

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

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.

and

INDIANA JOINT BOARD, RETAIL, WHOLESALE,
DEPARTMENT STORE UNION, UNITED FOOD &
COMMERCIAL WORKERS UNION, LOCAL 835,
A/W RETAIL, WHOLESALE,
DEPARTMENT STORE UNION, UNITED FOOD &
COMMERCIAL WORKERS UNION

Cases 25-CA-117090
25-CA-117093
25-CA-117097
25-CA-117151
25-CA-117254
25-CA-120437
25-CA-125968

Rebecca Ramirez and Ryan Funk, Esqs.,
for the General Counsel.
H. Joseph Cohen, Esq.,
for Respondent.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on July 15-16, 2014. The Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the Union) filed the charges at issue here on the following dates:

<u>Case</u>	<u>Charge Filing Date</u>
25-CA-117090	November 15, 2013
25-CA-117093	November 15, 2013
25-CA-117097	November 15, 2013
25-CA-117151	November 18, 2013
25-CA-117254	November 19, 2013
25-CA-120437	January 13, 2014
25-CA-125968	April 7, 2014 ¹

On April 30, 2014, the General Counsel issued a complaint covering the first six cases. Subsequently, on June 9, 2014, the General Counsel issued a consolidated complaint covering all seven cases listed above.

¹ All dates are from 2013 to 2014, unless otherwise indicated.

In the consolidated complaint, the General Counsel alleges that SMI/Division of DCX-CHOL Enterprises, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), and also Section 8(a)(1) of the Act, by: on August 19, 2013, threatening employees with job loss and plant closure if they did not agree to accept Respondent's proposal to change employee pay dates; on October 16, 2013, threatening to divide the Company into two entities (one union, and one non union) because employees engaged in union and protected activities; and, on October 16, 2013, bypassing the Union and dealing directly with employees to solicit them to leave Respondent and begin working for a non union company.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by: since August 20, 2013, refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit; on August 22, 2013, denying union officials access to the employee break room; on November 4, 2013, bypassing the Union and dealing directly with employees to announce and distribute \$100 bills to employees; on January 3, 2014, withdrawing recognition from the Union as the exclusive representative of the bargaining unit, and thereafter refusing to meet and bargain with the Union to negotiate a collective-bargaining agreement; and, on or about March 27, 2014, unilaterally changing employee pay dates. Respondent filed a timely answer denying the violations alleged in the consolidated complaint.

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

FINDINGS OF FACT²

I. JURISDICTION

Respondent, a corporation with an office and place of business in Fort Wayne, Indiana, manufactures wires, cables and harnesses at its facility that is also located in Fort Wayne, Indiana. In the twelve months preceding the date of the consolidated complaint in this case, Respondent: sold and shipped goods valued in excess of \$50,000 from its Fort Wayne facility directly to points outside of the State of Indiana; and, at its Fort Wayne facility, purchased and received goods valued in excess of \$50,000 from points outside of the State of Indiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Stuart Manufacturing

² Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

In July 2001, Lionel Tobin became the owner of Stuart Manufacturing, a company that manufactures electronic parts, wires, cables and harnesses. (Tr. 17, 243, 250.) Since Stuart Manufacturing was a minority-owned business and also qualified as a “HUB zone” entity,³ Stuart Manufacturing was eligible to work on contracts (often with the Federal Government) that provided incentives to hire companies with those characteristics. (Tr. 19.)

2. The Union

Since 2000,⁴ David Altman has served as the Union’s representative for the following appropriate bargaining unit at Stuart Manufacturing:

[A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company’s production facilities located in the City of Fort Wayne and County of Allen, Indiana.

(Tr. 105; Jt. Exh. 1, Article I.) In 2011, the Union and Stuart Manufacturing negotiated and executed a collective-bargaining agreement effective from February 9, 2011, to February 8, 2014. (Jt. Exh. 1.)

B. DCX-CHOL Buys Stuart Manufacturing’s Assets

1. The asset purchase

In 2013, Stuart Manufacturing began experiencing some financial difficulty and accordingly hired a consultant to assist with finding potential buyers for the Company. (Tr. 38–39, 48.) As a result of that search, on August 9, 2013, DCX-CHOL Enterprises, Inc. (DCX-CHOL)⁵ bought the assets of Stuart Manufacturing, and began operating the business under its current name, SMI/Division of DCX-CHOL Enterprises, Inc. (Tr. 18–19, 44–45; Jt. Exh. 2.)

Since DCX-CHOL was not a minority-owned business and was not eligible to perform HUB zone work, the asset purchase left a void that Tobin proposed to fill by operating Stuart Manufacturing as a separate company that would compete for contracts that DCX-CHOL could not handle. (Tr. 19, 35–36, 84–85.) Tobin therefore continued to be the owner of Stuart Manufacturing, albeit under circumstances where Stuart Manufacturing was a shell corporation with no assets beyond the funds in its bank account. (Tr. 34–35; Jt. Exh. 2.)

2. Respondent meets with employees and the Union

³ According to Tobin, a business qualifies as a HUB zone entity if it is located in an area targeted for economic development (based on U.S. Census data concerning area poverty levels) and at least 35 percent of the business’ employees reside in that area. (Tr. 19–20.)

⁴ The Union has represented employees at the facility since the 1980’s, through various changes in ownership. (Tr. 105.)

⁵ DCX-CHOL has a total of six divisions: four in California; one in Illinois; and one (SMI/Division of DCX-CHOL) in Indiana. (Tr. 44, 76.)

After finalizing the asset purchase, Respondent's owner, Neal Castleman (joined by Tobin), met with employees in August 2013, to announce the ownership change. (Tr. 48-49, 80, 221-222.) Later, on August 19, Respondent and the Union participated in a special meeting to discuss the transition process. Carol Goods-North, Respondent's Vice President of Human Resources,⁶ provided the Union with a letter that stated as follows:

Dear Dave [Altman]:

This memo serves as a formal notification of change in ownership of Stuart Manufacturing, Inc.

Effective August 9, 2013, DCX-Chol out of Los Angeles, CA has purchased the assets of the Company; Mr. Tobin still owns Stuart Manufacturing, Inc. The Fort Wayne location will be named SMI – a Division of DCX.

The two owners are currently ironing out the particulars as it pertains to which customers will be serviced by Stuart Manufacturing, Inc. or DCX.

Gerry Pettit remains on board as the General Manager for SMI; I will stay on as an employee of DCX as a Liaison/Human Resources Director. My position is a proposed position; finalization will take place within the next coming weeks.

DCX understands that by purchasing the Stuart assets, they became a successor,⁷ [and] therefore would request various modifications to the Bargaining Unit Agreement in order to effectively and successfully manage the operations at SMI.

We expect to have a proposal of [] DCX's requests for modifications within the next week.

In the interim, please forward any questions or concerns to me. . . .

We look forward to an amiable exchange to finalize the agreement between DCX and [Union] members.

(Jt. Exh. 2; see also Tr. 106-109, 151.)

Regarding possible modifications to the collective-bargaining agreement, Goods-North explained that Respondent would likely need to request a change in employee pay dates, since Stuart Manufacturing paid its employees on a biweekly basis (every other Wednesday), and Respondent paid its employees on the fifth and twentieth of each month. Altman responded that he did not anticipate that it would pose a problem to modify the pay dates, but advised that he

⁶ Goods-North is Tobin's sister, and previously served as Stuart Manufacturing's director of human resources. (Tr. 43-44.)

⁷ At trial, Respondent stipulated that on August 9, 2013 (the date that it purchased Stuart Manufacturing's assets), it became the successor employer to Stuart Manufacturing. (Tr. 47.)

nonetheless would need to submit the proposed modification to the bargaining unit for a vote.⁸ (Tr. 50-53, 106-108; see also Jt. Exh. 1, Article XIV, Section 14.6.)

C. *The August 22, 2013, Grievance Meeting*

5

1. Union access history

10 The collective-bargaining agreement states that “[a]n International representative of the Union shall be granted admission to the facility during work hours after his request has been granted by the senior management.” (Jt. Exh. 1, Article XIV, Section 14.2.)

15 For the past seven years, Respondent (and its predecessor, Stuart Manufacturing) generally met with the Union each month to conduct grievance meetings, with Goods-North typically representing the Company, and Altman representing the Union. After many of those meetings, Altman asked Goods-North if he could meet with employees in the break room. Goods-North routinely granted Altman’s requests.⁹ (Tr. 55-57, 99.)

⁸ Both Altman and Union Chair Jamarcus Tinker testified that Goods-North warned them that Respondent could close the facility and move the work if the Union refused to agree to change the employee pay dates. (Tr. 108, 223-224; see also GC Exh. 2, p. 1 (Altman’s notes from the meeting).) Goods-North denied making the alleged threat, describing the notion that she would make such a statement as “absurd.” (Tr. 66.) All three witnesses were equally forthright and credible when they testified about this issue.

I do not see a basis for crediting Altman’s and Tinker’s testimony over Goods-North’s testimony, particularly when one considers the letter that Goods-North presented to the Union at the meeting. Respondent’s August 19, 2013 letter raised the issue of potential contract modifications in a conciliatory tone, and that fact undermines the proposition that Respondent was dead set on modifying the contract to change employee pay dates as soon as possible. Furthermore, since Respondent did not change the employee pay dates until in or about April 2014, and there is no suggestion that Respondent viewed the pay date change as an urgent matter, it does not stand to reason that Respondent (through Goods-North or anyone else) would draw a line in the sand on that issue within days of the asset purchase.

Ultimately, the evidence that the General Counsel presented about the alleged August 19, 2013, threat to close the facility and move the work was, at best, equally credible to Respondent’s contrary evidence on that issue. Accordingly, I find that the “tie” goes to Respondent and I have credited Goods-North’s denial on this point, since the General Counsel bears the burden of proving the allegations in the complaint by a preponderance of the evidence. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591-592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

⁹ I have not credited Goods-North’s testimony that she denied Altman access to the break room on one occasion in the past because “there was something going on and [Altman] agreed.” Goods-North admitted to having trouble recalling the circumstances about this occasion because “it was a long time ago.” Given Goods-North’s uncertainty about this incident, I do not find her testimony on this point to be reliable. Instead, at most, the evidence shows that on one occasion, Goods-North asked Altman to keep his break room visit short because employees had a work assignment that needed attention. Altman agreed. (Tr. 56-57.)

I do credit Gerald Pettit’s testimony that he did not allow the Union to meet with employees in the break room when he was in charge of representing the Company at grievance meetings. Pettit, however, has not held that role for seven years – instead, Goods-North has handled everything concerning

2. Union access on August 22, 2013

On August 22, 2013, Altman participated in the monthly grievance meeting at Respondent's facility. Gerald Pettit, Respondent's vice president and general manager, represented Respondent in person at the grievance meeting, while Goods-North participated by telephone. After the grievance meeting, Altman asked Pettit if he could meet with employees in the break room. Pettit refused because he believed that it was not a good time for Altman to visit because employees were trying to attain certain production goals, and because Respondent had only recently purchased Stuart Manufacturing's assets and Pettit did not want Altman to cause a disruption by stirring up speculation about the implications of the asset purchase transaction. Altman explained that Goods-North allowed him to visit the break room every month after their grievance meetings, and asserted that it would not be disruptive to meet with employees because he (Altman) would only see employees who were on break or at lunch. When Pettit again refused, Altman decided to leave the facility without meeting with employees. (Tr. 86-87, 109-111, 224-225; GC Exh. 2, p. 5.) On all other occasions since August 22, 2013, Respondent has granted Altman's requests to meet with employees in the break room after grievance meetings. (Tr. 68, 95, 167, 236-237.)

D. August/September 2013 – Respondent and the Union Table Further Discussions about Contract Modifications

On August 26, 2013, Altman followed up with Goods-North about what modifications she planned to propose to make to the collective-bargaining agreement. Specifically, Altman advised Goods-North as follows:

We are having a membership meeting on Wednesday. If you can provide me with the contract modifications [you're] looking for, I will discuss them with my members at Wednesday's meeting.

(GC Exh. 3, p. 1; see also Tr. 113, 118.)

On August 29, 2013, Goods-North replied to Altman about the collective-bargaining agreement. Goods-North stated:

Dave, in response to establishing an agreement with [the Union] and the new company; as I stated earlier in the week, we are trying to finalize the transition from Stuart Manufacturing to DCX (SMI). Many challenges are taking a great amount of time to work through.

I would like to propose the following:

SMI accepts the existing contract with a minor [change.] The Pay period changes [from] every other Wednesday to the 5th and 20th of the month. As I mentioned before, the difference is merely 1 day.

grievance meetings for the past seven years. (Tr. 95, 99-100.)

All other Work Rules [remain] the same. If you can agree to this, I believe I can get the new owner to sign.

5 Also, I have attached a copy of the Purchase Agreement; please advise if you have any questions.

Please advise your thoughts. Thank you.

10 (GC Exh. 4, p. 1.)

15 Goods-North and Altman communicated again about possible modifications to the collective-bargaining agreement on September 3, 2013. As indicated in the following email exchange, Goods-North and Altman agreed to put the issue of contract modifications aside because of uncertainty related to the asset purchase, and because a petition to decertify the Union had been filed:

20 Altman: Good morning Carol, If the payday is the only modification you [are] looking for, I suggest that I put together a secret ballot, and conduct the voting in the break room at the plant in order to exp[e]dite the process. Otherwise Thursday will be the first opportunity I'll have to get it to the members for a vote. Let me know your thoughts.

25 G-N: Good morning Dave. We received notification that a petition has been filed with the NLRB for decertification of the current contract [sic]; I've been informed that you are aware and have provided a response. At this point we should wait on the Board's decision before moving forward, do you agree?

30 Altman: Carol, [i]f you prefer to wait, we can wait.

35 G-N: There are too many unanswered questions surrounding the current contract in place; especially since Stuart Manufacturing is still in business. I don't believe we have a choice.

(GC Exh. 4, p. 2; see also Tr. 118-120, 158-159, 251-252.)¹⁰

E. September/October 2013 -- Stuart Manufacturing's Ongoing Presence at the Facility

40 1. Tobin maintains connections to Respondent's facility

Consistent with his idea of operating Stuart Manufacturing as a smaller business that would be eligible for HUB zone and minority-owned business contracts, Tobin (with Respondent's consent) continued to use his old office space and telephone at Respondent's

¹⁰ According to employee Michelle Stump, she filed a decertification petition on August 28, 2013, but that petition was denied due to timeliness issues. (Tr. 252.)

facility, even though he was not on Respondent's payroll as an employee after the asset purchase was completed.¹¹ Tobin also hoped to lease equipment and facility space from Respondent for Stuart Manufacturing, and to that end established a separate mailing address (1613 East Wallace Street) that was at the same location as Respondent's facility (1615 East Wallace Street). (Tr. 23-25, 32-34, 84.)

In addition, Tobin (again, with Respondent's consent) began speaking to individual employees to determine if they would be interested in leaving Respondent to work for Stuart Manufacturing. Specifically, Tobin separately approached a total of about 15 employees (including employees Angela Dixon, Joe Horton and Jamarcus Tinker) while they were working and, either on the shop floor or in Respondent's conference room, asked if they would be interested in working for a newly constituted version of Stuart Manufacturing. Tobin assured the employees that their working conditions would remain the same. (Tr. 20, 25-28, 90, 175-177, 189, 202-204, 214-215, 225-226.) There is no evidence that Tobin stated or indicated in these meetings that Stuart Manufacturing would operate as a non union company. (Tr. 38, 215.)

2. The October 16 grievance meeting

On October 16, 2013, Goods-North spoke with Altman and Tinker by telephone for their monthly grievance meeting. After some initial discussion about employee grievances, Altman asked Goods-North for an update on the sale of the company, and in particular an update on whether the parties to the sale were still considering having two companies. Goods-North answered yes, and added that DCX-CHOL would be located at 1615 Wallace Street, while Tobin's company would be at 1613 Wallace Street.

Next, Altman asked Goods-North if, as Altman had heard, Tobin had been going on to the shop floor to solicit employees to come and work for his company. Goods-North responded that Tobin needed employees who live in the HUB zone so he could continue handling certain government contracts.

Finally, Altman asked Goods-North whether DCX-CHOL and Tobin's company would be under the same or different collective-bargaining agreements. When Goods-North responded that DCX-CHOL would operate under the union contract, but Tobin's company would not because it would be non union, Altman expressed concern about that arrangement and asserted that if Tobin's company began as non union, Altman would talk to Tobin's employees and unionize them.¹² (Tr. 120-124, 226-227; GC Exh. 2, pp. 6-9; see also Tr. 23.)

¹¹ In fact, at least one of Respondent's customers continued to interact with Tobin as if he owned the facility. Tobin forwarded the customer's information to Respondent as needed. Respondent did not compensate Tobin for taking on this role. (Tr. 29-30.)

¹² Goods-North did not testify about the October 16 grievance meeting, other than (in response to a closed question) to deny telling the Union that there was a plan between Stuart Manufacturing and DCX-CHOL to make a nonunion facility. (Tr. 67.) I do not find Goods-North's general denial to be persuasive because it does not rebut Altman's and Tinker's testimony. Indeed, Goods-North only denied that there was a joint effort between DCX-CHOL and Stuart Manufacturing to create a non union company – that limited denial stopped well short of addressing Altman's and Tinker's testimony that Goods-North advised them that Tobin's company would operate as a non union company.

3. Relationship between Respondent and Stuart Manufacturing goes sour

Later in the fall of 2013, the relationship between Respondent and Tobin soured, in part due to disputes that arose about contract payments that Tobin received erroneously because a customer failed to update its payment information to show Respondent as the new owner of the company. Respondent accordingly stopped allowing Tobin access to the facility unless he obtained permission in advance, and any discussions about Stuart Manufacturing leasing Respondent's equipment or facility space came to a halt. (Tr. 22, 30-32, 39-41, 85, 225.)

F. November 4, 2013 -- Respondent Gives each Employee a Surprise \$100 Bonus

1. November 4, 2013 -- the \$100 bonus

In the latter part of October, Respondent's managers observed that the facility was approaching one million dollars in sales. Since the facility had not reached that level of sales for some time (as it normally averaged \$600,000 to \$800,000 in sales per month), Respondent encouraged its employees to pick up their production even further to reach the one million dollar sales mark for the month. (Tr. 77, 79, 87-88, 91-93, 244-245.)

Respondent and its employees ultimately succeeded in reaching the one million dollar sales mark for October. To reward employees (including supervisors, bargaining unit employees, and non-bargaining unit employees) for their efforts, Castleman directed Pettit to give everyone a crisp \$100 bill as a bonus. Accordingly, on November 4, Pettit called an all-employee meeting to announce the bonus, and later that day, supervisors passed out envelopes containing \$100 bills to all employees (which all employees accepted). In at least one instance, Production Manager Jerome Stallworth told an employee that employees might earn additional bonuses in the future if they kept up the good work.¹³ Respondent did not notify or bargain with the Union before announcing and distributing the \$100 bonuses to employees. (Tr. 61-62, 76-79, 88-89, 91-93, 99, 126, 177-178, 204-207, 212-214, 227-228, 243-248.)

2. November 4, 2013 – Union meeting

At 4:30 pm, Altman met with Tinker and two other employees for the Union's monthly meeting. (Normally, Union meetings occur when the work day ends at 2:30 p.m., but on November 4, Tinker notified employees that the meeting would start at 4:30 p.m. because employees were working overtime and thus would still be on the clock at 2:30 p.m.) The paltry attendance (Altman plus three employees) at the November 4 Union meeting was surprising because: employees still had questions related to the recent change in ownership; the Union was electing officers that day; and Union meetings normally drew 8-15 employees. (Tr. 125-126, 178-179, 204, 207, 214, 228-231, 238-240.)

¹³ At trial, Castleman agreed that he intended to award employees a \$100 bonus each month that Respondent reached the one million dollar mark in sales. (Tr. 77, 78-79.) At the time of trial, October 2013 was the only month that Respondent reached the one million dollar sales benchmark – accordingly, Respondent has not awarded any additional cash bonuses based on that production goal. (Tr. 246.)

3. Respondent's and Stuart Manufacturing's history regarding bonuses and gifts to employees

5 Before Respondent purchased Stuart Manufacturing's assets, Stuart Manufacturing had a varied history regarding gifts and bonuses to employees. From the 1980's to the August 2013 asset sale to Respondent, Stuart Manufacturing did not award cash bonuses to employees for their individual performance, nor did it award cash bonuses to all employees based on the Company's performance. In fact, when Goods-North suggested awarding "Stuart Dollars" (pretend dollars that could be used to purchase items at periodic "auctions") to employees based on their performance, the Union opposed the idea because employees would not receive the same amount of Stuart Dollars. (Tr. 66, 71-72, 90, 102, 229.) However, Stuart Manufacturing did have a history of giving or awarding the following items to employees without notifying or bargaining with the Union: turkeys for Thanksgiving; chances to win (via free drawing/raffle) coffee mugs, hats, T-shirts, bags, cameras, televisions and other items that the purchasing department received as free gifts from companies like Staples; and food at company picnics and parties. (Tr. 65, 70-71, 97-98, 100-102, 180-184, 186-188, 191-192, 210-212, 218-219.)

20 In the past, DCX-CHOL has paid cash awards to employees in its Illinois and California facilities for their performance. (Tr. 69.) The November 4 bonus was the first cash award that Respondent paid to SMI division employees. (Tr. 79-80.) Regarding other gifts to SMI division employees, Respondent provided interested employees with up to two free tickets to see the movie "Lee Daniels' The Butler" in August 2013,¹⁴ and provided food and free raffle prizes (e.g., candy, flowers, a camera) for the company Christmas dinner in December 2013. Respondent did not notify or bargain with the Union before providing these gifts. (Tr. 49-50, 71, 101, 179-181, 207-208, 217-218.)

G. November 12, 2013 – Second Decertification Petition Filed

30 On November 12, 2013, employee Michelle Stump filed a second petition to decertify the Union as the representative of the employees in the bargaining unit. Twenty-nine employees in the bargaining unit signed the petition between August 21-23, 2013.¹⁵ Pettit received a copy of the petition in December 2013 (someone placed a copy in his office), and decided to hold onto it until Respondent figured out what to do with it. (Tr. 73-74, 95-97, 162-163, 252-254; R. Exh. 1.)

H. November 25, 2013 – Union Requests Bargaining for New CBA

40 On November 25, 2013, Altman sent a letter to Goods-North to request that the Union and Respondent commence bargaining for a new collective-bargaining agreement. Altman's letter stated as follows:

Dear Ms. Goods-North

¹⁴ Employees at DCX-CHOL's Illinois and California facilities also received movie tickets. (Tr. 49-50.)

¹⁵ The record does not include a definitive statement about the size of the bargaining unit, but witnesses estimated that the bargaining unit includes between 40 and 54 employees. (Tr. 240, 253.)

With reference to the Agreement now in effect by and between Stuart Manufacturing, Inc. and [the Union]:

5 In accordance with the provisions of the Agreement please be advised that the Union desires to terminate the agreement.

10 It is further desired by the Union to meet with you and/or your representatives as soon as possible within this period prior to the expiration of the present Agreement, for the purpose of negotiating a new Agreement.

We are also requesting a list of all employees with their present classifications and wage rates, plus the Company's cost on all fringe benefits.

15 An early reply will be appreciated.

(GC Exh. 5, p. 1; see also Tr. 53, 127.)

20 Goods-North replied to Altman on November 27, essentially to assert that Altman's request for bargaining was premature. Specifically, Goods-North stated:

Dear Dave,

25 We are in receipt of your letter dated November 25, 2013, requesting termination of the current agreement and to negotiate a new agreement.

30 The current Agreement states that you may make the request (60) sixty days prior to the expiration of the Agreement.¹⁶ As you know, the expiration of the Agreement is February 8, 2014.

Your request is pre-mature; therefore, we ask that you withdraw your request at this time.

(GC Exh. 5, p. 3.) Altman did not respond to Goods-North's letter. (Tr. 127.)

35 *I. December 2013 – Respondent and the Union Prepare for Bargaining*

40 Notwithstanding Goods-North's initial assertion that the Union requested bargaining prematurely, in December 2013, the parties agreed to begin bargaining for a new collective-bargaining agreement on January 6, 2014. The Union also sent its contract proposal to Respondent, but was disappointed when Respondent did not reciprocate with its own proposal

¹⁶ The collective-bargaining agreement states that the agreement "shall remain in full force and effect from February 9, 2011 until and including February 8, 2014 and shall continue thereafter in full force and effect from year to year unless sixty (60) days prior to the expiration of this Contract . . . either party gives written notice . . . of its desire to terminate the entire Agreement or to change, modify, or add to the same." (Jt. Exh. 1, Article XVI.)

and instead merely planned to respond to the Union's submission. (GC Exh. 6, pp. 1-2; Tr. 128-132; see also GC Exh. 7 (the Union's contract proposal, sent on December 31); GC Exh. 8, p. 1.)

5 On December 31, 2013, Goods-North emailed Altman to thank him for sending the Union's contract proposal. Goods-North also stated, however, that she would need additional time to respond to the Union's proposal, and thus asked to postpone the first contract bargaining session from January 6 to January 9 or 10. Goods-North concluded her email by stating that she was "looking forward to reaching an agreement that is amiable to the Company and the Union." (GC Exh. 8, p. 1; see also Tr. 54-55, 131.)

10 *J. January 3, 2014 – Respondent Notifies the Union that it Cannot Negotiate for a New Contract*

15 On January 3, 2014, Respondent (through counsel) notified the Union that Respondent could not negotiate for a new contract. (Jt. Exh. 3; see also Tr. 54 (Goods-North consulted with Respondent's attorney after sending her December 31, 2013 email to Altman).) Respondent advised the Union as follows in its letter:

20 Dear Mr. Altman:

I recently received a copy of your correspondence dated December 31, 2013, which included the Union's Proposals for a new Collective Bargaining Agreement. At this time, DCX-CHOL is in possession of a document signed by a majority of the DCX-CHOL bargaining unit employees indicating that they do not wish to be represented by the Union going forward.

25
30 Importantly, we will honor the Collective Bargaining Agreement that is currently in effect as required by law. However, the mere fact that the Union has filed a blocking charge does not alter the fact that we are in possession of a document signed by a majority of the bargaining unit employees indicating that they do not wish to be represented by [the Union]. As such, we believe that we are legally obligated to honor that Petition and cannot negotiate for a contract that would cover a period of time within which the Union no longer represents the employees.

35 If you believe that we are in error in our legal analysis, please do not hesitate to provide us immediately law which suggest we are in error. We would obviously review such information and reconsider our position. However, we believe that we are legally bound to honor the clear directive of the majority of the unit employees.

40 If you wish to discuss this matter in greater detail or forward information, please do not hesitate to contact us.

45 (Jt. Exh. 3; see also Tr. 55, 69-70, 134, 168-169.) The Union did not respond to Respondent's January 3, 2014 letter because the Union viewed the letter as a refusal to bargain. (Tr. 168-169.)

K. Respondent Changes Employee Pay Dates

In April 2014, Respondent began paying employees on the fifth and twentieth of each month (instead of every other Wednesday, as stated in the collective-bargaining agreement) because Respondent wanted to have its employees on the same payroll as DCX-CHOL employees in other locations. Respondent did not notify or bargain with the Union before making this change to employee pay dates. (Tr. 62-63, 67-68, 126-127, 135, 184-185, 208-209, 229-230, 237-238; Jt. Exh. 1, Section 14.6.)

DISCUSSION AND ANALYSIS

A. *Witness Credibility*

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives*, 358 NLRB No. 37, slip op. at 12.

In this case, most of the operative facts are not in dispute. However, where witnesses presented conflicting testimony on material issues, I have stated my credibility findings in the findings of fact for this decision.

B. *Did Respondent Unlawfully Threaten Employees in Violation of the Act?*

1. Applicable legal standard and complaint allegations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives*, 358 NLRB No. 37, slip op. at 12.

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Id.* Apart from a few narrow exceptions (none of which apply in this case), an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. *Id.*

The General Counsel alleges that Respondent violated Section 8(a)(1) (as well as Section 8(a)(5) and (1)) by: (1) on or about August 19, 2013, threatening employees with job loss and plant closure if they did not approve Respondent's proposal to contractually change employee

pay dates (GC Exh. 1(t), pars. 5(a), 9); and (2) on or about October 16, 2013, threatening employees that Respondent would divide into two separate companies, one unionized and one nonunionized, because the employees engaged in union and protected concerted activities. (GC Exh. 1(t), pars. 5(b), 9.)

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2. Discussion – August 19 threat of job loss and plant closure

As noted above, the General Counsel maintained that in a meeting on August 19, Goods-North asserted that Respondent could close its Fort Wayne facility and move the work if the Union did not agree to modify the collective-bargaining agreement on certain issues. I find that the General Counsel fell short of meeting its burden of proving that Goods-North made the offending statement. Although the General Counsel presented credible evidence that Goods-North made the offending statement (see Altman’s and Tinker’s testimony, plus Altman’s notes from the meeting), Respondent’s evidence to the contrary was equally credible (see Goods-North’s testimony, plus Respondent’s letter that used a conciliatory tone to request contract modifications). (Findings of Fact (FOF), Section II(B)(2).) Given the equally credible, but conflicting, accounts, the General Counsel failed to prove by a preponderance of the evidence that Respondent (through Goods-North) threatened job loss and plant closure if the Union did not agree to modify the collective-bargaining agreement. Accordingly, I recommend that the allegation in paragraph 5(a) of the complaint be dismissed.

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3. Discussion – October 16 threat of dividing into two companies

In the Findings of Fact, I found that Goods-North did tell the Union that Respondent would operate under the collective-bargaining agreement, but Tobin’s company (Stuart Manufacturing) would not because it would be non union. (FOF, Section II(E)(2).) I therefore turn to the question of whether Goods-North’s statement had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

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The context for Goods-North’s statement is significant. When Goods-North made her representations about whether Respondent and Stuart Manufacturing would be unionized, Respondent and Tobin still shared a close, if not cozy, relationship. Immediately after the asset purchase, Respondent advised the Union that Tobin still owned Stuart Manufacturing, and added that Respondent and Stuart Manufacturing were working out the details about the customers that each company would handle going forward. (FOF, Section II(B)(2).) Consistent with that statement of ongoing cooperation and coordination between the two companies, Respondent allowed Tobin to (among other things): keep using his old office and telephone at the facility; and enter Respondent’s shop floor to chat with multiple employees about the possibility of working with him at Stuart Manufacturing. (FOF, Section II(E)(1).)

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In light of the close connection between Respondent and Stuart Manufacturing at the time (i.e., before the relationship went sour), and the brother-sister relationship between Tobin and Goods-North, a reasonable employee would have taken Goods-North at her word when she represented that Respondent’s employees would be unionized while Stuart Manufacturing’s employees would be non union. Furthermore, by telling the Union that Stuart Manufacturing would operate as a non union company once it reopened, Respondent informed the Union (and its members) that union membership would be incompatible with employment at Stuart

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Manufacturing, and thereby violated Section 8(a)(1) of the Act by making statements that had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.¹⁷ See *Ryder Truck Rental*, 318 NLRB 1092, 1094–1095 (1995) (finding that the employer violated Section 8(a)(1) of the Act when it told employees that the new facility to which they were transferred would be non union); *Kessel Food Markets*, 287 NLRB 426, 429 (1987) (explaining that when “an employer tells applicants that it will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the [predecessor’s] employees to ensure its nonunion status”), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied, 493 U.S. 820 (1989).

C. *Did Respondent Unlawfully Deny Union Officials Access to the Employee Break Room?*

1. Applicable legal standard and complaint allegation

“Under the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.” *Lawrence Livermore National Security, LLC*, 357 NLRB No. 23, slip op. at 3 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 1 fn. 4, 5 (2011). Notably, an employer’s regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26, slip op. at 4–5 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about August 22, 2013, denying Union officials access to the employee break room located in Respondent’s facility. (GC Exh. 1(t), par. 7(b).)

2. Discussion

The evidentiary record establishes that Respondent, and its predecessor Stuart Manufacturing, had a seven-year past practice of allowing union representatives to access the employee break room at its facility upon request after grievance meetings.¹⁸ (FOF, Section

¹⁷ To the extent that the General Counsel alleged that Respondent’s October 16 threat to divide Respondent into two companies (one union and one non union) also constituted an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act (see GC Exh. 1(t), par. 9), I recommend that this additional theory be dismissed because such a violation (if found) would be cumulative and would not materially affect the remedy. See *Management Consulting Inc. (MANCON)*, 349 NLRB 249, 249 fn. 2 (2007).

¹⁸ As noted in the findings of fact, the collective-bargaining agreement included a provision stating that a Union representative “shall be granted admission to the facility during work hours after his request

II(C)(1).) In light of that lengthy and virtually uninterrupted history of union access, I find that Respondent and its predecessor allowed the Union to access its employee break room with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis.

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The Board has held that “access by representatives of an incumbent union for representational purposes is a mandatory subject of bargaining.” *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997); see also *Granite City Steel Co.*, 167 NLRB 310, 315 (1967). As a result, “the Act requires that, instead of implementing its own solution to perceived abuse, the [employer] bargain with the [u]nion over possible solutions to any problems with access.” *Frontier Hotel & Casino*, 323 NLRB at 817; see also *Peerless Food Products*, 236 NLRB 161, 161 (1978).

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In this case, it is undisputed that Respondent did not notify or bargain with the Union before (on August 22, 2013) unilaterally changing its practice of allowing the Union to access Respondent’s employee break room after grievance meetings. It is also undisputed that after August 22, Respondent resumed its practice of allowing the Union to access the employee break room. (FOF, Section II(C)(2).) Based on those facts, Respondent asserts that it did not violate the Act because the one-time unilateral change to Respondent’s break room access practice was not a material, substantial and significant change. See *Peerless Food Products*, 236 NLRB at 161 (dismissing an alleged Section 8(a)(5) and (1) claim because the unilateral change at issue was not material, substantial and significant).

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I am not persuaded by Respondent’s argument that the one-time unilateral change to its union access practices was not material, substantial and significant. To the contrary, the Board has held that where an employer, through unilateral action, denies or reduces the ability of the union to access its employees for representational purposes, the unilateral action or change is material in nature. See *Frontier Hotel & Casino*, 323 NLRB at 818 (finding that the employer violated Section 8(a)(5) and (1) when it denied union representatives access to its facility on one occasion because they refused to sign a document acknowledging the employer’s new union access policy).¹⁹ Respondent committed that precise violation here, as it unilaterally changed its past practice of allowing the Union to meet with employees in the break room, and thus denied

has been granted by the senior management.” (FOF, Section II(C)(1).) Since the contract does not include a clear and unmistakable waiver of the Union’s right to bargain about union access (including changes to Respondent’s policies or practices regarding such access), I do not find that the contract language in this case regarding union access undermines the General Counsel’s allegation that Respondent unlawfully changed its union access practices. See *Dearborn Country Club*, 298 NLRB 915, 920 (1990) (noting that a contractual waiver “will not be lightly inferred but rather, must be stated in ‘clear and unmistakable’ language”)

¹⁹ The Board’s decision in *Peerless Food Products*, 236 NLRB 161 is distinguishable. In *Peerless Food Products*, the employer unilaterally changed its union access practices, but only in such a way as to limit the union’s ability to “engage unit employees in conversations on the production floor when those conversations are unrelated to contract matters.” The Board did not find that unilateral change to be material, substantial and significant. *Id.* at 161. In this case, by contrast, Respondent’s unilateral change precluded all conversation between the Union representative and employees at the facility in the day in question, including conversations in the employee break room for representational purposes. That broad unilateral change was unlawful. See *Frontier Hotel & Casino*, 323 NLRB at 818.

the Union the ability to confer with employees about workplace issues and concerns (including concerns about Respondent's arrival as the new owner, a development that occurred only days earlier). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally denied Union officials access to the employee break room at Respondent's facility on August 22, 2013.

D. Did Respondent Unlawfully Bypass the Union and Deal Directly with its Employees?

1. Applicable legal standard and complaint allegations

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979 (1995)).

In this case, the General Counsel alleges that Respondent unlawfully engaged in direct dealing when Tobin, on or about October 16, 2013, bypassed the Union and directly solicited employees to resign from Respondent and join him at Stuart Manufacturing, which would operate as a non union company. (GC Exh. 1(t), par. 7(c).) The General Counsel also alleges that Respondent engaged in unlawful direct dealing on or about November 4, 2013, when it bypassed the Union and announced and distributed \$100 bonuses directly to employees. (GC Exh. 1(t), par. 7(d).)

2. Discussion – Tobin's October 2013 meetings with employees

The General Counsel's assertion that Respondent (through Tobin) engaged in unlawful direct dealing with employees about joining Stuart Manufacturing turns, at least initially, on whether Tobin was Respondent's agent. Since there is no dispute that Tobin was not one of Respondent's employees (and thus lacked actual supervisory authority), the General Counsel maintains that Tobin's conduct is attributable to Respondent because Tobin had apparent authority to act on Respondent's behalf.

"The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action." *Pan Oston Co.*, 336 NLRB 305, 305 (2001) (collecting cases and other supporting authority). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." *Id.* at 305-306. "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief." *Id.* at 306. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management," taking into account "the position and duties of the employee in addition to the context in which the behavior occurred."

Id. “The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. . . . In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties.” Id. “Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority.” Id. And finally, the Board has emphasized that “an employee may be an agent of the employer for one purpose but not another.” Id.

Turning to the facts of this case, I find that although Respondent’s employees would have been uncertain about Tobin’s precise role with Respondent, Respondent’s employees would reasonably have believed that Tobin was authorized to act on Respondent’s behalf when he spoke to employees about joining Stuart Manufacturing. Immediately after the asset purchase, Respondent (and Tobin) made it clear that there had been a change in ownership, and that Castleman now owned Respondent and all of its assets. However, Respondent also indicated that it was still coordinating with Tobin about which customers Respondent would retain, and which customers Tobin would handle through Stuart Manufacturing. (FOF, Section II(B)(1)–(2).) In addition, in September and October 2013, Respondent allowed Tobin to use his old office and telephone at Respondent’s facility, and also allowed Tobin to go on the shop floor to ask employees if they might be interested in working for him at Stuart Manufacturing.²⁰ (FOF, Section II(E)(1).) Based on those facts, I find that Tobin had apparent authority to act on Respondent’s behalf when he spoke to employees about working for Stuart Manufacturing, because Respondent’s employees reasonably would have believed that Respondent and Tobin were working together to restart Stuart Manufacturing, with Tobin as the point-person for that venture.

Although the General Counsel established that Tobin had apparent authority to act on Respondent’s behalf when speaking to employees about joining Stuart Manufacturing, the General Counsel did not present sufficient evidence to show that Tobin’s conversations with employees about joining Stuart Manufacturing constituted unlawful direct dealing. To the contrary, although the record establishes that Tobin communicated directly with union-represented employees to the exclusion of the Union, the General Counsel did not show that Tobin’s conversations with employees were for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the Union’s role in bargaining. When Tobin spoke to employees, he essentially put out feelers to see if the employees might be interested in joining him at Stuart Manufacturing. It was not possible to discuss any specifics about the revamped company (beyond generally assuring employees that their working conditions would remain the same) because the idea of restarting Stuart Manufacturing was just that – an idea. Given the uncertainty about Stuart Manufacturing’s future, and the preliminary nature of Tobin’s inquiries to employees about whether they might be interested in working for Stuart Manufacturing, I cannot find that Respondent engaged in unlawful direct dealing even

²⁰ There is no evidence that shop-floor employees were aware that Tobin was erroneously receiving payments on some of Respondent’s contracts, or that he was forwarding those payments to Respondent. Accordingly, I have not relied on those facts to support my finding that Tobin had apparent authority to act on Respondent’s behalf while speaking to employees about working with him at Stuart Manufacturing.

though Tobin had apparent authority to act as Respondent's agent regarding that issue. See generally *Fremont Medical Center*, 357 NLRB No. 158, slip op. at 6-7 (2011) (finding no direct dealing violation where a manager made preliminary inquiries to employees about shift changes, but never mentioned the union, had no role in ongoing bargaining, did not attempt to negotiate with or make promises to employees, and had no authority to make shift changes). Accordingly, I recommend that the allegation in paragraph 7(c) of the complaint be dismissed. (See GC Exh. 1(t), par. 7(c).)

3. Discussion – \$100 bonuses to employees

There is no dispute that on November 4, 2013, Respondent announced and paid a \$100 bonus to all employees because the Company reached one million dollars in sales for the preceding month. The evidentiary record shows that Respondent did not notify or bargain with the Union about the bonus, and also shows that Respondent planned to award the \$100 productivity bonus to all employees for any future month that the facility reached the one million dollar sales mark. (FOF, Section II(F)(1).) As its defense, Respondent maintains that the \$100 bonus was simply a gift to employees that did not need to be bargained with the Union.

It is well established that an employer and the representative of its employees have a mandatory duty to bargain with each other in good faith about wages, hours, and other terms and conditions of employment. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). The Board has held, however, that employers do not have to bargain about gifts that they give to their employees. *Id.* As the Board has explained, items “given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors” are properly characterized as gifts. *Benchmark Industries*, 270 NLRB 22, 22 (1984). Conversely, items that are “so tied to the remuneration which employees receive for their work that [the items] are in fact a part of the remuneration” are properly characterized as wages and are subject to the mandatory duty to bargain. *North American Pipe Corp.*, 347 NLRB at 837.

Applying the Board's guidance, I find that the \$100 bonus at issue here was not a gift, and instead was a form of compensation that is subject to the duty to bargain. Respondent awarded the bonus because its employees, collectively, reached a performance and production goal for the preceding month. In addition, Respondent promised additional bonuses if employees reached the productivity goal (one million dollars in sales) in future months. There was, therefore, a clear nexus between employees' production and the bonuses that employees received, such that Respondent had a mandatory duty to bargain with the Union.²¹

With that issue resolved, I now turn to the allegation that the General Counsel made about the \$100 bonus in the complaint. The General Counsel alleged that Respondent violated the Act when it announced and paid the \$100 bonus because those acts constituted unlawful

²¹ I am not persuaded by Respondent's argument that the \$100 bonus here was a gift because it was given to all employees regardless of their individual performance. Although it is true that an individual employee could theoretically ride the coattails of his or her coworkers and receive a bonus despite contributing little to the cause, the fact remains that the bonus depended on employees collectively achieving some measure of production. The fact that the bonus hinged on employee production makes it a form of remuneration that requires bargaining.

direct dealing with employees. That legal theory is misplaced, however, because there is no evidence that Respondent attempted to negotiate or have a discussion with employees about the \$100 bonus – instead, Respondent unilaterally announced and implemented the new bonus program. As the Board has held, “simply notifying the employees that a unilateral change will affect them does not constitute unlawful direct dealing.” *Capitol Ford*, 343 NLRB 1058, 1058, 1067 (2004); see also *Spurlino Materials, LLC*, 353 NLRB 1198, 1218 (2009) (dismissing a direct dealing allegation because the employer did not attempt to bargain with employees, but rather, announced a predetermined company decision), adopted in 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011).

Perhaps because it realized this deficiency in its complaint, the General Counsel argued in its posttrial brief that the \$100 bonus was both an unlawful unilateral change and an instance of unlawful direct dealing. (See GC Posttrial Br. at 18–19.) While the General Counsel arguably should have amended the complaint before or during trial to add an allegation that the \$100 bonus constituted an unlawful unilateral change, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990)). That standard has been met here, since: (a) the parties fully litigated the \$100 bonus by, among other things, presenting extensive evidence about the nature of the bonus, both Stuart Manufacturing’s and Respondent’s past practices regarding gifts and bonuses, and the fact that Respondent did not notify or bargain with the Union about the bonus; and (b) the (new) allegation that Respondent’s \$100 bonus is an unlawful unilateral change is closely related to the (original) allegation that Respondent engaged in unlawful direct dealing when it announced and implemented the \$100 bonus, since under either theory, the General Counsel maintains that Respondent unlawfully failed and refused to bargain with the Union about the bonuses. I therefore will consider whether Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally announced and implemented the \$100 bonus.

Applying the unilateral change standard (set forth in Section C(1), supra) to the findings of fact in this case, I find that the \$100 bonus at issue here constitutes an unlawful unilateral change that violated Section 8(a)(5) and (1) of the Act. The \$100 bonus was a new development at Respondent’s facility that had a direct impact on employee compensation and the terms and conditions of employment. Respondent fell short with its attempt to show that the \$100 bonus was consistent with past practices (of both Stuart Manufacturing and DCX-CHOL), because neither company had an established practice of giving employees at the Fort Wayne facility cash bonuses for collectively reaching a productivity goal. Although both Stuart Manufacturing and Respondent occasionally treated employees to holiday meals, Thanksgiving turkeys, and free raffles, all of those instances were examples of gifts to employees that did not require bargaining. See *Benchmark Industries*, 270 NLRB at 22 (finding that Christmas hams and dinners given to employees over a period of three years were gifts that did not trigger a duty to bargain); see also FOF, Section II(F)(3). The \$100 bonus, by contrast, was an unprecedented award of additional compensation at the facility since there was no established practice of paying bonuses to employees for collectively reaching a productivity goal. See *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003) (finding that the employer did not have a past practice of awarding bonuses, since, at most, the employer intermittently handed out bonuses to specific employees at its discretion), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004). Since the \$100 bonus

was a form of compensation subject to a mandatory duty to bargain, and since Respondent did not fulfill its duty to bargain with the Union before implementing the \$100 bonus, Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented the bonus.

5 In sum, I recommend that the direct dealing allegation in paragraph 7(d) of the complaint be dismissed. (See GC Exh. 1(t), par. 7(d).) I find, however, that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the terms and conditions of employment on November 4, 2013, by announcing and implementing a \$100 bonus based on productivity.

10 *E. Did Respondent Unlawfully Withdraw Recognition from the Union?*

1. Applicable legal standard and complaint allegation

15 In *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), the Board reinstated the “successor bar” rule. As the Board explained, the successor bar rule applies where a successor employer has abided by its legal obligation to recognize an incumbent union, and the “contract bar” is inapplicable. “In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for election raised by employees, by the employer, or by a rival union; 20 nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.” *Id.*, slip op. at 8.

25 The Board also defined the term “reasonable period of bargaining” for purposes of the successor bar rule. Specifically, “where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes,” the reasonable period of bargaining shall be 6 months, measured from the date of the first bargaining meeting between the union and the successor employer.” *Id.*, slip op. at 9. However, “where the successor employer recognizes the union, but unilaterally announces 30 and establishes initial terms and conditions of employment before proceeding to bargain,” the reasonable period of bargaining shall be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the successor employer. *Id.* The party invoking the successor bar rule bears the burden of showing that a reasonable period of bargaining has not elapsed. *Id.*

35 In this case, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union on or about January 3, 2014, and thereafter refused to meet and bargain with the Union to negotiate a successor collective-bargaining agreement. (GC Exh. 1(t), pars. 7(h)–(i).)

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2. Discussion

45 After considering the relevant facts, I find that the successor bar applies in this case, and I find that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on January 3, 2014 while the successor bar was still in effect. The evidentiary record establishes that on or about August 19, 2013, Respondent acknowledged that it is a successor employer and recognized the Union as the exclusive collective-bargaining representative of

employees in the bargaining unit. Respondent also accepted the terms of the existing collective-bargaining agreement as the starting point for bargaining (i.e., without making unilateral changes, though Respondent did attempt to negotiate certain changes). (FOF, Section II(B)(2), (D).) Under those circumstances, the Union was entitled to a six month period of bargaining, during which Respondent was precluded (under the successor bar) from unilaterally withdrawing recognition from the Union based on a claimed loss of majority support. *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 8.²²

Respondent did not comply with the six-month period of bargaining required by the successor bar. Instead, as alleged in the complaint and established in the evidentiary record, Respondent withdrew recognition from the Union on January 3, 2014, without participating in any bargaining sessions with the Union before or after that date despite the Union's requests for bargaining. (FOF, Section II(J).) I find that Respondent's withdrawal of recognition from the Union and failure and refusal to bargain under these circumstances violated Section 8(a)(5) and (1) of the Act.²³

F. Did Respondent Violate the Act when it Unilaterally Changed Employee Pay Dates?

1. Applicable legal standard and complaint allegation

As previously noted, “[u]nder the unilateral change doctrine, an employer’s duty to bargain under the Act includes the obligation to refrain from changing its employees’ terms and conditions of employment without first bargaining to impasse with the employees’ collective-bargaining representative concerning the contemplated changes.” *Lawrence Livermore National Security, LLC*, 357 NLRB No. 23, slip op. at 3. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 1 fn. 4, 5.

The General Counsel alleges that on or about March 27, 2014, Respondent unilaterally changed the pay dates of bargaining unit employees without notifying the Union or giving the Union the opportunity to bargain about the change. (GC Exh. 1(t), pars. 7(e), (g).)

2. Discussion

The unilateral change doctrine not only applies to changes to employees’ terms and conditions of employment while a collective-bargaining agreement is in effect, but also to

²² Respondent questions the validity of the Board’s decision in *UGL-UNICCO Service Co.* (see R. Posttrial Br. at 22–24.), but the Board’s decisions are binding on my analysis. Respondent retains the right, of course, to present its arguments about the *UGL-UNICCO Service Co.* decision directly to the Board if Respondent decides to appeal my decision on this issue.

²³ Because I have found that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in violation of the successor bar, I need not rule on the General Counsel’s alternative theory that Respondent’s decision to withdraw recognition from the Union based on a claimed loss of majority support was tainted by the presence of significant, unremedied unfair labor practices. (See GC Posttrial Br. at 21–23.) However, I note that I have made findings of fact (including credibility findings) that are relevant to that theory, should further analysis be necessary.

changes to employees' terms and conditions of employment after a collective-bargaining agreement expires (with certain exceptions not applicable here). Specifically, if contract negotiations between an employer and a union are pending (e.g., negotiations for a successor collective-bargaining agreement), an employer has a duty to maintain the status quo with the terms and conditions of employment set forth in an expired collective-bargaining agreement. *Southwest Ambulance*, 360 NLRB No. 109, slip op. at 9 (2014).

The collective-bargaining agreement in this case, though it expired on February 8, 2014, requires Respondent to pay employees every other Wednesday. It is undisputed that in April 2014, Respondent unilaterally changed employee pay dates to the fifth and twentieth of each month, without first notifying or bargaining with the Union. (FOF, Section II(A)(2), (K).)

By unilaterally changing employee pay dates from what was specified in the expired collective-bargaining agreement, and by making this change without notifying or bargaining with the Union, Respondent failed to fulfill its obligation to maintain the status quo regarding employees' terms and conditions of employment. I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 7(e) and (g) of the complaint.

CONCLUSIONS OF LAW

1. By, on or about August 22, 2013, unilaterally denying Union officials access to the employee break room at Respondent's facility after an employee grievance meeting, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By, on or about October 16, 2013, threatening employees that Respondent would divide into two separate companies, one union and one non union, Respondent violated Section 8(a)(1) of the Act.

3. By, on or about November 4, 2013, unilaterally changing employees' terms and conditions of employment by announcing and implementing a \$100 bonus based on productivity without first notifying or bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By, on or about January 3, 2014, withdrawing recognition from the Union and thereafter refusing to meet and bargain with the Union to negotiate a successor collective-bargaining agreement when a successor bar was still in effect, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By, in or about April 2014, unilaterally changing employee pay dates without notifying or bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By committing the unfair labor practices stated in conclusions of law 1-5 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

7. I recommend dismissing the complaint allegations that are not addressed in the Conclusions of Law set forth above.

REMEDY

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

Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decisions to: on or about November 4, 2013, change employees' terms and conditions of employment by announcing and implementing a \$100 bonus based on productivity; and, in or about April 2014, change employee pay dates. Backpay for these violations shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate affected bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to employees during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Marquez Bros. Enterprises*, 358 NLRB No. 61, slip op. at 2 (2012).

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives. Although I have found that Respondent committed various unfair labor practices, this case does not involve widespread misconduct. In addition, this is not a case where bargaining unit employees are unfamiliar with exercising their Section 7 rights or being represented by a Union – to the contrary, the Union has represented the bargaining unit at the facility (through various changes in ownership) for over thirty years. (FOF, Section II(A)(2).) Under those circumstances, the standard remedies that I have set forth in my order will serve the purpose of notifying Respondent and bargaining unit employees of the

unfair labor practices that Respondent committed and the rights of employees under Section 7 of the Act. I therefore deny the General Counsel's request that I order Respondent to have one of its representatives read the notice to employees.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

10 Respondent, SMI/Division of DCX-CHOL Enterprises, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Unilaterally denying Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (Union) officials access to the employee break room at Respondent's facility after employee grievance meetings.

20 (b) Threatening employees that Respondent will divide into two separate companies, one union and one non union.

25 (c) Unilaterally changing employees' terms and conditions of employment by announcing and implementing a \$100 bonus based on productivity without first notifying or bargaining with the Union.

30 (d) Withdrawing recognition from the Union and failing and refusing to meet and bargain with the Union to negotiate a collective-bargaining agreement for employees in the following appropriate bargaining unit:

[A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

35 (e) Unilaterally changing employee pay dates without first notifying or bargaining with the Union.

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

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

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On request and for a reasonable period of time of six months (measured from the date of the first bargaining meeting), bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement.

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[A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

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(b) Make whole Respondent's employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral decisions to: announce and implement \$100 bonuses and change employee pay dates, with interest, as provided for in the remedy section of this decision.

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(c) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards covering periods longer than 1 year, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

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(d) 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.

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(e) Within 14 days after service by the Region, post at its facilities in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 22, 2013.

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²⁵ 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."

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

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

Dated, Washington, D.C. September 23, 2014

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Geoffrey Carter
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT unilaterally deny Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (Union) officials access to the employee break room at our facility after employee grievance meetings.

WE WILL NOT threaten employees that we will divide into two separate companies, one union and one non union.

WE WILL NOT unilaterally change employees' terms and conditions of employment by announcing and implementing a \$100 bonus based on productivity without first notifying or bargaining with the Union.

WE WILL NOT withdraw recognition from the Union and fail and refuse to meet and bargain with the Union to negotiate a collective-bargaining agreement for employees in the following appropriate bargaining unit:

[A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

WE WILL NOT unilaterally change employee pay dates without first notifying or bargaining with the Union.

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

WE WILL, on request and for a reasonable period of time of six months (measured from the date of the first bargaining meeting), bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement.

[A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral decisions to announce and implement \$100 bonuses and change employee pay dates.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters for each bargaining unit employee.

**SMI/DIVISION OF DCX-CHOL
ENTERPRISES, INC.**

(Employer)

Dated _____ By _____
(Representative) (Title)

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

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

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

The Administrative Law Judge's decision can be found at www.nlr.gov/case/25-CA-117090 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.



THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.