Professional Medical Transport, Inc. *and* Independent Certified Emergency Professionals, Local No. 1. Cases 28–CA–089300 and 28–CA–099144

February 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On January 9, 2014, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed exceptions and a supporting brief, and the General Counsel 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 exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Professional Medical Transport, Inc., Mesa, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain in good faith with Independent Certified Emergency Professionals, Local No. 1 as the exclusive bargaining representative of our employees in the following bargaining unit:

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

In adopting the judge's dismissal of the allegation that the Respondent unlawfully refused to bargain with the Union over the effects of its decision to relocate station 2 employees to station 3, we rely on the absence of any evidence showing that this change had any impact on unit employees. However, we disavow any suggestion in the judge's discussion that an employer need only bargain over the effects of a decision if unit employees are "adversely affected." Rather, in determining the impact of a change, the Board considers "the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co*., 284 NLRB 1205, 1205 fn. 1 (1987), enfd. mem. 852 F.2d 572 (9th Cir. 1988). See also *Northside Center for Child Development*, 310 NLRB 105, 105 (1993) (Board generally does not focus on potential benefit or detriment of change, but whether it implicates legitimate concerns that require bargaining.).

No party excepted to the judge's finding that the Respondent did not fail to comply with the requirements of the parties' June 15, 2012 compliance stipulation by shutting down unit 603.

[2] In adopting the judge's finding that labor costs were not a factor in the Respondent's decision to relocate station 2 employees to station 3, and that the Respondent therefore had no duty to bargain over the decision, we do not rely on *Mercy Health Partners*, 358 NLRB 566 (2012), cited by the judge. We instead rely on cases such as *El Paso Electric Co.*, 357 NLRB 2323, 2324 (2012) (employer's unrebutted testimony and record evidence established that labor costs played no role in decision to close facility).

In finding that the Respondent unlawfully presented the Union with a fait accompli prior to its August 2012 shutdown of unit 603, and that this theory was closely connected to the complaint allegations and fully litigated, the judge relied in part on *Aggregate Industries*, 359 NLRB 1419 (2013), and *Evenflow Transportation, Inc.*, 358 NLRB 695 (2012). In adopting these findings, we note that the Board incorporated those decisions by reference after initially setting them aside following the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). See *Aggregate Industries*, 361 NLRB 879 (2014); *Evenflow Transportation, Inc.*, 361 NLRB 1482 (2014). However, in adopting the judge's findings, we do not rely on two additional decisions that he cited: *Federal Security, Inc.*, 359 NLRB 1 (2012); and *Mammoth Coal Co.*, 358 NLRB 1643 (2012).

In adopting the judge's dismissal of the allegation that the Respondent made unlawful unilateral changes related to its new contract with the City of Chandler, we do not rely on *Aramark Educational Services*, 355 NLRB 60 (2010), a decision issued by a two-member Board.

[3] We deny the General Counsel's request for an effects-bargaining remedy under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), for employees affected by the Respondent's unlawful shutdown of unit 603. Because the judge found, and we agree, that the Respondent unlawfully refused to bargain with the Union over this decision, restoration of the status quo ante, including by making whole affected employees, is instead appropriate. See, e.g., *Bridon Cordage, Inc.*, 329 NLRB 258, 259 fn. 11 (1999).

In affirming the judge's recommended tax compensation and Social Security Administration reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). We shall also substitute a new notice to conform to the Board's standard remedial language and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

All full-time field paramedics, EMTs, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider, guards, office clericals and supervisors as defined by the National Labor Relations Act.

WE WILL NOT discriminatorily discipline you because of your union activities or to discourage you from engaging in union or other protected concerted activities.

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 restore unit 603 as it existed before we unlawfully shut it down in August 2012.

WE WILL make you whole for any lost earnings and benefits resulting from our unlawful 2012 shutdown of unit 603, plus interest.

WE WILL, on request, bargain in good faith with the Union to an agreement or valid impasse over the effects of our March 2012 changes in the posting location and duties of unit 284.

WE WILL, within 14 days of the Board's Order, remove any reference to the unlawful August 26, 2012 suspension that we retroactively issued to Tony Lopez on September 11, 2012, and WE WILL notify Lopez within 3 days thereafter that this has been done and that the suspension will not be used against him in any way.

WE WILL make Lopez whole for any lost earnings and benefits resulting from the unlawful suspension, less any net interim earnings, plus interest.

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

PROFESSIONAL MEDICAL TRANSPORT, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-089300 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.

Sandra Lyons, Esq., for the General Counsel.
Ellen Shadur-Gross, Esq. (Baker & Hostetler, LLP), for the Respondent Company.
Joshua Barkley, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving Professional Medical Transport (PMT), a provider of 911 emergency and general medical and transportation services in Maricopa County, Arizona. As detailed in two previous decisions, in 2006 PMT's certified medical professionals (paramedics, EMTs, and RNs) formed their own independent union, ICEP Local 1, to represent them in collective-bargaining negotiations with the Company. However, the parties failed to reach an initial contract. Further, PMT thereafter committed a number of unfair labor practices in derogation of the Union and the employees' rights under the National Labor Relations Act (the Act). In 2008 and 2009, the Company unlawfully withdrew recognition from the Union; refused to provide it with requested information; made various unilateral changes, including relocating two stations, without bargaining over the decision and/or effects; dealt directly with employees; and threatened to remove the union president (paramedic Joshua Barkley) from active duty because of his union activities. See JD(SF)–38–09 (ALJ Kocol), adopted in the absence of exceptions December 13, 2010, enfd. No. 11–71785 (9th Cir. June 27, 2011). In 2011, the Company again unlawfully refused to provide requested information to the Union; unilaterally shut down one of the ambulances (unit 603); and threatened and disciplined both Barkley and the union vice president (EMT Travis Yates) for engaging in union activities and filing unfair labor practice charges with the Board. See JD(SF)–49–11 (2011 WL 6394819) (ALJ Parke), adopted in the absence of exceptions Aug. 21, 2012 (2012 WL 3597764).[1]

In February 2012, PMT was acquired by Rural/Metro, a national provider with numerous established collective-bargaining relationships around the country. Several months later, on June 14 and 15, 2012, the parties executed a compliance stipulation

[1] As discussed in ALJ Parke's decision, in the interim between the two decisions, a third unfair labor practice complaint against the Company was settled in December 2010 (R. Exh. 15).

resolving all remedial issues arising from the above two decisions (GC Exh. 4). However, the parties remained unable to reach an initial contract. Further, according to the instant complaint, PMT continued to engage in unfair labor practices, including bypassing the Union and directly offering the employees a contract ratification bonus in June 2012; unilaterally and discriminatorily again shutting down unit 603 in August 2012; discriminatorily disciplining the Union's secretary-treasurer (paramedic Tony Lopez) in September 2012; unilaterally transferring certain employees to new duty stations and changing other employees' location and duties in January and March 2013; and failing to provide the Union with requested information in January 2013, in violation of Section 8(a)(5) and/or (3) of the Act.[2]

Following two pretrial conference calls, a 4-day hearing on the foregoing allegations was held on August 5–8, 2013, in Phoenix. Thereafter, on September 12, 2013, the General Counsel and the Company filed posthearing briefs.[3] After carefully considering the briefs and the entire record, for the reasons set forth below, I find that the Company unlawfully failed to bargain over the decision and effects of shutting down unit 603 and the effects of modifying the location and duties of unit 284. I also find that the Company discriminatorily disciplined Lopez. However, I find that the General Counsel has failed to prove the remaining allegations by a preponderance of the credible evidence.[4]

Alleged Unfair Labor Practices

I. OFFERING EMPLOYEES A CONTRACT RATIFICATION BONUS IN JUNE 2012

Contract negotiations between the parties resumed in March 2012, shortly after Rural/Metro acquired the Company. Approximately 3 months of good-faith bargaining later,[5] at the end of the parties' eleventh and unusually lengthy session on June 7, the Company presented the Union with its "last, best, and final" offer. Handwritten at the bottom of the proposal, as the tenth and last listed item, was a bonus of $200 for each EMT and $400 for each paramedic and RN if the contract was ratified by July 1 (R. Exh. 24, p. 00290). However, Thomas Segar, the Company's chief negotiator, did not specifically mention the bonus, and Barkley did not notice it, at the time.[6] Barkley did not realize that the Company had added the ratification bonus to its proposal until June 11, when he received a midafternoon email from PMT CEO John Wilson giving him a "heads up" that the Company was going to send a letter directly to the employees describing the June 7 offer.[7] The email attached the letter and advised Barkley and the other members of the Union's bargaining team that it would be sent out that night. In fact, the letter was mailed to employees the following morning. (GC Exh. 38; Tr. 143–144, 476–477, 598, 673.)

The General Counsel argues that the Company failed to give the Union adequate time to consider the proposed ratification bonus before notifying the employees about it, citing *Detroit Edison*, 310 NLRB 564 (1993) (finding unlawful direct dealing where the employer distributed its new proposal to the employees without previously presenting it at the bargaining table and only a few days after giving the union's representative a copy at his home while he was on vacation and painting his house); and *Americare Pine Lodge Nursing*, 325 NLRB 98, 104 (1997) (finding unlawful direct dealing where the employer distributed its proposal to employees at the same time it faxed the proposal

[2] The charges were filed by the Union on September 14 and November 30, 2012 (Case 28–CA–089300), and February 26, 2013 (Case 28–CA–099144). The consolidated complaint issued on April 24, 2013. As in the prior cases, commerce jurisdiction is uncontested and well established by the admitted complaint allegations.

[3] The Union's September 14 posthearing brief was rejected as untimely, and has not been considered.

[4] Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[5] There is no allegation that the Company engaged in overall bad-faith or surface bargaining over the contract, or that any of its contract proposals were unlawful, during the relevant period.

[6] I discredit the testimony of Segar and PMT CEO John Wilson to the extent it indicates otherwise. Segar testified that the Union specifically asked about the ratification bonus, and that he explained the rationale for it (Tr. 749–750). However, Wilson testified that he could not recall the Union asking any questions about the bonus. He also gave inconsistent testimony about whether Segar mentioned the bonus. He initially testified that Segar made only a "brief," general comment about the overall proposal when he tendered it, and that everyone then left. (Tr. 662–663, 707–708.) However, inexplicably, on further examination he testified that, in fact, Segar specifically went through each of the open items in the proposal, including the bonus (Tr. 708). I also reject the Company's contention that an adverse inference should be drawn from the General Counsel's failure to call the two other members of the Union's bargaining team who were present at the end of the meeting—Jason Seyfert and Duane Owens—to corroborate Barkley's testimony that nothing was said about the bonus. It is well established that no adverse inference is warranted where the circumstances indicate that an additional witness was not called because the testimony was unnecessary. See, e.g., *One Stop Kosher Supermarket*, 355 NLRB 1237, 1238 at fn. 3 (2010); and *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Here, although the General Counsel has the burden of proof, the Company's failure to mention the bonus when tendering the proposal is not critical to the General Counsel's allegation or argument. Further, given the inconsistencies in Segar's and Wilson's testimony, the General Counsel could reasonably conclude that there was no need to prolong the trial to rebut it, particularly since the Company itself never asked the other two Rural/Metro officials on the Company's bargaining team that day—Maureen Thompson and John Karolzak (Tr. 652)—to testify about the matter and clarify or resolve the inconsistencies. Although the Company called Thompson as its last witness, contrary to the Company's brief (p. 25) she did not testify about the June 7 meeting or the Company's proposal.

[7] Contrary to the Company's brief (pp. 24, 29), the record clearly establishes that the letter was emailed to Barkley on Monday, June 11, not Sunday, June 10.

to the union), enf. denied in relevant part 164 F.3d 867, 875–877 (4th Cir. 1999).[8]

However, this case more closely resembles *United Technologies Corp.*, 274 NLRB 609 (1985), enfd. sub nom. *NLRB v. Pratt Whitney Air Craft Division*, 789 F.2d 121 (2d Cir. 1986) (finding no unlawful direct dealing where the employer presented its last, best, final offer to the union at the bargaining table in the context of lawful good-faith negotiations, did not communicate the offer to employees until later that day and the next day, and the communications recognized the union as the legitimate bargaining representative and urged the employees to act through union channels or at the ratification meeting).[9] Although the parties in *United Technologies* had a long and fruitful bargaining history, the facts here are otherwise even more favorable to the Company. For example, the Company did not send the letter to the employees until several days after it presented the last, best, and final offer to the Union at the bargaining table. Further, the Company also gave the Union advance notice of the letter. Moreover, the letter did not merely recognize the Union's legitimate role, it emphasized that there had been "real bargaining with [the Union] with substantive results," including "agreement on numerous articles," and that Rural/Metro desired to "work with" the Union "in a new spirit of cooperation" "to create a successful partnership." Accordingly, the allegation is dismissed.

II. SHUTTING DOWN UNIT 603 IN AUGUST 2012

"Unit 603" is one of several ambulances assigned to Scottsdale. It is manned by two PMT employees, a paramedic and an EMT. As discussed in ALJ Parke's 2011 decision (pp. 5, 11), prior to 2007 the unit operated 24 hours a day out of station 604. However, sometime in 2007 it ceased to function. About 3 years later, in the spring of 2010, it was reinstituted at station 604, but on a reduced, 8 hours per day, 5 days per week (Monday through Friday) schedule. And the Company subsequently again ceased its operation in October of the same year.

As indicated above, ALJ Parke found that the Company unlawfully failed to bargain with the Union over both the decision to shut down the unit in October 2010 and its effects.[10] As a remedy for this violation, she ordered the Company to cease and desist from shutting down the unit and to meet and bargain with the Union upon request regarding the unilateral change. She also ordered the Company to post a notice to employees for 60 days stating that it would "rescind the shutdown of unit 603 [and] restore that work to unit employees in the manner that existed prior to our October 2010 cessation of that service" and meet and bargain with the Union upon request regarding the change.

The Company initially filed exceptions to ALJ Parke's decision. However, it subsequently withdrew them pursuant to the June 15, 2012 compliance stipulation. The Company agreed in the stipulation that the Board could thereafter issue an order adopting ALJ Parke's decision, and that it would take certain affirmative action "in final settlement" of "the remedial obligations arising out of" both that decision and ALJ Kocol's prior decision. (GC Exh. 4.)

Approximately a week later, on June 21, PMT CEO Wilson emailed Barkley and asked to discuss unit 603 (GC Exh. 5). Wilson also again raised the matter with Barkley at a meeting later that month. He gave Barkley a chart showing the June month-to-date transport statistics for the existing nine units in Scottsdale (601–602, 604–608, 610, and 615). He also accompanied the chart with a brief memo stating:

> I would propose we meet and discuss the information in greater detail. I believe the data shows clearly that the high season is over and the need for 603 has long since [passed]. Of our 9 units in Scottsdale, 7 of them are transporting less than 1 patient every 5 hours. If you agree, I would propose that we execute the following language:
>
> > The parties, PMT and ICEP, agree that 603 is no longer needed and may be taken down. If PMT should decide to reestablish 603 in the future, it will notify the union and discuss the conditions of its reestablishment.

(R. Exh. 27; Tr. 681–684.)

Barkley did not respond to Wilson's requests to discuss 603 or the proposed language. Accordingly, the following month, on July 16 and 24, Wilson again wrote and emailed Barkley, this time with copies to the entire union bargaining team, specifically requesting a meeting to discuss "eliminating" the unit (GC Exhs. 7, 19).

The Union eventually agreed to meet on August 1. At that time, the Company provided the Union with another chart showing the utilization statistics for the Scottsdale units for the month of July. Unlike the June chart, the July chart included unit 603, but indicated that it had the lowest unit hour utilization rate (.075) of any of the 911 units during that month. The Company also presented the Union with a proposed memorandum of agreement (MOA). The MOA stated that, effective August 1, the parties agreed that "part-time Unit 603 will be removed from the schedule." (See GC Exh. 8; R. Exh. 41; and Tr. 78, 833–834.)

Again, however, the Union did not respond to the proposal, either at the meeting or thereafter (Tr. 547, 686–687, 754). Accordingly, on August 6, Wilson sent another email to Barkley. Wilson reviewed the history, noting that the Company had "heard or received nothing" back from the Union; "no counter was made, nor specific issues on the subject of taking down unit 603 raised." He notified Barkley that the Company therefore intended to implement the MOA effective August 13.

Barkley replied later that day, stating:

> Do so at your own peril . . . You have never put 603 up for Bid, you staff it rarely and you give us numbers based on a

[8] See also *Overnite Transportation Co.*, 329 NLRB 990, 104–105 (1999) (finding unlawful direct dealing where the employer informed employees of its proposal the day after it was delivered to the union and 2 days before negotiations were to resume), enf. denied in relevant part 280 F.3d 417, 432–433 (4th Cir. 2002).

[9] Although *United Technologies* predates the cases cited by the General Counsel, it has not been overruled and appears to remain good law. See *Armored Transport, Inc.*, 339 NLRB 374 (2003) (distinguishing *United Technologies* and finding unlawful direct dealing where the employer's letter attaching a new bargaining proposal was hand delivered to employees the same day that the employer mailed the letter to the union).

[10] See JD. at 18. There is no dispute about this. See R. Br. 27.

> call volume that can't exist if the unit isn't staffed. . . . Follow the order as is. With your announcement to . . . sidestep the order, I will report it for contempt at my earliest convenience. [GC Exh. 9.]

The Company thereafter implemented the MOA and eliminated the unit as planned, i.e., it no longer staffed it or put it on the schedule (Tr. 83, 688).

The General Counsel alleges that, like the October 2010 shutdown, the August 2012 shutdown of unit 603 violated Section 8(a)(5) of the Act. The General Counsel's primary theory, as articulated both at the hearing and in the posthearing brief, is that the Company never fully restored unit 603 to the way it operated before the unlawful October 2010 shutdown; that the Company therefore failed to comply with the requirements of the June 15, 2012 compliance stipulation before again proposing to shut down the unit in late June 2012; and that, under well-established Board law, the unremedied October 2010 unlawful shutdown therefore precluded a valid bargaining impasse in August 2012 over the Company's proposal. For the reasons set forth below, I reject this theory.

The Company does not dispute that ALJ Parke's 2011 decision and order required it to restore unit 603 to the way it operated prior to October 2010. However, it contends, correctly, that the June 15, 2012 compliance stipulation did not incorporate or specifically contain that requirement. Although the stipulation incorporated and/or liquidated other affirmative provisions in ALJ Parke's and ALJ Kocol's orders "in final settlement" of "the remedial obligations arising out of" their decisions,[11] it did not include any of the cease and desist or affirmative provisions of ALJ Parke's order regarding unit 603. Rather, the only provisions relating to 603 were in the stipulated notice, which was identical in relevant respects to ALJ Parke's notice, and which the stipulation required the Company to post within 14 days and for 60 consecutive days thereafter.

The full 60-day posting period had not yet passed as of August 13 (the 59th day after the compliance stipulation was approved), when the Company implemented its proposed MOA and eliminated unit 603. Thus, in this limited respect, the Company had not yet fully complied with the compliance stipulation at that time.[12] However, there is no evidence that the unexpired notice-posting period was the reason for the parties' failure to reach agreement regarding the Company's proposal to again shut down unit 603. Rather, it is clear from Barkley's August 6 email and hearing testimony that the Union refused to bargain with the Company over the proposal because it believed, erroneously, that the Company was still legally required, after the compliance stipulation, to do more than it had before the stipulation to restore the unit as it operated prior to October 2010.[13] Accordingly, I find that the unexpired posting period did not preclude a valid impasse. See *Aramark Educational Services*, 355 NLRB 60, 72–73 (2010), citing *Dynatron/Bondo Corp.*, 333 NLRB 750 (2001) (an employer's previous, unremedied unfair labor practices do not preclude a valid impasse unless there is a causal connection to the parties' failure to reach agreement).

This is not the end of the matter, however. While the compliance stipulation effectively relieved the Company from taking any further remedial action with respect to unit 603 other than posting the notice, it did not relieve the Company of its ongoing bargaining obligations under the Act. As noted by the General Counsel (Br. 30–31), the Company remained obligated to provide the Union with a meaningful opportunity to bargain over substantial changes in terms and conditions of employment, including the elimination of unit 603. See *Aggregate Industries*, 359 NLRB 1419, 1422 (2013), and cases cited there (finding no waiver or impasse where the employer presented the union with a "fait accompli"). And the Company does not contend otherwise. The Company admits, consistent with its own actions, that it had an obligation to provide the Union with notice and an opportunity to bargain before shutting the unit down again.[14]

As indicated above, however, the Company's own chart, which Wilson gave to Barkley in late June with the Company's shutdown proposal, indicates that the Company failed to do so, i.e., that unit 603 was already shutdown and not being utilized, at that time. And while the additional chart the Company gave the Union on August 1 indicated that the unit had been utilized during July, the utilization rate was extremely low. Further, Wilson did not dispute, either at the time or at the hearing, Barkley's statement in his August 6 email that the unit was being staffed only "rarely."

The Company argues that there was nothing unusual about this; that unit 603 was created solely to back up other units in Scottsdale, and was therefore historically staffed and operated only on a part-time/overtime and seasonal basis, i.e., it was brought up during the winter busy season and taken down during the summer slow season. In support, the Company cites Wilson's testimony to this effect (see Tr. 66, 676, 683), and a May 2009 memorandum outlining the 911 dispatch and deployment procedures in Scottsdale, which does not list 603 among the permanent units (R. Exh. 25).

---

[11] Among other things, the Company agreed to pay over $1 million in backpay within 14 days of the stipulation.

[12] There is no contention that the Company had otherwise failed to fully or substantially comply with its affirmative remedial obligations under the compliance stipulation as of August 13, or that its failure to do so precluded a valid impasse.

[13] The Company asserts that it "voluntarily reinstated" unit 603 in February 2012, while its exceptions to the decision were still pending and months before the compliance stipulation was executed, "as part of the new ownership's effort to resolve the quagmire of labor charges" (Br. 29). While there is actually no probative evidence of this (other than Wilson's brief, unsupported, and uncorroborated self-serving statement, in the memo he gave Barkley in late June, that 603 had been "re-established back in February"), and the Union disputes it, it is ultimately immaterial to evaluating whether the Company satisfied its remedial obligations under the compliance stipulation. However, I accept the assertion as true for purposes of evaluating whether the Company met its statutory bargaining obligations before eliminating 603 (an issue discussed infra), as it is essentially an admission that the Company's subsequent actions changed the status quo.

[14] Unlike in the prior case before ALJ Parke, the Company does not argue here that the decision to shut down unit 603 was not a mandatory subject of bargaining.

There are at least two problems with this argument, however. First, Wilson was not hired by PMT until July 2010,[15] and his testimony regarding unit 603's history is contrary, not only to Barkley's testimony, but to ALJ Parke's findings. As discussed above, Judge Parke found that the unit operated 24 hours a day prior to 2007, was shut down for 3 years thereafter (even during the busy winter seasons), and was reestablished from spring through October 2010 (even during the slow summer season).[16] Second, given those findings, it is just as likely, if not more so, that unit 603 was omitted from the May 2009 dispatch and deployment procedures because the unit had not been utilized at all in the previous 2 years, rather than because it was only a "seasonal" unit.

Accordingly, I find that, as with the 2010 shutdown, the Company failed to satisfy its bargaining obligations under Section 8(a)(5) of the Act before again shutting down the unit in August 2012.[17]

As indicated above, the complaint also alleges that the shutdown of 603 in August 2012 was discriminatory in violation of Section 8(a)(3) of the Act. Specifically, the General Counsel argues that the shutdown "was used to adversely affect" the working conditions of Union Vice President Yates. In support, the General Counsel cites the Company's history of discrimination against Barkley and Yates; Barkley's testimony that Yates' unit in South Scottsdale (unit 604, which Barkley previously worked on as well) was the primary beneficiary of unit 603's assistance in handling high call volumes (Tr. 481); and the timing of the shutdown "right before the busy season." (GC Br. 17–18, 31.)

However, Barkley acknowledged, consistent with Wilson's testimony (Tr. 65), that unit 603 also benefited the other two units in South Scottsdale (601 and 602). And there is no record evidence that the busy season starts as early as September or October. On the contrary, Wilson testified without contradiction that October was still the "off season," and that higher call volumes do not begin until around January (Tr. 72, 99).[18] Accordingly, notwithstanding the Company's history of discrimination against Barkley and Yates, the General Counsel has failed to prove this particular 8(a)(3) allegation by a preponderance of the evidence.

III. SUSPENDING TONY LOPEZ IN SEPTEMBER 2012

Lopez is a 24-year employee of the Company with no previous disciplinary record. He began as an EMT and has been a paramedic for the past 8 years, currently assigned to unit 615 in Scottsdale. At the time of the relevant events in September 2012, he was the union secretary-treasurer. He had also been serving on the union bargaining team with Barkley and two other employees (Jason Seyfert and Duane Owens) since negotiations resumed in March of that year.

Like other certified company employees, Lopez is required to maintain the necessary CPR, ACLS, and other certifications, which typically expire every 2 years, to perform his job. The Company's most recent policy statement regarding this requirement, effective October 2005, states:

> It is the responsibility of each employee to renew any required certification or licenses prior to their expiration date and to provide proof of such renewal to the Director of Quality Assurance and Staffing, at a minimum of seven (7) days prior to their expiration date. Original certification and licensure cards are to be provided to the Director of Quality Assurance and Staffing [or] their representative and copies of the cards will be made. Copies or faxes will not be accepted. [GC Exh. 59.]

However, at the time of the relevant events, the Company was not strictly enforcing the requirement that employees submit their original recertification cards to the director of quality assurance and staffing (then Kelly O'Connor) or the scheduling department (where O'Connor worked). As a matter of convenience, employees were permitted to submit their cards to various other managers, including then-Operations Director Ted Beam, General Manager Wayne Clonts, Compliance and Administration Director Jim Roeder, and Human Resources Director Joy Carpenter. (Tr. 174–175, 207–208, 278–279.)[19]

---

[15] The Company's brief states (seemingly against its own interest) that Wilson did not join PMT until after unit 603 was shut down in October 2010 (Br. 29). However, this is inconsistent with Wilson's testimony that he was hired in July 2010 (Tr. 60), and no contrary evidence is cited.

[16] PMT's counsel specifically stated at the August 2013 hearing that the Company did not have any desire to relitigate ALJ Parke's (or ALJ Kocol's) findings, and that it had no objection to relying on them in this proceeding (Tr. 514–515). I thereafter advised the parties that I would do so, citing both counsel's foregoing statements and supportive case law (Tr. 517). The Company's posthearing brief cites no grounds for reconsidering that ruling, and I reaffirm it. See *Moulton Mfg. Co.*, 152 NLRB 196, 207–209 (1965) (rejecting the respondent's argument that ALJ decisions adopted by the Board in the absence of exceptions should be given no more effect than a settlement agreement); and *Hitchens v. County of Montgomery*, 98 Fed. Appx. 106 (3d Cir. 2004) (holding that the issue-preclusion requirement of a final judgment on the merits was satisfied where the hearing examiner's proposed decision became final in the absence of timely exceptions).

[17] Unlike the General Counsel's "unremedied violation" theory, this "fait accompli" theory was not clearly articulated by the General Counsel at the hearing. Nevertheless, it is encompassed by the complaint's 8(a)(5) failure-to-bargain allegations and, as discussed above, the relevant facts were fully litigated. See generally *Federal Security, Inc.*, 359 NLRB 1, 5 fn.35 (2012); *Mammoth Coal Co.*, 358 NLRB 1643, 1652 (2012); *Evenflow Transportation, Inc.*, 358 NLRB 695, 698 fn. 8 (2012) ; *Parexel International, LLC*, 356 NLRB 516, 517–519 (2011); and *Akal Security, Inc.*, 354 NLRB 584, 587 (2009), reaffd. 355 NLRB 584 (2010). See also *NLRB v. Litton Financial Printing Division*, 893 F.2d 1128, 1134 fn. 5 (9th Cir. 1990), revd. in part on other grounds 501 U.S. 190 (1991); and *Tasty Baking Co., v. NLRB*, 254 F.3d 114, 122 (D.C. Cir. 2001). The General Counsel has never specifically argued, however, that the Company was required to wait until an overall impasse in the negotiations over the initial collective-bargaining agreement before implementing its proposal to shut down unit 603. See *RBE Electronics*, 320 NLRB 80 (1995) (discussing general rule and exceptions). Nor was that issue fully litigated. Accordingly, I have not addressed it.

[18] Although there was testimony in the first case that the "curve of need" starts around September, this testimony was discredited. See ALJ Kocol's decision at 12.

[19] Carpenter testified that employees could also give their certifications to two other individuals: Suzanne Coleman in the human re-

In order to obtain the necessary recertifications, employees must first attend training. Although they may take the training from any qualified or approved organization, the Company also offers the training at its facility. In any event, the employees are required to pay for the recertification training; the Company does not reimburse them when they take the training elsewhere, and it charges them, pursuant to an authorized payroll deduction, when they receive the training from the Company.

On July 17, 2012, Lopez attended a company training course to renew his 2010 CPR and ACLS certifications, which were due to expire August 31. The course was conducted by the Company's lead instructor, Glenn Trainor, and lasted the entire day. About 12 other individuals, including Lemoine, Lopez' direct supervisor, also took the training.

Lopez completed the course and was given both an original and a copy of his new CPR and ACLS cards at the end of the class. However, Lopez did not thereafter submit the cards to anyone in management. Accordingly, the following month, one of the schedulers repeatedly called Lopez' personal cell phone and left voice mails reminding him that he needed to bring in his recertifications by Friday, August 24.[20] However, Lopez did not respond or bring in his new certifications as requested.

On August 24, O'Connor informed Operations Director Beam of the situation. Beam, who knew Lopez well from serving on the management bargaining team during the ongoing contract negotiations, sent an email to him later that day, at 4:57 p.m., shortly before the office closed for the weekend. The email, which Beam sent both to Lopez' company Blackberry and to his personal email address, stated that, "regretfully," the Company had to remove him from his upcoming Sunday, August 26 shift because he had not submitted his recertifications 7 days prior to expiration as required by company policy (GC Exh. 55).

Lopez saw Beam's email the next day (Saturday), and turned in his new certifications to General Manager Clonts when the office reopened on Monday. About 10 days later, on September 6, Beam and Lemoine called Lopez in for an interview about the matter. Lopez told them that he did not turn in his new certification cards because he had taken the Company's training course and had received his cards from the Company. Lemoine, who as indicated above took the same course with Lopez, responded, "Do you not remember me telling y'all to be sure to still show your certs to Kellie, Wayne, or Ted?" Lopez said no, he did not remember that. As for the voice mail reminders from the scheduling department, Lopez said he never got them because he did not know how to retrieve voice mails from his phone until he downloaded an app that converted them to text messages.

Beam acknowledged to Lopez that the training department used to notify the scheduling department by email when employees took the training from the Company. He said the Company stopped or "switch[ed]" this practice because training and scheduling are two separate departments, and the certifications themselves were not being placed in the employee's file, which led to a lot of confusion. Beam also acknowledged to Lopez that the schedulers could have contacted him by calling or emailing him on his company Blackberry while he was at work. (GC Exh. 58; Tr. 257, 296, 319, 409–412.)

Nevertheless, the following week, on September 11, Beam sent an email to Wilson and Carpenter recommending that Lopez be issued a disciplinary suspension for the August 26 shift. Beam stated that such a suspension was warranted because "the policy is clear that it is the employee's responsibility to [turn in certifications 7 days before expiration], and Lopez had ample reminders." This recommendation was approved by Wilson and Carpenter, as well as Rural/Metro Director of Human Resources Ann Hebert, and the suspension issued shortly thereafter, on September 17. The suspension effectively denied Lopez any pay for the August 26 shift, and also constituted a "last and final warning" that could lead to further disciplinary action up to and including termination for future violations. (GC Exhs. 54–55; R. Exh. 26.)

As indicated above, the General Counsel contends that, notwithstanding the stated reason for the suspension, Lopez was actually disciplined because of his prominent union role as a union officer and member of the union bargaining team, in violation of Section 8(a)(3) of the Act. The appropriate test for evaluating such allegations is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are un-

sources department, and Len Aiken (Tr. 212). However, their titles or positions were never identified.

[20] See R. Exh. 5, the scheduler's daily phone logs for August; specifically her entries for August 11, 22, and 24. These phone logs were admitted at the hearing, over the General Counsel's objection, pursuant to FRE 803(6), the "business records" exception to the hearsay rule (Tr. 190–193). The General Counsel's posthearing brief argues that this ruling was in error, and that the logs should be given no weight (Br. 8 fn. 2). The General Counsel argues that the scheduler's logs do not satisfy the requirements of the business-records exception because Carpenter acknowledged that the schedulers are not required to keep the logs, and the Company failed to call either the scheduler (who no longer works at the Company) or any other knowledgeable witness to testify about why the logs were created. I reject the General Counsel's argument. The Respondent adequately established—through Carpenter's testimony about the scheduling department's procedures and how the logs were maintained and retrieved (Tr. 180–198, 210–212), and by presenting similar logs kept by the scheduler in May, June, and July (R. Exhs. 2–4)—that the scheduler routinely kept the phone logs in the course of performing her regular duties at or near the time the calls were made. See generally *U.S. v. Smith*, 609 F.2d 1294, 1301–1302 (9th Cir. 1979); *U.S. v. Kail*, 804 F.2d 441, 448–449 (8th Cir. 1986); *U.S. v. Dominguez*, 835 F.2d 694, 698 (7th Cir. 1987); and *Japanese Electronic Products Litigation*, 723 F.2d 238, 288 (3d Cir. 1983), revd. on other grounds sub nom. *Matsushita Electronic Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). Further, it makes no difference whether the scheduler was required to keep the logs or whether other schedulers also kept such logs. See *Keogh v. Commissioner of Internal Revenue*, 713 F.2d 496, 499–500 (9th Cir. 1983); and *U.S. v. Hedman*, 630 F.2d 1184, 1197–1198 (7th Cir. 1980). Finally, there are no circumstances indicating a lack of trustworthiness; indeed, the detailed and apparently comprehensive nature of the scheduler's daily logs indicates the opposite.

> ion or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (citations omitted). See also *St. Bernard Hospital*, 360 NLRB 53 (2013).

Here, the General Counsel clearly made the required initial showing. It is undisputed that Lopez was one of the Union's top officers and a member of the union bargaining team, and that the Company, including Beam, Wilson, and Lemoine, were well aware of this. The Company's animus towards the Union, and union officers in particular, is also well established by ALJ Parke's findings in the 2011 case. Indeed, Beam and Lemoine were likewise directly involved in the investigation and discriminatory discipline of Barkley and Yates in that case.[21] And while the parties' relationship appeared to improve after Rural/Metro acquired the Company and negotiations resumed in early 2012, as discussed more fully below it had clearly again soured by September, after the employees overwhelmingly rejected the Company's last, best and final contract offer and the Company unilaterally implemented its proposal to eliminate unit 603.

Moreover, there are at least two other circumstantial factors supporting the General Counsel's case. First, the Company has not enforced the policy consistently (Tr. 201). Indeed, it is undisputed that, just 4 months earlier, in May 2012, an employee (Aaron Zeigman) was not suspended even though he failed to turn in his new CPR card until after his old card expired. The Company also did not suspend another employee (Jonathan Perona) in August 2011, even though he did not renew his CPR certification until after it expired. (R. Exhs. 7–8; Tr. 202–205.) The record provides no explanation for this inconsistent treatment.[22]

Second, in deciding to enforce the policy in this instance, the Company deliberately ignored several significant facts or circumstances supporting Lopez' defense. For example, although Beam acknowledged to Lopez at the investigatory meeting that the Company had changed its practice under the recertification policy, he took no account whatsoever of this in making his recommendation for the suspension. There is no apparent reason why Beam failed to do so unless he was determined to discipline Lopez regardless of the circumstances. Indeed, he acknowledged at the hearing that the "switch" occurred after Lopez last renewed his CPR and ACLS certifications in 2010, and that the Company did not negotiate with the Union about it at the time (Tr. 267, 291–292, 311, 320). Thus, there was good reason to believe that Lopez was not aware of the new practice.[23]

Similarly, although Beam cited Lopez' "ample reminders" in recommending suspension, he failed to address the known problems with those reminders. Thus, although Beam mentioned Lopez' denial that he received the scheduler's voice mails on his personal cell phone and that Lemoine herself had reminded him to turn in his certifications, Beam never explained, either in his recommendation or at the hearing, whether or why he disbelieved Lopez.[24] Indeed, conspicuously absent

[21] The Company's posthearing brief argues that it is inappropriate to rely on ALJ Parke's findings of animus in the prior case to establish animus in this case. However, as noted above, counsel specifically stated at the hearing that the Company had no objection to relying on ALJ Parke's findings in this proceeding. In any event, the argument is without merit. The cases cited by the Company as support are all distinguishable, either because the prior ALJ decisions in those cases were still pending before the Board on exceptions (*Ampersand Publishing, LLC*, 358 NLRB 1415, 1431 (2012)); because the prior cases were remote in time and did not involve the same supervisors or managers (*Stabilus, Inc*., 355 NLRB 836, 847 (2010)); or because the prior cases involved different employee units (*Control Services*, 319 NLRB 1195, 1200 (1995)). Here, the Board adopted ALJ Parke's findings, and it is immaterial that it did so in the absence of exceptions. See cases cited in fn. 16, above. Further, the Company's prior conduct occurred only a year before the alleged conduct in this case and involved the same supervisors or managers. In these circumstances, to hold that ALJ Parke's findings regarding the prior conduct cannot be relied on to prove animus would make no sense.

[22] The Company itself cites a third example—its failure to suspend employee Greg Empey in May 2012—arguing that this example "clearly" disproves the General Counsel's theory because Empey is likewise a member of the union bargaining team (Br. 20). The argument might be persuasive if it had any factual basis. Although Carpenter testified that Empey is a union official of some sort (Tr. 204), there is no evidence that he served on the union bargaining team. Further, the Empey example actually occurred in May *2013*, well after the unfair labor practice charges were filed (R. Exh. 8; Tr. 202–205). Thus, it is not particularly probative. See *Windstream Corp*., 352 NLRB 44, 50 (2008), reaffd. 355 NLRB 406 (2010).

[23] Contrary to the Company's posthearing brief (p. 19), it is not clear from Lopez' hearing testimony that he had turned in his recertifications to Clonts or other managers in the past when he took the training at the Company's facility. While that is a possible interpretation of his testimony, it is not the only one, or even the most reasonable one. (See Tr. 405–406.) In any event, there is no evidence that the Company considered Lopez' past actions in rejecting his excuse for not timely turning in his new cards in this instance. For similar reasons, I do not give any weight to Trainor's testimony that he told employees at the end of the class that they must turn in their cards (Tr. 236), which is also cited in the Company's brief (p. 13). First, the testimony is not particularly credible. Indeed, Trainor, who works for the Phoenix Fire Department when he is not conducting training for the Company, initially testified that he was not aware of any policy telling employees what they need to do with their cards, and that he only gave them copies of the cards "as a courtesy, because I'm a nice guy" (Tr. 235–236). Moreover, Lopez credibly testified that he received his cards from the training department secretary, not from Trainor himself, and that the secretary did not give him any instructions on what to do with the cards (Tr. 404–405). Second, even if Trainor's testimony were credible, there is no evidence that the Company knew or considered what Trainor told his trainees when it disciplined Lopez.

[24] Beam's recommendation incorrectly quoted Lopez as saying that he did not get his voice mails because he forgot his password. Similarly, the Company's posthearing brief incorrectly states (p. 15) that

from both Lemoine's and Beam's hearing testimony was any mention of Lemoine's reported reminder. Although both testified about Lopez' suspension at the hearing, Lemoine did not testify that she had reminded Lopez, and Beam did not testify that he relied on Lemoine's report in concluding that Lopez had "ample reminders" and should be suspended. Nor does the Company's posthearing brief mention or rely on Lemoine's reported reminder as support for the suspension.

Considered together, the foregoing circumstances strongly support an inference of unlawful motive. See, e.g., *Wright Line*, 251 NLRB at 1090–1091, 1097; and *Carolina Steel Corp*., 296 NLRB 1279, 1283–1284 (1989). See also *Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006) ("circumstantial evidence is sufficient to establish anti-union motive"); and *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011) ("most evidence of motive is circumstantial").[25]

Finally, the Company has failed to establish that it would have suspended Lopez even absent his union activity. Although the Company provided several examples where other employees were disciplined for failing to submit their new certifications at least 7 days before expiration of their old ones,[26] it presented only one example, in November 2011, where an employee (David Herman) had likewise received the training and recertifications from the Company rather from than an outside source. Further, the only evidence it presented to prove this is a copy of a sign-in sheet containing Herman's name (R. Exh. 9). The sign-in sheet is missing its top half and thus, unlike the July 13, 2012 sign-in sheet that Lopez signed (GC Exh. 49), does not indicate whether the training was for the same recertifications (PALS and CPR) that Herman failed to timely submit. Trainor testified that the form is also used for ACLS training (Tr. 230–232; see also GC Exh. 51). In addition, the sign-in sheet is undated, and thus it is not even clear that the sign-in sheet was for the relevant training class. Although Trainor testified that it appeared to be for that class, he based this solely on a handwritten notation, across from one of the other trainees (Alan Gregory), indicating that, while Gregory was initially recorded as incomplete, he "completed" the training on "10-21-11."[27]

Moreover, as discussed above, the record indicates that the Company has not consistently enforced the 7-day policy. Although perfection is not required,[28] the inconsistency cannot reasonably be overlooked here given the lack of substantial evidence that the policy had ever previously been enforced where the employee received the training and recertification cards from the Company.

Accordingly, I find that the Company discriminatorily suspended Lopez in violation of Section 8(a)(3) of the Act, as alleged.

IV. UNILATERAL CHANGES REGARDING EFFECTS OF CHANDLER CONTRACT ON JANUARY 3, 2013

Nearly half of PMT's business comes from contracts with cities and municipalities. The Company obtains these contracts by bidding on requests for proposals (RFPs) issued by the local governments. As discussed in the prior cases, the Company has historically had such contracts with Tempe, Scottsdale, Peoria, and Chandler.

Prior to 2013, PMT's contract with Chandler covered only a portion of the city. PMT therefore maintained only one dedicated 911 unit/station in the city (282), which was staffed with three PMT paramedics and three EMTs over three shifts. Although PMT also had two other rescue units in Chandler, they operated out of city fire department stations and were staffed with city firefighter-paramedics instead of PMT paramedics.

Sometime in 2011, Chandler issued a new RFP, which, unlike the existing contract with PMT, covered the whole city. The Company forwarded a copy of the RFP to the Union, and in late July 2011 Barkley offered the Union's position on it. Barkley objected to the RFP because, among other things, it would effectively require PMT to use city firefighter-paramedics on all of the 911 units instead of PMT paramedics, and to reimburse the city at the firefighters' higher wage and benefit rates, thereby placing "additional pressure on any future wage adjustments" for PMT employees. Barkley notified the Company that, if it bid on the RFP and executed a contract with Chandler that removed the PMT paramedics from the ambulances, the Union wanted to "bargain over the affects." Specifically, Barkley stated that the Union would seek "equivalent working conditions, pay and benefits for the entire unit and the employees displaced." (GC Exh. 15; Tr. 448.)

Notwithstanding the Union's objections, the Company did, in fact, bid on the Chandler RFP. As CEO Wilson informed Barkley at the time, if the Company failed to bid on the RFP, the Company would lose its current business with the city and potentially have to lay off 18 bargaining unit employees (GC Exh. 14). Further, as Human Resources Director Carpenter subsequently reminded Barkley on January 6, 2012 (GC Exh. 42), a provision in the parties' December 2010 settlement agreement in the third unfair labor practice case specifically allowed the Company to unilaterally submit bids that transferred bargaining unit work to nonunit employees if required by the RFP. (See fn. 1, above, and R. Exh. 15, p. 00006.)

Lopez said he did not know how to retrieve email from his personal phone. In fact, as indicated above, Lopez stated that he did not know how to retrieve his voice mails at the time (GC Exh. 58).

[25] In its posthearing brief, the Company argues that I should have permitted it, over the General Counsel's objection, to examine Lopez about whether he personally believed the Company suspended him because of his union activity. (See Tr. 417–418.) However, Lopez' personal belief that the suspension was not discriminatory would be no more relevant than his personal belief that it was discriminatory. Discriminatory motive is proven or disproven by objective facts, not by subjective opinions. See *Grizzell v. City of Columbus Division of Police*, 461 F.3d 711, 724 (6th Cir. 2006); and *Billet v. Cigna Corp*., 940 F.2d 812, 825 (3d Cir. 1991), overruled in part on other grounds 509 U.S. 502 (1993).

[26] See GC Exh. 48; R. Exhs. 9–10.

[27] It is unclear who wrote this. Although Trainor testified that he wrote the letters and numbers in the first and third columns from the left, it is unclear from his testimony if he also wrote the notation in the second column regarding Gregory. (See Tr. 233–235.) Accordingly, for this and the other reasons indicated above, I find that the sign-in sheet is unreliable and unpersuasive, and therefore proves nothing.

[28] *Consolidated Biscuit Co.*, 346 NLRB 1175, 1179 fn. 24 (2006), enfd. 301 Fed. Appx. 411 (6th Cir. 2008).

The city accepted the Company's bid on March 5, 2012, and the contract was approved by the Arizona Department of Health Services (DHS) about 3 months later, on June 26 (GC Exhs. 20 and 60). Approximately 3 weeks later, on July 16, Wilson wrote Barkley and requested to meet and bargain regarding Chandler. Wilson advised Barkley that the effective date of the Chandler contract would be January 2013. He also acknowledged that the three existing paramedic positions would be lost under the contract. However, he stated that there would be an increase of nine EMT positions, and that the three displaced paramedics would be moved elsewhere in the Company with no loss of annual pay. (GC Exh. 7.)

Barkley responded by email 2 days later, requesting "a detailed and itemized list of what it is that you want to negotiate so we can prepare accordingly." (GC Exh. 13.) Wilson replied the following day, listing the following specific items regarding Chandler:

> 1. Plans and details of the City of Chandler contract projected to be implemented in January2013;
> 2. Projected impact on the unit;
> 3. Making any displaced Paramedics whole; [and]
> 4. Any items relating to Chandler that ICEP wishes to discuss.

Wilson also identified a few other items for discussion, including eliminating unit 603. (GC Exh. 19.)

The parties subsequently met on August 1. The Company at that time presented the Union with proposed agreements regarding both Chandler and unit 603. The proposed memorandum of understanding (MOU) regarding Chandler stated that, "in full satisfaction of any and all obligations under the NLRA," the parties agree that "[a]ny and all paramedics displaced by the City of Chandler contract (expected to be 3) will be placed elsewhere in PMT at no loss of annual pay, defined as base hours and current scheduled overtime, or seniority."

The Company also gave the Union two other supportive or related documents. One listed the new "rescue" units under the new contract (i.e., units staffed by firefighter paramedics and located at city fire department stations) and the expected change in the number of PMT paramedics and EMTs. The other identified the three unit/station 282 paramedics who would be displaced: Brad Taylor, Eric Hightower, and Jason Bickford. It indicated that Taylor would be moved to a permanent slot on unit 284—a Chandler "general transportation" (GT) unit stationed about 5 miles away that transported patients between facilities and performed 911 emergency work only on a "backup" basis— displacing one of two paramedics temporarily assigned there. As Taylor was also the Field Training Officer (FTO) assigned to unit/station 282,[29] the document stated that the Company intended to post and fill an FTO position at unit 284 prior to the contract start date. Finally, the document stated that Hightower and Bickford, who were both temporarily assigned to unit/station 282, likewise needed to be permanently reassigned by January 3.[30]

The proposed Chandler MOU also addressed the issue of assigning part-time work to firefighters. This was an issue that had arisen in late 2008, when the Company unilaterally increased its use of off-duty firefighters to perform nonemergency GT work on a part-time basis, thereby depriving bargaining-unit employees of unscheduled overtime. In his November 2009 decision in the first unfair labor practice case, ALJ Kocol found that the Company had thereby violated Section 8(a)(5) of the Act, and ordered the Company to rescind the transfer of work and restore it to unit employees as it previously existed. As discussed above, ALJ Kocol's decision was adopted by the Board in the absence of exceptions on December 13, 2010, and was subsequently enforced by the Ninth Circuit Court of Appeals on June 27, 2011. The parties thereafter reached a stipulation resolving all compliance issues on June 15, 2012. The stipulation specifically provided that the Company had "subcontracted" 52,903 hours to nonbargaining unit firefighters prior to its unlawful transfer of the work in 2008; thereby indicating that this was the baseline number that the Company had to return to pursuant to ALJ Kocol's order. (GC Exh. 4, p. 5, par. (e).) In the meantime, during their negotiating sessions in April and May, the parties also made proposals and bargained over the subcontracting issue "going forward." The proposals generally focused on imposing a "cap" on the number of hours the Company could assign to nonbargaining unit part-time firefighters during a 12-month period, using the 52,903 number as the baseline. The proposals, however, specifically excluded firefighter hours required by contracting municipalities, which were not at issue in the first case. (R. Exh. 30; GC Exhs. 17–18, 63; Tr. 102–103, 780, 788.) And a tentative agreement (TA) on subcontracting that the parties executed on June 7, 2012, shortly before the Company made its LBFO, specifically excepted such firefighter hours pursuant to both the existing Tempe contract and the "forthcoming" new Chandler contract (GC Exh. 16). The Company's August 1, 2012 proposed MOU regarding Chandler reiterated this, stating that "[a]ny additional part-time firefighter hours resulting from the use of contracted firefighters under the City of Chandler contract will not be included in the 52,903 baseline part-time firefighter hours per the compliance specification."

As with the proposed MOA regarding unit 603 (see sec. II, above), the Union offered no response to the Chandler MOU or related documents at the meeting. Rather, the Union simply stated that it would take them under advisement. (Tr. 686–687.)

Approximately a week later, on August 6, Barkley informed Wilson that both the subcontracting TA and the Company's LBFO had been "voted down" (GC Exh. 9). The following

[29] An FTO is the Company's "first line of communication" between management and the crews, and also serves as the liaison between PMT and city fire departments and personnel. The FTO provides supplies and relays personnel and other general information to the crews, checks the stations to ensure that required maintenance duties are performed, and also responds to incidents or accidents involving the crews. FTO positions are posted, and individuals selected to be permanent FTOs are paid an extra $1.50/hour. (Tr. 330–334, 359, 421–422, 426–427, 431.)

[30] See GC Exh. 22; R. Exhs. 29, 41; Tr. 109, 691–693, 833–834. Although Barkley testified that the Company did not give the Union the latter two documents at the August 1 meeting (see Tr. 495–496, 554–555, 584), I discredit his testimony as contrary to the weight of the evidence. See also GC Exh. 12 (item 5).

day, Barkley emailed Wilson a proposed agreement. The proposal, entitled "EMS Reform," addressed, not only staffing in Chandler, but also in other cities. Among other things, the proposal stated that the Company would "maintain all current staffing levels in all cities that PMT contracts with for 911 services," and that "no PMT employee or unit member shall be displaced from their assigned position for any reason." It also stated that "all current ambulance contracts," with the exception of Peoria, would be "maintained with Advanced Life Support units that deploy one PMT/ICEP Paramedic, and one PMT/ICEP [EMT]"; that no RFP could "displace, or replace current PMT/ICEP staff through change in delivery system"; and that municipal RFPs would "have no effect on staffing in any of the aforementioned areas."

The Union's proposal also addressed the use of part-time workers for "backfilling scheduling holes." The proposal stated that the Company could only use "non-fire part time employees" for backfilling. It also stated that the Company could only "schedule 52,903 hours for firefighters throughout the entire system, acknowledging that Chandler uses 17,520 hours and Tempe uses 17,520 hours per year for a total of 35,040 hours." Unlike the Company's August 1 proposal and the recently rejected TA, however, it did not specifically exclude from this cap the required use of city firefighter paramedics under municipal contracts. (GC Exh. 21; R. Exh. 17.)

Wilson responded to Barkley on August 10. He stated that it was unclear to the management bargaining team whether the Union's proposed agreement was a counter to the Company's proposed MOU regarding the effects of the Chandler contract. However, Wilson stated that, if so, the Union's proposal was rejected because it would not allow the Company to fulfill the contract with Chandler, which had already been approved and required the use of city firefighter-paramedics on each ambulance. Wilson asked Barkley to "[p]lease let us know if the Union has any responsive proposal to our needs as reflected in the MOU tendered to your committee on August 1 for the PMT to consider, or are we at loggerheads on the issue." (GC Exh. 23.)

Barkley replied later the same day. He advised Wilson that the Union would respond the following week "when we have had time to discuss our options." He acknowledged that he did "feel it necessary to be more genuine on this issue." He noted that the Chandler RFP had been "submitted" while ALJ Kocol's order, including the provisions addressing the unlawful attempt to terminate him and "the subcontracting issue," were before the Ninth Circuit for enforcement. He also stated that the Chandler contract "is not viewed as a positive thing for PMT employees," because it "removes private paramedics from the 911 system" and "pay[s] firefighters 90k each and a gravy overtime ride at $30 an hour," which "seems to be coming out of our pocket also" as the Company had offered only a 1-percent raise in its LBFO at the "unlawful bargaining session" on June 7. Nevertheless, Barkley stated that "there is a solution to this" and promised to get back to Wilson "with some proposal as soon as I can." However, he stated that "any proposal we submit will be in CBA [collective-bargaining agreement] form." (GC Exh. 24.)

Wilson responded to Barkley early the following week, on August 14. He disagreed that the Chandler contract was not a positive thing for PMT employees. He noted again that it would expand the bargaining unit by nine EMTs and that the three displaced paramedics would be reassigned elsewhere at no loss of annual pay. He also reiterated that the Company was "seeking to fulfill [its] bargaining obligations concerning this matter with the Union," and stated that the Company looked forward to receiving the Union's response to the Company's proposal sometime that week as Barkley suggested. (GC Exh. 25.)

Barkley replied late that evening. He said he had discussed Wilson's email with his "constituents" and they were "struggling with where to go from here." He again reviewed the Company's history of unfair labor practices and rejection of the Union's various collective-bargaining proposals. He accused the Company of "prematurely ending negotiations" when it presented its LBFO on June 7, and also cited the Company's alleged failure to bargain with the Union before subsequently writing a letter to employees offering them a ratification bonus. He also cited a litany of other alleged wrongs, which he stated proved "nothing has changed." As for Chandler, Barkley stated:

> We can go back and forth on Chandler till the cows come home, but at the end of the day, you have shown that it comes out of our pocket and our employees are displaced. . . .We are under no obligation to bargain away our unit, one RFP at a time. . . .We move [sic] to create another proposal for you, but it is looking redundant and your response preconceived by our team. . . . We will see what we can come up with, but what we have on paper now rectifies all scenarios and has been previously ignored or rejected by your team. [GC Exh. 26.]

Wilson responded 2 days later, on August 16, "to set the record straight." He disputed Barkley's review of the bargaining history, and detailed the Company's efforts since 2006 to increase the number of both paramedics and EMTs, within the RFP and contractual limitations imposed by the cities or other political subdivisions. He told Barkley, "I am hopeful you will reconsider your position and make a sincere proposal that perhaps can bring our two sides closer to a resolution and collective bargaining agreement." (GC Exh. 27.)

Thereafter, on August 19, Barkly notified Wilson that the Union was almost finished drafting it proposal. However, another week passed without Wilson receiving anything. Accordingly, on August 27, he emailed Barkley and the other members of the union bargaining team asking if there was "any new follow up on the proposal you mentioned." (GC Exh. 29.)

Two more weeks passed without a response. Accordingly, on September 10, Wilson sent another email to Barkley. He reviewed the history, noting that "we have been discussing the City of Chandler RFP now for months." He stated that, if the Company did not receive a counterproposal to its MOU by Friday, September 14, "we will assume that we are at loggerheads and the Union has no further suggestions or counterproposals to the MOU." (R. Exh. 19.)

Barkley formally responded by letter the following week, on Monday, September 17. He again reviewed the overall bar-

gaining history, repeating his previous assertion that the Company had "prematurely ended" the June 7 bargaining session and subsequently offered the employees a ratification bonus without first negotiating it with the Union. With respect to Chandler, he noted that the Company had announced to the employees, "without notifying or negotiating with the Union," that the Company had pursued and won the Chandler contract. He also noted that the RFP was "issued in August 2011 while there was a 9th circuit court order that was clear on subcontracting restrictions." Barkley asserted that "PMT was to cease and desist and redact all subcontracting and subcontractors, yet a contract was negotiated with a city that should have known about the restrictions." Barkley stated that it was the Union's "impression" that "legally" the Company's response to the RFP "could not contain subcontracting as per the 9th Circuit's order, but PMT bid for the removal of its own employees anyway." He also accused the Company of failing to stop "the use of firefighters" as agreed in the June 15 compliance stipulation.

Barkley also attached to his letter the promised union proposal. The proposal was in the form of a complete collective-bargaining agreement, and addressed numerous terms and conditions, including wages and benefits. With respect to "subcontracting," the proposal set forth three options. "Option 1" instituted a subcontracting cap of 52,903 hours per year, and required the Company to match employee wages, benefits, and working conditions to the subcontracted work force and to negotiate with the Union before terminating an employee "for any reason." "Option 2" provided that the Company would "transfer" employment of the unit employees to the cities currently under contract with PMT; the employees would retain their seniority and maintain their same wages, benefits, and working conditions with the city, but with civil service protections and state sponsored pension and healthcare; and the cities would recognize the Union as the employees' bargaining representative. "Option 3" provided that the Union would "transfer 70,010 hours of unit work to non-unit firefighters," but the Company would negotiate civil service protections, pensions and benefits for PMT employees, and "at no time [would] any PMT employee be laid off, terminated or harassed to the point of voluntary separation." (GC Exh. 30; Tr. 592–593.) However, the proposal did not otherwise specifically address the effects of the Chandler contract on bargaining unit employees.

Wilson responded by email 2 days later, on September 19. He expressed disappointment with the Union's contract proposal overall, but said the Company would study it and respond with a counter. "As for the items that relate to Chandler," Wilson said,

> there was nothing to indicate that the parties are not at impasse. Indeed, the union withdrew its TA that could have resolved the matter. The company is implementing its Chandler MOU. Obviously nothing final will happen until January. [GC Exh. 31.]

Barkley replied later the same day. He reminded Wilson that the union membership had voted down the TA, which limited the Union's ability to negotiate. As for the Chandler MOU, Barkley stated, it was "dead on arrival as we previously notified you of." (GC Exh. 32.)

The Company subsequently proceeded as planned. In September it posted for special bid the EMT positions created by the Chandler contract. It also posted and filled the FTO position at unit 284 (selecting Taylor for the A shift). Thereafter, on January 3, 2013, when the Chandler contract became effective, the Company closed Chandler unit/station 282 and transferred Taylor to unit 284 and the two other paramedics to other ambulances. Pursuant to the terms of the Chandler contract (GC Exh. 20, p. 3, sec. 2.1), it also reassigned all bargaining unit employees in Chandler to post out of the city fire department stations.

The General Counsel contends that the foregoing unilateral changes violated Section 8(a)(5) of the Act because, contrary to the Company's assertions, the parties had not reached a valid impasse over the effects of the Chandler contract. The General Counsel's primary theory, articulated both at the hearing and in the posthearing brief, is that a valid impasse was precluded by the Company's prior, unremedied unfair labor practices; specifically, unlawfully bypassing the Union and offering employees a contract ratification bonus in June 2012, unilaterally shutting down unit 603 in August 2012, and discriminatorily suspending Lopez, a member of the union bargaining team, on September 17, 2012.

As found above, however, the Company did not unlawfully bypass the Union when it notified employees of the ratification bonus; contrary to Barkley's September 17 letter, the Company's previous communication to the employees about the offer was entirely lawful. As for shutting down unit 603 and suspending Lopez, the General Counsel offers no explanation how or why these violations contributed to the parties' failure to reach agreement regarding the effects of the Chandler contract. Nor is the causal relationship so obvious as to be self-explanatory. While the Company raised unit 603 at the August 1 meeting, it proposed a separate agreement on the issue, and there was little or no discussion about it. Further, the issue was not thereafter discussed or tied together with the Chandler issue in any way, and was not even mentioned in Barkley's September 17 letter. As for Lopez' September 17 suspension, it was only for 1 day and retroactive to August 26, and there is no evidence that he was unable to participate in the Chandler negotiations because of the retroactive suspension or that it impacted the negotiations in any way. Accordingly, I reject the General Counsel's theory. See *Aramark Educational Services*, supra.

The General Counsel's posthearing brief additionally argues that the Company failed to give the Union prior notice of the changes before declaring impasse and implementing them. However, this is factually incorrect; as found above, the Company provided the Union with documents at the August 1 meeting that specifically stated how the Company proposed to address the effects of the new contract under the proposed MOU.[31] The January 2013 changes were either identical to or

[31] Although there is no evidence that the Company gave the Union prior notice of the September 2012 special bid for the anticipated new EMT positions, this was not alleged as an unfair labor practice in the complaint. Nor was the Company's legal obligation, if any, to provide

reasonably comprehended by those proposals. See generally *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), review denied *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) ("an employer does not violate the Act by making unilateral changes that are reasonably comprehended within [its] pre-impasse proposals"). Moreover, as indicated above, at least some of the changes, such as posting the 911 units at city fire department stations, were required by, and therefore "an inevitable consequence" of, the Chandler contract. See *Fresno Bee*, 339 NLRB 1214 (2003); and *Holly Farms Corp*., 311 NLRB 273, 278 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996) (indicating that there is no duty to bargain over such effects). Accordingly, the argument is without merit.

Finally, the General Counsel's posthearing brief alternatively argues that, even if the Union was given adequate notice, the Company declared impasse on September 19 prematurely, i.e., it "had the obligation to not simply reject [the Union's September 17 proposal] and declare impasse but to continue discussing the proposals" (Br. 20 fn. 8, 34). I reject this argument as well. In evaluating the existence of an impasse, the Board considers a number of factors, including the bargaining history, whether the parties have negotiated in good faith, the length of the negotiations, the importance of the issues over which there is disagreement, and the contemporaneous understanding of the parties regarding the status of the negotiations. *Taft*, 163 NLRB at 478. Here, as discussed above, although the Company committed certain other unfair labor practices during the same general time period, the violations did not in any way impact the negotiations over the effects of the Chandler contract. Nor is there any allegation or evidence that the Company bargained in bad faith, either with respect to the effects of the Chandler contract or in the overall negotiations for an initial collective-bargaining agreement. Further, while only about 7 weeks passed between the Company's August 1 proposal and its September 19 declaration of impasse, the Union never provided a counterproposal to the Company during that time specifically addressing the effects of the Chandler contract on the work force. Rather, Barkley continued to object to the RFP/contract itself—in part on erroneous legal grounds—and offered only various "EMS reforms" and "subcontracting options" that were tied to broader issues in collective bargaining and prevented the Company from performing the contract and/or failed to address the effects of the contract as written.[32] Moreover, in his September 19 response, Barkley did not dispute Wilson's assertion that the parties were at impasse regarding the effects of the Chandler contract. Nor, despite Wilson's assurance that "nothing final will happen until January," did the Union subsequently request additional meetings or make any subsequent proposals regarding the matter to break the impasse prior to that time.

The General Counsel's brief fails to address any of the foregoing facts and circumstances. Indeed, it does not even mention the relevant *Taft* factors for evaluating the existence of an impasse.

Accordingly, the allegation is dismissed.

V. UNILATERALLY RELOCATING STATION 2 EMPLOYEES TO STATION 3 ON JANUARY 17, 2013

About January 17, 2013, the Company unilaterally relocated its employees at station 2 in Glendale to station 3 in Peoria (about 6 miles away) without giving the Union notice or an opportunity to bargain (GC Exh. 39–40; Tr. 145–148, 152, 496). The General Counsel contends that the decision to relocate station 2 employees was a mandatory subject of bargaining because it did not involve a change in the scope and direction of the enterprise, citing *Dubuque Packing*, 303 NLRB 386 (1991), enfd. sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C.Cir. 1993).

However, as indicated by the Company, under *Dubuque* even relocations that are unaccompanied by a fundamental change in the business do not require bargaining "[i]f the employer shows that labor costs were irrelevant to the decision." Id. at 391. Here, there is no dispute that the relocation had nothing to do with labor costs. The purpose of the relocation was simply to provide the crews with better working conditions, as station 3 is a newer facility with working air conditioning and toilets, a large kitchen and breakrooms, and a secure parking lot, and there is no evidence that any unit employee suffered a reduction in pay or benefits. (Tr. 151–152, 701.) Accordingly, the Company clearly had no duty to bargain over the decision. See also *Mercy Health Partners*, 358 NLRB 566, 567 fn. 9, and 573 (2012).[33]

The General Counsel also contends that the Company had a duty to bargain over the effects of the relocation. And it is generally true that, "[e]ven when an employer does not have a duty to bargain about a decision to relocate, it still has a duty to bargain with the union over the effects of that decision on unit employees." *Mercy Health Partners*, 358 NLRB at 567; citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). See also *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012), and cases cited there. However, this rule only applies if the employees were adversely affected in some "material, substantial, and significant" way. *Fresno Bee*, supra. See also *Rochester Gas & Electric Corp*., 355 NLRB 507 (2010), enfd. sub nom. *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013); and *EAD Motors*, 346 NLRB 1060, 1065 (2006).[34] Here, as indicated by the Company, there is no

advance notice and an opportunity to bargain over such bids fully litigated.

[32] Contrary to Barkley's assertions in his September 17 letter, there is no complaint allegation or record basis to conclude that the Company violated any of the prior orders or the Act by unilaterally bidding on the Chandler RFP and/or executing the contract. See Tr. 19, 88; GC Br. 13, fn. 3. Similarly, as with the unit 603 issue, the General Counsel does not contend that the Company was obligated to refrain from implementing its Chandler MOU until the parties had reached an overall impasse in the negotiations for an initial collective-bargaining agreement.

[33] In light of this conclusion, it is unnecessary to address the Company's alternative argument that no bargaining was required under the Fourth Circuit's analysis in *Dorsey Trailers v. NLRB*, 233 F.3d 831 (2000).

[34] As indicated by the General Counsel, it is well established that employers must bargain over a decision to implement changes in mandatory subjects of bargaining even if the changes would be beneficial to employees. See, e.g., *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); and *Randolph Children's Home*, 309 NLRB 341, 343 fn.

record evidence that the station 2 unit employees were adversely impacted in any way by their relocation to station 3. Thus, no effects bargaining was required.

Accordingly, the allegation is dismissed.

VI. FAILING TO PROVIDE INFORMATION REQUESTED ON JANUARY 30, 2013

On January 24, 2013, Barkley sent Human Resources Director Carpenter an email listing several "scheduling malfunctions that need attention," including employee reports that overtime had been cut. Carpenter responded on January 30, advising Barkley that overtime was being monitored, there had been no change in policy, and the Company continued its attempts to spread out overtime opportunities. Barkley replied later the same day, stating:

> I will detail the loss of overtime by the numbers and get it back to you as soon as possible. I would think that all former Chandler medics that were transferred to GT lost the ability to obtain overtime. Did you compensate them for their loss by adjusting their pay? Please advise on the adjustments of all paramedics pay, companywide that had a pay adjustment for scheduling changes or reductions. [GC Exh. 43.]

Carpenter responded on February 8, describing in detail the history of how and where the units 282 and 284 paramedics who were displaced by the Chandler contract were reassigned. As for Barkley's query about compensation/pay adjustments, she stated, "On a quarterly basis, we will conduct a true up for those eligible displaced employees to fulfill the obligation to make them whole." (GC Exh. 44.)

Barkley did not reply to Carpenter's February 8 response (Tr. 172, 210). Instead, about 3 weeks later, on February 26, he filed an unfair labor practice charge on behalf of the Union. Among other things, the charge alleged that the Company had unlawfully failed to provide the Union with requested information "regarding the pay rate changes for 12-hour staff" (GC Exh. 1(h)).

The General Counsel alleges, the Company does not dispute, and I find that the compensation/pay adjustment information Barkley requested was relevant and necessary to the Union's performance of its duties as the unit employees' collective-bargaining representative. Nevertheless, in agreement with the Company, I find that a preponderance of the evidence fails to support a conclusion that Carpenter's February 8 response violated the Company's duty to bargain. As indicated above, Carpenter's email provided detailed information to Barkley regarding the reassignment of the displaced paramedics, and assured Barkley that the Company would "make them whole" on a quarterly basis for any scheduling changes or reductions. As Barkley made no response or objection to this, there was no reason for Carpenter to believe, prior to the Union's February 26 unfair labor practice charge, when there was still over a month left in the quarter, that her response was considered unacceptable. Nor does the General Counsel contend that the February 26 charge was sufficient to put the Company on notice thereafter that Carpenter's response was insufficient. Accordingly, the allegation is dismissed. Cf. *Day Automotive Group*, 348 NRLB 1257, 1263 (2006) (finding that the employer did not unlawfully fail to provide the union with requested information about a proposed health plan as the employer gave the union the information it had at the time and had every reason to believe satisfied the union, and the union gave no indication that it needed or expected more information).

VII. UNILATERALLY CHANGING LOCATION AND DUTIES OF UNIT 284 IN MARCH 2013

As indicated above, unit 284 is a 24-hour GT unit that transports patients between facilities and also performs 911 emergency work on a "backup" basis. It posts out of its own station in Chandler, but has historically been redeployed or "moved up" into Scottsdale to assist with call demand. In March 2013, however, the Company directed unit 284 to post out of station 275 in Tempe, which borders Scottsdale, for the first 12 hours of the shift, between 8 and 10 a.m. until about 8 and 10 p.m., to perform GT and backup work for both Tempe and Scottsdale. (Tr. 137, 432–434, 439, 441, 497, 618.) The Company did so unilaterally, without providing the Union with any advance notice or opportunity to bargain. And the Union did not otherwise learn of the change until after it was implemented. (Tr. 137, 496–497, 622–633.)

Unlike the Company's decision to relocate station 2, the General Counsel does not contend that this decision constituted a mandatory subject of bargaining under *Dubuque* or any other test or analysis. Rather, the General Counsel argues that the Company had an obligation to provide the Union with notice and an opportunity to bargain over the change pursuant to its obligation to bargain over the effects of the new Chandler 911 contract. However, unlike with the earlier January 3 changes, the record fails to establish any significant causal connection between the Chandler contract and the March change. Accordingly, I reject the argument.

Nevertheless, as discussed above, the Company was obligated to provide the Union with notice and an opportunity to bargain over any substantial adverse effects of the decision. And, unlike with the relocation of station 2, the record indicates that the decision to modify unit 284's posting location and duties did, in fact, have such an impact. The increased workload backing up two cities, constant driving back and forth, and being away from their home station limited the crews' downtime and ability to fix meals between calls. They also made it impossible for Taylor to properly perform his FTO duties at station 284. Indeed, for all of the foregoing reasons, Taylor transferred to an FTO position at a Scottsdale 911 unit (604) in May. (Tr. 433–435, 439–441; see also Tr. 497–498.)

The Company offers no substantial response to the foregoing evidence or other defense to the allegation. Accordingly, I find that the Company violated Section 8(a)(5) of the Act by failing to give the Union notice and an opportunity to bargain over the effects of the March 2013 unilateral change.

CONCLUSIONS OF LAW

1. The Company violated Section 8(a)(5) and (1) of the Act by:

3 (1992). However, the General Counsel cites no authority applying the same rule to bargaining over the effects of nonmandatory subjects of bargaining.

(a) Again shutting down unit 603 in August 2012 without providing the Union with sufficient notice and a meaningful opportunity to bargain over the decision and its effects.

(b) Changing the posting location and duties of unit 284 in March 2013 without providing the Union with notice and an opportunity to bargain over the effects of the decision.

2. The Company violated Section 8(a)(3) and (1) of the Act on September 11, 2012, by discriminatorily issuing a retroactive 1-day suspension to Tony Lopez effective August 26, 2012, because of he was a union officer and member of the union bargaining team.

3. The Company did not otherwise violate Section 8(a)(5), (3), and (1) of the Act in the manner alleged in the complaint.

REMEDY

The appropriate remedy for the violations found is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, the Company will be required to restore unit 603 as it existed prior to the unlawful August 2012 shutdown.[35] Such a restoration order is presumptively appropriate, and the Company has not to date shown, or even contended, that restoration of the unit would be unduly burdensome.[36] The Company shall also be required to make whole the unit employees for any lost earnings or benefits as a result of the shutdown. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed and compounded as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Company will also be required, on request, to bargain in good faith with the Union over the effects of the March 2013 change in the posting location and duties of unit 284. However, I deny the General Counsel's request that the Company be required to pay 2-weeks minimum backpay to the employees in the manner prescribed in *Transmarine Navigation Corp*., 170 NLRB 389 (1968). Contrary to the General Counsel's suggestion, such a remedy is not automatic or appropriate in every effects-bargaining case regardless of loss. See *AG Communication Systems*, 350 NLRB 168, 173 (2007), affd. in relevant part sub nom. *Electrical Workers Local 21 v. NLRB*, 563 F.3d 418 (9th Cir. 2009). Further, the cases cited by the General Counsel in support of such a remedy are clearly distinguishable. For example, in *Live Oak Care & Manor*, 300 NLRB 1040 (1990), the primary case relied on by the General Counsel, the Board found that a *Transmarine* remedy was appropriate because the employees had, in fact, suffered financial losses, and that, on learning of the sale/transfer of the facility, the union had immediately requested bargaining over such issues as accrued leave, severance pay, pending grievances, and payment of all wages and benefits due. Moreover, the Board specifically stated that, given these circumstances, "we need not decide whether the remedy for a minimum of 2 weeks' backpay in *Transmarine* is warranted for all effects bargaining violations, regardless of loss." (Id. at 1040.)

The additional cases cited by the General Counsel following *Oak Care* are to the same effect. In *Richmond Convalescent Hospital*, 313 NLRB 1247 (1994), the Board found that such a remedy was appropriate because it was unclear whether all of the unit employees were hired following the takeover/transfer of the business, and that, on learning about it second hand, the union immediately requested bargaining over several pending issues in dispute, including sick leave, overtime pay, a grievance, and payment of other wages and benefits due. In *Sierra International Trucks*, 319 NLRB 948 (1995), the union repeatedly requested effects bargaining before the asset sale occurred and before it was known whether the employees would be retained by the new ownership. Further, the employer actually terminated all of the unit employees and ceased operating when it transferred the franchise and assets. Although the dealership resumed operating under the new ownership the very next business day, two of the former unit employees either did not apply or were not hired after submitting applications. And in *Sea-Jet Trucking Corp*., 327 NLRB 540 (1999), rev. denied mem. 221 F.3d 196 (D.C. Cir. 2000), the union sought severance pay for employees who chose not to relocate and transportation costs for employees forced to travel longer distances because of the move.

Here, in contrast, there is no evidence or reason to believe that Taylor or other unit employees may have suffered economic losses as a result of the change. Nor is there any evidence or reason to believe that the Union would have sought any kind of economic compensation or benefits for the affected employees had it received timely notice. Accordingly, I find that a *Transmarine* backpay remedy is unwarranted.

With respect to the discriminatory 1-day suspension of Lopez, the Company shall be required to expunge any reference to the suspension from the Company's files, and to advise Lopez that this has been done and that the suspension will not be used against him in any way. The Company will also be required to make Lopez whole for any loss of pay or benefits as a result of the suspension. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed and compounded as set forth in *New Horizons* and *Kentucky River*, above.

Finally, the Company will be required to compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. See *Latino Express, Inc.*, 359 NLRB 518 (2012).

[35] Given the Company's admission that it restored unit 603 in February 2012 as required by ALJ Parke's December 2011 order (see fn. 13 above), the Company shall presumptively be required to again restore the unit in that manner, i.e. to schedule and staff the unit 8 hours per day, 5 days per week. However, the ultimate determination of the appropriate manner in which the unit must be restored will be left to the compliance proceeding. Cf. *American Girl Place New York*, 355 NLRB 479, 480 (2010) (evidence warranted presumption that employer would have granted actors a $6-per-show wage increase absent their protected activities, but employer would be given an opportunity to demonstrate otherwise at the compliance stage).

[36] See, e.g., *Solutia, Inc*., 357 NLRB 58 (2011), enfd. 699 F.3d 50 (1st Cir. 2012). If there is any new or previously unavailable evidence showing that restoration of unit 603 has become unduly burdensome since the hearing, the Company may present that evidence in the compliance proceeding. Id. at fn. 19.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[37]

ORDER

The Respondent, Professional Medical Transport, Inc., Mesa, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Independent Certified Emergency Professionals, Local No. 1 as the exclusive bargaining representative of the employees in the following unit:

> All full-time field paramedics, EMTs, IEMT's, and registered nurses, but excluding administrative staff individuals, support services or personnel not directly operating in the field as an EMS provider, guards, office clericals and supervisors as defined by the National Labor Relations Act.

(b) Discriminatorily disciplining employees because of their union activities or to discourage employees from engaging in union or other protected concerted activities.

(c) 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) Restore unit 603 as it existed prior to the unlawful August 2012 shutdown.

(b) Make whole the bargaining unit employees for any lost earnings and benefits resulting from the unlawful 2012 shutdown of unit 603, in the manner set forth in the remedy section above.

(c) On request, bargain in good faith with the Union to an agreement or valid impasse over the effects of the March 2012 changes in the posting location and duties of unit 284.

(d) Within 14 days of the Board's order, remove any reference to the unlawful August 26, 2012 suspension that it retroactively issued to Tony Lopez on September 11, 2012, and notify Lopez within 3 days thereafter that this has been done and that the suspension will not be used against him in any way.

(e) Make Lopez whole for any lost earnings and benefits resulting from the unlawful suspension, in the manner set forth in the remedy section above.

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

(g) 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.

(h) Within 14 days after service by the Region, post at its facilities in Maricopa County, Arizona, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2012.

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

---

[37] 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.

[38] 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."