UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

FAA CONCORD H, INC. d/b/a
CONCORD HONDA

and

Cases 32–CA–066979
32–CA–070343
32–CA–072231

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190,
AUTOMOTIVE MACHINISTS LODGE
NO. 1173

Judith H. Chang, Esq., for the General Counsel.
Joshua J. Cliffe and
Aurelio Perez, Esqs., for the Respondent.
David A. Rosenfeld and
Caren P. Sencer, Esqs., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This case was tried in Oakland, California on July 16, and 17, 2013. The Machinists Automotive Trades District Lodge No. 90, Automotive Machinists Lodge No. 1173 (the Union or Machinists) filed the charge in case 32–CA–066979 on October 18, 2011. The Union filed the charge in case 32–CA–070343 on December 7, 2011, and in case 32–CA–072231 on January 11, 2012. On March 22, 2012, the Acting General Counsel issued its first consolidated complaint. The Union filed the charge in case 32–CA–070343 on December 7, 2011. On February 26, 2013, the Acting General Counsel issued a second complaint (the complaint) consolidating case 32–CA–070343 with the previous cases.

The complaint alleges that the Concord Honda (Respondent or Concord) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it implemented a bonus plan and changed the bargaining unit employees' work schedule without bargaining with the Union. The complaint further alleges that the Respondent, bypassing the Union, met with employees to discuss holding alternative work week elections and held such elections in violation of Sections 8(a)(1) and(5). Lastly, the complaint alleges the Respondent violated Section 8(a)(1) of the Act by: (1) requiring its employees, as a condition of employment, to sign agreements that compel the employees to submit to binding arbitration; (2) maintaining and enforcing the mandatory arbitration agreement since about July 2012; and (3) expressly taking a position that the

mandatory arbitration agreement prohibits employees from proceeding as a class and/or on a collective basis in an arbitration proceeding.

The parties entered into numerous stipulations of fact, which I approved. They are in the record as Joint Exhibit 1.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, Respondent, and Charging Party, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Concord Honda, a corporation, sells and services automobiles at its dealership in Concord, California, where it annually derives gross revenues in excess of $500,000. The Respondent admits and I find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Concord Honda, owned by Sonic Automotive, sells and services new and used vehicles. At the time of the hearing, Concord employed roughly 25 vehicle service technicians. Chris Tastard, Concord's service manager, is the technicians' first-line supervisor. He maintains an open-door policy whereby any employees or group of employees may come to him with concerns about workplace problems. Tastard reports to Mike Cervantes, who has been the divisional fixed operations director for the Western Division of Sonic Automotive since 2011. Rax Patel is Concord's general manager.

On May 14, 2010, the Board certified the Machinists Automotive Trades District Lodge No. 190 as the designated exclusive bargaining representative of the following employees, hereinafter referred to as the Unit:

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[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "R Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; "R Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[2] I note the Respondent attached an exhibit to its closing brief. The Exhibit was not properly entered into evidence. It consists of a memorandum from a previous General Counsel of the Board regarding the issue of whether employers can require employees to waive their right to class or collective actions. Because I am required to follow Board precedent, which does not include this memorandum, and because the memo was not introduced at the hearing, I do not consider it.

> All full-time and regular part-time technicians and lube technicians employed by Respondent and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

Since June 2010, the Union and Respondent have been bargaining for an initial collective-bargaining agreement. To date, the Union and Respondent have not reached an overall agreement nor has either declared impasse. They have reached tentative agreements in some areas but have not come to agreement in others. Most relevant here, the parties disagree about the inclusion of a union security clause.[3] For the Union, Rick Rodgers, area director and business representative/organizer, and Mark Hollibush, area director/assistant directing business representative, have been the primary bargaining agents. Josh Cliffe, the Respondent's counsel, and Cervantes (as of 2011) have been the Respondent's primary bargaining representatives.

B. Alleged Unilateral Changes and Direct Dealing

1. June 2011 Bonus

Once or twice a month, Tastard holds morning meetings with the technicians. At a morning meeting in mid-June 2011, he told them about a bonus incentive. If Concord made its June budget, the technicians would receive an extra dollar for every hour of service sold. In addition, technicians would receive $100.00 if they maintained a positive attitude throughout June. (GC Exh. 3.) The June 2011 bonus is the only bonus Tastard has offered to the Unit employees. (Tr. 52, 355.)[4]

The Respondent did not give the Union advance notice of its intent to implement the bonus plan. During a June 29, 2011, bargaining session, Rodgers raised his frustration over the implementation of the bonus plan without bargaining. (GC Exh. 6; Tr. 190.) On July 11, Cliffe sent an email to Rodgers with an attachment detailing the "proposed" June bonus plan, and asked if there was any problem with paying it. (GC Exh. 7.) Rodgers was on vacation at the time and therefore did not immediately respond. The bonus for maintaining a positive attitude was paid to the technicians on July 15, 2011.[5] (GC Exh. 2.) On July 19, Rodgers responded to Cliffe's email, stating, "I have no issues with the two bonus plans as long as they are applied equally." (GC Exh. 7.) By that point, Rodgers knew that the bonus for maintaining a positive attitude had already been implemented. Concord did not meet its budget goal, so no employees got the extra dollar-per-hour bonus. (Tr. 373.)

[3] Other areas of disagreement include jury duty, sick leave, and pensions.

[4] The transcript contains some errors. Page 394, line 12, "would" should be replaced by "could".

[5] Bryan's paycheck dated June 26 showed a bonus of $125.00. Other employees' paychecks showed bonus amounts for other months that could not be explained. These bonuses are not at issue in this case, however, and the parties have stipulated that the employees were paid the $100.00 bonus. The paychecks for the paydate July 15 uniformly denote a $100.00 bonus. (GC Exh. 2.) The Acting General Counsel argues that clearly some of the bonus at issue was paid in June. I disagree, but this makes no difference to the outcome.

2. Alternative Work Week Meetings and Elections

From at least July 2008 until November 13, 2011, the Unit employees at Concord have worked a 4-day-per-week, 10-hour-per day schedule (4/10 schedule).[6] This is also referred to as an "alternative work week" schedule. The "normal" work week is considered to be to a 5-day-per-week, 8-hour-per-day schedule (5/8 schedule). Under California state law, unless employees in a work unit have voted for an alternative work week schedule in a secret ballot election or agreed to it as part of a valid contract with the union, the employer must pay overtime for work beyond 8 hours in a day. Specifically, Cal. Labor Code, § 510(a) states, in relevant part:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.

As noted, there are exceptions set forth in § 510(a):

> The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:
>
> (1) An alternative workweek schedule adopted pursuant to Section511.
>
> (2) An alternative workweek schedule adopted pursuant to a collective bargaining agreement . . . .

Section 511, in turn, states in relevant part:

> (a) Upon the proposal of an employer, the employees of an employer may adopt a regularly scheduled alternative workweek that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section. A proposal to adopt an alternative workweek schedule shall be deemed adopted only if it receives approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit. The regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose.

There are specific adoption procedures that must be followed as set forth in California Industrial Welfare Commission (IWC) Order No. 4-2001, governing professional, technical, clerical, mechanical and similar occupations.

During early 2011, Rodgers received information leading him to suspect that Concord did not properly implement the 4/10 schedule. Specifically, he read a February 16, 2000, letter of

[6] The parties dispute whether the 4/10 schedule was lawfully implemented in accordance with California state law governing alternative work schedules.

compliance from Concord to the State of California Department of Industrial Relations. The letter stated that Concord held a secret ballot election of the work unit on February 14, 2000, and all three of the affected employees voted in favor of the 4/10 workweek. (GC Exh. 11). Rodgers learned there were more than 3 technicians employed during February 2000. Among those remaining, none recalled a secret ballot alternative workweek election.

At a bargaining session on March 9, 2011, Rodgers asked whether it was safe to assume there would not be an issue regarding Union security at the end of negotiations. In response, Cliffe said that was not a safe assumption, the Company took it seriously, and "it would be wrong to think that it would just go away at the end." Cervantes, who was there, described the Union's response to this as "very vocal, very heated."[7] (Tr. 434.)

On March 14, 2011, Union attorney David Rosenfeld sent a letter to Cliffe stating that none of the Unit employees recalled having an election to establish the alternative work week. He instructed Cliffe to provide to the Union any documentation to prove the 4/10 schedule had been implemented pursuant to an election. (Jt. Exh. 1at Exh. P.)

At the next bargaining session on May 11, the Union rescinded its tentative agreement on safety and submitted an information request pertaining to safety. (R. Exh. 4.)

As discussed in detail below, beginning in July 2011, counsel for the Union and Concord began exchanging correspondence regarding the arbitration demands of certain Unit employees. On July 8, 2011, Union attorney Karen Sencer sent a written demand for arbitration on behalf of some Unit employees alleging they were owed overtime money as a result of Concord's failure to implement the alternative workweek schedule properly. (Jt. Exh. 1 at Exh. Q.) That same day, Cliffe and Cervantes called Rodgers and said they were thinking of holding an alternative workweek election because they were concerned that employees wanted to go to a 5/8 schedule. Rodgers responded that, through contract negotiations, the parties had already reached a tentative agreement to maintain the 4/10 schedule.

On October 13, 2011, Cliffe informed Rodgers via email that a number of the Unit employees had demanded arbitration over issues related to the 4/10 schedule. He stated that this raised an issue as to whether the technicians still wanted to work the 4/10 schedule that had been authorized by vote on February 14, 2000. As a result, Concord was proposing an election. Cliffe attached documents pertaining to the election. One such document was an October 17 letter to the employees stating that the Company was proposing an election to determine if the Unit wanted to retain the 4/10 schedule. The letter further stated the employees would vote by secret ballot on November 2 and 3. Finally, the letter set forth the details of Concord's proposed 4/10 work schedule. (GC Exh. 12.)

During the bargaining session on October 14, Cliffe brought up the 4/10 work schedule election. Rodgers informed him they had already tentatively agreed to the 4/10 schedule in bargaining, he objected to an election, and he would consider it self-dealing. (GC Exh. 8.)

[7] At some undetermined point in time, Rodgers said the Union would never agree to a contract without a Union security provision. The Respondent pinpoints this statement to March 9, but the testimony fails to establish the date. (Tr. 434; R. Br. 6.)

Cervantes and Cliffe told the Union representatives that Concord felt it was necessary to go forward with the elections. (Tr. 515.)

On October 17, and 18, 2011, Tastard, Patel and Larry Brock, Concord's director of associate development, met with Unit employees to discuss holding alternative work week elections. At the meeting, the employees received the October 17 alternative work week schedule proposal described above. The employees also signed a receipt for the proposal as well as an attendance record.

On November 2, and 3, 2011, the Respondent held secret ballot elections with Unit employees. The elections took place in Concord's break room. Tastard and Patel were present for the Respondent. The Union opted not to be present. The Respondent distributed a voter list for each employee to sign and date, indicating their participation in the election and attesting that they cast a vote of their choice.

To establish (or here retain) the 4/10 schedule, two-thirds of the technicians needed to vote for it. Because less than two-thirds of the technicians voted in favor of the 4/10 schedule, the Respondent was required to change to a 5/8 schedule within 60 days under California IWC Order 4 § 3(C)(5). As a result of the need to change the schedule, Cervantes determined there were not enough stalls for all of the Unit employees to continue as service technicians. Accordingly, management decided they would need to lay off the 2 technicians with the least skill and seniority.

On November 4, Cliffe informed Rodgers there were not enough votes to retain the 4/10 schedule and the technicians would be moved to a 5/8 schedule on November 7. Rodgers was also told of the plan to lay off 2 technicians. In response, Rodgers demanded that the schedule not change and said he would file unfair labor practices if Unit employees were laid off. Though precise accounts of how the employees learned about the impending schedule change and proposed layoffs vary, the information sparked concern and confusion among them.

Later on November 4, Cliffe told Rodgers that Concord wanted to delay implementing the schedule change until November 14 and hold another alternative workweek election. Cliffe proposed to transfer the two employees who were slated to be laid off into the parts room to work. Rodgers thought this was a temporary move pending the election. According to Cervantes, the transfer was not intended to be temporary. (Tr. 465– 466.)

On November 8, Rodgers wrote Cliffe to tell him he thought the alternative workweek issue must be resolved through collective bargaining rather than a new election, and offered some bargaining dates. He further instructed that if Concord management intended to circumvent collective bargaining and hold the election, they should do it soon. (R. Exh. 1.)

The parties met for another bargaining session on November 11. The Union wanted to come to a global settlement whereby it would withdraw pending claims against Concord if the parties could reach agreement on a final contract. The parties, however, could not agree on union security. The Respondent announced that it wanted to have another alternative work week election and Cervantes said he wanted to bargain over the second election. Rodgers expressed

his viewpoint that the election was unlawful and therefore he would not bargain over it or otherwise participate.[8]

On November 15, 2011, the Respondent again met with the Unit employees to discuss holding a second election. The Respondent once again invited the Union to participate in the meeting, but the Union opted not to participate. As with the earlier meeting, the employees were presented with an alternative work week proposal similar to the October 17 proposal, but dated November 11. Also in line with the earlier meeting, the employees signed a receipt for the proposal as well as an attendance record.

On November 21, 2011, the Respondent reverted back to a 4/10 schedule. The work schedule has not changed since that time. The second election took place on November 30 at the same place and in the same manner as the November 2 and 3 elections. Likewise, the Respondent distributed a voter list for employees to sign and date, indicating their participation in the election and attesting that they cast a vote of their choice. The Respondent invited the Union to participate in the elections, but the Union opted not to participate. The Unit employees voted unanimously in favor of the 4/10 schedule.

C. The Arbitration Agreement

At all material times, the Respondent has required Unit employees to sign, as a condition of their employment, agreements covering employment at will and binding arbitration. An agreement is set forth below in the analysis section for ease of reference.

On July 8, 2011, Sencer made an initial demand to invoke the alternative dispute resolution system and binding arbitration on behalf of Unit employees. Specifically, the Union alleged violations of the California Labor Code and Business and Professions Code regarding a dispute over, *inter alia*, the Respondent's alternative workweek schedule and allegedly unpaid overtime wages. (Jt. Exh. 1 at Exh. Q.) Cliffe responded on July 21, acknowledging the arbitration demand and requesting the names of the employees seeking arbitration. (Jt. Exh. 1 at Exh. R.) On July 25, Sencer informed Cliffe of the Union's intent to arbitrate claims on a classwide basis, and identified three class representatives: Lucio Amaya, Brian Brock, and Paul Bryan. (Jt. Exh. 1 at Exh. S.) On August 9, 2011, Cliffe replied, stating Concord's position that class arbitration was inappropriate under the Federal Arbitration Act because the arbitration agreements did not authorize class arbitration. He offered to arbitrate the threshold issue of class arbitrability. (Jt. Exh. 1 at Exh. T.) On September 13, Sencer informed Cliffe that the three class representatives would proceed with separate individual arbitrations. She requested a list of arbitrators for each individual grievant. (Jt. Exh. 1 at Exh. U.)

Having received no response to her September 13 letter, Sencer wrote Cliffe on October 13, stating that unless the Union received a list of arbitrators for each grievant before the end of the month, the Union would take steps either to compel arbitration or be excused from the arbitration agreement. On October 31, Cliffe sent Sencer an email stating that Concord would provide a list of arbitrators, and stated Concord's desire to consolidate the now 19 individual

[8] IWC 4-2001 § 3(C)(5) provides for a 12-month interval between elections. http://www.dir.ca.gov/IWC/IWCArticle4.pdf.

actions. Sencer responded on November 3, stating that the Union would only agree to consolidate the claims if Concord provided a list of all current and former employees, notified them of the arbitration, and permitted them to join their claims in the consolidated complaint. Receiving no response, Sencer proposed 6 arbitrators for the first 6 cases. Again receiving no response, Sencer prompted Cliffe in a December 5 email. Cliffe responded on December 7, stating he did not agree to any of the arbitrators she proposed. Instead, he proposed to have a different arbitrator hear and decide Concord's motion to consolidate. Sencer responded on December 13, questioning the authority for an arbitrator to hear a consolidation motion without the parties' consent. (Jt. Exh. 1 at Exh. V.)

Following a telephone conversation, Cliffe sent Rosenfeld and Sencer a letter on January 10, setting forth legal authority that, in his view, supported Concord's proposal of submitting its motion to consolidate to an arbitrator. (Jt. Exh. 1 at Exh. W.)

On April 20, 2012, Amaya, Brock, and Bryan, sought arbitration on behalf of themselves and similarly situated current and former employees, alleging that Concord violated the California Labor Code. (Jt. Exh. 1 at Exh. X.) On November, 13, 2012, Respondent filed a motion to dismiss the class allegations, which the arbitrator granted on February 6, 2013. The arbitration is currently proceeding on a consolidated basis with 19 plaintiffs. (Jt. Exh. 1 at Exhs. Y, Z.)

III. DECISION

A. Bonus Plan

The complaint, at paragraph 8(a), alleges that in about June 2011, Respondent unilaterally implemented a bonus plan in violation of Section 8(a)(1) and (5) of the Act.

When employees have duly elected a collective bargaining representative, an employer violates the Act when it bypasses the Union and takes unilateral action regarding a term and condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). This is so even if the unilateral changes increase rather than decrease the employees' wages or benefits. *The Daily News of Los Angeles*, 304 NLRB 511 (1991). More to the point, the Board has held that implementing bonuses without bargaining with the Union violates Section 8(a)(1) and (5) of the Act. *Koenig Iron Works*, 282 NLRB 717 (1987), enfd. in relevant part, 681 F.2d 130 (2d Cir. 1988*); Johnson-Bateman*, 295 NLRB 180, 182 (1989) (Wage incentive program is mandatory subject of bargaining).

The Respondent, citing to Board caselaw, argues that Concord was excused from bargaining because the Acting General Counsel failed to meet its *prima facie* burden to present evidence of:

(1) an established past practice or condition of employment;
(2) a change to that past practice or condition of employment; and
(3) a change that has a material, substantial, and significant impact on the terms or conditions of employment of unit employees

(R. Br. 21.) This is an incorrect statement of the Acting General Counsel's initial burden of proof, and not surprisingly the cases to which the Respondent cites do not support it.

Specifically, it is upside down on the burden regarding past practice. Correctly stated, if the Acting General Counsel shows that the employer made material unilateral changes to mandatory subjects of bargaining, the burden shifts to the employer to prove the change was in some way privileged, such as being consistent with an established past practice. *NLRB v. Katz*, 369 U.S. 736 (1962); *Fresno Bee*, 339 NLRB 1214 (2003). Thus the past practice burden is by no means *prima facie* and it rests squarely with the employer.

As to whether the bonus was "material, substantial and significant," the Acting General Counsel bears the burden of proof. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). The Board has found similar and lesser bonus payments to be mandatory subjects of bargaining. See *Gas Machinery Co*., 221 NLRB 862, 863-865 (1975) ($25 bonus); *Southern States Distribution*, 264 NLRB 1, 2-3 (1982) ($25 Christmas bonus); *Rubatex Corp.*, 235 NLRB 833, 835 (1978) ($100 bonus); *Czas Publishing Co.*, 205 NLRB 958, 969–971 (1973), enfd. 495 F.2d 1367 (2nd Cir. 1974) ($50 Christmas bonus); *Aero-Motive Manufacturing Company*, 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973). ($100 bonus); *General Telephone Company of Florida*, 149 NLRB 311, 313–314 (bonuses from $5 to $10). Accordingly, I find the bonus was material.

Because the Acting General Counsel has established a unilateral material change, to avoid liability the Respondent must show that it was privileged to act as it did. The Respondent's arguments in this regard are grounded in its incorrect impression that the Acting General Counsel must show no such privilege existed. As such, the Respondent argues that because there was no "well established status quo ante of announcing and bargaining employee bonuses with the Union" there could be no unilateral change. (R. Br. 22.) There could not be an established practice for bargaining over bonuses. First of all, the Union was recently certified and initial contract negotiations were ongoing. Moreover, as Tastard stated, "June 2011 is the only bonus." (Tr. 355.) The change was from an established practice of not offering bonuses to offering and implementing a bonus. The Respondent argues that the record contradicts Tastard's testimony because payments that also appeared to be bonuses appeared on various employees' paychecks at different times. None of the Respondents' witnesses, however, including Tastard and Cervantes, could explain the reason behind this.[9] No employee recalled having been incented to receive any other bonus. Absent record evidence of specific bonuses the Respondent offered and paid, the unexplained references to various amounts paid on certain employees' paychecks do not prove a well established past practice of bypassing the Union and unilaterally implementing bonus plans.

Because Concord implemented the June 2011 bonus plan without notifying or bargaining with the Union, I find it violated of Section 8(a)(1) and (5) of the Act.

B. The Alternative Workweek Meetings, Elections and Schedule Change

Because I find the issues in complaint paragraphs 8 and 9 are intertwined, I will analyze each as part of a larger whole.

[9] The Respondent attempts to attack Bryan's credibility based in part on his confused testimony regarding the bonus payments. It is clear, however, that none of the witnesses could decipher what the relevant portion of the paychecks represented, so this attempt is unconvincing.

Paragraph 9 alleges that on about October 17, and 18, 2011, and November 15, 2011, the Respondent bypassed the Union and dealt directly with Unit employees by meeting with them to discuss holding alternative work week elections and by holding said elections on November 2, 3, and 30, 2011. Paragraph 8(b) of the complaint alleges that, as a result of the November 2 and 3 elections, the Respondent unilaterally changed the bargaining unit employees' work schedule from four 10 hour days per week to five 8 hour days per week from November 14–18, 2011, in violation of Section 8(a)(1) and (5).

1. Unilateral Changes

In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board held:

> [W]hen, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. [Footnote omitted.]

There are two limited exceptions to this rule: (1) when a union employs delay tactics in bargaining, and (2) "when economic exigencies compel prompt action." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). See also *Visiting Nurses Services of Western Massachusetts*, 325 NLRB 1125, 1130 (1998), enfd. 177 F.3d 52 (1st Cir. 1999) cert. denied 528 U.S. 1074 (2000).

The parties have stipulated that the meetings and elections occurred as alleged. The Respondent argues that the parties reached impasse on the issue of the alternative workweek elections. The burden to prove impasse rests with the Respondent. *Coastal Cargo Company, Inc*., 348 NLRB 664, 668 (2006). As set forth in *Bottom Line*, absent an overall impasse (which the parties have stipulated did not exist) this argument fails unless the Respondent can prove of one of the *RBE Electronics* exceptions applies.[10]

Turning to the first exception, the Respondent asserts that the Union engaged in delay tactics.[11] The Respondent cites to *Jefferson Smurfit Corp*., 311 NLRB 41, 60 (1993), as permitting piecemeal implementation when a union has engaged in conduct that prevents either agreement or impasse. The Board has held that an employer may make unilateral changes absent an overall impasse "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." See *M & M Contractors*, 262 NLRB 1472 (1982). To being with, I find the Respondent did not make "diligent and earnest" efforts to bargain over the alternative workweek meetings or elections. The Respondent's proposal to meet with the employees about the election was transmitted to the Union on October 13. The proposal was to meet with the employees a mere 4 days later and hold the election less than 3 weeks later. The Union opposed the elections, stating they had already reached tentative agreement over the alternative work week during negotiations. Nonetheless, on November 14, Cervantes and Cliffe told the Union representatives that Concord

[10] Even without the stipulation, the evidence is clear that the actions at issue herein took place when the parties were continuing to conduct negotiations.

[11] In its answer, the Respondent asserted that it was excused from bargaining to the extent the Union bargained in bad faith. During opening statements, the Respondent alleged the Union used stalling tactics. I find, therefore, that the Respondent has adequately asserted this affirmative defense.

felt it was necessary to go forward with the election. (Tr. 515.) In this context and with this timing, I do not find the Respondent's attempts to bargain about the election were genuine. Instead, I find the meetings and elections, when presented to the Union, were a *fait accompli*. See *Ciba Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). As such, the Union was under no obligation to bargain to impasse. *Dorsey Trailers, Inc*., 327 NLRB 835, 858 (1999).

I further note that the Respondent did not offer to bargain over the effects of the election. Instead, it initially announced that 2 technicians would be laid off and later announced they would be transferred. There is no evidence that the Union was given an opportunity to bargain as to the timing of the schedule change following the first election or any proposed layoffs and/or transfers.

Assuming the Respondent made diligent and earnest attempts to bargain, I turn to the Respondent's argument that the Union engaged in delaying tactics. The Respondent begins this argument by discussing witness credibility, asserting that I should not believe Bryan's denial that the Union was engaged in delaying tactics. The Respondent, however, does not cite to any testimony or other evidence of Bryan's purported denial, and I could find none in the record. (R. Br. 26.) In any event, my decision as to whether the Union engaged in delaying tactics does not rely on Bryan's testimony.

The Respondent next asserts that Rodgers is not a reliable witness because of the implausible positions he has taken during bargaining. Straying from any real argument about delaying tactics, the Respondent essentially contends that the Union's objection to the alternative work week election made no sense in light of its assertion in a separate arbitration claim that the alternative work week had not been lawfully established. This is neither here nor there for my purposes. The Respondent has steadfastly asserted that it implemented its alternative work week schedule pursuant to prior valid election(s). At the time of the elections at issue before me, the parties had reached, through bargaining, a tentative agreement for an alternative work week schedule and the employees had been working that schedule for years. The election of course could change this, and as discussed below and in the statement of facts, it did for a time. For the Union not to agree to it does not strike me as a delaying tactic, regardless of the positions the parties may have taken in other forums. [12]

The Respondent makes further arguments about the unreliability of Rodgers' testimony regarding whether there is such thing as a confirmation election. These arguments do not, without more, meet the Respondent's burden to prove that the Union engaged in delaying tactics. Next, the Respondent argues that Rodgers really should have supported the second election and his claimed ignorance that he had no idea how to bargain over a confirmation election "provides no defense for his refusal to bargain over the second election." (R. Br. 31.) This again has

[12] It is clear the parties had concerns about the impact of this litigation on the wage-and-hour claim asserted through arbitration and vice versa. It is also clear these concerns resulted in legal maneuvering and posturing all around. I don't share these concerns, however, lacking jurisdiction over the claims not before me and having no investment whatsoever in the outcome of the arbitration.

The Respondent faults Rodgers for failing to explain what he meant by the "status quo" during his testimony at the hearing. Rodgers was subject to cross-examination, however, so the Respondent could have elicited this information.

nothing to do with delaying tactics and is seemingly misplaced. It also ignores Rodgers' assertion that he believed the election was illegal. In any event, this argument is only potentially persuasive if there was overall impasse or an exception under *RBE Electronics*. Otherwise, Rodgers need not defend his refusal to bargain over the elections.[13] Regardless of the Union's reasons, any contention that its refusal to bargain on this topic falls within an exception under *RBE Electronics* must fail because it would result in the exception swallowing the rule.

In its brief, the Respondent mentions the Union's revocation of the tentative agreement on safety and subsequent requests for information as part of its statement of facts, but does not present argument that these were delaying tactics. Because the Acting General Counsel addressed these actions and the Respondent's brief mentions them, I will address them here. When determining if a union is engaging in delay tactics, the Board will look at overall conduct. See, e.g., *Register-Guard*, 339 NLRB 353, 354–355 (2003). Delaying tactics have been found where the union's "entire course and conduct, prior to the start of collective bargaining and during the instant negotiations evidenced 'a legal strategy to obstruct negotiations,' one grounded in the tactics of avoidance and delay . . ." *Serramonte Oldsmobile*, 318 NLRB 80, 100-101 (1995), enf. granted in part, denied in part on other grounds 86 F.3d 227 (D.C. Cir. 1996). Specifically, in *Serramonte*, the union avoided bargaining altogether for over 3 months, disingenuously pretended the employer had failed to give timely notice of its intent to open negotiations, and did not ask unit employees what they wanted out of bargaining. See also *M&M Contractors*, 262 NLRB 1472 (1982) (union's refusal for 7 months to respond to a date to meet for bargaining was delaying tactic).

No similar pattern of delaying tactics is present here. On the contrary, the Union maintained that the work schedule should be resolved through bargaining and it proposed bargaining dates. It is true that rescission of proposals tentatively agreed to may be considered elements of bad faith. See, e.g, *NLRB v. Industrial Wire Prod. Corp*., 455 F.2d 673, 79 LRRM 2593 (9th Cir. 1972), enforcing 177 NLRB 328, 74 LRRM 1128 (1969); But see *Loggins Meat Co.*, 206 NLRB 303 (1973) (lawful for employer to withdraw two proposals after acceptance by union). The rescission of the safety proposal and the requests for information occurred well before the unilateral changes to the work schedules, and the parties continued to bargain in the interim.[14] There is no evidence the Union avoided or caused any overall delay with regard to its bargaining obligations. As such, I find the Respondent has failed to meet its burden to prove the Union engaged in delaying tactics under *RBE Electronics.*

[13] The same rationale holds true for the Respondent's next assertion, *i.e.* that Rodgers cannot defend himself by virtue of his asserted fears of tainting the vote. Ditto for the Respondent's arguments regarding Rodgers' testimony about the number of employees potentially facing layoff and whether he talked to employees about whether they were upset about the first election.

[14] The Respondent points out that the specific safety incidents the Union pointed to in support of its decision to rescind the proposal occurred after the rescission. Rodgers supported the decision to rescind the proposal on "ongoing safety concerns." I note concerns about dumping of water, invalid safety forms, and improper write-ups for safety violations in the Union's bargaining notes. (GC Exhs. 6, 8.) Even if this single instance of regressive bargaining in May, however, was a bargaining tactic, it is not sufficient to establish the overall delay required to excuse the Respondent's unilateral actions in October and November.

Next, the Respondent argues its actions of holding the elections and changing the employees' work schedules were taken to comply with legal obligations and therefore did not violate the Act. The Respondent, however, has consistently maintained that it implemented the alternative work week schedule pursuant to a valid election, as is shown by the certificate it filed with the State of California.[15] In essence, the Respondent faults the Union for not helping to fix its legal problems while simultaneously alleging no problems exist. It wants to have its proverbial cake by arguing it has complied with the election requirements to establish an alternative work week (and by extension has complied with wage-and-hour law), and eat it too by holding new seemingly redundant elections and attempting to blame the Union for not agreeing to them. If the Respondent's contention that it lawfully established the alternative work week schedule is found to be correct in arbitration, there will be no liability for unpaid overtime compensation. If it is not, any relief to the employees will be determined by arbitration.[16] The Respondent's argument that the Act should not be construed to discourage or prohibit an employer's attempt to comply with other laws is, as applied here, an ill-conceived attempt to foist responsibility for its own conduct on the Union, the Acting General Counsel, and in turn, the Board. I reject the Respondent's attempts to deflect the potential fallout from a lawsuit in another forum based on actions it maybe took or maybe didn't take in the past—actions the Union has no obligation to mitigate in this forum.

Finally, the Respondent argues that the second *RBE Electronics* exception, economic exigency, applies. The economic exigency exception requires "a heavy burden" to show "circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action." 320 NLRB at 81 (footnotes and internal citations omitted). Unless there is a dire financial emergency, events such as losing significant accounts or contracts (*Farina Corp.*, 310 NLRB 318, 321 (1993)), operating at a competitive disadvantage (*Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994)), or a supply shortage (*Hankins Lumber Co*., 316 NLRB 837, 838 (1995)), will not excuse unilateral action. To successfully prove an economic exigency defense, the employer must show that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE Electronics,* supra. at 82.

I find the Respondent has not met its burden to prove economic exigency because the circumstances placing them in the position to seek the new elections were in Concord's control and were reasonably foreseeable. It was Concord's responsibility to comply with the legal requirements for establishing an alternative workweek schedule. Any failure to do so was not the result of an external event beyond its control. In fact it could not conceivably be in anyone else's control. Potential liabilities associated with a failure to hold elections properly and to file a legitimate record of the elections with the state are plainly reasonably foreseeable. Rodgers'

[15] I have reviewed the cases the Respondent cited to in its brief in support of its legal obligations defense. None of the cases involves a situation like the one present here, where the employer asserts it has already complied with the law.

The Respondent asserts that any reliance on *Pratt Industries*, 358 NLRB No. 52 (2012), is misplaced. My decision on this issue does not rely on that case but instead rests squarely on precedent from the Supreme Court and Board decisions rendered at times when the validity of the Board Members' appointments is not disputed.

[16] As previously stated, I do not pass judgment on the validity of the earlier election, only the Respondent's position on its validity in relation to the issues before me.

discovery of the 2000 certificate of compliance and the ensuing arbitration likewise cannot be seen as an unforeseeable external event beyond the Respondent's control. If a corporate officer files an erroneous tax return, whether intentionally or inadvertently, it is reasonably foreseeable the company may face liability. If someone discovers the error and reports it to the Internal Revenue Service, this does not change the fact that the corporate officer's actions are the reason for the exigency, regardless of the discoverer's motive. Similarly, here it cannot rationally be argued that anyone other than the Respondent created the situation giving rise to the claimed exigency.

In addition, the Respondent presented no evidence that it faced a dire economic emergency, and in fact presented no evidence of its financial situation whatsoever. See *Bottom Line,* 302 NLRB at 374 (No evidence of circumstances requiring economic action at time it was taken). Though the Respondent argues the liability it potentially faces if it loses the wage-and-hour and arbitration could amount to hundreds of thousands of dollars, it presented no evidence of what this potential liability would be measured against. Moreover, if the Respondent is correct in its position that it lawfully established the alternative work week schedule, then there will be no liability. Arbitrator Hodge, while presiding over the arbitration, shared his frustration over feeling as if parties tried to use him as a pawn for other objectives and expressed his resolve not to take the bait. (GC Ehx. 15, p. 8.) Like Arbitrator Hodge, in making my ruling here, I decline to speculate about what might happen in another lawsuit in another forum.

The Respondent points to *Seaport Printing & Ad Specialties, Inc.*, 351 NLRB 1269, 1270, enfd. 589 F.3d 812 (5th Cir. 2009), for support. In that case, a hurricane and mandatory evacuation followed by significant destruction to the employer's facility resulted in layoffs. I need not spend time contrasting the difference between the level of the employer's control in *Seaport Printing* versus here. The same holds true for *Brooks-Scanlon, Inc*., 246 NLRB 476 (1979), where a timber shortage caused lumber milling to cease. The Respondent also cites to *Raskin Meat Packing Co.*, 246 NLRB 78, 82-42 (1979). *Raskin* involved a meat packing plant that was forced to close when its line of credit, which had been keeping the plant in business, was discontinued. In addition, the Department of Agriculture filed a complaint against the bank for purchasing livestock without being properly bonded. The Department of Agriculture complaint against the plant was clearly brought about by actions within the plant's control. The discontinuation of the line of credit, which the bank had extended to the plant for many years, was not within the plant's control, however. It came about only because, due to the plant's dire economic situation, it was unable to secure a bond. Here, the Respondent presented no evidence of a such a dire economic situation or an event beyond its control leading to its demise. Likewise, in the other cases the Respondent cites, the employer came forward with specific evidence of a complete lack of funds or a loss of a significant portion of its business. As noted above, no such evidence was presented here.

Accordingly, I find the Respondent's economic exigency argument fails.

2. Direct Dealing

I will next turn to whether the meetings the Respondent held to discuss holding the elections constituted direct dealing.

The Board's criteria for finding an employer has engaged in unlawful direct dealing with represented employees is articulated in *Southern California Gas Co*., 316 NLRB 979 (1995), as follows:

> (1) the employer was communicating directly with union-represented employees;
> (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and
> (3) such communication was made to the exclusion of the Union.

I find the Respondent communicated directly with union-represented employees for the purposes of establishing or changing hours in satisfaction of the first two criteria. In addition, the discussion about the upcoming election also clearly undermined the Union's role in collective bargaining.[17] See *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 7 (1st Cir. 2001) (employer solicitation permits it to "gain intelligence on employees' views and to gauge the level of support for a particular position, undermining the chosen representative's exclusive right to perform these functions.").

The more difficult question is whether the communications were made to the exclusion of the Union. It is undisputed that the Union was invited to attend the meetings and opted not to come. This does not end the inquiry, however. As noted, I have found the elections were presented to the Union as a *fait accompli*. The meetings were held while the employees were on the clock, attendance was taken, and the employees had to sign a sheet stating they had received the Respondent's proposal. Under these circumstances, it is clear employee attendance was expected and monitored. Attending the meetings would have put the Union in the position of telling all of its Unit employees that though it had bargained for and reached a tentative agreement about the work schedule, the employer was holding an election for them to vote on it anyway.

As the Board stated early on in *Union Mfg. Co.*, 27 NLRB 1300, 1306 (1940):

> Employees' designation of a collective bargaining representative and the Board's certification thereof would be futile and meaningless, could an employer, shortly thereafter, at any designated stage of the bargaining procedure, demand proof that the exclusive representative was acting in accordance with the desires of the employees. By such demand the employer would refuse to grant the exclusive representative of his employees that recognition to which under the Act it is entitled.

Though *Union Mfg.* was a refusal to bargain case, the point is applicable to a direct dealing case, as shown in *Darlington Veneer Co.*, 113 NLRB 1101 (1955). There, Board affirmed the intermediate report, which concluded that employer ratification of contract proposals was not only a refusal to bargain, but was also direct dealing:

[17] Whether or not the meetings had the purpose of undermining the Union, they clearly had the effect. Regardless, the Union met the first part of the second prong of the *Southern California Gas Co.* test as the meetings were to discuss an election to establish (or re-establish) and/or change the work schedule.

> To compel the Union to submit the contract for ratification as proposed by Respondent would also violate the well-established principle that where the employees have designated a representative as provided in the Act, the employer may not deal directly with the employees. . . . It follows, therefore, that the employer may not insist on a contractual right, in effect, to bypass the exclusive representative as the Company seeks to do in this case.

Id. at 1107. The October 17 meetings were held to introduce the Respondent's plan to bypass the Union and demand proof from the employees that the Union was acting in accordance with their desires. While the Union was permitted to be present for the meeting, it is unclear what meaningful role it could play.

As to the November 15 meeting, the Union contended that holding the second election without waiting 12 months violated California law, as articulated above. Again, it is unclear what meaningful role the Union could play at the meeting other than to watch while the Respondent discussed its plans to hold another election the Union deemed illegal about a work schedule that had already been agreed upon through bargaining. By holding meetings to announce its intent to conduct elections with the employees, the Respondent denied the Union the recognition to which it was entitled under the Act, and I therefore find the communications were effectively made to the Union's exclusion. *Darlington,* supra; see also *Aggregate Industries*, 359 NLRB No. 156 (2013).

Based on the foregoing, I find the Respondent's meetings with Unit members about the elections constituted direct dealing in violation of Section 8(a)(1) and (5).

C. Arbitration

Complaint paragraphs 10–12 allege that since around July 2011, the Respondent has required employees to sign mandatory arbitration agreements (MAAs) as a condition of employment, and has enforced the MAAs to preclude class or collective litigation in violation of Section 8(a)(1).

A representative MAA states:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Tills VII of the Civil Rights Act of 1964, as amended, as well as all other applicable local, state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my

seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. I understand and agree that after I exhaust administrative remedies through the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission, I must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business (repairing automobiles and selling automobiles and parts coming from outside the State) and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. The arbitrator shall be vested with authority to determine any and all issues pertaining to the dispute/claims raised, any such determination shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, motions of "just cause") for his/her determinations other then such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provision or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. (Jt. Exh. 1, L–O.)

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. See, e.g., *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 n. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982).

The parties do not dispute that the MAA is a condition of employment, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, *Inc.*, 357 NLRB No. 184 (2012). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

The MAA does not expressly restrict Section 7 activity, and neither the Acting General Counsel nor the Union asserts that it was promulgated in response to union activity. The first disputed question therefore is whether employees would reasonably construe the MAA's language to prohibit Section 7 activity. For the following reasons I find that they would.

The MAA is written with singular language, referring repeatedly to actions between "myself" and the Company. The second sentence, which incidentally contains 213 words, refers to the benefits that "private binding arbitration can provide both the Company and myself." It further states that "I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another" will be decided through binding arbitration. This singular language, with no reference to the ability to pursue claims about working conditions jointly (other than through the Board's procedures) would lead an employee to read the MAA as applicable to individual employment disputes. Moreover, the MAA states, "all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b)." By stating that any communication made in connection with arbitrations proceeding is privileged, the MAA would reasonably be construed as prohibiting employees from discussing with each other information about employment disputes subject to arbitration.

The Respondent asserts that, by incorporating the state's procedural rules, *i.e.*, the California Code of Civil Procedure (CCP), which permit joinder of claims, the MAA is distinguishable from the agreement the Board found unlawful in *D.R. Horton*. The MAA does not incorporate the entire CCP, however. Instead, certain provisions are referenced and incorporated by description and/or section number. The MAA does incorporate the procedures of the California Arbitration Act and cites to them as "Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery." Unlike section 1283.05 and the provisions related to discovery rights, the MAA does not expressly reference Section 1281.3, which addresses consolidation of arbitration claims as follows:

> A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

> (1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and
>
> (2) The disputes arise from the same transactions or series of related transactions; and
>
> (3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Compounding its failure to specifically reference CPP § 1281.3, the MAA does not mention the word "joinder" nor does it incorporate CPP § 378 which permits joinder of plaintiffs in civil court actions. By contrast, other CPP provisions applicable to civil court actions, such the rules of pleading and rules of evidence, are specifically mentioned and incorporated. The MAA's lack of any direct reference to joinder or consolidation as well as the absence of any specific citation to procedures that permit such render it silent on the matter for the average employee/technician. Accordingly, I find employees would reasonably construe the MAA as permitting individual arbitration actions only.

The Acting General Counsel asserts that the MAA has also been applied to restrict employees from exercising Section 7 activity. Though I need not decide this in light of my findings above, I will address the argument in the event a reviewing authority disagrees that employees would reasonably construe the MAA as permitting individual claims only.

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942), *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D.R. Horton* at n.4. The Board stopped short of requiring employers to permit both classwide arbitration and classwide suits in a court or administrative forum, finding that "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." Id. at 16.

It is clear that by seeking to consolidate the 19 separate individual arbitration actions, the Respondent has not been utilizing the MAA to prohibit collective arbitrations. Indeed, the Charging Party has opposed consolidation, insisting on either class action arbitration or separate individual arbitrations. I find, therefore, that the MAA has not been applied to restrict collective action. Whether that ends the inquiry, however, depends on the scope of the Board's decision in *D.R. Horton*. More specifically, I must determine whether *D.R. Horton* requires an employer to permit both class *and* collective claims in one forum or another.

The Board in *D.R. Horton* was not forced with resolving this precise issue because the arbitration agreement it considered completely barred all class and collective claims. The Board, however, clearly held that filing a class action is protected activity. It relied on *Meyers Industries,* 281 NLRB 882, 887, for the proposition that the actions of a single employee are

protected if he or she "seek[s] to initiate or to induce or to prepare for group action." *D.R. Horton,* slip op. at 4. The Board concluded that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." Id. The Board further noted that "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in other concerted activities." Id. at 6. The Board, therefore, clearly found both class and collective claims are protected Section 7 activities. The Respondent argues that collective actions align better with employees' Section 7 rights not to engage in concerted activities because employees who do not wish to participate need not opt out. This argument fails because, regardless of its merits, the Board has held that class action claims are protected by Section 7. Id.

The Respondent sets forth multiple arguments contending that *D.R. Horton* was wrongly decided. Because *D.R. Horton* is Board precedent that has not been overturned by the Supreme Court, I must follow it. Any arguments regarding its legal integrity are properly addressed to the Board. Though the Respondent cites to Supreme Court cases that were decided after *D.R. Horton*, nothing in those decisions overrules the Board's decision. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 n.4 (2012) and *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2034 (2013), the Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The Board has found, however, that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find this argument fails.

Finally, I will address the Respondent's argument that *D.R. Horton* is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at n.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Consistent with Board precedent, the Respondent's defense based on *Noel Canning* and a lack of quorum fails.[18]

The Union asserts that the FAA, which derives its authority from the commerce clause, does not apply here because the manner in which the parties resolve the instant dispute does not impact interstate commerce. This argument is based on the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___,(2012), 132 S.Ct. 2566 (2012), which held that the Affordable Care Act's individual mandate is not subject to regulation

[18] The Respondent's argument that the Board lacked authority to act on the charges filed in this case based on a lack of quorum also fails for the reasons set forth in *Bloomingdales, Inc*.

under the Commerce Clause. This is because, the Court reasoned, the Commerce Clause cannot be used to require individuals to engage in commerce.

The path from the Court's rationale upholding the individual mandate in the Affordable Care Act to the Respondent's argument that the choice of forum to resolve a dispute alleging violation of state law does not impact interstate commerce is relatively obscure. In determining whether employment contracts with arbitration clauses are subject to the FAA, the Supreme Court has focused on whether the work the employees at issue perform involves interstate commerce. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200–201 (1956), the Court found the FAA did not apply to an employment contract where there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce . . ." [19] In making this determination, the work activity is looked at in the aggregate. *Citizen's Bank v. Alafabco, Inc*., 539 U.S. 52, 56–57 (2003). Thus the proper inquiry here is whether the technicians' work activity affects commerce, not whether their choice of dispute resolution forum affects commerce. The Union fails to point out how *National Federation* has changed this inquiry, and there is no Board precedent on point to serve as guidance. It appears the only court to consider the issue so far has continued to focus on the scope of the employer's business and/or the employees' duties to determine the FAA's applicability to an employment contract.[20] *McElveen v. Mike Reichenbach Ford Lincoln, Inc.*, No. 4:12–874–RBH–KDW, 2012 WL 3964973 (D.S.C. 2012). As I cannot find authority to support the Union's assertion that I should consider the choice of forum for the employment dispute resolution rather than the technicians' employment itself, its argument fails.

CONCLUSIONS OF LAW

(1) The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the July 2011 bonus, meeting with employees about alternative workweek elections, holding alternative workweek elections, and unilaterally changing employees' work schedules.

(3) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement which required employees to resolve employment-related disputes exclusively through arbitration proceedings and by enforcing that agreement to preclude resolution of such disputes through class action.

[19] Though not discernible from the decision, the petitioner's brief to the Supreme Court states that he worked as a plant superintendent. 1995 WL 72431.

[20] There appears to be uncertainty among the courts as to whether the employees' duties or the employer's operations should be the primary consideration. Analysis of this is not required to address the Union's argument or render my decision.

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.

As I have concluded that the Mandatory Arbitration Agreements are unlawful, the recommended order requires that the Respondent revise or rescind them, and advise its employees in writing that they have been so revised or rescinded.

At the hearing, the Acting General Counsel requested that I order the Respondent to "move the arbitrator to rescind the order granting Respondent's motion to dismiss class action allegations and to consolidate the cases pursuant to the unlawful policies contained in the unlawful mandatory arbitration agreements." (Tr. 9.) The law does not require the employer to permit class action arbitrations. Instead, *D.R. Horton* states that a forum for class or collective claims must be available. It is therefore beyond my authority to require the Respondent to permit classwide arbitration. Instead, the employees must be permitted to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

The Acting General Counsel also requested "an Order requiring Respondent to reimburse the unit employees and/or the Union for any litigation expenses directly related to its opposition to the Respondent's unlawful motion to prohibit class arbitration." (Tr. 9.) The Respondent argues that, until *D.R. Horton* was decided, the Board's position on the issue was unclear. I agree, and therefore find that no litigation expenses are appropriate prior to January 3, 2012, the date *D.R. Horton* was issued. Neither the Acting General Counsel nor the Union submitted any argument or legal authority to support a request for reimbursement of litigation expenses. Presumably, the request is premised on the Acting General Counsel's belief that the Respondent's objective in opposing class action arbitration was unlawful. Given the absence of any supporting argument, and in light of the fact that the Respondent did not preclude collective action among the employee-plaintiffs, I decline to grant this remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[21]

ORDER

The Respondent, FAA Concord Honda Inc., d/b/a Concord Honda, Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) unilaterally implementing an employee bonus or changes in the work week schedule in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations;

(b) bypassing the Union and dealing directly with its employees with regard to their terms and conditions of employment;

(c) maintaining Mandatory Arbitration Agreements that employees would construe as prohibiting class or collective actions;

(d) enforcing the Mandatory Arbitration Agreements to prohibit class actions;

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

(a) Rescind or revise the MAAs to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(b) Notify the employees of the rescinded or revised agreements to include providing them copies of the revised agreements or specific notification that the agreements have been rescinded.

(c) Within 14 days after service by the Region, post at its facility in Concord, California, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 21, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 2011.

[22]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."

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

Dated, Washington, D.C. October 23, 2013

_____
Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to bargain collectively and in good faith with Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers (the Union) as the designated exclusive collective bargaining representative of the employees in the following unit:

All full-time and regular part-time technicians and lube technicians employed by FAA Concord H, Inc. d/b/a Concord Honda (the Employer) and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT implement the June 2011 Bonus or the change in your weekly work schedule from a four day/ ten hour schedule to a five day/ eight hour schedule in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

WE WILL NOT bypass the Union and deal directly with you with regard to the holding of alternative work week elections or any other changes to your terms and conditions of employment.

WE WILL NOT solicit employees to sign and then maintain and enforce any provision of our mandatory arbitration agreements that we have interpreted in a way that interferes with your Section 7 rights to engage in collective legal activity by precluding you from participating in class actions relating to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

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

WE WILL rescind the June 2011 Bonus and the November 14-18, 2011 change to the work week schedule which we unilaterally implemented without bargaining with the Union and/or without an overall agreement or a lawful impasse in negotiations.

WE WILL rescind the mandatory arbitration agreements or revise them to make clear to employees that they may bring collective and class claims in an arbitral or judicial forum under the terms of the agreements.

WE WILL no longer object to our employees bringing or participating in class actions under the terms of the agreements.

FAA Concord Honda, Inc.,
d/b/a Concord hONDA

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3253.