

Hallmark-Phoenix 3, LLC and Transport Workers Union of America, Local 525, AFL-CIO

Hallmark-Phoenix 3, LLC and International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO. Cases 12-CA-090718 and 12-CA-094037

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

On May 19, 2014, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO (IATSE) each filed an answering brief. In addition, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering 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 exceptions¹ and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions⁴

¹ We adopt the judge's finding that the Respondent is required to include the \$1.50 hourly wage differential when calculating its lead employees' severance pay. In so doing, we agree with the General Counsel that this differential is part of the lead employees' hourly wage rate, and thus is properly factored into the severance payments owed to them under the Respondent's collective-bargaining agreements with IATSE and Transport Workers Union of America (TWU).

² In adopting the judge's finding that deferral to arbitration is not appropriate in this case, we find no merit in the Respondent's contention on exception that "[c]ontract interpretation is outside the jurisdiction of the NLRB." See, e.g., *Mining Specialists, Inc.*, 314 NLRB 268, 268 fn. 5 (1994).

³ There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to pay its IATSE-represented employees for all of their accrued vacation time in a timely manner, and by failing to include the \$1.50 wage differential in the vacation pay of lead employees in the IATSE unit.

For the reasons stated by the judge, we adopt his findings that the Respondent violated Sec. 8(a)(5) and (1) by failing to pay its TWU-represented employees for all of their accrued vacation time in a timely manner; failing to include the \$1.50 hourly wage differential in the vacation pay of lead employees in the TWU unit; failing to make severance payments to its employees; and failing to deduct employees' union dues and transmit them to IATSE. In doing so, we note that as all of these findings involved the Respondent's failure to comply with its obligations under its collective-bargaining agreements with the Unions, this conduct constitutes midterm contract modifications within the meaning of Sec. 8(d) and, as such, violates Sec. 8(a)(5) of the Act. See,

and to adopt the recommended Order as modified and set forth in full below.⁵

ORDER

The National Labor Relations Board orders that the Respondent, Hallmark-Phoenix 3, LLC, Cocoa, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Adding waiver language on the back of employees' paychecks, stating that the employee acknowledges the check represents the full amount owed to the employee, without first notifying the employees' collective-bargaining representative, International Alliance of Theatrical Stages Employees and Motion Picture Techni-

e.g., *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). See also *Parkview Furniture Mfg. Co.*, 284 NLRB 947, 973 (1987). We also find, contrary to the Respondent's exceptions, that the Respondent has failed to prove it relied on a sound arguable contract interpretation in failing to make severance payments. We note that prior to the hearing in this case the Respondent successfully gained reimbursement from the United States Air Force for severance payments that the Respondent unconditionally stated it was obligated to make, based on the same contract provisions relied on by the General Counsel and cited in the judge's decision. Chairman Pearce and Member Hirozawa do not agree with the "sound arguable basis" standard articulated in *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), aff'd. 475 F.3d 14 (1st Cir. 2007), but agree that under this standard, the Respondent's failure to make severance payments violated the Act.

We adopt the judge's finding that employee Kevin Ratliff's employment with the Air Force since November 5, 2012, did not excuse the Respondent's obligation to pay him severance under the collective-bargaining agreement with IATSE. In addition to the reasons cited by the judge, we additionally note that Ratliff was entitled to severance pay under arts. 20.6.1 and 20.6.3 of the agreement because—as of October 1, 2012—he had been laid off for more than 30 days.

For the reasons stated in his decision, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by inserting waiver language on the back of each employee's paycheck, stating that the employee acknowledges that the check represents the full amount owed to the employee. In doing so, we find it unnecessary to pass on the General Counsel's contention that the Respondent's conduct in this regard constitutes a modification of the applicable collective-bargaining agreement, as any such finding would not affect the remedy.

⁴ In his decision, the judge inadvertently stated that the Respondent owed \$3010 in vacation pay for employees represented by TWU, rather than \$3028.16, as set forth in the compliance specification and App. A to the judge's decision, attached herein. This inadvertent error does not affect our disposition of this case.

In addition, although the judge inadvertently stated in his decision that, as the union dues owed had been deducted and transmitted to IATSE, "no remedy is required," he correctly clarified in the remedy section that "no affirmative remedy is required."

⁵ We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010) and *Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice to conform to the Order as modified.

Because the Respondent no longer maintains operations at the Cape Canaveral Air Force Station or the Patrick Air Force base, we further modify the judge's Order to limit the notice provision to a mailing requirement.

cians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO (IATSE), and giving it an opportunity to bargain.

(b) Failing and refusing to deduct union dues from the paychecks of employees in the IATSE-represented unit, and failing to transmit these dues to IATSE, as required under its collective-bargaining agreement with IATSE.

(c) Failing and refusing to pay employees their severance pay and all of their accrued vacation pay in a timely manner, as required under its collective-bargaining agreements with IATSE and Transport Workers Union of America, Local 525, AFL-CIO (TWU).

(d) Failing to include the \$1.50 wage differential in its lead employees' vacation and severance payments, as required under its collective-bargaining agreements with IATSE and TWU.

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

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

(a) Pay its TWU- and IATSE-represented employees their accrued vacation pay and severance pay, including any applicable wage differential, in the amounts set forth in Appendixes A and B, respectively, plus interest accrued to the date of payment, at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws.

(b) Rescind the waiver language placed on the back of the paychecks of its IATSE-represented employees.

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

(d) 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.

(e) Within 14 days after service by the Region, mail to employees, at its own expense and after being signed by the Respondent's authorized representative, copies of the

attached notice marked "Appendix."⁶ The Respondent shall mail copies of the notice, together with Appendixes A and B, to all employees employed by the Respondent at the Cape Canaveral Air Force Station and the Patrick Air Force Base as of August 31, 2012, at their last known address. In addition, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED AND MAILED 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 add waiver language on the back of your paycheck, stating that you acknowledge the check represents the full amount owed you, without first notifying your collective-bargaining representative and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to deduct union dues from your paycheck and fail to transmit these dues to your collective-bargaining representative.

WE WILL NOT fail or refuse to pay you severance pay and all of the accrued vacation pay in a timely manner, as required under our collective-bargaining agreements with International Alliance of Theatrical Stage Employees and

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO (IATSE) and Transport Workers Union of America, Local 525, AFL-CIO (TWU).

WE WILL NOT fail and refuse to include the \$1.50 hourly wage differential in our lead employees' vacation and severance payments, as required under our collective-bargaining agreements with IATSE and TWU.

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

WE WILL pay you for your accrued vacation pay and severance pay, including any applicable wage differential, plus interest accrued to the date of payment, and minus tax withholdings required by Federal and State laws.

WE WILL rescind the waiver language placed on the back of the paychecks of IATSE-represented employees.

WE WILL compensate you for any adverse tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration

allocating the backpay award to the appropriate calendar quarters for each of you.

HALLMARK-PHOENIX 3, LLC

The Board's decision can be found at – www.nlr.gov/case/12-CA-090718 or by using 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.



APPENDIX A

Hallmark-Phoenix 3, LLC
Cases 12-CA-090718
12-CA-094037

APPENDIX A (As Amended April 7, 2014)
TWU LOCAL 525 UNIT
VACATION PAY AND
SEVERANCE PAY

Employee name	Hourly wage rate	Unpaid accrued vacation hours	Vacation pay owed based on unpaid accrued vacation hours (includes lead differential)	Accrued vacation hours for which lead pay differential (\$1.50) is owed	Vacation pay owed based on unpaid lead differential for hours already paid	Total vacation pay owed	Weeks of severance pay owed	Hours of severance pay owed	Severance pay owed
Brown, Walter	\$29.60	13.43	\$397.53			\$397.53	13	520	\$15,392.00
Castro, Joseph	\$29.60	0	\$0.00			\$0.00	5	200	\$5,920.00
Crowley, Joe	\$29.60	7.93	\$234.73			\$234.73	13	520	\$15,392.00
Davis, Schevella	31.10 (Lead)	7.93	\$246.62	104.37	\$156.56	\$403.18	13	520	\$16,172.00
Harper, Tim	\$29.60	7.53	\$222.89			\$222.89	0	0	\$0.00
Hubbard, Brian	\$29.60	30.84	\$912.86			\$912.86	13	520	\$15,392.00
Lockhart, Leon	\$29.60	7.77	\$229.99			\$229.99	13	520	\$15,392.00
Peterson, Craig	31.10 (Lead)	4.9	\$152.39	182.6	\$273.90	\$426.29	11	440	\$13,684.00
Weidner, Mark	\$29.60	6.78	\$200.69			\$200.69	9	360	\$10,656.00
Totals			\$2,597.70		\$430.46	\$3,028.16			\$108,000.00

Notes:

Employees whose names are in bold (Schevella Davis and Craig Peterson) were lead employees.

Unpaid accrued vacation hours = (Hours accrued as of pay period ending 8/15/12 + hours earned in pay period ending 8/31/12) minus (accrued vacation hours paid on September 14, 2012 + accrued vacation hours paid in April 2013), as follows:

Brown: $(259.46 + 7.34) - (176 + 77.37) = 266.8 - 253.37 = 13.43$

Crowley: $(213.96 + 7.34) - (92 + 121.37) = 221.3 - 213.37 = 7.93$

Davis: $(104.96 + 7.34) - (97.5 + 6.87) = 112.3 - 104.37 = 7.93$

Harper: $(57.57 + 7.34) - (57.38) = 64.91 - 57.38 = 7.53$

Hubbard: $(289.98 + 7.67) - (136 + 90.81 + 40) = (297.65 - 266.81) = 30.84$

(Hubbard took 40 hours of vacation during the pay period ending 8/31/12.)

Lockhart: $(253.8 + 7.34) - (176 + 77.37) = 261.14 - 253.37 = 7.77$

Peterson: $(182.5 + 5.0) - (64 + 118.60) = 187.5 - 182.6 = 4.9$

Weidner: $(211.82 + 5.0) - (120 + 90.04) = 216.82 - 210.04 = 6.78$

APPENDIX B

Hallmark-Phoenix 3, LLC
Cases 12-CA-090718
12-CA-094037

APPENDIX B (AS FURTHER AMENDED APRIL 7, 2014)
IATSE LOCAL 780 UNIT VACATION PAY
AND SEVERANCE PAY OWED

Employee Name	Original hire date	Hourly wage rate	Vacation hours paid on 9/14/12 and 4/2013 for which lead pay of \$1.50 per hour is owed	Lead pay of \$1.50 per hour owed for vacation hours paid on 9/14/12 and 4/2013	Weeks of severance pay owed	Hours of severance pay owed	Severance pay owed
Anderson, Donald L.	8/2/2002	\$32.51			11	440	\$14,304.40
Carpenter, Reid M.	7/24/1987	\$32.51			18	720	\$23,407.20
Chick, Daniel J.	4/23/2009	\$32.51			4	160	\$5,201.60
Garrett, Mary L.	5/14/1996	\$27.31			17	680	\$18,570.80
Gorr, Thomas P.	4/1/1994	\$32.51			18	720	\$23,407.20
Grove, John C.	9/20/2011	\$30.04			1	40	\$1,201.60
Harmon, Richard E.	5/21/2002	\$28.89			11	440	\$12,711.60
Harris, James Y.	4/1/1994	\$30.39	154.5	\$231.75	18	720	\$21,880.80
Hudec, Ralph	1/26/2011	\$28.91			2	80	\$2,312.80
James, Jerry J.	4/1/1994	\$34.01	348	\$522.00	18	720	\$24,487.20
Kelley, Nathan C.	2/23/2003	\$32.51			10	400	\$13,004.00
Lemieux, Timothy A.	10/1/2008	\$25.53			4	160	\$4,084.80
McDougall, Josephine M.	8/29/2005	\$28.89			8	320	\$9,244.80
Phillips, Kevin	4/27/2009	\$32.51			4	160	\$5,201.60
Ratliff, Kevin W.	4/1/1994	\$28.89			18	720	\$20,800.80
Rice, Kristine M.	9/20/2011	\$21.69			1	40	\$867.60
Scott III, Wilson	10/1/1994	\$34.01	100	\$150.00	18	720	\$24,487.20
Sewell, Kenneth R.	10/4/2004	\$32.51			8	320	\$10,403.20
Veltri, Thomas J.	10/1/1985	\$34.01	296.64	\$444.96	18	720	\$24,487.20
Totals				\$1,348.71			\$260,066.40

Note: Employees whose names are in bold were lead employees.

B-1

John King, Esq., for the General Counsel.

Bryant Banes, Esq. (Neel, Hooper & Banes, P.C.), for the Respondent.

Paul Berkowitz, Esq. (Paul Berkowitz & Associates, Ltd.), for Charging Party IATSE.

Kevin Smith, President, TWU Local 525.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on March 3, 2014, in Cocoa, Florida. On January 30, 2013, the complaint issued in Case 12-CA-90718 based upon an unfair labor practice charge and an amended charge filed on October 4, 2012,¹ and January 11, 2013, by

¹ Unless indicated otherwise, all dates referred to relate to the year 2012.

Transport Workers Union of America, Local 525, AFL-CIO (TWU). On February 28, 2013, the complaint issued in Case 12-CA-94037 based upon an unfair labor practice charge and an amended charge filed on November 30 and February 27, 2013, by International Alliance of Theatrical Stage Employees and Motion Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 780, AFL-CIO (IATSE). These complaints allege that TWU represents an appropriate unit of employees at Cape Canaveral Air Force Station and that since in about October 2010, Hallmark-Phoenix 3, LLC (the Respondent), has recognized it as the exclusive collective-bargaining representative of these employees and that this recognition was embodied in a collective-bargaining agreement effective from October 1, 2010, to September 30, 2014, and that IATSE represents an appropriate unit of employees at Patrick Air Force Station and that since about October 1, 2008, the Respondent has recognized it as the exclusive collective-bargaining representative of these employees, and this recognition was embodied in a collective-bargaining agreement effective from September 1, 2011, to August 31,

2014. The complaints allege that the Respondent failed and refused to continue in effect all the terms and conditions of these collective-bargaining agreements since about August 31, by (in the TWU complaint):

- (a) Failing and refusing to pay the unit employees for their accrued vacation time as required by the contract; and
- (b) Failing and refusing to pay employees Severance Pay as required by the contract.

It is alleged that these are mandatory subjects of bargaining, and that by failing and refusing to pay these employees their accrued vacation pay and severance pay, the Respondent violated Section 8(a)(5) and (1) of the Act.

The IATSE complaint alleges that since about August 31 the Respondent has failed and refused to continue in effect all the terms and conditions of employment of its agreement by:

- (a) Failing and refusing to make authorized deduction of union dues from vacation pay paid to unit employees and refusing to remit these dues to the union as required by the contract;
- (b) Failing and refusing to pay unit employees for their accrued vacation time, as provided in the contract; and
- (c) Failing and refusing to pay unit employees severance pay as provided in the contract.

It is further alleged that on about September 14, the Respondent bypassed IATSE and dealt directly with the unit employees by requiring them to sign the following waiver in order to receive vacation pay:

By signing this check, employee agrees that it has been paid all it is owed for accrued pay and waives any and all claims for that purpose.

It is alleged that by the acts specified above in (a) through (c) and by asking the employees to sign this waiver and thereby bypass the Union, it violated Section 8(a)(5) and (1) of the Act.

The Consolidated Complaint and Compliance Specification issued on February 7, 2014. It alleges that the Respondent ceased its operations at the locations involved on August 31 and although it has paid certain vacation pay amounts to the TWU unit employees on about September 14 and April 5, 2013, it has:

- (a) Failed and refused to pay the TWU unit employees for the remaining accrued vacation hours as of August 31;
- (b) has failed and refused to pay the lead employees in the TWU unit the lead employee wage differential for their accrued vacation hours; and
- (c) has failed and refused to pay the TWU unit employees any severance pay.

The Consolidated Complaint and Compliance Specification² further alleges that although the Respondent paid vacation pay

amounts to its IATSE unit employees on September 14 and the vacation pay balance on April 5, 2013, it has failed and refused to pay the lead employees the lead employee wage differential for their accrued vacation hours and has not paid severance pay to any of the IATSE unit employees. The amounts due are, allegedly, as follows:

TWU Unit Vacation Pay Due	\$3,028.16
TWU Unit Severance Pay Due	\$108,000
IATSE Unit Vacation Pay Due	\$1,348
IATSE Unit Severance Pay Due	\$260,066

The Respondent's answer states that it ceased being the prime service contractor for the Air Force on August 31 when the Air Force decided to in-source the work involved herein, and that due to the loss of the work, the unit employees were all terminated on September 1. The Respondent defends that as the employees were terminated, without any possibility of being recalled when they lost the contract, it has no obligation to pay the unit employees severance pay. In the alternative, the Respondent defends that even if severance pay is due to the unit employees, it should be the Air Force, rather than the Respondent, that is obligated to pay the severance pay to the employees. The Respondent further argues that it "pursued a challenge to the in-sourcing at great expense to itself" and that both Unions refused to join it in this pursuit: ". . . HP3 went to great time and expense to file and receive payment on this certified claim, an effort done completely on its own without any assistance from either the Unions or the NLRB. . . ." The Respondent further denies that it owes any additional vacation pay to TWU unit employees because article 27.7 of the TWU contract states that the maximum carryover for vacation pay is 180 hours, and also denies that it owes a lead wage differential to the TWU unit as article 31.3 of the contract states that employees will receive lead pay for all holidays and vacations while on leave; the employees herein were not on leave, they were terminated. The Respondent admits that it has not paid severance pay to the TWU unit due to: "the loss of the VOMS contract due to in-sourcing and the great expense incurred by the Respondent both in working to stop the in-sourcing and to file the certified claim with the USAF."

As regards the IATSE unit, the Respondent denies that any additional vacation pay is owed as article 19.2.4 of the IATSE contract states that the maximum carryover for vacation pay is one time the annual award, any unused credits in excess were to be paid in January of each calendar year: "Respondent did not pay the excess in January 2012 and IATSE did not grieve the action, thereby waiving its right to claim the excess credit now." Further, the Respondent denies that lead wage differential is owed to the IATSE unit. The IATSE contract states that employees will receive lead pay for all hours worked: "Employees do not get lead pay while not working or terminated." The Respondent admits that it didn't pay severance pay to either the TWU or the IATSE employees:

changes in the backpay allegedly owed to the TWU unit and would substitute for GC Exh. 3, is granted.

² Counsel for the General Counsel's Motion to Further Amend the Compliance Specification, dated April 7, 2014, which makes minor

The combination of the loss of the VOMS contract due to in sourcing and the great expense incurred by Respondent both in working to stop the in-sourcing and to file the certified claim with the USAF to obtain the severance payments...has resulted in putting Respondent in a difficult financial situation and unable to pay all severance at one time.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of the Act and that TWU and IATSE have each been labor organizations within the meaning of the Act.

II. THE FACTS

Waiver Language on Employee Checks

IATSE represented approximately 20 of the Respondent's unit employees. The paychecks that the IATSE employees received dated September 14, which included the initial payment for vacation pay, contained the following language: "By signing this check employee agrees that it has been paid all that it is owed for accrued pay and waives any and all claims for that purpose." Jaroslaw Lipski, the IATSE business manager, testified that prior to the distribution of these paychecks, the Respondent never notified the Union that they were going to insert this waiver language on the checks. On September 28, Lipski wrote to Jason Freeman, the Respondent's president, stating that not only were the amounts on some of these checks incorrect, but that he was surprised "... with the attempt to bamboozle the employees by adding the 'waiver' language on the back of the checks." On November 28, counsel for IATSE wrote to counsel for the Respondent asking that the Respondent send him something stating that the waiver language on the checks can be disregarded and that the Respondent will not attempt to enforce it. By email dated December 13 to Lipski and counsel for IATSE, counsel for the Respondent stated that the Respondent would not enforce the waiver language for any IATSE member with a claim for additional vacation pay.

Failure to Remit Due to IATSE

The contract between the Respondent and IATSE contains a checkoff provision authorizing the Respondent to deduct union dues from employees who have executed the proper authorizations, and to transmit these amounts to the Union. On September 14, when the Respondent sent vacation paychecks to IATSE unit employees, it did not deduct any union dues from these checks, nor did it transmit any dues to the Union. In Lipski's September 28 email to Freeman, he stated that the Respondent did not check off and forward the dues to the Union. On April 23, 2013, the Respondent sent a check in the amount of \$1882 to IATSE, as full payment for the checked off dues owed to IATSE from the vacation pay paid to its unit members.

Background

The Respondent obtained the Vehicle Operations and Maintenance Services (VOMS) contract at these two locations in about 2008. Freeman testified that in 2011 the Air Force

advised the Respondent that it was going to in-source the work which, at the time, was performed by the Respondent's employees at the two locations. After hearing this, Kevin Smith, the TWU president, emailed Freeman, with a copy to IATSE saying that his members were concerned, and asked: "Just to be clear and to put some of my members' fear to rest. The company will be paying out severance pay upon layoffs at the end of the contract...correct?" Freeman responded later that day (also with IATSE copied): "Our intention is to attempt to comply with the CBA." On July 21, John Rogers, Respondent's vice president of operations, sent an email to both Unions saying that the Air Force was still intending to in-source the work and that Freeman would like to meet with the Unions "... to see if we can help to throw a wrench in their plan and make it more difficult to in-source." At about this time, Smith had a telephone conversation with Rogers who asked him if the Union would agree to lower the employees' wages by about \$5 an hour in order to assist in maintaining the contract and Smith replied that, unfortunately, he could not agree to that. In about September 2011, Rogers told him that the Air Force had agreed to postpone the in-sourcing for about a year.

The Respondent's VOMS contract was terminated effective September 1 and the employees' last day of employment with the Respondent was August 31. The employees were sent the following letter from the Respondent dated August 17:

Due to the government's decision to in-source your positions and terminate the existing Vehicle Operation and Maintenance contract, this letter will serve as formal notification that as a result of the termination of our contract, your employment with Hallmark Phoenix 3, LLC has been terminated. The termination becomes effective 1 September 2012.

You will be compensated for all hours worked and remaining vacation through the end of your normal workday

On July 7, Smith wrote to Rogers, inter alia:

I wanted to point out one condition of the Contract that will continue to be your obligation if you must layoff the current workforce covered by our Collective Bargaining Agreement.

Article 30.1 states the following: Any employee with one (1) year or more of service under this agreement **who is laid off for any reason** other than those set forth in paragraph 30.2 and 30.5 shall receive severance pay as set forth in paragraph 30.4. I'm bringing this to your attention just to make sure that you understand your obligation to the article and the severity of the issue. . . .

By letter to Freeman dated July 3, counsel for IATSE wrote that while they were also disappointed at the loss of the VOMS contract, IATSE intends to strictly enforce the severance pay provision contained in section 20.6 of their contract. Counsel for the Respondent answered 6 days later that the Government told them that they do not believe that severance is warranted because they view their action as a termination pursuant to article 23.3 of the contract rather than the layoff provision of

article 20.6.1. By email dated August 3, IATSE wrote to Rogers stating that employees were asking about severance pay and when they can expect to receive it, and Rogers responded later that day that “[i]f they are paid it will be a lump sum payment,” but the Government claims that they are not liable for it and, “It will be a fight. . . .”

After losing the VOMS contract, the Respondent began negotiating with the Air Force in order to recoup costs that it anticipated might be associated with the loss of the contract and possible severance pay for the unit employees. When the negotiations proved unsuccessful, the Respondent filed a claim with the Air Force and, in about August 2013, the Respondent was paid \$400,382 by the Air Force as a severance pay settlement. None of this money has yet been paid to either IATSE or TWU employees.

It is alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to continue in effect all the terms and conditions of its collective-bargaining agreements with IATSE and TWU, by failing and refusing to pay severance pay to its IATSE employees pursuant to article 20.6 of the IATSE Agreement, and to the TWU employees pursuant to article 30 of the TWU Agreement. It is further alleged that the Respondent has failed to pay all of the accrued vacation pay due to the TWU employees pursuant to their contract, as well as the \$1.50 differential to be paid to the TWU lead employees, and that while all accrued vacation pay was paid to the IATSE employees, although delayed, the Respondent has failed to pay the \$1.50 lead differential for all hours of accrued vacation pay to the IATSE lead employees. By these refusals, the Respondent is alleged to have violated Section 8(a)(5) and (1) of the Act.

Vacation Pay

The relevant portions of the collective-bargaining agreements are, for the TWU unit:

27.3

An employee who has completed his probationary period shall be paid for his accrued vacation upon termination of employment with the Company, except that he shall not be paid for such vacation if he has been discharged for a cause involving monetary or material loss to the Company.

27.7

Vacation carryover will be permitted, per the following schedule. Any excess hours not used will be forfeited. Days over and above this requirement are in a use or lose situation, maximum carry over allowed as of 9/30 is 180 hours.

Carry over does not apply if HP3 is not the successful contractor for the rebid of VOM.

31.3

Any employee selected by Management to perform a lead function shall receive \$1.50 per hour in addition to his regular straight- time base rate of pay for all hours worked as lead. If an employee performs as a lead for 30 days or more and is off on holiday, vacation or sick leave, he shall continue to receive sick pay.

The TWU contract provides for annual vacations ranging from 10 days to 22 days for employment periods of 1 to 20 years. As

the Respondent paid the IATSE vacation pay, albeit delaying the payment by about 7 months, it is not necessary to cite or discuss the vacation provision in its contract. However, as the Respondent has not paid the lead pay premium for these vacation hours, paragraph 6 of schedule B states:

Lead Pay

Any employee that performs a lead function shall receive \$1.50 per hour in addition to his/her straight-line base rate of pay for all hours worked as a lead.

By email dated September 24, Smith wrote to counsel for the Respondent denigrating his argument that article 27.7 limits their vacation pay obligation, stating that neither the Respondent nor any other employer bid on the post-September 1 work: “How can you win or lose a contract you aren’t bidding on?” Counsel for the Respondent replied that pursuant to article 27.7 of the TWU contract, as the Respondent “was not awarded the follow-on VOM contract, so the carryover provisions do not apply. Given this, the maximum vacation paid is any earned and not used since October 1, 2011 to the date of termination.”

By email to Rogers dated September 24, Smith wrote that the vacation checks paid to the TWU employees were “far short of what they should have been.” The balance of the vacation pay has never been paid and Smith testified that the amount set forth on appendix A of counsel for the General Counsel’s Motion to Amend the Compliance Specification accurately represents the balance owed to the TWU employees. On November 15, TWU filed a grievance alleging that the Respondent did not pay its members their accrued vacation balance effective August 31.

Lipski and Smith testified that, in the past, the Respondent has paid its lead employees the lead premium rate for their vacation hours and counsel for the General Counsel introduced into evidence some of the Respondent’s payroll records which establish that prior to September 1, the Respondent paid its lead employees the \$1.50 lead premium rate for vacation hours. Smith testified: “It’s part of the contract, it’s been enforced for years and we never had a dispute prior to that from anybody.” However, after September 1, the Respondent did not pay this lead pay differential with the lead employees’ vacation pay. Rogers testified that lead pay is paid for lead work, and since employees don’t work during vacations, they are not entitled to lead pay for this period. He also testified that prior premium payments to lead employees during vacation periods were paid by mistake, and that vacation pay was not due to the TWU employees under article 27.7 of their contract as the Respondent was not the successful contractor for the rebid of the VOMS contract.

Severance Pay

It is undisputed that the Respondent has failed to pay severance pay to either its TWU employees or its IATSE employees. Article 30 of the TWU contract provides that severance pay is to be determined by the length of employment of each employee, ranging from 3 weeks for 1 year of service to 13 weeks for 12 years of service. In addition:

30.1

An employee with one year or more of service under this Agreement who is laid off for any reason other than those set forth in paragraph 30.2 and 30.5 shall receive severance pay as set forth in paragraph 30.4.

30.2

Severance allowance will not be paid if the layoff is the result of an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work.

30.8

Such severance pay shall be paid at the end of a waiting period of 30 days from the date of such layoff.

The IATSE contract provides for 1 week of severance pay for 1 year of service up to 18 weeks of severance pay for 17 years of service, as well as:

20.6.1

Any employee with more than 6 months of continuous service credit, who has established seniority, shall be entitled to severance pay when involuntarily laid off because of lack of work for a period in excess of 30 days; however, no employee shall be entitled to severance pay in cases where such layoff is due to fire, flood, explosion, bombing, earthquake or Act of God, causing damage at locations where work is performed under this agreement, or from strikes or work stoppages resulting in the inability to maintain normal operations.

20.6.3

Such severance pay shall be paid at the end of a waiting period of 30 days from the day of such layoff.

Rogers testified that the Respondent's position was that neither the TWU employees or the IATSE employees were entitled to severance pay; the IATSE employees because article 20.6.1 ends by saying, "resulting in the inability to maintain normal operations," and the loss of the VOMS contract resulted in their inability to maintain normal operations. As for the TWU employees, he testified: ". . . as for TWU, there's a clause in there that says it becomes null and void, so I wasn't really sure about that." As stated supra, both Smith and counsel for IATSE wrote to the Respondent in July setting forth their views that if the Respondent terminated the employees because the Air Force in-sourced the work that they had been performing, then they would be entitled to severance pay under their contracts. Rogers responded to Smith by email dated August 28 that the Government disputes that severance paid is owed, but that "we will be pursuing a claim." Smith responded that whether the Government disputes that it is owed is irrelevant as "the contract is clear." Also as stated, supra, counsel for IATSE wrote to Freeman on July 3 to "remind" him of the contract's requirement for severance pay, and counsel for the Respondent responded 6 days later saying that the request was premature and that the Government believes that the employees are not entitled to severance and have refused to pay any portion of it. By letter dated September 28 to Freeman, the "bamboozle letter," Lipski stated that the amount in a few of the employees' checks were incorrect and on October 9, IATSE filed a grievance,

and an amended grievance on October 15, alleging a violation of articles 19, 20, and 23 in that the checks were incorrect. On October 18, the Respondent denied the grievance:

As Company mentioned before, this grievance is untimely with respect to severance pay. On July 9, 2012, the Company sent a letter explaining our interpretation and the Union did not respond in a timely manner. Any claim for additional vacation pay is untimely as well because under the terms of the CBA, those payments were to be paid in January 2012 they were not and the Union did not challenge it. The sums paid reflect all vacations owed under the CBA. Based on sums paid, no additional union dues are owed.

Lipski responded 5 days later that the grievance was timely and that they should proceed to arbitration. The Respondent maintained its position that the grievance was untimely, and it never went to arbitration.³ The TWU and IATSE contracts contain identical provisions regarding timeliness of grievances:

8.2 (TWU), 6.2 (IATSE):

All grievances shall be presented as soon as practicable after the occurrence of the event on which it is based, but in no event later than 10 working days if it is a dismissal grievance, or if the grievance arises from any other cause, no later than 20 working days from the date the union knew or reasonably should have known of the events giving rise to the grievance. The Arbitrator may consider the timeliness of the non-termination grievances filed after the 20th day and before the 45th day and may continue the matter where there is a justifiable excuse for the untimeliness. The failure to submit a grievance within a period of 45 days shall constitute an absolute bar to further action.

8.3 (TWU), 6.3 (IATSE):

Time limits for grievances at any step, or for any response, may be extended by mutual agreement between the union and HP3...

The Respondent defends that arbitration is the proper forum for this matter, not the Board, although it has denied the Union's grievances as untimely and has refused to waive the time limits contained in the contracts.

By email dated April 18, 2013, the Respondent notified Smith that the Air Force had just "agreed to pay the severance to HP3, so it can pass it along to the former employees . . . it will probably take about 3-4 months to get the payments." On July 26, 2013, counsel for the Respondent notified counsel for the General Counsel that the Air Force agreed to pay the Respondent \$400,382 for severance and that it should be sent out soon.

³ Counsel for the Respondent, by email to Smith dated November 27, 2012, stated: "I have discussed this matter with Ms. Pabon [of the Board] and her letter does not recite our entire written agreement on timeliness issues. We did not agree to waive all timeliness issues. We agreed to allow the grievance and arbitration to proceed for filing purposes, but whether other aspects of timeliness affect entitlement was not waived."

Kevin Ratliff

Article 20.6.3 of the IATSE contract, concludes by stating: “Severance pay will not be granted when the employee accepts employment of the same, similar or greater responsibility or skill by a Successor Contractor to the PAFB & CCAF VOM.” Ratliff,⁴ who had been employed by the Respondent’s predecessors at the facility, began working for the Respondent when they obtained the VOMS contract in about 2008. He was employed primarily as a heavy driver, and spent about 60 to 80 percent of his time driving a tractor-trailer; about 20 to 40 percent was spent driving a bus and the remaining 5 percent was as a forklift operator. He was unemployed from September 1 through November 4, and was offered a job by the Air Force in late October and began working for the Air Force as a vehicle operator dispatcher on November 5 at the prior facility. His job with the Air Force involves, primarily, scheduling. He deals directly with customers setting up bus support, and occasionally operates a forklift. Scheduling and data entry requires about 50 to 70 percent of his time, bus support work consumes about 20 to 30 percent, leaving about 5 percent for forklift work. The bus support duties (and, apparently, the forklift work) are similar to the work that he performed for the Respondent. Ratliff identified a document that lists the training that he has received from the Air Force. It includes training in 37 areas of operational security; he received training from the Respondent in about 10 of these areas. While employed by the Respondent, he wore a uniform of polo shirt, pullover, and gray slacks; at the Air Force he does not wear a uniform. In his current position he uses a computer about 60 percent of the time; while employed by the Respondent he only used a computer for training purposes. His employment with the Respondent required him to have class A CDL license with HAZMAT, which permitted him to drive vehicles in excess of 32,000 pounds with HAZMAT materials. His present license is class B, for driving a bus with 15 to 50 passengers. He testified that while employed by the Respondent he was responsible for the truck that he was operating; now he spends most of his time on data entry on the computer, which he hadn’t done previously, coordinating the locations of several vehicles at a time. He testified that the work presently is more difficult for him than his work for the Respondent because it’s a new job, although, “. . . I don’t see it as being a greater responsibility what I do now. It’s different, but not necessarily greater.”

Rogers, who was involved in transportation and vehicle maintenance for the Air Force from 1984 to 2005, testified that a dispatcher is much more responsible than a driver because he is, basically the supervisor of the drivers, and he “absolutely” believes that Ratliff’s present position as a dispatcher involves greater responsibility than he had while employed by the Respondent, although he has not personally witnessed Ratliff’s work for the Air Force.

⁴ In the Respondent’s claim for reimbursement from the Air Force dated December 11, it included Ratliff’s severance pay in the amount of \$20,800.

III. ANALYSIS

Two weeks after they were terminated by the Respondent due to the in sourcing by the Air Force, the IATSE employees were asked to sign a waiver that the check that they received for accrued vacation pay was all that they were owed by the Respondent. Prior to issuing these checks with the waiver on the back, the Respondent had not notified the union that it was going to do so, nor did it offer to bargain with the Union about this language. As this was clearly a mandatory subject of bargaining, the Respondent was obligated to bargain with the Union prior to presenting the employees with this “Hobson’s Choice” of endorsing the checks and possibly waiving their rights. By the failure to do so, the Respondent violated Section 8(a)(5) and (1) of the Act. *Kaiser Permanente Medical Care*, 248 NLRB 147 (1980). The Respondent defends that it notified the Union that it would not enforce this waiver, but this notification came 2 months later and was not adequate to relieve itself of liability for this activity. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Although its contract with IATSE contained a dues-checkoff provision, when the Respondent sent these checks to the IATSE employees on September 14 for their accrued vacation pay, it failed to deduct union dues from this pay or to transmit these amounts to IATSE. Lipski notified the Respondent of this error and the Respondent did not transmit these dues to IATSE until April 23. By failing to deduct dues from these checks and failing to transmit this amount to the Union until April 23, the Respondent violated Section 8(a)(5) and (1) of the Act. As these dues have since been deducted and transmitted to the Union, no affirmative remedy is required.

It is undisputed that the Respondent failed to pay the \$1.50 lead pay differential to the TWU and IATSE lead employees for their vacation pay. The evidence establishes that in the past (while it operated under the VOMS contract) the Respondent paid this \$1.50 differential to the lead employees for their vacation pay. The Respondent defends that these payments were a mistake and that the IATSE contract states that the differential shall be paid “. . . for all hours worked as a lead” and side letter 2 of the IATSE contract states that they will receive lead pay “for all payroll hours.” [Emphasis added.] However, vacation hours are earned from hours worked and are therefore payroll hours. The TWU contract contains similar language as well, but adds: “If an employee performs as a lead for 30 days or more and is off on holiday, vacation or sick leave, he shall continue to receive sick pay.” As vacation pay is a term and condition of employment and a mandatory subject of bargaining, an employer cannot unilaterally make changes in the unit’s terms of employment during the term of the agreement. *NLRB v. Katz*, 369 U.S. 736 (1962). The evidence is clear that the Respondent previously paid the lead differential to its lead employees for vacation pay prior to September 1. By refusing to pay this differential for vacation pay after September 1, and by failing to pay all of the accrued vacation hours to the TWU unit employees, the Respondent unlawfully modified a mandatory subject of bargaining in violation of Section 8(a)(5) and (1) of the Act. *Daycon Products Co.*, 357 NLRB 508 (2011). The Respondent defends that the TWU contract provides that maximum carryover is 180 hours, but the contract states that this restriction is

not effective until September 30, 30 days after the termination. It also defends that carryover does not apply if the Respondent is not “the successful contractor for the rebid of VOM.” However, neither the Respondent nor anyone else bid on the contract as the Air Force began performing the work with its own employees. As there was no bidding for the contract there could be no successful bidder. Therefore this sentence does not relieve the Respondent of its obligation to pay the balance of the vacation pay due to the TWU employees. I therefore find that the Respondent has failed to pay all of the accrued vacation hours to the TWU unit members, as well as the lead differential to lead persons, Schevella Davis and Craig Peterson, in the amounts set forth in Appendix A. I further find that the Respondent has failed to pay the lead differential to IATSE lead persons, James Harris, Jerry James, Wilson Scott, and Thomas Veltri in the amounts as set forth in Appendix B.

It is also undisputed that the Respondent refused to pay severance pay to its employees in both units. Both contracts specifically provide for severance pay. The TWU contract provides that it need not be paid where the layoff results from “an Act of God, a national war emergency, dismissal for cause, resignation, retirement, or a strike or picketing causing a temporary cessation of work” (none of which is true herein), and under Duration of Agreement it states: “This Agreement shall be null and void for any period(s) for which the Company is not the prime service contractor for the above mentioned scope of work.” This provision obviously refers to any future obligations of the Respondent, rather than past obligations, such as vacation pay and severance pay. The IATSE contract refers to similar situations, as well as “. . . strikes or work stoppages resulting in the inability to maintain normal operations.” Respondent defends that this last part of this sentence warrants it to refuse to pay severance to the IATSE unit. However, this must be read in its entirety, and clearly refers to strikes or work stoppages by the unit employees *that result in* an inability to maintain normal operations, rather than the loss of a contract to perform the work, as is true in this situation. As it was the loss of the VOMS contract, rather than a strike or work stoppage, that resulted in the loss of work, severance pay is due to the IATSE employees as well. By refusing to pay severance pay to the TWU and IATSE employees, The Respondent violated Section 8(a)(5) and (1) of the Act.

The Respondent defends, generally, that as this matter involves contract interpretation, it is improperly before the Board and that its proper forum is arbitration. I would agree with counsel’s argument, except that, at least, one aspect of deferral is missing: the Respondent’s agreement to waive the timeliness issue. In *Hallmor, Inc.*, 327 NLRB 292 (1998), the Board, in denying referral to arbitration, referred to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and stated:

A key element of the deferral policy is the parties’ expressed willingness to waive contractual time limitations in order to ensure that the arbitrator addresses the merits of the dispute. . . . One critical element is that the party seeking deferral agrees to waive any contractual time limitations. . . . Here, the Respondent plainly breached its agreement not to raise a timeliness defense.

On the other hand, in *Caritas Good Samaritan Medical Center*, 340 NLRB 61 (2003), the Board deferred to the parties grievance arbitration procedure where the employer offered to waive any timeliness issue. As the Respondent has not unconditionally offered to waive timeliness issues herein, this matter is not appropriate for deferral to the parties’ grievance arbitration process.

The final issue relates to Ratliff, who was terminated by the Respondent along with the other employees on September 1, and who began working for the Air Force on November 5. The IATSE contract states that employees who accept employment of the same, similar or greater responsibility with the Successor Contractor for the VOM contract are not entitled to severance pay, and the Respondent argues that since Ratliff’s job with the Air Force involves greater responsibility, he is not entitled to full severance pay. Ratliff’s employment with the Respondent primarily involved driving a tractor-trailer carrying HAZMAT material, while his job for the Air Force primarily involves using a computer on data entry doing scheduling. Clearly, his work for the Respondent was more difficult, physically, than operating a computer, while his present job requires more “skill” than his job with the Respondent as shown by the extensive computer training for his position with the Air Force. I find that his present job has “greater responsibility and skill” than his prior position and that he would be excluded from the provisions of article 20.6.3, except that this provision also provides that the new employer be the “Successor Contractor” to the VOM that the Respondent operated under. As previously stated, as the Air Force in-sourced the work, there was no “Successor Contractor.” Therefore Ratliff is entitled to his full severance pay.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. TWU and IATSE are each labor organizations within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(5) and (1) of the Act by adding the waiver language on the back of the employees’ vacation paychecks without prior discussion with IATSE, the collective-bargaining representative of these employees.
4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to deduct the union dues from the September 14 vacation pay checks to these employees and failing to transmit these dues to the Union, in violation of the contract, and without prior notification to, or negotiations with, IATSE.
5. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay all of the vacation pay that it was obligated to pay to the TWU employees under its contract, and by failing to pay all of the vacation pay that was due to its IATSE employees, under that contract, in a timely manner.
6. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay severance pay to its TWU and IATSE employees.
7. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay to its lead employees the \$1.50 wage differential along with their vacation pay, as required under its contracts with the Unions.

THE REMEDY

Having found that the Respondent has violated the Act, I recommend that it be ordered to cease and desist from engaging in this activity and to take certain action designed to effectuate the policies of the Act. As the Respondent, in April, transmitted the dues to IATSE that were not deducted in September, no affirmative remedy is required for that violation and as the Respondent paid the IATSE employees the balance of their vacation pay on about April 5, no affirmative remedy is necessary for that violation. As this case is a combined unfair labor practice complaint together with a compliance case, and as I have found merit to the allegations herein, I recommend that

the Respondent be ordered to pay the amounts set forth below in Appendix A and Appendix B, attached hereto, to the employees listed thereon who had been represented by TWU and IATSE. Also, as the employees are no longer employed by the Respondent, I shall recommend that the Respondent be ordered to mail a copy of the notice herein, together with Appendixes A and B, to each of the employees at their last known address, at the Respondent's expense, as well as posting this notice at each of its locations within the State of Florida.

[Recommended Order omitted from publication.]