See, e.g., *Pillsbury Chemical Co.,* 317 NLRB 261, 261 fn. 2 (1995) (holding that employee's demotion and substantial wage reduction "rendered [employee's working] conditions so difficult or unpleasant" that constructive discharge was demonstrated).[13] Finally, in *Carpenters Local 1031*, 321 NLRB 30 (1996), the Board held that the suggestion in some prior Board decisions that "a change in terms or conditions of employment affecting only one employee does not constitute a violation of Section 8(a)(5) . . . is erroneous as a matter of law," and the Board overruled all such prior cases. Id. at 32.

Not every unilateral change that affects terms and conditions of employment triggers the duty to bargain. Rather, the Board asks "whether the changes had a *material, substantial, and significant impact* on the employees' terms and conditions of employment." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (emphasis added). This test is a pragmatic one, designed to avoid imposing a bargaining requirement in situations where bargaining is unlikely to produce a different result and, correspondingly, where unilateral action is unlikely to suggest to employees that the union is ineffectual or to precipitate a labor dispute. We draw on this basic principle, adjusted to fit the present context, today. Disciplinary actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees' tenure, status, or earnings. Requiring bargaining *before* these sanctions are imposed is appropriate, as we will explain, because of this impact on the employee and because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed. Just as plainly, however, other actions that may nevertheless be referred to as discipline and that are rightly viewed as bargainable, such as oral and written warnings, have a lesser impact on employees, viewed as of the time when action is taken and assuming that they do not themselves automatically result in additional discipline based on an employer's progressive disciplinary system. Bargaining over these lesser sanctions—which is required insofar as they have a "material, substantial, and significant impact" on terms and conditions of employment—may properly be deferred until after they are imposed.[14]

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[10] The Supreme Court in *Katz* therefore agreed with the Board that the employer acted unlawfully when, during bargaining with a newly certified union, it made unilateral changes to its sick leave policy and to its processes for granting both automatic and merit-based wage increases. Id. at 744–747.

[11] Sec. 8(d) describes the conduct required of an employer and its employees' bargaining representative pursuant to the obligation to "bargain collectively."

[12] See also *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works a dramatic change in their working conditions" and thus "[l]ayoffs are not a management prerogative [but] a mandatory subject of collective bargaining"); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) ("A grievance about a discharge is clearly a mandatory subject of bargaining.").

[13] Significantly, the Board in *Pillsbury Chemical* also held, contrary to the judge, that the employer had violated Sec. 8(a)(5) by informing the demoted employee of the demotion and layoff decision without first providing the union notice and an opportunity to bargain over the decision and its effects. Id. at 261–262.

Cf. *Falcon Wheel Division L.L.C.*, 338 NLRB 576 (2002) (holding that the layoff of one employee was a material, substantial, and significant change). A suspension would affect an employee in much the same way that a temporary layoff would, if not more so.

[14] We recognize that warnings may in certain cases demonstrate supervisory authority to discipline or to effectively recommend discipline. See, e.g., *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1425 fn. 23 (2010). In assessing supervisory status, however, our concern is with what the issuance of warnings reflects about the authority of the individual imposing the discipline over other employees, not with the warning's immediate effect on the terms and conditions of the employee receiving it. Further, nothing in the distinction we draw for the specific purpose at issue in this case suggests that a bargaining representative would not have a right to obtain information concerning warnings and similar personnel actions under the broad relevance standard applicable to information requests.

In short, we do not intend to suggest that the distinction we draw here among types of discipline for purposes of a *preimposition* duty to bargain modifies Board precedents in any other context in which discipline is relevant.

C. The Board has Consistently Held that Discretionary Changes in Terms and Conditions of Employment Cannot be Unilateral

The Board has recognized that an employer's obligation to maintain the status quo sometimes entails an obligation *to make* changes in terms and conditions of employment, when those changes are an established part of the status quo. Thus, if an employer has an established practice of granting employees a 1-percent increase in wages on the anniversary of their hire date, an employer not only does not violate its duty to bargain by making that change unilaterally, it violates its duty if it *fails* to do so. *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), affd. 485 F.2d 1239 (6th Cir. 1973); see also *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970) ("The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge."). A corollary to this rule, however, is that an employer must always bargain over the discretionary aspect of the change in question.

Oneita Knitting Mills, 205 NLRB 500 (1973), illustrates this proposition. There, the Board held that an employer violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases. The Board explained:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan* [supra]) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B.* v. *Katz,* 3[69] U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that 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.

Id. at 500. *Katz* itself involved an employer's grant of merit increases that were "in no sense automatic, but were informed by a large measure of discretion." *NLRB v. Katz*, 369 U.S. at 746.

In the decades since *Katz* and *Oneita Knitting*, across a range of terms and conditions of employment, the Board has applied the principle that even regular and recurring changes by an employer constitute unilateral action when the employer maintains discretion in relation to the nature or extent of the changes. In *Washoe Medical Center*, which the judge relied on here, the Board applied *Oneita Knitting* and concluded that an employer's "substantial degree of discretion" in placing newly hired employees into quartiles within their positions' wage ranges, based on subjective judgments, required the employer to bargain with the union before implementing the wage rates. 337 NLRB at 202. As discussed in detail below, the Board majority in *Washoe* expressly rejected the dissent's contention that there was no duty to bargain because "the [r]espondent's policy and procedure for setting initial wage rates entails the consistent application of uniform standards and, thus, curtails its exercise of discretion." Id. In *Eugene Iovine*, 328 NLRB 294 (1999), the Board held that an employer's recurring unilateral reductions in employees' hours of work were discretionary and therefore required bargaining: "there was no reasonable certainty as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours appear[ed] to be unlimited." Id. at 294 (internal quotations omitted). In *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990), the Board required an employer to bargain regarding economically motivated layoffs, when the owner selected the employees to be laid off based, not on seniority, but on his own judgment of their ability. In so holding, the Board rejected the employer's argument that its failure to bargain was permissible "because of its past practice of instituting economic layoffs due to lack of work." The Board held that the employer's practice before its employees were represented did not provide a defense and that once the union represented the employees, "the [r]espondent could no longer continue unilaterally to exercise its discretion with respect to layoffs."[15]

[15] Reviewing courts have similarly concluded that discretionary decisions are subject to bargaining. See *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (rejecting employer's defense that unilateral economic layoffs were "in accordance with its established practice" and thus were lawful; the court held that, even assuming that economic layoffs are not inherently discretionary, the employer's "layoff procedure was *ad hoc* and highly discretionary: before layoff, decisions were made whether to transfer employees to a busier department, to implement a permanent or part-week layoff, and to follow seniority or other methods in selecting the employee to lay off"), abrogated on other grounds by *Hoffman Plastic Compounds*, 535 U.S. 137 (2002); *NLRB v. Allis-Chalmers Corp.*, 601 F.2d 870, 875–876 (5th Cir. 1979) (the court, rejecting employer's "conten[tion] that the [wage] increases were in compliance with a periodic survey of wages and benefits and were, therefore, not subject to bargaining," found "the increases were not automatic, in that Allis-Chalmers exercised considerable discretion in determining the timing and amount. Therefore, the union could properly demand bargaining.").

As explained above, discipline may alter core components of employees' terms and conditions of employment. Moreover, as the Board held in *Daily News of Los Angeles*, "the *Katz* doctrine . . . neither distinguishes among the various terms and conditions of employment on which an employer takes unilateral action nor does it discriminate on the basis of the nature of a particular unilateral act." *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). Consistency with these precedents and their underlying principles demands that we apply the *Oneita Knitting* approach to require bargaining before discretionary discipline (in the form of a suspension, demotion, discharge, or analogous sanction) is imposed, just as we do in cases involving discretionary layoffs, wage changes, and other changes in core terms or conditions of employment, where bargaining is required before an employer's decision is implemented. Accordingly, where an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects (if any), e.g., whether to impose discipline in individual cases and, if so, the type of discipline to impose. The duty to bargain is triggered before a suspension, demotion, discharge, or analogous sanction is imposed, but after imposition for lesser sanctions, such as oral or written warnings.

This conclusion is strongly supported by the Board's reasoning in *Washoe*, cited by the judge in this case. In *Washoe*, the Board affirmed the judge's dismissal of 8(a)(5) charges arising out of individual acts of discipline, stating:

> We affirm the judge's recommended dismissal of the allegation that the Respondent unlawfully failed to bargain before-the-fact, i.e., before the planned imposition of specific discipline on particular employees. The record does not establish that the Union at any time sought to engage in such before-the-fact bargaining.

But the Board expressly declined to rely on the alternative rationale articulated by the judge, a rationale that parallels that offered by the Respondent here.

> In light of the Board's holding in *Oneita Knitting Mills* . . . we reject the judge's comment . . . that "[I]t is not sufficient that the General Counsel show only some exercise of discretion to prove the alleged violation; the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures." [Footnote omitted.]

Id. at. 202 fn. 1.

In fact, the *Washoe* Board applied the holding in *Oneita Knitting* not only to reject the judge's suggestion that the employer had no duty to bargain over individual acts of discipline absent a change in its disciplinary policies, but also to reject a parallel argument concerning the assignment of initial wage rates to new employees. The Board stated:

> the issue is *not* whether the Respondent unilaterally discontinued its practice of establishing discretionary starting wage rates for newly hired employees based on numerous criteria. Rather, the issue is whether the Respondent failed to provide the Union with advance notice and an opportunity to bargain about the *implementation* of these discretionary wage rates, as required by *Oneita*, supra.
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> . . . .
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> [The employer's] judgments [in selecting and weighting the criteria on which it rated new employees] are necessarily subjective, as it is unlikely that any two applicants or employees will be precisely comparable. It is this substantial degree of discretion, as well as the unavoidable exercise of such discretion each time the Respondent establishes a wage rate for a new employee, that requires the Respondent to bargain with the Union, pursuant to the Board's holding in *Oneita*.

Id. at 202. That statement, albeit dicta, expressly rejected the basis for dismissing the allegations advanced by the Respondent here.

Amici argue, however, that the Board held in *Fresno Bee*, 337 NLRB 1161 (2002), that an employer has no preimposition duty to bargain over discretionary discipline. There, the Board, without comment, affirmed a judge's dismissal of 8(a)(5) charges arising out of the imposition of individual discipline. The General Counsel, drawing on the principles and precedent that we discuss here, had argued that the employer "exercised considerable discretion in disciplining in its employees and is therefore required to bargain to impasse with the Union over each and every imposition of discipline." 337 NLRB at 1186. The judge rejected this argument, but her rationale for doing so misunderstood the Board's case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment.

As her decision reveals, the judge's error was to conclude that because the employer had not changed its dis-

ciplinary *system*, the imposition of discipline with respect to individual employees, even if it involved the exercise of discretion, did not amount to a unilateral change. The judge recognized that the "discipline administered to unit employees by [the employer] is, at least in part, discretionary." Id. at 1186. Nevertheless, the judge reasoned that the "fact that the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified, does not vitiate the system as a past practice and policy." Id. The General Counsel had not contended that the employer's "discipline policies were unilaterally altered," and "[t]here was no evidence that [the employer] did not apply its preexisting employment rules or disciplinary system in determining discipline." Id. "*Therefore*," the judge concluded, the employer "made no unilateral change in terms and conditions of employment when it applied discipline." Id. at 1186–1187 (emphasis added).

Under our case law, the judge's conclusion was a non sequitur. As we have explained, the lesson of well-established Board precedent is that the employer has both a duty to maintain an existing policy governing terms and conditions of employment *and* a duty to bargain over discretionary applications of that policy. It was no answer to the General Counsel's argument in *Fresno Bee*, then, to say that because the employer's disciplinary policy had stayed the same, the employer had no duty to bargain over discretionary disciplinary decisions. Nor did it suffice to point out that the employer had bargained over the discipline *after* it was imposed: the General Counsel was arguing for a *preimposition* duty to bargain. Id. at 1187.

As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale—the only rationale articulated—was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee*. See *Goya Foods of Florida*, 356 NLRB 1461, 1463 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation."). To the extent *Fresno Bee* contradicts our conclusion here, it is overruled.[16]

Amicus LPA asserts that *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court agreed with the Board's holding that an employee has a Section 7 right to union representation in investigatory interviews that the employee reasonably believes may lead to discipline, precludes the bargaining obligation we impose today. Properly understood, however, the rights and duties adopted here are in harmony with those addressed by *Weingarten*. In affirming the Board's recognition of the right to union representation in certain investigatory interviews, the Court agreed with the Board's qualification that the employer had no obligation to bargain with the union representative. Id. at 259–260. But the Board's representations and the Court's ruling addressed the investigatory interview only.[17] That is, the limited right confirmed in *Weingarten* applies only to an employer's investigation—an investigation that may or may not lead to discipline affecting an employee's terms and conditions of employment—and arises only when the employer seeks to interview the employee as part of such an investigation. In other words, an investigation by itself is not, and may not result in, a change in employees' terms and conditions of employment and thus does not implicate discipline or Section 8(a)(5) of the Act.

Weingarten, which is grounded in Section 8(a)(1), seeks to ensure that employers carrying out investigations do not restrain or coerce employees in the exercise of their Section 7 rights to engage in concerted activity for mutual aid and protection. An employee who seeks her union representative's assistance in responding to an employer's investigation that may lead to discipline is, quite literally, engaging in "concerted activit[y] for the purpose of . . . mutual aid or protection" under Section 7. For this reason, the *Weingarten* right is held by the employee, not by the union. It must be asserted by the employee, not by a union representative, and it can be waived by the employee. See, e.g., *Appalachian Power Co.*, 253 NLRB 931, 933 (1980). In contrast, the obligation to refrain from unilateral action regarding mandatory

[16] In *Pennsylvania State Corrections Officers Assn.*, 358 NLRB 108 (2012), the Board adopted without discussion a judge's recommendation to dismiss the allegation that unit employees were discharged without notice to their union or an opportunity to bargain. Although the discharges at issue were not disciplinary, a portion of the judge's analysis relied on *Fresno Bee*. We do not, however, view *Fresno Bee* as essential to the Board's decision in *Pennsylvania State Corrections*, in light of the judge's unchallenged finding in that case that the union received notice of the discharges but failed to request bargaining.

[17] See *NLRB v. J. Weingarten, Inc.,* Brief for the Board, 1974 WL 186290 (U.S.). In a handful of pre-*Weingarten* decisions, too, the Board referred to the absence of an obligation to bargain. See *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enf. denied 482 F.2d 842 (7th Cir. 1973); *Illinois Bell Telephone Co.*, 192 NLRB 834 (1971); *Jacobe-Pearson Ford*, 172 NLRB 594 (1968). Like the *Weingarten* brief and decision, however, those Board decisions addressed whether employees have a right to union assistance at investigatory interviews, *not* whether the union has a right to notice and an opportunity to bargain before the employer implements its decision to impose discipline.

Further, the right that we adopt today does not conflict with the representations in the Board's *Weingarten* brief, in which "the Board acknowledge[d] that the duty to bargain does not arise *prior to* the employer's decision to impose discipline." Brief for the Board at 10 (emphasis added); see also id. at 15, 16. As explained elsewhere in this decision, the duty to provide the union with notice and an opportunity to bargain arises *after* the employer has decided to impose discipline, but before actually imposing it.

subjects of bargaining is grounded in Section 8(a)(5). Moreover, the two rights arise at different points in time: the *Weingarten* right arises during an investigation into whether discipline is merited, while the right to bargaining arises after such an investigation results in a decision to impose discipline, but prior to its implementation. Thus, although the *Weingarten* Court agreed with the Board that an employer's *refusal to bargain* with a union in an investigatory meeting that may lead to discipline does not violate Section 8(a)(1), the Court expressed no view concerning whether the employer's unilateral decision to discipline an employee violates Section 8(a)(5) by denying the employees' chosen representative the right to participate in good-faith bargaining over mandatory subjects of bargaining.

As stated above, it is our view that the well-established *Weingarten* right and the bargaining obligation adopted here work in conjunction to ensure that the participants' rights are respected at each stage of the disciplinary process. Thus, an employer with a represented work force would have the following legal obligations:

As *Weingarten* established, the employer must permit the union to be present at an investigatory interview with an employee, should the employer decide to conduct one, if the employee reasonably believes that the investigation could lead to discipline and requests the union's presence. The employer need not bargain with the union at that interview, however. (As *Weingarten* further established, if the employer is unwilling to allow the union to be present at the investigatory interview, the employer may forgo the interview.)

Under today's decision, after the employer has decided (with or without an investigatory interview) to impose certain types of discipline, it must provide the union with notice and an opportunity to bargain over the discretionary aspects of its decision *before* proceeding to implement the decision. As explained below, at this stage, the employer need *not* bargain to agreement or impasse, if it does so afterward. In exigent circumstances, as defined, the employer may act immediately, provided that, promptly afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects. Finally, if the employer has properly implemented its disciplinary decision without first reaching agreement or impasse, the employer must bargain with the union to agreement or impasse *after* imposing discipline.

D. An Obligation to Bargain Prior to Imposing Discipline will not be Unduly Burdensome for Employers

We recognize that an obligation to bargain prior to imposing discipline may, in some cases, delay the employer's action or change the decision that it would have reached unilaterally. With regard to the latter, it is our view that permitting the employee to address the proposed discipline through his or her representative in bargaining is likely to lead to a more accurate understanding of the facts, a more even-handed and uniform application of rules of conduct, often a better and fairer result, and a result the employee is more able to accept. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 668 (1981) ("The concept of mandatory bargaining is premised on the belief that collective discussions . . . will result in decisions that are better for both management and labor and for society as a whole.").

With regard to possible delay that a bargaining obligation may cause in implementing discipline, we do not perceive that our decision today will unduly burden employers in that regard.

First, as explained above, the preimposition obligation attaches only with regard to the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees' tenure, status, or earnings, such as suspension, demotion, or discharge. Thus, we expect that most warnings, corrective actions, counselings, and the like will not require preimposition bargaining, assuming they do not automatically result in additional discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining.

Second, where the preimposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This duty entails sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion. It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests. (Again, we note that, in this context, the scope of the duty to provide information is limited to information relevant to the subject of bargaining: the discretionary aspects of the employer's disciplinary policy.) The aim is to enable the union to effectively represent employees by (for example) providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties have not reached agreement, the duty to bargain continues after imposition. Moreover, the employer

has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy. Third, an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.[18] The scope of such exigent circumstances is best defined going forward, case-by-case, but it would surely encompass situations where (for example) the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct, poses a significant risk of exposing the employer to legal liability for his conduct, or threatens safety, health, or security in or outside the workplace. Thus, our holding today does not prevent an employer from quickly removing an employee from the workplace, limiting the employee's access to coworkers (consistent with its legal obligations) or equipment, or taking other necessary actions to address exigent circumstances when they exist.[19]

Finally, an employer need not await an *overall* impasse in bargaining before imposing discipline, so long as it exercises its discretion within existing standards. In *Stone Container Corp.*, 313 NLRB 336 (1993), the Board held that the rule established in *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), barring an employer from making unilateral changes in terms and conditions of employment during bargaining prior to either agreement or an overall impasse in negotiations, does not prevent an employer from maintaining a dynamic status quo with respect to "a discrete event, such as an annually scheduled wage review . . ., that simply happens to occur while contract negotiations are in progress." *Stone Container*, 313 NLRB at 336. In such cases, the Board has held that an employer satisfies its obligation to bargain if it maintains the status quo as to the timing of and criteria for making the discrete, regularly scheduled decisions and gives the union "reasonable advance notice and an opportunity to bargain" over the discretionary application of those criteria. *Neighborhood House Assn.*, 347 NLRB 553, 554 (2006).

The Board has not, however, specified exactly what the extent of the bargaining obligation is under *Stone Container*. In fact, twice since *Stone Container*, the Board has expressly found it unnecessary to reach the question of whether the employer must bargain to agreement or impasse over the discrete matter at issue before acting unilaterally. *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776 fn. 4 (2006); *Saint-Gobain Abrasives, Inc.*, 343 NLRB 542, 542 fn. 3 (2004), enfd. 426 F.3d 455 (1st Cir. 2005). Here, we again find it unnecessary to resolve that question in the typical *Stone Container* situation involving "a discrete event scheduled to occur during bargaining." *Neighborhood House*, 347 NLRB at 554. In such cases, because the discrete event, such as an annual wage adjustment, is regularly scheduled, both parties are well aware of it in advance, and it would not be unduly burdensome to require bargaining to agreement or impasse on the discrete issue prior to unilateral action. See, e.g., id. at 554 fn. 6 (explaining that in *TXU Electric Co*., 343 NLRB 1404 (2004), the Board applied *Stone Container* "where a discrete event occurs every year at a given time").

Although discipline represents a "discrete event . . . that simply happens to occur while contract negotiations are in progress," it is neither regularly scheduled nor, in fact, scheduled in any manner. Considering the practicalities of this unique circumstance, we hold that so long as the employer continues to apply existing standards and procedures for discipline, the employer's duty is simply to bargain over the discretionary aspect of the discipline, in accord with today's decision. After fulfilling its preimposition duties as described above, the employer may act, but must continue to bargain concerning its action, including the possibility of rescinding it, until reaching agreement or impasse. Cf. *Daily News of Los Angeles*, 315 NLRB at 1244 fn. 2 (concurring opinion) (asserting that *Stone Container* would allow employer, after giving the union notice and an opportunity to bargain, to implement its proposal on the discrete issue without reaching impasse even on the discrete issue, but noting that, "[o]f course, absent impasse, the employer may have to continue bargaining after implementation, and such bargaining could include demands for retroactive application of any agreement ultimately reached"). We believe such a rule appropriately defines the statutory duty to bargain in good faith concerning all terms and conditions

[18] The Board has developed an analogous approach to the duty to bargain over other issues where economic exigencies exist. See *RBE Electronics of S.D.*, 320 NLRB 80 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. mem. 15 F.3d 1087 (9th Cir. 1994).

[19] In the circumstances described, an employer could suspend an employee pending investigation, as many employers already do. An employer who takes such action should promptly notify the union of its action and the basis for it and bargain over the suspension after the fact, as well as bargain with the union regarding any subsequent disciplinary decisions resulting from the employer's investigation.

of employment in this area critical to both employers and employees.[20]

Thus, the narrow scope of the bargaining obligation and the limited nature of the duty to bargain will not impede an employer's ability to effectively manage its workforce. For example, in a workplace where the employer has an established practice of disciplining employees for absenteeism, the decision to impose discipline for such conduct will not give rise to an obligation to bargain over whether absenteeism is generally an appropriate grounds for discipline. Instead, bargaining will be limited to the specific case at hand: e.g., whether the employee actually was absent and merited discipline under the established practice. Similarly, if the employer consistently suspends employees for absenteeism, but the length of the suspension is discretionary, bargaining will be limited to that issue (assuming the fact of absenteeism is not contested). Our expectation is that, when bounded by past practice and policy, bargaining over the limited topics that implicate employer discretion will yield expeditious results, and that it will, in fact, be the norm that parties will reach agreement before the necessity of testing the limits of the preimposition bargaining period. If our expectation proves inaccurate, any infringement on the employer's ability to effectuate its desired discipline will be limited (as we have made clear), because we impose no duty to bargain to impasse prior to imposing discipline.

To hold otherwise, and permit employers to exercise unilateral discretion over discipline after employees select a representative—i.e., to proceed with business as usual despite the fact that the employees have chosen to be represented—would demonstrate to employees that the Act and the Board's processes implementing it are ineffectual, and would render the union (typically, newly certified) that purportedly represents the employees impotent. Employees covered by the Act attain union representation only after participating in a government-sanctioned process and only if a majority desires representation. We appreciate that they do not lightly undertake that process and exercise their free choice. If, after employees follow this path, their chosen representative can lawfully be denied the opportunity to represent them, especially in such a critical context as significant disciplinary action, the employees might reasonably conclude that their statutory rights are illusory. In addition, as Judge Posner explained in a case involving unilateral layoffs after the union was certified but before a first contract was executed:

> The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them. Of course, if the change is authorized by the collective bargaining agreement, it is not in derogation of the union and is not an unfair labor practice. But there was no agreement here. Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.

NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1090 (7th Cir. 1987) (citations omitted). An employer's unilateral exercise of discretion in imposing serious discipline without first giving the union notice and an opportunity to bargain would send employees the same signal as the imposition of unilateral layoffs.

Acknowledging that discretion is inherent—and perhaps unavoidable—in many kinds of discipline does not alter the conclusion that a bargaining obligation attaches to the exercise of such discretion. Granting merit increases, as in *Katz*, *Oneita Knitting*, and subsequent cases, is also inherently discretionary, as are many decisions regarding economic layoffs.[21] Nonetheless, we require bargaining over those inherently discretionary decisions. The inevitability of discretion in most decisions to discipline does not support treating it differently from other forms of unilateral change; indeed, it makes bargaining over disciplinary actions that much more critical.

E. Application to this Case

We have no difficulty here in finding that the discipline at issue was discretionary. Nevertheless, for reasons we will explain, we have determined not to apply today's holding retroactively. As a result, we reverse the discretionary discipline violations found by the judge, and dismiss the corresponding allegations of the complaint.

1. The discipline at issue was discretionary

The fact that the Respondent has disciplined employees in the past pursuant to a progressive disciplinary pol-

[20] An employer seeking a safe harbor regarding its duty to bargain before imposing discipline may negotiate with the union an interim grievance procedure that would permit the employer to act first followed by a grievance and, potentially, arbitration, as is typical in most complete collective-bargaining agreements.

[21] See, e.g., *Garment Workers Local 512 (Felbro, Inc.) v. NLRB,* 795 F.2d at 711.

icy for broadly defined offenses does not establish a sufficiently nondiscretionary past practice privileging what would otherwise clearly be unilateral changes in the individual employees' terms and conditions of employment.[22] Moreover, as discussed above, the Respondent admitted that it exercised discretion in its choices of whether and how severely to discipline employees for particular violations. As the judge found, the Respondent reserves the right to determine what types of employee misconduct warrant disciplinary action and the "nature and severity of an offense"; for certain types of misconduct, the Respondent reserves the right, at its "sole discretion," to impose discipline without progressing through each stage of its stated disciplinary procedure. The Respondent's plant manager and human resources manager both testified that discretion was exercised in disciplining individual employees.[23] In sum, the record compels a finding that the Respondent's imposition of the discipline at issue here was discretionary.

2. Retroactive application to the instant case is inappropriate

"The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage. The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 729 (2001) (quotations omitted). Put differently, we apply new rules and other changes prospectively where retroactive application would cause "manifest injustice." *SNE Enterprises*, 344 NLRB 673, 673 (2005). As the Board has explained,

> In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

Id. (citations omitted); see also *Allied Mechanical Services*, 356 NLRB 2 (2010) (incorporating by reference 352 NLRB 662 (2008)), enfd. 668 F.3d 758 (D.C. Cir. 2012). Although the issue here is a close one, we believe that the controlling factors weigh against retroactive application.

The discipline at issue here predated the Board's 2002 decision in *Fresno Bee*, supra, which held (incorrectly, we have concluded) that there is no preimposition duty to bargain over discretionary discipline. The Respondent, then, could not have relied on *Fresno Bee* in acting unilaterally. That said, at the relevant time, Board precedent did not speak clearly and directly to the issue—indeed, it was essentially silent. The issue, in other words, was not one that seems to have been raised before and certainly not one that was widely recognized. To that extent, it would not have been unreasonable for the Respondent to believe that it could decline to bargain with the Union without committing an unfair labor practice.

We are not aware of any evidence that a practice of preimposition bargaining over discipline has ever been common in workplaces governed by the Act. In contrast, *postimposition* bargaining, in the form of a grievance-arbitration system, is commonplace. These practical considerations persuade us that retroactive application of our holding could well catch many employers by surprise and, moreover, expose them to significant financial liability insofar as discharges and other disciplinary actions that could trigger a backpay award are involved.

To be sure, we believe that today's change in the law is well-grounded in Board doctrine and better serves the policies of the Act. Retroactivity, however, is not essential to achieving those benefits, and it may impose unexpected burdens on employers. For these reasons, we will apply our holding only prospectively.

II. THE REMAINING ALLEGATIONS AT ISSUE

We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by bargaining in bad faith and dealing directly with employees.[24] We also agree with the judge, again for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) by unilaterally making the following changes in employees' terms and conditions of employment: implementing a new work rule deeming leave from work an unexcused absence if taken with less than one week's prior notice; changing the work shift and working hours of the unit inventory clerk; implementing a plan to hire temporary employees directly rather than through temporary employment agencies and paying temporary employees at a different rate for performing

[22] See *Eugene Iovine*, 328 NLRB 294, 294 (1999) (employer's failure to establish consistent past practice prevented it from demonstrating that practice had not changed). Cf. *Toledo Blade*, supra (holding that change from uniform rule on when discipline is to be imposed to case-by-case—i.e., discretionary—determination was mandatory subject of bargaining).

[23] Williams and Chorro acknowledged that discretion played a role in the discharges of employee Miller and employee Pontiflet.

[24] As to the direct dealing violation, we agree with the judge that the Respondent violated Sec. 8(a)(5) by polling employees and discussing with them a reduction in force in the container repair department, and by offering employees triple pay for working on Memorial Day if they worked the previous Saturday and did not miss any days of work the following week. See sec. IV.J.3 and IV.J.4 of the judge's decision.

bargaining-unit work; and changing the shift times for the first-shift processing department employees during the Memorial Day holiday.

We agree only in part with the judge's finding that the Respondent violated Section 8(a)(5) and (1) when it unilaterally reduced the number of nonworking holidays. The contract between the Respondent and USPS gives USPS the right to change any contract term at its discretion. On April 18, the USPS modified its contract with the Respondent to change Memorial Day and Labor Day from nonworking to working holidays. As a result, the Respondent eliminated Memorial Day and Labor Day as nonworking holidays without affording the Union notice and an opportunity to bargain over either the decision or its effects. We agree with the judge that the Respondent breached its duty to bargain with the Union over the effects of the holiday reduction. As to the decision, however, we reverse the judge's finding of a violation. The Respondent's hands were tied by USPS's contract modification, and thus the Respondent was not obligated to bargain over the decision. *Long Island Day Care Services*, 303 NLRB 112, 117 (1991) (finding no violation because "there was nothing of substance to bargain about" due to the respondent's "total lack of discretion" over a federally subsidized wage increase).

We also agree, but only in part, with the judge's findings concerning the Respondent's rule prohibiting union talk. The complaint alleged that the Respondent violated Section 8(a)(1), (3), and (5) by implementing the rule. The judge found that the Respondent unilaterally promulgated the rule in violation of Section 8(a)(5) and that it discriminatorily enforced the rule in violation of Section 8(a)(3) and (1). We agree with the judge, for the reasons he states, that the Respondent's promulgation of the rule violated Section 8(a)(5). We also find that promulgation and enforcement of the rule, which prohibited employees from discussing the Union or union-related matters during worktime while allowing all other topics of conversation except racial slurs, constituted an independent violation of Section 8(a)(1). See *Jensen Enterprises,* 339 NLRB 877, 878 (2003) (finding violation in a general ban on discussion of all union-related topics during working time). There is no evidence, however, that the Respondent disciplined any employees for violating the rule. Thus, we will dismiss the 8(a)(3) allegation.

We dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by changing welder Kevin Lynch's work assignments. These assignments were consistent with past practice. The record establishes that Lynch had been experiencing an excessive amount of down time. On June 6, Lynch was asked to perform container repair mechanic work when he had no welding work to do. The record indicates that Lynch previously had performed such work. Moreover, his written job description stated that "[o]ther duties may be assigned" in addition to the enumerated "[e]ssential [d]uties and responsibilities" of his welder classification. In these circumstances, we find that the assignment was not a unilateral change. See *Outboard Marine Corp.*, 307 NLRB 1333, 1338–1339 (1992) (finding no substantial and material change in practice of having employees available to fill a variety of positions on the plant floor where employees acknowledged same practice existed before), enfd. mem. 9 F.3d 113 (7th Cir. 1993).

ORDER[25]

The National Labor Relations Board orders that Alan Ritchey, Inc., Richmond, California, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing the Union or union-related matters during working time, when there is no such prohibition as to conversations about any other subjects.

(b) Failing or refusing to recognize and bargain in good faith with Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit, by insisting, as a condition precedent to resuming face-to-face collective bargaining, that the Union provide it with a complete contract proposal, including all economic items; by de-

[25] We modify the judge's recommended Order to conform to the violations found and in accordance with the Board's standard remedial language. We substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and we modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), we modify the judge's remedy by requiring that backpay and any other monetary awards shall be paid with interest compounded on a daily basis. In the remedy section of his decision, the judge recommended a 10-month extension of the certification year, but he omitted from his recommended Order language giving effect to this remedy. We grant the General Counsel's exception and the Charging Party's cross exception concerning the judge's inadvertent omission, and we modify the recommended Order accordingly. In addition, the judge recommended that the notice be posted in Spanish as well as English. The judge did not explain the basis for his recommendation, however, and we find no support in the record for a finding that a substantial number of the Respondent's employees have limited English proficiency. Accordingly, we reject the judge's recommendation for bilingual notice posting. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 989 fn. 61 (2007), enfd. in relevant part sub nom. *S & F Market Street Healthcare, LLC v. NLRB*, 570 F.3d 354 (D.C. Cir. 2009).

laying the appointment of a substitute authorized bargaining representative; and by demanding to meet at an unreasonable location for bargaining.

(c) Undermining the Union as the bargaining representative of its employees by bypassing the Union and dealing directly with its employees in an appropriate bargaining unit concerning wages, hours, or other terms and conditions of employment.

(d) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(e) Failing or refusing to bargain collectively and in good faith with the Union concerning the effects resulting from the elimination of Memorial Day and Labor Day as nonworking holidays.

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

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

(a) Rescind the work rule prohibiting employees from discussing the Union or union-related matters during working time.

(b) On request by the Union, rescind the following unilateral changes: (i) the work rule mandating that leave would count as an unexcused absence if taken without at least one week's prior notice; (ii) changes in shift times for the first-shift processing department employees during Memorial Day weekend; (iii) changes in the work shift and the working hours of the unit inventory clerk; and (iv) hiring temporary employees directly rather than through temporary employment agencies and paying them at a different hourly rate than bargaining-unit employees for performing bargaining-unit work.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, processing, container repair, and quality and data departments employees, including inspectors, material handlers, banders, stretch wrappers, receivers, loaders, unloaders, forklift operators, tray repair operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors, palletized quality auditors—initial inspectors, and final inspectors employed by Respondent at its Richmond, California facility; excluding all employees performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies, outside contractor employees, office clerical employees, janitors, managers, supervisors, acting supervisors, confidential employees, professional employees, data analysts, plant maintenance leads, guards, and supervisors as defined by the Act.

The Union's certification is extended ten months from the date the Respondent begins to comply with this Order.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(e) On request, bargain with the Union in good faith concerning the effects of the elimination of Memorial Day and Labor Day as nonworking holidays.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Richmond, California, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2000.

[26] 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."

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

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 prohibit you from discussing the Union or union-related matters during working time, when there is no such prohibition as to conversations about any other subjects.

WE WILL NOT fail or refuse to recognize and bargain in good faith with Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO (the Union) as the exclusive collective-bargaining representative of our bargaining-unit employees by insisting, as a condition for resuming face-to-face collective bargaining, that the Union provide us with a complete contract proposal, including all economic items; by delaying the appointment of a substitute authorized bargaining representative; or by demanding to meet at an unreasonable location for bargaining.

WE WILL NOT undermine the Union as the bargaining representative of our employees by bypassing the Union and dealing directly with our unit employees concerning wages, hours, or other terms and conditions of employment.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union concerning the effects resulting from the elimination of Memorial Day and Labor Day as nonworking holidays.

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

WE WILL rescind the work rule prohibiting you from discussing the Union or union-related matters during working time.

WE WILL, on the Union's request, rescind the following unilateral changes: (i) the work rule mandating that leave would count as an unexcused absence if taken without at least one week's prior notice; (ii) changes in shift times for the first-shift processing department employees during Memorial Day weekend; (iii) changes in the work shift and the working hours of the unit inventory clerk; and (iv) hiring temporary employees directly rather than through temporary employment agencies and paying them at a different hourly rate than bargaining-unit employees for performing bargaining-unit work.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehouse, processing, container repair, and quality and data departments employees, including inspectors, material handlers, banders, stretch wrappers, receivers, loaders, unloaders, forklift operators, tray repair operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors, palletized quality auditors—initial inspectors, and final inspectors employed by Respondent at its Richmond, California facility; excluding all employees performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies, outside contractor employees, office clerical employees, janitors, managers, supervisors, acting supervisors, confidential employees, professional employees, data analysts, plant maintenance leads, guards, and supervisors as defined by the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, on request, bargain with the Union in good faith concerning the effects of the elimination of Memorial Day and Labor Day as nonworking holidays.

ALAN RITCHEY, INC.

Jo Ellen Marcotte, Esq. and *Thomas Bell, Esq.,* for the General Counsel.

Paul L. Myers, Esq. and *Bruce A. Griggs, Esq. (Strasburger & Price),* of Dallas and Austin, Texas, respectively, appearing on behalf of Respondent.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and amended unfair labor practice charges in Case 32–CA–18149 were filed by Warehouse Union Local 6, International Longshore and Warehouse Union, AFL–CIO (the Union), on May 11 and June 9, 2000, respectively. On November 6, 2000, after an investigation, based upon said unfair labor practice charges, the Acting Regional Director for Region 32 of the National Labor Relations Board (the Board) issued an amended complaint, alleging that Alan Ritchey, Inc. (Respondent) had engaged in, and is continuing to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1] On December 7, 2000, after an investigation, based upon the original and amended unfair labor practice charges in Case 32–CA–18459, filed by the Union on September 25 and October 16, 2000, respectively, and the unfair labor practice charge in Case 32–CA–18526, filed by the Union on October 25, 2000, the Acting Regional Director for Region 32 of the Board issued a consolidated complaint, alleging that Respondent had engaged in, and is continuing to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.[2] The original and amended unfair labor practice charges in Case 32–CA–18601 were filed by the Union on November 30, 2000, and January 4, 2001, respectively, and, on February 6, 2001, after an investigation, based upon the unfair labor practice charges, the Acting Regional Director for Region 32 of the Board issued a complaint, alleging that Respondent had engaged in, and is continuing to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. The unfair labor practice charge in Case 32–CA–18693 was filed by the Union on January 31, 2001; after an investigation, based upon the unfair labor practice charge, on February 22, 2001, the Regional Director for Region 32 of the Board issued a complaint, alleging that Respondent had engaged in, and is continuing to engage in, acts and conduct violative of Section 8(a)(1) and (5) of the Act. Respondent timely filed answers to the amended complaint in Case 32–CA–18149, the consolidated complaint in Cases 32–CA–18459 and 32–CA–18526, the complaint in Case 32–CA–18601, and the complaint in Case 32–CA–18693, essentially denying the commission of any of the alleged unfair labor practices. Pursuant to notices of hearing, these matters came to trial before the above-named judge on February 20 through 23, 26, through 28, and March 19, 2001, in Oakland, California. During the trial, all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record any relevant documentary evidence, to argue legal positions orally, and to file posthearing briefs. Counsel for the General Counsel and counsel for Respondent each filed a posthearing brief, and said documents have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of each witness, I issue the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a State of Texas corporation, with an office and place of business located in Richmond, California, has been engaged in the business of inspecting, repairing, and storing mail transport equipment for the United States Postal Service (USPS). During the 12-month periods immediately preceding issuance of each of the complaints herein, in the normal course and conduct of its above-described business operations, Respondent purchased goods and products valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent admits that, at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

In the amended complaint in Case 32–CA–18149, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by telling an employee she could not participate in protected concerted activities. Further, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by, since May 21, 2000, promulgating and

[1] Subsequent to issuing the amended complaint, on February 6, 2001, the Acting Regional Director issued an amendment to it. Then, during the hearing, counsel for the General Counsel was granted permission to amend the amended complaint, adding an additional par. 10(m).

[2] In their posthearing brief, counsel for Respondent argue that, inasmuch as the allegation of par. 18 of the consolidated complaint does not contain the words, ". . . Respondent thereby has been engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section (6) and (7) of the Act," Respondent has been denied due process and fair notice of the allegations against it and, therefore, no findings can be made against it on this allegation. However, the failure to include the above language appears to have been a mere typographical error, and the paragraph does allege that Respondent ". . . has failed and refused and is continuing to fail and refuse to bargain collectively and in good faith with the representative of it employees . . ."—the sine quo non of an alleged violation of Sec. 8(a)(1) and (5) of the Act. Moreover, given that they addressed the alleged violations of said section of the Act in their brief, it can hardly be found that Respondent or its counsel did not completely comprehend the gravamen of the allegation. Accordingly, as I believe counsel for Respondent has mistakenly elevated form over substance, I find no merit to their contention.

discriminately enforcing a no-talking rule.[3] Moreover, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by, since April 13, 2000, more harshly enforcing the efficiency standard for inspectors and by subjecting 41 named inspectors to progressive discipline, including termination, for failing to meet its efficiency standards because they engaged in activities in support of the Union and without initially bargaining with the Union.[4] Finally, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by, unilaterally and without affording the Union notice and an opportunity to bargain, requiring that its employees in the processing department wear safety glasses, implementing a safety ticket program whereby employees would be progressively disciplined for violating safety rules, reducing the number of nonworking holidays from six to four through the elimination of Labor Day and Memorial Day, implementing a rule requiring that the first-shift inspectors finish the second shift's work, from May 22 through 30, 2000, changing the start time for employees in the first-shift mailbag section of the processing department from 6 to 4 a.m., through a memo dated June 6, 2000, setting forth more onerous plant objectives, implementing more onerous working assignments for welder Kevin Lynch, on or about June 18 promulgating more stringent discipline standards and procedures and more onerous objectives for the completion of work, informing employees that they would receive an unexcused absence if they failed to provide 1 week's notice, informing employees that they were required to work on their regularly scheduled days off Friday, July 7, and Saturday, July 8, 2000, and changing the worktime of employees who worked in the processing department on the first shift;[5] by, since April 13, 2000, subjecting 67 employees to progressive discipline, including termination, for violating its absenteeism policy without initially giving notice to and offering the Union an opportunity to bargain; and by bypassing the Union and dealing directly with bargaining unit employees by polling the first-shift mailbag section of the processing department about whether they wanted their start time changed for receiving overtime and by offering to pay employees triple time for working on May 26, 2000 (Memorial Day), if they volunteered to work on May 27 and did not miss any days through June 2.

In the consolidated complaint in Cases 32–CA–18459 and 32–CA–18526, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by, during collective bargaining with the Union, insisting, as a condition for continuing the negotiations, that the Union provide a complete contract proposal which included all economic and noneconomic items and failing and refusing to meet at any time or place for negotiations; by subjecting two employees to progressive discipline, including termination, without initially giving notice to and offering to bargain with the Union; and bypassing the Union and dealing directly with bargaining unit employees by asking container repair department mechanics to sign a memo agreeing to the changes to their job duties. Further, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by changing the job duties of its mechanics in the container repair department, changing the shift and number of hours worked of its bargaining unit inventory clerk, beginning stricter enforcement of its efficiency rating standard for container repair department mechanics, and announcing that there would be layoffs of container repair department employees and what the criteria for selection would be.[6] Finally, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by subjecting two employee to progressive discipline because of their activities in support of the Union and without offering the Union an opportunity to bargain. In the complaint in Case 32–CA–18601, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by, unilaterally without notice to or bargaining with the Union, offering its employees an accident/disability insurance

[3] The amended complaint alleges that employees, Christy Jackson, Latachianna Pontiflet, and Cheryl Robinson were terminated because of their activities in support of the Union in violation of Sec. 8(a)(1) and (3) of the Act. However, at the hearing, each testified that she was terminated for reasons other than not meeting Respondent's minimum efficiency standard and, inasmuch as counsel for the General Counsel offered no evidence that Respondent possessed any knowledge of the union activities of the each of the alleged discriminatees or that Respondent harbored any specific unlawful animus toward any of them and as there existed no nexus between the alleged discriminatees' activities in support of the Union and their discharges, I granted counsel for Respondent's motion to dismiss the allegations. I shall adhere to my ruling at the trial.

[4] Of the 41 named employees, the General Counsel alleges that the discipline of 15 violated only Sec. 8(a)(1) and (5) of the Act. These include employees Jackson, Pontiflet, and Robinson. With regard to employee Robinson, while it is true that the second amendment to the amended complaint in Case 32–CA–16149 appears to exclude her from the alleged violations of the above section of the Act, the record as a whole makes it quite clear that such was an oversight and that counsel for the General Counsel meant to continue to include her name in the amended complaint. Therefore, I have not considered her name to have been amended out of the amended complaint par. 10(l).

[5] The amended complaint sets forth these alleged unlawful unilateral changes as violations of Sec. 8(a)(1), (3), and (5) of the Act; however, in its second amendment to the amended complaint, the General Counsel seemingly limited the alleged violations of Sec. 8(a)(1) and (3) of the Act to pars. 10(a)(i) and (l)(1) through (7), (9), through 26, and (28) through (31). That this view is correct is seen from the fact that, in their posthearing brief, counsel for the General Counsel argue that the asserted unlawful unilateral changes were only violative of Sec. 8(a)(1) and (5) of the Act. Accordingly, I view the alleged unilateral changes as only violative of the latter section of the Act.

[6] While these acts and conduct are alleged as violative of Sec. 8(a)(3) of the Act, as with the allegations in the amended complaint in Case 32–CA–18149, in their posthearing brief, counsel for the General Counsel treat the alleged unlawful acts and conduct as unilateral changes violative of Sec. 8(a)(1) and (5) of the Act and fail to ascribe any unlawful animus to Respondent in engaging in any of them. In these circumstances, as with the alleged unlawful unilateral changes in Case 32–CA–18149, I have likewise considered the alleged unilateral changes only as violations of Sec. 8(a)(1) and (5) of the Act.

policy, reducing the number of daily hours worked by mechanics in its container repair department, and directly hiring and employing temporary employees to perform the work of bargaining unit employees and paying them wages and benefits different than those paid to bargaining unit employees and by issuing progressive discipline, including termination, to employee Marcell Spain without initially giving notice to and offering to bargain with the Union. In the complaint in Case 32–CA–18693, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by meeting directly with bargaining unit employees on two occasions and soliciting their views concerning upcoming subjects of bargaining with the Union including soliciting their views concerning how reduction-of-work issues could be handled.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The record establishes that Respondent is a privately-owned State of Texas corporation; that an individual named Alan Ritchey, whose office is located in Valley View, Texas, is the majority shareholder in the corporation and its president and chief operating officer; that James Craig Brown is the vice president and general counsel of the corporation; that Respondent's principal business is as a contractor to the USPS for highway mail transportation and the operation of mail transport equipment service centers[7] (service centers), at which Respondent inspects, repairs, and stores the nonmotorized equipment,[8] with which the USPS handles the mail at its postal service facilities and on its mail transportation vehicles. At its Richmond, California[9] service center, which opened in August 1999 and which is the facility at issue herein, David Williams was the plant manager, the highest management position at the facility, from December 5, 1999, through January 2001;[10] Respondent employs approximately 250 workers, who work in five separate departments on three shifts;[11] and, at all times material herein, June Rivera and John Medina have been the first- and second-shift managers. Pursuant to a petition for a representation election, filed by the Union on February 29, 2000, on April 13, 2000, agents of the Board conducted a representation election amongst the full-time and regular part-time employees, who work in the warehouse, processing, container repair, and quality and data departments at Respondent's Richmond service center, including all inspectors, material handlers, stretch wrappers, receivers, loaders, unloaders, forklift operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors—palletized quality auditors, initial inspectors, and final inspectors,[12] and a majority of the employees voted in favor of representation by the Union.[13] As a result, on April 21, the Board certified the Union as the representative for purposes of collective bargaining of Respondent's employees in the above-described appropriate unit. The record further establishes that the USPS, pursuant to its contract with Respondent, punctiliously monitors and controls all aspects of Respondent's operations, including worker productivity,[14] at its six service centers to the extent that the USPS has reserved to itself the right to unilaterally change any term of its contractual relationship with Respondent.

B. Respondent's Alleged Unlawful Disciplining of Employees for Failing to Work at Its Minimum Efficiency Levels

The amended complaint in Case 32–CA–18149 alleges that, since April 13, 2000, Respondent has unlawfully enforced its efficiency standards for inspectors and unlawfully disciplined inspectors[15] for failing to work at its minimum efficiency levels. The record reveals that the USPS constantly monitors the productivity of the 23 mail transport equipment service centers;[16] that, prior to contracting out the operation of the service

[7] There are 23 such facilities located throughout the United States, with each operated by a private company. Respondent operates six such sites located in Springfield, Massachusetts; Long Island, New York; Philadelphia, Pennsylvania; Minneapolis, Minnesota; Seattle, Washington; and Richmond, California.

[8] The post office equipment includes cardboard, nylon, plastic, and denim mailbags, mail trays, lids, and sleeves, which fit over the trays, and rolling carts, which include shopping cart type containers, rigid wire containers, and large containers with shelves.

[9] Richmond, California, is located near Oakland and across the bay from San Francisco.

[10] Respondent employed at least two plant managers at the Richmond, California service center prior to hiring Williams. They were terminated because the USPS was dissatisfied with the amount of work, which had been processed by Respondent at this facility.

[11] While Respondent nominally keeps the plant open for three work shifts, the bulk of the work force is divided equally between the first and second shifts, and it employs only a few warehousemen on the third shift.

[12] Among other individuals, specifically excluded from the voting unit were employees, ". . . performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies."

[13] Of the 268 eligible voters, 160 cast ballots in favor of the Union and 4 cast ballots in favor of Teamsters Local 315. Eighty-two employees cast ballots against both labor organizations.

[14] According to David Williams, for every job in a service center, the USPS has published a statement of work," . . . tell[ing] you every single thing you have to do, and it describes step by step how you have to do it."

[15] Respondent employs approximately 120 inspectors in its processing department; they are divided equally between the first and second shifts.

[16] Plant Manager Williams testified that, for the first 20 weeks of a new service center's operations, the USPS pays a 30-percent premium over the normal rates—"They knew it was going to take a while to get [our] rhythm down and they paid you a higher rate to do the exact same work [when, they determined, you were at] full operating capacity [at] week 21." According to Williams, the USPS deemed Respondent's Richmond, California facility to be at full operating capacity in early January, and there was no more time to be inefficient and continue being profitable.

Williams further testified that, in order to be in compliance with USPS-mandated productivity levels, Respondent's Richmond, California facility ". . . was supposed to be at 95 percent effectiveness or above, because the [USPS] had a guaranteed minimum to [Ritchey], if we ever ran out of work, the USPS guaranteed us . . . x dollars a week, as long as our plant [operated at the 95 percent efficiency level]. . . ." He added that, upon being hired, he noted that the service center's efficiency level ". . . was . . . running about 65 percent effective on an

centers to private companies, the USPS operated one such facility in North Carolina; and that, in order to ascertain the productivity of inspectors,[17] who are employed in the processing department,[18] it accumulated data and devised formulas for determining the "normal amount" of inspections the employees should perform over a given amount of time while examining different products—the so-called efficiency standards. According to David Williams, the USPS expects that inspectors at each of the 23 privately operated service centers, including those employed by Respondent at its Richmond, California facility, work at a rate equal to 100 percent of the efficiency standard for a particular product.[19] He testified that, since August 1999,[20] as early as their date of hire, employees, classified as inspectors, have been inculcated with the efficiency rate at which Respondent expects them to be working and with the importance of continuing to maintain this standard; that, after he became plant manager, initially during meetings with all employees on the first two shifts on January 18, 2000, and subsequently, perhaps, in a memo to employees,[21] he announced that, no matter the product, all inspectors would be expected to be working at a minimum efficiency level of 80 percent of the USPS efficiency standard;[22] and that, on a daily basis, processing department supervisors consistently informed inspectors regarding the efficiency level at which they were working and, if below the 80-percent level, prodded them to increase their efficiency.[23] While alleged discriminatee Michelle Mayse, who was hired by Respondent as an inspector in November 1999 and who normally inspected the sleeves, which fit over mail trays, specifically denied being informed, upon her hire, that she was expected to meet an efficiency standard while working, she corroborated Williams, recalling she heard from him a month after her hire about the existence of an efficiency standard for inspectors. According to Mayse, the plant manager told her "that we had to meet a certain percentage of 80 percent," and that "we couldn't go anything below 80 percent *or disciplinary action would be taken*."[24] (Emphasis added.) Asked if she ever was told what her 100-percent efficiency level was, Mayse replied, "That's what we were trying to find out. . . . there's different products and there's different standards for different products . . . ," and ". . . we were unaware of what the standard . . . was . . . on different products." Contradicting Mayse on this point, Williams testified that the 100-percent efficiency standards "were taped" on the work tables ". . . so people could see the standard associated with all the different products." He added that ". . . we would print out . . . on a daily basis, where peoples' work was at and counsel them whether they were below standard . . . . So every single day . . .

overall basis" or approximately 30 percent below the guaranteed minimum.

[17] These employees scrutinize the various types of mailbags for tears or rips or the mail trays, lids or sleeves for holes or cracks. Inspectors are assigned to either product.

[18] Inspectors, along with mechanics, who work in the container repair department, comprise the so-called rated positions in a service center. Unlike inspectors, who are not required to repair the products, which they determine to have rips, tears, holes, or cracks, the mechanics examine and, if necessary, repair the rolling containers, which they initially inspect.

[19] The USPS designed computer programs, pursuant to which each inspector is responsible for imputing his or her raw production figures, for determining the efficiency levels of the rated employees on a daily basis.

[20] There is scant record evidence as to the efficiency level at which inspectors were required to be working prior to Williams hire. Brandee Chorro, Respondent's human resources manager, who has been employed at the Richmond facility since April 1999, failed to testify on the subject. Employee warning notices for the time period prior to December 1999 refer to 75-, 80-, and 85-percent efficiency levels.

[21] During cross-examination, Williams admitted that no sign-in sheet was maintained at the employee meetings. With regard to whether anything was placed in writing regarding the 80-percent efficiency level, he said, "I put out a memo at some point about it, but that was verbally discussed every single day. So it wasn't something we gave them in writing." As to the memo, Williams recalled issuing it "sometime just after I did the meetings" but then averred, "I don't have it any longer."

[22] Originally, Williams announced that the minimum efficiency level for inspectors of trays, sleeves, and lids would be 85 percent; however, he subsequently decided that all inspectors should have the identical minimum efficiency rate of 80 percent.

Williams testified that, during the January 18 employee meetings, he also informed the mechanics in the container repair department, the other rated position, they were required to work at a minimum efficiency level of 100 percent of the efficiency standard for mechanics, which was established by the USPS. Contradicting Respondent's plant manager, Edward Grissom, a mechanic in the container repair department at Respondent's Richmond facility and a member of the Union's employee bargaining committee, testified that, when he was hired, nothing was said about a minimum efficiency level but that ". . . later on they expected us to do 80 percent." Grissom added that he became aware of the 80-percent figure in September 1999 and that the mechanics' minimum efficiency level remained the same until the publication of a memo, GC Exh. 4, "a number of weeks" after the election but prior to July 4, 2000, with the memo establishing the mechanics' minimum efficiency level at 120 percent. Then, several months later, he became aware that Respondent had established another minimum efficiency level for container repair mechanics—100 percent. In this regard, Grissom testified that two mechanics, Dale May and Tyrone Sparkman, were disciplined by Respondent in October 2000 for low efficiency, and Respondent admits that each received a verbal warning in that month. As to Sparkman, his counseling report, the content of which, Grissom testified, was what he heard, states that his efficiency was below 100 percent. Concerning May, Grissom, who was present during the counseling session, their supervisor, George Jordan, told May ". . . that his efficiency was unacceptable. . . . It was just too low . . . . [Jordan] asked . . . if he was having a problem, could he help him and . . . bring it up." In the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526, the General Counsel alleges that both disciplinary acts were violative of Sec. 8(a)(1), (3), and (5) of the Act.

[23] Williams testified that, during his January 18 meetings with the inspectors, he told them that an efficiency rate of 80 percent was "the minimum level" and that they actually had to reach a 100-percent level and, if possible, above on a weekly basis.

[24] Mayse testified that David Williams arrived at the plant in December 1999 and pointed out the existence of efficiency standards to the employees—"He said there were percentages that had to be met by each of the inspectors. . . . [The inspectors] had to meet an 80 percent standard."

the supervisors would take . . . the numbers from the day before . . . and talk to each person . . . ."

There is no dispute that, prior to the bargaining unit employees' selection of the Union as their representative for purposes of collective bargaining on April 13 and thereafter, Respondent subjected inspectors, who were not performing at satisfactory and/or minimum efficiency levels and who had failed to respond to the prodding of their supervisors by improving their job performance, to discipline,[25] including termination, pursuant to its progressive disciplinary procedure.[26] Thus, according to Respondent's employee handbook, which is given to all new hires at its Richmond, California service center, Respondent utilizes a progressive disciplinary procedure for most types of employee performance or behavioral problems, including "failure to meet production or quality standards," with such discipline to employees ranging from verbal counselings through verbal warnings, written warnings, suspensions, and possible termination.[27] With regard to enforcing this discipline, Plant Manager Williams testified that "[b]asically when we put the new numbers in place what we told people is that we would always look at a four-week average before we disciplined them."[28] Further, asked if there were situations when no discipline was given even though an employee did not meet the required efficiency level, Williams replied, "I'm sure there were. [It was] hard to get the consistency . . . when I was hired, I had a bunch of supervisors who were new, and you're kind of working on multiple . . . tasks, and as your trying to get your supervisors to do things consistently, they also fall off the boat . . . ." Asked whether employee discipline depends upon the surrounding circumstances, Williams answered, ". . . when you know someone's working the low volume area, or you know someone's doing something else, you're always going to look and say . . . there's this exception." He added that "absolutely" circumstances are taken into consideration before disciplining for low efficiency—". . . nothing in life is ever straight numbers." For example, according to Williams, notwithstanding low efficiency, no discipline was given to a woman, who was having "issues" related to her husband, who was dying of cancer, or to employee Amelia Santos, who wasn't able to work longer than 3 or 4 days in a position and, thus, was unable to get her job "rhythm down," or to employees used in "low volume" areas. Also, workers going from inspecting mailbags to inspecting trays, sleeves, and lids was not a difficult transition for efficiency rating purposes, "but to go from [trays, sleeves, and lids]to bags was difficult," and in the latter circumstance, ". . . we'd give them some time. We'd retrain them, wouldn't hold them accountable." Similarly, inspectors, who are utilized to train new employees, and inspectors, who work in low volume areas, are given special consideration, and new inspectors, after training, are not held responsible for even having any efficiency for the initial 4 weeks. "They [have] four weeks to kind of get up to speed."

In arguing that Respondent more harshly enforced its efficiency levels subsequent to the April 13 election, counsel for the General Counsel point to the discipline, which was imposed by Respondent upon Daryl Johnson, who, despite consistently lower than 80-percent average weekly efficiency since the second week in January, was not disciplined for his low efficiency level until April 10, 3 days prior to the election.[29] On that date, according to Johnson, June Rivera, the day-shift manager, called him into her office and ". . . she explained to me that I could be doing . . . better than what I had been doing according to what the efficiency level was. . . . She explained to me then that I needed to be at 85 percent . . . and could I bring my numbers up . . . . I said I would do my best. . . ." Rivera added that their conversation should not be considered to be discipline but asked Johnson to execute an acknowledgement of their conversation. Ten days later, 3 days after the election, after his efficiency average had risen from 45.31 percent to 60.58 percent, Rivera called Johnson into her office, and "she explained to me

[25] While not disputing the extensive documentary evidence of verbal and written warnings given to employees for failing to perform at mandated efficiency levels prior to the election, counsel for the General Counsel presented Michelle Mayse, who testified that it was not until "after the election" that she heard of actual discipline for inspectors, who failed to meet Respondent's minimum efficiency standard.

[26] Such discipline predated Respondent's hiring of David Williams as the plant manager for its Richmond, California service center.

[27] Respondent's employee discipline documents are called "employee counseling reports." On the documents, there is no space for verbal warnings. Therefore, I shall consider a written report of a verbal counseling as constituting a verbal warning.

Respondent reserves the right to determine what types of employee misconduct warrant disciplinary action and the "nature and severity of an offense," and, for certain types of misconduct, Respondent reserves the right, at its "sole discretion," to discipline without progressing through each stage of the disciplinary procedure. Moreover, "a decision by [Respondent] not to enforce any policy or practice . . . is not intended to prevent and does not restrict [Respondent's] right to insist on strict adherence to the policy or practice in the future."

[28] Contrary to Williams' assertion as to when he informed bargaining unit inspectors about the need for compiling a 4-week average efficiency rating, in his testimony, regarding what he said to employees during his January 18 meetings, under direct examination by counsel for the General Counsel and, later, under direct examination by counsel for Respondent, Williams failed to mention telling them about the compilation of such an average prior to the imposition of any discipline. Further, Williams did not recall ever discussing the necessity of a 4-week average prior to discipline in any memo to Respondent's employees. Moreover, Michelle Mayse testified that she first learned how Respondent would calculate an inspector's 80-percent efficiency level during a conversation with Williams on May 27. "I . . . asked him to put something in writing, stating" the efficiency standard for all inspectors was 80 percent. "He was kind of upset" and said ". . . basically you had four weeks to be at [the minimum efficiency level]. Anything below, then they call you in and they can discipline you. . . . depending on the circumstances of the individual . . . ."

Asked why a 4-week average was used, Williams said, ". . . you just want to make sure you have time for all the work to wash through the system. . . . The reality is we don't always control the amount of work that comes . . . through. And then you want to give a person adequate time to adjust. . . . And you want to look at long-term trend versus a short-term trend." Williams added that he announced this adjustment period during his January 18 meetings with employees.

[29] R. Exh. 38 establishes that Johnson's weekly efficiency average was above 80 percent only once between the week ending January 7, 2000, and the week ending April 7, 2000. Thus, for the week of February 18, Johnson's efficiency was 116.77 percent. Other than that week, his efficiency average never rose above 73.99 percent.

that I needed to bring my numbers up or that I would be facing suspension and/or termination. . . ." The alleged discriminatee explained that he had never received training for the inspector position and that he was doing the best he could. Thereupon, Rivera analogized Johnson's job performance to money, saying Respondent was paying him a dollar for 43 cents worth of work, and concluded by again warning he faced suspension or termination if he failed to improve. Approximately 10 days later, Johnson testified, Rivera called him into her office and said that there had been "a mix-up" and that his minimum efficiency number was 80 percent.[30] Thereafter, on April 25,[31] Johnson was suspended from work for 3 days because his efficiency "was not up to par. . . ." Johnson protested that he had never been given a target date to be at 80-percent efficiency and thought it "absurd" for Respondent to expect his numbers to rise precipitously. After 3 days, he returned to work; however, on May 8, Rivera again called him to her office, and, on this occasion, informed Johnson he was being discharged.[32] Brandee Chorro, the human resources manager, was present and said that, over the prior month, Johnson's efficiency average had risen no higher than to 62 or 63 percent over a 4-week evaluation period[33] and that such was "unacceptable" to Respondent.

Similarly, counsel points to the disciplining of LaTachianna Pontiflet, who had been hired by Respondent as an inspector on November 17, 1999. A month later, John Medina gave her a verbal warning for "low efficiency" and noted that she would "need to be at 70%." Five days after the election, on April 18, 2000, June Rivera called Pontiflet into her office, gave her a second verbal warning because her average weekly efficiency level for the preceding 5-week period had been 70 percent, and said Pontiflet had to increase her average weekly efficiency level to 80 percent. Pontiflet asked why she had to be at 80 percent when Medina told her 70 percent, and " . . . [Rivera] said that on her shift, she would like it to be 80 percent . . . and I was not meeting the requirement." On May 2, Rivera gave Pontiflet a written warning because her average efficiency level for the preceding week had been 57.8 percent, and, 2 weeks later, Pontiflet received a 3-day suspension. On this latter occasion, May 16, Rivera informed Pontiflet that she ". . . was still not maintaining the 80 percent;" that her average efficiency level for the prior week had been 75.15 percent and that her 4-week average efficiency level had been 76.26 percent. Pontiflet, who testified, "[T]his was my first time knowing what this was about," complained that she was being punished for a time period for which she had already received discipline.

Counsel for the General Counsel argue that Respondent's own disciplinary records demonstrate a "marked contrast" between how it disciplined employees for low efficiency prior to the election and how it did so subsequent to the bargaining unit employees' selection of the Union as their bargaining representative. At the outset, during the period, August 1999 through April 12, 2000, Respondent subjected in excess of 50 different bargaining unit inspectors to a total of 68 verbal warnings, 20 written warnings, 4 suspensions, and 1 termination for failure to achieve acceptable efficiency rates[34] and, during the period, April 13 through September 2000, Respondent subjected 41 different bargaining unit inspectors to a total of 22 verbal warnings, 29 written warnings, 22 suspensions, and 14 terminations[35] for failure to achieve minimum efficiency levels. Further, analysis of the "corrective action" required and the "timeframe[s]" for such in the only counseling report for November 1999 and the December 1999 employee counseling reports, which begin on the day before Williams became plant manager, reveal that Respondent normally permitted employees, who received verbal warnings for low efficiency, to increase their efficiency levels gradually and to different final levels. For example, employee Vincent Stroud was required to reach a 75-percent efficiency level by increasing his efficiency 5 percent each week; employee Joseph Fullwood was required to be at a 50-percent efficiency level the following week and, thereafter, to increase his efficiency 5 percent each week until he reached 80-percent efficiency; with no efficiency goal established, eight other employees were expected to be at a 50-percent efficiency level the following week and to raise their levels by 5 percent each subsequent week; employee Lowe Shakesnider was expected to be at a 55-percent efficiency level and to increase his efficiency 5 percent thereafter; several employees were expected to raise their efficiency levels 10 percent each week until they reached a 100-percent efficiency level;

[30] This conversation occurred a day or two after an employee meeting during which Johnson complained to Williams about his counseling by Rivera and handed the plant manager a copy of what he executed on April 10.

[31] His average efficiency for the weeks of April 21 and 28 had been 57.82 percent and 60.97 percent, respectively.

[32] Johnson's average efficiency for the weeks of May 12 and 19 were 68.41 percent and 66.16 percent, respectively.

[33] Johnson protested that he had known nothing about a 4-week evaluation period.

[34] If one concentrates only on the period between January 18, the day upon which Williams assertedly announced to the inspectors that they were required to maintain, as a minimum, an efficiency level of 80 percent, and April 13, Respondent issued seven verbal warnings, three written warnings, three suspensions, and one termination. As will be discussed infra, there exists specific record evidence only as to the efficiency of six inspectors during the 3-month period prior to the election.

[35] Other than the discharge of Demone Anderson, which I shall discuss infra, other alleged discriminatory discharges appear to be in accord with Respondent's disciplinary policy for low efficiency. Thus, George Booker received a verbal warning for low efficiency and "standing around and not working" on May 14, 2000, a written warning for continued low efficiency 2 weeks later, a 3-day suspension a week later, and, on June 18, he was terminated for low efficiency and poor attendance. John Chatman received a verbal warning for low efficiency on January 15, 2000, a written warning for low efficiency on May 28, a 3-day suspension on June 4, and he was terminated on June 15 based upon a 4-week average efficiency of 74. 47 percent. After receiving verbal and written warnings for low efficiency, Sheila McFarland was suspended for 3 days on August 28, 2000, based upon a 4-week efficiency level average below 80 percent, and, for continued low efficiency, she was terminated on September 22. On April 17, 2000, Melvin Rucker received a verbal warning for low efficiency based upon a 4-week average below 80 percent. He was suspended for 3 days on April 26 for continued low efficiency and discharged 19 days later.

employee Sheila Jackson was required to be at a 50-percent efficiency level the following week and, thereafter, show "steady improvement until she reached a 75- to 85-percent efficiency level; and another employee, Lynette Groom, was required to be at a 60-percent efficiency level the following week and "needs to improve" each week to a 75- to 85-percent efficiency level. Likewise, even after Plant Manager Williams imposed the 80-percent minimum efficiency level for inspectors, in January 2000, employee John Chatman received a verbal warning for low efficiency and was required to raise his efficiency level to only 70 percent, and, in February, employees Lynette Groom and Joseph Fullwood received suspensions for continued low efficiency but were only required to increase their efficiency levels to 70 percent. Similarly, on the day before the election, April 12, employee Jemina Morris received a warning notice for low efficiency and was given 2 weeks to increase her efficiency level to 80 percent. In contrast, except for a verbal warning given to employee Melvin Rucker on April 17, each act of discipline, given by Respondent to bargaining unit inspectors, subsequent to the election, requires the employee to achieve an 80-percent efficiency level, without permitting the inspector to gradually increase his or her percentage, or face further discipline.

Next, counsel for the General Counsel asserts that there are several inspectors, who, prior to the election, were not disciplined by Respondent even though they consistently failed to achieve an 80-percent efficiency level but who were first disciplined for failing to do so after the election. Thus, while he was initially disciplined for low efficiency on April 10, 2000, employee Daryl Johnson averaged in excess of the 80-percent minimum efficiency level for a week just once during the first 3 months 2000.[36] Next, while inspector Kylandria Thomas failed to average an 80-percent efficiency level for any week in February or March,[37] Respondent did not discipline her with a verbal warning for low efficiency[38] until 4 days after the election, and she was required to be at the 80-percent level the following week. Counsel next point to inspector Bettina Lawrence. However, while she likewise received a verbal warning on April 17 for low efficiency based upon the preceding 5-week period, it is questionable whether she deserved discipline for low efficiency during the period January through April 13. Thus, she achieved weekly average efficiency levels above 80 percent during the first and third weeks of February and the first 2 weeks of March 2000. Finally, as examples, counsel points to two other inspectors, Wyla Torres and Francis Young. Neither was disciplined for low efficiency during the first 3 months of 2000 notwithstanding that Torres achieved an average efficiency of over 80 percent just once[39] or that Young did so just twice.[40]

Next, counsel for the General Counsel argue that, subsequent to the election, Respondent enforced its policies in an inconsistent manner. Thus, they assert, while David Williams maintained that Respondent did not hold new inspector employees to the 80-percent minimum efficiency level for their first 4 weeks in a rated position, such was not the case for employees after the election. In this regard, they point to employee Demone Anderson, who, according to Paul Tuazon, Respondent's quality control and data manager, first moved into a rated (inspector) position on June 8, 2000. Nevertheless, according to Respondent's disciplinary records, just 11 days later, on June 19, he received a verbal warning for "low efficiency" and was required to be at 80-percent efficiency the following week. Then 11 days after this initial warning, on June 30, Respondent subjected him to a written warning for not achieving an 80-percent efficiency average for the week of June 25. Two weeks later, Anderson was suspended for 3 days for continuing to average "low efficiency" levels, and, finally, on August 6, Respondent discharged him—2 months after moving him into a rated position. Similarly, Respondent first moved employee Monique Dudley into a rated (inspector) position on April 7, and, on May 17, issued her a verbal warning for failing to average a weekly 80-percent efficiency level for the 4-week period commencing April 17—just 10 days after Dudley began working as an inspector. Then, a week later, Respondent issued her a written warning for low efficiency, taking into account basically the same 4-week period. As a third example, counsel cite to Yuseff Ivey. He was hired by Respondent on April 19, 2000, and Respondent first moved him into a rated (inspector) position on May 1. Ivey was issued a verbal warning for low efficiency on May 28 and, a week later, on June 5, was issued a written warning for low efficiency.

Counsel for the General Counsel next examine plant manager Williams' asserted practice of only disciplining inspectors for low efficiency if they failed to average an 80-percent efficiency level for a 4-week period and contend that its postelection discipline was contrary to the stated practice. In this regard, the discipline, to which Respondent subjected inspectors Donika Dotson, Jacqueline Greer, and Maggie Hales, did not result from measurements of the efficiency of each over a 4-week period. Further, counsel contends that, rather than for 4 weeks, after verbal warnings, supervisors were requiring disciplined inspectors to maintain an 80-percent efficiency average each week. Thus, Demone Anderson's suspension notice states that, thereafter, "each week Demone's efficiency needs to be at 80%;" Donika Dotson's suspension notice states that she ". . . needs to maintain weekly efficiency of 80%. . . . each and every

[36] During the week of February 18, 2000, Johnson's efficiency average was in excess of 110 percent.

[37] Thomas did average over 80-percent efficiency for 2 weeks in January 2000.

[38] This was based upon the 5-week period immediately preceding the date of the warning notice. Thus, it encompassed 3 weeks in March and 2 weeks in April.

[39] There is no record evidence that Torres was ever disciplined by Respondent for low efficiency.

[40] As mentioned above, Plant Manager Williams testified that Respondent did utilize discretion in subjecting employees to discipline for low efficiency, citing to an inspector, whose husband was dying from cancer. According to Williams, the employee was Francis Young, "and we kind of cut her some slack a couple of times. . . . Her husband did eventually die and we cut her a little bit of slack after that."

week;" Monique Dudley's verbal warning notice and written warning notice require that she maintain an 80-percent efficiency level "each" and "every" week; Jacqueline Greer's suspension notice requires that she maintain 80-percent efficiency "each and every week;" Maggie Hales' verbal warning requires her to be at or better than 80-percent efficiency "each week;" Patricia Hales' written warning demands that she maintain an 80-percent efficiency rate on a "weekly basis;" Ebony Mouton's suspension notice requires that she be at 80-percent efficiency "each day;" Yolanda Stevens' suspension notice requires her to be at 80-percent efficiency on a "weekly basis;" Kylandria Thomas' written warning requires her to be at 80-percent efficiency on a "weekly" basis; Jemina Morris' written warning notice states that she must be at 80-percent efficiency "each week;" and Paulette Hicks' verbal warning requires that she maintain an 80-percent efficiency level "each and every week." However, counsel's contention fails to take into consideration Williams' testimony that an inspector's 4-week efficiency average was utilized only to assess the propriety of initial discipline. Further, the foregoing constitute "corrective actions" and "resolutions" for the employees' low efficiency levels.

Counsel for the General Counsel next assert that, subsequent to the election, there are numerous instances in which only short intervals of time elapsed between levels of discipline, effectively punishing employees "two and three times" for the same periods of low productivity. Thus, employee Melvin Rucker received a verbal warning on April 17, 2000, based on low productivity, and, 9 days later on April 26, he was suspended. Similarly, employee Yolanda Stevens received a verbal warning on April 14, 2000, for low productivity. She next received a written warning on May 9 for low productivity, a suspension on May 23, and, 13 days later, on June 5, her termination. Also, Latachianna Pontiflet received a verbal warning for low efficiency on April 18, 2000. Two weeks later, on May 2, she received a written warning, and, 2 weeks after that, on May 16, she received a suspension for continued low productivity, in part, based upon the same time period for which she received the written warning. Likewise, On May 28, 2000, inspector John Chatman received a written warning for low productivity; 7 days later, on June 4, he was suspended; and, 11 days later, on June 15, Respondent discharged him for low efficiency based upon the preceding 4-week period. Also, Monique Dudley received a verbal warning on May 17, and she received a written warning 6 days later for low efficiency, essentially based upon the same period of time. Finally, regarding inspectors Misty Machado and Ardell Shelfo, the former was given a verbal warning for low efficiency on May 28, 2000, and, 14 days later, on June 11, a written warning, and Respondent gave Shelfo a verbal warning for low efficiency on June 23, 2000,[41] a written warning 7 days later on June 30, and a suspension for continued low efficiency 10 days later on June 10. Other than for Shelfo, I note that the initial discipline for the above inspectors was assessed only after Respondent determined that, over a 4-week period, the average efficiency level for each employee was below 80 percent.

In the amended complaint in Case 32–CA–18149, the General Counsel alleges that, subsequent to the election, Respondent disciplined its inspectors for not working at or above its minimum efficiency level without notice to the Union of each instance of proposed discipline or affording it an opportunity to bargain, and, in their posthearing brief, counsel for the General Counsel contend that "it is undisputed that Respondent never afforded the Union an opportunity to bargain about the efficiency standard or the disciplinary procedure associated with it." In this regard, in a letter, dated May 26, 2000, Alfredo Flotte, a union representative, and John Lopes, a business agent, wrote to David Williams, protesting certain "unlawful actions," which had been allegedly committed by Respondent. In their letter, Flotte and Lopes wrote that "the law . . . requires the Company to provide [the Union] with prior notice, and an opportunity to bargain, before taking disciplinary action against bargaining unit employees" and that ". . . the company has recently terminated, suspended or otherwise disciplined numerous . . . bargaining unit members without affording prior notice and a reasonable opportunity to bargain over the proposed action to the Union" and specifically demanded that Respondent ". . . immediately rescind all terminations, suspensions, verbal or written warnings or other disciplinary actions which have been taken against bargaining unit members by the company since the April 13th election . . . ."[42] During cross-examination, David Williams conceded that, prior to disciplining, including, terminating employees for various offenses, such as low efficiency and attendance, he never gave notice to the Union.[43] However, he added, "It was explained to me . . . . That the only time I needed to negotiate or bring the Union in is if we were going to investigate a person" or "[any time] that you were going to do a change . . . " meaning "if I wasn't going to change how I did business."[44] On this latter point, Williams testified that inspectors had been disciplined for not working at Respondent's efficiency levels prior to the election and continued to be disciplined for this reason after the election and that

[41] There is no indication on the warning notice whether, prior to issuing the discipline, Respondent bothered to observe the employee's efficiency over a 4-week period.

[42] In a letter, dated December 27, 2000, to Williams, Lopes referred to his May 26 letter, stating "we also demanded prior notice of any proposed disciplinary action against unit employees."

[43] Williams testified that he did occasionally inform the Union about potential "attendance issues," involving members of the employees' bargaining committee so that union officials could speak to the employees and avoid discipline. Also, according to Williams, there was one instance of an employee, who believed she was about to be discharged for attendance problems and who went to the Union to seek assistance. A union official subsequently spoke to him, but "the actual event happened."

[44] Williams testified, "There was a couple of instances where we had conversations about discipline prior to it taking place. . . . regarding a couple of the [bargaining committee representatives. . . . And some of those people were having attendance issues, and some of those people were having performance issues." According to Williams, he telephoned union representatives and alerted them that these people were having problems.

there was never any change in Respondent's practice in this regard.

While Respondent does not dispute the content of its employee counseling reports or that inspectors were, in fact, disciplined subsequent to the election or, indeed, that it failed to notify the Union of each incidence of discipline and offer to bargain before imposing such on each employee, David Williams testified that, when he began in December 1999, plant efficiency was "sixty-five to 70 percent overall plantwide," that he desired the efficiency level to be "ninety-five to 97 percent minimum," and that his target was over 100 percent. He added that, during his plantwide meetings on January 18, 2000,[45] he informed all rated employees that inspectors in the entire processing department were expected thereafter to be working at a minimum efficiency level of 80 percent and mechanics in the container repair department were expected to be working at a minimum 100-percent efficiency level and that, during his tenure as plant manager, these efficiency levels never changed. Williams further testified that, prior to hiring him as plant manager at the Richmond facility, Respondent had imposed progressive discipline on employees for not working at a minimum efficiency level; that, upon being hired, he continued to authorize the same degrees of discipline for poor performance;[46] that such discipline continued after the election; that the discipline system always remained the same; and that, as discussed above, the same discretionary standards for imposing discipline were utilized prior to and subsequent to the election.

As set forth above, the General Counsel alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1), (3), and (5) of the Act, by, subsequent to the April 13, 2000 representation election, disciplining 41 named bargaining unit employees, classified as inspectors, for failing to work at its minimum efficiency levels. I note that, of the foregoing individuals, Respondent is alleged to have disciplined 26 in violation of Section 8(a)(1) and (3) of the Act and that the General Counsel contends that, by the incidents of discipline, Respondent more harshly enforced its efficiency standard for inspectors in order to retaliate against the employees for having selected the Union as their representative for purposes of collective bargaining.[47] In this regard, traditional Board law is well settled. Thus, as explained by the Board in *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999), pursuant to *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), in order to establish a violation under Section 8(a)(1) and (3) of the Act, the General Counsel must prove, by a preponderance of the evidence, that antiunion animus was a motivating factor in Respondent's conduct. Once the showing has been made, the burden shifts to Respondent to demonstrate that the same action would have taken place in the absence of or notwithstanding the employees' activities in support of the Union. To sustain his initial burden, that of persuading the Board that Respondent acted out of antiunion animus, the General Counsel must show (1) that the employees were engaged in activities in support of the Union; (2) that Respondent was aware of or suspected the employees' involvement in activities in support of the Union; and (3) that the employees' activities in support of the Union were a substantial or motivating factor for Respondent's actions. Such motive may be demonstrated by circumstantial evidence as well as by direct evidence and is a factual issue. *FPC Moldings, Inc. v. NLRB,* 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994). Four points are relevant to the foregoing analytical approach. First, in concluding that the General Counsel has established a prima facie showing of unlawful animus, the Board will not quantitatively analyze the effect of the unlawful motive. The evidence of such is sufficient to make the acts and conduct, at issue, violative of the Act. *Wright Line,* supra at 1069 fn. 4. Second, once the burden has shifted to Respondent, the crucial inquiry is not whether Respondent could have engaged in its alleged unlawful acts but, rather, whether Respondent would have done so in the absence of the alleged discriminatees' support for the Union. *Structural Composites Industries,* 304 NLRB 729 (1991); *Filene's Basement Store,* 299 NLRB 183 (1990). Third, pretextual discharge cases should be viewed as those in which ". . . the defense of business justification is wholly without merit" (*Wright Line,* supra at 1089 fn. 5), and the "burden shifting" analysis of *Wright Line* need not be utilized. *Arthur Anderson & Co.,* 291 NLRB 39 (1998). Finally, regarding the latter point, "it is . . . well settled . . . when a respondent's stated motive for its actions are found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Flour Daniel, Inc.,* 304

[45] There is no record evidence as to why Williams waited over 5 weeks to implement new minimum efficiency levels for inspectors and for mechanics.

[46] As described above, the record establishes that, during December 1999, Respondent subjected inspectors to no fewer than 53 verbal warnings, 14 written warnings, and 1 suspension for low efficiency and that, during the next 3 months, presumably after David Williams realized the need for increasing plantwide efficiency, fewer than 10 employees received discipline for low efficiency. Respondent's plant manager offered the following explanation for this marked dropoff of discipline—"[It was] hard to get the consistency . . . when I was hired, I had a bunch of supervisors who were new, and you're kind of working on multiple . . . tasks, and as you're trying to get your supervisors to do things consistently, they also fall off the boat."

[47] Concerning the credibility of the witnesses, I was particularly impressed with the testimonial demeanor of Michelle Mayse and Daryl Johnson, each of whom appeared to be candidly recounting his/her version of the events at issue herein. On the other hand, David Williams impressed me as testifying in a disingenuous manner as to several points, including assertedly informing inspectors during meetings on January 18 that, in order to determine the propriety of initial discipline, their efficiency levels would be averaged over a 4-week period and informing the container repair mechanics that their minimum efficiency level would be 100 percent, and I shall only rely upon his version of events when corroborated by more credible witnesses or other record evidence and when uncontroverted. Thus, given corroboration by Mayse and the record as a whole, I specifically credit Williams on two points—that, in December or January, he informed bargaining unit inspectors that, thereafter, Respondent would expect them to be working at a minimum efficiency level of 80 percent and that, while not announced to employees, in order to determine the propriety of initial discipline, Respondent's practice was, in fact, to measure efficiency over a 4-week period.

NLRB 970, 970 (1991); *Shattuck Den Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966).

Herein, there is no record evidence that any of the 26 alleged discriminatees were sympathetic towards the Union, engaged in any activities in support of the Union, urged others to support the Union, or voted for the Union in the April 13 representation election. Further, of course, other than general knowledge of the result of the election, there exists no record evidence that Respondent knew or suspected that any of the alleged discriminatees were sympathetic towards the Union, voted for the Union, or engaged in activities in support of the Union. Moreover, there exists no direct evidence, such as statements or comments by supervisors or managers, suggesting Respondent harbored unlawful animus against any of its employees and no direct evidence establishing any nexus between the alleged disciplinary acts against employees and any union activity in which they may have engaged. Nevertheless, in their posthearing brief, citing *ACTIV Industries,* 277 NLRB 356 fn. 3 (1985), counsel contend that, under the General Counsel's theory for the alleged violations of Section 8(a)(1) and (3) of the Act, ". . . it is not necessary to show a correlation between each alleged discriminatee's activities in support of the Union and his or her discipline. Rather, it must be established that [Respondent's efficiency standard] was more harshly enforced in retaliation for the outcome of the election." Once such has been established, counsel further contend, the General Counsel has made the requisite prima facie showing of unlawful animus, required under *Wright Line*. Although unstated, counsel contend that the instant fact matrix is comparable to those in Board decisions involving alleged unlawful mass discharges and that the identical analytical approach be utilized. Thus, in the cited *ACTIV Industries,* supra, just 9 days after the commencement of a union organizing campaign about which the plant manager was aware, the respondent terminated more than one-third of its work force. The plant manager also was aware that three other employees were union activists but the company president did not permit their discharges. In selecting the discriminatees for discharge, the respondent apparently was unaware of the prounion or antiunion sympathies of any of the discriminatees. In affirming the administrative law judge's decision that the discharges had been in violation of Section 8(a)(1) and (3) of the Act, the Board ". . . emphasize[d] that it is the [r]espondent's mass discharge, and not its selection of employees for the discharge, that is unlawful. Accordingly, the General Counsel was not required to show a correlation between union activity and his or her discharge. . . . Instead, the General Counsel's burden was to establish that the mass discharge was ordered to discourage union activities or in retaliation for the protected concerted activities of some." Id. at fn. 3. Significantly, the Board found direct evidence of such unlawful motivation in the admission of a supervisor, which was overheard by another employee, that the union was the reason for the discharges—a statement, which the Board found violative of Section 8(a)(1) of the Act.[48] Thus, as both the Board and the courts have noted, in the context of a mass discharge or similar acts against employees, analysis as to whether the General Counsel has proven a prima facie violation of the Act focuses ". . . upon an employer's motive in [acting against] its employees rather than upon the antiunion or prounion status of particular employees." *Birch Run Welding & Fabricating, Inc. v. NLRB,* 761 F.2d 1175, 1180 (6th Cir. 1985), enfg. 269 NLRB 756 (1984); *Guille Steel Products Co.,* 303 NLRB 537 fn. 1 (1991).

Other mass discharge cases, upon which counsel for the General Counsel rely, similarly concentrate upon the employer's motivation rather than upon the discriminatees' union activities and the employer's knowledge of each discriminatee's said acts. Thus, in *Hyatt Regency Memphis,* 296 NLRB 259 (1989), as herein, the General Counsel alleged that, subsequent to a representation election and in retaliation for the union's successful election, the respondent more stringently enforced a work rule and unlawfully discharged several employees for assertedly violating it. Finding that, after the election, the respondent disciplined employees for violating the work rule, for which, prior to the election, no employees had been discharged or otherwise disciplined for violating, and that, prior to the election, the respondent had unlawfully threatened to enforce its work rule more stringently if the union were elected, without determining whether each discriminatee had engaged in union activities and whether respondent suspected or was aware of such, the Board concluded that the General Counsel had met its *Wright Line* burden of proof, establishing that the respondent was unlawfully motivated in discharging the discriminatees. Likewise, in *J. T. Slocomb Co.,* 314 NLRB 231 (1994), the respondent obtained knowledge of a union organizing campaign amongst its employees and, during the following week, laid off 11 employees. In finding that the layoffs were designed to chill the employees' organizational drive without regard to each of the discriminatees' particular union activities or sympathies, in addition to noting that their timing established the respondent's unlawful animus, the administrative law judge relied upon a statement by the respondent's president, which the Board later found violative of Section 8(a)(1) of the Act, that ". . . he would get rid of the bastards who were bringing the company down . . . ."[49] Also, in *Guille Steel Products Co.,* supra*,* shortly after a union began handbilling employees outside a plant's gates, over a 2-week period and, upon becoming aware that employees were accepting handbills, the respondent terminated in excess of 30 employees without regard to any discriminatee's union sympathies. Notwithstanding the lack of direct evidence of union animus, the Board adopted an administrative law judge's finding that the terminations were unlawful based upon their timing, employer threats of discharge, employer coercive interrogations of employees, and the employer's surveillance of the handbilling. Finally, in *Birch Run Welding,* supra, there existed no direct evidence of union animus. In concluding that the respondent unlawfully laid off 13

[48] In addition, the Board found two instances of unlawful interrogation.

[49] In their posthearing brief, counsel for the General Counsel wrongly assert that ". . . there is an absence here of any 8(a)(1) statements to establish union animus" and that there is an ". . . absence of direct evidence of animus."

employees in general retaliation against its entire employee complement's demonstration of support for a union and without regard to the union sympathies of individual discriminatees, the Board inferred unlawful motivation from antiunion statements by the plant manager, from the immediate availability of work for the laid-off employees, from the layoff of employees despite unfinished work, from the layoff of an employee, who had just been given a raise in pay and whose job had recently been assured by respondent, and from the respondent's departure from its past practice by informing laid-off employees to seek jobs elsewhere.

Analysis of the above-five decisions discloses that the Board relied upon animus statements or acts separate from the alleged unlawful acts themselves from which to find either direct evidence of or to warrant inferences of the existence of unlawful animus. The difficulty with the latter, of course, concerns the quality of the observable facts and events. Put another way, the more amorphous or problematic the facts are, the likelihood of mere speculation, rather than inference, increases. Herein, counsel for the General Counsel seek to infer that Respondent retaliated against its employees for selecting the Union as their bargaining representative by more stringently enforcing its efficiency standards against its inspectors. However, absent clear statements of animus or unlawful acts and conduct from which to draw an inference, in order to demonstrate that the discipline to which Respondent subjected its inspectors for low efficiency after the election was harsher than prior to the election, counsel for the General Counsel rely solely upon an analysis of Respondent's disciplinary records,[50] which, I believe, are rather ambiguous.

In this regard, there does exist record evidence that, subsequent to the election, unlike prior to it, Respondent no longer permitted employees to gradually increase their efficiency levels to the 80-percent minimum level; that, subsequent to the election, contrary to David Williams' asserted practice, inspectors were disciplined for low efficiency after working fewer than 4 weeks in the rated position; that, subsequent to the election, after initial warnings, rather than measuring over new 4-week periods, Respondent's managers required disciplined inspectors to maintain 80-percent efficiency levels for as little as 1-week periods or be subjected to additional discipline; and that, subsequent to the election, there were instances in which only short intervals of time elapsed between levels of discipline for some inspectors. However, a review of Respondent's disciplinary notices for low efficiency corroborates David Williams' testimony that Respondent only considered an inspector's average efficiency level over a 4-week period in determining the need for initial discipline; therefore, I see nothing nefarious about the short-term corrective actions, which Respondent requires of inspectors before imposing additional discipline upon inspectors, who fail to maintain efficiency levels of, at least, 80 percent, or any indicia of unlawful animus from Respondent's imposition of *additional* discipline upon inspectors for continued failure to maintain the 80-percent minimum efficiency level over shorter periods than 4 weeks or from the short periods between levels of discipline after an initial verbal warning. While counsel further purports to find a disparity between the number of disciplinary actions, which were given to inspectors during the 3 months immediately preceding and subsequent to the election, in order to argue that Respondent issued significantly more discipline to employees subsequent to the election than before, the contention rests upon a self-serving selection of time periods for comparison,[51] and consideration of the entire period of the Richmond service center's operations (August 1999 through the fall of 2000) discloses that more employees were disciplined for low efficiency prior to the election than subsequent to it and Respondent subjected inspectors to more total disciplinary actions for low efficiency prior to the election. Further, while counsel pointed to several inspectors (Daryl Johnson, Kylandria Thomas, Bettina Lawrence, Wyla Torres, and Francis Young) who, during the 3-1/2-month period prior to the election, consistently failed to achieve an 80-percent efficiency level but were never subjected to discipline, Lawrence, in fact, achieved the 80-percent efficiency level in 4 of the weeks and Young, according to the uncontroverted testimony of Williams, was "cut . . . some slack" due to the death of her husband from cancer during this time period. Also, while Respondent did, in fact, terminate more inspectors for low efficiency subsequent to the election than before, close scrutiny of the counseling reports discloses that, in each instance, Respondent closely adhered to its progressive discipline policy, and the low efficiency levels of each inspector are well documented and uncontroverted.

Based upon the foregoing, while it might be argued that, to a degree, Respondent more stringently enforced its efficiency policy against its inspectors in the processing department after the election, the issue, of course, is whether such occurred to such an extent so as to warrant the inference that Respondent thereby engaged in retaliation against the employees because they selected the Union as their bargaining representative. Bluntly put, given what I believe to be the inherent ambiguity extant in Respondent's disciplinary records and the lack of corroborative evidence, I do not believe the state of the record permits or warrants drawing such an inference. Accordingly, either under a traditional *Write Line* analysis, as there exists no record evidence of the alleged discriminatees' union sympathies or activities, no direct or circumstantial record evidence to suggest Respondent knew or suspected that any of the alleged discriminatees was sympathetic towards the Union, had engaged in any activities in support of the Union, or voted in favor of it, and no direct evidence of union animus or acts and conduct from which to infer union animus, or under a mass

[50] This distinguishes the instant matters from *Hyatt Regency Memphis,* supra, in which the Board found direct evidence of unlawful animus from ". . . Respondent's threats to enforce its rules more stringently if the Union were elected." Id. at 263.

[51] While Williams' explanation for the low number of disciplinary notices for the 3 months preceding the election is not credible, given that the record contains evidence regarding the average efficiency levels of just six inspectors over this time period and that Respondent utilized its discretion in determining whether to discipline inspectors for low efficiency, it would be mere speculation to find that others should have been, but were not, disciplined or to draw an inference of unlawful motivation. *News Journal Co.,* 331 NLRB 1331 fn. 1 (2000).

discharge-type analysis, as there is no direct evidence of unlawful animus or acts and conduct from which to draw such an inference, I do not believe the General Counsel has met its burden of proof by establishing a prima facie showing of that Respondent was unlawfully motivated in disciplining the alleged discriminatees subsequent to the election. Therefore, I shall recommend dismissal of the alleged violations of Section 8(a)(1) and (3) of the Act pertaining to paragraphs 10(a)(1) and (l) of the amended complaint in Case 32–CA–18149.[52]

With regard to whether Respondent's above-described disciplining of inspectors for low productivity subsequent to the April 13, 2000 election was in violation of Section 8(a)(1) and (5) of the Act, counsel for the General Counsel set forth two theories for the allegations. Pursuant to their initial theory, counsel argue that ". . . prior to the election, Respondent allowed employees to gradually improve their efficiency, did not require employees to consistently maintain an 80% rating, and did not consistently enforce the standard. The post election enforcement, however, constituted a change in that the employees were required to consistently maintain no less than an 80% rating or face discipline and/or discharge. Thus, the preelection lax enforcement became an established term and condition of employment that Respondent could not change to one of strict enforcement without notice to the Union and giving it an opportunity to bargain about it . . . ." Therefore, counsel assert, any discipline of employees for low efficiency resulting from this unlawful unilateral change was likewise violative of Section 8(a)(1) and (5) of the Act. Two cases are cited in support—*Hyatt Regency Memphis,* supra, and *Celotex Corp.,* 259 NLRB 1186 (1982). In *Hyatt Regency Memphis,* as stated above, the Board concluded that the respondent had discriminately enforced its work rule more stringently after a union victory in a representation election than it had prior to the election, finding that, few, if any, employees had been disciplined prior to the election but that, at least, 12 employees had been discharged for violating the rule after the election. In other words, the respondent ". . . went from a system of lax, sporadic enforcement into one of stringent enforcement," and the Board concluded that this fact represented a change in the employees' terms and conditions of employment over which the respondent has an obligation to bargain." Id. at 263. Likewise, in *Celotex Corp.,* during the entire year prior to a representation election, the respondent had issued a total of 11 employee warnings with half being based upon absenteeism-tardiness; in the first 6 months subsequent to the election, the respondent's warnings to employees had increased to 49 with half being for absenteeism-tardiness. The Board concluded that this postelection "flurry" constituted the respondent's unilateral institution and pursuit of a policy of stricter enforcement of its employees' work rules in violation of Section 8(a)(1) and (5) of the Act.

Having carefully considered counsel for the General Counsel's contentions, I believe that their arguments are seriously flawed and that the cited decisions are inapposite. Both *Hyatt Regency Memphis* and *Celotex Corp.* essentially involve employers subjecting their employees to more frequent discipline for violations of work rules subsequent to union victories in representation elections than for violations of the same work rules prior to the said elections, and the bargaining obligations flowed from the prior lax enforcement, which became, in the Board's view, terms and conditions of employment. In contrast, the instant matter does not involve lax enforcement of a work rule prior to the April 13 election and more stringent enforcement thereafter; rather, more inspectors received discipline for not working at Respondent's minimum efficiency level prior to the election than subsequent to it, and Respondent issued more total disciplinary actions prior to the election. Further, the asserted change from past practice herein concerns the "corrective actions," which Respondent required its inspectors to undertake in order to avoid receiving further discipline for low efficiency, and, indeed, subsequent to the election, unlike prior to the election, Respondent no longer permitted employees to gradually raise their efficiency levels to the required level. However, Respondent's acts and conduct do not represent any basic change in the efficiency policy itself,[53] which has been in effect since the Richmond service center commenced operations, nor in Respondent's enforcement mechanism through its progressive discipline system. Thus, unlike *Hyatt Regency Memphis* and *Celotex Corp.,* in which lax enforcement of work rules, in effect, became the term and condition of employment, while the corrective actions, which Respondent demanded of inspectors subsequent to the election, reflected more stringent minimum efficiency requirements for them to avoid incurring additional discipline, its practice remained unchanged—employees had been disciplined for low efficiency prior to the election and continued to be subjected to discipline for low efficiency after the election. Accordingly, contrary to the General Counsel, I do not believe the fact that, subsequent to the election, Respondent required inspectors, who received verbal and written warnings, to immediately increase their efficiency levels to 80 percent or face further discipline, represented a change in the employees' terms and conditions of employment so as to have required notice to the Union and bargaining upon request prior to each act of alleged unlawful discipline herein. *Trading Port, Inc.,* 224 NLRB 980, 983 (1976); *Wabash Transformer Corp.,* 215 NLRB 546 (1974).[54]

[52] For the reasons, discussed above, I shall likewise recommend dismissal of the alleged violations of Sec. 8(a)(1) and (3) of the Act pertaining to pars. 11(e)(1) and (2) of the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526.

[53] The policy is, of course, that employees work at a minimum efficiency level. It is true, through December 1999, Respondent did not have a consistent minimum efficiency level. However, as corroborated by Michelle Mayse, I credit Plant Manager Williams that he implemented a minimum efficiency level for inspectors of 80 percent in January 2000. Thus, the 80-percent minimum efficiency level, at which inspectors were required to work after the election, did not represent a change from that which existed prior to the election.

[54] A contrary result is mandated with regard to the paragraphs in the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526 pertaining to Respondent's alleged stricter enforcement of its efficiency levels for container repair mechanics and to the verbal warnings given to mechanics Tyrone Sparkman and Dale May in October 2000. It appears that Sparkman and May were disciplined for not achieving

With regard to the General Counsel's second theory, underlying the alleged violations of Section 8(a)(1) and (5) of the Act, counsel argue that, inasmuch as Respondent's managers utilize discretion in determining whether inspectors should be disciplined for failing to work at its minimum efficiency levels, upon the Union's victory in the April 13 election, Respondent became obligated to give notice to the Union and to afford it an opportunity to bargain prior to subjecting any inspector to such discipline under its progressive disciplinary procedure. As Respondent failed do so, counsel contend, each act of discipline against employees, subsequent to April 13, 2000, was violative of Section 8(a)(1) and (5) of the Act. In this regard, there is no dispute that, prior to disciplining an inspector for low efficiency, a shift manager will take into account whether the employee's performance has been adversely affected by an illness to a member of his/her family, whether the inspector is a new employee, whether the employee had transferred from inspecting trays, sleeves, and lids to inspecting mailbags or transferred from a nonrated position, whether the inspector had been utilized to train new employees, or whether the inspector is working in a low volume area. Pursuant to this theory for the alleged violation of Section 8(a)(1) and (5) of the Act, according to counsel, "the critical element . . . is Respondent's exercise of substantial discretion which creates uncertainty and is tantamount to a change requiring bargaining. The fact that Respondent exercises discretion in determining whether and what discipline is warranted imposes upon it the duty to notify and bargain with the Union before applying its discretionary policy. The important fact is not whether Respondent was continuing a past practice but that its past practice was discretionary."

In support of its theory for the violation, counsel rely upon several decisions in which the Board has held that, once employees select a labor organization to represent them, their employer's discretionary actions become subject to a bargaining obligation notwithstanding the existence of a past practice. For example, with regard to the implementation of a merit raise program to the extent that implementation involves discretion in determining the amounts or timing of the increases, the Board has held that this ". . . is a matter as to which the bargaining agent is entitled to be consulted." *Colorado-Ute Electric Assn.,* 295 NLEB 607, 608 (1989); *Oneita Knitting Mills, Inc.,* 205 NLRB 500 fn. 1 (1973). Likewise, in *Garret Flexible Products,* 276 NLRB 704 (1985), the employer did not have an established past practice regarding the payment of insurance premium increases. Instead, it exercised substantial discretion in allocating the increases between itself and its employees. In these circumstances, the employer ". . . was obligated to notify and bargain with the union before passing on the entire premium increase to the employees . . . ." Id. at fn. 1. Further, in *Adair Standish Corp.,* 292 NLRB 890 (1989), an employer had a past practice of implementing discretionary layoffs. The Board held that, inasmuch as its employees had selected a union as their bargaining representative, the employer could no longer lay off employees without bargaining with the union. Id. at fn. 1. Counsel place their greatest reliance upon two recent decisions of the Board. First, in *Eugene Iovine, Inc.,* 328 NLRB 294 (1999), finding that the respondent's unilateral reduction of its employees' hours of work constituted a violation of Section 8(a)(1) and (5) of the Act, the Board noted, initially, that the respondent had failed to establish a past practice and, next, that, given there was no "reasonable certainty" as to the timing or criteria, the respondent's decision to reduce its employees' hours of work involved significant "management discretion." The Board then stated that it ". . . and the courts have consistently held . . . such discretionary acts are . . . 'precisely the type of action over which an employer must bargain with a newly certified union.'"[55] Next, in *Tim Foley Plumbing Service,* 332 NLRB 1432 (2000), the employer's agent informed employees that, if the union won the election, he would caution his client not to give loans to employees without bargaining with the union. According to the Board, given the respondent's "substantial discretion" as to when and whether to make loans to employees, the agent's statement was true and not unlawful. Id. at fn. 1.

Contrary to counsel for the General Counsel, counsel for Respondent argue that the former's reliance upon *Eugene Iovine,* supra, is misplaced, for, unlike herein, the Board found that no past practice existed for the respondent's unilateral reduction of employees' hours of work and that, as opposed to the Board's finding in the cited decision, Respondent's disciplinary policy for low efficiency is "predictable and clear" and has been applied in same manner after the election as prior to it. Counsel for Respondent further argue that *Eugene Iovine* does not deal with discretionary discipline; that the Board has never required bargaining in the context of discipline; and that to require bargaining over each and every instance of discipline would ". . . remove Respondent's ability to manage its business." In the latter regard, they point out that, while the frequency of bargaining over raises in pay or layoffs may be on an annual or

minimum efficiency levels of 100 percent. Edward Grissom, who is currently employed by Respondent as a container repair mechanic and whose demeanor was that of an honest witness, testified that an 80-percent minimum efficiency level for mechanics had been in effect since September 1999 and that at no time prior to the election had he been informed of a change. I credit his testimony and do not rely upon the uncorroborated testimony of Plant Manager Williams that he announced the 100-percent minimum efficiency level for container repair mechanics at an employee meeting in January 2000. Clearly, then, the 100-percent efficiency level, implemented against mechanics in October 2000, represented stricter enforcement of, and a change in, the minimum efficiency level at which mechanics in the container repair department were required to work. Further, as failure to work at the minimum level might well have subjected employees to discipline, the higher minimum efficiency level constituted a material change in the terms and conditions of employment of bargaining unit employees, over which Respondent was required to have given prior notice to the Union and afforded it an opportunity to bargain upon request. Accordingly, as the higher minimum efficiency level was implemented as a result of an unlawful unilateral change, the discipline imposed against May and Sparkman in May and for not working at the 100-percent minimum efficiency level was violative of Sec. 8(a)(1) and (5) of the Act. *Pepsi-Cola Bottling Co.,* 315 NLRB 882 (1994). However, absent evidence of unlawful animus, I shall recommend dismissal of the alleged violations of Sec. 8(a)(1) and (3) of the Act.

[55] As examples, the Board listed only discretionary wage increases and discretionary layoffs.

semi-annual occurrence, bargaining over efficiency discipline may be required on a daily basis[56] and that it is far easier to draft pay raise or layoff policies which do not involve discretion than to formulate a disciplinary policy, which does not involve a degree of discretion. In support of their arguments, counsel rely upon two Board decisions, both of which involve efficiency standards and neither of which has been overruled—*Wabash Transformer Corp.,* supra, and *Trading Port, Inc.,* supra. In the former, the Board considered the respondent's imposition of discharge as a penalty for failure to meet its efficiency standards. In finding no bargaining obligation existed, the Board noted that the respondent did not promulgate new efficiency rules or standards and that the efficiency standards predated the union's organizing campaign and concluded that discharge was merely one means of enforcing the preexisting efficiency standards and was implicit in the existence of any such standard. In *Trading Port,* without bargaining with the union which represented its employees, the respondent, who had a past practice of measuring its employees' productivity, installed a timing device as a more scientific means of doing so. Noting that, as in *Wabash Transformer,* ". . . the respondent's action did not entail the publication of new rules or revisions to published standards, nor were new penalties imposed for low productivity," the Board concluded that ". . . management activity in this area, *when exercised on the basis of purely discretionary considerations,* failing to conflict with plant practices openly evident from published standards . . . and which imposes no new form of discipline . . . is perfectly legitimate as peculiar to the general supervisorial function." (Emphasis added.) Id. at 983. Further, *Trading Port* was discussed, by the Board, in *Bath Iron Works Corp.,* 302 NLRB 898 (1991), as support for the proposition that "when changes in existing plant rules . . . constitute merely particularization of, or delineations of means for carrying out, an established rule or practice, they may in many instances be deemed not to constitute a 'material, substantial, and significant' change." Specifically, the Board stated, in *Trading Port,* while the employer had tightened the application of existing disciplinary sanctions, ". . . the standards themselves and the sanctions remained the same as before; thus the employer had made no significant, substantive change in the status quo and had no obligation to bargain over the matter." Id. at 901.

I find merit to this theory, proffered by counsel for the General Counsel, for the alleged violations of Section 8(a)(1) and (5) of the Act for the following reasons. At the outset, Board law is clear that disciplinary policies and procedures and employee discharges constitute mandatory subjects of bargaining. *N. K. Parker Transport, Inc.,* 332 NLRB 547, 550 (2000); *Honda of Hayward,* 314 NLRB 443, 448–450 (1994); *Optica Lee Borinquen, Inc.,* 307 NLRB 705, 717 (1992); *Ryder Distribution Services,* 302 NLRB 76, 90 (1991); *Venture Packaging, Inc.,* 294 NLRB 544, 557 (1989); *Migali Industries,* 285 NLRB 820, 621 (1987). Further, "work rules that could be grounds for discipline are mandatory subjects of bargaining," and ". . . their constituent penalties should not be artificially severed from [them] for purposes of collective bargaining under the Act." *Praxair, Inc.,* 317 NLRB 435, 436 (1195); *Peerless Publications,* 283 NLRB 334, 334 (1987). Recently, in *Washoe Medical Center, Inc.,* 337 NLRB 202 (2001), the Board was confronted with fact and legal issues closely congruent to those herein involved. Thus, subsequent to a union ballot victory in a representation election, without prior notice to or affording the union an opportunity to bargain, utilizing its discretion, the respondent imposed discipline, ranging from oral warnings to discharges, upon numerous bargaining unit employees. Ultimately, upon receiving notice, the union failed to request bargaining over any of the instances of discipline. As herein, relying upon *Eugene Iovine, Inc.,* supra, the counsel for the General Counsel argued that, as the respondent exercised its discretion in subjecting employees to discipline and as employee discipline is a mandatory subject of bargaining, it was obligated to have given the union notice and afforded it an opportunity to bargain prior to every instance of discipline. The administrative law judge rejected the General Counsel's theory and dismissed the alleged unfair labor practice, stating that it was not sufficient for the General Counsel merely to show some exercise of discretion; rather, the General Counsel must establish ". . . that the imposition of discipline constituted a change in respondent's policies and procedures." The Board affirmed the administrative judge's ruling. However, citing its *Oneita Knitting Mills,* supra, decision and concluding that the significant issue in cases, involving an employer's obligation to bargain over discretionary actions, is *not* whether the employer unilaterally discontinued to adhere to the same discretionary criteria or unilaterally discontinued its practice of relying upon its discretion at all but, rather, ". . . whether the [employer] failed to provide the union with advance notice and an opportunity to bargain about the *implementation* of [the discretionary acts] . . . ," the Board rejected the administrative law judge's conclusion regarding the necessity of a "change" for finding a violation of Section 8(a)(1) and (5) of the Act. *Washoe Medical Center,* supra at 202 and fn. 1. Instead, in affirming the administrative law judge that the employer did not unlawfully fail to bargain "before-the-fact" (before planning to impose "specific discipline on particular employees"), the Board merely noted "the record does not establish that the union at any time sought to engage in such before-the-fact bargaining. Id. Further, in so concluding, the Board failed to discuss the continuing efficacy of its *Wabash Transformer,* supra, and *Trading Port,* supra, decisions.

In my view, the crux of the Board's holing in *Washoe Medical Center,* supra, is that, unlike discretionary pay raises or discretionary layoffs, in which situations the Board places the burden upon the employer to give prior notice to a labor organization, in discretionary discipline situations, the Board will place the burden upon the labor organization to make a "before-

[56] Counsel for the General Counsel counter this, arguing that the Union might not desire to engage in bargaining over all instances of discipline but that it is entitled to notice and the opportunity to decide whether bargaining is appropriate and warranted.

the-fact" demand for bargaining,[57] and, if such a demand is made, the employer is obligated to give prior notice to and afford the labor organization an opportunity to bargain prior to subjecting employees to discretionary discipline.[58] Thus, I believe that the critical inquiry herein is whether, after the election, prior to Respondent's imposition, upon its bargaining unit employees, of each act of alleged unlawful discipline for low efficiency, the Union ever informed Respondent that it desired to bargain over the imposition of such discipline. Inasmuch as this query must be answered affirmatively, the instant fact matrix is distinguishable from *Washoe Medical Center* and, unlike in that matter, unfair labor practices must be found. In this regard, I find that Alfredo Flotte's and John Lopes' above-described letter to Respondent, dated May 26, constituted a demand upon the latter to bargain prior to any further discretionary disciplining of employees for low efficiency. I further find that, by its failure to give the Union prior notice of employee discipline subsequent to the date of the Union's bargaining demand, Respondent, in effect, ignored it. As stated above, plant rules constitute mandatory subjects of bargaining and discretionary discipline given to employees for violating such rules may not be separated from them; therefore each act of alleged unlawful discipline herein, not limited to the discharges, likewise constituted a mandatory subject of bargaining.[59] In these circumstances,[60] I believe that, subsequent to May 26, inasmuch as Respondent continued to issue discretionary discipline to bargaining unit employees for low efficiency levels without giving prior notice to the Union and affording it an opportunity to bargain, each alleged act of unlawful discipline subsequent to May 26 must be considered violative of Section 8(a)(1) and (5) of the Act,[61] and I so find.[62]

[57] I can see no reason for this distinction other than that the Board deems failing to bargain prior to discretionary pay raises and discretionary layoffs as being inherently disruptive of a bargaining relationship; while, as, in most instances, time is of the essence, requiring an employer to give prior notice and an opportunity to bargain to a labor organization each time it desires to discipline an employee would be disruptive of the employer's ability to effectively manage its work force.

[58] I am troubled by the Board's failure to discuss the continuing efficacy of *Wabash Transformer,* supra, and *Trading Port,* supra. However, I believe the wording of the footnote in *Washoe Medical Center* leaves me no choice but to conclude as I have.

[59] Counsel for the General Counsel failed to cite any decisions of the Board, nor have I been able to find any, ruling that disciplinary acts, such as warning notices and suspensions, are mandatory subjects of bargaining; however, given that discipline, in general is, it seems clear that they are, and I so find.

[60] While it might be argued that Respondent could not have anticipated any obligation to bargain prior to *Washoe Medical Center,* I believe that it acted at its peril in blatantly ignoring the Union's demand for bargaining prior to imposing discipline.

[61] As the Union's bargaining demand was made after Respondent began imposing postelection discipline upon employees for low efficiency, I view *Washoe Medical Center* as privileging such acts of discipline prior to May 26. Consequently, Respondent did not commit any unfair labor practices regarding the acts.

[62] These acts include the post-May 26 verbal and written warnings given to employees Demone Anderson, George Booker, John Chatman, Donika Dotson, Yuseff Ivey, Sheila Jackson, Shirley Lawson, Kevin Lynch, Misty Machado, Sheila McFarland, Sydney Peete, Ardell Shelfo, Euy Souksamphana, Lonnie Spann, Jemina Morris, Paulette Hicks, Toni Bertrand, David Patterson, and Dale May; the post-May 26 suspensions of employees Demone Anderson, George Booker, John Chatman, Jacquelyn Greer, Marietta Haywood, Sheila Jackson, Sheila McFarland, Ardell Shelfo, Ebony Mouton, Monique Dudley, Donika Dotson, Paulette Hicks, Linda Martinez, Toni Bertrand, Candace Minter, and Tina Bowman; and the post-May 26 discharges of employees Demone Anderson, George Booker, John Chatman, Daryl Johnson, Sheila McFarland, Ardell Shelfo, Yolanda Stevens, and Marian Howard.

I shall recommend dismissal of the remainder of the alleged unlawful employee disciplines for low efficiency in par. 10(l) of the amended complaint in Case 32–CA–018149.

C. The Discharges of Employees Latachianna Pontiflet, Cheryl Robinson, and Christy Jackson

The amended complaint in Case 32–CA–018149 alleges that employees LaTachianna Pontiflet, Cheryl Robinson, and Christy Jackson were terminated in violation of Section 8(a)(1) and (5) of the Act. In these regards, the record establishes that Cheryl Robinson worked as an unloader for Respondent on the second shift; that her son was the victim of a murder in January 2000 and, as a result, she missed work for a month; that Robinson returned to work in February; that, subsequent to returning, she experienced difficulty in concentrating upon her job and spent significant amounts of time leaving her workstation and going to the bathroom in order to cry; and that, as a result of her inability to work, John Medina gave her permission to take a 3-month leave of absence conditioned upon her obtaining a doctor's excuse. The record further discloses that, on May 24, Brandee Chorro telephoned Robinson and asked her to come to the Richmond facility; and that 2 days later, on May 26, Robinson came to Respondent's facility and Chorro handed her a discharge letter, dated May 25, which stated, "Due to circumstances in your life, your attendance has been well below standard. . . . You have been absent from work since . . . March 21, 2000, Since that time there has been no communication between you and your supervisor or manager. Therefore, your employment with Alan Ritchey, Inc. has been terminated effective . . . May 25, 2000." As to Latachianna Pontiflet, the record reveals that she worked as an inspector for Respondent; on May 31, 2000, after returning to work following a suspension for continued low efficiency, she engaged in a confrontation with her shift manager, June Rivera, regarding instructions for her job assignment; that, during the argument, Rivera accused Pontiflet of becoming insubordinate and refusing to follow instructions; that, as a result, Rivera ordered her to clock out and to immediately leave the facility; and that, later in the day, she telephoned the facility and David Williams informed her she had been terminated for insubordination. The record discloses that Christy Jackson worked for Respondent as an inspector and that, on May 1, 2000, according to her, while on a break, she engaged in a conversation with other employees during which, after she complained about being demoted to inspecting mailbags, another employee said, "Why don't you have some of your biker friends . . . come down here" and she responded by grabbing the sleeve of her Harley-Davidson sweat shirt and saying, ". . . don't you think they would all know it was me."

Shortly after the conclusion of the break period, John Medina called Jackson into his office and informed her she was being discharged based upon reports from two individuals that she had threatened him, saying, ". . . that my boyfriend was going to come down here and beat them up . . . ." Jackson denied it, but Median said she was terminated because he could not "tolerate" threats being made against him. As set forth above, on May 26, the Union demanded that Respondent afford it an opportunity to bargain prior to imposing any discipline against bargaining unit employees.

While there is no direct evidence on the point, I believe Respondent must have exercised some degree of discretion in deciding to terminate each individual. Thus, I agree with counsel for the General Counsel that, in determining whether Pontiflet acted insubordinately, and, in determining whether Jackson's threat should have been viewed as serious, Respondent's managers must have utilized some discretion in reaching their discharge decisions. Further, with regard to Robinson, as discussed in detail infra, Respondent exercised much discretion in determining whether the poor attendance of bargaining unit employees warranted discipline. As set forth above, discharges of employees are mandatory subjects of bargaining. Pursuant to the Board's decision in *Washoe Medical Center,* supra, Respondent was free to issue discretionary discipline, including discharge, to employees for violating its work rules unless and until the Union demanded to bargain prior to the imposition of such discipline. I have found that, on May 26, 2000, the Union made such a demand upon Respondent to bargain. Thereafter, I believe, Respondent was obligated to give notice to the Union each time it issued discretionary discipline to an employee and to afford the Union an opportunity to bargain over the discipline, and there is no dispute, of course, that Respondent ignored the Union's bargaining demand. Inasmuch as Jackson was discharged on May 1 and as Robinson's discharge was effective May 25, I do not believe Respondent was obligated to have given the Union prior notice of either discharge or to have afforded the Union an opportunity to bargain. Accordingly, I shall recommend that paragraph 10(l) of the amended complaint in Case 32–CA–018149 be dismissed as to both individuals. However, as to Pontiflet, the record discloses that she was terminated on May 31 subsequent to the Union's before-the-fact bargaining demand. Respondent was obligated to have given the Union prior notice of its decision to terminate her, and, by discharging her without giving such notice to the Union or affording it an opportunity to bargain, Respondent acted in violation of Section 8(a)(1) and (5) of the Act, and I so find.

D. Respondent's Alleged Unlawful Disciplining of Employees Relating to Absenteeism

In paragraph 10(m) of the amended complaint in Case 32–CA–18149, the General Counsel alleges that, since the date of the election, April 13, 2000, Respondent violated Section 8(a)(1) and (5) of the Act by subjecting 67 bargaining unit employees to discipline, pursuant to its progressive disciplinary procedure, for violating its absenteeism policy.[63] Under the "Attendance and Punctuality" section of Respondent's employee handbook, employees are informed that, if they are absent for more than 2 days without notice to Respondent, they will be considered as having "voluntarily resigned" their jobs and that, for any absences of three or more continuous days, they must provide a health provider's statement, setting forth the nature of the illness or condition. Further, Respondent's excessive absenteeism guidelines provide the following discipline for unexcused absences over a 12-month period—2 to 4 require a verbal counseling; 5 to 6 require a verbal warning; 7 to 8 require a written warning; 9 to 10 require a suspension; and 11 or more require termination. Brandee Chorro, Respondent's human resources manager at its Richmond service center, testified that, for the entire time it has operated the facility, prior to and subsequent to the April 13, 2000 election, Respondent has disciplined, and continues to discipline, employees for violating its absenteeism policy in the manner set forth above and that neither its excessive absenteeism policy nor the progressive disciplinary policy attendant to it changed subsequent to the election. Finally, the record establishes that, at no time subsequent to Flotte's and Lopes' above-described bargaining demand letter, dated May 26, has Respondent given notice to the Union and offered to bargain prior to imposing discipline upon bargaining unit employees for violating its absenteeism policy.

There is also no dispute that Respondent's managers exercise discretion in deciding whether to discipline employees for violations of its absenteeism policy. Thus, asked if the disciplinary policy for unexcused absences was always enforced, David Williams averred, "It's not a matter of strictly followed, I mean every single case is going to be different based on the circumstances. . . . there is always discretion involved . . . ."[64] Further, when asked if the imposition of progressive discipline is simply mechanically imposed or whether managers exercise discretion in doing so, Chorro responded, "It is based upon a number of occurrences. . . . And the guidelines . . . are very wide frame, and also would depend upon the time frame," and, as to whether an employee is automatically terminated after his or her 11th unexcused absence in a 12-month period, she replied that, "if the counseling report said the next occurrence, [the employee] would be [discharged], depending on the situation . . . . we use discretion . . . because [it may be something the employee can't help]. And so, we go within the guideline." Finally, Chorro added, "I've never come across any attendance policy that has been set in stone and so rigid without using some type of discretion," and Respondent's use of discretion has never changed. Moreover, Respondent's own employee counseling reports, involving discipline for excessive unexcused absences, disclose that it did not always impose disci-

[63] Likewise, the complaint in Case 32–CA–018601 alleges that Respondent violated Sec. 8(a)(1) and (5) of the Act by disciplining and terminating employee Marcell Spain without notice to or affording the Union an opportunity to bargain. GC Exhs. 79(a) through (c) disclose that Respondent subjected Spain to discipline, including termination, for reasons relating to its absenteeism policy.

[64] Williams said this was the same before and after the election.

pline according to the above guidelines. For example, two employees each had nine instances of unexcused absences since January 2000; rather than suspensions, one was given a verbal warning and the other a written warning. Also, after the election, rather than termination, an employee was merely issued a verbal warning after no less than 62 unexcused absences, and another employee was terminated after just 10 unexcused absences.

Counsel for the General Counsel's theory for Respondent's alleged violation of Section 8(a)(1) and (5) of the Act, with regard to its disciplinary policy as applied to unexcused absences, is the same as urged for its disciplinary policy, concerning low efficiency. Thus, what is critical is Respondent's admitted exercise of discretion in determining whether to impose discipline and the severity of the discipline imposed—". . . such creates uncertainty and is tantamount to a change requiring bargaining," and "the important fact is not whether Respondent was continuing a past practice but that its past practice was discretionary." For the reasons discussed above, I find merit to counsel's contentions. Thus, in accord with *Washoe Medical Center,* supra, the crucial inquiry herein is whether, after the election, prior to Respondent's imposition, upon its bargaining unit employees, of each act of alleged unlawful discipline for violation of its excessive absenteeism policy, the Union ever informed Respondent that it desired to bargain over the imposition of such discipline. In this regard, of course, Flotte's and Lopes' May 26 letter constituted such a demand, and the undisputed record evidence is that Respondent ignored this letter and continued to impose discipline for employee violations of its absenteeism policy without prior notice to the Union. I believe that Respondent's plant rule, regarding excessive absenteeism, constitutes a mandatory subject of bargaining as do the various stages of progressive discipline attendant to said policy. Therefore, as, on May 26, the Union demanded to bargain prior to Respondent's further imposition of discipline upon bargaining unit employees and as Respondent ignored said demand, each act of discretionary discipline against bargaining unit employees for excessive absenteeism subsequent to said date must be considered to be an unfair labor practice violative of Section 8(a)(1) and (5) of the Act, and I so find.[65]

[65] These include the verbal and written warnings to employees Wilburt Harris (Nov. 21, 2000), Lowe Shakesnider (June 16, 2000), Shawndale Quilter, Marcel Robinson, Monika Pone, Ebony Mouton, Tina Bowman, Karen Moore, Laverne Abner, Toni Bertrand, Jessica Carrzosa, Joanne Carter, Fredrick Clement, Jose Garcia, Paulette Hicks, Michelle Mayse, Beverly Bowman, Kelvin Lett, Sheila McFarland, Mandrell Miller, Cornelia Bizzell, Curt Voilase, Dorsetta Johnson, Donika Dotson, Wynona Crump, Jesse Tate, Willie Roberts, William Dishman, Luther Jacobs, Michael Ellison, Jamilah Stewart, Lester McGlottin, LaKeysha Johnson, Michael Allen, Latosha Green, Jonathan Prater, Michelle Foster, Lawona Taylor, Jurina Phea, Janice Jackson, Isahel Ochoa, Johnson Ronalt, Candace Minter, Samuel Williams, Timothy White, Angela Prudhomme, Jacqueline McIntosh, Damon Futch, Sharon Eddings, Jacqueline Roberts, Diane Breaux, Phillip Allen, Eric Farrell, Jose Garcia, Curt Vallare, LaQuita Green, LaKesha Evans, Heather Dalton, Dee Dee Yancey, and Marcell Spain; the suspension to employee Latosha Green, and the terminations of employees Lowe Shakesnider, Merdia Fort, Theodore Hagaman, Shawndale Quilter, Michelle Mayse, Armando Leapheart, and Marcell Spain.

E. The Alleged Unlawful Disciplining of Employees Mandrell Miller and Dante Clement

The consolidated complaint in Cases 32–CA–018459 and 32–CA–018526 alleges that Respondent violated Section 8(a)(1) and (5) of the Act by disciplining and eventually terminating employees Mandrell Miller and Dante Clement without notice to and affording the Union an opportunity to bargain over the discipline and terminations. Respondent admits that it discharged employee Miller on October 13, 2000. According to David Williams, Miller, an inspector, was terminated ". . . for the episode of threatening behavior and improper behavior toward another employee."[66] While testifying during direct examination that he discussed Miller's discharge with an official of the Union, during cross-examination, Respondent's plant manager admitted, that the conversation occurred subsequent to the employee's termination and stated he could not recall any such conversation prior to discharging Miller. Brandee Chorro testified that, since August 1999, Respondent has had a policy pertaining to threats by employees against coworkers or supervisors and that, rather than enforced by Respondent's progressive discipline system, such conduct is usually grounds for immediate discharge.[67] With regard to employee Clement, while Respondent admits verbally warning him on May 23 and 26, 2000, suspending him on May 27, and discharging him on July 18, there exists no record evidence as to Respondent's reasons for disciplining[68] and, ultimately, discharging the employee.[69] Further, there is no record evidence that Respondent gave notice to the Union or afforded the Union an opportunity to bargain over the discharge of Miller or over any of the discipline, including the termination, to which Clement was subjected.

Mandrell Miller was terminated on October 13. As I have previously observed, given that there must have been some determination as to the severity of his threatening behavior, I believe Respondent certainly exercised some degree of discretion in terminating employee Miller. Accordingly, for the reasons discussed above, as, on May 26, the Union demanded to bargain prior to each act of discipline, as Respondent ignored the Union's demand and failed to give such notice to the Union, and as a discharge is a mandatory subject of bargaining, I find

I shall recommend dismissal of the remaining allegations of par. 10(m) of the amended complaint in Case 32–CA–108149.

[66] In their posthearing brief, without citing any record evidence, counsel for the General Counsel conjure a reason for the employee's discharge. I have found nothing in the record to substantiate counsel's assertion and will make no such finding.

[67] As discussed above, employee Christy Jackson was immediately terminated after an alleged threat. The record establishes that two other employees, Sheila Schaffer and Latasha Reed, were immediately terminated on November 5 and December 6, 1999, respectively, for threats to others—a threat to a coworker by Schaffer and a threat to a supervisor by Reed.

[68] There is no record evidence that the discipline, to which Clement was subjected, was related to the reason for his termination.

[69] In their posthearing brief, without citation to any evidence in the record, counsel for the General Counsel conjure a reason for Respondent's disciplining of Clement. In the absence of record evidence. I have not made any such finding as to the reason for his discharge.

the termination of Miller to have been violative of Section 8(a)(1) and (5) of the Act. However, with regard to Dante Clement, while Respondent concedes that it warned, suspended and, ultimately, discharged him, there is no record evidence as to Respondent's rationale for doing so and, in particular, whether managers exercised any discretion in discharging him. In the absence of such record evidence, while there is no contention that Respondent gave prior notice to the Union of its decision to terminate Clement, I am unable to conclude that Respondent was, in fact, obligated to have done so and shall recommend that paragraph 11(e)(5) of the consolidated complaint be dismissed.

F. Respondent's Alleged Promulgation and Discriminatory Enforcement of a No-Talking Rule

In the amended complaint in Case 32–CA–018149, the General Counsel alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1), (3), and (5) of the Act by promulgating and discriminately enforcing a no-talking rule, In this regard, former employee, Michelle Mayse, who was on the bargaining unit employees' negotiating committee and, as such, often discussed employee-related matters with David Williams, testified that, one day, at the end of May 2000, she was walking to Williams' office when she encountered another employee, Maggie Hales, who informed Mayse that, during no more than a 2-minute meeting, she had just been discharged by Respondent and that, while doing so, Respondent had neither permitted her to speak nor allowed her to have a union representative present.[70] The two were in the reception area of the Richmond facility, and, while they spoke, Williams approached ". . . and told me that I was out of my work area . . . . And he . . . asked me again where are you at right now, and I told him I was away from my work station. And he said that it wasn't a threat . . . but he was concerned for my job and that I had to abide by the same rules as all the other employees, and that we're not to talk about any union activities or anything about the Union other than lunch time, break time or before or after hours. . . . I . . . told him that I . . . took this position to help the people and . . . to assist them. And that it wasn't fair for me not to be able to assist them." As it was obvious to him that Mayse was speaking about Maggie Hales, Williams replied that ". . . his decision was pre-determined for Maggie and that there was no representation." Mayse further testified that employees always had been permitted to speak about nonwork-related topics while working. She added that, subsequent to the election, she overheard supervisors making union-related comments in work areas.

Williams confirmed that he had a conversation with Mayse shortly after he terminated Maggie Hales. Asked if he invoked any no-talking rule that day, Williams replied, "We repeatedly found Michelle outside her work area talking with people. And we told Michelle that she was welcome to do surveys at lunch or at break or she could punch out. . . . But when people were on the clock and on direct hours she and everybody else . . . needed to be concentrating on their work." Williams specifically denied telling Mayse not to discuss union matters. Finally, as to talking while working, Williams, who stated that he eliminated a no-talking rule when he arrived at the facility, testified some of Respondent's work is "repetitious" and "boring," and ". . . you're welcome to talk, just don't let your talking interfere with your work or somebody else's. . . ." He added that the only prohibitions concerned racial slurs and that "no talking in that kind of plant is counterproductive."

As stated above, Michelle Mayse impressed me as being a frank and veracious witness. In contrast, Williams' demeanor, while testifying, was that of a duplicitous witness, one not worthy of belief except where corroborated by others. Accordingly, I shall rely upon Mayse's version of their conversation and find that, upon encountering Mayse and Hales in the reception area of the facility, Williams questioned Mayse as to why she was not at her workstation and, after impliedly threatening her with termination, said she was subject to the same rules as are other employees and was forbidden to discuss union activities or any other union-related matters other than during breaktimes, lunch, or before and after work. I further find that, given Williams' explicit admission, Respondent previously had no general prohibition against employees talking during worktime. There is no evidence that Respondent informed the Union prior to imposing its prohibition against speaking about the Union during working time upon Mayse. In my view, this constituted a work rule, which markedly differed from Respondent's enunciated practice, and the General Counsel contends that William's promulgation of this rule constituted an unlawful unilateral change. Board law, regarding employer work rules such as herein involved, is quite clear:

> Employer work rules, and particularly those which can lead to disciplinary actions, constitute mandatory subjects of bargaining. As such, the general rule is that an employer may not, without violating the Act, make or change work rules without notifying a union which represents its employees and giving it an opportunity to bargain.

Randolph Children's Home, 309 NLRB 341, 343 and fn. 3 (1992); *Southern Florida Hotel Assn.,* 245 NLRB 561 (1979). Accordingly, noting that Williams impliedly threatened Mayse with discipline for engaging in conversations about the Union during worktime, I find that Respondent's unilateral imposition of the above-new work rule was violative of Section 8(a)(1) and (5) of the Act. *Pepsi-Cola Bottling Co.,* supra at 895. Moreover, counsel for the General Counsel contends that, by promulgating this rule, Respondent also engaged in conduct violative of Section 8(a)(1) and (3) of the Act. I agree. The record evidence establishes that, since January 2000, Respondent had enforced no restrictions against bargaining unit employees talking while working or regarding the subjects of their conversations—other than racial slurs. "Enforcing a rule which prohibits discussion of the Union . . . where there has been no enforcement of restrictions on other subjects . . . is discrimina-

[70] On the latter point, there is no evidence that, prior to being terminated, Hales approached Mayse about accompanying her to a meeting, and Mayse herself couldn't have attended the Hales discharge meeting—"I was with another individual."

tory and violates Section 8(a)(1) and (3) of the Act," and I so find herein. *Hertz Corp.,* 316 NLRB 672, 687 (1995).[71]

G. Respondent's Alleged Unlawful Bad Faith During Collective Bargaining

In the consolidated complaint in Cases 32–CA–018459 and 32–CA–18526, the General Counsel alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by insisting, as a condition for continuing negotiations, that the Union provide a complete contract proposal which included all economic and noneconomic terms, and by failing and refusing to meet at any time or place for negotiations; and by engaging in overall bad-faith bargaining. In these regards, there is no dispute that, after an exchange of letters between John Lopes, a business agent for the Union and James Craig Brown, Respondent and the Union held their first negotiating session for an initial collective-bargaining agreement on June 6, 2000, at the Union's hall in Oakland, California. Present for the Union were Lopes, Alfredo Flotte, an organizer, and five employees, who comprised the employees' negotiating committee, and present for Respondent were Alan Ritchey, Brown, David Williams, Brandee Chorro, and Richard Stroup. Lopes and Ritchey were the "lead" negotiators for the parties; the bargaining session lasted for approximately 2-1/2 hours; and neither any written contract proposals were exchanged nor any agreements were reached during the meeting, with Brown characterizing it as "kind of a waste of time." As to what was said,[72] Lopes testified that, at the outset, Respondent submitted all the information, which the Union had requested prior to the meeting, to the latter's representatives. Then, "Mr. Ritchey explained his business and how he got into this agreement" with the USPS. Next, Lopes and Ritchey discussed how the negotiations would proceed, with Lopes suggesting that the parties reach "tentative agreements" and with Ritchey objecting, stating ". . . they didn't want to sign off on . . . individual pages or articles. They wanted to negotiate a complete contract first." He further testified that, as the bargaining session concluded, ". . . I asked [Ritchey] if we could calendar some dates" for future meetings, and Ritchey replied ". . . that he wasn't really sure because Craig Brown was going to be married [soon] . . . and . . . he wasn't really sure how long Craig was going to be gone after that, and when Brown got back . . . he would be contacting us to calendar some dates." According to Lopes, this was his initial meeting with Ritchey and the others, and ". . . we were . . . comfortable with that . . . ." Asked if there was discussion about contract proposals, Lopes said, "Craig Brown had asked me if I could have written proposals, and I said, yes. . . . He said he wanted a complete proposal, and I said I think I could do that, if all the information we have is correct." Asked if Brown explained what he meant by a complete contract, Lopes responded, "Well, like everything, you know, the costs of health and welfare . . . ." He then conceded "I understood" a complete agreement included wages.[73] During cross-examination, Lopes added that he agreed to provide this "complete" proposal to Respondent within 2 weeks. Brown testified, "Towards the end of the meeting, there was a discussion concerning . . . the non-productivity [of the meeting]," with ". . . Mr. Ritchey [expressing] . . . disappointment that we weren't able to make any . . . headway . . . . Mr. Ritchey expressed a desire to have a contract with the Union within three or four negotiating sessions," and "we wanted a complete proposal in order to do that. And Mr. Lopes agreed. Said that he will have that within two weeks. . . . I guarantee were the words that he used. That he would have that in two weeks."[74] Asked, by Respondent's counsel, was there any discussion about whether there would be further face-to-face meetings either before or after that proposal was presented, Brown replied, "Yes. In the course of the same conversation . . . Ritchey stated that he didn't want to have another meeting like we had now and that we wouldn't be able to get anything done until we had their complete proposal."[75] However, Brown was unable to

[71] The General Counsel also alleges that Respondent engaged in conduct violative of Sec. 8(a)(!) of the Act by not permitting Mayse to attend the meeting, during which Maggie Hales was terminated, as the latter's designated representative. Counsel for the General Counsel cite no Board or court decisions in support of the allegation. Assuming that Respondent, in fact, failed to permit Mayse to attend the meeting at which Hales was terminated—something I doubt occurred as Mayse admits she was with another employee at the time, I find no violation of the Act. Thus, in *NLRB v. J. Weingarten,* 420 U.S. 251 (1975), the Supreme Court held that an employer violates Sec. 8(a)(!) of the Act by denying an employee's request that a union representative by present during an investigatory interview, which, the employee believes, may result in discipline. Herein, the Hales discharge interview lasted no more than 2 minutes, and Williams told Mayse that the decision had been predetermined. Thus, the meeting, at which Hales was terminated, appears to have been a discharge interview rather than an investigatory interview, and an employer is not required to permit union representation during the imposition of previously decided upon discipline. *LIR-USA Mfg. Co.,* 306 NLRB 298, 305 (1992). Therefore, I shall recommend that par. 9(a) of the amended complaint in Case 32–CA–018149 be dismissed.

[72] Notwithstanding that several individuals, who attended the meeting, testified at the trial, only Lopes and Brown testified as to what occurred.

[73] During cross-examination, Lopes agreed that the inclusion of wages was stressed by Brown.

[74] As to what was to be included in this "complete" proposal, according to Brown, Lopes ". . . said I will send you our standard proposal and then he asked if we wanted management rights included in that. . . . And then he said, I can assure you the first two things . . . in that proposal are wages and our pension plan." Lopes failed to deny this testimony.

[75] Asked why it was critical that the Union submit a complete proposal, Brown averred, "Well, the importance was . . . the amount of . . . executive time and the people we were bringing to the table, since we were committing that time and that effort . . . in the time frame that we wanted to talk to the Union, we needed to have everything in front of us. Because when we sit down at the table . . . we had no idea . . . what was going to be talked about . . . or what issue is going to . . . a trade off here for something over there." Brown testified it was critical to Respondent that the Union's contract proposal contain wages and pension proposals as these were "the most critical, the most important" proposals, those having "the biggest impact . . . on our business" and, rather than bargaining noneconomic issues first, "I think we envisioned a combined negotiations where there would be non-economic and economic . . . items." During cross-examination, Brown said what precipitated Respondent's desire to have a complete proposal was Lopes' attitude at the bargaining session—he used profanity and ". . . we were

recall Lopes' reply, averring ". . . it was all in the same conversation of you'll have your proposal within two weeks, and we'll meet after that."[76] Lopes specifically denied agreeing there would be no further negotiations until the Union submitted its complete contract proposal to Respondent.

Notwithstanding Lopes' admitted commitment to do so, the Union failed to furnish a "complete" contract proposal to Respondent within the next 2 weeks. Nevertheless, on June 22, Lopes wrote a letter to Brown in which he provided dates in July—the 18 through the 21st—on which he would be available to resume contract negotiations. Alan Ritchey replied with a letter, dated June 25, in which he stated Brown would be "out of the office" until July 10 and he (Ritchey) would be away "on business" July 19 through 21 and would be unavailable on July 18 for bargaining. Next, on July 21, Brown wrote to Lopes regarding the latter's requests to David Williams for available meeting dates and noted:[77]

> At our initial meeting on June 6th, you promised to provide a complete "contract package" to us within two weeks. It was agreed that no further negotiation sessions would be held until after you provided the proposal. To date, we have not received your proposal. Per our agreement, we will be happy to discuss future meeting dates once we receive the promised proposal and have had an opportunity for review.

Finally,[78] on August 3, 2000, along with a cover letter, in which Roberto Flotte Jr., its president, demanded the resumption of collective bargaining "as soon as possible" and suggested dates later during August, the Union finally submitted its initial proposed collective-bargaining agreement to Respondent. Two weeks later, by letter dated August 16, Brown responded, stating that he had been out of his office the previous week, that he would be unavailable on the bargaining dates suggested by the Union, and that the "length" of the Union's proposed agreement necessitated time in which to "decipher,review, and consider" it and to draft counterproposals and noting the absence of wage rates from the contract proposal.

Perusal of General Counsel's Exhibit 30, the Union's initial contract proposal,[79] does, indeed, disclose the absence of wage rates. In explanation, Lopes testified that "we wanted to double check the wage determination and . . . we wanted more information . . . and we were waiting on our own copy of the wage determination for the area" from the United States Department of Labor and that the International was responsible for obtaining all wage information and the Union had not, as yet, received that information. Also, union officials were concerned ". . . that some of the information that we were getting from the employees was . . . incorrect." In this regard, according to Lopes, some employees reported to union representatives that managers told them "by the contract with the government," they ". . . would only get wage increases every other year . . . ," and the Union believed raises were, in fact, "optional" every year and not mandated on an every other year basis. Finally, Lopes pointed out that, other than wages, "ninety-nine percent of the contract" was amenable to negotiations immediately and that the Union was not obligated to have mentioned in the cover letter, which accompanied General Counsel's Exhibit 30, the absence of wage rates from the proposed contract.

The Union heard nothing further from Respondent until receipt of a letter, dated September 5, to Roberto Flotte from Brown in which the latter wrote:

> At our initial meeting in June of this year, John Lopes expressly and unambiguously agreed to provide a complete contract proposal package to Alan Ritchey, Inc. within two weeks. He further agreed that no further negotiation sessions would be scheduled before the complete proposal was forwarded. To date, more than three months later, we still have not received the contract proposal as promised by Mr. Lopes. We expect the ILWU to honor the agreement made by Mr. Lopes. We will be happy to discuss negotiation dates once this is done.

Three days later, on September 8,[80] Flotte responded, in writing, to Brown, terming the contents of Brown's September 5 letter "silly" and accusing Respondent's general counsel of "stretching the truth."[81] Also, Flotte referred to General Counsel's Exhibit 30, stating, ". . . I mailed you a complete contract proposal with wages and pension to be proposed at a later date" and then accused Respondent of engaging in "a stall tactic in order to frustrate the bargaining unit and to bust the Union."

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immediately told we're not here to talk about anything. We just wanted to get you to the table."

[76] Later, Brown reiterated that Ritchey said he did not want to meet again until he had a complete proposal and that, while he could not recall Lopes' "verbatim exact words," it was ". . . very clear . . . what we were looking for and what they were agreeing to."

According to Brown, the Postal Workers Union represents Respondent's employees at its Springfield, Massachusetts facility, and, as of June 2001, the parties had, at least, one bargaining session. While the union eventually presented a complete contract proposal, including wages, to Respondent, Brown was certain the proposal had not been submitted prior to the initial bargaining session and conceded there was no agreement not to bargain until Respondent had the proposed collective-bargaining agreement. Brown added that, as of February 2001, the parties remained "far apart" on economic and noneconomic items.

[77] Lopes asserted he heard nothing from Respondent during July either verbally or in writing.

[78] During cross-examination, Lopes testified that, while he heard nothing from Respondent about the resumption of bargaining, he would have been unavailable during July—"I believe I was in negotiations with Volvo" and "the ball was taken from me by the president of our local."

[79] Lopes testified that he and Roberto Flotte worked together on preparing the proposed collective-bargaining agreement and that both believed it was not necessary to include a wage proposal as there was ". . . still information that we were getting."

[80] On September 6, clearly not in response to Brown's September 5 letter, Roberto Flotte wrote to Brown, stating that he would be available for the resumption of contract negotiations on any date in September.

[81] Notwithstanding Flotte's comments, Brown denied that anyone form the Union ever, verbally or in writing, specifically disputed the contents of his September 5 letter to Flotte. John Lopes conceded he had no knowledge of any letter from the Union to Respondent, specifically refuting Brown's statements in his September 5 letter.

Brown responded to Flotte by letter dated September 13. Brown reiterated that ". . . Lopes agreed to provide a ***complete*** contract proposal within two weeks of our initial meeting" and "over three months later we are still awaiting the promised ***complete*** proposal." He also noted that, in his September 8 letter, Flotte conceded that the agreed upon "complete" proposal had not yet been submitted to Respondent. Brown concluded, stating Respondent remained willing to resume negotiations upon its receipt and review of the Union's promised "***complete***" contract proposal.

Five days later, on September 18, the Union's attorney wrote a 4-page letter to Brown, requesting ". . . information concerning the Company's compliance with the wage and fringe benefit requirements of the Service Contractor Act (SCA)." In detailing his requests, the attorney noted "in order to formulate appropriate wage proposals for employees in the various job classifications at the Richmond facility, Local 6 must first determine whether those employees are currently being paid at the minimum rate legally required by the SCA and the applicable [Department of Labor] determinations." On September 22, Brown replied, in writing, to the Union's attorney, noting "I trust you will find the enclosed information useful . . . so that [the Union] complete their proposals to us. Although more than three months have passed since Local 6's self-imposed deadline for furnishing us a complete proposal, we continue to look forward to receiving the proposal so that negotiations can move forward." That same day, Roberto Flotte wrote to Brown, stating that he was responding to the latter's September 13 letter. In his letter, Flotte noted that the contract proposal, which the Union submitted to Respondent on August 3, ". . . cover[ed] everything except wage rates and pension contributions. We are unable at this point in time to present meaningful proposals on those issues because the wage and benefit information you gave us in June is incomplete and outdated." Flotte next noted his attorney's information request and stated, after Respondent provided the Union with "adequate" information, the latter would give Respondent proposals on wages and pension increases. Then, Flotte stated that there was nothing to prevent the parties ". . . from bargaining *now* over the Union's numerous other contract proposals . . . ;" that "there will be plenty for us to do;" and that Respondent's failure and refusal to meet and discuss the other issues "suggests an absence of good faith." Flotte concluded by requesting that Respondent agree to meet and bargain over the Union's proposed initial collective-bargaining agreement. On September 26, the Union's attorney wrote to Brown, essentially reiterating Flotte's demand for bargaining and stating, "[W]e see no reason why the Company cannot meet with the Union immediately to discuss the numerous *other* proposals it submitted on August 3, 2000." The attorney noted that "bargaining over non-economic issues prior to the submission of wage proposals is common labor relations practices in most industries."

Pursuant to its agreement at the initial June bargaining session, the Union finally submitted its wage and pension proposals to Respondent on November 15 in a letter from Lopes to Brown. On wages, the Union simply requested $2-per-hour increases added to all classifications for each year of a 3-year agreement, and, on the pension plan, the Union demanded that Respondent contribute $3 per hour for each bargaining unit employee. Lopes concluded by requesting Brown to contact the Union in order to schedule bargaining. However, 2 weeks later, on December 1, Brown wrote the following letter to Lopes:[82]

> I am in receipt of your correspondence finally setting forth your wage and pension proposals and requesting that we contact your office to schedule further negotiations. Unfortunately, we do not have any proposed dates at this time. Mr. Ritchey is scheduled to undergo heart surgery on December 6, 2000. While we expect him to recover quickly and completely, we will not have an accurate picture of his recovery time until after December 6th. We will, however, propose future dates once the picture is more complete.[83]

On December 19, Brown again wrote to Lopes, reporting that Ritchey was at home and recovering quickly from his surgery, that he was expected to return to his normal work duties within 3 weeks, but that "unfortunately, his doctors have forbid him to travel for the next six to eight weeks. In the interim and to move the process along, Mr. Ritchey welcomes you and your representatives to conduct negotiations at our corporate offices in Valley View, Texas." On December 22, evidently not yet in receipt of Brown's December 18 letter, Lopes wrote to the former:

> On December 1, 2000 you wrote to indicating that the Company was unable to schedule any bargaining because Mr. Ritchey was undergoing heart surgery . . . and availability would not be known until some unspecified time after that date. I have not heard anything further from you.
>
> We have been trying to get a meeting with you to commence contract negotiations for over 6 months. The Company first refused to meet until Local 6 had submitted a full set of wage proposals. Now that we have submitted wage proposals, you are still dragging your feet. While we sympathize with Mr. Ritchey's health problems, we are not willing to delay bargaining indefinitely while he recovers from surgery. Surely, you or some other representative of the Company can conduct the negotiations in his place. . . .

It is unclear whether such was precipitated by Lopes' letter, but, at some point following his surgery, Ritchey appointed his son Robby to be the lead negotiator in bargaining with the Union, and the parties eventually resumed bargaining for an initial contract on January 18, 2001.[84]

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[82] As to his 2-week delay in responding to Lopes, Brown noted ". . . that was during Thanksgiving and the open heart surgery of Mr. Ritchey."

[83] Brown testified that Ritchey planned to attend all bargaining sessions and would have "ultimate" approval of any negotiated collective-bargaining agreement.

[84] While, between August 3, 2000, and January 17, 2001, no contract bargaining occurred between the parties, there were meetings between John Lopes and David Williams regarding such matters as employees' uniforms and staffing in the container repair department.

The General Counsel's contention that the foregoing fact matrix establishes that Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act has two aspects—Respondent insisted, as a condition for continuing negotiations, that the Union provide a complete contract proposal which included all economic and noneconomic terms and has failed and refused to meet at any time or place for the negotiations. In this regard, in his letter, dated July 21, 2000, to John Lopes and his letter, dated September 5, 2000, to Roberto Flotte, Respondent's general counsel, James Craig Brown, asserted that, at the parties' June 6, 2000 bargaining session, which was the parties' commencement of negotiations on their initial collective-bargaining agreement, John Lopes consciously agreed that no further negotiations would be scheduled before the Union submitted a "complete" contract proposal to Respondent. In this regard, I credit the forthright testimony of Lopes that, during the June 6 bargaining session, at most, he agreed to provide a "complete" contract proposal to Respondent within 2 weeks after the meeting and that he never explicitly agreed there would be no further negotiations until he did so.[85] Moreover, in his June 25 letter, to Lopes, regarding the latter's request for available meeting dates, rather than raising the business agent's purported commitment as a reason for refusing to meet, Alan Ritchey, to whom Lopes had been speaking during the June 6 meeting, merely mentioned his and Brown's unavailability on the suggested dates. In these circumstances, noting that the Union presented Respondent with a comprehensive contract proposal, with the exception of wage rates and a pension contribution amount, on August 3, I find, as alleged, that, in his July 21 and September 5 letters, rather than describing a commitment by the Union's business agent,[86] Brown actually imposed a gratuitous and baseless condition precedent for continuing initial contract negotiations with the Union—no further bargaining until Respondent received a "complete" contract proposal, including all economic terms, from the Union—and that, in fact, from August 3, the date upon which the Union mailed its contract proposal to Respondent, through November 15, the date upon which Lopes transmitted to Brown the Union's proposed contractual wage and pension contribution amounts, based upon this condition precedent, Respondent repulsed each and every demand from the Union that the parties meet for the purpose of resuming collective bargaining for an initial agreement. I further find that, notwithstanding having the required "complete" contract proposal from the Union, from November 15 through the end of December, Respondent continued to refuse to meet and bargain with the Union, raising pretentious objections to the Union's demands. Thus, 2 weeks after receiving the latter proposals, while failing to name a substitute lead negotiator, Brown wrote to Lopes that, inasmuch as Ritchey was scheduled to undergo heart surgery, Respondent would not be available for negotiations with Respondent, and, approximately 3 weeks later, continuing to fail to name a replacement, Brown again wrote to Lopes, asserting that Ritchey was recuperating but would be unavailable for 3 weeks and that thereafter, while unable to travel for several more weeks, Ritchey would be willing to meet with union representatives in Texas. Finally, only after Lopes again demanded that Respondent meet and bargain and appoint a substitute for Ritchey did Respondent appoint Ritchey's son to act as lead negotiator and agree to again meet and bargain with the Union.

Based upon the foregoing, I find merit in the position of counsel for the General Counsel that Respondent's continuing refusal to meet with representatives of the Union between August 3, 2000, and January 17, 2001, constituted a failure and refusal to bargain in good faith.

The Board has long held "it is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of the parties at the bargaining table. Indeed, the Act imposes this duty to meet." *U.S. Cold Storage Corp.,* 96 NLRB 1108, 1108 (1951), enfd. 203 F.2d 924 (5th Cir. 1953); *Twin City Concrete, Inc.,* 317 NLRB 1313, 1314 (1995); *Chemung Contracting Corp.,* 291 NLRB 773, 774 an fn. 3 (1988); *Fountain Lodge, Inc.,* 269 NLRB 674, 674 (1984). Further, an employer's obligation to meet and bargain with the labor organization, which is the bargaining representative of its employees, is not satisfied by inviting or demanding written proposals in advance of any face-to-face negotiations. 203 F.2d at 928. This principle is especially true in cases where ". . . the parties had not yet begun the bargaining process through which proposals would have been subjected to the give-and-take of negotiations." *Holiday Inn Downtown-New Haven,* 300 NLRB 774, 775 (1990). Moreover, an employer's obligation to bargain in good faith includes a duty to make its authorized representative available for negotiations at reasonable times and places. *Nursing Center at Vineland,* 318 NLRB 901, 905 (1995).[87] Herein, Respondent's acts and conduct conform to what the Board found unlawful in the above and like cases.

In defense, counsel for Respondent argue that their client was, at all times, prepared to bargain upon receipt of a contract proposal, which included wages and benefits—as promised by the Union. While, it is true that, as wage rates and a pension contribution amount were not included, the proposed contract, which Respondent received on or about August 3, 2000, from the Union, failed to comport with John Lopes' commitment to

[85] Nothing in Brown's account of what purportedly was said during the meeting corroborates his assertions in his subsequent letters to Lopes and Flotte. Thus, if believed, he quoted Alan Ritchey as merely expressing a desire to conclude the negotiations after only three or four bargaining sessions, as expressing his frustration with what occurred at the June 6 session, and as saying there would be no progress until the Union submitted its "complete" proposal. Further, whatever Lopes assertedly said in response to indicate agreement, Brown could not recall.

[86] Contrary to Respondent's counsels' contention that no union agent specifically contradicted Brown, I note that the Union's president, Roberto Flotte, termed Brown's statements "silly" and accused him of "stretching the truth."

[87] While Sec. 8(d) of the Act simply requires bargaining at "reasonable times," the Board has found an employer's proposal for bargaining at a particular location to be a factor in considering whether it has met its obligations under the above section of the Act. *Somerville Mills,* 308 NLRB 425 (1992).

provide a "complete" contract, the document clearly constituted a comprehensive, proposed collective-bargaining agreement in all other aspects.[88] There were myriad items available for the give-and-take of collective bargaining; Respondent's ability to prepare counterproposals or to make "trade-offs" seems hardly to have been impaired; and it is quite common in collective bargaining to negotiate noneconomic items prior to considering economic ones. In my view, the Act required face-to-face negotiations between the parties at the point that Respondent received General Counsel's Exhibit 30, and Respondent patently failed its obligation to bargain in good faith by insisting upon receipt a "complete" contract before meeting and continuing its initial contract negotiations with the Union. Further, while one may sympathizes with Respondent's plight, caused by Alan Ritchey's illness and resultant surgery, such must be balanced against the Section 7 rights of the bargaining unit employees, and, in the circumstances of this case, given its unlawful refusal to meet and bargain with the Union, Respondent's obligation under Section 8(d) of the Act required considerably more than delaying 6 weeks before appointing Ritchey's son as his replacement and then proposing that contract negotiations take place in Texas when its facility and employees were located in northern California. Based upon the record as a whole, I conclude that, by insisting, as a precondition to face-to-face bargaining, that the Union provide it with a "complete" contract proposal and by delaying in the appointment of a substitute authorized bargaining representative and refusing to meet at a reasonable location, Respondent failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

H. The Alleged Unlawful Unilateral Changes

1. Overview

I turn next to the allegations of the amended complaint in Case 32–CA–018149, the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526, and the complaint in Case 32–CA–018601 that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by unilaterally, without giving the Union notice and affording it an opportunity to bargain, changing the bargaining unit employees' terms and conditions of employment. It is, of course, well settled that an employer violates the section of the Act by unilaterally imposing new and different wages, hours, and other terms and conditions of employment upon bargaining unit employees[89] without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz,* 369 U.S. 736 (1962); *Bryant & Stratton Business Institute,* 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo,* 311 NLRB 869, 873 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1150–1151 (1990). However, it is clear that not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices. Thus, to be found unlawful, the unilaterally imposed change must be ". . . material, substantial, and . . . significant" and must have a "real impact" on or be "a significant detriment to" the employees or their working conditions. *Outboard Marine Corp.,* 307 NLRB 1333, 1339 (1992); *UNC Nuclear Industries,* 268 NLRB 841, 847 (1984); *Pacific Diesel Parts Co.,* 203 NLRB 820, 824 (1973); *Coca Cola Bottling Works, Inc.,* 186 NLRB 1050, 1062 (1970), affd. sub nom. *Retail, Wholesale Union v. NLRB,* 466 F.2d 380 (D.C. Cir. 1972). Further, an employer's obligation, under Section 8(a)(5) of the Act, to refrain from making unilateral changes in working conditions commences at the time the labor organization, which represents its employees, gains ballot victory in a representation election (*Lawrence Textile Shrinking Co.,* 235 NLRB 1178 (1978)), and, as noted by the General Counsel, the Board has held that, with limited exceptions, ". . . when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991). The limited exceptions are when, in response to an employer's diligent and earnest efforts to engage in bargaining, a labor organization avoids or delays bargaining and when "economic exigencies compel prompt action." Id.

2. The required use of safety glasses

The General Counsel alleges that Respondent unlawfully implemented a mandatory safety glasses policy for all bargaining unit employees subsequent to the election without notice to the Union or affording it an opportunity to bargain. Former employee, Michelle Mayse, who was a member of the Richmond service center's bargaining unit employees' bargaining committee, testified, during direct examination, that she also became a member of the facility's safety committee[90] in either February or March 2000.[91] Asked about a reference to "not

[88] I do not mean to excuse the Union's conduct in this case. Lopes did make a commitment to Respondent on June 6, and the simplicity of its November 15 wages and pension proposals demonstrates that a "complete" contract proposal certainly could have been submitted to Respondent on August 3.

[89] In *Ford Motor Co. v. NLRB,* 441 U.S. 488, 498 (1979), the Supreme Court defined the mandatory subjects of bargaining as those matters which are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Normally, the mandatory subjects of bargaining concern anything having to do with bargaining unit employees' wages, hours, or other terms and conditions of employment. *Phelps Dodge Mining Co.,* 308 NLRB 985, 999 (1992), enf. denied 22 F.3d 1493, 1496–1498 (10th Cir. 1994); *Johnson-Bateman Co.,* 295 NLRB 180, 182 (1989).

[90] The Richmond facility's safety committee is comprised of managers and bargaining unit employees, and, apparently, membership is voluntary. The committee meets on a monthly basis and discusses and takes action on "safety concerns" of management and employees. Specifically, according to Mayse, "[W]e would discuss issues that we'd seen on the floor that would help benefit safety management, and we would bring it to Brandee Chorro's attention. And everybody would just discuss it, and then she would go over it with . . . the plant manager."

[91] According to R. Exh. 11, the minutes for the January 12, 2000 safety committee meeting, Mayse became a volunteer member of the committee for the period January through June 2000. However, she is not noted as being present at the January 12 meeting.

wearing safety glasses" while working as a safety violation on a document, entitled "Safety Violation Tickets," which, according to Mayse, was published by Respondent some time "after the election," Mayse denied that this had always been Respondent's practice in the Richmond facility. Rather, she stated that, previously, only welders and "some" mechanics had been required to wear safety glasses while working. Then, "after the election, they . . . informed us that we had to, it was mandated for us to wear our safety glasses at all times on the floor , . . ." Specifically, the new practice was instituted "within a week or so" after the election; "Dave Williams . . . brought us all into the lunch room and he . . . told us that we had to start wearing safety glasses, and , if not . . . we would be issued violation tickets and that there would be other [discipline including] verbal warnings, written, suspensions, and terminations, depending on how many violations you had." Thereafter, safety glasses were distributed, and employees were required to sign upon receipt of their glasses. During cross-examination, Mayse recalled that, at the February 9, 2000 safety committee meeting, which she attended, the wearing of safety glasses was discussed as a reaction to an employee, who suffered an eye injury while working. "It was discussed that . . . it would be a good idea for everybody . . . to wear glasses but not [to enforce] in the way that they were enforcing it and taking disciplinary actions as far as being terminated or suspended. That was never discussed." She denied that, at the above safety meeting, the issue was discussed as a "set policy" but admitted that safety glasses had been ordered for all bargaining unit employees in March.

Plant manager Williams denied that the wearing of safety glasses constituted a change from existing plant practice and that, while such may have become mandatory for all employees, the policy was implemented prior to the election on April 13. "When I got there safety glasses were required in some areas of the plant and in some job functions and not in other areas of the plant and other job functions." He testified that some employees used this as an excuse not to wear them even when required. "So, somewhere in the first part of April we actually implemented a mandatory eye glass policy everywhere. But the actual decision was made prior to that. . . ." In this regard, Williams stated that, in response to an eye injury, suffered by a bargaining unit employee in January, at the Richmond service center safety committee meeting on February 9, 2000, "we just made the decision to . . . put safety glasses on everybody, keep everybody's eyes safe."[92] Williams noted that, given the time necessary for ordering the safety glasses, Respondent was unable to implement the policy until April. Thus, Respondent's Exhibit 13, dated March 29, 2000, is an invoice for the ordering, by Respondent, of 300 safety glasses from a company located in San Leandro, California, and, contradicting Mayse, Williams testified that the safety glasses were actually distributed to bargaining unit employees on "about April 5th, 6th, 7th. I did a meeting. It was about . . . eight to ten days prior to the election date. . . . I remember . . . I literally said in this meeting that it was probably not a wise decision on my part to do it [then]. . . but I felt it was an issue that needed to be addressed." Moreover, the notes for the April 12 meeting of the safety committee reflect that, under the topic of safety glasses, which was termed an "old" topic, is the word "completed." Finally, there is no contention that Respondent offered to bargain with the Union prior to implementing its new safety glasses policy.

There is no dispute that, requiring all bargaining unit employees to wear safety glasses at all times while working, constituted a change from past practice. In assessing the respective credibility of Michelle Mayse and David Williams, I have previously concluded that, in contrast to the latter, who appeared to be a dishonest witness and, unless corroborated, not worthy of reliance, Mayse impressed me as being a candid and a trustworthy witness. Therefore, I shall rely upon her version of events and find that Respondent implemented its above-described new work rule subsequent to the April 13 representation election. However, Williams testified that he announced his decision to implement this new work rule at the safety committee meeting in early February; his testimony, in this regard, was corroborated by Mayse herself and by the minutes of the meeting; and it would be utterly unreasonable to presume that, prior to the election, Respondent would have ordered a large supply of safety glasses from an outside vendor unless Williams previously had decided to distribute them to all bargaining unit employees. In these circumstances, I find that David Williams made the decision to make the wearing of safety glasses by all bargaining unit employees mandatory over 2 months prior to the election and 3 weeks before the Union filed its petition for an election. Accordingly, assuming, without deciding, that Respondent's new policy represented a material change in the bargaining unit employees' terms and conditions of employment, inasmuch as ". . . [Williams'] decision was made prior to the time the Respondent was obligated to bargain with the Union," Respondent did not violate Section 8(a)(1) and (5) of the Act by failing to give notice to the Union prior to implementing its new work rule, mandating the use of safety glasses by all bargaining unit employees. *Consolidated Printers,* 305 NLRB 1061 at fn. 2 (1992); *Long Island Day Care Services,* 303 NLRB 112,114 (1991); *Embossing Printers,* 268 NLRB 710 at fn. 2 (1984). Therefore, I shall recommend dismissal of paragraph 10(a)(ii) of the amended complaint in Case 32–CA–018149.

3. The safety ticket program

The General Counsel alleges that Respondent unlawfully implemented a safety ticket program in late April without notice to or offering the Union an opportunity to bargain. In this regard, former employee Mayse testified that she first became aware of such a program through the posting of the aforementioned "Safety Violation Tickets" document "after the election" in the lunchroom, in the employee breakroom, and by the timeclock and that no such program had existed at the Richmond facility prior to the posting of the memorandum. According to Mayse, under the announced policy, which did not become effective until after the election, members of the safety

[92] This decision is reflected in the minutes of the safety committee meeting of February 9, which state the goal of implementing it in March.

committee were to issue the safety tickets and, while on the committee, she issued one such ticket. Plant Manager Williams testified that "[this] was strictly a means to facilitate the issuing of documentation on safety glasses violations and other safety violations." He added that Respondent had been having "some difficulty" ensuring employees were wearing the safety glasses at all times and asserted that the tickets were "almost like a gag thing" designed to "get people to accept" wearing the glasses—". . . I issued [them] kind of like a parking ticket, trying to make it seem that way." Nevertheless, during cross-examination, Williams conceded that the safety tickets were another form of the existing disciplinary procedure and equated the tickets to the issuance of a verbal warning—"It was the same process we always had."[93] He testified further that the policy was implemented "within four or five days of the safety glasses" and prior to the election and that no new safety rules were implemented with the tickets. Also, with regard to the safety ticket program, analysis of the minutes of the April 12 safety committee meeting discloses that it was discussed as a new topic, with implementation scheduled for late April. There is nothing in the minutes as to when a final decision would be reached on implementation of the program. Finally, there is no contention that Respondent informed the Union of its decision to implement this program or that it afforded the Union an opportunity to bargain over it.

Given the respective credibility of Mayse and Williams, I rely upon the former as the more honest and persuasive witness. Accordingly, I find that Respondent implemented its safety ticket program subsequent to the date of the representation election, April 13. Moreover, unlike the safety glasses policy, there is no record evidence to establish that Respondent reached its decision to implement its safety ticket program prior to the election, and, as it was first discussed the day before the election, it seems reasonable to conclude that the decision to implement was, in fact, reached after the election. However, as the program continued use of the existing disciplinary procedure to enforce Respondent's safety practices and as the safety tickets themselves were the equivalent of a verbal warning, I do not believe that implementation of this program represented a material, substantial, or significant change from past practice or had such an impact upon the working conditions of the bargaining unit employees so as to require notice to the Union and bargaining. Arguing to the contrary, counsel for the General Counsel points to the fact that employees, who are on the safety committee, are empowered, in the same manner as supervisors, to give these to their coworkers. While true and presumably a change from past practice, I fail to understand how this substantially impacted upon any recipient's terms and conditions of employment. Thus, there is no evidence that receipt of a safety ticket from a coworker, instead of receipt of a verbal warning from a supervisor, increased the seriousness of the safety violation, the severity of the discipline, or the repercussions there from. Therefore, I do not believe that Respondent violated Section 8(a)(1) and (5) of the Act by implementing its safety ticket program without notice to the Union or affording it an opportunity to bargain. *Rust Craft Broadcasting of New York, Inc.,* 225 NLRB 327, 327 (1975). Accordingly, I shall recommend the dismissal of paragraph 10(b)(i) of the amended complaint in Case 32–CA–18149.

[93] According to Williams, Respondent's disciplinary procedure had always been utilized to enforce safety violations, and the safety tickets were merely a "written difference" than past practice. Thus, ". . . before we would use the . . . employee counseling report [for]. . . safety violations." The safety ticket ". . . was just a little more concise vehicle to talk about the safety issue." Williams added that use of the safety tickets did not represent any change in the discipline for a safety violation.

4. Respondent's elimination of Memorial Day and Labor Day as nonworking holidays

The General Counsel contends that Respondent's elimination of Memorial Day and Labor Day as nonworking holidays, thereby reducing the number of nonworking holidays from six to four, without notice to the Union or affording it an opportunity to bargain constituted an unlawful unilateral change. In this regard, former employee Mayse testified that she first became aware of General Counsel's Exhibit 10, a document entitled "Holiday Update," at the end of April 2000. The document, which was posted throughout the plant, is signed by Brandee Chorro and simply states that the number of "non-working" holidays are being reduced to four; that these are Independence Day, Thanksgiving Day, Christmas Day, and New Years Day; and that "the deleted 'non-working' holidays are Memorial Day & Labor Day." Mayse added that employees were also told their holidays had been reduced. Plant Manager Williams did not dispute the fact that Respondent reduced the number of nonworking holidays form six to four by eliminating Memorial Day and Labor Day as such holidays. In Respondent's defense, he testified that, on or about April 18, 2000, he received a "contract order modification" from the USPS, mandating a "modification" in the contract, between Respondent and the USPS, to reflect a reduction in the number of employees' nonworking holidays from six to four and naming Memorial Day and Labor Day as the deleted nonworking holidays.[94] As set forth above, the USPS has the contractual right to change or modify any of the terms of the contract at its discretion, and, according to James Craig Brown, "[W]e would technically be in default of our contract if we failed to incorporate or make the changes they directed." Brown added that, prior to the election, the USPS made "numerous, numerous changes" to the contract and that these were always implemented by Respondent. Finally, Williams asserted that he gave notice to the Union of the change in nonworking holidays—"I . . . left them a message with the contract change when we got it," and ". . . I know for a fact that we had conversations with them to let them know it was coming."

At the outset, the number of nonworking holidays, which are enjoyed by Respondent's bargaining unit employees, clearly is an integral part of their terms and conditions of employment and constitutes a mandatory subject of bargaining. In my view, Respondent's elimination of two such holidays established a material, substantial, and significant change, which required

[94] With regard to Memorial Day, Respondent paid its bargaining unit employees 8 hours holiday pay and double time for working that day.

notice to and bargaining with the Union. *Bryant & Stratton Business Institute,* supra at 1025. In this regard, as David Williams did not appear to be a particularly candid witness, I am unable to credit his tenebrous assertions of either having left a message with the Union or spoken to some unnamed Union official about the elimination of the holidays and find that, prior to publishing the notice, regarding the elimination of the two nonworking holidays, Respondent failed to give notice to the Union or afford it an opportunity to bargain. As a defense, Respondent's counsel posit the mandatory nature of the USPS directive and Respondent's obligation to abide by it. While this may be true, I agree with counsel for the General Counsel that Respondent certainly could have bargained with the Union over the effects, including the compensation for employees, of the elimination of the two nonworking holidays. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union over the elimination of Memorial Day and Labor Day as nonworking holidays. *Legal Aid Bureau,* 319 NLRB 159, 168 (1995); *Accurate Dye Casting Co.,* 292 NLRB 982, 988–989 (1989); *Saloon, Inc.,* 247 NLRB 1105, 1108 (1980).

5. The work rule that first-shift inspectors finish the work of second-shift inspectors

The General Counsel alleges that Respondent unlawfully implemented a rule, requiring that first-shift inspectors finish the work of inspectors on the second shift, without notice to the Union or affording it an opportunity to bargain. In this regard, former employee, Latachianna Pontiflet, whose job was as an inspector on the first shift, testified that, on May 22, her supervisor distributed a memo to her and other employees and that the memo stated ". . . we have to start . . . finishing up the second shift's pallets . . . ."[95] According to the witness, prior to receipt of the memo, while ". . . we did have some inspectors who would just finish up a pallet and start another one from scratch," first-shift inspectors were not required to complete the pallets of inspectors on the second shift. Further, she noted that complying with the new work rule impacted on the job performance of inspectors, for, in order for an inspector to complete a partially completed pallet, an unloader was required to locate the exact product, which was in the unfinished pallet. This meant that the inspector would be ". . . just standing around going on down time . . ." until the unloader placed the exact product in the former's work cage, and this directly impacted upon his or her efficiency level.[96] During cross-examination, Pontiflet stated that, at the end of her shift, she was required to complete a form, showing the total number of pallets upon which she worked and how many remained incomplete, and that the purpose of the form was for her to receive credit for an incomplete pallet. Also, asked if such was always company policy to complete the prior shift's incomplete pallets, Pontiflet said, "no." However, upon being confronted with her pretrial affidavit, in which she stated that an incomplete pallet always ". . . was supposed to be finished by an inspector on the first shift," she averred it ". . . was a glitch that I overlooked." Contrary to Pontiflet, Plant Manager Williams testified that "it's just almost impossible to end up finishing a pallet exactly at the end of your day." According to him, an inspector is supposed to log the percentage of pallet remaining to be filled, "and the next person is supposed to finish it. . . . And then both people get credit for the pallet . . . ." Williams further testified that, while the foregoing had been Respondent's policy since January 2000,[97] from time to time, he was required to remind bargaining unit employees of Respondent's policy as "it's one of the problems with people, they're human." Also, Williams identified Respondent's Exhibit 8, a document entitled "Percentages of Pounds for Credit," as a type of "sheet that we made up to put around to help people keep track of partial pallets." Finally, Williams contradicted Pontiflet as to the effect of "down time" upon efficiency—"If they ran out of product, they would labor into down time and then that time wouldn't be held against them."

With regard to the respective credibility of Pontiflet and Williams, I have previously discussed my impression that the latter did not appear to be testifying in a truthful manner. Likewise, I am also reluctant to rely upon the testimony of Pontiflet, whose demeanor was not that of an honest witness and who was clearly impeached by her pretrial affidavit.[98] Therefore, contrary to Pontiflet's assertion, I believe that Respondent always had a work rule, predating the election, of requiring first-shift inspectors to complete the unfinished pallets of second-shift inspectors and that the memorandum, which Pontiflet asserted she was given, did not represent a change of past practice. Moreover, while, as set forth above, work rules are mandatory subjects of bargaining, even assuming that the memorandum existed and established a new work policy, I do not believe that requiring first-shift inspectors to finish incomplete pallets constituted a significant detriment to the bargaining unit employees or their terms and conditions of employment. Thus, while an unwarranted increase in down time may impact upon an employee's efficiency, as it makes no logical or practical sense that Respondent would count down time, which is not the fault of the inspector and results from the lack of identical product with which to finish an incomplete pallet, as negatively impacting upon an inspector's efficiency, I credit Williams that Respondent does not do so. In these circumstances, I find no merit to the allegation that requiring first-shift inspectors to complete unfinished pallets constituted an unlawful unilateral change and shall recommend that paragraph 10(d) of the amended complaint in Case 32–CA–018149 be dismissed.

[95] Counsel for the General Counsel failed to offer a copy of this document into the record.

[96] She was corroborated on this point by container repair mechanic, Edward Grissom, who testified that, under Respondent's system "down time" is referred to as "indirect time" and an increase in this would result in a lowered efficiency standard.

[97] He gave as the reasons for the policy—safety, efficiency, and ensuring both inspectors received credit for the work.

[98] Unlike, counsel for the General Counsel, I was not impressed with her excuse for not correcting the "glitch" in her pretrial affidavit.

6. The change in the starting time for employees in the first-shift mailbag section

The General Counsel alleges that Respondent unlawfully unilaterally changed the starting time for first-shift employees in the mailbag section of the processing department from 6 to 4 a.m. In this regard, former employee Mayse testified that, during May 2000, she worked in the mailbag section of the processing department and that the starting time for employees working in the department, as well as all other bargaining unit employees on the first shift, was 6 a.m. One day, at the end of the month, according to Mayse, Shift Manager June Rivera held a meeting with the employees in the mailbag section and said, ". . . it was going to be a mandated overtime, that they had to come in at 4:00 a.m. and work until 2:30 p.m.," starting the following day. Numerous employees, including single mothers, complained that this change made it impossible for them to find day care for their children. As a result, after the meeting, Mayse approached Rivera and said there had not been sufficient notice of the earlier starting time. Rivera replied that the overtime ". . . was mandated and if anybody didn't report at that time they would be disciplined." The next morning, one female employee, who was unable to find day care for her children at such an early hour, reported late for work and found a another employee at her work station. Respondent moved her to a different job; Mayse complained that Respondent's treatment of the employee was not fair, and, after a few days, the employee was returned to her normal job. During cross-examination, Mayse said that the starting time change lasted for just 5 days, and the mailbag employees' shift starting time was changed back to 6 a.m.. While Respondent offered no testimony to controvert Mayse's version of what occurred, counsel for Respondent point to the testimony of container repair department mechanic, Ed Grissom, who testified regarding a memo, dated July 5, 2000, from the plant manager, requiring employees to work the following weekend due to a 110-truck backlog and making such work "mandatory." Asked, during cross-examination, whether the company policy before and after the election was occasionally to require employees to work on their days off when the backlog was high, Grissom replied, ". . . they had been having mandatory overtime. This was mandatory overtime." He added that "they've always done it" and "this isn't a change" in policy.

As to whether Respondent gave notice to the Union and afforded it an opportunity to bargain over assignments of mandatory overtime, plant manager Williams testified that he ". . . had a conversation with John Lopes about overtime in general, about procedures we would use to call overtime, and the procedures we would use to staff overtime. We agreed on those. As to when this conversation occurred, Williams said that he could not remember, but ". . . we had a fairly long conversation . . . ." Later, after placing the conversation in May or June 2000, Williams recalled it occurred during a meeting "in my office," and, besides Lopes and him, "I believe that there was one other person from the Union there." While denying that any management official of Respondent contacted him regarding a change in shift starting times for employees in any departments in May 2000, despite being recalled as a rebuttal witness, Lopes failed to deny Williams' above-described testimony.

Mayse testified that, pursuant to assigning them mandatory overtime, Respondent changed the shift starting time for its first shift mailbag employees from 6 to 4 a.m.; employee Edward Grissom testified that Respondent has a longstanding past practice, dating to prior to the election, of assigning employees to work mandatory overtime; and David Williams was uncontroverted that he and John Lopes agreed on the procedures, which Respondent would utilize in assigning mandatory overtime to bargaining unit employees. In *San Antonio Portland Cement Co.,* 277 NLRB 309 (1985), the employer had a longstanding mandatory overtime policy and implemented the practice, without notice to its employees bargaining representative, after becoming obligated to recognize and bargain with the labor organization. The Board concluded that the employer's actions were not unlawful inasmuch as the mandatory overtime policy predated the employer's obligation to bargain with the union. Id. at 313. Likewise, Respondent had a past practice, which predated the April 13 representation election, of assigning mandatory overtime when work backlog was high, and there is no contention that Respondent deviated from it with regard to assigning mandatory overtime to the mailbag employees at the end of May.[99] Accordingly, as it appears that Respondent and the Union did meet and discuss the former's practice of assigning mandatory overtime and as Respondent's actions did not represent a change from past practice, I shall recommend dismissal of paragraph 10(e) of the amended complaint in Case 32–CA–018149.

7. Respondent sets forth more onerous plant objectives for bargaining unit employees

The General Counsel alleges that, through a memorandum published after the election, Respondent unlawfully published new performance objectives for bargaining unit employees without informing the Union or affording it an opportunity to bargain. In this regard, container repair department mechanic, Edward Grissom, who works on the swing shift, testified that, some time after the election but prior to July 4, 2000, his department supervisor, George Jordan, "passed . . . down" a memorandum, entitled "Plant Objectives," to the mechanics in his department. The document (GC Exh. 4) sets forth the efficiency standard for inspectors, working on mailbags as being "98%," the efficiency standard for inspectors working on trays, sleeves, and lids as being "118%," and the efficiency standard for container repair mechanics as being "120%." As discussed, at length above, the prior published efficiency standard for inspectors was 80 percent, and Grissom testified that, as early as September 1999, the efficiency standard for container repair mechanics likewise had been set at 80 percent and, to his knowledge, had never been changed. On General Counsel's Exhibit 4, the percentage number 120 percent is circled, and,

[99] It is true that the Board has held that a unilateral change in the starting time of a work shift constitutes a material and substantial change in bargaining unit employees' terms and conditions of employment and is unlawful. *Blue Circle Cement Co.,* 319 NLRB 954 (1995). However, in the decision, the Board specifically rejected the employer's defense that its change of starting times was justified by a longstanding policy and found that the employer had no practice of consistently implementing such a policy.

according to Grissom, Jordan "underlined" the number "in front of us . . . ." During cross-examination, asked if any container repair mechanic had been disciplined for not performing at 120-percent efficiency, Grissom replied, "They haven't been disciplined for achieving 120 . . ." and, obviously referring to the above-discussed disciplinary actions against mechanics, Dale May and Tyrone Sparkman, added, ". . . they was disciplined for under 100."[100] With regard to General Counsel's Exhibit 4, Plant Manager Williams testified that he prepared the document and that ". . . it was just a reiteration of existing plant goals that I was giving to the supervisors in a staff meeting."[101] He added that the document was "a target," designed to illustrate for the supervisors where ". . . we needed to get" department by department. For example, according to Williams, for mailbag inspectors "[the 98 percent efficiency level] represents the overall average where we needed the mailbag area to be to get our targets." He specifically denied it represented a change in anything, including minimum efficiency levels. As to Williams' testimony, I note that, subsequent to the election, there is no record evidence of discipline for an inspector for failing to perform at a minimum efficiency level of higher than 80 percent. Further, Williams himself testified that he set the minimum efficiency level for mechanics at 100 percent and that both May and Sparkman were disciplined for not performing at this level.

While I have expressed my skepticism regarding the honesty of David Williams, as the record evidence appears to corroborate him, I believe he must be credited with regard to the intent of General Counsel's Exhibit 4. Thus, there is no record evidence that, since the April 13 election, any inspector was ever disciplined for failing to perform at a minimum efficiency level other than 80. Further, there is no record evidence that container repair mechanics were ever required to work at a 120-percent minimum efficiency level. Rather, I have held that, in October, Respondent unlawfully unilaterally implemented a 100-percent minimum efficiency level for mechanics in disciplining employees May and Sparkman. Finally, I find support for Williams' testimony from the written words on the document—"our goal." Accordingly, as I do not believe that the memorandum, at issue, represented a change from past practice, I shall recommend that paragraph 10(g) of the amended complaint in Case 32–CA–018149 be dismissed.

8. More onerous work assignments for welder, Kevin Lynch

The General Counsel alleges that Respondent unlawfully implemented more onerous work assignments for its welder, Kevin Lynch, without giving notice to the Union or affording it an opportunity to bargain. In this regard, Edward Grissom testified that he knows Lynch as a welder who works in the container repair department; that, at Lynch's request, he attended a meeting between Lynch and two management officials (John Medina, the shift manager, and Henry Holloway, a foreman) on or about June 6, 2000. According to Grissom, Medina ". . . was wanting Kevin to repair a container when he didn't have any welding to do. . . . I said that . . . I figured there would be plenty of welding to do. . . . And . . . he was a different job classification." To this, Medina said, ". . . he thought that if there was work to be done, why [Lynch] ought to do the work." Grissom further testified that Lynch had no training as a mechanic, for which position Grissom and the other mechanics participated in a 2-week training program; that Respondent's welders, such as Lynch, are "certified welders," who must have be so classified in order to be eligible for hire by Respondent; and that welding is ". . . a different trade. A mechanic's a mechanic . . . we're using tools, and a welder has to use a welding machine," a machine, which is not utilized by mechanics. During cross-examination, Grissom denied that Lynch performed any container repair work prior to June 6 but was contradicted by his pretrial affidavit in which he stated that, prior to the meeting, Lynch "helped" with repair work. Grissom then admitted this was true but said Lynch did this only ". . . when he didn't have any work . . . in his spare time, but it wasn't mandated." Finally, while Grissom maintained Lynch was not trained for mechanic's work, he conceded Lynch received on-the-job type training in mechanic's work.

David Williams testified with regard to Lynch that "his indirect time was just out of control. His down time was . . . 50 percent or higher . . . which basically meant that for half his day . . . he wasn't doing anything" because "there wasn't enough work for him to weld . . . . and the supervisor wasn't doing a good job of moving him to other tasks. . . ." According to Williams, he determined Lynch had to be assigned to other jobs in order to be "productive," and "I talked with his supervisors to remind them of our policy that [Lynch] needed to be working, that was part of what he agreed to when he came to work." Williams admitted that Respondent informed Lynch it wanted him to perform "mechanic's work" and believed Lynch had done such work for Respondent in the past. As support for its position that it was justified in requesting Lynch to perform the work of a mechanic, Williams pointed to a statement in the job description for welding work, which Lynch signed upon being hired by Respondent. Prior to listing a welder's "essential duties and responsibilities, the document states that "other duties may be assigned." Also, Williams testified that Lynch was given discipline one day in June—"We had a day where I was walking through departments and found him sitting in the parts cage reading a newspaper with his feet kicked up on a desk." Williams added, Lynch ". . . was talked to about that . . . ."[102] Finally, Respondent does not contend that it gave notice to the Union nor afforded the Union an opportunity to bargain before approaching Lynch about his job duties.

Analysis of the foregoing discloses no dispute as to what occurred. Thus, Williams admitted that Respondent did request

[100] Specifically, Grissom said there was no mention of a 120-percent efficiency standard at either the May or the Sparkman disciplinary proceedings.

[101] On this point, I note that the writing "Our Goal" appears at the top of the document but that there is no record evidence as to who wrote the words on the document.

[102] Inasmuch as it appointed Lynch to be acting foreman over the second-shift container department in November 2000, Respondent could not have been too concerned with Lynch's job performance.

Lynch to perform container repair work when there was no welding for him to do.[103] Further, Williams believed Williams had performed such work in the past, and Grissom admitted that Lynch previously had done some container repair work in his "spare time" when he had no welding work to do. Moreover, Williams did not dispute Grissom's testimony that welding is a highly specialized craft and that such work fundamentally differs from container repair work. Having considered the arguments of counsel, I believe that Respondent did, in fact, engage in a change over which it should have given notice to the Union and afforded it an opportunity to bargain. Thus, given his specialized job duties as a welder, and as it had significant precedential value, I believe requiring Lynch to perform container repair work constituted a significant change, affecting his and other bargaining unit employees' terms and conditions of employment. While the wording of Lynch's job description may reasonably be construed as permitting Respondent to assign him job duties other than those enumerated for a welder, I agree with counsel for the General Counsel that such clearly includes the element of discretion and is "'precisely the type of action over which an employer must bargain with a newly certified Union.'" *Eugene Iovine, Inc.,* supra. Moreover, Respondent's actions sent ". . . the message to the employees that [it] set an important term and condition of employment, thereby suggesting the irrelevance of the employees' collective-bargaining representative." *Kurdzeil Iron of Wauseon,* 327 NLRB 155, 155 (1998). In so concluding, I note that the problem involving employee Lynch's down time seems to have been longstanding, not requiring an immediate solution, and clearly amenable to collective bargaining before unilateral action. In these circumstances, I find that, by acting unilaterally without notice to the Union or affording it an opportunity to bargain, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

9. More stringent discipline standards and procedures and more onerous standards for the completion of work

The General Counsel alleges that, on or about June 18, 2000, by orally promulgating more stringent disciplinary standards and procedures, including progressive discipline, and more onerous objectives for the completion of work, Respondent unlawfully changed the terms and conditions of employment for bargaining unit employees without giving prior notice to the Union or affording it an opportunity to bargain. In this regard, there is no dispute that, during a meeting with the second-shift container repair department mechanics, John Medina distributed a document, entitled "Meeting Agenda—June 18, 2000." According to Edward Grissom, who attended the meeting, there were two items, set forth in the document and discussed by Medina, about which he had never been aware prior to the meeting. Thus, under the topic, "What is Expected of Alan Ritchey's Second Shift Work Team," is the phrase, "Container repair will repair 19–21 units per shift," and, under the topic, "Excessive Talking and Wandering Off Workstations during Shift," is the admonition, "Excessive talking and wandering off workstations will not be tolerated and will be dealt with using disciplinary action." As to the former, Grissom testified that preciously Respondent had utilized the efficiency standard in describing worker productivity, and ". . . now . . . they're asking for . . . raw numbers," and, as to the latter, Grissom said, ". . . this was the first time that had been said. They just hadn't mentioned it, it hadn't been said. There hadn't been any document telling us not do this." During cross-examination, while continuing to deny Respondent had ever given the container repair mechanics the "raw" number of containers they were to repair per shift, Grissom admitted that management had previously informed the mechanics it should take them an "average of 12 minutes" to repair a container and that, to determine the number of units per shift to be completed by a mechanic, ". . . you can add and subtract. You figure up the minutes that they have . . . they had us so many minutes to do the hampers . . . and so many minutes to do the OTRs, and you figure up that over a period of eight hours and it comes out to that." Further, he was contradicted by his pretrial affidavit in which he stated that, prior to June 18, mechanics were required to do 21.2 hampers per shift and 17 over-the-road containers per shift. Upon being confronted with these figures in his affidavit, Grissom admitted he was aware of those numbers, "but there wasn't any . . . literature brought out about it." As to the "excessive talking" work rule, during cross-examination, Grissom reiterated "that is the first time I've seen it in writing, and . . . no one ever said anything, it was never mentioned" but conceded he did not mean that, prior to the election, employees were permitted to wander away from their workstations and walk throughout the plant or to engage in conversations which might affect production. Regarding the June 18 document, David Williams described it as a meeting agenda, which was prepared by John Medina for the second-shift processing department. The plant manager denied it represented any changes in company practices or policies; rather "it just breaks down weekly targets into shift targets." Asked if any employees were ever disciplined based upon anything in the document, Williams replied that "people were disciplined for wandering away from their job sites but that happened before [the document] and after. . . . I mean [discipline] wasn't predicated on [the memorandum]." Finally, there is no contention that Respondent gave notice to the Union or afforded it an opportunity to bargain before distributing the above document.

Concerning the alleged more onerous objectives for the completion of work, while Grissom initially testified that Respondent had previously always written and spoken about productivity in terms of efficiency levels and that he had never previously seen productivity discussed in terms of raw numbers of items completed per shift, on the latter point, he was effectively impeached by his pretrial affidavit and subsequently admitted previously being aware of the "raw" production numbers. In these circumstances, I am unable to conclude that setting forth their expected productivity in terms of units per shift represented any change in the container repair employees' terms and conditions of employment. The Board has held that a written clarification which is "fully consistent" with the pre-

[103] Williams was uncontroverted that, prior to being requested to perform container repair work when having no welding work to do, Lynch had an excessive amount of down time on the job and, in fact, had been disciplined for reading a newspaper during worktime.

existing policy does not represent a change about which an employer is required to bargain with the labor organization representing its employees. *Allied Mechanical Services,* 320 NLRB 32, 32 (1995). Accordingly, I shall recommend dismissal of paragraph 10(i)(2) of the amended complaint in Case 32–CA–018149. As to the excessive talking warning, as between Grissom and Williams, given my impression that the latter's demeanor, while testifying, was not that of a candid witness, I credit the more forthright Grissom that, in its June 18 memorandum, Respondent announced a new work rule. In this regard, I note that Williams was not corroborated on the past existence of such a rule and that, even if employees always were aware they should not wander away from their work stations or engage in excessive talking to the detriment of their work, there is no record evidence that they knew such acts would subject them to discipline. As set forth above, work rules are mandatory subjects of bargaining. In my view, establishing this new rule suggested to the bargaining unit employees that their elected bargaining representative was irrelevant. *Kurdzeil Iron of Wauseon,* supra. Also, given the likelihood of attendant discipline, the work rule clearly had a material, substantial, and significant impact upon the bargaining unit employees' terms and conditions of employment, and Respondent was obligated to have given the Union notice of the change and to have afforded it an opportunity to bargain. Having failed to do so, I find that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

10. The policy that employees receive an unexcused absence for not providing a week's prior notice

The General Counsel alleges that Respondent acted unlawfully by unilaterally changing its existing practice and requiring that all time off be scheduled, at least, 1 week in advance in order not to be considered an unexcused absence without giving the Union prior notice and affording it an opportunity to bargain. In this regard, there is no dispute that, on July 3, 2000, David Williams published a memo, which was distributed to all bargaining unit employees, concerning "attendance and time off." The memo read, "Just a reminder. All time off, whether for a full day or for a partial day must be scheduled at least one week in advance. Any notice less than one week will be considered an unexcused absence or occurrence." Container repair mechanic Grissom testified that Williams himself distributed the memo to employees at a meeting and that the practice at the time for scheduled time off was employees ". . . had to give reasonable notice . . . there wasn't any memo that said you had to give a week." Grissom knew Williams was not enunciating an existing policy as, during the prior Christmas season, he gave his supervisor 2 or 3 days advance notice of his need to take time off, and his request was granted.[104] Also, according to Grissom, 3 weeks later, he again requested time off, giving his supervisor 2 or 3 days notice, and the latter again gave him permission. During cross-examination, Grissom conceded that he believed Williams' memo represented a change in policy because it was the first time he ever saw it in writing, that both of his examples of time off were not "foreseeable" absences, and that Respondent distinguishes between foreseeable and unforeseeable absences in its notice policy. As to his memo, Williams testified, "Its a memo I put out as a reminder; we were starting to get an increased number of people requesting time off with very short time notices." According to Williams, since January 2000, "one week was the minimum amount of time we wanted" as notice for time off, and this policy never changed during his tenure with Respondent. Thus, the document "does not" represent a change; rather, it was "just a reminder." However, notwithstanding Respondent's policy, Williams conceded the company would make allowances for employees, who need time off and do not have a week's notice. Brandee Chorro corroborated Williams on Respondent's notice policy, testifying that Respondent's time off policy has a notice requirement, which is ". . . one week's advance notice for it to be an excused absence." She added that this policy has not changed since the Richmond facility opened in August 1999. She then identified a leave of absence request form, dated January 24, 2000, from an employee who wanted a day off for a doctor appointment. At the top of the document (R. Exh. 28), are words in a box. The four lines of text begin with "Please Note" and the third sentence reads, "You must hand in this form at least *1 week before* the date you request off occurs." Finally, there is no contention that Respondent gave notice to the Union or afforded it an opportunity to bargain before publishing the July 3 memo.

In considering whether Williams' July 3 memo constitutes a new policy or merely reiterates an existing practice or policy, I credit Williams, as corroborated by Chorro and Respondent's Exhibit 28, that, since, at least, January 2000 and probably earlier, Respondent has had a policy of requiring an employee to provide, at least, 1 week's notice for a time off request. Noting that he filled out a leave request form on, at least, one occasion, I can not credit container repair mechanic Grissom that Williams' July 3, 2000 memo was the first time he became aware of this requirement. However, the second sentence of Williams' memo is that which is alleged as constituting the alleged unlawful unilateral change[105] and is more troubling. Thus, neither Williams nor Chorro specifically testified that Respondent's existing notice of absence policy included the protocol that notice of less than a week would result in the leave being considered as an unexcused absence or occurrence, and no such admonition is found in Respondent's Exhibit 28. Moreover, Grissom testified regarding two instances of leave requests, both of which he made less than a week before the requested days off and both of which were granted, and Williams himself admitted Respondent made allowances for bargaining unit employees who required time off but failed to give the required 1 week's advance notice. Respondent's counsel correctly point out that an employer may lawfully implement a

[104] Grissom recalled that he filled out a leave request form on this occasion.

[105] In their posthearing brief, counsel for the General Counsel argue that the unlawful unilateral change is the requirement of 1 week's notice prior to taking leave. However, this is not the allegation of the amended complaint in Case 32–CA–018149.

written clarification of a preexisting policy without notice to and bargaining with a union; however, as set forth above, the issue is whether the clarification is "fully consistent" with the existing practice. *Allied Mechanical Services,* supra. The only written version of Respondent's preexisting policy is found on Respondent's Exhibit 28, and I do not believe that the corollary necessarily is that providing less than 1 week's notice will result in an unexcused absence. Therefore, I believe that, in his July 3 memo, by adding the second sentence, Williams implemented a new notice for time-off policy, and, as accumulated unexcused absences lead to discipline under Respondent's progressive discipline policy, the unilateral change had a material, substantial, and significant impact upon the bargaining unit employees' terms and conditions of employment. Further, as set forth above, by unilaterally implementing this new work rule, a mandatory subject of bargaining (*Praxair, Inc.,* supra), Respondent sent a message to the bargaining unit employees that their newly elected collective-bargaining representative was irrelevant. *Kurdzeil Iron of Wauseon,* supra. Accordingly, by implementing this policy change without giving notice to the Union or affording it an opportunity to bargain, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

11. Respondent required employees to work on their regularly scheduled days off—July 7 and 8

The General Counsel alleges that Respondent acted unlawfully by unilaterally, without notice to the Union or affording it an opportunity to bargain, requiring bargaining unit employees to work on their regularly scheduled days off. There is no dispute that, on July 5, 2000, Respondent published a memo from David Williams to all bargaining unit employees at the Richmond facility, stating, "Unfortunately, our backlog is at 110 trailers. In order to reach an acceptable level by this weekend we will need to schedule Friday night and Saturday as regularly scheduled workdays. Regularly scheduled is a nice way of saying 'MANDATORY'. . . ." Edward Grissom testified that the document was posted on a bulletin board, that, at the time, his regular workweek was Sunday through Thursday, and that second-shift employees were not regularly scheduled to work on Friday nights or on Saturdays. As set forth above, asked during cross-examination whether Respondent's policy before and after the election was occasionally to require employees to work on their days off when the backlog was high, Grissom replied, ". . . they had been having mandatory overtime. This was mandatory overtime." He added that "they've always done it" and "this isn't a change" in policy."

Echoing Grissom, David Williams testified that the July 5 document announced "overtime" for Friday, July 7, and Saturday, July 8; that ". . . overtime was just a fact of life" at the Richmond facility; that he had requested employees to work overtime on days off "at least 25 or 30 times;" that "from the Post Office's perspective, a holiday was only a holiday if we were current on our work;" and that Respondent's goal was to have no more than 15 to 20 unloaded trucks on any Friday. He then pointed to Respondent's Exhibit 18, a notice, which is similar to the above, requiring Respondent's second-shift employees to work on Friday, November 26 and its first-shift employees to work on Saturday, November 27, 1999. During cross-examination, asked about employees who had unbreakable plans for the mandatory overtime days, Williams replied, ". . . if they came to our supervisors prior to the business day, we tried to work with them." He added that it was the supervisor's decision as to whether to excuse an employee from the mandatory overtime. Finally, as discussed above, Williams testified that, in May or June, he and John Lopes met at his office, discussed "overtime in general," and reached agreement upon the procedures Respondent would utilize to announce and staff overtime when necessary. While denying that Respondent gave notice to the Union regarding mandatory overtime on July 7 and 8, despite testifying on rebuttal, Lopes failed to deny Williams' testimony as to their discussion of and agreement upon overtime procedures.

In Respondent's July 5 memo to bargaining unit employees, David Williams informed employees that, due to excessive backlog, the scheduling of Friday night, July 7, and Saturday, July 8, as regularly scheduled workdays was "mandatory;" Edward Grissom testified that Respondent has a past practice, predating the election, of scheduling mandatory overtime when the backlog was high, and the record evidence corroborates such a past practice; and David Williams was uncontroverted that, prior to July, he and John Lopes discussed and agreed upon Respondent's procedures for assigning overtime days. Further, Board law is longstanding that, where an employer adheres to a longstanding past practice of assigning mandatory overtime and implements it without giving notice to the labor organization, which represents its employees, or affording it an opportunity to bargain, the employer's actions are not unlawful if said past practice predates the employer's obligation to bargain with the union. *San Antonio Portland Cement Co.,* supra. Herein, of course, there is ample record evidence that Respondent's policy of assigning mandatory overtime to employees predated the election and that Respondent acted fully in accord with this policy. Accordingly, I believe that the assignment of mandatory overtime on July 7 and 8, 2000, did not represent a change in the bargaining unit employees' terms and conditions of employment and that, therefore, as Respondent had no obligation to give notice to or afford the Union an opportunity to bargain, no violation of Section 8(a)(1) and (5) of the Act occurred, and I shall recommend that paragraph 10(k) of the amended consolidated complaint in Case 32–CA–018149 be dismissed.

12. Respondent's change in the working times of processing department employees on the first shift

The General Counsel alleges that Respondent acted unlawfully by unilaterally, without giving notice to the Union or affording it an opportunity to bargain, changing the shift times for its bargaining unit employees on the first shift. In this regard, there is no dispute that, on the Friday preceding the Memorial Day weekend in 2000, Respondent posted a notice throughout the Richmond facility, advising first-shift employees that their hours of work on Saturday and Monday would be 4 a.m. through 12:30 p.m. According to Michelle Mayse, who worked on the first shift and whose normal hours of work were 6 a.m. through 2:30 p.m., first-shift employees previously had never

worked such hours, and "Mr. Williams said that due to people requesting to come in at an earlier time that we were going to [work this earlier shift]." Williams testified that this occurred because of the USPS announcement, making Memorial Day a working holiday. "A lot of employees came up to me and wanted to know if they could come in at 4:00 instead of 6:00 so they could get out at 12:30 instead of 2:30" over the weekend. He added, "They felt like on that Saturday especially they would get a longer time-off cycle if they got out of the plant two hours earlier. . . . I told them if they could get some supervisors to volunteer to come in early they could. But I wasn't going to change the plant shifts." Williams further testified that this was a "strictly voluntary" thing and that less than half of the first-shift work force participated. He denied any discipline was associated with failing to come in at 4 a.m. During cross-examination, Williams conceded not informing the Union of the changes in the employees' shift times over the Memorial Day weekend—"I thought since they just asked to do it, it wasn't necessary."

There is no dispute that shift starting and closing times are mandatory subjects of bargaining and that changing the starting and ending shift times for the bargaining unit employees on the first shift for the Saturday and Monday of the Memorial Day weekend in 2000 constituted changes in their terms and conditions of employment. While Respondent only acted upon the entreaties of the bargaining unit employees themselves, while compliance with the earlier starting time was entirely voluntary, while no employees were disciplined for reporting at their normal starting time, and while the shift starting and ending terms reverted to the normal times on the following Tuesday, other than "a lot," there is no evidence as to the number of employees who petitioned Respondent to change the shift hours for the 2 days. Moreover, no matter how inconsequential the change in shift times for 2 days appears, a precedent was arguably established for more substantial changes merely based upon requests from unit employees. Therefore, I believe the change, in fact, did have a material and substantial impact upon the terms and conditions of employment of the bargaining unit employees. Also, in acting as it did, Respondent exhibited to the employees that their designated bargaining representative was irrelevant in establishing their terms and conditions of employment. *Kurdzeil Iron Wauseon,* supra. Accordingly, I believe that, by unilaterally changing the shift times for the first-shift processing department employees during the Memorial Day holiday in 2000, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act, and I so find.

13. Respondent changes the job duties of container repair department mechanics

The General Counsel alleges that Respondent acted unlawfully by unilaterally, without giving notice to the Union or affording it an opportunity to bargain, changing the job duties of its bargaining unit mechanics in the container repair department. In this regard, Edward Grissom testified that the following document (GC Exh. 8) was distributed by Supervisor George Jordan to the swing-shift mechanics during a department meeting. Dated July 26, 2000, the document reads:

Container Repair Expectations Revised

1) After clocking in to begin your shift, a mechanic should immediately receive a container. This will cut down on the unnecessary down time we have been using.

2) All breaks, including lunch, should be taken at the normal time that breaks are given, the only exception to this issue is our welder do [sic] to the over amount of fumes in the welding cage. He may need to come out for air outside the normal break times.

3) With the over abundance of work that we are presently faced with, no mechanic should clock into meeting, training, or down time after returning from lunch or break. The mechanic or welder should immediately clock into a container and continue work.

4) When looking for a container to work on this should not be a mission that takes a great deal of time. It should not take five or ten minutes to find a container to work on. To stop this problem a mechanic should already have a container at his work station that he is already clocked on before he goes looking for another container to bring to his work station. This will take away using to [sic] much time in looking for another container.

5) We can spend an over amount of time looking for that perfect container to work on, it may look great until you get it back to your station and put it on your eater and see it has a lot of damage to be repaired underneath the container. This in turn will cause you to lose valuable time on repairing that container.

6) As far as triple liners on the ER's this type of work can be done by teams or any other way the mechanics see fit to get the job done, 1st shift and 2nd shift must share the work load on all the bad containers on a equal basis.

7) All of these revisions will be approved by the mechanics before they are put into effect, we work in a democracy and will continue to have input and suggestions by the mechanics before anything becomes official.

8) Mechanics should immediately clock into a container after lunch instead of clocking back in to down time ie. Previous container or the next container you plan to work on.

9) If a mechanic has problems with a container not scanning he should have his supervisor or a material handler take the paper work back to initial to be researched, in the mean time he can be working on the next container. If the supervisor or the material handler are not immediately available move on to your next container until they can take the paper work over to the initial inspection area for you.

10) A mechanic can have up to five containers at his work station at any given time so long as it is not creating a jam that might create a safety issue. It is understandable that on some occasions that a mechanic may have containers coming back from welding that may cause more containers at his/her work station it is the responsibility of the supervisor to assure that the material handlers align the containers properly to avoid congestion.

According to Grissom, with regard to 1, previously "we would get four, five maybe six containers, enough to do for a while . . . which would take us a little while to get them . . . ." As to 2, it was a "different" rule as, previously, ". . . if we were working in a container and we lacked a little bit to finish it and then we'd clock out and go to lunch." Under the new rule, every mechanic was required to take breaks and lunch at the same time as other mechanics. No. 3 is "different" as previously there had been no mention if employees would ". . . spend a little time in the rest room or something . . . ."[106] Concerning 4, Grissom believed it differed form what existed as previously ". . . we used to just pull a container over and . . . clock in on it and work on it and then go get another one . . . ." Under the new system, ". . . if [the container] didn't have much work to do on it and you get it finished, they want you to go out while you're still on this [container] and get more . . . "while remaining on the initial clock." With regard to 6[107] and 7, Grissom believed the former to be different as Respondent was requesting that employees work in teams while performing their individual work and, and, as to the latter, Jordan ". . . asked me to sign it." Finally, Grissom said that 9 was a different procedure but conceded it had no effect upon his job and that 10 was different as previously there had been no specified limit to the number of containers a mechanic could have at his workstation for repair. During cross-examination, Grissom said his supervisor, Jordan, held meetings with the container repair department employees daily at the start of the shift and that it was "not unusual" for Jordan to raise work-related issues including suggestions on how to improve their work. Grissom added that Jordan had been holding such meetings since prior to the election, that much of the material on General Counsel's Exhibit 8 concerned improving the mechanics' efficiency levels, but that, in the past, Jordan's suggestions had been verbal—"He never did pass none of these out." Finally, Grissom acknowledged that Respondent's facility was a new venture for the USPS and that, since the commencement of operations in Richmond in August 1999, there had been constant "tweaking" of job procedures—"I'd say so."

Counsel for the General Counsel contend that, in the above document, Respondent implemented ". . . substantial and significant changes in the mechanics' job functions," including a decrease in the amount of time for employees' lunchbreaks, a heavier workload, and new instructions for selecting containers, and that these were not mere "adjustments" in how the mechanics did their jobs. Arguing to the contrary, counsel for Respondent contend that, taken as a whole, the document sets forth "minor changes to the means by which container repair employees performed their existing job duties . . . ." Grissom was uncontroverted, and I find, that most of what is contained in General Counsel's 8 represented changes in how the container repair department employees performed their daily work. However, while work rules are nominally mandatory subjects of bargaining, as stated above, to rise to the level of the types of changes, which require prior notice and bargaining with a labor organization, such changes must represent ". . . material and substantial change[s] in terms and conditions of employment." *Outboard Marine Corp.,* supra. Further, if the changes ". . . constitute merely particularization of, or delineations of means for carrying out, an established practice, they may, in many instances, be deemed not to constitute a 'material, substantial, and significant' change." *Bath Iron Works Corp.,* supra. I agree with counsel for Respondent that the alleged unlawful changes are, in reality, minor changes in the "means" by which container repair mechanics were to perform their job duties and had a quite negligible, if any, impact upon their terms and conditions of employment.[108] Accordingly, no duty to bargain existed, and I shall recommend that paragraph 11(a) of the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526 be dismissed.[109]

14. The unit inventory clerk changes

The General Counsel alleges that Respondent unlawfully unilaterally changed the shift and number of hours worked by the unit inventory clerk without notice to or bargaining with the Union. In this regard, Edward Grissom testified that the individual, classified as the unit inventory clerk, works in the container repair department and that the person's job is to stock the shelves with parts. Grissom further testified that, prior to the election, there had been two women—Sheila _____ and Debra Hadnot—performing this work; that one worked the entire first shift and one worked the entire second shift; that, subsequent to the election, the two women were moved to other departments and, thereafter, only one employee, a male, Daryl _____, performed the work of the unit inventory clerk; and that he begins working midway through the first shift and continues working until midway through the second shift. David Williams testified that, in July 2000, the USPS issued a modification to its contract with Respondent, changing the inspection criteria on containers to be repaired in the container repair department. According to Williams, the effect of the modification was to reduce the amount of work by half, and, as a result, there was a reduced demand for parts. He continued, stating that Hadnot had always performed different jobs in order to keep busy; that, with the reduced workload, "she was . . . switched to material handling" in the warehouse with an increase in pay; that the other clerk was on leave at the time;[110] that an individual, Daryl Staley, was eventually given the job of unit inventory clerk with a 10-hour workday (6 a.m. until 4:30 p.m.) overlapping the first and second shifts. Williams conceded that he failed to give the Union notice of Staley's working hours.

Contrary to counsel for Respondent, I agree with counsel for the General Counsel that the foregoing represent the types of

[106] As stated above, Grissom testified that, under Respondent's system, down time is referred to as "indirect time" and an increase in this would result in lowered efficiency.

[107] Grissom stated that 5 represented no change in procedures.

[108] For example, requiring the mechanics to take lunch at the appointed hour and requiring them to resume working rather than lounging in the rest room at the conclusion of the lunch hour hardly impact upon the mechanics' terms and conditions of employment or represent suitable subjects for bargaining.

[109] Absent any record evidence of unlawful animus, I shall also recommend dismissal of the allegation that publication of the July 26 memorandum was violative of Sec. 8(a)(1) and (3) of the Act.

[110] Upon her return, she was given a different job.

material and significant changes in mandatory subjects of bargaining, requiring prior notice and bargaining with a labor organization. Thus, the changes, set forth above, involved such subjects as bargaining unit staffing, the transfer of employees to different jobs and their applicable rates of pay, and the establishment of a work shift longer than Respondent's normal work shift and one overlapping the first and second shifts, all of which, I believe have significant precedential value. Therefore, I find that the changes did, in fact, have a material and substantial impact upon the bargaining unit employees' terms and conditions of employment. Further, as set forth above, by acting unilaterally in the above manner, Respondent suggested to its bargaining unit employees that their newly selected collective-bargaining representative was irrelevant. *Kurdzeil Iron of Wauseon,* supra. In such circumstances, Respondent was obligated to have given the Union prior notice of the changes and an opportunity to bargain, and, having failed to do so, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act, and I so find.[111]

15. Respondent's cafeteria benefits plan

The General Counsel alleges that Respondent acted unlawfully by implementing an accident/disability insurance policy without notice to the Union or affording it an opportunity to bargain. There is no dispute that the allegation pertains to Respondent's benefits plan, known as the "Alan Ritchey, Inc. Cafeteria Plan." The uncontroverted record evidence establishes that the cafeteria plan has been offered to all of Respondent's employees since July 1994, the effective date of the plan and that, since prior to the election, information briefly mentioning the cafeteria plan, which is available to all of Respondent's employees in all of its divisions, including the several service centers, along with an outline of other company benefits, has been given to each bargaining unit employee at the time of his or her hire.[112] The record further establishes that the plan has an open enrollment period from May 1 through 31 each year; that, as operations at Respondent's Richmond facility did not commence until August 1999, bargaining unit employees did not become eligible to enroll in the plan until May 1, 2000; that the cafeteria plan includes life, disability, and accident insurance coverage; and that there were no changes in the terms of the plan, which was offered to the bargaining unit employees in May 2000. There is no dispute that, prior to offering the plan to its bargaining unit employees at its Richmond facility during the open enrollment period in May 2000, Respondent did not give notice to the Union or afford it an opportunity to bargain. In my view, the salient facts are that Respondent's cafeteria plan has been part of its employee benefits package since prior to the time the Richmond plant commenced operations in August 1999 and that, from the date through April 12, it had been described, although not in minute detail, for all newly hired employees in an outline of available benefits. Thus, contrary to the General Counsel, what occurred in May 2000 was not the implementation of a new employee benefit by Respondent but, rather, the commencement of the open season for enrollment in the preexisting cafeteria benefits plan, about which the bargaining unit employees were aware and for which they were now eligible to enroll. Section 8(a)(1) and (5) of the Act prohibits a unilateral change in the bargaining unit em-ployees' existing terms and conditions of employment, and "it is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *NLRB v. Dothan Eagle,* 434 F.2d 93, 98 (5th Cir. 1970). Herein, as the cafeteria plan was a preexisting benefit, about which the bargaining unit employees had knowledge, as the yearly enrollment period remained the same, and as the terms of the plan itself remained the same, the requisite "change" for finding an unfair labor practice does not exist.[113] In these circumstances, Respondent was not obligated to have given notice to the Union prior to offering the cafeteria plan during open enrollment, and, while cognizant of the Union's status as a recently certified labor organization, I am compelled to recommend dismissal of paragraph 9(a) of the complaint in Case 32–CA–018601.

16. Respondent's hiring of temporary employees directly to perform the work of bargaining unit employees and paying them different wages and benefits than paid to unit employees

The General Counsel alleges that, commencing in November 2000, Respondent began acting unlawfully by unilaterally, without notifying or affording the Union an opportunity to bargain, hiring temporary employees directly to perform the work of bargaining unit employees and paying them at different hourly rates of pay than paid to bargaining unit employees. In this regard, Edward Grissom testified that, one day, in early December 2000, in the lunchroom, he spoke to another employee, who said that he had been hired on a temporary basis to work for Respondent. "A couple of days later, in a hallway at the Richmond facility, Grissom approached David Williams, and 'I asked him . . . about [hiring temporary employees who were performing the work of bargaining unit employees] . . .

[111] In the absence of evidence establishing unlawful animus, I shall recommend dismissal of the allegation that Respondent's conduct was violative of Sec. 8(a)(1) and (3) of the Act.

[112] Edward Grissom recalled receiving a "bunch of papers" at the time of his hire but did not recall seeing the document, which discussed the cafeteria plan.

[113] In asserting the existence of an unfair labor practice, counsel for the General Counsel contend, "Whether or not employees were given notice at the point of hire that they would be eligible to enroll . . . is immaterial. The salient facts are that Respondent was offering a benefit . . . that clearly materially altered the terms of their employment that Respondent had not previously offered." However, they cite to no Board or court decisions on point or even to any analogous decisions. Contrary to the General Counsel, I equate Respondent's offering of the plan during its open season enrollment period to a 6-month anniversary raise of a specified amount, the existence of which had been made known to employees at the time of hire. Surely, absent any discretion, an employer would be under no obligation to bargain at the 6-month anniversary date of each employee, and, as in *Rural/Metro Medical Services,* 327 NLRB 49, 51 (1998), counsel would be arguing that the failure to give the raise constitutes an unlawful unilateral change. I think the same is true herein, and the requisite change for an unfair labor practice would have been Respondent's failure to have offered the plan on May 1.

and he said that he had talked to John Lopes about it.'" According to Grissom, Williams said the temporary employees were working on just a short-term basis, and ". . . if they worked out well, then he would keep them." Grissom, who believed the temporary employees were being paid at a higher hourly wage rate than were bargaining unit employees, asked Williams if such were true, and the latter said they were being paid more per hour because they were not receiving any benefits. Also, the plant manager told Grissom that, rather than hiring the temporary employees from an agency, Respondent had hired them directly. Finally, Grissom testified that the temporary employees ". . . were working in processing . . . [doing] material handling, inspection, and shrink wrap . . ." — work done by bargaining unit employees. During cross-examination, Grissom conceded that Respondent had hired temporary employees, who worked in the processing department, in December 1999; however, the individuals were hired ". . . through a temporary agency and [Respondent] got rid of all of them." The record establishes that, commencing in November, Respondent hired 24 temporary employees at a rate of pay of $14.38 per hour and, at least, two other temporary employees at a rate of pay of $18.95 per hour, that the individuals were not permitted coverage under Respondent's health and welfare plans, and that they were subject to a different absenteeism policy than were bargaining unit employees.

Williams testified that, in fact, Respondent did hire temporary employees toward the end of 2000 "to handle the increase in volume that you're going to get . . . during that time period." He added that the temporary workers performed the "same jobs" as bargaining unit employees but were needed due to the ". . . seasonal workload that we hadn't kept up with." Initially testifying he spoke to John Lopes about the hiring of temporary employees, Williams corrected himself, stating he ". . . called for John Lopes but I actually spoke with Hector Valdivia," another business agent,[114] "and we were just talking about options" having to do with the anticipated "excess work" at the end of the year and whether Respondent would need temporary workers. The options, about which they spoke included utilizing a permanent weekend shift and whether temporary employees would be "in the group or out of the group" working weekends, "and he said he would get back to me." Upon examining his calendar, other than leaving a message for John Lopes on November 6 regarding "temp employees," Williams was unable to say he ever again spoke to anyone form the Union regarding the matter of temporary employees, and, according to Williams, Lopes ". . . never called me back." On this point, General Counsel's Exhibit 69 establishes that temporary employees were hired as early as November 9 and, according to Williams, the actual decision to hire temporary workers was reached "probably within the 30 days prior to hiring them . . . ." As to the higher hourly rates of pay, Williams explained that, in order to be in compliance with Respondent's contract with the USPS and "with the Department of Labor," the temporary employees were paid "the same hourly rates as our employees in the same positions plus they had to be paid the health and welfare amount . . . ."[115] Finally, Williams conceded that, unlike in 1999, the temporary employees, who were hired at the end of 2000, were hired directly by Respondent, and "they were performing unit work" and that the employment contracts, which the temporary workers executed, referred to the possibility that they would be retained as full-time employees.

John Lopes testified that he did not become aware that Respondent had hired temporary employees in 2000 until December. He denied any conversations with Williams on the subject except, in early October, when Williams mentioned to him ". . . that they were thinking about hiring people without benefits that they were going to pay them more money in lieu of benefits. . . . I asked him why . . . would you want to do that . . . . he just told me . . . it's something we're thinking about. That's the last I heard about that." Lopes denied being given notice by Respondent of the decision to hire temporary employees or being afforded the opportunity to bargain about it. On this point, on December 8, Lopes wrote to James Craig Brown, stating that the Union had just become aware that Respondent had hired temporary workers and requested information regarding the number of hires, their rates of pay, and their benefits.

Initially, with regard to Respondent's alleged direct hiring of temporary employees, there can be no question that such represented a "change" herein. Thus, Respondent admits that, in contrast to hiring temporary employees from an employment or temporary agency in 1999, it hired such employees directly in 2000 to fill bargaining unit positions and to perform the work of bargaining unit employees. Moreover, unlike the temporary employees in 1999, who were specifically excluded from the bargaining unit and none of whom were offered full-time employment, as the possibility existed that the temporary employees, who were hired in November and December 2000, would be offered employment on a full-time basis to continue performing the work of bargaining unit employees, Respondent's direct hiring of such employees clearly had a material and significant effect upon the bargaining unit employees. The hiring of temporary employees to perform the work of bargaining unit employees is a subject about which an employer is obligated to give a labor organization prior notice and to afford it an opportunity to bargain. *Alamo Cement Co.,* supra at 1034. Crediting the uncontroverted testimony of Williams and that of Lopes, it is clear that Respondent and the Union never actually engaged in bargaining over the direct hiring of temporary employees, and, even assuming Williams left a message, regarding the decision to hire temporary employees, with the Union on or about November 6, 2000, the record evidence is that Respondent commenced hiring such employees within a day or two after the "notice" and that Respondent reached its decision to do as many as 30 days earlier. In these circumstances, at the time Williams left his message, the direct hiring of temporary employees was a fait accompli, and the Board has held that

[114] Williams averred that Lopes was not in the Union's office and he was transferred to Valdivia. Williams added that the subject of the conversation actually was upcoming employee overtime—". . . I was talking to him about some overtime to be coming up, and then I also spoke with him about . . . the extra work coming in."

[115] Counsel for Respondent failed to offer into the record any portions of the contract with the USPS which corroborated Williams' testimony.

notice of such is insufficient to satisfy an employer's obligation to bargain within the meaning of the Act. *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017 (1982). Accordingly, I believe Respondent's direct hiring of temporary employees was violative of Section 8(a)(1) and (5) of the Act, and I so find.

Regarding the contention that Respondent unlawfully unilaterally established hourly pay rates for its temporary workers different than the hourly rates at which bargaining unit employees were paid for performing the same work, there is no dispute that, commencing in November 2000, Respondent paid its directly-hired temporary employees at higher hourly rates of pay for performing the same work as bargaining unit employees and that these amounts consisted of the wage rate for the position plus an amount equal to the hourly cost of health and welfare coverage. Also, there is no contention that Respondent notified the Union prior to implementing these hourly rates of pay. Williams testified that he formulated the temporary workers' hourly rates of pay in the above manner so as to be in compliance with Respondent's contract with the USPS and with the Department of Labor. On this latter point, in their posthearing brief, counsel for Respondent describe the requirements of the Federal Service Contract Act and imply that this is what plant manager Williams meant is stating he acted in compliance with the Department of Labor. There is, of course, no mention of the Service Contract Act in the transcript and, while explaining its terms, counsel failed to cite to the relevant potions of that statute, which support their contention, and never requested that I take judicial notice of it.[116] Further, as stated above, Respondent failed to offer into the record portions of its contract with the USPS, supporting Williams' testimony. Therefore, Williams' explanation for the hourly pay rates of the temporary workers is uncorroborated by either provisions of the contract between Respondent and the USPS or any other documents. Obviously, rates of pay are a mandatory subject of bargaining. Respondent failed to bargain with the Union over the temporary employees' hourly rates of pay, and the temporary employees, hired directly by Respondent, specifically were not excluded from the bargaining unit. Further, given the lack of corroborative evidence, I do not believe that, based solely upon Williams' testimony, Respondent established that it was restricted in what it could have negotiated with the Union on the above subject. Accordingly, given the status of the temporary employees, who were hired in November and December 2000, as, at least, potential bargaining unit employees, I find that their rates of pay had a substantial and significant effect upon the bargaining unit employees' terms and conditions of employment and that Respondent acted in violation of Section 8(a)(1) and (5) of the Act by unilaterally, without notice to the Union or affording it with an opportunity to bargain, implementing the hourly pay rates of its temporary employees.

[116] In these circumstances, I find Respondent's defense that it acted in conformity with the provisions of the Service Contract Act to be unavailing.

17. Respondent's reduction of the work hours of mechanics in the container repair department

The General Counsel alleges that Respondent acted unlawfully by unilaterally, without giving notice to the Union or affording it an opportunity to bargain, reducing the number of daily hours worked by its container repair department mechanics on a day-to-day, as-needed basis including, but not limited to, several dates in December 2000 and January 2001. In these regards, there is no dispute that, commencing in early December 2000 and continuing through the time of the instant hearing, Respondent reduced the work hours of its Richmond facility's container repair department mechanics. The record establishes that, in June 2000, the USPS modified its contract with Respondent, changing the criteria for determining which containers were to be inspected and repaired, and, as a result, the volume of containers to be repaired was reduced by approximately half. On September 12, 2000, James Craig Brown wrote to John Lopes that, due to the decline, ". . . it has become necessary to decrease the staffing of the second-shift container repair department at our Richmond facility" stated that ". . . each affected employee will be offered available positions on second shift." He added that any employee, who failed to accept Respondent's offer, ". . . will be laid off." Concluding, Brown wrote:

> As the representative of the bargaining unit employees at our Richmond facility, we wanted to give you advance notice of the necessity to eliminate the second shift container repair department and transfer those employees into available positions on second shift. While we are fully willing to discuss with you the above-described changes, we cannot allow those discussions to unduly protract such changes as time is of the essence. I have directed that no announcement of the reduction-in-force/transfer be made to members of the bargaining unit until September 19th . . . .

Three days later, on September 15, Lopes wrote to Brown, objecting ". . . to implementation of this reduction in force on such short notice without affording the Union a reasonable opportunity for prior bargaining" but stating the Union's desire to begin bargaining on the subject. Thereafter, on October 24, Lopes and Edward Grissom met with David Williams in the latter's office at the Richmond facility. According to Lopes, Williams spoke about "changes" which were required in the container repair department. "It was slowing down and it was going to affect four or six . . . of the lowest people," and ". . . we . . . just talked about . . . what's the Union's opinion about something like that." Williams said "that he . . . felt . . . if he moved somebody in a different department . . . their wage rate should change to the lower rate because the maintenance department . . . is a higher rate." Lopes testified that he said he had no objection to moving people to other departments, ". . . but they retained their same rate of pay." Williams objected to this, and, after each continued to state his position, the meeting ended with Williams saying, ". . . he'd just get back to us." Lopes added that he and Williams never discussed the matter again and specifically denied that there was any discussion

about possibly sending container repair employees home early. Six days later, on October 30, Lopes wrote to Williams:

> This letter is in response to our meeting at your office on Tuesday, October 24, 2000
>
> Local 5's position regarding layoff due to reduction in work in the maintenance department is the following:
>
> (1) Those employees in the maintenance department with the least amount of seniority would be affected
>
> (2) The Company has the right to utilize those affected in other classifications as needed. They retain classification and rate of pay.
>
> (3) If the company finds that it cannot provide enough work in the production area, then a layoff would accrue.
>
> (4) Layoff using seniority list of all employees defined by the National Relations Board as the Local 6 bargaining unit. Thus, the lowest people on seniority list would be laid off.
>
> I hope that this letter clarifies our discussion regarding this matter. . . .

Lopes testified that he received no response to this letter. He further testified that he believed his conversation with Williams about the container repair department concerned just four to six workers in the department and not the entire employee complement—"During our discussion it wasn't going to affect no more than six." Also, he denied any agreement about reducing the hours of work of employees in the container repair department, stating, "that wasn't discussed." He added that such was not even an issue—"The issue was the rate of pay" in another department. According to Lopes, the next thing he heard about the container repair department employees was from Grissom, who telephoned him in early December ". . . and told me that people were sent home." Testifying during rebuttal, Grissom[117] stated that he was present during the entire October 24 meeting. Asked whether Williams ever proposed sending container repair employees home early as a solution to dealing with the reduced volume of work, he said Williams did discuss the work shortage but specifically denied Williams mentioning sending employees home early as a solution.

David Williams testified with regard to this October 24 meeting with Lopes at his office in the Richmond facility. The meeting concerned the container repair department employees, and "basically we talked about how . . . we were having less and less work come into the area. And that we had too many mechanics in that area. We [discussed] some of the options . . . we didn't want to lay anybody off. What . . . we . . . offered to do [was] to . . . move people to processing or give them the option to go to processing, based on seniority. And then [pay] them their higher rate for a week. And then [drop] them to the processing rate if they decided to keep that job." Asked what were the other available options, Williams replied, ". . . to lay people off, lay off the mechanics permanently." Then asked the following leading question, "Was there a discussion about reduced hours," Williams replied, "I mentioned to him that we couldn't pay the mechanics . . . the higher rate forever. . . . I said if we didn't get that option, then we would just keep them . . . as mechanics and . . . just cut their hours when there was no work available . . . . pay them the legal minimum for the day but then send them home. . . . Lopes . . . basically said that he negotiated contracts . . . with moving people and lowering their rates, and it was . . . my understanding when he left the meeting that it was probably okay with him." Williams further testified that he discussed three options with Lopes—moving people from container repair to processing, laying them off, or reducing hours. Later, Williams testified, "It was my understanding that he was going to have to go back and get it approved, but I thought he was going to say it was okay to move people to processing and lower their rate if they wanted that option. Other than that, to lay them off." According to Williams, he subsequently learned that the latter was not Lopes' position and that Lopes said the Union would only agree to moving employees to processing at the higher wage rate or, if not, layoffs in seniority order. Williams continued, stating that thereafter he continually attempted to reach Lopes by telephone but that Lopes never returned his calls.

Based upon the foregoing, I believe that, in December 2000, by implementing a decrease in its bargaining unit container repair department mechanics' hours of work, a mandatory subject of bargaining (*Carpenters Local 1031,* 321 NLRB 30, 31 (1996)), Respondent materially and significantly changed their terms and conditions of employment. Having observed the testimonial demeanor of the above three witnesses, Lopes and Grissom appeared to be honest and forthright with regard to what occurred during the October 24 meeting; while Williams impressed me as testifying mendaciously. Moreover, I note that the latter's testimony was inconsistent and that he only mentioned reducing the hours of the container repair mechanics and sending them home early in response to a leading question by counsel; that, in his September 12 letter, James Craig Brown never mentioned decreasing the hours of work for mechanics as a solution to the reduction of work in the container repair department. Further, in his October 30 letter to Respondent, Lopes never mentioned any proposal to reduce employees' hours, a matter he surely would have discussed had it been raised by Williams. Accordingly, I find that at no point during the meeting did Williams ever raise as an option, which Respondent had been considering, reducing the work hours of bargaining unit mechanics and sending them home early when work was slow. Also, I credit Lopes that he never again heard from Williams after their October 24 meeting. In this regard, noting his October 30 letter and as it would have been in the Union's interests to have reached an accommodation on the container repair department mechanics, I believe Lopes undoubtedly would have returned phone calls from Williams.[118]

[117] Grissom did testify that, on November 6, his supervisor, Jordan, announced that all container department work would be divided evenly between the first and second shift mechanics and that if ". . . day shift gets four hours, we get four hours. If day shift gets six hours, we get six hours." He added that this system has continued to date.

[118] I do not believe the parties had reached impasse after just one bargaining session concerning the contents of James Craig Brown's letter. Thus, there is no evidence that the parties had exhausted their prospects of reaching an agreement, had reached a deadlock, or had

Based upon the foregoing, while the parties obviously commenced bargaining on Respondent's plan to transfer second-shift container repair mechanics to other positions or lay them off due to their decreased workload, inasmuch as the matter was neither raised by Respondent nor discussed by the parties, by reducing the hours of its container repair department mechanics without giving notice to the Union or affording it an opportunity to bargain, Respondent engaged in an unlawful unilateral change, violative of Section 8(a)(1) and (5) of the Act, and I so find. *Carpenters Local 1031,* supra; *Equitable Resources Energy Co.,* 307 NLRB 730, 733 (1992).[119]

I. Jordan's Announcement of the Pending Layoff of Container Repair Department Mechanics

The General Counsel alleges that Respondent acted to undermine the Union as the collective-bargaining representative if its employees by announcing there would be layoffs of container repair department mechanics and what the criteria for the layoff selections would be. In this regard, Edward Grissom testified that, on September 13, 2000, his supervisor, George Jordan, held a meeting for the second-shift container repair department mechanics in the work area at approximately 3 p.m. Jordan began, informing the employees that, due to the post office having "changed the criteria," they would be having "less work coming in . . . . and that something was going to have to give , . . ."[120] He then mentioned the possibility of layoffs, saying that, while ". . . the Union would probably disagree with him," he would base a ". . . layoff according to absenteeism, efficiency, and attitude." He then discussed the mechanics working in other departments, saying, "[Y]ou could either go work in another department or go home." Employees asked questions, mainly about the manner in which Respondent would conduct a layoff; Jordan repeated how he would do it and reiterated that the Union would not agree. There is no dispute that, at no point during the meeting, did Jordan state that, prior to implementing transfers or layoffs, Respondent was obligated to inform the Union of its decisions and afford the latter an opportunity to engaging in bargaining over what Respondent proposed regarding the container repair department mechanics. During cross-examination, Grissom conceded that, notwithstanding what Jordan said, "[N]obody in container repair was laid off" and that Jordan spoke in a professional manner and not in a threatening way.

Counsel for the General Counsel state that, at the time Jordan spoke to the mechanics, the Union had neither the time in which to formulate positions as to Respondent's proposals nor the opportunity to engage in bargaining with Respondent and that he failed to inform the employees Respondent was obligated to give notice to the Union prior to implementing transfers or layoffs and to afford the Union an opportunity to engage in bargaining. Counsel then argue, without citing any supporting decisions of the Board, that, in the above circumstances, Jordan's comments had the effect of unlawfully undermining the Union as the employees' bargaining representative. I disagree. Thus, unlike in *Rock-Tenn Co.,* 319 NLRB 1139 (1995), Jordan did not provide the employees with information which was inconsistent with the position Brown advanced to the Union in his September 12 letter. Further, unlike in *Page Litho, Inc.,* supra, Jordan did not threaten that Respondent was close to implementing employee transfers and/or layoffs; there is no record evidence of any transfers of container repair mechanics to other positions; and Grissom admitted that no employees were laid off. Also, unlike in *St. Joseph's Hospital,* 247 NLRB 869, 877 (1980), Jordan did not solicit the listening employees' views as to Respondent's plans. In my view, Jordan merely spoke prematurely to the listening mechanics about the same subjects, which Brown addressed in his letter to the Union, and expressed his own views as to how Respondent should proceed. Accordingly, his comments did not have the effect of undermining the Union in the minds of the bargaining unit employees and were not violative of Section 8(a)(1) and (5) of the Act. Therefore, I shall recommend dismissal of paragraph 11(d) of the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526.

J. Respondent's Alleged Unlawful Direct Dealing

1. Respondent requires mechanics to execute the "Container Repair Expectations Revised" document

The General Counsel alleges that Respondent unlawfully bypassed the Union and dealt directly with its bargaining unit employees by asking them to sign a memo, agreeing to changes in their job duties. In this regard, I have previously found that, during a meeting with the second-shift mechanics, the supervisor, George Jordan, distributed a memorandum, dated July 26, 2000, entitled "Container Repair Expectations Revised" and that each mechanic was requested to execute his copy of the document. Further, I concluded that, inasmuch as the delineated changes in the manner, in which mechanics were required to perform their jobs, were minor and had a negligible impact on their terms and conditions of employment, they did not rise to the level of the types of changes, which require notice to a labor organization prior to implementation affording the latter an opportunity to bargain. Board law clearly requires that an employer meet and bargain exclusively with the bargaining representative of its employees and that an employer which deals directly with its bargaining unit employees or with any repre-

used their "best efforts" to reach an agreement. It is evident that the Union did not believe they were at impasse as, 6 days later, Lopes gave Williams a counterproposal.

[119] Assuming that the parties reached an impasse on October 24 with regard to Respondent's proposals to transfer container mechanics to other positions or to lay them off, Board law is clear that an employer may only implement changes in terms and conditions of employment consistent with its preimpasse proposals. *McAllister Bros.,* 312 NLRB 1121, 1123 (1993). Herein, reducing the hours of work of the container repair department mechanics was not part of Respondent's preimpasse proposals. Accordingly, implementation of such changes would have been unlawful.

[120] The record establishes that Jordan held this meeting just 1 day after James Craig Brown sent a letter to the Union, informing it that in order to resolve the problem of decreasing work for its container repair department, Respondent wanted to transfer the second-shift mechanics to other positions on that shift or, if the employees refused to accept transfers, to lay them off. In the letter, Brown promised to withhold announcement of Respondent's plans until September 19.

sentative of the employees, other than their designated bargaining representative, does so in violation of Section 8(a)(1) and (5) of the Act. Further, direct dealing need not take the form of actual bargaining. *Allied Signal, Inc.,* 307 NLRB 752, 753 (1992). In any case, involving an allegation of direct dealing, the inquiry must concern whether the employer's direct solicitation is likely to erode "the union's position as exclusive representative." *Modern Merchandizing,* 284 NLRB 1377, 1379 (1987). Finally, the Board has developed criteria to be used for determining whether an employer has engaged in direct dealing, violative of Section 8(a)(1) and (5) of the Act. These are that the Respondent was communicating directly with union-represented employees; that the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and that such communication must be to the exclusion of the union. *Permanente Medical Group,* 332 NLRB 1143, 1144 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995); *Obie Pacific,* 196 NLRB 458, 459 (1972). In my view, it may be argued that requiring employees to execute their copies of General Counsel's Exhibit 8 was tantamount to seeking their approval of the changes to the exclusion of their designated bargaining representative. However, as I have previously concluded that, while arguably controversial, the changes set forth in said document do not arise to the level of the types of changes which materially impact upon the bargaining unit employees' terms and conditions of employment so as to require prior notice and bargaining with a labor organization, I do not believe that Respondent's request or requirement that the container repair mechanics execute the July 26 memorandum had the effect of eroding the position of the Union as the employees' exclusive bargaining representative. Cf. *Allied Signal, Inc.,* supra. Accordingly, I do not believe Respondent's acts and conduct constituted direct dealing in violation of Section 8(a)(1) and (5) of the Act, and I shall recommend dismissal of paragraph 12 of the consolidated complaint in Cases 32–CA–018459 and 32–CA–018526.

2. Polling the first-shift processing department employees regarding changing their starting times

The General Counsel alleges that Respondent unlawfully engaged in direct dealing with its bargaining unit employees by polling its first-shift processing department employees regarding their desire to change their starting times and, thus, receive overtime. In this regard, I have found that, prior to the Memorial Day holiday in 2000, as a result of "a lot" of the first-shift processing department employees approaching Plant Manager Williams with regard to changing the shift starting times for the weekend, Respondent changed the shift times for the 2 days. Other than the foregoing admitted entreaties, there is no evidence that any managers approached employees as to the matter prior to changing the shift times. In their posthearing brief, counsel for the General Counsel concede that ". . . it does not appear . . . that any polling actually occurred," but then inexplicably argue that ". . . there was evidence of direct dealing by Respondent." Of course, counsel neglected to point out what this evidence is or where it could be found. In these circumstances, as the allegation involves "polling," counsel's concession is rather significant. Accordingly, in the absence of evidence pertaining to polling or of any instance of direct dealing with the bargaining unit employees regarding changing the shift times, I find no violation of Section 8(a)(1) and (5) of the Act of the Act occurred and shall recommend dismissal of paragraph 14(b) of the amended complaint in Case 32–CA–018149.

3. Respondent's offer of triple time to bargaining unit employees for working on Memorial Day

The General Counsel alleges that Respondent unlawfully bypassed the Union and dealt directly with its bargaining unit employees by offering to pay its first-shift processing department employees triple time for working on the May 29, 2000 Memorial Day holiday if they voluntarily worked on Saturday, May 27 and did not miss any days of work the following week. In this regard, Michelle Mayse was uncontroverted that, on Saturday, May 20, supervisors informed employees on the first shift that they would not be required to work over the following Saturday. Two days later, on Monday, Plant Manager Williams announced "over the intercom" that "we were going to have to work Saturday due to backlog." Then, on Wednesday, Williams reversed himself, informing the bargaining unit employees "that we didn't have to work on Saturday." However, on Thursday, Williams announced that ". . . he had made a mistake and was asking for volunteers to work on Saturday." At this point, supervisors approached employees, seeking volunteers, but few expressed any willingness to work on Saturday. Then, on Friday, Respondent published General Counsel's Exhibit 11, leaving copies in conspicuous places throughout the Richmond facility. Said document, entitled "Plantwide Hours for Saturday and Monday for Day Shift 4:00AM to 12:30PM," announced that employees would be paid time and a half for working on Saturday and double time plus 8 hours holiday pay for working on Monday, with payment contingent upon employees working 8 hours on Saturday and Monday and 40 hours the following week. David Williams testified that, prior to the election, he had the authority to pay employees in the manner, set forth on the above document, and that employees were paid in the manner for the Memorial Day weekend.

Notwithstanding that counsel for the General Counsel disregarded the pleading of the allegation and, treating it as an alleged unlawful unilateral change, argued that Respondent's conduct violated Section 8(a)(1) and (5) of the Act as it ". . . gave no notice to the Union and did not afford it an opportunity to bargain over the issue," I shall treat it as alleged. In this regard, there can be no question that Respondent's supervisors conduct on Thursday, May 25, and the wording of General Counsel's Exhibit 8, together constituted an offer to the bargaining unit employees for work on the following Saturday and Monday and effectively composed bargaining.[121] Whether the employees work on those days would be voluntary or required, their payment, and any preconditions for payment were mandatory subjects of bargaining, and Respondent was obligated to have dealt with the Union on these matters. The Union was a newly certified labor organization and, by dealing directly with

[121] Of course, acceptance of Respondent's offer was signified by employees showing up for work on both days.

the bargaining unit employees and acting as if the Union did not exist, Respondent's conduct clearly had the effect of undermining the Union's status as the employees' bargaining representative. *Modern Merchandizing,* supra. Accordingly, Respondent's conduct was violative of Section 8(a)(1) and (5) of the Act, and I so find.

4. Respondent's meetings with bargaining unit employees concerning reduction-in-force issues

The General Counsel alleges that Respondent undermined the Union as the exclusive bargaining representative of its employees by meeting directly with its employees concerning upcoming subjects of bargaining including reduction of work issues. In this regard, the record establishes that, after a 6-month interruption, collective bargaining for an initial contract between Respondent and the Union resumed on January 18, 2001. Representing the Union were John Lopes and the employees' negotiating committee, and representing Respondent were Bobby Ritchey, James Craig Brown, Anthony Welling, the new plant manager, and Richard _____. According to Edward Grissom, late in the bargaining session, which concluded at 3:30 p.m. "we were discussing safety, uniforms, and tools, and I brought up the subject that the shirt the Company gave us to wear was 50 percent polyester and that when I was welding . . . I got burned because a spark caught on fire." Then, speaking directly to Lopes, Welling asked if he could speak to these people and gestured towards the employees. Lopes responded that he could and that any of these employees would be "a good member on your safety committee." Grissom continued, testifying that, on the following Tuesday, January 23, Welling called a meeting of the container repair department employees at 3 p.m. Employees from both shifts were present, and Welling began speaking. He started on the subject of the mechanics being sent home early, saying, ". . . that was because they didn't have the work and because Alan Ritchey only has one client," the USPS. He then asked for "feedback" as to what the mechanics thought "should be done."[122] He then proceeded to "ask each individual" the question. "He went to each individual around the room asking them . . . what should be done . . . that they have this work shortage." Several responded that, if there had to be a layoff, it should be done in order of seniority. Others suggested switching days off. "Tony made it very clear that before anything could be actually done, he would have to meet with Mr. Lopes." Grissom recalled that Welling also spoke about their efficiency levels, stating that the Seattle employees were "more efficient" and that we needed to pay attention to what we were doing.[123]

Grissom next testified that, at the end of the above meeting, Welling announced he would hold a followup meeting during the following week to discuss the reduction in the number of containers for repair. On January 31, after Grissom reported for work, Welling held a meeting but only the second-shift container repair department employees were present.[124] "Tony started the meeting with the subject of work load that something just had to be done . . . and that these short hours wasn't getting it . . . ." Then, Welling ". . . went around to each individual and asked them what they thought should be done. He said he wanted input from each mechanic. . . ." During the meeting, Welling again cautioned that ". . . he would have to speak with Mr. Lopes before anything was final." Finally, Grissom testified that he attended the next bargaining session between the parties on March 9 and that, during the meeting, the parties held a lengthy discussion about the consequences of the reduced amount of work in the container repair department.

Anthony Welling testified that, towards the end of the January 18 bargaining session, he got John Lopes' attention and said it was necessary that he be able to speak to the container repair department employees and "'. . . go over the issues of cherry picking and the lack of work and reduced hours in the department.'" Welling pointed out that members of the employees' bargaining committee were also container repair department employees ". . . so nothing would be happening that they wouldn't be part of. And I just said I need to be able to talk to them . . . . and Mr. Lopes said, yes, that is appropriate, that's what we'd like to see happen."[125] After giving the container repair mechanics advance notice of the meetings, on January 23, he met separately with the employees on each shift. With regard to the second-shift employees meeting, "I explained to them that we were getting together so that we could take an opportunity to discuss things that were going on in the department . . . give them a chance to ask questions and hear clearly from me what I know and what information there is in terms of where we are in terms of the workload, and wanted the opportunity to explain to them what we were doing to try and assure

[122] Clearly, Respondent already was aware of the Union's position with regard to what should be done about the work shortage. Thus, as set forth above, Lopes wrote to David Williams on October 30 that seniority should govern on any matters affecting the bargaining unit mechanics; that, while Respondent had the right to transfer mechanics to other bargaining unit positions, the affected employees should retain their classifications and rates of pay; and that, if layoffs were chosen as the course of action, ". . . the lowest people on seniority list would be laid off."

[123] Grissom testified that neither he nor any union official objected to Welling holding this meeting and that, besides himself, three other bargaining committee members were container repair mechanics. Also, besides efficiency and reduction in work, they also discussed "cherry picking," which means selecting containers with little or nothing wrong to work on rather than the next container in line, at the meeting.

[124] Grissom said that no one informed the Union about the scheduling of the meeting.

[125] Welling recalled Grissom speaking about his shirt catching on fire but said it occurred earlier in the meeting.

According to Welling, he felt the need to speak to the container repair mechanics as ". . . a couple of employees . . . had come up to me . . . and asked me questions" regarding ". . . the issues that they were facing and the loss of work hours and wages was becoming more and more pregnant with them . . . ." Welling admitted he wanted to reach an agreement with the Union on the container repair department employees quickly and did not want to wait for the conclusion of contract negotiations.

that all the work that was available for container repair . . . was getting to them. We [discussed] . . . the issue of cherry picking . . . some of the harder more difficult pieces of container repair work. We were talking about the lack of work and the reduced hours, and again explained to them that this is an opportunity for them to be able to share information with me. . . . I indicated that Mr. Lopes was aware we were having the meeting . . ." and ". . . your bargaining committee people are going to hear the same stuff, but we're not here to decide anything. That any decisions about anything or any practices or any changes that would have to be handled between the company and . . . the union in negotiations." Welling stated that he informed the employees that Respondent was in a difficult position because it could not go and seek work for the container repair employees, that Respondent was limited by its contract with the USPS, and that ". . . I needed to hear from them" whether they wanted matters to remain the same ". . . or did they want me to try and move things forward with the Union and . . . see . . . if we could balance the work to the work force." Welling mentioned he was attempting to obtain as many containers as he could for them to repair. Then, employees began ". . . asking questions like how long is this going to continue, and my answer [was] I don't have an answer to that, we're trying to work through it." Also, "some employees asked if they could work in other areas and I said at this point my understanding is that that's restricted because . . . there's no agreement [on] wages for that area." Asked if he mentioned options other than reducing the hours of work, Welling replied, "I pointed out that . . . I can't source any of their work. I can't bring in anything else for them to do, so we're faced with this amount of work and this number of people. And so the reality is . . . to wind up with some reduction in the labor force in order to equal the amount of work if you want to return to somewhere around 40 hours worth of work." Finally, with regard to this meeting, Welling admitted asking employees what they thought of the issues, stating, ". . . that was the general tone of the information exchange, which was . . . tell me what your experience has been with these types of things. According to Welling, his goal was ". . . to get them all themselves talking about it, so they're aware of what's happening . . . ." He denied such rose to the level of bargaining.

Welling testified that he held another meeting with the container repair mechanics on each shift a week later. According to him, the subject was layoffs and "the types of things . . . involved in making the selection . . . for the layoff . . . . basically I asked an open ended question, what are ways of doing it because . . . they as a group needed to sort of think it through and understand what was going on and the process . . . ." As to this, Edward Grissom mentioned the use of social security numbers. "I think I gave people the heads up that probably seniority was going to be a critical issue . . . . I asked . . . you're all trained in the various product and everything, and everyone pretty much acknowledged that they were. Welling testified that, as to the role of the Union, he said, "[E]veryone is open and welcome to give their input here and stuff but ultimately it's going to come down to discussion with the Union and do it. And I may have made the comment that Z hoped . . . we could move this through as an aside and not get balled up in the whole contract negotiation because . . . this is urgent to you . . . ."

During cross-examination, Welling was asked if the information he obtained was important to Respondent, and he replied, "Not particularly, no. . . . It was important in sense of them hearing from me where we were and having them understand the nature of the business with [the USPS] . . . ." Asked why, then, it was important for him to have Lopes' permission to speak to the employees, Welling said, "[T]o avoid any confusion or conflict." As to what information he obtained from the employees, Welling replied, "That they wanted to . . . get the work force reduced so the remaining people had 40 hours of work." Also, ". . . lots and lots of different things." He conceded ". . . I discussed it with Craig Brown that we needed to make this an important item and not let it get backlogged in the entire bargaining process. . . ." Then, Welling further conceded, "I had to call meetings so that people had an opportunity to voice their concerns . . . ." Specifically, his purpose for holding the second meeting on January 31 was ". . . to get input . . . on methods and things that they felt would be appropriate ways for a selection of who would stay in the department and who should go elsewhere in terms of seniority or other criteria . . . and be able to share with me those methods that have been used in their past . . . ." Finally, Welling admitted he failed to inform Lopes on January 18 that he would be asking employees for input or soliciting opinions.

James Craig Brown corroborated Welling as to what occurred at the January 18 meeting. Towards the end of the session, "Tony Welling spoke directly to Mr. Lopes . . . and said that he needed . . . to speak to the mechanics in the container repair department about some issues that we had raised in the meeting particularly the cherry picking and the lack of work . . . ." Lopes raised no objection, saying the Union wanted open dialogue back and forth. Brown also testified that the parties next met for bargaining on March 9 and that the subject matter was "the lack of work in container repair and the need to effectuate the layoffs." According to Brown, Lopes raised no objection to the two employee meetings prior to the bargaining session. Finally, testifying on rebuttal, John Lopes specifically denied that, during the January 18 bargaining session, Welling asked him for permission to speak to the container repair mechanics about the impact of the lack of work in that department or to solicit input from said employees about the lack of work.

While they differ on some details, the recollections of Grissom, Welling, and Brown are not thoroughly inconsistent. I was most impressed with the demeanor of Grissom and believe his version of events was the more convincing and trustworthy and shall rely upon his testimony as to what occurred at the January 18 and March 9 bargaining sessions and the two container repair department employees meetings with Welling. The testimony of the latter appeared to be too labored to be entirely accurate, and Brown appeared to be merely repeating Welling's version of events. Accordingly, I find that, during the parties' January 18 bargaining session, without explaining what he would say or ask, Welling sought and was granted permission, by Lopes, to speak to the container repair mechanics. I further find that, during his ensuing meeting with the container repair personnel, amongst whom were members of the bargaining unit

employees' negotiating committee, while cautioning he would have to reach agreement with Lopes before anything became final and after explaining the existing, unsatisfactory situation of declining work and employees receiving fewer hours, Welling questioned each mechanic as to what should be done and that, during his second meeting with the mechanics the following week, after again cautioning that he would have to reach an agreement with Lopes before anything could be final, Welling stated that employees working shorter hours was not a satisfactory solution the problem of the lack of work and again asked each employee what should be done. I also find that, during the March 9 bargaining session, the parties spent a substantial part of the time discussing the consequences of the lack of work in the container repair department. Finally, Welling admitted that, during his first meeting with the container repair department employees, he told them he needed to hear from them whether they wanted matters to remain the same; that, during his second meeting with the employees, he sought each employee's opinion as to how layoffs should be effectuated; that he discussed what he heard with Brown; and that, on January 18, he failed to disclose to Lopes he would be polling employees regarding the above matters.

In my view, noting that Welling received Lopes' permission to hold meetings with the container repair department mechanics, that members of the bargaining unit employees' negotiating committee attended the two meetings and voiced no objections to what Welling did, and that he stressed to the mechanics the need to bargain to an agreement with the Union before anything final could be implemented, the issue herein is whether Welling polled the container repair department employees for the purpose of undermining the Union's role in bargaining. In my view, this must be answered affirmatively. Thus, it is axiomatic that, by virtue of the April 13, 2000 election, only the Union was the designated bargaining representative of Respondent's bargaining unit employees, including the container repair mechanics, and, based upon Lopes's October 30, 2000 letter, Respondent already was acutely aware of the Union's positions on its proposed solutions for the lack of work in the container repair department. While Welling may well have felt the need to explain the serious nature of the existing situation to the mechanics—and, indeed, Lopes felt this was a good idea, there seems to have been no reason for his polling other than to ascertain the extent of the employees' support for the Union's bargaining positions. In this regard, unlike in *Von's Grocery Co.,* 320 NLRB 53, 67 (1995), Welling's polling was not ". . . simply an innocent query about a matter of general interest." To the contrary, if done innocently, Welling certainly would have been candid with Lopes, regarding his intent, when he sought the latter's permission to speak to the mechanics. His silence speaks proverbial volumes, and the importance, which, I believe, Respondent attached to the information gained from Welling's questions, is best seen from the extensive bargaining, regarding the container repair mechanics, which occurred at the parties' next bargaining session. Further, counsel for Respondent's reliance upon the Board's decision in *Permanente Medical Group,* supra, is misplaced as that case involved an employer's meetings with employees in order to obtain information to help it formulate its own bargaining proposals, and Respondent makes no such contention herein. Indeed, Welling disingenuously claimed little of any import was derived from his polling. In sum, while Welling had permission to speak generally to the container repair mechanics about their current and future job situation, he did not have the Union's permission to poll them regarding their positions on an issue about which Respondent was acutely aware of the Union's position. As I believe the purpose, and only foreseeable effect of Welling's polling, was to undermine the Union's bargaining position, I believe Respondent acted in violation of Section 8(a)(1) and (5) of the Act and so find.

CONCLUSIONS OF LAW

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

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

3. At all times since April 13, 2000, the Union has been the exclusive representative for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act of the following appropriate unit:

> All full-time and regular part-time warehouse, processing, container repair, and quality and data departments employees, including inspectors, material handlers, banders, stretch wrappers, receivers, loaders, unloaders, forklift operators, tray repair operators, logistic clerks, yard drivers, mechanics, welders, repair parts inventory clerks, quality auditors, palletized quality auditors—initial inspectors, and final inspectors employed by Respondent at its Richmond, California facility; excluding all employees performing work duties at Respondent's facility who are provided to Respondent by temporary placement or employment agencies, outside contractor employees, office clerical employees, janitors, managers, supervisors, acting supervisors, confidential employees, professional employees, data analysts, plant maintenance leads, guards, and supervisors as defined by the Act.

4. By issuing disciplinary warnings to two container repair department mechanics for failing to perform at minimum efficiency levels subsequent

to increasing the minimum efficiency level for the employees without giving prior notice to the Union or affording it an opportunity to bargain over the increase, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5. Subsequent to the Union's May 26, 2000 demand to bargain prior to each act of discipline, by issuing discretionary verbal warnings, written warnings, suspensions, and discharges to its bargaining unit inspectors for failing to perform at minimum efficiency levels without prior notice to the Union or affording it an opportunity to engage in bargaining over the discipline, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. Subsequent to the Union's May 26, 2000 demand to bargain prior to each discharge of a bargaining unit employee, by issuing discretionary discharges to bargaining unit employees

without prior notice to the Union or affording an opportunity to bargain over the discharge, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

7. Subsequent to the Union's May 26, 2000 demand to bargain prior to each act of discipline, by issuing discretionary verbal warnings, written warnings, suspensions and discharges to its bargaining unit employees for violations of its absenteeism policy without prior notice to the Union or affording it an opportunity to bargain, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

8. By unilaterally, without giving prior notice to the Union or affording it an opportunity to bargain, imposing a new work rule on bargaining unit employees, prohibiting them from discussing the Union with their fellow employees during working time, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

9. By imposing a work rule upon its bargaining unit employees, prohibiting them from discussing the Union with their fellow employees during working time, when there were no prohibitions as to conversations about any other subjects, Respondent engaged in discriminatory acts and conduct, violative of Section 8(a)(1) and (3) of the Act.

10. By insisting, as a condition precedent to the resumption of face-to-face collective bargaining, that the Union provide it with a "complete" contract proposal, one which included all economic terms, by delaying the appointment of a substitute authorized bargaining representative and by demanding to meet at an unreasonable location for bargaining, Respondent failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

11. By unilaterally, without prior notice to the Union or affording it an opportunity to bargain, eliminating Memorial Day and Labor Day as nonworking holidays, changing the job duties of welder, Kevin Lynch, implementing a new work rule prohibiting excessive talking and wandering away from work stations, implementing a new work rule mandating that, with less than 1 week prior notice, leave from work would be considered an unexcused absence, changing the shift times for the first-shift processing department employees during the Memorial Day weekend in 2000, changing the work shift and the working hours of the unit inventory clerk, implementing a plan to hire temporary employees directly rather than through temporary employment agencies and paying the employees at a different hourly rate than paid to bargaining unit employees, who perform the same work, and reducing the hours of work of container repair department mechanics, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

12. By bypassing the Union and dealing directly with its bargaining unit employees regarding working voluntarily on the Saturday of the Memorial Day holiday weekend in 2000 and offering to pay them at a triple time rate of pay for working on Memorial Day, Respondent undermined the position of the Union as the bargaining representative and engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

13. By bypassing the Union and directly polling its container repair department employees as to their positions on solutions for the lack of work in their department and on implementing layoffs while well aware of the Union's positions on these issues, Respondent undermined the bargaining position of the Union and engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

14. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

15. Unless specified above, Respondent has engaged in no other acts and conduct violative of the Act.

THE REMEDY

I have found that Respondent has engaged in, and continues to engage in, serious and extensive acts and conduct violative of Section 8(a)(1) and (5) of the Act. Accordingly, I shall recommend that it be ordered to cease and desist from the actions and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Initially, I have found that two container repair mechanics, Tyrone Sparkman and Dale May, received unlawful disciplinary warnings after Respondent began stricter enforcement of its efficiency standards for its container repair mechanics without prior notice to the Union or affording it an opportunity to bargain. In these circumstances, I shall recommend that Respondent immediately rescind and remove the warning notices from the personnel file of each employee and notify him that such has been done. Next, I have found that, notwithstanding the Union's May 26, 2000 request to bargain prior to the disciplining of bargaining unit employees, Respondent unlawfully continued to issue discretionary warning notices, suspensions, and discharges to inspectors for not working at the minimum efficiency level without prior notice to the Union or affording it an opportunity to bargain. Accordingly, I shall recommend that Respondent be ordered to rescind and remove all verbal and written warning notices and notices of suspensions and terminations from the personnel records of all inspectors, who received such discipline for low efficiency since May 26, and notify each that such has been done. With regard to employees Demone Anderson, George Booker, John Chatman, Jacquelyn Greer, Marietta Haywood, Sheila Jackson, Ardell Shelfo, Ebony Mouton, Monique Dudley, Donika Dotson, Sheila McFarland, Paulette Hicks, Linda Martinez, Toni Bertrand, Candace Minter, and Tina Bowman, each of whom was suspended for low efficiency subsequent to May 26, I shall recommend that Respondent be ordered to make each employee whole for any loss of earnings he or she may have suffered, with interest to be computed in the manner prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). Regarding employees Anderson, Booker, Chatman, McFarland, Shelfo, Daryl Johnson, Yolanda Stevens, and Marian Howard, each of whom was discharged for low efficiency subsequent to May 26, I shall recommend that Respondent be ordered to immediately offer each reinstatement to his or her former position of employment or, if the position no longer exists, to a substantially equivalent position without prejudice to his or her seniority or other rights or privileges previously enjoyed and to make each employee whole from the date of his or her discharge until the day he or she is offered reinstatement for any loss of earnings and other benefits he or she may have suffered as a result of his or her discharge, with said amounts computed in the manner prescribed in *F. W. Woolworth Co.,* 90

NLRB 289 (1950), and with interest computed as in *New Horizons for the Retarded,* supra.[126]

I have found that, notwithstanding the Union's May 26 request to bargain prior to the discharge of any bargaining unit employees, utilizing its discretion, Respondent unlawfully discharged employees, LaTachianna Pontiflet and Mandrell Miller, without prior notice to the Union or affording it an opportunity to bargain. Therefore, I shall recommend that notices of their discharges be expunged from the personnel files of each employee and that Respondent be ordered to immediately offer Pontiflet and Miller reinstatement to their former positions of employment or, if the positions no longer exist, to a substantially equivalent ones without prejudice to his or her seniority or other rights or privileges previously enjoyed and to make each whole from the date of his or her discharge until he or she is offered reinstatement for any loss of earnings or benefits he or she may have suffered as a result of his or her unlawful discharge. The amounts are to be computed in the manner established in *F. W. Woolworth Co.,* supra, with interest computed as in *New Horizons for the Retarded,* supra.

I have found that, notwithstanding the Union's May 26 request to bargain prior to the imposition of discipline against bargaining unit employees, Respondent unlawfully continued to issue discretionary warning notices, suspensions, and discharges to employees who violated its absenteeism policy without prior notice to the Union or affording it an opportunity to bargain. Accordingly, I shall recommend that Respondent be ordered to rescind and remove any verbal or written warning notices and notices of suspensions and terminations for violations of its absenteeism policy from the personnel files of any bargaining unit employees, who received such discipline subsequent to May 26, and to inform the employees that such has been done. With regard to employee, Latosha Green, who was suspended for excessive absenteeism, I shall recommend that she be made whole for any loss of earnings and benefits with interest to be computed in the manner set forth in *New Horizons for the Retarded,* supra. As to employees Lowe Shakesnider, Merdia Fort, Theodore Hagaman, Shawndale Quilter, Michelle Mayse, Armando Leapheart, and Marcell Spain, each of whom was discharged for violating Respondent's absenteeism policy, I shall recommend that Respondent be ordered to offer each immediate reinstatement to his or her former position or, if the position no longer exists, to a substantially equivalent position without prejudice to his or her seniority or any other rights or privileges previously enjoyed and to make each whole from the date of his or her discharge until the date he or she is offered reinstatement for any loss of earnings or benefits, with the amounts to be computed in the manner set forth in *F. W. Woolworth Co.,* supra, and with interest computed in the manner set forth in *New Horizons for the Retarded,* supra.

I have found that Respondent engaged in numerous unlawful unilateral changes, each of which materially and substantially affected the bargaining unit employees' terms and conditions of employment. In this regard, generally, I shall recommend that Respondent specifically be ordered to cease and desist from unilaterally changing the terms and conditions of employment of its bargaining unit employees without giving prior notice to the Union and affording it an opportunity to bargain over any such changes. Specifically, I shall recommend that, in order to restore the status quo ante herein Respondent be ordered, upon the request of the Union, to rescind each of the unlawful unilateral actions described above.[127] Further, in order to restore the status quo ante for its container repair department employees, in addition to reinstituting their normal daily work schedules to that which existed prior to Respondent's unlawful conduct, I shall recommend that Respondent be ordered to reimburse each of the above employees in the department for any wages and benefits he or she may have lost as a result of Respondent's unlawful reductions in their hours of work, with the amounts computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), and with interest as set forth in *New Horizons for the Retarded,* supra. Also, I shall recommend that Respondent be ordered to cease and desist from bypassing the Union and dealing directly with its employees regarding changes in their terms and conditions of employment and polling them regarding issues, which are the subject of bargaining between the parties.

Finally, I have found that Respondent bargained in bad faith by insisting that the Union provide it with a "complete" contract proposal as a condition precedent to resuming collective bargaining and by delaying in the appointment of a substitute lead negotiator and insisting on meeting at an unreasonable location. As a remedy, I shall recommend that Respondent be ordered to cease and desist from such acts and conduct and, affirmatively, to bargain in good faith. Counsel for the General Counsel seeks as an additional remedy an order extending the certification year. Board precedents establish that a labor organization's certification year commences to run from the date of its initial bargaining session with an employer—herein June 6, 2000. *Dominguez Valley Hospital,* 287 NLRB 149, 150 (1987); *San Antonio Portland Cement Co.,* 277 NLRB 309, 311 (1985). Board law is equally well settled that, when an employer's unfair labor practices intervene and prevent the bargaining unit employees' certified bargaining agent form enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962). In these circumstances, to assure a period of good-faith bargaining, the measures, required by the Board, include an extension of the certification year for some time period. *Bryant &*

[126] Counsel for the General Counsel additionally backpay order, requiring Respondent to reimburse the employees involved herein for any extra Federal and/or State income tax that would or may result from the lump sum of any backpay award to them. In the absence of any Board decisions on the propriety of such an additional remedy, I must deny the General Counsel's request. It is, of course, within the power of the Board to grant the General Counsel's request.

[127] Quite obviously, Respondent will be unable to rescind its unlawful change in the shift hours during the Memorial Day weekend in 2000.

Stratton Business Institute, 321 NLRB 1007, 1045 (1996). While in most cases, this extension is for 1 year (id; *Dominguez Valley Hospital,* supra; *Cellar Restaurant,* 262 NLRB 796 (1982)), the Board has also extended the certification year for less than a year and for, what it terms, a "reasonable time" or a "reasonable period." *Valley Inventory Services,* 295 NLRB 1161 (1989); *San Antonio Portland Cement Co.,* supra at 309; *G. J. Aigner Co.,* 257 NLRB 669 (1981). Herein, while it is true that more than 7 months elapsed before the parties resumed collective bargaining in January 2001 and that the delay was, in great part, caused by Respondent's unlawful condition precedent to a continuation of bargaining and by the delay resulting from its unlawful, delinquent appointment of a substitute lead negotiator, it is also true that the Union delayed 2 months in submitting a draft contract proposal to Respondent and that, inexplicably, another 3-1/2 months elapsed before the Union submitted an uncomplicated and generic proposal on wages and pension plan contributions to Respondent. In these circumstances, I believe the Union's certification year should be extended for a reasonable period, not exceeding 10 months, after all the unfair labor practices herein have been remedied.

[Recommended Order omitted from publication.]