

**Latino Express, Inc., and Teamsters Local Union No. 777, affiliated with the International Brotherhood of Teamsters, AFL-CIO.** Cases 13-CA-077678, 13-CA-078126, 13-CA-078127, 13-CA-079765, and 13-CA-082141

May 21, 2014

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON  
AND SCHIFFER

On October 30, 2013, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent and a group of employees seeking to participate as Intervenor (Ramiro Lopez, et al.) each filed exceptions and a supporting brief, the General Counsel filed answering briefs to both, and Ramiro Lopez, et al., filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions,<sup>1</sup> cross-exceptions, and briefs, and has decided to affirm the judge's rulings,<sup>2</sup> findings,<sup>3</sup> and conclusions, and to adopt the recommended Order as modified and set forth in full below.<sup>4</sup>

<sup>1</sup> The Respondent's exceptions "incorporate" the exceptions filed by Ramiro Lopez, et al., which challenge the judge's finding of an unlawful withdrawal of recognition, and proposed bargaining remedies. In light of our affirmance below of the judge's denial of the motion to intervene, we consider those exceptions only as part of the Respondent's exceptions.

<sup>2</sup> In accord with the Board's unpublished November 27, 2012 Order Denying Request for Special Appeal, we affirm, as involving no abuse of discretion, the judge's denial of the motion of Ramiro Lopez, et al., employee petitioners in a decertification case, to intervene in this unfair labor practice case, his denial of the petition of this employee group's attorney to revoke the General Counsel's subpoena of the attorney to testify in this case, and the modified sequestration procedure used by the judge with respect to this attorney.

<sup>3</sup> For the reasons stated by the judge, we find no merit in the exceptions to the judge's finding that the Respondent's withdrawal of recognition violated Sec. 8(a)(5).

For the reasons stated by the judge, we similarly find no merit in the Respondent's exceptions to the judge's findings that it violated Sec. 8(a)(5) by unilaterally implementing the "Driver's Accountable Act" (DAA), and by bargaining in bad faith in April 2012. Chairman Pearce and Member Schiffer therefore find it unnecessary to address the General Counsel's motion to strike these exceptions. While Member Johnson agrees that the judge's findings are well supported, he would affirm them by granting the General Counsel's motion to strike the exceptions to them as deficient under Board Rules Sec. 102.46(b), inasmuch as neither the exceptions nor supporting brief state with sufficient specificity any grounds on which these purportedly erroneous findings should be overturned.

<sup>4</sup> We shall modify the judge's recommended order to include the additional requirement that the Respondent provide periodic reports on the status of bargaining for 6 months. We find such a remedy appropri-

**ORDER**

The National Labor Relations Board orders that the Respondent, Latino Express, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from, and failing and refusing to recognize and bargain collectively with, the Teamsters Local Union No. 777 (the Union) as the exclusive collective-bargaining representative of the bargaining unit employees of the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at its facility presently located at 3230 West 38th Street, Chicago, Illinois; excluding mechanics, dispatchers, trainers, charter directors, payroll people, payroll assistants, public relations people, maintenance directors, office personnel, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Unilaterally implementing changes to terms and conditions of employment of its unit employees without prior notice and affording the Union an opportunity to bargain, and without first bargaining to a valid bargaining impasse.

(c) In any other 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) On request, recognize and bargain with the Union for a reasonable period as set forth in the remedy portion of the judge's decision, as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) For a period of 6 months, submit written bargaining status reports every 30 days to the compliance officer for Region 13, serving copies thereof on the Union.

(c) Rescind and restore the status quo ante as to the unlawful unilateral change of implementing the Driver's Accountable Act.

(d) Make bargaining unit employees whole for any losses they may have incurred as a result of the above-

ate in light of the Respondent's failure to bargain in good faith for a first contract with a newly certified union, the Respondent's regressive and bad-faith bargaining in April, its unlawful unilateral change to the DAA that month, and the unlawful withdrawal of recognition. Member Johnson concurs in providing this additional remedy, but would limit it to 3 months.

We shall also substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

described unilateral change, plus interest, as described in the remedy portion of the judge's decision.

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

(f) Within 14 days after service by the Region, post at its Chicago, Illinois facility, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2012.

(g) Within 14 days after service by the Region, hold a meeting or meetings, during working time, scheduled to ensure the widest possible attendance, at which the attached notice is to be read in English and Spanish to the employees assembled for this purpose, by a responsible official of the Respondent, or by a Board agent in the presence of a responsible official of the Respondent, and providing an opportunity for representatives of the Board and the Union to be present for the reading of the notice.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 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.

<sup>5</sup> If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain 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 withdraw recognition from, or fail and refuse to recognize and bargain in good faith with, Teamsters Local Union No. 777 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at its facility presently located at 3230 West 38th Street, Chicago, Illinois; excluding mechanics, dispatchers, trainers, charter directors, payroll people, payroll assistants, public relations people, maintenance directors, office personnel, professional employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally implement changes to terms and conditions of employment, such as those in the Driver's Accountable Act, without providing the Union prior notice and an opportunity to bargain and without first bargaining to a valid impasse.

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

WE WILL recognize the Union as your collective-bargaining representative, and upon request of the Union, bargain in good faith with the Union and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WE WILL, for a period of 6 months, submit written bargaining status reports every 30 days to the compliance officer for Region 13, serving copies thereof on the Union.

WE WILL, upon request of the Union, rescind our unilateral changes implemented with regard to the Driver's Accountable Act.

WE WILL make you whole, with interest, for any loss of earnings or other benefits you suffered as a result of the unlawful unilateral changes to terms and conditions of employment that we made.

LATINO EXPRESS, INC.

The Board's decision can be found at [www.nlr.gov/case/13-CA-077678](http://www.nlr.gov/case/13-CA-077678) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



*Charles J. Muhl, Esq.*, for the Acting General Counsel.  
*Zane D. Smith, Esq. (Zane D. Smith & Associates, LTD)*, of Chicago, Illinois, for the Respondent.  
*James Glimco (Teamsters Local 777)*, of Lyons, Illinois, for the Charging Party.

#### DECISION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve an employer that provides school and charter trip transportation in the Chicago area. Its employees' successful effort to unionize in 2010 and 2011 resulted in numerous findings of violation of the National Labor Relations Act (the Act) against the Employer.<sup>1</sup> The instant cases arise out of the conduct of the Employer during the period after the Union's certification as the employees' representative on April 18, 2011. The Government alleges that during the certification year the Employer bargained in overall bad faith from June 10, 2011, to April 10, 2012, by its conduct at the negotiating table, as well as by unilateral changes in terms and conditions of employment—one of which, implemented April 6, 2012—is independently alleged to be unlawful. The Government further alleges that the employer unlawfully withdrew recognition from the Union on April 24, 2012, based on an employee decertification petition signed by employees in March 2012, during the initial certification year. The Government alleges that the petition was tainted by the Employer's bad-faith bargaining, and, in addition, that the petition was premature and did not prove lack of majority support for the Union.

<sup>1</sup> *Latino Express, Inc.*, 358 NLRB 823 (2012), supplemented at 359 NLRB 518 (2012).

As discussed herein, I find that the one alleged unlawful unilateral change violated the Act. I further find that the Employer's bargaining conduct beginning in April 2012 was unlawful. However, the record evidence of the course of conduct at the bargaining table from June 2011 through March 2012 is too vague and nonspecific to prove an overall intent not to reach agreement and I do not find a violation as to those periods of the allegation. Finally, I find that the petition for decertification cannot be relied upon to show a lack of majority support for the Union because it was solicited during the certification year and, because it was not proven to contain authentic signatures of a majority of the bargaining unit employees. Accordingly, I find that the April 24, 2012 withdrawal of recognition, which was based solely on the petition, was unlawful.

#### STATEMENT OF THE CASE

On March 28 2012, Teamsters Local 177 (the Union or Teamsters) filed an unfair labor practice charge alleging violations of the Act by Latino Express, Inc. (Latino Express), docketed by Region 13 of the National Labor Relations Board (the Board) as Case 13-CA-077678. The Union filed two additional unfair labor practice charges, docketed as Cases 13-CA-078126 and 13-CA-078127, on April 4, 2012. On April 27, 2012, the Union filed another charge against Latino Express, docketed as Case 13-CA-079765. On May 31, 2012, the Union filed a further charge against Latino Express, docketed as Case 13-CA-082141.

On July 31, 2012, based on an investigation into the charges, the Acting General Counsel (the General Counsel), by the Acting Regional Director for Region 13 of the Board, issued an order consolidating the above-listed cases and issued a consolidated complaint (the complaint) and notice of hearing alleging violations of Section 8(a)(1) and (5) of the Act against Latino Express. An amendment to the complaint pertaining to requested remedial relief was issued August 13, 2012. Latino Express filed an answer to the complaint denying all alleged violations of the Act.

A trial in this case was conducted in this matter on October 9 and 10, 2012, and April 15, 2013, in Chicago, Illinois.<sup>2</sup> After the close of the hearing, on May 15, 2013, Latino Express filed a motion to dismiss with the Board. On May 17, and again on May 24, 2013, Latino Express filed motions to stay further proceedings. By Order issued, June 11, 2013, the Board denied Latino Express' motions to dismiss the complaint and to stay the proceedings.

Counsel for the General Counsel filed a posthearing brief in support of his position on May 20, 2013. On the entire record, I make the following findings, conclusions of law, and recommendations.

#### JURISDICTION

Latino Express is an Illinois corporation with an office and place of business in Chicago, Illinois, engaged in the business of providing bus transportation services for students as well as

<sup>2</sup> At the outset of the hearing, the Respondent orally admitted pars. 2(b) and 6(b) of the complaint, which had been denied in its answer to the complaint.

charter bus services to the general public. During the calendar year preceding issuance of the complaint in this matter, Latino Express, in conducting its business operations, derived gross revenues in excess of \$250,000, and purchased and received at its Chicago, Illinois facility goods and materials valued in excess of \$5000 from points outside the State of Illinois. At all material times, Latino Express has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

#### UNFAIR LABOR PRACTICES

##### The Union's Certification and Request to Bargain

The Responden, Latino Express, provides transportation services for the Chicago public schools. Latino Express drivers pick up students in the morning on assigned routes and take them to school, and then in the afternoon, pick up students at school and deliver them near their homes. In addition, Latino Express provides charter bus services for the general public and for school-related events such as field trips. As of February 2012, there were approximately 84 drivers employed by Latino Express.

After an organizing drive and a Board-conducted representation election, on April 18, 2011, Teamsters Local 777 was certified by the Board as the collective-bargaining representative of the following unit of Latino Express employees:

All full-time and regular part-time drivers employed by the Employer at its facility presently located at 3230 West 38th Street, Chicago, Illinois; excluding mechanics, dispatchers, trainers, charter directors, payroll people, payroll assistants, public relations people, maintenance directors, office personnel, professional employees, managerial employees, guards, and supervisors as defined in the Act.

On April 28, the Union's president, James Glimco, wrote to Latino Express (one third) owner and Vice President Henry Gardunio, requesting dates on which the parties could commence collective-bargaining negotiations.

##### Bargaining June 10, 2011, through April 11, 2012

Bargaining commenced June 10, 2011. There were approximately 22 bargaining sessions conducted over the course of the following 10 months (through April 11, 2012). The Union's principal negotiators were Teamsters Local 777 President Glimco and Local 777 Business Agent and Organizer Elizabeth Gonzalez. The Employer was represented at the bargaining table by Attorney Zane Smith and a second attorney retained by the Employer for negotiations, Sheila Genson. However, according to Genson, it was communicated to the Union at "every meeting" that "once we get a decent, full contract together" it has "got to go to [Employer VP] Henry [Gardunio]." Gardunio confirmed in his testimony that he was "involved all along" and that Genson and Smith "would inform me about what was going on." Gardunio, along with Latino Express' president, Michael Rosas Sr., attended (one or both of them) the final five meetings in February–April 2012. According to Gardunio, after his attorneys "had resolved like maybe 50 of [the issues]

... [and] there was like maybe ten issues left" he got involved at the bargaining table "to try to work on those final points." At that point, according to Gardunio, the parties were down to about 10 or so issues in dispute, and had reached tentative agreement on the remainder.

Prior to the first meeting on June 10, the Union sent the Employer a noneconomic proposal. The Employer provided a counterproposal in November 2011.

One "key" issue in negotiations was the distribution of charter work to employees. Charters formed a significant part of employees' income and union organizer/negotiator Gonzalez testified that the assignment of charter work was an issue in negotiations. Charter trips averaged about 40 a day before the Union was certified, but had dropped to as few as five a day after certification. Gonzalez testified that a chief concern of drivers was that the charter work was not assigned fairly and, further, that (nonunit) office workers and mechanics were sometimes given this work, which was an important source of income for the drivers.

The Union had been certified as the drivers' bargaining representative and the Union's June 2011 proposal on (art. 1) provided that the agreement would cover:

All bus routes or runs, including any movement of buses, vans or any other vehicle that will be used for the purpose of transportation by the Employer, except for emergency or maintenance-related movements.

The parties tentatively agreed to this language. However, the parties' discussions also revealed the Employer's desire to have nonunit mechanics, who could perform maintenance on vehicles if the need arose, drive the long-distance charter assignments. During negotiations, the Union agreed to permit mechanics to drive charter trips over 100 miles, but did not agree that the work was exempt from the agreement or that any other charter work would be excluded from the agreement.

However, notwithstanding the Employer's agreement in earlier negotiations, the Employer's April 2, 2012 "final offer" included, in the scope of agreement, the provision that "This Agreement will not cover charter routes, charter routes on weekends, charter routes in excess of 100 miles, emergency, maintenance-related; and non-revenue related movements, as more specifically addressed in this Agreement." According to the uncontradicted (and credited) testimony of union negotiator Gonzalez, when the Union saw this it protested that this was an attempt to "change the certified bargaining unit" and told the Employer representatives that "we never agreed or accepted to not covering the charter routes . . . . [I]t was different from what we already had agreed to in the previous negotiations."

Another issue in negotiations was the Union's proposal governing discharges, discipline, and other disciplinary action. The Union's proposal, made in June 2011, incorporated a typical "just cause" standard for discipline, with discipline subject to review through the grievance procedure. The Employer's counterproposal—sent to the Union in November 2011—excluded employees "written up based on just cause" from using the grievance procedure and defined just cause to include, but not be limited to, an array of 20 offenses ranging from

“committing a sex crime” to “failing to adhere to safety rules” and “customer complaint.” In addition, the Employer’s proposal excluded “laid-off” employees from using the grievance procedure.

The Employer’s final offer, provided to the Union on April 2, 2012, contained a proposal on discharge, suspension, and other disciplinary action that was similar to its November 2011 proposal. It continued to provide that laid-off employees, and employees written up for “just cause” were excluded from using the grievance procedure. The Employer continued to propose examples of charges that constituted just cause, although the list shifted somewhat from its November proposal. Some of the less serious infractions—such as “customer complaint”—had been removed from the definition of “just cause,” but others had been added, including “disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication.” The April 2 proposal also included a list of infractions for which an employee could be “written up,” including “distributing union literature on Company time,” “attending a union meeting on Company’s property,” and “attending a union meeting on Company time.”

The Union objected to the addition of these additional disciplinary bases, arguing to the Employer that they were illegal. It also maintained throughout the negotiations that it would not exclude employees (i.e., laid off, or employees charged with “just cause” transgressions”) from being able to use the grievance procedure.

Other articles were the subject of tentative agreements between the parties, but were changed by the Employer in its April 2 final offer. For instance, the Employer and the Union “TA’ed” a proposal on “Access to Premises” (art. 8) that governed access to the Employer’s premises by union agents.<sup>3</sup> However, in its April 2, 2012 final offer, the Employer replaced the TA’ed version of article 8 with a proposal that included more restrictive access rights and prohibited the union representatives from “soliciting union members” or “distribut[ing]” union literature to employees on “Company time,” and prohibited the union representatives from “hold[ing] meetings on company property.”<sup>4</sup> The Union objected at the bargaining table to these changes to the proposal.

<sup>3</sup> The agreed-to language of art. 8 stated:

Authorized agents of the Union shall have access to the Employer’s establishment during working hours, to investigate working conditions, collect dues, and inspect all time cards, log books and other payroll records of the Employer, for the purpose of determining whether or not the terms of this Agreement are being complied with. The Employer will make such records available within seven (7) days of the Union’s request and will provide a suitable bulletin board exclusively for the Union’s use in a conspicuous place for posting of information and interest to the members of the Union.

The Union representatives agree to follow the Company’s prescribed safety and security regulations while on the Company’s premises.

<sup>4</sup> The revised “final offer” proposal on access stated:

After presenting themselves to the facility manager or supervisor, and obtaining the facility manager’s or supervisor’s approval, which will not be unreasonably withheld, authorized agents of the Union shall have access to the Employer’s estab-

lishment (although restricted to only areas where employees are allowed, and specifically, there is no access to the second floor) during normal working hours, for the purpose of determining whether or not the terms of this Agreement are being complied with by investigating working conditions, collecting dues, and inspecting all log books and other payroll records of the Employer as to Union members. The Employer will make such records available within seven (7) business days of the Union’s written request.

The Union representatives agree to follow the Company’s prescribed safety and security regulations while on the Company’s premises. Under no circumstances will the Union representatives be paid by the employer.

Union representatives shall not interfere with the Company’s business. Union representatives shall not solicit union members or distribute union literature to Employees who are on Company time. Union representatives shall not hold meetings on company property.

#### The Decertification Petition

Employee Ramiro Lopez, a longtime Latino Express employee, testified that in March 2012, he brought information to the other drivers on the process for decertifying the Union. He contacted an attorney from the Right-to-Work Foundation, and with the assistance of employees Paul Penro and Tina Patitucci, began collecting signatures for a decertification petition.

The petition calls for the decertification of the Local 777 and lists 54 employee names with signatures.

Lopez, Penro, and Patitucci, each testified that they procured all the signatures while standing off the property, across the street from the exit to the facility parking lot. Lopez said he began obtaining signatures after his work shift the afternoon of March 21, 2012. He used a clipboard to hold the petition and had copies in English and Spanish for employees. Penro described parking his truck across the street from the Latino Express facility, while Patitucci stood at the facility exit and told people to go to Penro’s truck if they wanted to sign the petition. He also used a clipboard, and would sit in his truck while employees approached and opened up the passenger side door. He would provide them information and the petition to sign. Most of the signatures were dated March 21, 2012, but some (approximately 16) signatures were obtained March 22, 23, and 26, as well. All the signed pages were given to Lopez who filed the petition with the Board in April.

However, other witnesses described solicitations that occurred on employer property. Raymond Deltoro, Sr., who has worked as a driver for Latino Express for 15 years, described being approached by Lopez, and agreeing to sign the petition “In the parking lot where the buses are in the company.”<sup>5</sup> Former busdriver Vivian Brown, who was employed by Latino Express from September 2010 to 2012, testified that in March or April 2012, while she was preparing her schoolbus for a trip (“pretripping” the bus), Lopez approached her at the garage on the Employer’s facility, carrying a clipboard and “wanted me to sign a form that said we didn’t need the union.” Brown declined to sign, telling Lopez that “I had to think about things before I signed anything.” Lopez told Brown “when I changed my mind to come back and see him and sign the petition.”

Finally, union organizer Raymond Alvarez testified that on or about March 20, 2012, at about 9 a.m., he hand-delivered a letter from Glimco to Latino Express, about half an hour before an employee safety meeting began in the dispatch area of the facility. Alvarez entered the facility parking lot at the main entrance and walked into the employee entrance of the facility. During his time there, he observed Lopez and Penro standing at the main entrance. They “had clipboards and they were following the employees around trying to get them to sign it.” Alvarez was only on the property for a few minutes to deliver the letter. Both as he entered and exited the building Lopez and Penro yelled obscenities at him and followed him as he exited the property. Alvarez remained on site, but off the property, for most of the day. He observed Penro and Lopez (for a total time of about 45 minutes to an hour) soliciting employees with their clipboards on the facility property. Alvarez described watching Penro “following employees out this west exit. There’s a gate back here where the employees park, and he was following them literally from the building all the way to their cars and then going back in and engaging on the property.”<sup>6</sup>

Employee Raymond Deltoro Sr., testified that because of a decline in charter assignments he resigned from Latino Express. The date on which this happened is unclear, but it appears to have been a Friday in late March or early April 2012. Before

<sup>5</sup> At this point I must correct my own error. At the hearing Deltoro identified the area of the parking lot where he signed the petition using an aerial photo exhibit of the facility and lot. I am quoted in the transcript (Tr. 321) as describing the area Deltoro pointed to as “the northeast corner of the building, outside the northeast corner of the building.” This is incorrect. It was the southeast corner of the building to which Deltoro pointed. The northeast corner of the building does not abut the parking lot, is not where the buses are parked, and, indeed, is not visible in the exhibit. Both by memory and logic, it is clear to me that Deltoro’s testimony that the petition was signed “[i]n the parking lot where the buses are parked,” and the area he pointed to on the exhibit, was by the southeast face of the building.

<sup>6</sup> Lopez and Penro testified that they solicited off the property. The implication (if not the express testimony) was they did not solicit on the property during working hours. I found Alvarez, Deltoro, and Brown credible in their presentation of the evidence. And significantly, the Respondent called no witnesses to dispute any of this testimony. Neither Penro nor Lopez were called to the stand by the Respondent, and neither disputed any of the testimony of Deltoro, Alvarez, or Brown. I credit Brown, Deltoro, and Alvarez’ uncontradicted testimony, which, in any event, was credibly offered.

his shift ended on that day. Deltoro told the office that it was going to be his last day of work. After telling the office, Deltoro ran into a Latino Express (admitted) supervisor and head of maintenance, Victor Gabino, in the parking lot where the buses are parked. Gabino asked Deltoro why he was leaving. Deltoro told him he needed more work and Latino Express was not giving it to him. Gabino told Deltoro that a group of employees had told Gardunio that Deltoro was “the brain” behind the employees’ demand for a Union. Deltoro told Gabino that this was a “lie.” Gabino then told Deltoro that it was “a lack of communication” that was the cause of Deltoro being out of work. Gabino encouraged Deltoro to talk with Latino Express, and Deltoro said that “I don’t need to say anything. Latino Express knows that I’m working very little. For all of 2011 I worked very little.” Deltoro told Gabino that he “was not with the union nor the company. The union hasn’t done anything for me, and the company doesn’t give me work . . . that’s why I’m not with anyone.” Gabino suggested that Deltoro should “decide on whose side” he was going to be. Deltoro testified that Gabino told him that it had been a “miscommunication. Let’s see what we can do. I said that’s fine.”

Although Deltoro went through with his resignation, the new job did not work out after the first day, and on Monday Deltoro called the Latino Express dispatcher (and supervisor) Sara Martinez and said he was coming back to work. She told him that she had already given away his routes to someone else but she would see what she could find for him. When he returned Tuesday, he was assigned different routes.

Deltoro further testified:

A week later Ramiro Lopez came up to me to put my signature for something [saying] that we didn’t want a union—he had been insisting many times, but I didn’t want to, but I said that’s fine, I’ll sign.

When I signed the paper I saw very few signatures, and I told him is this all you have. No, and he showed me five or six sheets like that with more signatures. I said okay, that’s fine. He left. About 60 feet away he found Victor. They spoke. I don’t know what they talked about.

After Ramiro left and I went to the office and Victor approached me and told me let’s see the form that you have. Let’s see what way we can have you have more work. Let’s see what we can do to help you. There may be a way in a charter. We can use it in the morning and you can pick them up in the afternoon. Because of that situation, because I couldn’t do it full-time because of my work, I said that’s fine, thank you.

The next Saturday and the Saturdays after that they gave me work. I had work. I’ve been working. That’s it.

Prior to this incident Deltoro had not been assigned any Saturday charters.

#### The Withdrawal of Recognition

On April 24, 2012, Attorney Zane Smith, counsel for Latino Express, received a letter from Attorney Matthew Muggeridge. The letter stated that he was an attorney for the National Right To Work Legal Defense Foundation, and that he represented Latino Express employee Lopez. Muggeridge reported in his

letter that Lopez had filed a decertification petition with the Board. Muggeridge went on to state that

Mr. Lopez has proof in the form of petition sheets signed by a majority of employees that the union no longer enjoys majority support among the employees. That being the case, the employer is prohibited from any further negotiations with the union. It is my understanding that contract negotiations are ongoing between Latino Express and the Teamsters. Further negotiations would be illegal.

That same day, Attorney Smith wrote to Glimco, enclosing the petition and signatures—the record does not tell us who provided the petition to the Employer—stating:

As evidenced by the attached petitions, the union no longer enjoys majority support among employees. As a result thereof our client, Latino Express, Inc., immediately withdraws recognition of Teamsters Local 777 as the Collective Bargaining Representative of its employees.

There were no further negotiations. By letter dated May 9, 2012, Attorney Smith wrote to Glimco, responding to a request for negotiations from Gonzalez, stating that, “[p]ursuant to union-representative] Gonazalez’ email of May 4, 2012, requesting further negotiations, we believe that any further negotiations would be improper” due to the due to the decertification petition. On May 17, Smith wrote Glimco stating that “This will confirm our conversation of today in which I informed you that our office would not agree to continue any further negotiations with the Union in regard to the above matter.”

#### Unilateral Changes Postcertification and During Bargaining May 2011 Changes to the Breakroom

Because the drivers’ typical route involved delivering students to school in the morning and picking them up from school in the afternoon, many drivers spent the interim period of the day in the common area of the Employer’s facility. This common area served as a breakroom for employees who congregated there during the midday hiatus. In the wake of the Union’s certification, and before negotiations commenced, an issue arose when drivers complained to the Union that the Employer had removed the pool table, large screen TV, and cable television access from the employee “common area” or breakroom in the facility.

Union President Glimco wrote to Gardunio (with a copy sent to Zane Smith) on May 11, 2011, complaining about reports that Latino Express had violated “status quo” requirements by, among other things, removing a “pool table, screen television and cable” from the common area of the facility, “[a] benefit that had been given to all Latino Express workers.” On May 26, 2011, Latino Express Attorney Genson wrote back to Glimco stating that:

the replacement of the 52” television with a 42” television, the removal of the pool table, and the removal of the cable are not ‘terms or conditions of employment.’ Even if such were, with the recent loss of Latino Express, Inc.’s ability to use other fa-

cilities to conduct meetings, the space taken up by the pool table was required for meetings. In regards to the cable, some drivers were refusing charters because they were watching a good show on cable.

Attorney Genson, testified at the hearing that the common room was needed to hold safety meetings. Previously the meetings had been held at another location owned by a different employer and that employer needed the space. Genson maintained at the hearing that these items were not “terms and conditions of employment” and did not “have anything to do with employment, it’s simply a convenience that’s there.”

#### The September 6, 2011 “welcome back” Letter

Latino Express issued a “welcome back” letter to drivers dated September 6, 2011, while negotiations were ongoing, that listed “a lot of rule changes from CPS [Chicago Public Schools] and in this letter we are informing you about those changes.” The letter listed rules on a wide array of topics. Some of the rules and topics were the same as those listed in the similar “welcome back” letter issued to drivers in September 2010. However, many were new or different from that listed in 2010, and, in sum, constituted significant new rules and policies for drivers to follow.<sup>7</sup> Given the resolution of the case, it is not necessary to list each change, but suffice it to say that 20 of 28 items listed on the 2011 welcome-back letter contain significant rule changes from the 2010 welcome-back letter in areas as wide-ranging as dress requirements, route and driving responsibilities, and disciplinary rules. (Compare 2011 letter (GC Exh. 25) with the 2010 letter (GC Exh. 24).)

The Union was not notified before these changed items were announced. No agreements were reached in bargaining regarding these items as of the time of the issuance of the letter.

#### April 6, 2012 Implementation of the Driver’s Accountable Act

On about April 6, 2012, and in the days thereafter, the Employer issued a notice announcing that “a new Driver’s Accountable Act has been implemented at Latino Express.” The notice explained the “Act” and provided for employees to sign stating that “I [employee name] do her[e]by agree that I am fully responsible for all damages which may occur from all accidents that take place with the bus which is assigned to me outside the times agreed upon in this contract. . . .” The text of the letter stated that implementation of this rule was being made “[d]ue to the serious problems we at Latino Express are having [r]egarding accidents from drivers who use their bus without authorization.” The letter continued:

<sup>7</sup> I do not credit Gardunio’s testimony that these newly listed restrictions, policies and rules were “remind[ers]” of established rules that “maybe some of the drivers . . . are not adhering to.” In the first place, a number of the provisions represent changes from the policies sent forth in the similar 2010 “welcome back” letter distributed to employees in September 2010. Second, the letter states that “there will be a lot of rule changes” and that the letter is to “inform[ ] you about those changes.” In other words, the stated purpose of the letter is to describe *changes* in rules.

Upon signing this act (agreement) you will take full responsibility for any or all accidents that happen outside route times. Latino Express will cover all accidents that take place during your route schedule or during authorized times. These times include: leaving the base lot while traveling *directly* to your first pick up point, or gas. Coverage continues th[r]ough the morning route. ***If an unscheduled stop is made and the driver is not authorized to do so, the driver will be held totally responsible for any accident which may occur.*** Coverage will continue the morning route until all the children have been taken directly to their designated school, whereupon the driver, unless notified to continue on an additional job, will return *directly* to the base lot.

Latino Express will cover all ***authorized time errands***, late child pick-up.

All mid-day drivers and charter will adhere to the same policies. All mid-day drivers and charter drivers will report to the base before the designated run. ***No driver will leave the Base unless authorized to do so by the base on-ly.***

(Original emphasis.)

In sum, according to this “new” policy—that, according to the April 6 memo had already been “implemented,”—Latino Express paid for damages caused by an accident during authorized driving. However, drivers were responsible for damages occurring during unauthorized or “off” route times.

This was a significant change from the previous policy. Thus, the September 2011 “welcome back” letter provided that:

16. Preventable accidents will be the financial responsibility of the Driver. Unpreventable accidents will be the responsibility of the Company as long as proper procedures are taken. (Based on \$500 maximum charge to the employee, The Company will charge the driver a maximum of \$500 for any accident, if the driver is fault, when damage are less than \$500.00 the driver will pay the remaining 25 %) **DRIVERS PLEASE ARE ADVISED IF YOU HAVE 2 PREVENTABLE ACCIDENTS, LATINO EXPRESS INC. HAS THE RIGHT TO RELEIVE YOU FROM YOUR DRIVING DUTIES. (ALL ACCIDENTS MUST BE REPORT TO THE BASE [WH]ETH[E]R YOU HAVE STUDENTS ON THE BUS ON NOT)**

(Original emphasis.)

This 25/75-percent split was the policy admitted to by the Employer to be in existence in February 2011, in a position statement submitted in previous litigation. (“Pursuant to Latino Express policy, any employee at Latino Express who is involved in an accident is required to reimburse the company 25% of the costs of the damages caused to the bus by the accident. The Company picks up the other 75%.”) It was also the policy found by the Board to be in existence at Latino Express in recent litigation. *Latino Express*, 358 NLRB 823, 828 (2012).<sup>8</sup>

<sup>8</sup> At the hearing, the Employer produced copies of the letter implementing the Driver Accountable Act and signed by two employees in

The newly implemented Driver’s Accountable Act was also a departure from the tentative agreement reached between the parties in bargaining. After much discussion in negotiations about who was to bear costs for accidents, the Employer had agreed that drivers would not be charged for accidents. In the face of that tentative agreement, which did not involve any exception for accidents occurring on “unauthorized” driving, the announcement and implementation of the Driver’s Accountable Act was particularly surprising to the Union, and to employees who had heard of the progress on this issue made in negotiations.

#### Analysis

The complaint alleges three distinct violations of Section 8(a)(5) of the Act (and derivatively, of Sec. 8(a)(1) of the Act).<sup>9</sup> First, an unlawful unilateral change in terms and conditions of employment by implementing the driver’s accountable act, on or about April 6, 2012. Second, overall bad-faith bargaining between June 2010 and April 2012. Finally, an unlawful withdrawal of recognition of the Union on or about April 24, 2012.

#### I. PARAGRAPH VI OF THE COMPLAINT

##### Unilateral Implementation of the “Driver’s Accountable Act”

Board precedent has long been settled that, as a general rule, an employer with an obligation to collectively bargain may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). “For it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. at 743. “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Katz*, supra at 747. “The vice involved in [a unilateral change] is that the

2006 and one in 2007. This was offered in support of Gardunio’s testimony that this was a longstanding policy and the April 2012 form was issued because there were many new drivers and they were unaware of this longstanding policy. I cannot credit this claim. The evidence that the 25/75 split policy was in effect—without any distinction being drawn between accidents during authorized and unauthorized bus operation—is too strong. Contrary to Gardunio’s claim are the findings of the Board in the previous case, the admissions of counsel in the previous case, the 2010 and 2011 “welcome back” memos, as well as the testimony of employee and driver Garcia that he was required to sign this policy for the first time in April 2012, and that it was his understanding that the employees were liable for 25 percent of all accidents and that this was new policy that he had never seen before. All of this establishes that the policy was newly implemented. In the face of that, I do not believe Gardunio’s somewhat vague and confusing testimony that the Driver Accountable Act was in force continuously for many years. That policy may have been considered, and at least some employees apparently signed a letter acknowledging that policy in past years. But there is no credible evidence that it was previously in effect or enforced.

<sup>9</sup> An employer’s violation of Sec. 8(a)(5) of the Act is also a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court’s emphasis)), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997).

Where, as here, negotiations for a collective-bargaining agreement are ongoing “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), *enfd. mem.* 15 F.3d 1087 (9th Cir. 1994).

As set forth above, on or about April 6, 2012, during the time that negotiations were ongoing, the Respondent announced the implementation of a “Driver’s Accountable Act” that changed the Respondent’s policy regarding employee financial responsibility for accidents. The Union was not notified in advance of this change in what is an indisputably mandatory subject of bargaining. And although the issue had been a subject of discussion in negotiations, the implemented policy had never been mooted by the Respondent. Thus, the implemented policy was not part of a pre-impasse offer that could be unilaterally implemented upon an overall bargaining impasse. *Taft Broadcasting, Co.*, 163 NLRB 475, 478 (1967) (“after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals”), *review denied* 395 F.2d 622 (D.C. Cir. 1968). In any event, there is no evidence, on claim, that the parties had reached a valid good-faith bargaining impasse as of the date of the implementation.

The Respondent’s implementation of the Driver’s Accountable Act violated Section 8(a)(1) and (5) of the Act as alleged.

## II. PARAGRAPH VII OF THE COMPLAINT

### Overall Bad-Faith Bargaining

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.” Section 8(d) of the Act defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” A “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002).

“In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” *Public Service Co.*, 334 NLRB 487, 487 (2001) (internal citations omitted), *enfd.* 318 F.3d 1173 (10th Cir. 2003). From a party’s total conduct both at and away from the bargaining

table, the Board determines whether the party is “engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Id.*

It is a statutory requirement that good-faith bargaining “does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. § 158(a)(5). At the same time, the employer is “obliged to make *some* reasonable effort in some direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (Board’s emphasis), citing *NLRB v. Reed & Prince, Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953), *cert. denied* 346 U.S. 887 (1953).

“Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining.” *Public Service Co.*, *supra* at 487–488, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), *affd.* in relevant part 906 F.2d 719 (D.C. Cir. 1990), *cert. denied* 498 U.S. 1053 (1991). Further, an inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer’s bad faith. See *A-1 King Size Sandwiches*, 265 NLRB [850[,] 859 [(1982), *enfd.* 732 F.2d 872 (11th Cir. 1984), *cert. denied* 469 U.S. 1035 (1984)]. *Public Service Co.*, *supra* at 487–488 (footnote omitted); *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993) (in assessing bad-faith bargaining, “an examination of the proposals is not to determine their intrinsic worth but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement”).

In this case, the General Counsel contends that the Respondent bargained in overall bad faith from the commencement of negotiations in June 2011 through April 2012. In advancing this argument, the General Counsel relies upon indicia of bad-faith bargaining both at and away from the bargaining table. However, as discussed herein, I find the case to be unconvincing as it pertains to the period prior to April 2012. However, as of April 2012, I find the contention of bad-faith bargaining very compelling.

As discussed above, bargaining began in June 2011. The parties met two to three times monthly through November (but four times in July), and then once in December and once in January 2012, twice in February, twice in March, and three times in April.

The Union provided the Respondent with a proposal on non-economic issues at the first session on June 10. This was a basis for discussion for many of the sessions. The Respondent did not provide counterproposals until November 2011. Many tentative agreements were reached between June and January

2012, but many key issues remained in dispute. For instance, as of January 2012, tentative agreements were reached on union officials' access to the employer's premise, and there was agreement on charter work (including the union's agreement that nonunit mechanics could drive charters that were more than 100 miles in distance). The parties remained in dispute throughout negotiations over the Union's proposal that required employees to join and maintain union membership (with provisions for objecting employees to avoid membership and pay a servicing fee). No tentative agreements were ever reached on wage or holidays among other significant items.

Notably, with one exception, the General Counsel's argument for bad-faith bargaining does not rely on the details of events at the meetings during June through January 2012. The exception is the parties' dispute over "just cause" for discipline. In November 2011, the Employer made good on its contention at the bargaining table that "just cause" should be defined in the contract, and proposed a counterproposal doing just that. The Employer's counterproposal excluded employees "written up based on just cause" from using the grievance procedure, and excluded laid-off employees from the grievance procedure. The proposal defined just cause to include, but not be limited to, an array of 20 offenses ranging from "committing a sex crime" to "failing to adhere to safety rules," and "customer complaint," thus proposing that an employee disciplined or discharged for such an alleged violation had no recourse to the grievance procedure.

However, I am unwilling to find that the Employer's initial definition of "just cause" or its exclusion of employees written up for just cause offenses, or laid-off employees, from the grievance procedure, is, by itself, an indicia of bad-faith bargaining. In this regard I note that the Employer's proposal did not contain a no-strike proposal. Without that—and one could not reasonably be implied where the scope of the proposed grievance procedure was so narrow—there is no basis for arguing that the Employer's November 22 just cause provision evidenced bad faith. As evidence of bad-faith bargaining, an employer's insistence on an ineffective grievance procedure—or no grievance procedure—usually requires a concomitant demand that employees waive the right to strike. Without such linkage, it is difficult to argue that employee is left with fewer rights under the labor agreement than it would under law. See *San Isabel Electric Services*, 225 NLRB 1073, 1079 fn. 7 (1976); *Target-Rock*, 324 NLRB 373, 386 (1997), enfd. 172 F.3d 921 (D.C. Cir. 1998).

The away-from-the-table indicia of bad-faith bargaining relied upon by the General Counsel to make his case is also quite limited during this pre-April 2012 period. The sum of it is two instances of unilateral changes: the unilateral changes to the break room in May 2011, and the unilateral changes in the 2011 "welcome back" letter.

It is well-settled that unilateral changes may be an indicia of a lack of good-faith bargaining. *Whitesell Corp.*, 357 NLRB 1119, 1123 (2011); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (unilateral changes may reflect on the Respondent's intent not to bargain in good faith). Moreover, the fact that these two unilateral changes relied upon by the General Counsel were not pled as violations of the Act—

because of concerns related to Section 10(b) of the Act (see GC Br. at 20 fn. 3)—is not significant. It is settled that conduct that is not an independent unfair labor practice may still support a finding of overall bad-faith bargaining. *Universal Fuel Inc.*, 358 NLRB 1504, 1504 (2012) ("unnecessary to determine whether any of the individual acts just described was unlawful in and of itself. Instead, the Respondent's conduct, as a whole, supports the judge's determination that the Respondent was not bargaining in overall good faith and thereby constitutes a violation of Section 8(a)(5)"); *Houston County Electrical Cooperative*, 285 NLRB 1213 (1987).

However, as evidence of overall bad-faith bargaining during the June 2011 through March period, these two unilateral changes cannot carry the load they are assigned in the General Counsel's case. Although the General Counsel cites no case on point, I agree, and will assume, that the May 2011 removal of the pool table, elimination of cable channels, and reduction of TV size from the breakroom constitute material changes in a mandatory subject of bargaining that should have been bargained with the Union. It has long been held that food and beverage service, parking privileges, and other such benefits are mandatory subjects of bargaining. Here, the breakroom, with its accoutrements, provided a place for workers to remain on site in between morning and afternoon bus runs, a benefit for both employees and the employer. I note however, that as an alleged indicia of overall bad-faith bargaining, this incident is weakened by the fact that it occurred prior to the time that collective bargaining began and prior to the time period during which the General Counsel is alleging overall bad-faith bargaining. The overall bad-faith bargaining is alleged to have occurred from June 2011 to April 2012. The breakroom changes occurred in May 2011. So while the unilateral breakroom changes were wrongly undertaken, they serve only as background to the Respondent's bargaining conduct during the June 2011 through April 2012 time period at issue.

This leaves the more significant changes in terms and conditions set forth in the 2011 welcome-back letter. These constituted indisputable and in many cases significant changes in terms and conditions of employment.<sup>10</sup> Had a timely charge been brought, the failure to notify the Union and bargain to an overall impasse before implementing these changes would certainly have been violative of the Act. Thus, this unilateral change, like the May 2011 change to the breakroom, demonstrates a lack of commitment to the bargaining process by the Respondent. However, as discussed above, the evidence for overall bad-faith bargaining—as evidenced in the collective bargaining for a new agreement—is nonexistent prior to April

<sup>10</sup> I note that Gardunio's contention that the changes were required by the Chicago Public school system rules is (1) largely not true and (2) irrelevant. While some of the changes may have been attributable to school requirements—no evidence for this was supplied—many clearly were not. Thus, rates of pay, penalties, and discipline, are unlikely to be dictated by the school system. No evidence was presented by the Respondent to allow a determination of which rule changes were required by the Chicago Public School contract. In any event, it is irrelevant. Even if required by the contract with the Chicago Public Schools, such changes were still subject to bargaining if, as here, they were otherwise mandatory subjects of bargaining.

2012. These two away-from-the table indicium of bad-faith bargaining—one occurring before collective bargaining began—are inadequate, particularly given the dearth of evidence about the bargaining itself—to prove overall bad-faith collective bargaining during the period June 2011 through March 2012. Rather, they simply provide evidence of two discrete unilateral changes in terms and conditions of employment that—had they been pled as violations—would have been the basis for a violation of the Act.

I find that the evidence is insufficient to permit the conclusion that there was overall bad-faith bargaining demonstrated in the June 2011 through March 2012 period.<sup>11</sup>

The picture changed, however, on April 2, 2012, with the Respondent's submission of its final proposal.

The Employer's final offer, provided to the Union on April 2, 2012, contained a proposal on discharge, suspension, and other disciplinary action that was similar to its November 2011 proposal. However, it added new conditions constituting just cause for discharge or for discipline that are clearly unlawful under Board precedent, including "disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication."<sup>12</sup> The April 2 proposal also included a list of infractions for which an employee could be "written up," including "distributing union literature on Company time," "attending a union meeting on

Company's property," and "attending a union meeting on Company time."<sup>13</sup>

The Respondent maintained these facially unlawful proposals until it withdrew recognition from the Union on April 24. This is bad-faith bargaining. I accept the contention of the Respondent's witness Attorney Genson that this was not necessarily the final proposal the Respondent was willing to give to the Union (had it not withdrawn from bargaining altogether). A "final" proposal—which is what this was called and what it was—is indicative of, and consistent with, but not always conclusive evidence of insistence. But the proof, so to speak, is in the pudding. This was, in fact, the Employer's final proposal, until it (unlawfully, as discussed below) withdrew recognition. Accordingly, from April 2, 2012, forward—until the Respondent unlawfully withdrew recognition—the Respondent was demanding acceptance of unlawful proposals as a condition of entering into a labor agreement. Moreover, the inference of bad-faith bargaining is heightened by the fact that these facially unlawful and regressive bargaining demands were introduced suddenly after months of negotiations and three months after the Employer's initial counterproposal.<sup>14</sup>

Another indicia of bad-faith bargaining that may be found in the Respondent's final proposal is in its withdrawal without legitimate explanation from tentative agreements already reached between the parties. The parties had tentatively agreed to the language governing the scope of work to be covered by the labor agreement, language proposed by the Union in June 2011. This included charter work which was a significant source of income for drivers and the distribution of charter work was a significant issue for the employees. For the first time, in the Respondent's final proposal, the Respondent proposed wholesale removal of charter work from coverage of the agreement.

<sup>11</sup> The General Counsel also contends that Gardunio's lack of involvement in negotiations—while the Respondent's negotiators made clear that Gardunio must approve all contract provisions—provides evidence of bad-faith bargaining. However, the record is simply too limited to demonstrate that Gardunio's failure to attend the negotiations until February 2012 hindered the negotiations in any substantial respect.

<sup>12</sup> Rules penalizing "disparagement or placing the Company in a negative light via social media or on Company property by any other means of publication" constitute an unlawful overly-broad restriction on employees' rights. *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (prohibition on posted statements "that damage the Company, defame any individual or damage any person's reputation" unlawfully overbroad. See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule against "derogatory attacks on hospital representatives" unlawful), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) ("By permitting the punishment of employees for speaking badly about hospital personnel, the employer 'failed to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities'" (quoting *American Cast Iron Pipe v. NLRB*, 600 F.3d 132, 137 (8th Cir. 1979)); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) ("rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful"); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348, 356–357 (2000) (rule prohibiting "false or misleading work-related statements concerning the company, the facility, or fellow associates" is unlawful), enfd. 297 F.3d 468 (6th Cir. 2002); *Knausz BMW*, 358 NLRB 1754, 1754 (2012) ("courtesy" rule prohibiting "disrespectful" conduct unlawful); *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2, 975 (1988) (rule prohibiting false statements unlawful).

<sup>13</sup> See *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994) (policy prohibiting solicitation or distribution "on company property, on company time" presumptively unlawful); *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 533 (9th Cir. 1986).

<sup>14</sup> The Board has stated that "Regressive bargaining . . . is not unlawful in itself; rather it is unlawful if it is for the purpose of frustrating the possibility of agreement." *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001), citing *McAllister Bros.*, 312 NLRB 1121 (1993); see also *Houston County Electric Cooperative*, 285 NLRB at 1214 (regressive bargaining tactics that are "designed to frustrate bargaining" are "an indicium of bad-faith bargaining"). The Respondent's bargainer, Attorney Genson, attempted to explain regressive proposals limiting union representatives from holding meetings or distributing union literature to employees "on company time," as a consequence of what she claimed was the union's "crashing" of an employee safety meeting. I note that there was no record evidence of such misconduct by the Union that would justify such a change in proposal by the Employer, and thus, the proposal is evidence of bad-faith regressive bargaining. But even more significantly, there was no explanation at all offered for the Respondent's addition to its disciplinary proposal in its final offer of the blatantly unlawful provision threatening employees with discipline for conducting protected activity on "company time." Given the unlawful nature of the proposals, the only motive appears to be retaliatory and cannot be justified as a legitimate response to events at the plant.

It is well settled that “[t]he withdrawal of a proposal by an employer without good cause is evidence of a lack of good-faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon . . . .” *Driftwood Convalescent Hospital*, 312 NLRB 247, 252 (quoting *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983)), *enfd.* 67 F.3d 307 (9th Cir. 1995). Here, there is no legitimate explanation for this drastic, abrupt, and late effort to remove a significant part of the traditional bargaining unit employees’ work from the scope of the agreement. It is behavior completely at odds with that of an employer seeking to that is pursuing its statutory obligation “to make some reasonable effort in some direction to compose his differences with the union.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), citing *NLRB v. Reed & Prince Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953), *cert. denied* 346 U.S. 887 (1953).<sup>15</sup>

Finally, I note the Respondent’s refusal to propose any health care. While there is no requirement that an employer provide health care, it is a mandatory subject of bargaining. At the hearing, the Respondent’s explanation made clear that its “non-proposal” was a further indicia of bad faith. As explained by Genson, “the issue with the health insurance was . . . that Obamacare was going to get kicked in and we said that . . . we kind of got to hold off a little bit to figure out what’s going on with that. And so it wasn’t we’re not ever going to provide it . . . its we’re going to comply with whatever comes up . . . . There was no agreement as to it because of the issue that was going on in the country.” As Genson explained, the Respondent was not saying “we’re not going to provide it” but was awaiting the implementation of “Obamacare” before it would be willing to reach any agreement on health care benefits.

We are all waiting to see the implications of the Affordable Care Act. But the duty to bargain is not suspended until it is fully implemented and all its implications clear. The Respondent had a statutory duty to bargain over health care *in the negotiations*, not at some future time of its choosing. Its position is that there would not be any “agreement as to it” as it awaited the rollout of the new law is an admission of a refusal to bargain over a mandatory subject of bargaining. Although not pled as a *per se* violation of the duty to bargain, it is surely one more indicia of the bad faith that the Employer brought to the negotiations.

As to away-from-the table evidence during this period, as discussed above, the implementation of the “Driver’s Accountable Act” on or about April 6, 2012, constituted an unlawful unilateral implementation and supports the overall failure to bargain case. See *Whitesell Corp.*, *supra*; *Bryant & Stratton Business Institute*, *supra*. This unlawful implementation occurred just days after the Respondent’s final proposal, at a time when the parties were still in the midst of bargaining, although

<sup>15</sup> The suggestion of bad faith is more not less pronounced by the fact that the parties had extensively bargained about charters and agreed that nonunit mechanics could drive charters that took the buses more than 100 miles from the facility. It is nonsensical to suggest, as the Respondent’s witness did at trial, that this agreed-upon concession by the Union provided justification, or required as a matter of conforming language to this agreement, the wholesale elimination of charter work from the scope of the labor agreement and from the bargaining unit.

some of Gardunio testimony about it provides specific support for the General Counsel’s claim that the Respondent had already dispensed with the bargaining process by this time. Gardunio testified that when the driver’s accountable act forms were issued (April 6, 2012), “We no longer had negotiations. There were no more negotiations going on and then this form came out. . . . We weren’t even talking anymore.” This constitutes an admission that the unilateral implementation of the driver’s accountable act was undertaken in lieu of and in derogation of the duty to bargain and renders the implementation of the driver’s accountable act particularly supportive of the overall bad-faith bargaining allegation.

The other “away-from-the-table” evidence relied upon by the General Counsel as support for its bad-faith bargaining claim is the Respondent’s actions with regard to the decertification petition. However, the fact that the decertification petitioner Lopez and his coemployees Penro and Patitucci collected signatures on the premises, and not only—as they described in their testimony—across the street from the facility—does not prove that Respondent illicitly collaborated in the petition drive. On the other hand, Gabino’s rewarding of employee Deltoro with charter work because of his willingness to be on the Employer’s “side” in the decertification campaign does evidence illicit Employer involvement. Such conduct by a supervisor of the Respondent is clearly unlawful, though not independently alleged as such. It does provide “away-from-the-table” evidence of bad-faith bargaining as a decertification petition has a “foreseeable effect of obstructing the bargaining process.” *Wahoo Packing Co.*, 161 NLRB 174, 179 (1966). The Respondent’s illicit support for the petition is an indicia of bad-faith bargaining. *Id.*; see also *Top Job Building Maintenance Co.*, 304 NLRB 902, 907 (1991) (“It is well settled that an employer violates Section 8(a)(5) and (1) of the Act when its supervisor who is not a member of the bargaining unit solicits employee signatures to a document seeking to deauthorize a union as a collective-bargaining representative”).

In sum I find that the allegation of overall bad-faith bargaining is proven—but only for the period beginning April 2, 2012. It was then that the Respondent’s regressive bargaining, assertion of unlawful proposals in its final offer, final insistence on not bargaining over health care, its unlawful unilateral implementation (a few days later) of the driver accountable act, and its support for the decertification petition, occurred.

I further note that, viewing the circumstances in their totality, it is more likely than not—and I find—that the sudden unveiling of the regressive, tentative-agreement breaking, and unlawfully provisioned final offer on April 2, 2012, represented a purposeful and conscious effort by the Respondent to undermine the possibility of progress at the negotiating table. As evidenced by Gabino’s actions with Deltoro, the Respondent was aware of the decertification petition around this time, and probably—given the evidence of Lopez and Penro’s solicitation in open view on company property—was aware of it as of March 21. With the decertification process in motion it strikes me as no coincidence, but rather, a goal of the Respondent to foreclose any possibility of reaching an agreement before the upcoming end of the certification year. The Respondent’s final offer made sure of that.

The Respondent violated Section 8(a)(1) and (5) of the Act by its overall bad-faith bargaining without intent to reach an agreement beginning April 2, 2012.

III. PARAGRAPH XIII OF THE COMPLAINT  
WITHDRAWAL OF RECOGNITION

Based solely on its receipt of the decertification petition, the Respondent withdrew recognition from the Union on April 24, 2012.

The General Counsel contends that the withdrawal of recognition was unlawful. He offers three independent grounds for finding that the decertification petition cannot justify the Respondent's withdrawal of recognition from the Union. First, the General Counsel argues that the Respondent's unlawful bargaining tainted the petition. Second, the General Counsel contends that the petition is an inadequate basis on which to withdraw recognition because the petition was signed by employees during the Union's certification year, and, argues the General Counsel, the Employer was aware of the petition during the certification year. According to the General Counsel, this precludes reliance on the petition as a valid basis for withdrawal of recognition. Third, the General Counsel argues that the Respondent was required but failed to prove that the petition demonstrated a loss of majority support, primarily because of the failure of the Respondent to authenticate the petition's signatures. The General Counsel contends that based on these arguments, the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union based on the petition.

The General Counsel's first argument is rendered a thin reed—or at least, a more complicated one—on which to rest its argument, as I have found that the bad-faith bargaining did not commence until April 2, 2012, after collection of the decertification signatures in March. However, I need not reach this argument because the General Counsel's remaining arguments compel the result that the petition did not legitimize the withdrawal of recognition on April 24.

*A. The Petition was Generated During the Certification Year, and Therefore, Cannot Provide a Basis for Withdrawal of Recognition after the Certification Year*

The precondition for a union's service as a bargaining unit's exclusive representative is the existence of majority support for the union within the unit. *Auciello Iron Works, Inc. v. NLRB*, 518 U.S. 581, 785–786 (1996). This reflects “the Act's clear mandate to give effect to employees' free choice of bargaining representatives.” *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001). However,

[t]he Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

*Levitz*, supra at 720.

The presumption of majority support is usually rebuttable, but in some periods of a collective-bargaining relationship it is conclusive. One such period is during the first year after certification. “To foster collective bargaining and industrial stability, the Board has long held that a certified union's majority status ordinarily cannot be challenged for a period of one year.” *Chelsea Industries*, 331 NLRB 1648, 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002).

After expiration of the certification year, an “employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition,” but “only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001). As the Board in *Levitz*, supra at 725, explained, an employer's resort to “self-help” measures to reject its employees' unionization (i.e., a unilateral withdrawal of recognition) carries some risk for the employer:

[A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

The question here is whether the Respondent proved by a preponderance of the evidence that the Union had, in fact, lost majority support at the time the employer withdrew recognition on April 24, 2012.

Its evidence was the petition for decertification signed by employees over 1 month before, in March 2012, during the period in which the certification bar was in effect. I agree with the General Counsel that this poses a legally fatal problem for the Respondent's withdrawal of recognition.

The Board held in *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002), that proof of loss of majority support justifying withdrawal of recognition may not be demonstrated “after expiration of the certification year . . . on the basis of an antiunion petition circulated and presented to the employer during the certification year.” In its ruling, the Board expressly endorsed the reasoning and validity of the holding in *United Supermarkets*, 287 NLRB 119, 120 (1987), enfd. 862 F.2d 549 (5th Cir. 1989). In *United Supermarkets*, the Board held that just as a decertification petition filed with the Board to during a certification year cannot provide a basis for a decertification election, an employer cannot not rely on a decertification petition filed prior to the end of the certification year to justify its withdrawal of recognition:

Although it is true that the Respondent delayed formally withdrawing recognition from the Union until the certification year expired, it is also true that the Respondent relied in part on this prematurely filed petition to support its withdrawal. We believe that just as the petition could not raise a question concerning representation nor be acted on by the Respondent

within the certification year, the Respondent cannot subsequently rely on it to justify a more timely withdrawal of recognition.

287 NLRB at 120.<sup>16</sup>

In this case, the Respondent acted to withdraw recognition just days after the expiration of the certification year bar based on a petition that was circulated and signed by employees during the certification year. This is not permitted pursuant to *United Supermarkets*, reaffirmed by the Board in *Chelsea Industries*. It is an independent violation of Section 8(a)(1) and (5) of the Act for the Respondent to withdraw recognition based on such a petition.

In his brief, the General Counsel goes to great lengths to argue that—contrary to the claims of the Respondent’s witnesses and the denials of the employees involved in the solicitation of the decertification petition—the Respondent must have received a copy of the petition prior to the expiration of the certification year on April 18, 2012. The evidence does not permit me to draw that conclusion. It is however, undoubtedly true that the Respondent had knowledge of the petition during the certification year. Thus, Gabino’s actions in “incentivizing” Deltoro to support the petitioners provides direct evidence that he was aware of the petition drive and illegitimately invoked the power of the employer to control scheduling to coerce support for the decertification drive. Gabino was the chief mechanic, and an admitted agent and supervisor of the Respondent. His knowledge of the petition drive during the certification year is appropriately imputed to the Respondent.<sup>17</sup>

I should add, however, that in my view, and pursuant to the Board’s ruling in *United Supermarkets*, reaffirmed in *Chelsea Industries*, whether or not the Respondent knew of the petition during the certification year, it is precluded from relying on it to withdraw recognition after the expiration of the certification year. During the certification year majority support is conclusively presumed and as a matter of Board policy evidence to the contrary is not recognized. Indeed, any other policy would fail to give full conclusive effect to the initial certification year presumption of majority support. As the Board in *Chelsea Industries* recognized, the conclusive presumption of majority support during the certification year is more strictly enforced than other bars to question of representation. Thus, the Board in *Chelsea Industries* ruled that, unlike contract bar situation, where evidence of a lack of majority support during the term of an extant collective bargaining agreement permits an “anticipa-

<sup>16</sup> The Board in *United Supermarkets* also held that the withdrawal of recognition was unlawful because the decertification petition in that case was tainted by employer unfair labor practices. However, lest there be any confusion, the Board in *Chelsea Industries* explained that there were two holdings in *United Supermarkets*. The Board explained that the ruling in *United Supermarkets* precluding withdrawal of recognition based on evidence from within the certification year was one of “two central holdings” in the *United Supermarkets* case and the two holdings “‘stand independent’ of each other.” 331 NLRB at 1649 (internal quotations omitted).

<sup>17</sup> *State Plaza*, 347 NLRB 755, 756 (2006) (supervisor’s knowledge of union activity appropriately imputed to employer); *Dobbs International Services*, 335 NLRB 972, 973 (2001).

tory” announcement of a withdrawal once the agreement expires, in the initial certification situation the same evidence does not permit a subsequent withdrawal of recognition. In reaching this result, the Board in *Chelsea Industries* recognized that “there are important differences between” the contract bar rule situation—which occurs “during the term of a collective-bargaining agreement and in the context of an established collective bargaining relationship” (331 NLRB at 1650)—and the situation of the initial certification year bar.<sup>18</sup>

The reasons for strict adherence to the certification bar rule cited by the Board in *Chelsea Industries* were the same reasons cited by the Supreme Court when it approved the Board’s certification year bar rule in *Brooks v. NLRB*, 348 U.S. 96 (1954): first, the rule is necessary “to give a union ‘ample time for carrying out its mandate on behalf of its members [without] be[ing] under exigent pressures to produce hothouse results or be turned out’” and second, “to deter an employer from violating its duty to bargain: ‘It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties at any time. . . .’” *Chelsea Industries*, 331 NLRB at 1648, quoting *Brooks*, 348 U.S. at 100.

Notably, the first of these two reasons cited in *Chelsea Industries* for rejecting reliance on evidence of minority support marshaled during the certification year applies whether or not the employer was aware of the premature petition evidence during the certification year. Thus, the Board and the Supreme Court agree that employee dissatisfaction should not be a concern for the union during the certification year. However, it necessarily will be if dissatisfaction during the certification year can later be relied upon to justify a withdrawal of recognition. Thus, even without employer knowledge of a certification year decertification petition, the fact that it was garnered during the certification bar precludes its use for an employer’s unilateral withdrawal of recognition after the expiration of the certification bar.<sup>19</sup>

<sup>18</sup> The Board in *Chelsea Industries* explained that, unlike the contract bar situation,

in the first year following the union’s certification, negotiations of ten commence in the aftermath of a contested representation proceeding. When the parties appear at the negotiating table during the certification year, they must attempt to put their differences behind them and forge a new bargaining relationship. The difficulty or their undertaking is complicated by the fact that they are negotiating for the first time without any prior contract or experience to guide them. Therefore the need is great for an insular period in which the bargaining relationship can stabilize and succeed free from distraction.

331 NLRB at 1650 (citations omitted).

<sup>19</sup> I note that in Board cases since *Chelsea Industries*, the Board has found it unnecessary to pass on this understanding of the rule of *Chelsea Industries*. See *Virginia Mason Medical Center*, 350 NLRB 923, 923 fn. 5 (2007); *Badlands Golf Course*, 350 NLRB 264, 266 fn. 9 (2007); *Goya Foods of Florida*, 347 NLRB 1118, 1122 fn. 13 (2006), enf’d. 525 F.3d 1117 (11th Cir. 2008); In re: *Saginaw Control*, 339 NLRB 541, 545 fn. 7 (2003) (Board majority does not reach the issue, but one Board Member agrees that withdrawal of recognition was unlawful under *Chelsea Industries* because “employee petition was signed during the Union’s initial certification year”); see *LTD Ceramics, Inc.*,

In any event, as referenced above, it is clear that in this case the Respondent knew of the decertification petition within the certification year. Thus, the second policy rationale girding the *Chelsea Industries* holding—barring an employer from relying upon a decertification petition garnered during the certification bar in order to “deter an employer from violating its duty to bargain”—is also operative here. The Respondent’s knowledge of the petition means that the Respondent knew—to the detriment of the bargaining process—“that, if he dillydallies or subtly undermines, union strength may erode and thereby relieve him of his statutory duties.”” *Chelsea Industries*, 331 NLRB at 1648, quoting *Brooks*, 348 U.S. at 100. Indeed, that appears to be precisely the gambit engaged in by the Respondent in this case. Thus, even assuming, arguendo, that the rule of *Chelsea Industries* applies only if the employer has knowledge of the decertification campaign, that requirement is fully met in this case.

Accordingly, I conclude that the Respondent was not privileged to rely upon the petition garnered during the certification year to withdraw recognition after the lapse of the certification year. The Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on April 24, 2012.

*B. The Respondent Failed to Satisfy its Burden to Prove that the Petition Evidenced Loss of Support Sufficient to Support a Withdrawal of Recognition*

The General Counsel also contends that the withdrawal of recognition was unlawful because the Respondent failed to prove that the petition demonstrated a lack of majority support for the Union. I find merit in the General Counsel’s claim.

While *Levitz* permits an employer to rely on a petition to withdraw recognition, the employer does so, “at its peril.” 333 NLRB at 725. The peril is precisely identified: “If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).” *Id.*

Thus, where an employer seeks to justify its withdrawal of recognition based on the union’s loss of majority support, it is the employer’s burden to prove the loss of majority support.

The Board has squarely held that where an employer relies on an employee petition for evidence of the a union’s loss of majority support, it is the Respondent’s obligation to authenticate the petition signatures on which it relies. *Ambassador Services*, 358 NLRB 1172, 1172 fns. 1 and 3 (2012). (As Judge Carson pointed out in *Ambassador Services, Inc.*, in reasoning adopted by the Board, it is the same standard of proof required

of a union (or the General Counsel) when seeking a bargaining order based on authorization cards.)

Here, no effort to authenticate the petition’s signatures was undertaken by the Respondent at trial or, as far as the record reveals, otherwise. The three employees involved in the solicitation of the petition signatures testified, however, their testimony does not authenticate anything close to a majority of the signatures. Lopez testified generally as to the process he used to solicit signatures but his testimony offers nothing in the way of evidence that would prove the authenticity of any of the signatures on the petition. Penro stated that he recognized “most of the ones that signed,” and testified that “I know when I had the paper and they were signing it, I know . . . they worked there.” However, he also testified that he only obtained and witnessed the signing by employees of one page of the multipage petition (p. 4), which contains 17 signatures in addition to Penro’s. To the extent his testimony may be read to state that he was also “in and out” when certain other employees signed, it is vague and indeterminable which or how many other employees he saw sign the petition. Patitucci testified that the names on the petitions were all employees of Latino Express, but that does nothing to authenticate the signatures. She testified that she saw people sign the petition, but there is no suggestion how many she observed, and according to Penro’s testimony of the role she played, she would not have observed any of the ones that he signed. Patitucci testified that she obtained three of the signatures.

Thus, at most, 20 signatures, plus the signatures of the employees who solicited signatures, or 23 signatures, were authenticated during the trial. As the General Counsel points out, there is no record evidence definitively establishing the number of unit employees at the time of the withdrawal of recognition, but the evidence points to a number of 84, the number of employees on a list of employees submitted by the Employer to the Region during the investigation of this case. In a May 10, 2012 letter to the Region, the Respondent maintained that this list was accurate as of February 12, 2012 (although, oddly, the list indicates it was generated in June 2012, which postdates the May 10, 2012 letter from the Respondent’s counsel enclosing the list). In any event, with only 23 signatures authenticated, the rule of *Ambassador Services*, prohibits a ruling in favor of the Respondent unless the evidence shows there were 46 or less unit employees, and nothing at all suggests the number is that low. Accordingly, the Respondent’s failure to authenticate the petition signatures amounts to a failure to demonstrate that the Union lacked majority support, and the Respondent’s withdrawal of recognition is unlawful on this basis.<sup>20</sup>

<sup>20</sup> I note that, particularly under the circumstances, the Respondent’s failure to authenticate the signatures should not be considered an oversight or technicality that can be ignored. The only evidence of authentication at all comes from the three employees who solicited the signatures. Their testimony about the process they undertook to obtain signatures has been demonstrated to be, at least, not the whole truth, as indicated by the credited testimony (discussed above) of witnesses who saw employees approached on company property by Lopez and Penro and asked to sign the petition. Given this, to simply assume the authenticity of the signatures would be particularly unwarranted. Authentication is the Respondent’s burden. And it failed to carry (or even attempt

341 NLRB 86 (2004) (Board majority adopts judge’s finding that petition signed by a significant number of employees “during the last hours of the last day of the certification year” is “de minimus” example of “prematurity . . . so slight as to be insignificant” and permitted petition as evidence of loss of majority support supporting withdrawal of recognition 6 days after end of certification year), *enfd.* 185 Fed. Appx. 581 (2006).

## CONCLUSIONS OF LAW

1. The Respondent Latino Express Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party Teamsters Local 777 (the Union) is the certified collective-bargaining representative of the following appropriate unit of the Respondent's employees:

All full-time and regular part-time drivers employed by the Employer at its facility presently located at 3230 West 38th Street, Chicago, Illinois; excluding mechanics, dispatchers, trainers, charter directors, payroll people, payroll assistants, public relations people, maintenance directors, office personnel, professional employees, managerial employees, guards, and supervisors as defined in the Act.

3. The Respondent has violated Section 8(a)(1) and (5) of the Act, since on or about April 2, 2012, by bargaining in bad faith without intent to reach an agreement.

4. The Respondent violated Section 8(a)(1) and (5) of the Act on or about April 6, 2012, by unilaterally implementing the Driver's Accountable Act workplace policy without affording the Union an opportunity to bargain with respect to these matters and without first bargaining to a valid bargaining impasse.

5. The Respondent violated Section 8(a)(1) and (5) of the Act, on or about April 24, 2012, by withdrawing recognition from the Union as the collective-bargaining representative of the above-referenced unit of the Respondent's employees.

6. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

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

Having found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the Driver's Accountable Act, the Respondent shall be ordered, upon the Union's request, to rescind those changes encompassed within the implementation of the Driver's Accountable Act and restore the status quo ante. The Respondent will be required to make whole any bargaining unit employees for losses suffered as a result of the Respondent's unlawful implementation of the Driver's Accountable Act. The make-whole remedy shall be computed in accordance with *Ogle Protective Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Latino Express, Inc.*, 359 NLRB 518 (2012), the Respondent shall 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

---

to carry) that burden in circumstances where significant contradictions dog the testimony of the petition solicitors regarding the solicitation process.

the backpay awards to the appropriate calendar quarters for each employee.

I have found that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to collectively bargain with the Union as the collective-bargaining representative of an appropriate bargaining unit of employees and by withdrawing recognition from the Union as the employees' collective-bargaining representative. Accordingly, the Respondent shall recognize the Union and, upon request, bargain for a reasonable period of time (as set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002)), with the Union as the bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed document.

The Board consistently has held that that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair Intl.*, 322 NLRB 64, 68 (1996). For the reasons set forth in *Caterair*, supra, an affirmative bargaining order is warranted as a remedy here.

However, while the Board applies *Caterair*, the Board also recognizes that the Court of Appeals for the D.C. Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics Inc. v. NLRB*, 209 NLRB F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Excel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In view of this, the Board analyzes the facts in accordance with the D.C. Circuit precedent, which was summarized in *Vincent*, supra at 738, as follows: an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: '(1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.'"

Adhering to the Board's approach, and analyzing the facts of this case under the three-factor balancing test outlined by the D.C. Circuit, I find that the facts warrant an affirmative bargaining order here.

An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining for the full one year certification period by the Respondent's refusal to bargain collectively with the Union. While I have found that the Respondent's bad-faith bargaining did not begin until approximately 10-1/2 months after certification, the timing was purposeful on the Respondent's part and doomed the bargaining to failure. The employees originally chose union representation but did not receive what Section 7 promises them.

At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation. The duration of the order is no longer

than is reasonably necessary to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent Employer to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.

An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. That is particularly important here, where, as discussed above, the Respondent, instead of bargaining lawfully as required, engaged in regressive and unlawful bargaining at a time it believed it only needed to wait out the certification period. Without an affirmative bargaining order, the Respondent's unlawful bargaining conduct will be rewarded. An affirmative bargaining order also ensures that the Union will not be pressured by the Respondent's unlawful conduct to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and the issuance of a cease-and-desist order.

A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations, because it would allow a challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated. Such a result would be particularly unfair in circumstances such as those here, where the nature of the Respondent's unfair labor practices were designed to preclude effective bargaining representation and, through unlawful conduct, rendered it difficult if not impossible for the Union to win back employee support that it had lost during the certification year. I find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of any employees who oppose the Union's continued representation.<sup>21</sup>

<sup>21</sup> The General Counsel requests that the certification year be extended in accordance with the Board's decision in *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." This "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992); *Accurate Auditors*, 295 NLRB 1163 (1989). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable time." *Alan Ritchey, Inc.*, 354 NLRB 628, 677-678 (2009); *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985).

In this case, the Board's standard remedial response to a finding of bad-faith bargaining, an order to bargain for a reasonable time, as explained and justified in the text, provides an adequate remedy equal to that which I would grant pursuant to *Mar-Jac Poultry*, supra. Indeed, were I to grant an extension of the certification year pursuant to *Mar-Jac Poultry*—in effect an order to bargain for an additional period during which the union's presumption of majority support is insulated

With regard to the cease-and-desist portion of the remedy, the General Counsel contends that a broad cease-and-desist order requiring the Respondent to cease and desist from abridging the rights of employees under the Act "in any other manner" is appropriate for this case. This is a broader remedy than the traditional order that the Respondent refrain from abridging employee rights "in any like or related manner."

A broad order is appropriate where "a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). In this instance, this bargaining unit's union representation campaign in late 2010 and 2011 resulted in findings of multiple violations of the Act against this Respondent. See *Latino Express, Inc.*, 358 NLRB 823 (2012). In that decision the Board considered but rejected the General Counsel's request for imposition of a broad cease-and-desist order, finding that despite the multiple violations during the campaign, a proclivity to violate the Act had not been shown by the violations, all centered around the employer's response to the organizing campaign. However, with the organizing campaign over, the Respondent has been found to have bargained in bad faith, and unlawfully withdrawn recognition from the union in the next phase of the union-employer relationship. At this point, a proclivity to violate the Act is undeniable, as the Respondent has continued to deny the

---

from challenge—I would order an extension of the certification year for a reasonable period of time—effectively the same remedy I am ordering here. In considering the length of any extension of the certification period, the Board has explained that

it is necessary to take into account the realities of collective-bargaining negotiations by providing a reasonable period of time in which the Union and the Respondent can resume negotiations and bargain for a collective-bargaining agreement without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them. Various factors are considered in making such an evaluation, including the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations.

*Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996) (footnotes and internal quotations omitted).

In this case, ordering an extension of the certification year for a few weeks (i.e., the period of time during the certification year in which the bad faith bargaining occurred) would be to "ignore the realities of bargaining" and fail to "provid[e] a reasonable period of time in which the Union and the Respondent can resume negotiations" and hope to move beyond the bad-faith bargaining. Here, the Respondent's final offer and conduct thereafter withdrawing recognition destroyed what little progress the parties had made in earlier bargaining and ensured the failure of the collective-bargaining process. Given this, whether proceeding under *Jar-Mac*, supra, or simply ordering an affirmative bargaining order, I find that an order of a reasonable period of bargaining—defined by *Lee Lumber*, 334 NLRB 399, to be at least 6 months, with the burden on the General Counsel to prove that a reasonable period has not elapsed after 6 months (334 NLRB at 402) is the most appropriate remedy. It will allow the parties to bargain without the shadow of the Respondent's unfair labor practices and enable the Union time to demonstrate to employees what benefits may come from good-faith bargaining.

full measure of rights under the Act to the employees, who chose union representation and opted for collective bargaining. Moreover, the Respondent's bad-faith bargaining, beginning April 2, 2012, was brazen, and, I have found, calculated to play a role in eliminating union representation. At this point further violations may be anticipated and an intensification of remedial options should be utilized in an effort to obtain compliance with the Act. I find that a broad cease-and-desist order is appropriate.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in all Respondent's facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2012. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 13 of the Board what action it will take with respect to this decision.

The General Counsel also seeks an order requiring that the attached notice be read to employees during working time both in English and Spanish. In the previous case involving this

Respondent, the Board declined to order the reading of the notice, noting that "despite the Respondent's misconduct, the Union won the election and has been certified as the employer's representative." *Latino Express*, 358 NLRB 823, 824. However, the new violations in the instant matter were designed to aid in the elimination of union representation. Just as a broad cease-and-desist order is warranted by the persistence of the Respondent's violations, the new violations warrant further measures to assure employees that their rights will be respected in the future. "Reading the notice to the employees in the presence of a responsible management official serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future." *Whitesell Corp.*, 357 NLRB 1119, 1124 (2011). A reading to the employees assembled for that purpose only, on company time, will enable the employees to fully perceive that the Respondent and its managers are bound by the requirements of the Act. *Federated Logistics*, 340 NLRB 255, 258 (2003), *enfd.* 156 Fed. Appx. 386 (2d Cir. 2005). Accordingly, the notice must be read to employees assembled for that purpose, on working time, in both English and Spanish, by a responsible official of the Respondent or, at the Respondent's option, by a Board agent in the presence of responsible Respondent officials. The Board and union representatives will be provided the opportunity to be present to monitor the reading of the notice. *Texas Super Foods*, 303 NLRB 209, 220 (1991).

[Recommended Order omitted from publication.]