

Enterprise Leasing Company of Florida, LLC d/b/a Alamo Rent-A-Car and Teamsters Local Union No. 769 affiliated with International Brotherhood of Teamsters. Cases 12-CA-026588, 12-CA-026637, 12-CA-026660, 12-CA-026706, 12-CA-026723, 12-CA-026820, and 12-CA-027057

July 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On April 11, 2012, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent and the Acting General Counsel each filed exceptions, a supporting brief, and an answering brief.¹

The National Labor Relations Board has considered the decision and the record in light of the exceptions² and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions as modified below, to amend his remedy, and to adopt the recommended Order as modified and set forth in full below.⁴

The judge found that the Respondent committed several unfair labor practices before it withdrew recognition of the Union, that those unfair labor practices tainted the decertification petition upon which the Respondent relied to withdraw recognition, and that the Respondent committed several unfair labor practices following the unlawful withdrawal of recognition. As explained below, we largely adopt the judge's findings.

¹ The Respondent also filed a separate motion arguing that the Board lacks a quorum because the President's recess appointments of two current Board Members were constitutionally invalid. For the reasons stated in *Bloomington's*, 359 NLRB 1003 (2013), this argument is rejected.

² During the hearing, the Respondent admitted that it violated Sec. 8(a)(1) of the Act when, on January 28, 2010, Supervisor Johnny Betancourt interrogated employees about their union membership and solicited employees to withdraw their membership. Before the judge, the Respondent argued that the incident was de minimis and did not warrant a remedy. No exceptions were filed, however, to the judge's inclusion of a cease-and-desist order remedying the violations.

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

⁴ We shall amend the judge's conclusions of law in accordance with our findings; modify the judge's recommended Order to conform to our findings, the Board's standard remedial language, and in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB 518 (2012); and substitute a new notice to conform to the Order as modified.

I. THE PREWITHDRAWAL UNFAIR LABOR PRACTICES⁵

1. As more fully set forth in the judge's decision, the Respondent, in December 2009, held a series of voluntary meetings with employees at the Miami International Airport Alamo Rent-A-Car facility who were represented by the Charging Party Union. The Respondent informed them that it would be eliminating the short-term disability benefit they had enjoyed for years as a component of the Respondent's comprehensive group insurance plan "because of their union contract," but that nonunion employees at other locations would continue to receive a short-term disability benefit, albeit under a new time-off policy that the Respondent had crafted for those employees. Thereafter, on January 1, 2010, the Respondent unilaterally eliminated the benefit.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated the unit's short-term disability benefit. The Respondent contends that article 23, section 3 of the parties' then-effective collective-bargaining agreement constituted a waiver of the Union's statutory right to bargain over the elimination of this benefit. We disagree. That section provided that "[n]o matter respecting the provisions of the [Comprehensive Group Insurance Plan or 401(k) Plan] shall be subject to the grievance, arbitration or negotiation procedure established hereunder." Although the agreement detailed grievance and arbitration procedures, it did not include any reference to negotiation, let alone any provision that could be characterized as a "negotiation procedure." In those circumstances, we decline to find that the terms cited by the Respondent constituted "'incisive, direct, and specific . . . assault[s] on the existence of any negotiating responsibility during the term of the contract'" or evidenced the parties' "'desire to commit unresolved issues to management prerogatives.'" *Trojan Yacht*, 319 NLRB 741, 742 (1995) (quoting *Rockford Manor Care Facility*, 279 NLRB 1170, 1174 (1986)).⁶

⁶ The Respondent also argues that the parties' bargaining history evinces the Union's intent to waive its rights to bargain over the elimination of the short-term disability benefit. But the Respondent presented no evidence regarding the parties' bargaining history; in fact, all of the evidence it cites pertains to unrelated negotiations involving bargaining units at other facilities. The Respondent further contends that the parties' collective-bargaining agreement incorporated by reference predecessor Vanguard's group insurance plan documents, which stated that Vanguard had the right to amend or terminate any component of the plan. This ignores the fact that, as of 2009, the Respondent had discontinued the Vanguard plan altogether and substituted its own plan. In any event, we agree with the judge's finding that language in the underlying plan documents could not constitute a clear and unmistakable waiver because the Union was not a party to the plan documents and did not expressly agree to their incorporation into the collective-

Accordingly, we find that the Union did not clearly and unmistakably waive its right to bargain concerning the elimination of the short-term disability benefit. See *Provena St. Joseph Medical Center*, 350 NLRB 808, 808–816 (2007).⁷ Indeed, article 23, section 3 does not provide even an arguable basis for the Respondent's position.

2. We further agree with the judge that the Respondent violated Section 8(a)(1) when it repeatedly told represented unit employees that it was eliminating the short-term disability benefit "because of their union contract," but that nonunion employees would continue to receive the benefit under the time-off policy covering them. As the judge found, unit employees would reasonably believe that the Respondent was eliminating their short-term disability benefit because they chose to be represented by the Union. See *Belcher Towing Co.*, 265 NLRB 1258, 1267–1268 fn. 11 (1982), *enfd.* in relevant part 726 F.2d 705 (11th Cir. 1984).

The Respondent argues that its statements were truthful and lawful. It contends that it accurately informed unit employees that their benefits were governed by their collective-bargaining agreement, and that the agreement authorized the Respondent to eliminate the short-term disability benefit. We disagree. Telling employees that the short-term disability benefit would be eliminated "because of their union contract" was not truthful, because nothing in the agreement mandated that the Respondent eliminate the benefit or, as shown above, privileged the Respondent to take such action unilaterally. Nor would the agreement have precluded the Respondent from continuing to fund the benefit, as it had since it succeeded Vanguard as the employer. In fact, contrary to the Respondent's repeated representations to unit employees, its decision to discontinue the benefit was entirely discretionary.

3. As more fully set forth in the judge's decision, on January 13, 2010, Glinda Jefferies, an employee witness whom the judge credited, observed a conversation in which two supervisors asked employee Cirilo Garcia how many signatures he had collected on his petition to

bargaining agreement. See *Trojan Yacht*, *supra*, 319 NLRB at 742 fn. 5.

⁷ We find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(3) and (1) when it eliminated the short-term disability benefit, as such a finding would not materially affect the remedy.

Chairman Pearce would find that the Respondent also violated Sec. 8(a)(3) and (1) by eliminating the short-term disability benefit for unit employees because the Respondent expressly cited union representation as its reason for eliminating the benefit, while it continued to provide the same benefit for unrepresented employees. See *Tocco, Inc.*, 323 NLRB 480, 487–488 (1997).

decertify the Union. After Garcia answered, the supervisors told him "it wasn't enough, to go back and get more."⁸ Garcia had begun circulating the decertification petition on his own initiative on January 1, 2010.

Unlike the judge, we find that the Acting General Counsel failed to establish that the Respondent coercively interrogated Garcia by asking him how many signatures he had collected. The conversation took place in a hallway near a back door, and the record does not establish whether the supervisors summoned Garcia to that location, nor whether they or Garcia initiated the exchange at issue. Moreover, Garcia was the primary agent of an effort to decertify the Union. Given the paucity of evidence concerning the context in which the exchange occurred, we cannot conclude that the supervisors' question would reasonably tend to coerce an employee in Garcia's position. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd.* sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

We do agree with the judge, however, that the Respondent violated Section 8(a)(1) when the supervisors directed Garcia to obtain more signatures.⁹ See *Treasure Island Food Store*, 205 NLRB 394, 397 (1973). It is no defense that the conversation may have been friendly. Nor does it matter that Garcia had already gathered signatures and might have gathered additional signatures in any event. See *Mickey's Linen & Towel Supply*, 349 NLRB 790, 791 (2007) (finding immaterial that the employee alone initiated the decertification petition). At a minimum, the supervisors' directive impermissibly propelled his efforts forward.

II. THE WITHDRAWAL OF RECOGNITION

We agree with the judge that, applying *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Respondent's January 19, 2010 withdrawal of recognition of the Union violated Section 8(a)(5) and (1) because the prewithdrawal unfair labor practices tainted the decertification petition that the Respondent relied upon when it concluded that the Union no longer enjoyed majority support. Garcia began circulating the decertification petition on January 1, 2010, just a few weeks after the Respondent repeatedly and unlawfully attributed the impending elimination of

⁸ In crediting Jefferies' testimony, the judge reasoned in part that Jefferies "was a reluctant witness and often appeared uncomfortable testifying in front of [Managers Lisette] Dow and [Bridget] Long." Both parties noted in their briefs that Dow was not present in the hearing room at the time. We correct the judge's error and find that it does not affect his credibility determination, which we affirm above. See fn. 3.

⁹ In agreeing with the judge, we do not rely on *Narricot Industries*, 353 NLRB 775 (2009), *enfd.* 587 F.3d 654 (4th Cir. 2009), cert. denied 131 S.Ct. 59 (2010), a two-member decision cited by the judge. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

the short-term disability benefit to the employees' union representation. Then, on the very day the petition began circulating, the Respondent unlawfully eliminated the short-term disability benefit—an act that directly affected all unit employees—without bargaining with the Union. Thus, the petition effort got underway in the immediate aftermath of actions that would have “minimize[d] the influence of organized bargaining” and “emphasiz[ed] to the employees that there is no necessity for a collective-bargaining agent.” *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001) (quoting *May Department Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) (alterations in original)).

In addition, the Respondent's supervisors unlawfully assisted the decertification effort when they told Garcia that he did not have enough signatures and to “go back and get more.”¹⁰ As the judge points out, it was after that 8(a)(1) violation that Garcia enlisted another employee, Jesus Torres, in the petition drive, and it was Torres who secured the additional signatures that resulted in a numerical majority. The record shows that Torres obtained those additional signatures from employees who were unhappy with the Respondent's unlawful elimination of the short-term disability benefit. Thus, as the judge's analysis makes plain, a strong causal connection links the Respondent's unfair labor practices concerning the short-term disability benefit to the Union's loss of majority support. Accordingly, the decertification petition was tainted and the withdrawal of recognition unlawful.

We further find the Respondent's withdrawal of recognition unlawful for an additional and independent reason. When the supervisors directed Garcia to collect more signatures, they unlawfully promoted the decertification effort. This act alone directly tainted the signatures subsequently collected, and therefore the petition as a whole. See *SFO Good-Nite Inn*, 357 NLRB 79, slip op. at 80–82 (2011) (stating that the Board will presume a decertification petition tainted where it was instigated or propelled by the employer), *enfd.* 700 F.3d 1 (D.C. Cir. 2012).¹¹

¹⁰ Although we reverse, above, the judge's finding that the Respondent's supervisors coercively interrogated Garcia, that does not affect our conclusion that the judge correctly found that the petition was tainted.

¹¹ The Respondent excepts to the judge's finding that it unlawfully withdrew recognition from the Union, but it does not argue that the judge's recommended affirmative bargaining order is improper even assuming the Board affirms the judge's finding that the withdrawal was unlawful. We therefore find it unnecessary to address whether a specific justification for that remedy is warranted. *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (stating that, in the absence of a particularized exception, a

III. THE POSTWITHDRAWAL UNFAIR LABOR PRACTICES

As the Respondent's withdrawal of recognition was unlawful, we adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) by making several postwithdrawal unilateral changes to wages and benefits effective October 29, 2010, and January 1, 2011; failing to process a March 3, 2010 grievance; and failing to continue dues checkoff between the date of withdrawal of recognition and March 31, 2010, the date the collective-bargaining agreement expired. Reasoning that he was bound by the rule of *Bethlehem Steel Co.*,¹² the judge also found that the respondent did not violate Section 8(a)(5) and (1) by failing and refusing to deduct and remit dues after the agreement's expiration.

After the judge's decision issued, we overruled *Bethlehem Steel* and its progeny “to the extent they stand for the proposition that dues checkoff does not survive contract expiration.” *WKYC-TV, Inc.*, 359 NLRB 286, slip op. at 293 (2012). We held in *WKYC-TV* that “an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer.” *Id.* We also decided, however, to apply the new rule prospectively only. *Id.*, slip op. at 294. Thus, as in *WKYC-TV*, we shall apply *Bethlehem Steel* in the present case. Accordingly, we adopt the judge's finding that, because the respondent was privileged under *Bethlehem Steel* to cease honoring the dues-checkoff arrangement after the expiration of the parties' collective-bargaining agreement, the Respondent did not violate the Act by failing and refusing to deduct and remit union dues after March 31.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 1

By telling employees they would lose short-term disability benefits because they were represented by a union, by interrogating employees regarding their union membership or support, by encouraging employees to circulate a decertification petition, and by soliciting employees to withdraw membership from the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

party has not preserved for appeal the imposition of an affirmative bargaining order).

¹² 136 NLRB 1500 (1962), *affd.* in relevant part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), *cert. denied* 375 U.S. 984 (1964).

2. Delete the judge's Conclusion of Law 2 and renumber the subsequent paragraphs accordingly.

AMENDED REMEDY

Pursuant to the Acting General Counsel's exception, we amend the judge's remedy to additionally require the Respondent to make unit employees whole for any losses suffered as a result of its unlawful elimination of the short-term disability benefit. See, e.g., *Best Century Buffet, Inc.*, 358 NLRB 143, slip op. at 143 (2012). We find no merit in the Respondent's argument that there should be no make-whole remedy because the Acting General Counsel did not prove that anyone was harmed by the elimination of the benefit. Whether employees actually suffered any loss is properly left to the compliance stage of this proceeding. See, e.g., *Teamsters Local 727*, 358 NLRB No. 86, slip op. at 1 fn. 3 (2012). The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

The Acting General Counsel also excepted to the judge's remedy that the Respondent deduct and remit union dues not paid to the Union before the collective-bargaining agreement expired on March 31, 2010, to the extent that the judge did not specify that the Respondent cannot recoup the dues from employees and did not order the Respondent to pay interest. Although the Respondent answered all of the Acting General Counsel's other exceptions, it chose not to respond to this one. As the Acting General Counsel's exception is unopposed, as well as consistent with Board precedent, we amend the judge's remedy accordingly. See, e.g., *Texaco, Inc.*, 264 NLRB 1132, 1145-1146 (1982), enf. 722 F.2d 1226 (5th Cir. 1984). Thus, the Respondent must reimburse the Union from its own funds, without recouping the amount from its employees, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Enterprise Leasing Company of Florida, LLC d/b/a Alamo Rent-A-Car, Miami, Florida, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their short-term disability benefits were being terminated because they were represented by Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters (the Union).

(b) Coercively interrogating employees about their union membership or support.

(c) Encouraging employees to circulate a petition to decertify the Union as their bargaining representative.

(d) Soliciting employees to withdraw their membership in the Union.

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

(f) Interfering with the Union's contractual right of access to the facility.

(g) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the following unit:

All full-time and regular part-time Bus Drivers, Cashiers, Custodians, Damage Clerks, Greeters, Inventory Clerks, Lead Bus Drivers, Lead Service Agents, Lost & Found Clerks, Parts Clerks, Phone Operators, Rental Agents, Return Agents, Service Agents, and Technicians A, B and C, employed by the Employer at its facility at 3355 NW 22nd Street, Miami, Florida; excluding: all other employees, including office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

(h) Refusing to bargain with the Union regarding grievances.

(i) Failing and refusing to deduct and remit dues to the Union pursuant to the dues-checkoff provision during the term of any collective-bargaining agreement.

(j) 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) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Restore the short-term disability benefits for unit employees that were in effect before January 1, 2010, and make the employees whole for any losses suffered as a result of the unlawful elimination of benefits in the manner set forth in the amended remedy section of this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Upon request, process the grievance filed by the Union over the discharge of employee Paul Garcia.

(e) Reimburse the Union for all dues that, following the unlawful withdrawal of recognition, it failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement before it expired on March 31, 2010, in the manner set forth in the amended remedy section of this decision.

(f) Upon request, rescind the wage increase that was implemented on October 29, 2010, and the benefits improvements that were implemented on January 1, 2011.

(g) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix"¹³ in English, Spanish, and Haitian Creole. Copies of the notice, on forms provided by the Regional Director for Region 12, 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, the 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. If 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 December 1, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 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.

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 tell you that your short-term disability benefits are being terminated because you are represented by Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters (the Union).

WE WILL NOT coercively question you regarding your union membership or support.

WE WILL NOT encourage you to circulate a petition to decertify the Union as your bargaining representative.

WE WILL NOT solicit you to withdraw your membership in the Union.

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

WE WILL NOT interfere with the Union's contractual right of access to our facility.

WE WILL NOT withdraw recognition from the Union or refuse to bargain with it as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time Bus Drivers, Cashiers, Custodians, Damage Clerks, Greeters, Inventory Clerks, Lead Bus Drivers, Lead Service Agents, Lost & Found Clerks, Parts Clerks, Phone Operators, Rental Agents, Return Agents, Service Agents, and Technicians A, B and C, employed by us at our facility at 3355 NW 22nd Street, Miami, Florida; excluding: all other employees, including office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

¹³ 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."

WE WILL NOT refuse to bargain with the Union regarding grievances.

WE WILL NOT fail and refuse to deduct and remit dues to the Union pursuant to the dues-checkoff provision during the term of any collective-bargaining agreement.

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

WE WILL restore your short-term disability benefits that were in effect prior to January 1, 2010, and WE WILL make you whole for any losses suffered as a result of our unlawful elimination of those benefits.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, upon request, process the grievance filed by the Union over the discharge of employee Paul Garcia.

WE WILL reimburse the Union for all dues that, following our unlawful withdrawal of recognition, we failed to deduct and remit pursuant to the dues-checkoff provision of the collective-bargaining agreement before it expired on March 31, 2010.

WE WILL, upon request, rescind the wage increase that was implemented on October 29, 2010, and the benefits improvements that were implemented January 1, 2011.

ENTERPRISE LEASING COMPANY OF FLORIDA,
LLC D/B/A ALAMO RENT-A-CAR

Karen M. Thornton, Esq. and Shelly Plass, Esq., for the General Counsel.

Daniel R. Begian, Esq. and John P. Hasman, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Miami, Florida, on May 16–20, 2011. Teamsters Local Union No. 769 affiliated with the International Brotherhood of Teamsters, filed and amended the seven charges in this case on various dates from December 18, 2009, through February 16, 2011.¹ On April 8, 2011, the General

¹ The Charge in Case. 12–CA–026588 was filed on December 18, 2009, and amended on January 13, 2010, February 18, 2010, and October 20, 2010. The charge in Case 12–CA–026637 was filed on February 18, 2010, and amended on October 20, 2010. The charge in Case

Counsel, based upon these charges and amended charges, issued the amended consolidated complaint alleging that the Respondent, Enterprise Leasing Company of Florida, LLC d/b/a Alamo Rent-a-Car, violated Section 8(a)(1), (3), and (5) of the Act.² On April 21, 2011, the Respondent filed an answer to the amended consolidated complaint denying that it committed any of the alleged unfair labor practices.

The primary allegation in the complaint is that the Respondent withdrew recognition from the Union as the representative of a unit of employees at its facility near the Miami Airport on January 19, 2010, in violation of Section 8(a)(1) and (5) of the Act. The complaint alleges that the Respondent engaged in unlawful conduct before it withdrew recognition by: telling employees on various dates in late November and early December 2009 that the employees would be losing their short-term disability benefits because they were represented by the Union and eliminating these benefits effective January 1, 2010; interrogating employees regarding their union membership and support on January 13 and 16, 2010; encouraging employees to circulate a decertification petition on January 13, 2010; and interfering with the Union's access to unit employees at the Miami facility on January 4, 2010. The complaint further alleges that the Respondent violated the Act after withdrawing recognition from the Union by interrogating employees and soliciting them to withdraw their membership in the Union on January 28, 2010; by making unilateral changes in employees' wages, hours, and other terms and conditions of employment starting in late February 2010 and continuing through January 1, 2011; and by refusing to process and arbitrate a grievance over the discharge of a unit employee since March 3, 2010.³

In its answer, the Respondent admits that it withdrew recognition on January 19, but denies that it violated the Act by this conduct. The Respondent asserts that its conduct was privileged because it had objective proof that the Union did not have majority support. The Respondent also admits making the unilateral changes that post date its withdrawal of recognition but defends this conduct on the same basis, i.e., that the Union no longer had the support of a majority of employees in the unit when the Respondent withdrew recognition. Finally, the Respondent admits that it made changes to the unit employees' short-term disability benefits but asserts that it was privileged to do so by virtue of waiver and/or contract coverage. The Respondent denied the commission of any of the other unfair labor practices alleged in the complaint.

12–CA–026660 was filed on March 9, 2010, and amended on October 20, 2010. The charge in Case 12–CA–026706 was filed on April 22, 2010, and amended on October 20, 2010. The charge in Case 12–CA–026723 was filed on May 6, 2010, and amended on July 6, 2010, and October 20, 2010. The charge in Case 12–CA–026820 was filed on August 5, 2010, and amended on October 20, 2010. The charge in Case 12–CA–027057 was filed on February 16, 2011.

² The General Counsel had previously issued an order consolidating cases, consolidated complaint, and notice of hearing on January 31, 2011.

³ All dates are in 2010, unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware limited liability company, is engaged in the business of commercial and business car rental throughout the United States, including at the facility located at 3355 NW 22nd Street in Miami, Florida. The Respondent annually purchases and receives at its facilities in Miami and throughout the State of Florida goods and services valued in excess of \$50,000 directly from points outside the State of Florida. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent operates car rental agencies at the Miami International Airport under three brands, i.e., Enterprise, National and Alamo. This case involves only the Alamo operation at Miami Airport. The Respondent acquired this business, along with the National Car Rental business at Miami Airport, when it acquired Vanguard Car Rental, USA in August 2007.⁴ At the time of the acquisition, the Union represented the employees of the Alamo and National Miami operations in separate wall-to-wall units.⁵ The Respondent's own Enterprise employees in Miami were unrepresented.

The Union was certified as the exclusive 9(a) representative of the following unit of Alamo employees on July 22, 2005:

All full-time and regular part-time Bus Drivers, Cashiers, Custodians, Damage Clerks, Greeters, Inventory Clerks, Lead Bus Drivers, Lead Service Agents, Lost & Found Clerks, Parts Clerks, Phone Operators, Rental Agents, Return Agents, Service Agents, and Technicians A, B and C, employed by the Employer at its facility at 3355 NW 22nd Street, Road, Miami, Florida; excluding: all other employees, including office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act.

The Union successfully negotiated a first contract for these employees with the Respondent's predecessor, Vanguard, that was effective from November 29, 2005, through January 2, 2010.

The Union initiated negotiations for a new agreement by requesting bargaining in a letter dated September 22, 2009. The Respondent also requested negotiations in its own letter dated October 26, 2009. Despite the parties' apparent mutual desire to negotiate a successor agreement, no meetings were held before the expiration of the contract. Correspondence in evidence indi-

⁴ The Respondent also acquired other Alamo and National Car Rental operations across the country as part of this transaction.

⁵ On February 19, 2008, the Union was decertified as representative of the National Car Rental unit after an election conducted by the Board.

cates that the Respondent had a change in labor relations representative which delayed the start of negotiations. By December 28, the parties had agreed to meet beginning in late February or early March 2010, which were the first dates offered by the Respondent's new representative. Because of the delay in the start of negotiations, the parties also agreed on December 28, 2009, to extend the existing contract until March 31, 2010. No meetings occurred because the Respondent withdrew recognition from the Union before the agreed upon dates for bargaining.

A. The Respondent's Elimination of Short-Term Disability Benefits

The parties' collective-bargaining agreement contained the following provision at article 23:

Section 1: All full-time employees covered by this agreement will be eligible for participation under the Employer's Comprehensive Group Insurance Plan. All employees who elect to participate in said plan shall contribute on a pre-tax weekly contribution basis. The amount of said contribution shall be determined by the Employer consistent with what is charged to other employees in Miami, Florida upon each annual enrollment.

Section 2: All full-time employees covered by this Agreement will be permitted to elect to participate in the Employer 401(k) Plan subject to the terms and conditions of the Plan and shall be permitted elections given other employees under the terms of the Plan.

Section 3: No matter respecting provisions of the above Plans shall be subject to the grievance, arbitration or negotiation procedure established hereunder.

This contract had been negotiated with the Respondent's predecessor, Vanguard. At the time, the unit employees were covered by the "Vanguard Car Rental USA Inc. Health and Welfare Plan," which included a short-term disability benefit. When the Respondent acquired the Miami Alamo operation as part of its acquisition of Vanguard, it adopted the collective-bargaining agreement and continued in effect the Vanguard Health and Welfare Plan, including the short-term disability benefit. The Respondent became the plan sponsor with the benefits administered by a company called Matrix Absence Management, Inc. On August 1, 2009, Matrix stopped administering these benefits. The Respondent, which was self-insured for these benefits, took over the administration of the plan and continued the benefits until January 1, 2010, when, it is undisputed, the Respondent eliminated the short-term disability benefit for unit employees at the Miami Alamo facility.

It is undisputed that, historically, the Respondent has held an open enrollment period in October and November each year during which employees may make various elections regarding their benefits. It is also undisputed that the Respondent did not conduct any open enrollment meetings in 2009 for the 2010 plan year, which led to some confusion and uncertainty among unit employees. One of these employees, Marjorie Wisecup, a rental agent since 1995 and a recent union steward, questioned Lisette Dow, the Respondent's human resources manager in

Miami, about the absence of any open enrollment information. According to Wisecup, who testified as a witness for the General Counsel, she first spoke to Dow on the subject during the first week of November 2009, which would have been toward the end of the traditional open enrollment period. Wisecup testified that Dow reviewed with her the 2010 benefits package without mentioning that the short-term disability plan was going to be eliminated. Wisecup further testified that, around the same time, she heard Dow tell other employees not to worry if they didn't have a chance to enroll because the employees' benefits in 2010 would be the same as they had in 2009.

Wisecup testified that she had another conversation with Dow regarding benefits in late November or early December, after the enrollment period had closed. Dow called Wisecup into her office and said she needed to tell her that, effective January 1, "we will no longer have short-term disability at Alamo." Wisecup asked Dow why? According to Wisecup, Dow replied by pulling out a copy of the collective-bargaining agreement and telling Wisecup that the contract did not specify short-term disability. Wisecup responded that short-term disability benefits were included in the comprehensive group insurance plan cited in article 23 of the contract. Wisecup asked Dow why, if the employees were union the last 4 years and had short-term disability, all of a sudden they (i.e., management) was taking it away. Dow replied that, because article 23 did not specify short-term disability, the employees couldn't have it. Wisecup responded by pointing out that the employees had medical, dental, and other coverage which was not specifically mentioned in the collective-bargaining agreement. Wisecup also talked about the impact the elimination of short-term disability benefits would have on employees, including herself, who were thinking of having children.⁶ In response to these entreaties, Dow simply referred to the omission of specific reference to the benefit in the contract as the reason the Respondent was eliminating the benefit.

Acknowledging confusion and discontent among the employees over this change, Dow and Airport Market Manager Bridget Long conducted a series of meetings with small groups of employees on December 1, 3, and 7, 2009. Dow posted a flyer to announce the meetings. A total of 15 employees attended these meetings, most of whom were rental agents. Wisecup attended one of these meetings. She recalled that there were about five or six employees at the meeting including fellow rental agents Andy Felgentres and Sal Baglio. She remembered that the meeting lasted about 20–30 minutes. According to Wisecup, Long opened the meeting by saying that she did not realize that short-term disability meant so much to the employees and she apologized for management failing to tell employees that this benefit was being eliminated. Wisecup spoke up at the meeting, saying that it was devastating to find out, after the enrollment period ended, that employees would no longer have short-term disability benefits. Wisecup then reminded Dow how she had gone to Dow's office to go over the benefits for 2010 and that Dow didn't say anything about short-term disability being eliminated. Dow responded that she knew about the

change when Wisecup was in her office and did not tell her because she did not think it was a big deal. Wisecup testified that, during this meeting, Felgentres asked Long why the benefit was being eliminated. According to Wisecup, Long replied, "[B]ecause you're union, you can't have short-term disability." When Felgentres said that was discrimination, Long responded, "[D]on't worry, Enterprise has very good lawyers." Baglio left the meeting at that point. Wisecup testified that she then tried to explain how the change would affect her personally and Dow told Wisecup that this was not the place to discuss personal issues, that they would discuss it later. At that point, according to Wisecup, Long left the room and she and Dow discussed, again, the meeting at which Dow reviewed the benefits for 2010 without mentioning this change. Dow was upset that Wisecup raised this in front of Long. Wisecup told her it was not personal, it was about the insurance. Long returned to the room at some point and Wisecup continued to express her frustration at not knowing about the change before the enrollment period closed. After some further discussion of the impact to her personally, Wisecup returned to the rental desk. According to Wisecup, the rental agents were "going crazy, flipping out" over the loss of short-term disability. She testified that employees continued to discuss the issue for several days. On December 10, Wisecup, as steward, filed a grievance over the elimination of short-term disability benefits.

The General Counsel called two other employees who attended these meetings with Dow and Long. Rental agents Sara Rivera and Wanda Rivera, who are not related, attended the same meeting but a different one than Wisecup attended. Sara and Wanda Rivera arrived after the meeting had started. Both recalled that rental agents Cesar, Mohammad, and Karel were already there when they arrived and that Long was talking about operational issues, such as the fleet of cars and low customer service scores when they entered the meeting. At one point, one of the other employees asked about short-term disability and Dow confirmed that this benefit was being eliminated. After the other employees left the meeting, Sara and Wanda Rivera stayed to discuss this issue with Dow.⁷ Wanda Rivera testified that she asked Dow whether short-term disability was being taken away because of the union contract and whether these benefits were being eliminated at other company locations. According to Wanda Rivera, Dow said that if a location was nonunion, the employees there would keep their benefits. Sara Rivera essentially corroborated Wanda Rivera. According to Sara Rivera, when Dow was asked whether other locations would also lose short-term disability, Dow replied that at locations where there was no union, employees would keep short-term disability benefits and that the Alamo employees could not keep this benefit because their union contract did not mention a short-term disability benefit. Dow said that, as a union location, the Respondent had to follow what the contract says. Sara Rivera testified further that she asked Dow whether the employees would have short-term disability if it was not for the Union, and Dow responded, "[Y]es, because the Respondent had to follow the union contract." Both Riveras confirmed Wisecup's testi-

⁶ Wisecup had used this benefit twice before when she was pregnant and was contemplating having another child.

⁷ Both Riveras recalled that Long left the meeting to take a phone call and Dow was alone when they talked to her.

mony that the elimination of short-term disability was a topic of conversation among employees at the rental counter for several days after the meeting.

Dow and Long were called as witnesses by the Respondent in an attempt to rebut this testimony. Dow recalled the meeting with Wisecup after the enrollment period had closed. According to Dow, the purpose of this meeting was to determine what Wisecup wanted to do with her unused sick leave because, under the collective-bargaining agreement, employees can cash out unused sick leave in December. Dow has a practice of meeting with employees individually to go over their options around that time of the year. Dow testified that she suggested to Wisecup that she not cash out her 2 weeks of sick leave but save it because short-term disability was being eliminated in 2010. Dow acknowledged that Wisecup expressed surprise at this announcement, questioning whether she could have elected short-term disability during the enrollment period. Dow told her she could not and then pulled out a copy of the collective-bargaining agreement, opening it to article 23. According to Dow, she read the three paragraphs quoted above to Wisecup verbatim. When she was finished, Wisecup said she didn't understand and became visibly upset. Dow admitted that Wisecup asked why Dow hadn't said something sooner. Dow also conceded that Wisecup mentioned that article 23 refers to the "Comprehensive Group Insurance Plan" and that plan had included short-term disability. Dow testified, consistent with Wisecup, that Dow said that the contract did not specifically provide for this benefit. Dow also acknowledged that Wisecup's reaction to the news was the reason she and Long decided to hold the group meetings in early December.

Dow and Long testified that these meetings were voluntary and that, although five meetings had been scheduled, only three were held because of lack of attendance. Dow testified that 15 employees attended these meetings while Long testified that no more than 12 employees, all customer facing employees, attended these meetings. Dow and Long's testimony was not altogether different from that of General Counsel's witnesses. For example, they admitted that Long apologized to the employees for the way the Respondent had handled that change in benefits. They confirmed that Wisecup was upset at the meeting and directed "accusatory" comments toward Dow over not having been informed about this change during the enrollment period and that Wisecup tried to raise her personal issues with the change but that they told her to do so after the meeting. On the critical question of what was said regarding the reason for the change and whether employees at nonunion locations were affected, Dow testified that employees were told that the National employees were covered under the Respondent's time-off policy and did not have a collective-bargaining agreement. Employees were told that, with respect to union locations, whether employees would have short-term disability depended on what was in the collective-bargaining agreement. Dow specifically denied telling employees at the meeting Wisecup attended that the benefit was being eliminated because of the Union. Dow also testified that, at the meeting attended by Sara and Wanda Rivera, this question was initiated by the employees, and that neither she nor Long referred to the Union in connection with the elimination of short-term disability. Again, the

Riveras were told that it depended on the language in their contract. Long testified in much the same way, emphasizing that employees were told that, whether they would continue to have short-term disability benefits would depend on what the collective-bargaining agreement at each location provided and that non-union employees were covered for short-term disability by the Respondent's time off policy. Both Dow and Long recalled Felgentres' questioning whether eliminating short-term disability benefits was legal. According to Dow and Long, Long responded by telling the employees that they worked for a very large company and she was confident that the people in the benefits department and their attorneys would not allow them to do anything illegal.

The complaint alleges that the Respondent, through statements made by Dow and Long in the meetings with Wisecup and with the small groups of employees, violated Section 8(a)(1) of the Act by telling employees they would be losing their short-term disability benefits because they were represented by a union. To some extent, resolution of this issue turns on credibility of the witnesses. To the extent there is any difference in the testimony of General Counsel's and Respondent's respective witnesses, I shall credit the testimony of Wisecup, and Sara and Wanda Rivera. I note initially that all three were still employed by the Respondent at the time they testified and that their testimony was adverse to their employer's interest. The Board has frequently cited this as a factor favoring reliance on such testimony. See *Evergreen America Corp.*, 348 NLRB 178, 207 fn. 63 (2006), and cases cited therein. In contrast, Dow and Long, as managers for the Respondent charged with implementing its personnel policies and communicating with employees regarding their benefits, have a vested interest in testifying favorably for the Respondent and ensuring that it is not found to have violated the law. In any event, I find that the distinction between the General Counsel's and the Respondent's version of these statements is a "distinction without a difference."

Respondent's witnesses concede that they told the employees that, although their short-term disability benefits were being eliminated, employees in the nonunion locations, such as the adjacent National Car Rental operation, would continue to receive such a benefit as part of the Company's time off policy. Although they deny stating that the change was due to the employees' status as union-represented employees, they admittedly told them the benefit was being eliminated because of their union contract, which Dow and Long claimed did not provide for a short-term disability benefit. This was said notwithstanding the fact that the employees had received this benefit for the duration of the contract as part of the "Comprehensive Group Insurance Plan," which the Respondent's witnesses acknowledged included a short-term disability component. The employees' surprise and "confusion" in response to this statement was understandable. An objective employee would reasonably believe that the Respondent was eliminating a benefit received by nonunion employees because he or she had chosen to be represented by a union which had negotiated a contract for them and that, without the union, they would continue to receive this benefit they had come to rely upon. Such a statement would have a reasonable tendency to chill employees exercise of their

right to select a union as their representative and interfere with, restrain and coerce the employees in the exercise of their Section 7 rights. See generally *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969). See specifically *Hill Park Health Care Center*, 334 NLRB 328 fn. 2 (2001); *Libby-Owens-Ford Co.*, 285 NLRB 673 (1987); *Alaska Pulp Corp.*, 300 NLRB 232, 243–244 (1990), enfd. mem. 972 F.2d 1341 (9th Cir. 1991).

The case cited by the Respondent in its postbrief submission of relevant recent case law is distinguishable. In *G & K Services*, 357 NLRB No. 109 (2011), the Board addressed the issue whether an employer's preelection statement to employees regarding whether the benefits available at nonunion facilities would be available to them if they decertified their union was objectionable conduct warranting a new election. The Board reiterated that, under established precedent, an employer may lawfully inform employees of the wages and benefits its nonunion employees receive and respond to requests for information from employees about such benefits. Only when employer statements amount to an implied promise of benefits will the conduct be found objectionable. Again applying precedent, the Board noted that whether a statement amounted to a promise of benefit depended on the circumstances in which it is made and whether, under those circumstances, an employee would reasonably interpret the statement as a promise. "Although an employer may compare union and nonunion benefits and make statements of historical fact, . . . even comparisons and statements of fact may, depending on their precise contents and context, nevertheless convey implied promises of benefits." 357 NLRB No. 109, supra, slip op. at 2, and case cited there. In *G & K Services*, supra, applying precedent, a majority of the Board found the employer's conduct objectionable. In the case before me, the employer's statements were more than a recitation of fact regarding what benefits might be available to the employees if they had no union. Rather, the Respondent told the employees they were losing a benefit they currently enjoyed precisely because they had a union contract that, in the Respondent's view, did not provide for this benefit. Although the statements were made in response to employees' questions, those questions were initiated by the Respondent's surprise announcement that employees were losing a benefit. This was not a situation where employees on their own sought information regarding benefits historically provided to nonunion employees.

Having considered the evidence and the circumstances under which Dow and Long told employees the reason they were losing short-term disability benefits, I find that the statements went beyond permissible statements of fact and were unlawful threats that employees would lose benefits if they continued to be represented by the union. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act as alleged.

There is no dispute that the Respondent in fact terminated the short-term disability benefit for unit employees effective January 1 and that it did so unilaterally, i.e. without bargaining with the Union. The complaint alleges that, in doing so, the Respondent violated Section 8(a)(1), (3), and (5). At the hearing, the Respondent offered a great deal of evidence showing the process by which it made the decision to eliminate short-

term disability benefits for the Miami employees. The decision was made as part of the Respondent's integration of its personnel policies and benefit programs following the acquisition of Vanguard. According to the Respondent's witnesses, this process began soon after the acquisition was complete. Dana Beffa, the Respondent's vice president in charge of the employee benefits department, spent several months reviewing the Vanguard benefit plans, including the short-term disability plan at issue here. Beffa testified that she reviewed in particular the following language in the Vanguard Comprehensive Group insurance Plan:

FUTURE OF THE PLAN

Vanguard intends to continue the plan, but has the sole right, at its discretion and acting through its board of directors or authorized delegate, to amend or terminate, at any time and without notice, the plan and any component plan that is part of this plan. For example, Vanguard may decide to terminate the plan in connection with a corporate merger or other change in control, or in the event of a restructuring of Vanguard's employee benefits program.

Beffa testified that she interpreted this language as giving the Respondent the right to make changes to the plan. She reviewed similar language that was contained in the short-term disability plan document. Beffa testified that she also discussed the issue with the Respondent's then vice president of labor relations who agreed with her interpretation. According to Beffa, it was then determined that short-term disability would be treated as a time off policy rather than a benefit.

At the same time that Beffa was reviewing benefits, a committee within the human resources department began reviewing all of Vanguard's existing personnel policies with the intent of integrating them with Respondent's existing policies. A subcommittee was created just to review time off policies. Collin Lane, then corporate human resource manager for the Southeast Team, headed this committee. The committee worked on integrating these policies until August 2009. Lane testified that the committee decided to wipe the slate clean and build a new time off policy from scratch. The final draft of the new time-off policy that was issued August 1, 2009, included a short-term disability benefit to replace a sick leave policy that existed in the Respondent's organization. The new policy specifically stated that, for those employees covered by a collective-bargaining agreement, the collective-bargaining agreement would govern to the extent any provision of the new personnel policies was inconsistent with the collective-bargaining agreement. Once the new policies were finalized, the Respondent conducted a series of power point presentations for its human resources personnel and management to educate them on the new policies. These presentations included the caveat that the policies would not apply to employees covered by a collective-bargaining agreement.

Lane testified that Dow contacted him in July 2009, in the midst of these power point presentations, with a question whether the unionized employees in Miami would be entitled to short-term disability under the new policies when they went into effect on August 1, 2009. According to Lane, this prompted him to review the collective-bargaining agreement. As a

result of this review, Lane testified that it was determined that the Miami employees would retain the short-term disability plan that was part of the Vanguard comprehensive insurance plan until the end of the year and that the Respondent would self-administer the plan for the remainder of the year.

Respondent also conducted power point presentations for the employees, including those in Miami, to review the new policies and benefits. Dow and Long conducted these presentations for the unit employees. Dow testified that she told the employees that they would continue to receive the vacation and time off set forth in the collective-bargaining agreement, she did not specifically tell the employees that they would not be entitled to short term disability benefits after January 1. As previously noted, the Respondent did not conduct open enrollment meetings in the fall of 2009 because it was busy implementing the integrated policies and benefits.

On January 1, 2010, when the unit employees in Miami lost their short-term disability benefit, the nonunion employees at National and enterprise in Miami and elsewhere continued to receive short-term disability as part of the time-off policies recently implemented. Because the unit employees were covered by a collective-bargaining agreement, the Respondent did not extend the new short-term disability time off policy to them.

The parties agree that the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), establishes the test for determining whether the elimination of short-term disability benefits for unit employees violated Section 8(a)(3) and (1) of the Act. Under this test, the General Counsel must first establish that employees' union or protected activity was a motivating factor in the employer's decision. If the General Counsel meets this burden, then the respondent must come forward with evidence that it would have made the same decision or taken the same action even in the absence of union or protected concerted activity. Because direct evidence of unlawful motivation is seldom available, the General Counsel may rely upon circumstantial evidence to meet his burden. See *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

In this case, the General Counsel relies upon the statements of Dow and Long in November and December 2009 as establishing unlawful motivation. I have already found these statements, linking the employees' loss of this significant benefit to their status as union-represented employees, to be unlawful. The General Counsel also relies on the other unfair labor practice alleged in the complaint as establishing animus. To the extent I have found such violations, the General Counsel's prima facie case is met. The question remains whether the Respondent has shown that it would have taken the same action, i.e. eliminating short-term disability benefits for the unionized Miami Alamo employees, if they were not represented by the Union. Clearly it would not. Respondent's own witnesses testified that the nonunion employees at Miami National and Miami Enterprise continued to receive short-term disability benefits, albeit as a time off policy, even after the Alamo employees lost this benefit. Thus, in the absence of their union activity, the Alamo employees also would have received short-term disability under the time off policy. I also agree with counsel for the General Counsel that the Respondent has not shown that it was

compelled to terminate its short-term disability benefit plan for the Miami Alamo employees by external factors over which it had no control. On the contrary, the Respondent plan was self-insured and, at least after August 1, 2009, self-administered. The Respondent made a choice to eliminate this benefit only for the union-represented employees. Because it did not replace the benefit with the alternative time off policy available to non-union employees, the union represented employees in the Alamo unit were the only ones left without such a benefit. Accordingly, I find, as alleged in the complaint, that the Respondent's January 1, 2010 termination of its short-term disability plan covering the unionized Alamo employees violated Section 8(a)(1) and (3) of the Act.

The Respondent argues in its brief that it could not extend the new short-term disability time off policy to the Alamo unit employees when it terminated their benefit plan because such a change would have to be bargained with the Union. This argument transitions nicely into the 8(a)(5) allegation in the complaint, which claims that the Respondent committed an unfair labor practice by acting unilaterally when it terminated the unit employees' short-term disability benefit. Nothing prevented the Respondent from bargaining with the Union regarding this change, including whether to replace the benefit with a time off policy, as the Respondent did with nonunit employees. Although the Respondent's managers deliberated over this change for an extended period of time before making the decision to end this employee benefit, it never notified the Union that it was contemplating such a move and never afforded the Union an opportunity to bargain over this change. This despite the fact that the Union was seeking to initiate bargaining for a new contract to replace the expiring agreement while the Respondent was implementing these changes. Instead, the Respondent acted as if there were no Union representing these employees.

The Respondent argues that it was privileged to Act unilaterally because the Union had waived its right to bargain over changes in the Comprehensive Group Insurance Plan by language in the contract and in the plan documents. While this argument has some superficial appeal, it does not withstand close scrutiny. As the Respondent acknowledges, in order to find a waiver of the right to bargain, the contractual language must be "clear and unmistakable." *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The language in the plan documents, and the Vanguard employee handbook cannot be a clear and unmistakable waiver by the Union because the union was not a party to these documents, did not negotiate the language in them, nor did it consciously agree to this language. The reference to the comprehensive group insurance plan in article 23 of the contract did not serve to incorporate all of the terms of those plans in the contract. *Trojan Yacht*, 319 NLRB 741, 742 fn. 5 (1995). Cf. *Bath Iron Works*, 345 NLRB 499 (2005); *Mary Thompson Hospital*, 296 NLRB 1245, 1249 (1989), enf'd. 942 F.2d 741 (7th Cir. 1991). Finally, the language in article 23, section 3, which exempts "provisions of the . . . Plans" from the "grievance, arbitration or negotiation procedure established [in the contract]" does not clearly and unmistakably waive the Union's right to bargain before the plan itself is eliminated. Accordingly, I find that the Respondent has

not established a waiver by the Union that would privilege its unilateral conduct here.

Based on the above, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally terminating unit employees' short-term disability benefits on January 1, 2010.

B. Alleged Interference with the Union's Visitation Rights

The parties' collective-bargaining agreement contained, at article 5, the following language regarding union visitation:

After making his or her presence known to a member of management, a duly authorized officer or Business Representative of Teamsters Local 769 shall be permitted to enter the premises of the Employer for the purpose of determining whether the terms and conditions set forth in this Agreement are being followed. It is understood that such visits shall in no way interfere with the business of the Employer.

Union Business Representative Eddie Valero testified that his usual practice when visiting the facility pursuant to the above provision is to notify a supervisor that he is there once he arrives at the facility. He testified that he had never experienced any problems visiting the facility before January 4. Although Dow testified that Valero normally notified her in advance that he was coming to the facility, she conceded on cross-examination that he sometimes made impromptu visits to the facility, informing her or a supervisor after he had arrived. She also acknowledged that the visits for which he gave advance notice included visits to meet with her to discuss grievances. In any event, the above contract language does not require advance notice.

Valero testified that he visited the Miami Alamo facility on January 4 in response to a report he received about a decertification petition being circulated on company time. He was accompanied on this visit by fellow union agent Rolando Peña and Kim Horner, a laid-off Alamo employee and former union steward. Only Valero testified about this incident. According to Valero, he and his companions first went to the Quick Turnaround Area (QTA), where returned cars are washed and cleaned, to look for a supervisor to notify of his presence. Before Valero could find a supervisor, Dow came out of the building with her arms raised, screaming at Valero, asking why he was there. Valero told her he was looking for a supervisor. Dow replied that she would follow him during the visit. When Valero asked why, Dow said she had orders from above. Valero told Dow that he was there to conduct an investigation and that, if she interfered, he would file charges with the NLRB.

Valero testified that he and his group left the QTA and went inside the building, with Dow following. She stood next to him while he sat on a bench in the lobby. Valero testified that this continued for about 35 minutes. Valero then called Esther Stanley, Respondent's corporate labor relations coordinator, and informed her that union representatives were being followed and that the Respondent was interfering with an investigation. Valero told her this was a courtesy call before he filed unfair labor practice charges. According to Valero, Stanley put him on hold and, while waiting on hold, the call was dropped. Valero then received a call from Collin Lane, the Respondent's director of labor relations. When Lane asked what was going on,

Valero told him that he was trying to conduct an investigation and that Dow was following him. Lane asked how far she was from him and Valero replied that Dow was standing right next to him. Valero also told Lane that this was a courtesy call before he filed charges with the Board. When Lane asked what Valero would put on the charges, Valero told him he would find out when the charges reached his desk. Valero, Peña, Horner, and Dow spent a total of 50 minutes in the lobby.

Valero testified that, about 5 to 7 minutes after his telephone conversation with Lane, Long came out of her office and asked Valero if he had called the attorneys. When Valero answered affirmatively, Long told him he was welcome to use the break room. Valero said the investigation was not in the break room. Long again told Valero he could use the breakroom and that he was not to interrupt the workforce. According to Valero, he told Long that he was not interrupting the work force, that he was conducting an investigation and that they knew why he was there. Long then spoke to Dow before returning to her office. At that point, Valero and his companions left the building and returned to the QTA with Dow following. Dow continued to follow the union visitors when Valero and the others went back inside the building to go to the breakroom. Valero testified that Dow finally left them after he and the others went in the breakroom. However, according to Valero, a manager would occasionally come to the breakroom door and look in on them. After about 25 minutes, Valero and the other visitors left the break room and checked the bulletin board before leaving the facility.

Dow, Long, and Lane all testified for the Respondent and corroborated Valero as to the sequence of events. Dow claimed, in contrast to Valero, that it was she who was acting aggressively when she first confronted the group in the QTA. Dow admitted following Valero and his group but claims she did so to figure out what they were doing there. Long acknowledged telling Valero that he had to use the breakroom. There is no dispute that Valero returned to the Respondent's facility on January 5 and 6 without incident. He was accompanied by even more people on these visits.

The General Counsel alleges that the conduct of Respondent's agents on January 4 violated Section 8(a)(1) and (5) of the Act. The General Counsel relies on the language in the collective-bargaining agreement and Valero's testimony regarding the established practice for conducting such visits. The violation is based on Dow's alleged deviation from this practice. The Respondent argues that Valero's visit was the departure from the contract and practice, relying on Dow's testimony that Valero would usually give her advance notice of his visits. The Respondent also claims that the purpose of the visit, to investigate the reports of circulation of a decertification petition on company time, was not permitted under the contract. Finally, the Respondent argues that Respondent did not deny the Union access, in fact, permitting Valero to stay at the facility and use the breakroom and not interfering with his two subsequent visits.

I credit Valero's testimony, which was corroborated by Dow, that he did not always give advance notice before visiting the facility. As previously noted, the contract did not even require such notice. I also agree with the General Counsel that the purpose of this visit was consistent with the language in the con-

tract. Valero was investigating whether the Respondent was undermining its status as the recognized collective-bargaining representative under article 1 of the contract by permitting circulation of a decertification petition on company time. Finally, nothing in the contract permits the Respondent to limit Valero to using the breakroom during these visits. The only restriction is that Valero or any other union representative visiting the facility may not “interfere with the business of the employer.” The Respondent offered no evidence that Valero or his group interfered with its business during the January 4 visit. In fact, the Respondent offered no satisfactory justification for Dow’s conduct that day, or for Long’s insistence that the union visitors restrict themselves to the breakroom.

Based on the above, I find that the Respondent did interfere with the union’s access to employees during this visit and that, by doing so, it violated Section 8(a)(1) and (5) of the Act as alleged in the complaint. *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777–779 (1982). See also *Pavilions at Forrestal & Princeton Healthcare*, 353 NLRB 540, 564 (2008), reaffirmed at 356 NLRB 5 (2010). Cf. *H.S.M. Machine Works*, 284 NLRB 1482, 1483, 1487 (1987), and *West Lawrence Care Center*, 308 NLRB 1011 (1992), where the Board found similar conduct amounted to surveillance in violation of Section 8(a)(1) of the Act.

C. Other Alleged Violations of Section 8(a)(1)

The employee petition to decertify the union, which is at the heart of this case, was circulated among employees beginning on January 1 and continuing until about January 19. The complaint alleges that, during this time, several of the Respondent’s admitted supervisors engaged in conduct that violated Section 8(a)(1) of the Act. In addition, the complaint alleges one incident that occurred after the Respondent had withdrawn recognition from the union. Specifically, it is alleged that Station Manager Johnny Betancourt interrogated employees about their union membership and solicited employees to withdraw membership in the Union on January 28. Although the Respondent denied this allegation in its answer, it amended the answer at the hearing to admit this unfair labor practice.⁸ The withdrawal of recognition violations are still contested.

Glinda Jefferies, who has been employed by the Respondent as a return agent for 13 years and also served as a union steward for 4 years, testified as a witness for the General Counsel regarding an incident that occurred on January 13, which is the subject of two complaint allegations. Jefferies testified that she arrived for work sometime between 7:15 and 7:45 a.m. that morning, consistent with her practice of coming to work early so she can eat her breakfast in the breakroom before her shift starts at 8 am. She testified that she was sitting at a table near the door entrance, by the timeclock, and could see down the hallway from where she was. Jefferies testified that she observed fellow employee Cirilo Garcia talking to Managers Larry Elsass and Rudy.⁹ According to Jefferies, Garcia was hold-

ing a paper while Elsass and Browne spoke to him. She testified that she heard Elsass and Browne ask Garcia how many signatures he got and when Garcia responded, Rudy told him it was not enough and to go back and get more. After they finished talking, Jefferies saw Garcia leave through the back door.

There is no dispute that Garcia was the employee who started the decertification petition and obtained many of the signatures on it. Jefferies testified that, before this incident, Garcia had approached her and asked her to sign it. When Jefferies asked if she could see the petition so she could read it before signing, Garcia told her he would not let her see it unless she was going to sign. At that point, Jefferies told Garcia that she would not sign it. Jefferies also testified that she observed Garcia soliciting employees to sign the petition in the car wash area (or QTA) while he and other employees were working. She also observed Elsass and Browne standing in the front of the QTA while Garcia did this. According to Jefferies, she has a clear view of the QTA from where she works checking in customers returning their rental cars.

Garcia, who has worked for the Respondent for about 25 years and was a service agent in the QTA at the time involved here, testified as a witness for the Respondent. He denied that any supervisors questioned him about the petition or told him that he needed to get more signatures. Garcia primarily speaks Spanish and testified through an interpreter. Elsass and Browne also testified for the Respondent, each denying that they questioned Garcia about the petition or told him to get more signatures. Elsass, the branch manager, also testified that he does not speak Spanish. He admitted that he is able to communicate basic instructions to Garcia and that he has used other employees to translate for him when necessary. Browne, who is the station manager in charge of the QTA and spends about 80 percent of his time there, testified that he speaks both English and Spanish. Elsass denied being aware that Garcia was circulating a petition to decertify the Union. He did admit to seeing Garcia with “papers” in his hand but professed no interest in their contents. Browne, on the other hand, admitted that he was aware of Garcia’s activities because Garcia volunteered this information to him. Browne claims that he did not actually see the petition. He acknowledged that he informed the Respondent’s managers during an evening shift change meeting that Garcia was doing a petition to decertify the Union.

The complaint alleges that, on January 13, during the conversation overheard by Jefferies, Elsass interrogated employees regarding the employees’ support for the Union and Browne encouraged employees to circulate a decertification petition. Resolution of these allegations turns on credibility. Although both Jefferies and Garcia were still employed by the Respondent at the time they testified, Jefferies was the only one testifying adverse to the employer’s interest. Garcia, as the proponent of the petition, had aligned his interest with those of the employer. Similarly, Elsass and Browne, as supervisors charged with being responsible for an alleged unfair labor practice, had a vested interest in disputing Jefferies’ testimony. In assessing the respective credibility of the witnesses, I also note that Jefferies was a reluctant witness and often appeared uncomfortable testifying in front of Dow and Long, managers at the facility where she worked. I also note that the Respondent chose not

⁸ The Respondent argues that this one incident is de minimis and does not warrant a remedy. I will address this contention later in my decision.

⁹ Rudy was later identified as Rudolfo Browne, one of the Respondent’s station managers and an admitted supervisor.

to cross-examine Jefferies, even after reviewing two affidavits she provided during the investigation. Her testimony on direct examination was unimpeached.

The Respondent argues that I should discredit Jefferies testimony for linguistic reasons. In the Respondent's view of the evidence, because Garcia does not speak or understand English, his conversation with Elsass and Browne had to have taken place in Spanish and, because Jefferies does not speak or understand Spanish, she could not have understood what was said. The Respondent also argues that, because Elsass speaks only English, he could not have interrogated Garcia. This argument ignores the testimony of Elsass that he is able to engage in basic communication with Garcia in English. Moreover, because Browne speaks Spanish, he was able to translate whatever Elsass said for Garcia. Thus, the testimony of Jefferies that "they" asked Garcia how many signatures he had. It is significant that Jefferies did not testify as to Garcia's response to this question, probably because it was given in Spanish. Browne's statement that Garcia needed more signatures is the type of basic communication that could have been conveyed in English and Spanish and thus be understood by Jefferies.

Based on the above, I shall credit the testimony of Jefferies and find that, on January 13, Elsass and Brown interrogated Garcia regarding how many signatures he had and encouraged him to get more employees to sign the decertification petition. *Narricot Industries*, 353 NLRB 775, 776 (2009).

The complaint alleges one other incident of interrogation by one of the Respondent's supervisors that occurred before the withdrawal of recognition. Vanessa Gonzalez was the witness who testified regarding this incident. Gonzalez, who was hired in June 2009 and was working as a kiosk greeter in January, testified that on January 16 supervisor Louis Dieppa escorted her to her vehicle at the end of her shift.¹⁰ As they walked to the bus drivers, who would no longer be needed because the Airport was going to take over operation of the busses. Gonzalez told Dieppa that she had heard that the drivers were going to be offered severance pay because they were part of the Union. Dieppa responded that he did not know what was going to happen to the Alamo drivers but that the National drivers would not be affected because they were not unionized. Dieppa then asked Gonzalez if she was in or out of the Union and Gonzalez replied that she did not feel comfortable responding to that question. According to Gonzalez, Dieppa apologized, changed the subject, and they continued walking to her car.

In a statement that Gonzalez provided to the Respondent's counsel shortly before the hearing, she recalled that this conversation occurred sometime after January 19, after the Respondent had withdrawn recognition from the Union. At the hearing, Gonzalez testified that, when she was interviewed by the Respondent's counsel for that statement, she did not recall the exact date of the conversation. She further testified that her recollection of the date provided in the affidavit she gave during the General Counsel's investigation was better because it was closer in time to the events. She also testified that she had checked the calendar before testifying and was certain the con-

versation occurred either on January 15 or 16.

Because the Respondent did not call Dieppa to testify regarding this conversation, Gonzalez' testimony is uncontradicted. Moreover, I found her to be a very credible witness and note the fact here as well that she was still employed by the Respondent when she testified. Her recollection of the dates and the content of the conversation was genuine and not embellished or contrived. Accordingly, I shall credit this testimony. However, it must still be determined whether the questioning here rises to the level of unlawful interrogation. See *Rossmore House*, 269 NLRB 1176 (1984), affirmed sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In that case, the Board rejected a per se approach to allegations of interrogation in favor of consideration of the circumstances in which the questioning occurred. Among the circumstances to be considered are the identity of the questioner, the location of the questioning, whether the questioning solicits information about other employees, and whether the employee being questioned is an open union supporter.

I find that Dieppa's question, whether Gonzalez was "in or out," occurring in the parking lot while he escorted Gonzalez to her vehicle, was not coercive. I note, in particular, that when Gonzalez told Dieppa that she did not feel comfortable answering the question, he did not pursue it and instead changed the subject. I also note that it was Gonzalez who introduced the Union to the conversation by asking about the unit bus drivers. This is not a situation where Gonzalez was called to a supervisor's office and subjected to questions regarding her and other employees union sympathies. While I have found that the Respondent committed other unfair labor practices, the conversation between Gonzalez and Dieppa was devoid of any coercive statements. Accordingly, I shall recommend that this allegation be dismissed.

D. The Respondent's Withdrawal of Recognition

There is no dispute that the Respondent withdrew recognition from the Union on January 19. On that date, the Respondent posted in its break room the following notice to its employees from Airport Market Manager Long:

The Company has received petitions from over half of our employees requesting that the Teamsters no longer represent them. Because the union no longer has the support from this many employees we have decided to stop recognizing or dealing with the Union. We have taken that action based on the clear wishes of the majority of our people.

As a result, we are now working with human resources, management and our attorneys to determine what actions we can and cannot take regarding any changes to your pay and benefits. We do not know yet what the Union's response will be; because this situation is still unfolding we are unsure how long it will take to consider any changes in pay or benefits. Please understand, however, that it is our intention to implement changes that will bring about overall improvements.

¹⁰ Gonzalez was working a shift that ended at midnight.

We are very grateful to see that so many of our employees want to work directly with us without the involvement of the Union. We will continue to keep you informed with any developments and what steps we will be taking to bring about overall improvements.

Thank you for continuing to work hard to make Alamo a great place, and for giving us the chance to work with you and without a union.

The Respondent, through its attorney, also faxed a letter to the Union on January 19, at about 3 p.m., informing the Union of its decision to withdraw recognition based on a petition it had received from employees.

Long testified for the Respondent regarding the receipt of the decertification petition and what steps the Respondent took before withdrawing recognition. According to Long, when she unlocked her office on the morning of Monday, January 18, she discovered an envelope on the floor that apparently had been slipped under the door. The first seven pages of the petition were in the envelope. Long testified that three more pages of the petition were left on her desk sometime later that day. She received the last page, containing only one signature, the next day when that employee handed it to her in the early morning. The petition in evidence, which Long identified as the one she received on January 18 and 19, consists of 11 pages. The following statement appears at the top of each page:

The undersigned employees of Alamo Rent A Car in Miami, FL do not want to be represented by the Teamsters Local 769, hereafter referred to as "union"

Should the undersigned employees constitute 30% or more, but less than 50% , of the bargaining unit represented by the union, the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority of employees no longer wish to be represented by the union.

In addition, should the undersigned employees constitute 50% or more of the bargaining unit represented by the union, the undersigned employees hereby request that our employer immediately withdraw recognition from the union, as it does not enjoy the support of a majority of employees in the bargaining unit.

This statement appears only in English, despite the fact that a number of the Respondent's employees speak primarily Spanish. There are a total of 92 signatures on the 11 pages, with each signature dated individually. The dates on the petition span the period from January 1 through 19.

Long testified that, upon receipt of the petition, she counted the signatures, compared the names on the petition to a "PeopleSoft" payroll document, and compared the signatures to W-4 and I-9 forms and other documents containing employee signatures in order to verify that a majority of the unit had signed. Long further testified that there were 159 employees in the unit at the time. Although Long testified that she received all but the last (11th) page of the petition on January 18, three of the signatures on the ninth page are dated January 19. In an effort to explain this discrepancy, the Respondent called Jesus Torres, a rental agent, to testify that he solicited all the signatures on that

page while at work on January 18 and that the three employees mistakenly wrote January 19 as the date. However, this testimony is contradicted by the Respondent's payroll records and work schedules which show that those three employees were not at work on January 18, but did work on January 19.

As previously noted, Cirilo Garcia is the employee who initiated the decertification effort. His name and signature is the second one on the first page. He admittedly does not read English and did not compose the language that appears at the top of each page. According to Garcia, he got the language from an employee named Andy who works in the office. "Andy" is actually Leandy Milanes who was employed at the time as an administrative director, a position within the bargaining unit. Garcia testified that he asked Garcia for a notebook to use to get employee signatures and that Andy told him he had something better, giving him the form that was ultimately used. Milanes corroborated Garcia's testimony that he was the source of the language on the petition. He testified that he found this language by doing a google search.

Garcia testified that he collected all of the signatures on the first two pages as well as some on the third page. According to Garcia, he enlisted another employee, who speaks Haitian Creole, to help him collect signatures. He at first identified that employee as "Luca" but later recalled that his name was "Ducasse."¹¹ Garcia testified that he also had help from employees Sylvia Falcon and Perla Diaz in soliciting signatures on the petition. Perla Diaz' signature is the second one on the fourth page of the petition and Falcon's signature is the first one on the fifth page. Although Garcia testified on direct examination that he was the one who placed the petitions in the envelope and slid it under Long's door, his testimony on cross-examination became muddled regarding how many pages and which pages were in the envelope. At one point he testified that he only placed three pages in the envelope. Later he testified that Falcon gave him her page but not Perla Diaz. There was also some inconsistency in his testimony regarding the pages of signatures that were collected by Rental Agent Jesus Torres.

Torres also testified for the Respondent regarding his solicitation of the signatures on the eighth and ninth pages of the petition. All of these signatures are dated on and after January 16. The employees solicited by Torres were rental agents, greeters and other customer facing employees whose discontent over the loss of short-term disability benefits was described by Wisecup and Sara and Wanda Rivera. Torres testified that, in the course of soliciting these signatures, he discussed with the employees the benefits they had and what was available to the unrepresented employees at National Car Rental. According to Torres, he obtained from Dow a chart comparing the benefits at Alamo and National. Falcon also testified for the Respondent regarding her solicitation of the names on the fifth through seventh pages of the petition, all of which are dated January 8 to 14. Falcon worked as a damage clerk in the off-site maintenance department and the employees who signed these pages were the mechanics who work at that facility. Falcon admitted that she collected the signatures while on the clock.

¹¹ The name "Ducasse Saintvil" appears on the first page of the petition.

The Board, in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), held that an employer may withdraw recognition from an incumbent union only where it is able to prove that the Union lost the support of a majority of unit employees. A good-faith belief based on objective considerations is no longer enough. The respondent must show an actual numerical loss of majority support. Here, the Respondent relies upon the petition circulated by Cirilo Garcia and others as proof of the actual loss of majority support. That petition was signed by 91 employees. Respondent concedes, based on the testimony of Long, who authenticated the signatures by comparing them with company documents, that two of the signatures (Ducasse Sainvil and Charles Chenet) could not be verified. That left 89 signatures deemed valid by the Respondent. Although counsel for the General Counsel raised some doubts about the credibility of Long and the employees who testified regarding the solicitation of these signatures, the dates upon which three individuals signed and whether the solicitation was done on company time, she offered no evidence to refute the testimony that the signatures were authentic. The documents used to compare the signatures are in evidence and a cursory review supports the testimony of Long that at least 89 signatures are authentic. The testimony of Long, based on payroll records in evidence, that there were 159 unit employees at the time is uncontradicted. Thus, the Respondent has proved numerically that, by January 19, more than half of the employees in the unit had signed a petition expressing their desire to decertify the Union.

The General Counsel's theory of a violation is that, even if the Union had lost support of a majority of unit employees, the Respondent could not rely on the petition because the Respondent's own unfair labor practices caused employee disaffection and tainted the petition. *Penn Tank Lines*, 336 NLRB 1066, 1067 (2001), and cases cited there. However, the Board has held that not all unfair labor practices will be found to have tainted a petition showing loss of majority. Where the employer has engaged in a general refusal to bargain with the incumbent union, a causal connection between the unfair labor practice and the loss of majority support will be presumed. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 178 (1998), *enfd.* in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 2001). In all other cases, the General Counsel bears the burden of proving a causal connection between the unfair labor practices and the loss of majority support. *Master Slack*, 271 NLRB 78, 84 (1984). The Board has identified four factors to consider in evaluating whether the necessary causal connection exists. These factors are: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. The Board has held that this is an objective test, i.e., whether the unfair labor practices would have a reasonable tendency to cause employee disaffection. *Wire Products Mfg. Corp.*, 326 NLRB 625, 626 fn. 13 (1998). Although the Board has, on occasion, considered the subjective testimony of employees regarding the cause of their disaffection from the union, it more recently has suggested that such

evidence is irrelevant. See *Comau, Inc.*, 357 NLRB 2294, 2299 (2012), and cases cited there.

I have already found that the Respondent committed several unfair labor practices shortly before and during the time period in which the decertification petition was circulated. Specifically, I have found that the Respondent told employees in November and early December 2009 that they would no longer have short-term disability benefits effective January 1 because of their union contract. Respondent discounts the impact of this violation by citing the fact that no more than 15 employees attended group meetings at which this statement was made. However, the testimony of Wisecup and Sara and Wanda Rivera, that employees talked about the meeting and the upcoming loss of benefits for a period of time after these meetings, was undisputed.¹² The Respondent also argues in its brief that the General Counsel did not prove that any of the employees who attended these meetings signed the petition. That argument is contrary to the record. Although the General Counsel did not offer independent evidence of this, a review of the petition, which is in evidence, shows that at least three of the employees identified as having attended one of the meetings conducted by Dow and Long signed the petition, i.e., Sal Baglio who was at the meeting attended by Wisecup, signed the petition on January 17; and Mohammad Lakhani and Karel Rodriguez, who were at the meeting attended by the Riveras, signed the petition on January 16. Significantly, all three signed on the page circulated by Jesus Torres, who admitted discussing with the employees he solicited the comparison of benefits between Alamo and nonunion National.

I have also found that the Respondent's termination of the short-term disability benefit on January 1 violated Section 8(a)(1), (3), and (5) of the Act. As noted above, this particular unfair labor practice caused some discontent among unit employees, particularly the rental agents and other customer service employees. Even Cirilo Garcia, who initiated the petition and obtained a significant number of the signatures on the petition, testified that he wanted to get rid of the Union because they promised to get more income and benefits for the employees and instead, "they took our benefits practically." Garcia himself was adversely affected by the loss of short-term disability benefits when he had to use vacation time following oral surgery in February and a foot fracture in May.

Respondent argues that, even if the loss of short-term disability cause some discontent among the employees, the General Counsel has not shown that this discontent was widely expressed. In this regard, the Respondent is correct that General Counsel has only offered evidence of this among the rental agents. However, the 23 or 24 rental agents who signed the petition when solicited by Torres did so after Elsass and Browne had unlawfully interrogated Garcia by asking him how many employees had signed the petition and told Garcia that he needed more signatures. As counsel for the General Counsel points out, at the time of this coercive conversation between Elsass and Browne and Garcia, only 66 employees had signed

¹² In fact, Jesus Torres who circulated the petition among the rental agents, acknowledged that benefits was a topic of discussion when he solicited signatures on the petition.

the petition, not enough to show a numerical loss of majority support for the Union. It was after this conversation that Garcia enlisted Torres' help and Torres was able to get enough signatures from the rental agents to get over the hurdle and reach a numerical majority.

Finally, I have found that the Respondent unlawfully interfered with the Union's right of access to the facility on January 4. The conduct of Dow in following Valero and the other union representatives around, standing next to them in the lobby and then periodically checking on them when they were in the break room, would have a reasonable tendency to deter the employees from approaching Valero with any problems or concerns. Unfair labor practices of this nature, which undermine a union's representational status, have been found to satisfy the *Master Slack* causation test. See *Tenneco Automotive, Inc.*, 357 NLRB 953 (2011), and cases cited there.

Having considered all of the evidence in the record and the arguments of counsel, I find that the unfair labor practices found in this case, because of their timing and nature, had a reasonable tendency to cause employee disaffection from the Union. I find further that the General Counsel has met the burden of proving that the petition was tainted by these unfair labor practices. Therefore, the Respondent was not privileged to rely upon the petition as proof of the Union's loss of majority support. The January 19 withdrawal of recognition based upon the tainted petition was thus unlawful.

E. The Respondent's Postwithdrawal of Recognition Unfair Labor Practices

There is no dispute that, beginning in February, after the Respondent had withdrawn recognition from the Union, it ceased deducting and remitting union dues for employees who had signed dues-checkoff authorizations. It is also undisputed that the Respondent, on October 12, announced a wage increase for unit employees effective October 29 and improvements in vacation days, choice days, and holidays effective January 1, 2011, and that on October 29 and January 1, 2011, respectively, it implemented these changes. It is also undisputed that, on January 1, 2011, the Respondent made a number of other improvements to employees terms and conditions of employment that are specified in paragraph 14(e) of the complaint. Respondent admits making these changes without notice and bargaining based on its position that the withdrawal of recognition was lawful. Having found that it was not, any subsequent changes the Respondent made to the employees' wages, hours, and terms and conditions of employment without affording the Union notice and an opportunity to bargain would be unlawful and I so find.

The Respondent's cessation of dues checkoff requires further analysis. The Board has long held that union security and dues-checkoff arrangements, unlike most terms and conditions of employment, do not survive expiration of a collective-bargaining agreement. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Recently, the Board's attempt to reaffirm this holding has run into resistance from the Ninth Circuit. See *Hacienda Resort & Casino*, 355 NLRB 742 (2010). On appeal for the third time, the court of appeals disa-

greed with the Board's holding as it applies in a right to work state like Florida. *Local Joint Executive Board of Las Vegas v. NLRB*, – F.3d –; 2011 WL 4031208; 191 LRRM 2609 (9th Cir. 2011). The court held that in a right to work State, where dues checkoff does not exist to implement union security, dues checkoff is akin to any other term of employment that is a mandatory subject of bargaining and may not be unilaterally discontinued upon contract expiration. Counsel for the General Counsel relies upon the Ninth Circuit's decision as well as the concurring opinions of Board Members Liebman and Pearce in arguing that the Respondent's failure to continue the checkoff provisions after it withdrew recognition was unlawful. Until a Board majority has adopted this position, I must follow established Board law as set forth in *Bethlehem Steel*, supra. See *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

In the present case, the parties collective-bargaining agreement was still in effect when the Respondent withdrew recognition and ceased deducting and remitting union dues by virtue of the December 28, 2009 agreement to extend the contract through March 31, 2010. Under existing Board law, Respondent was required to continue dues checkoff until the end of March. Because the withdrawal of recognition was unlawful and the cessation of dues checkoff premature, I find the Respondent violated the Act by failing to deduct and remit dues for the months of February and March 2010.

Finally, the complaint alleges that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to process a discharge grievance filed by the Union over the discharge of employee Paul Garcia. Respondent admits this conduct but defends on the basis of its withdrawal of recognition. Garcia was discharged after the Respondent withdrew recognition but before the expiration of the contract extension. Since I have found that the withdrawal of recognition was unlawful, it follows that the Respondent's refusal to process this grievance and to meet with the Union for that purpose was unlawful.

CONCLUSIONS OF LAW

1. By telling employees they would lose short-term disability benefits because they were represented by a union, by interrogating employees regarding their and other employees' union support, by encouraging employees to circulate a decertification petition and by soliciting employees to withdraw membership in the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating employees' short-term disability benefits effective January 1, 2010, because they were represented by a union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By unilaterally terminating employees' short-term disability benefits effective January 1, 2010, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. By interfering with the Union's contractual right of access to the Respondent's facility on January 4, 2010, the Respondent has engaged in unfair labor practices affecting commerce with-

in the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

5. By withdrawing recognition from the Union on January 19, 2010, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

6. By failing and refusing to deduct and remit dues to the Union for the months of February and March 2010, pursuant to the check-off provision in the collective-bargaining agreement, before the expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

7. By unilaterally increasing employees' wages and improving their terms and conditions of employment on and after January 19, 2010, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

8. By failing and refusing to process the discharge grievance of employee Paul Garcia since March 3, 2010, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

9. Respondent, through its supervisor Louis Dieppa, did not unlawfully interrogate employees in violation of the Act on January 16, 2010.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. In particular, Respondent shall be ordered to restore recognition to the Union and, upon request, meet and bargain with the Union regarding the terms and conditions of employment of its unit employees and regarding the Paul Garcia grievance. The Respondent shall also be required to restore the unlawfully terminated short-term disability benefits for unit employees and, if requested by the Union, to rescind the unilateral wage increase and other improvements in benefits that were announced and implemented after the Respondent withdrew recognition from the Union. The Respondent shall also be ordered to deduct and remit dues to the Union pursuant to the contractual dues-checkoff provision for the months of February and March 2010. Because the record indicates that the Respondent employs a significant number of employees who do not speak or read English, I shall recommend that the attached notice be posted in English, Spanish, and Haitian Creole. I shall also recommend electronic posting pursuant to the Board's decision in *J. Picini Flooring*, 356 NLRB 11 (2010).

[Recommended Order omitted from publication.]