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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.	:	
Petitioner,	:	Case No. 15-1126
vs.	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent.	:	

ORIGINAL

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Midwest Terminals of Toledo International, Inc. hereby petitions the United States Court of Appeals for the District of Columbia Circuit, pursuant to 29 U.S.C. § 160(f), for review of the Decision and Order entered by the National Labor Relations Board on March 31, 2015, in Case 8-CA-38092, et al. The NLRB's decision is not supported by the law or statutory interpretation and enforcement should be denied. A copy of the Decision and Order, which is reported at 362 NLRB No. 57, is attached as Exhibit A.

Respectfully submitted,

Ronald L. Mason (54642)
Aaron T. Tulencik (54649)
Mason Law Firm Co., L.P.A.
425 Metro Place N., Suite 620
Dublin, OH 43017
(614) 734-9450
e-mail: rmason@maslawfirm.com
e-mail: atulencik@maslawfirm.com
Counsel for Petitioner Midwest Terminals of Toledo International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2015, a true and correct copy of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board was served via United States Mail, First Class, Postage Prepaid, on this 6th day of May, 2015 upon the following:

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Yvonne T. Dixon
Division of Enforcement Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Cheryl Sizemore, Esq.
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 E. Ninth Street, Room 1695
Cleveland, OH 44199-2086
Cheryl.Sizemore@nlrb.gov

Counsel for the General Counsel

Allen Binstock, Esq.
Regional Director
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 E. Ninth Street, Room 1695
Cleveland, OH 44199-2086

Joseph Hoffman, Jr., Esq.
Faulkner, Hoffman & Phillips, LLC
20445 Emerald Parkway Drive, Suite 210
Cleveland, OH 44135
Hoffman@fhplaw.com

Counsel for Charging Party, Local 1982

Ronald L. Mason (54642)

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Midwest Terminals of Toledo International *and* Otis Brown *and* Miguel Rizo, Jr. *and* Mark Lockett, Sr. *and* Local 1982, International Longshoremen's Association, AFL–CIO. Cases 08–CA–038092, 08–CA–038581, 08–CA–038627, 08–CA–063901, 08–CA–073735, 08–CA–092476, 08–CA–097760, and 08–CA–098016

March 31, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On November 12, 2013, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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,[1] findings,[2] and conclusions[3]

[1] The Respondent contends that the allegations arising from the charges filed in Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627 should be dismissed based on the doctrine of laches, arguing that the delay in processing these charges prejudiced the Respondent. We affirm the judge's rejection of this affirmative defense. Laches does not apply to bar action by the Board, as a federal government agency, to vindicate public rights. *Entergy Mississippi, Inc.*, 361 NLRB No. 89, slip op. at 2 fn. 5 (2014); *F. M. Transport, Inc.*, 302 NLRB 241 (1991). Moreover, we note that publicly available records show that many of the charges brought against the Respondent were deferred to arbitration, settled, or dismissed during the period preceding the commencement of the hearing. We find, contrary to our dissenting colleague, that the General Counsel's decision about when to proceed to a hearing on the allegation in Case 08–CA–038581 does not warrant a departure from the Board's long-standing rule.

Contrary to his colleagues, Member Johnson is persuaded that the complaint allegation based on Case 08–CA–038581, which alleged that the Respondent violated Sec. 8(a)(1) by Supervisor Tim Jones telling employee Miguel Rizo, Sr., that he could not hire people off the "regular" hiring list because they had charges against the company, should be dismissed. He finds that the General Counsel's inordinate and unexplained delay in processing and litigating the charge was prejudicial to the Respondent's case. The statement attributed to Jones was alleged to have been made in April 2009, and the charge was filed in September 2009. However, the administrative hearing in this case did not commence until June 2013, after a series of new charges, consolidated complaints, and postponements of scheduled hearings. Disposition of those later alleged violations did not involve Jones or the statement attributed to him. By the time a hearing finally commenced, Jones no longer worked for the company and was unavailable as a witness. There were no witnesses to the alleged statement other than Jones and Rizo. Although Member Johnson recognizes that the defense of laches is generally not available to parties in Board proceedings, he believes that "at some point laches [will] apply against the Board for inordinate delay in bringing an action." *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 765 (6th Cir. 2003) (quoting *NLRB v. Michigan Rubber Products*, 738 F.2d 111, 113 (6th Cir. 1984). But see *Entergy Mississippi*, above, slip op. at 2 fn. 5 (the defense of laches does not lie against the Board as an agency of the United States Government) (citing *NLRB v. J. H. Rutter-Rex Mfg. Co.* 396 U.S. 258 (1969)). In the interest of fairness and due process, Member Johnson believes that the Board should establish standards for the timely prosecution of unfair labor practices, which could avoid the kind of prejudice suffered by the Respondent here, affecting if not totally undermining its ability to defend itself. A period of almost 4 years between the filing of this charge and the commencement of the hearing, in the absence of any explanation from the General Counsel, is well past the point that the Board should tolerate.

[2] There are no exceptions to the judge's findings that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing to assign Otis Brown work in September, October, and November 2008; that the Respondent did not violate Sec. 8(a)(5) and (1) by ceasing to apply seniority principles in assigning work to employees in 2008; and that the Respondent did not violate Sec. 8(a)(1) by instructing Union Steward Raymond Sims to leave the premises when he was not performing overtime work.

We reject the Respondent's argument that Acting General Counsel Lafe Solomon lacked the authority to issue the complaints in this case. Contrary to the Respondent's contention, the Acting General Counsel was properly appointed under the Federal Vacancies Reform Act (Vacancies Act), 5 U.S.C. Sec. 3345. *Benjamin H. Realty Corp.*, 361 NLRB No. 130, slip op. at 1 (2014).

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 finding that the Respondent did not violate Sec. 8(a)(3), (4), and (1) by failing to assign work to Brown and 6 other employees in April and May of 2009, we note that the record evidence shows that, throughout this period, the Respondent did not use a disproportionate amount of overtime compared to prior years.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by refusing to assign work to Otis Brown in June, July, and August 2008, we agree with the judge that the General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to show that Brown's protected activity was a motivating factor in the refusal to assign him work. We do not, however, adopt the judge's statement of the elements commonly required to support a finding of discriminatory motivation, because that statement can be read to imply, erroneously, that animus is not a necessary element. As set forth in *Mesker Door*, 357 NLRB No. 59, slip op. at 2 and fn. 5 (2011), the required elements are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. Animus may, however, be inferred from circumstantial evidence, including the timing of an adverse action. *Sears, Roebuck & Co.*, 337 NLRB 443, 443 (2002). We agree with the judge that the timing of the reduction in Brown's hours supports an inference of animus here.

In adopting the judge's finding that the Respondent unlawfully ceased deducting dues on January 1, 2013, we do not rely on his finding that the checkoff cessation, occurring after the expiration of the master collective-bargaining agreement, was an unlawful unilateral change under *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012), a decision

EXHIBIT A

and to adopt the recommended Order[4] as modified and set forth in full below.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"The Respondent has engaged in an unfair labor practice within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1), by modifying the May 22, 2012 Memorandum of Understanding during its term by ceasing the deduction of dues pursuant to the parties' memorandum of understanding, without the Union's consent."

ORDER

The National Labor Relations Board orders that the Respondent, Midwest Terminals of Toledo International, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing and failing to comply with the dues-checkoff provision of the May 22, 2012 memorandum of understanding with Local 1982, International Longshoremen's Association, AFL–CIO (the Union).

(b) Refusing to assign work to employees because of their support for and activities on behalf of the Union or other protected concerted activities.

(c) Threatening not to hire employees because they filed grievances under the collective-bargaining agreement and unfair labor practice charges with the National Labor Relations Board.

(d) Threatening employees with future discipline because they filed a grievance.

(e) Coercively telling employees that the Union had caused them to lose overtime.

(f) Threatening to remove from the job or discharge employees because they engaged in union and/or other protected concerted activity.

(g) Grabbing employees because they engaged in union and/or other protected concerted activity.

(h) 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) Within 14 days of the date of this Order, begin deducting and remitting to the Union dues owed to it as required under the terms of the May 22, 2012 memorandum of understanding and reimburse the Union for the losses resulting from its failure to deduct and remit union dues since January 1, 2013, as set forth in the remedy section of the judge's decision.

(b) Make Otis Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Otis Brown for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written threat to discipline Miguel Rizo, Jr., and within 3 days thereafter, notify the employee in writing that this has been done and that the threat to discipline him will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel rec-

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rendered invalid by the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). See *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 1 fn. 4 (2015). Rather, we find that the cessation of dues checkoff constituted an unlawful contract modification within the meaning of Sec. 8(d). The parties entered into a memorandum of understanding on May 22, 2012, extending the Respondent's obligation to deduct dues beyond the expiration of the master collective-bargaining agreement, until the parties ratified a new local agreement. As the judge found, the Respondent thereafter ceased deducting dues without the Union's consent, at a time when the parties had neither agreed to nor ratified a new local agreement. See, e.g., *United Rigging & Hauling*, 310 NLRB 828, 829 (1993); *H. W. Wesley Elec. Co.*, 307 NLRB 1260, 1261 (1992). Although the complaint alleges that the Respondent ceased its dues checkoff without affording the Union notice and an opportunity to bargain, the contract modification argument was clearly presented at the hearing, as counsel for the General Counsel argued to the judge that the Respondent ceased deducting dues at a time when it was "legally and contractually" bound to continue deducting members' dues. And on exception, the Respondent contested the applicability of the memorandum of understanding. Thus, the midterm modification theory of the violation is squarely before us, and we find that cessation of dues checkoff violated the Act on this basis. Cf. *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (reversing finding of violation based on theory General Counsel expressly chose not to litigate).

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to implement or execute a collective-bargaining agreement on December 8 or 9, 2011, we find, in agreement with the judge, that there was no meeting of the minds between the parties.

[3] We shall amend the judge's conclusions of law to reflect our finding that the Respondent's cessation of dues checkoff unlawfully modified the parties' May 22, 2012 memorandum of understanding.

[4] We shall modify the judge's recommended Order to include our standard remedial language. In accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), we shall modify the judge's recommended Order to require the Respondent to compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. We shall substitute a new notice to conform to the Order as modified and in accordance with the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Toledo, Ohio facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 June 1, 2008.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 8 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.

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

Dated, Washington, D.C. March 31, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse and fail to comply with the dues-checkoff provision of our May 22, 2012 memorandum of understanding with Local 1982, International Longshoremen's Association, AFL–CIO (the Union).

WE WILL NOT refuse to assign work to you because of your support for and activities on behalf of the Union or your other protected concerted activities.

WE WILL NOT threaten not to hire you because you filed grievances under the collective-bargaining agreement and/or unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT threaten you with future discipline because you filed a grievance.

WE WILL NOT coercively tell you that the Union caused you to lose overtime.

WE WILL NOT threaten to remove you from the job or discharge you because you engaged in union and/or other protected concerted activity.

WE WILL NOT grab you because you engaged in union and/or other protected concerted activity.

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, within 14 days of the Board's order, deduct and remit to the Union dues owed to it as required by the parties' May 22, 2012 memorandum of understanding, and WE WILL reimburse the Union, with interest compounded daily, for the losses resulting from our failure to deduct and remit union dues since January 1, 2013.

WE WILL make Otis Brown whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Otis Brown for the adverse tax consequences, if any, of receiving a lump-sum backpay

award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written threat to discipline Miguel Rizo, Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the threat to discipline him will not be used against him in any way.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL

The Board's decision can be found at http://www.nlrb.gov/case/08-CA-038092 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.

Cheryl Sizemore, Esq., for the General Counsel.
Ronald Mason and *Aaron Tulencik, Esqs.*, for the Respondent.
Joseph Hoffman, Esq., for the Charging Party Local 1982, International Longshoremen's Association, AFL–CIO.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Toledo, Ohio, on June 10–14, 2013, and on August 21, 2013. On April 11, 2013, a fifth order consolidating cases, fifth amended consolidated complaint and notice of hearing (the first complaint) issued against Midwest Terminals of Toledo International (the Respondent), in Cases 08–CA–038092, 08–CA–038581, 08–CA–038627, 08–CA–063901, 08–CA–073735, and 08–CA–092476, based on charges and amended charges filed by Otis Brown, Miquel Rizo Jr. (Rizo Junior), and Local 1982, International Longshoremen's Association, AFL–CIO (Local 1982 or the Union).[1] On April 29, 2013, an order consolidating cases, consolidated complaint, and notice of hearing (the second complaint) issued in Cases 08–CA–097760 and 08–CA–098016, against the Respondent based on a charge filed by Local 1982 and a charge filed by Mark Lockett Sr.[2] On May 3, 2013, an order consolidating cases and rescheduling hearing issued consolidated all of the above noted cases for hearing.

The complaint in Case 08–CA–038581 et al. (the first complaint), alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: threatening employees on or about April 24, 2009, that it would not hire any employees who had filed lawsuits and/or unfair labor practice charges with the Board against the Respondent; on or about August 19, 2011, by written memorandum, threatening an employee with future discipline, including termination, because of his union and/or protected concerted activities; on or about September 28, 2012, impliedly threatening an employee because of his union and/or protected concerted activities and coercively telling an employee that the Union caused him to lose overtime.

As finally amended at the hearing, the first complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by: between June and November 2008 refusing to assign work to Otis Brown (Brown); on or about November 27, 2008, and for several days thereafter, refusing to assign Brown light-duty work, on or about April 1, 2009, and for some period of time thereafter, refusing to employ Brown, Lester Corggens, Fred Victorian Jr., Clifford Anderson, Laverne Jones, Ricardo Canales, and Don Russell from its "regular" hiring list to perform stevedoring work at its facility.

The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: since on or about June 2008, refusing to apply seniority principles in assigning work to employees and since on or about January 1, 2012, failing and refusing to implement the terms of an agreed-upon collective-bargaining agreement.

The complaint in Case 08–CA–097760 et al. (the second complaint) alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff for unit employees on or about January 1, 2013. The second complaint also alleges that on or about November 14, 2012, the Respondent violated Section 8(a)(1) by threatening an employee with removal from the jobsite and/or termination and by physically grabbing an employee by the arm.

The Respondent's answers to the complaints deny the material allegations of the complaints and raised certain affirmative defenses which will be discussed below.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed

[1] The charge in Case 08–CA–038092 was filed by Brown on December 30, 2008, and an amended charge was filed on March 24, 2009. The charge in Case 08–CA–038581 was filed by Rizo Junior on September 24, 2009. The charge in Case 08–CA–038627 was filed by Brown on October 21, 2009. The charge in Case 08–CA–063901 was filed by Local 1982 on September 6, 2011. The charge in Case 08–CA–073735 was filed by Local 1982 on February 2, 2012. The charge in Case 08–CA–092476 was filed by Local 1982 on November 2, 2012.

[2] The charge in Case 08–CA–097760 was filed by Local 1982 on February 6, 2013. The charge in Case 08–CA–098016 was filed by Lockett on February 11, 2013.

[3] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of their testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds

by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with a place of business located at 3518 St. Lawrence Drive, Toledo, Ohio (the Respondent's facility), has been engaged in providing stevedoring services to shipping companies that are engaged in interstate and foreign commerce. Annually, the Respondent, in conducting its business operations derives gross revenues in excess of $500,000 for its services. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent's Affirmative Defenses

Whether the Board has a Lawful Quorum

In its brief filed on September 13, 2013, the Respondent argued that the Board cannot lawfully act in this matter because the appointments of former Members Block and Griffin were not valid. This argument obviously has no merit since, at present, the Board has five members, all of whom were confirmed by the Senate on July 30, 2013, and duly sworn in on various dates in August 2013. In making this finding, I have taken administrative notice of Board's Press Release dated July 31, 2013, and August 12, 2013, publicly announcing these facts.

Whether the Acting General Counsel had the Authority to Issue the Complaints

The Respondent contends Acting General Counsel Lafe Solomon did not lawfully hold his office at the time that the complaints issued and therefore they should be dismissed. The Board has found no merit to this argument. *Belgrove Post Acute Care Center*, 359 NLRB No. 77 fn. 1 (2013). I am, of course, bound to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F.2d. 176 (8th Cir. 1964). Accordingly, I find that this affirmative defense of the Respondent also has no merit.

Whether the Allegations of the Complaint Arising From Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627 Should be Dismissed Because of Laches

The Respondent contends that the allegations in the first complaint arising from the charges filed in Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627 must be dismissed because the delay in prosecuting these allegations is entirely attributable to the Acting General Counsel[4] and his predecessors and that the delay has prejudiced it in presenting his defense.

The charge in Case 08–CA–038092 was filed on December 30, 2008, by Brown and amended charge was filed on March 24, 2009. As amended, this charge alleges that Brown was denied employment opportunities in violation of Section 8(a)(3) and (1) and that the Respondent unilaterally changed its hiring practices in violation of Section 8(a)(5) and (1) (GC Exh. 1(c)). On September 24, 2009, the charge in Case 08–CA–038581 was filed by Rizo Junior alleging that the Respondent's superintendent, Tim Jones, violated Section 8(a)(3) and (1) by refusing to hire employees who had filed unfair labor practice charges against the Respondent and that Jones stated he would not hire any employees who had filed charges and/or lawsuits against the Respondent. (GC Exh. 1 (e).). On October 21, 2009, Brown filed a charge in Case 08–CA–038627 alleging that Jones stated that he would not hire any employee who had filed a charge and/or lawsuits against the Respondent (GC Exh. 1(g)). On November 30, 2009, the Regional Director issued a complaint in Case 08–CA–038581 scheduling a hearing for February 3, 2010. This complaint alleged that on about April 24, 2009, the Respondent, by Tim Jones, threatened employees that the Respondent would not hire employees that had filed lawsuits and/or unfair labor practice charges against the Respondent in violation of Section 8(a)(1). The complaint also alleged that on or about April 1, 2009, the Respondent refused to hire Brown and other unidentified bargaining unit employees from its "regular" hiring list in violation of Section 8(a)(4), (3), and (1) (GC Exh. 1(i)).

On December 23, 2009, the Regional Director issued an order consolidating cases, amended consolidated complaint and notice of hearing in Cases 08–CA–038581 and 08–CA–038627 scheduling a hearing for February 3, 2010 (GC Exh 1 (l)). On January 6, 2010, the Regional Director issued an order postponing the hearing indefinitely (GC Exh. 1(o).) On January 28, 2011, the Regional Director issued an order rescheduling the hearing for April 18, 2011 (GC Exh. 1(q)). However, on March 14, 2011, the Regional Director issued an order indefinitely postponing the hearing (GC Exh. 1(s)).

On September 6, 2011, the charge was filed in Case 08–CA–063901 (GC Exh. 1(v)). On November 29, 2011, the Regional Director issued a second order consolidating cases, second amended complaint and notice of hearing in Cases 08–CA–038581, 08–CA–038627, and 08–CA–063901. The complaint indicated that the hearing would be held on a date to be determined later. (GC Exh. 1(x).) On February 3, 2012, the charge was filed in Case 08–CA–073735 (GC Exh. 1 (bb)). On May 31, 2012, the Regional Director issued a third order consolidating cases, third amended complaint and notice of hearing in Cases 08–CA–038581, 08–CA–038627, 08–CA–063901, and 08–CA–073735. This complaint also indicated that a hearing date would be determined later. (GC Exh. 1 (dd).)Thereafter, the charge in Case 08–CA–092476 was filed on December 12, 2012 (GC Exh. 1 (hh)).

On February 28, 2013, the Regional Director issued a fourth order consolidating cases, fourth amended complaint and notice of hearing in Cases 08–CA–038581, 08–CA–038627, 08–CA–063901, 08–CA–073735, and 08–CA–038092 (GC Exh. 1 (ll)).

340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007).

[4] I have taken administrative notice of the fact that on October 29, 2013, the United States Senate confirmed President Obama's nomination of Richard F. Griffin Jr., to be the Board's General Counsel and that he was sworn in on November 4, 2013.

Thus, it was not until February 28, 2013, that the allegations of the original charge in Case 08–CA–038092, that was originally filed in December 2008, were included in a complaint.

On March 28, 2013, the Regional Director issued a fifth order consolidating cases, fifth amended consolidated complaint and notice of hearing in Cases 08–CA–038581, 08–CA–038092, 08–CA–038627, 08–CA–063901, 08–CA–073735, and 08–CA–092476.

The Respondent contends that the substantial delay in the prosecution of Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627, has prejudiced it in presenting a defense to these cases. The allegations arising from the charges filed in Cases 08–CA–038581 and 08–CA–038627 directly implicate the Respondent's then superintendent, Jones. Jones was laid off due to economic circumstances on June 30, 2009. The record in this case establishes that the Respondent made a diligent effort to locate Jones prior to the trial but was unsuccessful.

The allegations arising from Case 08–CA–038092 relate to the Respondent's alleged refusal to employ Brown in violation of Section 8(a)(3) and (1) and its alleged unilateral change regarding its hiring procedures in violation of Section 8(a)(5) and (1). The Respondent's operations manager in 2008 through 2009 was John Staler. The General Counsel's theory regarding the alleged refusal to assign Brown work from June through November 2008, is that because of grievances filed by Brown and other bargaining unit employees the Respondent discriminated against him. The record establishes that Staler was substantially involved in the Respondent's hiring during this time. In addition, a significant number of the grievances introduced during the hearing either mentioned Staler or were submitted to him. Staler died in 2011 and therefore was not available to testify at the hearing in defense of these allegations. The Respondent contends that the substantial delay in the prosecution of these cases prejudiced it because Staler was not available to testify at the hearing. The Respondent contends that if a hearing had been held in a timely manner regarding the allegations in these charges both Staler and Jones would have been available to testify.

There have been a substantial number of charges filed in this matter since December 2008. The Board generally disfavors piecemeal litigation and the General Counsel therefore normally consolidates all pending charges into one complaint or complaints and litigates all outstanding issues in one case. *Jefferson Chemical Co.*, 200 NLRB 992 fn. 3 (1972); *Peyton Packing Co.*, 129 NLRB 1358, 1360 (1961). The Board has held, however, that this policy does not require the consolidation into one proceeding of all the charges that are filed against the same respondent during the pendency of that proceeding. *Harrison Steel Castings Co.*, 255 NLRB 1426, 1426–1427 (1981); *Maremont Corp. World Parts Division*, 249 NLRB 216, 216–217 (1980).

In the instant case, the action of the Acting General Counsel and his predecessors in not proceeding to trial in an expeditious manner regarding the complaint allegations arising from Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627 has created a situation where two witnesses became unavailable to the Respondent and has therefore caused the Respondent some prejudice in presenting its defense to the complaint allegations arising from these charges. With respect to the allegations arising from Case 08–CA 083092, neither the record nor the General Counsel's brief explains why some of the allegations in a charge last amended on March 29, 2009, do not appear in a complaint until February 28, 2013.

I am troubled by the fact that the long delay from the time the charges were filed in the three above-noted cases until the trial was held has created a situation where witnesses have become unavailable to the Respondent in presenting its defense. However, the Board has generally not applied the doctrine of laches to itself or to the General Counsel. *F.M. Transport, Inc.*, 302 NLRB 241 (1991). In *Mid-State Ready Mix*, 316 NLRB 500 (1995), the Board summarized its position on the doctrine of laches as follows:

> The principal cases on this issue are *Carrothers Construction Co.*, 274 NLRB 762 (1985), and *Smyth Mfg. Co.*, 277 NLRB 680 (1985). *Carrothers* stated at 763: "In general, laches may not defeat the action of a governmental agency in enforcing a public right." It also quoted from a Supreme Court decision, *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264 (1969), which stated: "Wronged employees are at least as much injured by the Board's delay in collecting their backpay as the wrongdoing employer." The Board in *Smyth* at 692 came to the same conclusion, quoting from another sentence from *J. H. Rutter-Rex*, supra: "[the Court] has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers."

On the basis of the foregoing Board and Supreme Court precedent, I find that the rights of employees to have the claims alleged in the complaint, arising from the charges filed in Cases 08–CA–038092, 08–CA–038581, and 08–CA–038627, adjudicated on the merits, outweighs any prejudice caused to the Respondent by the delay in prosecuting those allegations. Accordingly, I will not dismiss the complaint allegations arising from the three above-noted charges on the basis of laches but rather will address them on the merits.

Background and Overview

The Respondent provides stevedoring and warehousing services at its facility in Toledo, Ohio, which encompasses 125 acres and has six warehouses. The Respondent's facility is located on the east side of the Maumee River near where the river empties into Lake Erie. The Respondent acquired the facility in 2004. There is an over 40-year history of collective-bargaining between the Respondent and its predecessors and Local 1982 and the International Longshoremen's Association, AFL–CIO (the International Union).[5] At the time of the hearing in this case, the Respondent was operating under the terms of an expired agreement with Local 1982 that was effective from

[5] In setting forth the background of this case, I have taken administrative notice of the Board's decision in a recent 10(k) proceeding involving the Respondent, Local 1982, and Teamsters Local 20, *Teamsters Local 20 (Midwest Terminals of Toledo International)*, 359 NLRB No. 107 (2013), and a case involving a predecessor of the Respondent, *Toledo World Terminals, Inc.*, 289 NLRB 670 (1988).

January 1, 2006, through December 31, 2010 (the local agreement) (Jt. Exh. 1). The Respondent was also party to a multiemployer agreement between the Great Lakes Stevedore Employers and Great Lakes District Council-Atlantic Coast District International Longshoremen's Association AFL–CIO that was effective from January 1, 2011, through December 31, 2012 (the master agreement) (Jt. Exh. 3).

The Respondent's stevedoring operations involving the loading and unloading of cargo vessels are performed by employees represented by Local 1982 and the International Union (referred to collectively as the ILA). The Respondent's warehouse operations include loading and unloading of trains and trucks and the movement of cargo into and out of storage. The Respondent assigns the warehouse work to both employees represented by the ILA and the Teamsters. Employees represented by the ILA perform warehouse work in the area near the docks which is located to the west of St. Lawrence Drive, a road which runs through the Respondent's facility. This area is referred to as the "wet" side of the facility. Employees represented by the Teamsters perform warehouse work in the area east of St. Lawrence Drive which is referred to as the "dry" side. The record establishes that the Great Lakes shipping season runs from April through November and that the bulk of the Respondent's stevedoring operations occur during this period.

In 2008, when some of the events alleged to be unfair labor practices in the first complaint occurred, the president of Local 1982 was Charles Moody and the dock steward was his brother, Robert Moody. The Moody brothers had held these positions in Local 1982 since the 1980s.[6] Pursuant to internal union charges filed by Miquel Rizo Sr. (Rizo Senior) and Miquel Rizo Jr. (Rizo Junior) the International Union removed Charles Moody and Robert Moody from their positions in approximately early 2009. At that time, Rizo Senior, who was Local 1982's recording secretary, was appointed president/dock steward of Local 1982. In 2010 the International Union placed Local 1982 into trusteeship. At that time, John Baker Jr., president of the ILA Great Lakes District Council and vice president of the Atlantic Coast District, and James Paylor, another International Union representative, were appointed as trustees. Rizo Senior was appointed to the position of dock steward. Andre Joseph, another International Union representative, replaced Paylor as a trustee in mid-2011. Local 1982 remained in trusteeship until approximately July 2012. During this period, the trustees had the responsibility of administering the day-to-day affairs of the local, together with Dock Steward Rizo Senior. In approximately July 2012, Otis Brown was elected president of Local 1982 and held that position at the time of hearing. Rizo Senior was removed from his position as dock steward in approximately August 2011.

The Respondent's president is Alex Johnson. The Respondent's director of operations, Terry Leach, began working for the Respondent in July 2007. Christopher Blakely is the Respondent's human resources manager and has been employed since May 2010. As noted above, John Staler, who is deceased, was employed as the Respondent's operations manager in 2008–2009.

[6] See *Toledo World Terminals*, supra and (Tr. 172).

The Order of Call Procedure

The Respondent utilizes a procedure referred to as the order of call in order to assign work to employees. This procedure is set forth in the most recent local agreement between the parties that expired December 31, 2010 (Jt. Exh. 1, sec. 5.2.1–6.2). The order of call is comprised of employees in three categories: skilled employees; regular employees, and casual employees. Section 5.2.1 (A) of the expired agreement provides the following definition for skilled employees:

> The company shall employ a core group of employees experienced in longshoremen and warehousing work known as skilled employees. These employees will be qualified in four (4) or more of the following job classifications: crane operator, checker, power operator, signal man, and hatch leader.

Section 5.2.1 of the local agreement and longstanding practice establishes that the Respondent first hires skilled employees for available work. The record establishes that the Respondent determines when employees have sufficient skills to be added to the skilled employee list. According to section 6.1 of the expired contract, seniority on all three lists is determined based on the hours worked in the preceding year. The record establishes that in practice the seniority of regular and casual employees is determined by this method. However, Terry Leach, the Respondent's director of operations since 2007 testified, without contradiction, that the practice has been that employees on the skilled list are ranked in seniority by their original hire date (Tr. 908, 911–912). The practice between the parties has been that the Respondent prepares the order of call list with employees ranked in their seniority order in each classification and submits it to Local 1982 in April of each year. While regular employees may have the qualifications to perform certain assignments, such as operating a forklift, they are not required to have any such qualifications in order to be on the regular list.

Utilizing the order of call list, the Respondent hires employees on a daily basis depending upon the availability of work. Employees on the skilled list are always offered employment before the employees on the regular or casual list. Employees on the skilled list are not guaranteed work every day. There may not be enough work available for all skilled employees or a skilled employee may not be qualified to perform a particular job. Employees on the skilled list are required, however, to call in and notify the Respondent if they will not be reporting to work on a particular day

When the Respondent determines that the amount of work available is going to require the hiring of employees beyond those on the skilled list, the Respondent places a recorded notice on its telephone line indicating that work is available for regular employees.

The Respondent will then conduct a shape up at 7:30 a.m. the following morning to hire employees from the regular list. Employees must be physically present in the shape up room in order to be hired. Generally, regular list employees are hired based upon their seniority and the ability to perform the particular jobs available. Thus, if the Respondent needs to hire a forklift operator from the regular list and the person with the most seniority present in the shape up room on that day does

not have the skill to operate a forklift, the Respondent will go down the list and assign the work to the most senior person who is a qualified forklift operator. Normally, employees on the casual list are offered employment only after the Respondent has offered all the employees on the regular list employment in jobs that they are qualified to perform.

Whether the Respondent Violated Section 8(a)(3) and (1) of the Act by Refusing to Assign Work to Brown between June and November 2008

Brown has been employed by the Respondent and its predecessor since approximately 2000. In April 2008, Brown was number two in seniority on the regular list (GC Exh. 27). On July 1, 2011, Brown was placed on the skilled list and in August 2012 Brown was elected president of Local 1982. In 2007 and 2008, Leach recognized that Brown had the skill and qualifications to be placed on the skilled list at that time and invited him to be placed on the skilled list on a number of occasions but Brown declined the opportunity.

In April 2008, as the shipping season picked up Brown was hired to work almost daily when he appeared at the shape up and was regularly assigned to perform maintenance work on cranes. (GC Exh. 32, p. 1–9.) Pursuant to the 2006–2010 contract, work on a crane was paid at the highest rate. (Jt. Exh. 1, p. 12).[7] The parties' practice was that once an employee was assigned work on a crane, the employee continued to receive the rate of pay for crane work, regardless of which job the employee was assigned. (Tr. 93, 399.) In May 2008, Brown continued to be regularly assigned work.

Brown's credited and uncontroverted testimony establishes that sometime in the spring of 2008, Leach approached him at work and told him that he was going to go on the skilled list. Brown replied that he was not.[8] Leach said that he was going to talk to Bob Moody about it. When Brown replied that Bob Moody could not make him go on the skilled list, Leach then stated that Brown would not "receive any more crane pay." (Tr. 254.)[9]

Brown also credibly testified that on May 9, 2008, he had been working on a barge until about 8 p.m. At that time he noticed that employees with lower seniority on the regular list and casual list employees were about to start work. Brown spoke to Staler about it and told him that there were more senior employees such as Mark Ward and Jerome Brown who had been told by Staler that there was no need for them to come to the shape up because there was not enough work left on the barge for them to come in. Staler replied that Bob Moody, the union steward, told him he could make the assignments to the less senior employees. At that point, Bob Moody pulled up in his pickup truck and Staler and Brown spoke to him about this issue. According to Brown, Moody acknowledged that he told Staler that Staler could have less senior employees work on the barge. Brown said that was wrong as that the more senior employees should be working and that he was going to file a grievance over this issue. Moody told Brown to come to the Union's office, which at that time was located on the Respondent's premises, and get a grievance form. As Brown arrived at the union office, Staler approached him and said that he had called Jerome Brown and Mark Ward into work. Brown testified that since Jerome Brown and Ward had been called in to work he did not file a grievance over the matter.

Brown testified that shortly after these incidents his crane pay rate was stopped and he was paid at the lower hourly rate for work he was assigned.[10] Brown also testified that he continued to regularly appear at the shape up after these two incidents but that the Respondent did not assign work to him with the same frequency as it previously had. Rather, the Respondent assigned work that he was capable of performing to less senior employees. The Respondent's gate records, which reflect all of the potential employees who appear at the shape up, corroborate Brown's testimony that he continued to regularly appear at the shape up during the period from June through November 2008. (Jt. Exhs. 16, 17, 18, 19, and 20.)

Rizo Junior credibly testified that during the summer of 2008 he and his brother Mario Rizo worked for the Respondent as casual employees. As noted above, casual employees were to be hired only after skilled and regular employees had been offered employment. According to Rizo Junior, beginning in approximately July 2008, Staler and Leach would at times signal the Rizo brothers to stay after the shape up for that day had ended. The Rizo brothers would remain in the area where the shape up occurs. On several occasions, after more senior employees were sent home from the shape up after having been informed there was no work for them, the Rizo brothers would be assigned work. Rizo Junior also testified that during this period he observed Steve Luce Jr. working at the facility, at times driving a forklift. The order of call list for 2008 establishes that Luce Jr. was number 22 on the seniority list, well below Brown (GC Exh. 27).

Rizo Senior also testified that during this period, he observed his sons working ahead of more senior employees on several occasions. Finally, former employee Mark Lockett testified that he observed employee Eddie Sutton working during this period of time, even though Sutton had not appeared at the shape up. Sutton was listed as number 13 on the seniority list for 2008.

On July 22, Brown filed a grievance alleging that the Respondent violated the contract on July 19 by hiring two regular list employees with less seniority than Brown (GC Exhs. 31a and b). On August 1, Brown filed a grievance alleging that Leach assigned Mark Ward work as a front-end loader when

[7] In 2008 the contractual hourly rate for a craneman and a crane mechanic was $24.95 an hour. The wage rate for longshoremen and warehousemen was $23.30.

[8] Brown credibly testified that because of personal issues, he did not want to go on the skilled list at that time because he would then have the obligation of making himself available for work every day.

[9] Sec. 6 of the contract between Local 1982 and the Respondent provides for filling vacancies on the skilled list (Jt. Exh. 1, p. 6). There is no contractual language requiring an employee to accept an offer to fill a vacancy for a skilled employee.

[10] There is no allegation in the complaint regarding the loss of Brown's crane pay. The record indicates that Brown's crane pay was restored in September 2008 and that he received backpay pursuant to a settlement at some point after the filing of the charge in Case 08–CA–038092. Consequently, I will not make any determination in this case regarding any crane pay Brown may have lost.

Ward was supposed to "operate from a supervisor or foreman position" (GC Exh. 31c). On August 4, Brown submitted a grievance indicating that he had not yet received a response to his July 22 grievance (GC Exh. 31d). On August 7, Brown filed a grievance alleging that Leach had hired Mark Ward to work as a foreman but assigned him work on a "rail car loading pipe as a laborer for an entire eight-hour shift." Brown's grievance alleged that this assignment demonstrated favoritism to Ward. (GC Exh. 31e.)

On September 17, after the shape up had ended, a front-end loader position appeared on the job board and employee Eddie Sutton was assigned that work even though he was not present at the shape up. Brown asked Leach why Sutton had been assigned work on a front-end loader instead of him, since Brown had higher seniority and had been present at the shape up. After not receiving a satisfactory answer from the Respondent, on September 19, Brown filed a grievance alleging that on September 17, Leach showed favoritism to employee Eddie Sutton by assigning him work on a front-end loader (GC Exh. 31g). The Respondent responded in writing to the grievances that Brown filed.

The Respondent's records for the period from April 1, 2008, through November 2008, establish that Brown worked the following number of hours: April—68; May—117.25; June—48.5; July—51.5; August—59.25; September—135.75; October—188.25, and November—71.25.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board established a framework for deciding cases alleging a violation of Section 8(a) (3) or violations of Section 8(a)(1) turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity or protected concerted activity by the employee, employer knowledge of the activity, and, at times, antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

In the instant case, Brown told Staler he was going to file a grievance on May 9 regarding the Respondent's alleged failure to honor the seniority provisions involving the assignment of work. Brown did not actually file a grievance on that issue because Slater called the more senior employees into work that Brown had claimed should be assigned the work in dispute. On July 22, August 1, 4, and 7, and September 19 Brown filed grievances claiming that the Respondent was violating the contract in the manner in which it made work assignments. The Board has held that filing a grievance pursuant to a contract is activity protected by Section 8(a)(3) and (1) of the Act. *LB & B Associates, Inc.* 340 NLRB 214 (2003); *Southern California Edison Co.*, 307 NLRB 1426 (1992).

I find that the Respondent was aware of Brown's stated intent to file a grievance on May 9 as I credit his testimony that he so informed Staler. The Respondent was, of course, aware of the grievances that Brown actually filed in July and August as it provided written responses.

The Board has indicated that the timing of an adverse action in response to protected conduct can support an inference of animus. *Yellow Transportation, Inc.*, 343 NLRB 43, 48 (2004). In the instant case, within weeks after his initial threat to file a grievance regarding the Respondent's alleged failure to hire employees consistent with the seniority provisions of the contract, Brown experienced a precipitous decline in the number of hours he worked in June as compared to May. In May Brown worked 117.25 hours while in June he worked only 48.5 hours. As noted above, between July 22 and August 7, Brown filed an additional four grievances regarding the Respondent's alleged refusal to assign work in accordance with contract. During this period, Brown continued to be assigned a low number of hours, 51.5 for July and 59.25 for August. The summer months are the height of the shipping season and the Respondent's busiest time. As noted above, Brown was number two on the regular employee seniority list and had sufficient skills such that the Respondent asked him to be added to the skilled list. I find that the timing of the sequence of events establishes sufficient evidence of animus toward Brown's protected conduct in threatening to file and in fact filing grievances. Accordingly, I find that the General Counsel has presented a prima facie case of discrimination toward Brown regarding the assignment of work during the period alleged in the complaint.

Turning to the Respondent's defense under *Wright Line*, the Respondent contends that it did not refuse to assign work to Brown during this period because he filed grievances or engaged in other protected action. In support of its contention, the Respondent contends that the hours worked by Brown in September and October exceed the number of hours that he worked in April and May. The Respondent also argues that Brown's hours in November were similar to the hours he worked in April, despite the fact that, as will be discussed in detail later, he missed some time from work due to an injury. While the Respondent concedes that the number of hours Brown worked in June, July, and August were lower than April and May, it contends that they were comparable to the hours he worked in April.

As noted above, April is the beginning of the shipping season but by May the shipping season is in full swing. Thus, the hours Brown worked in May are the appropriate comparison to the hours he worked in June through October. There is evidence that during this period that, at times, the Respondent assigned work to employees with less seniority than Brown without an explanation. The Respondent offers no specific reason for the precipitous decline in the number of hours of work Brown performed in June or July and August and thus I find that the Respondent has failed to rebut the Acting General Counsel's prima facie case for this period. However, the record establishes that the number hours assigned to Brown in September and October exceeded the number of hours he worked in May. In addition, in November, the shipping season is winding down and Brown missed some time due to an injury but

was still assigned more hours than he had received in April. Thus, I find that the evidence establishes that the hours assigned to Brown in September or October and November is sufficient to rebut the prima facie case for this period. Accordingly, on the basis of the foregoing, I find that the Respondent violated Section 8(a)(3) and (1) by refusing to assign work to Brown only during the months of June, July, and August 2008.

Whether on or about June 2008 the Respondent Ceased Applying Seniority Principles in Assigning Work to Employees in violation of Section 8(a)(5) and (1) of the Act

In his brief the General Counsel asserts generally that the "Respondent did not follow seniority principles in assigning work during the relevant time period in 2008 and 2009 as part of a scheme to prevent Brown from obtaining work on a regular basis in violation of Section 8(a)(3)." (GC Br. at 30.) In support of this assertion, the General Counsel asserts that the testimony of Brown and other witnesses, certain records of the Respondent, and the order of call demonstrates that seniority provisions were not being followed to hire employees in accordance with the contract and past practice. The General Counsel asserts that the Union was not provided with any notice or opportunity to bargain over the alleged departure from the job assignments based on seniority and therefore the Respondent violated Section 8(a)(5) and (1).

In defense to this allegation the Respondent denies that it unilaterally ceased applying the seniority provisions of the contract in assigning work in June 2008. The Respondent argues that it continued to follow the order of call regarding the assignment of work. The Respondent also contends that at times verbal agreements were reached with local union officials when circumstances required in order to properly staff the operation.

Although the complaint alleges that the Respondent unilaterally abrogated the seniority principles of the contract regarding the assignment of work in June 2008, the General Counsel did not call as witnesses either the then president of Local 1982, Charles Moody, or the then dock steward, Robert Moody. The only witness called by the General Counsel in support of this complaint allegation who was a local union official during the material time was the then recording secretary, Rizo Senior. Rizo Senior held that position until sometime in 2009 when the Moody brothers were removed from office by the International Union. At that time Rizo Sr. was appointed as president of Local 1982 by the International Union. Rizo Senior held that position for a relatively short period of time until Local 1982 was placed in trusteeship by the International Union. He was then appointed as the dock steward for the Local 1982. He held that position until August 2012 when the trusteeship ended and an election was held to elect new Local 1982 officers.

Rizo Senior testified that during the summer of 2008 his sons Mario Rizo and Miquel Rizo Jr. worked for the Respondent as casual list employees. On at least three occasions during the summer of 2008, Rizo Senior observed his sons performing laborer work and driving forklifts after regular list employees had not been hired at that shape up. Rizo Senior also observed Steve Luce Jr., a regular list employee working when more senior regular list employees had not been hired at that shape up. Rizo Senior also testified that during the period from June through November 2008 he regularly observed Randy Balmert, Kevin Newcomer and Eddie Sutton working on front-end loaders without being hired through the shape up. Rizo Senior said that these three employees would be hired to work on front-end loaders out of the maintenance shop over which Local 1982 did not have jurisdiction.

On cross-examination, Rizo Senior testified that during the summer of 2008 he questioned Union Steward Robert Moody about the manner in which the Respondent was assigning some of the jobs to employees. When first asked by Respondent's counsel if Moody ever told him that the Respondent was making assignments correctly, he denied that Moody had made such a statement (Tr. 217). However, Rizo Senior then testified that he did not recall Moody saying that the Respondent could make the assignments in the manner that it had (Tr. 218). When the Respondent's counsel asked Rizo Senior if his affidavit given on July 13, 2009, refreshed his recollection regarding the conversation he had had with Moody regarding the assignment of work in 2008, Rizo Senior stated, "If it's there and signed by me I must have said it." (Tr. 219.) The Respondent's counsel then read into the record the following portion of Rizo Senior's affidavit: "I am also aware that in 2008 the Employer began the practice of assigning regular employees to certain jobs without following seniority as provided in the contract and during the previous years. In other words, they would post each job on the board. For example for forklift operators specifically assign an individual to the job and ignored (sic) the seniority list. To my knowledge there were grievances filed on this issue and when I questioned Moody regarding it he stated that the Company can do it." (Tr. 221.)

While I find that Rizo Sr. was generally a credible witness, in my view his pretrial affidavit more accurately sets forth his conversation with Union Steward Moody regarding the assignment of work made by the Respondent in the summer of 2008. His testimony was equivocal in that he first testified that Moody had not said that the Respondent could make the assignments in the manner that it did in 2008, but later testified that he did not recall Moody making such a statement. His uncertainty is understandable given the fact that he was testifying regarding events that had occurred 5 years earlier. Under these circum-stances, I find that the portion of Rizo Senior's affidavit that was read into the record is more reliable, as the affidavit was given much closer in time to the events in question. Accordingly, I find that in the summer of 2008 when Rizo Senior questioned Union Steward Moody about some of the assignments made by the Respondent, Moody told him that the Respondent could make those assignments.

Brown was also questioned about the Union's acquiescence in certain assignments made by the Respondent in 2008. In this connection, on cross-examination Brown was asked about the May 9, 2008 incident when he objected to Staler's assignment of work to employees with lower seniority. When asked by the Respondent's counsel if Staler had told Brown that Union Steward Moody had told Staler to make the assignments in that manner, Brown responded that "he [Staler] asked him if he could do it." (Tr. 373.) Respondent's counsel then read into the

record the following portion of Brown's March 9, 2009 affidavit dealing with Brown's objection to Staler's work assignment on May 8, 2008: "When I saw this I immediately spoke to John Staler and working foremen Lavern Jones regarding the fact that they canceled the telephone tape and sent people home on the regular list that should be working." Staler, at first, stated it was too late to call anyone. And when I challenged him again along with Jones, Staler said union steward Moody told him to do this. Steward Moody was present on the grounds, so we all approached Moody, and Moody stated, "I told him to do it" (Tr. 374–375). Brown then admitted that on this occasion the Union and the Respondent had discussed the matter and agreed that the assignments would be made in that fashion on that day, but that he disagreed with that determination (Tr. 376).

The Board has held that the manner in which employees are dispatched for work is a mandatory subject of bargaining. *Long Mile Rubber Co.*, 245 NLRB 1337 (1979). In the instant case, however, the General Counsel has failed to meet his burden the burden of establishing, by a preponderance of the evidence, that in 2008 the Respondent unilaterally made work assignments without giving notice or an opportunity to bargain to the Union. There is evidence of assigning work to less senior employees than Brown during this period. As noted above, I find this evidence supports the claim that the Respondent acted discriminatorily toward Brown June, July, and August 2008. However, the evidence establishes that during the relevant time period the Respondent did, in fact, discuss work assignments with Union Steward Moody who acquiesced in the manner in which the Respondent made those assignments. Accordingly, the allegation that the Respondent acted unilaterally in refusing to make assignments in accordance with seniority in violation of Section 8(a)(5) and (1) has not been established and I shall dismiss this allegation in the complaint.

Whether the Respondent refused to Assign Brown Light-Duty Work on November 27, 2008, and Several Days Thereafter, in Violation of Section 8(a)(3) and (1)

In November 2008, the Respondent had a practice of providing injured employees with available light-duty work opportunities. In this connection, Brown testified that he had previously been assigned light-duty work as a checker by Leach after injuring his hand in approximately 2007. Employee Kevin Newcomer testified that in 2008 he burned his left hand at work and was assigned light-duty work involving checking safety features such as the expiration date of fire extinguishers. Leach acknowledged that the Respondent's practice was to assign injured employees light-duty work consistent with their restrictions

On November 21, 2008, Brown was involved in an accident at work while driving a truck. On November 22, he went to the emergency room at St. Vincent Medical Center. On November 24, 2008, Brown saw Dr. Reardon at the Vincent Mercy Medical Center and was diagnosed with a cervical strain (GC Exh. 4B). Brown was informed by Dr. Reardon that he could return to work on November 24 with the restrictions of no driving and minimal neck movement (GC Exh. 4a). Dr. Reardon's report indicated that that Brown would be reexamined on December 1 and that he expected his probable return to full duty at that time.

According to Brown's credited testimony, on November 24, 2008, Brown presented the document with his work limitations to the Respondent's safety officer Jim Hasenfratz, who informed Brown that the Respondent would find work for him that accommodated his restrictions. Hasenfratz told Brown to report to work the next day. However, on November 25 Brown called Hasenfratz and told him that he would not be able to come to work that day because medication Brown's doctor had prescribed him had made him drowsy and unable to work. Hasenfratz told him to report to work on November 26.

Brown reported to work on November 26 and was assigned by Staler to work on the hopper, a job consistent with his restrictions. On November 27, 2008, Thanksgiving Day, Brown appeared at the shape up. The skilled list employees' jobs were posted on the hiring board. Brown's name was also posted as being assigned to the hopper job. Prior to making assignments to the regular list employees who were present at the shape up, Leach and Staler spoke privately. Either Leach or Staler then erased Brown's name from the board and replaced it with Mark Ward, a skilled employee.

Leach then began to make assignments to the employees on the regular list who were present at the shape up. Leach assigned work to Claude Tucker the first person on the regular seniority list but then skipped Brown and went to the next regular list employee who was present. Brown immediately told Leach that he had passed by his name. Leach said that Brown could not work because he was injured. Brown said that he could work on the hopper job but Leach replied that Mark Ward had received that job. Brown stated that he could open bags in the warehouse. Leach said that Brown's neck was fragile and further stated that he had talked to Brown's doctor and that his injury was more serious than what was listed on his work restrictions. Brown called Leach a liar and then turned to Union Steward Moody who was present and asked if he was going to let Leach do that to him. Moody said that since Leach said he could not work, he could not work. Brown told Moody that he was going to file a grievance over Leach's refusal to assign him work.

Both Lockett and Rizo Senior testified they were present at the shape up on November 27 and their testimony corroborates that of Brown regarding what Leach said to Brown about speaking to Brown's doctor regarding his injury.

Brown later met with Dr. Reardon and obtained a signed statement from him indicating that Dr. Reardon did not talk to anyone at the Respondent and that he did not indicate that Brown should be placed on any restrictions other than those indicated in his return to work form dated November 24. (GC Exh. 5b.) After obtaining the signed statement from Dr. Reardon, Brown filed a grievance on December 12, alleging that on November 27, the Respondent refused to assign him work because he had engaged in protected concerted activity. (GC Exh. 5a.) Brown's grievance states in part, the following: "Mr. Leach told me I could not work because of the severity of my neck injury. I told him the doctor cleared me to return to work. Mr. Leach stated to me in his own words, I talked to your doctor myself, and he told me that the injury to your neck is more

serious than what is written on your restrictions—your neck is to fragile—I'm not going to let you work until your doctor clears you."

At the trial, Leach testified that he did not recall speaking Brown's doctor regarding his medical condition (Tr. 790). Leach did not, however, testify regarding what he said to Brown on November 27 regarding his medical restrictions. As noted above, Brown's testimony regarding this incident is corroborated by that of Lockett and Rizzo Senior. In addition, Brown's testimony is supported by the language in the grievance that he filed on December 10. Thus, I find that Leach told Brown on November 27 that he would not assign him work because Leach had spoken to Brown's doctor who had indicated that his restrictions were greater than what the doctor had listed on Brown's work restrictions form. Accordingly, I find Leach's statement to Brown to be demonstrably false.

On December 3 and 4, 2008, Brown returned to work without restriction and worked 12-hour shifts (Jt. Exhs. 18k and n).

For the reasons set forth in the preceding section of this decision involving the Respondent's discriminatory refusal to assign Brown work in June, July, and August 2008, I find that the General Counsel has established a prima facie case regarding the Respondent's discriminatory refusal to assign Brown light-duty work from November 27 through December 2, 2008. Thus, under *Wright Line*, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

With respect to cases in which an employer's asserted reasons for its alleged discriminatory conduct are found to be pretextual, the Board does not apply the second part of the *Wright Line* analysis. In this connection, in *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), the Board indicated:

> However, if the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). [Accord: *Austal USA, LLC*, 356 NLRB No. 65 (2010).]

In the instant case, the Respondent was within its rights to assign Ward the hopper job on November 27, as Ward was a skilled employee and present at the shape up. Such action is consistent with the contract and past practice. However, as noted above, Leach gave Brown a patently false reason for not assigning him to other light-duty work consistent with his restrictions, such as opening bags in the warehouse. I note that the Respondent did not produce any evidence that such work was not available on November 27. Thus, I find that Leach's asserted reason for not assigning Brown other light-duty work—that Leach had spoken to Brown's doctor, who indicated his restrictions were greater than those listed on his written work restriction form—was pretextual. Rather, I find that the Respondent's real motivation was to retaliate against Brown for engaging in the protected conduct of stating an intent to file a grievance on May 9 and actually filing a series of grievances in July, August, and September 2008. My conclusion is further supported by the fact that the Respondent treated Brown disparately from Newcomer and acted in a manner inconsistent with its past practice regarding the assignment of light-duty work. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to assign Brown light-duty work from November 28 through December 2, 2008.

Whether the Respondent, Through its Vice President of Operations, Tim Jones, Violated Section 8(a)(1) on April 24, 2009, by Telling an Employee that it Would not Hire Employees who had Filed Lawsuits and/or Charges

Rizo Senior testified that on April 24, 2009, he was in a warehouse warranting aluminum that had been shipped by truck.[11] Jones approached Rizo Senior and told him that he had a problem. When Rizo Senior asked him what it was, Jones replied that he had a coal ship coming in and he did not know how to handle it because he had removed at least eight skilled employees from the job of warranting the aluminum in order to man the ship. Rizo Senior replied that that should not be a problem because Jones should remove the skilled employees from the job of warranting aluminum in order to man the ship and then go to the regular list and hire more employees. Jones stated that was not going to happen because the people at the top of the list either had filed charges or lawsuits against the Respondent. Rizo Senior replied that Jones' statement was discriminatory and that he was going to have to file a grievance over it.

That same day Rizo prepared a handwritten grievance which states the following:

> On Friday, April 24 in the afternoon I had a discussion with Tim Jones about bringing men from the regular hiring list. Mr. Jones stated that he would not hire men because several members had suits & charges pending against the company. This is a discriminatory practice by Mr. Jones and more importantly Mid-West Terminals. [GC Exh. 2.]

On April 29, 2009, Jones submitted a written response to the grievance filed by Rizo Senior regarding this matter. In his response, Jones did not specifically deny making the statements referred to in Rizo's grievance. His response indicated that it was possible that his comments were taken out of context or interpreted incorrectly. (GC Exh. 3.)

As noted previously, despite a diligent effort, the Respondent could not locate Jones, who was laid off in 2009, in order to have him testify at the trial.

I credit Rizo Senior's uncontradicted testimony. I find Rizo Senior credible with regard to this issue as his testimony at the trial was clear and unequivocal. In addition, his testimony is supported by the grievance that he filed on the date that Jones spoke to him. Jones' written response to the grievance did not specifically deny making the statement but rather only suggested that Rizo took it out of context or may have misunderstood it.

[11] Rizo Senior explained that warranting was a procedure that involved unloading aluminum slabs from trucks and weighing and marking them.

I find that Rizo understood Jones' statement very well and that his testimony at the trial accurately reflected what Jones had told him. Accordingly, I find that Jones told Rizo that the Respondent would not hire employees from the regular list because the employees at the top of that list had filed lawsuits or charges against the Respondent. In context, I find that Jones' reference to "charges" encompassed both the filing of grievances and unfair labor practice charges. Accordingly, I find that the Respondent, through Jones, by telling an employee that it would not hire other employees because they had filed grievances under the collective-bargaining agreement and charges with the National Labor Relations Board, violated Section 8(a)(1) of the Act.

Whether the Respondent Refused to Hire Brown and Other Employees during the period from April 1, 2009, Through May 13, 2009, in Violation of Section 8(a)(4),(3), and (1)

As amended at the hearing, paragraph 9 of the first complaint alleges that the Respondent refused to employ employees: Brown, Lester Corggens, Fred Victorian Jr., Clifford Anderson, Laverne Jones, Ricardo Canales, and Don Russell from its regular employee list because of their union and protected concerted activity and because they filed charges under the Act.

The Respondent contends that the employees named in the complaint were not hired on a consistent basis in April through mid-May 2009 because there was not available work for them to perform.

In support of this complaint allegation, the General Counsel relies on the fact that some employees on the regular and casual lists had filed grievances and unfair labor practice charges against the Respondent prior to April 1, 2009. Specifically, as noted above, Brown filed several grievances against the Respondent in the summer and fall of 2008. In addition, Brown filed the charge in Case 08–CA–038092 on December 30, 2008, and an amended charge on March 24, 2009.

Rizo Junior filed grievances on July 21, 2008 (GC Exh. 16(1)); August 24, 2008 (GC Exhs. 16(3), (5), and (6)); October 7 (GC Exhs. 16(8) and (9)); October 16 (GC Exh. 16(11)); December 22 (GC Exh. 16(12)); and March 23 (GC Exh. 16(15)). Rizo Junior, also filed an unfair labor practice charge in Case 08–CA–038102 on January 7, 2009 (GC Exh. 19(1)) and an amended charge on March 17, 2009 (GC Exh. 19(3)).

On July 12, 2008, Prentis Hubbard and Rizo Senior filed a grievance regarding an alleged loss of employment on that date because they had not received the necessary training (GC Exh. 62a). On December 30, 2008, Hubbard filed an unfair labor practice charge in Case 08–CA–038094 alleging that the Respondent violated Section 8(a)(3), (2), and (1) regarding training and hiring that resulted in a loss of employment to him (GC Exh. 63). On March 17, 2009, Hubbard filed an unfair labor practice charge in Case 08–CA–038094 alleging that the Respondent violated Section 8(a)(5), (3), and (1) by not following the contractual provisions regarding training and hiring (GC Exh. 62b).[12]

In further support of the complaint allegation, the General Counsel relies on the statement that Jones made to Rizo Senior in April 2009, that the Respondent would not hire employees at the top of the regular list because they had filed lawsuits and charges against the Respondent.

The above-noted grievances and unfair labor practice charges, coupled with Jones' unlawful April 2009 threat establishes that unit employees had engaged in protected activities involving the filing of grievances and unfair labor practice charges and that the Respondent had knowledge of those activities. I also find that by April 2009 the evidence establishes that the Respondent harbored animus toward employees for engaging in such conduct by virtue of Jones' threat and the prior discriminatory refusal to assign work to Brown.

Brown was third in seniority on the regular list as of April 1, 2009 (Jt. Exh. 4), behind Robert Moody and Claude Tucker. Brown had filed numerous grievances and an unfair labor practice charge prior to April 2009. Hubbard, however, was at the bottom of the regular seniority list while Rizo Junior was number 26. Joint Exhibit 4 establishes that the other named employees were ranked in seniority on the regular list as follows: Corggens—4; Jones—6; Canales—7; Boyd—8; Victorian Junior—9; Russell—10 and Anderson—11.There is no question regarding the fact that a prima facie case has been presented with respect to Brown, but most of the other employees named in the complaint had not engaged in any overt protected activity prior to the time that the General Counsel claims that they were discriminated against. The record indicates that during the period alleged in the complaint, the skilled employees and Robert Moody and Claude Tucker, the regular list employees with the highest seniority, were employed regularly. At least some of these employees were assigned overtime work on every Saturday during this period and on two Sundays. The General Counsel's brief contends, "These employees were scheduled to work voluminous hours to avoid the hiring of Otis Brown and others who filed grievances and unfair labor practices." (AGC Br. at 28.) As indicated above, however, the employees, in addition to Brown, who filed multiple grievances and unfair labor practice charges were Hubbard and Rizo Junior and not the other employees alleged in the complaint. While I have some reservations regarding the employees named in the complaint other than Brown, I find that the Acting General Counsel has presented a prima facie case of discrimination under *Wright Line* given the fact that Jones told Rizo Senior that the Respondent did not want to hire employees at the top of the regular seniority list because they had filed lawsuits and charges against the Respondent.

Turning to the Respondent's defense under *Wright Line*, April is the traditional beginning of the Great Lakes shipping season when work at the Respondent's facility increases until reaching its peak in the summer months. The Respondent contends that the volume of work at its facility in early 2009 was substantially less than 2008. In this connection, the Respondent's vessel logs indicate that from January 1, 2008, through July 30, 2008, 76 vessels were loaded or unloaded at the Re-

[12] None of the unfair labor practice charges filed by Rizo Junior and Hubbard that are referred to in this section of the decision are part of this case. Since they are not, it appears that they were either withdrawn or dismissed.

spondent's facility (R. Exh. 73). In 2009 the number of vessels during that same period declined precipitously to 29 (R. Exh. 74). The record does establish, however, that the Respondent had more bulk aluminum in its warehouse in the winter and spring of 2009 than it had in prior years.

Records introduced by the Acting General Counsel and the Respondent establish that employees named in the complaint did, in fact, work during the months of April and May 2009. In this connection, on April 8, Brown and Corggens each worked 4 hours (GC Exh. 47h). On April 21, 22, and 23 Canales worked a total of 43.5 hours (GC Exh. 47z). On April 29, Brown, Canales, and Victorian Junior each worked 4 hours (GC Exh. 47ee). On May 2 through 3 Victorian Jr. appears to have been paid for 27 hours of work on a barge, including overtime (GC Exh. 49i). On May 2, Victorian Junior also worked on a vessel named the *Federal Rhine* for 4 hours (GC Exh. 49d). On May 9, Victorian Junior worked 9:25 hours (GC Exh. 49F). On May 4, Brown, Corggens, and L. Jones worked 8 hours (GC Exh. 49k). On May 5, 2009, Brown, Corggens, L. Jones, and Canales each worked 9 hours (GC Exh. 49l). On May 6, 7, and 8, Brown, Corggens, and Canales each worked 9 hours (GC Exhs. 49m, 49n, and 49p). On May 9, Brown and Corggens each worked 8 hours (GC Exhs. 49r and 49t). On May 11, Brown, Corggens, Canales, and Victorian Junior each worked 10 hours and L. Jones worked 9 hours (GC Exh. 49W). Finally, on May 12, Brown, Corggens, and Jones each worked 10 hours (GC Exh. 49x).

In order to meet its burden under *Wright Line* the Respondent must show that it would have made the same work assignments in the absence of the protected activities referred to above. I find that the evidence establishes that the Respondent has presented a valid defense under *Wright Line* to this complaint allegation. Pursuant to the provisions of contract and past practice, the Respondent first assigned work to the skilled list employees, before hiring employees on the regular list. It also assigned work on a consistent basis to Claude Tucker and Robert Moody, the regular list employees with the highest seniority. The Respondent did hire Brown and other regular list employees during April and the first half of May, but the number of hours the employees named in the complaint worked was less than that of the skilled employees and Moody and Tucker. As set forth above, the number of vessels at the Respondent's facility in the first part of 2009 was substantially less than the number that docked at the Respondent's facility in 2008. The record also indicates, however, that there was more bulk aluminum in the Respondent's warehouses then had been there in previous years.

The Acting General Counsel's theory is that the Respondent had an unlawful motivation in assigning a greater number of hours to skilled employees and Moody and Tucker than the number of hours assigned to Brown and the other regular list employees named in the complaint. The Respondent made the assignments, however, consistent with the contract and past practice. In this connection, there is no evidence that the Respondent did not follow the order of call in the assignment of work during the period referred to in the complaint. It appears that the Acting General Counsel would have me decide that the employees named in the complaint were discriminated against because their number of hours worked relative to the skilled employees and Tucker and Moody should have been higher. Since I find that the Respondent assigned work consistent with the contract and past practice it is not for me to determine how the relative hours are to be apportioned. The Board has made it clear that it will not substitute its business judgment for that of an employer with respect to what constitutes sound management. *Dravo Lime Co.*, 234 NLRB 213 fn. 1 (1978). On the basis of the foregoing, I find that the Acting General Counsel has not established, by a preponderance of the evidence, that the Respondent refused to hire the employees named in the complaint from April 1, 2009, to May 15, 2009, for reasons violative of Section 8(a)(4), (3), and (1) of the Act. Accordingly, I shall dismiss this complaint allegation.

Whether, on August 19, 2011, the Respondent, by Christopher Blakely, by Written Memorandum, Threatened an Employee with Discipline, Including Termination, in Violation of Section 8(a)(1)

On August 7, 2011, seven bargaining unit employees appeared for shape up but were not hired. On that date, the Respondent hired eight employees from a third party, Gurtzweiler, on the basis that none of the employees presented themselves for work at the shape up were qualified welders. On August 8, 2011, the seven employees who had appeared at the shape up, filed grievances regarding the Respondent's hiring of the Gurtzweiler employees requesting that they be made whole. Rizo Junior was not present at the shape up on August 7 but was informed of the hiring of the Gurtzweiler employees by a fellow employee represented by Local 1982. Rizo Junior was initially uncertain of his right to file a grievance over this issue because he was not present at the shape up. However, after speaking to John Baker Jr., who at that time was one of the trustees of Local 1982, Rizo Junior filed a grievance on August 8, 2011. (GC Exh. 20 p. 1.) The grievance claimed that the "Company hired 8 employees from Gurtzweiler to perform unsecuring a cargo vessel on August 2, 2011." The grievance claimed that the Respondent's action violated "Page 6 Art. 10 of the master agreement" and sought as a remedy that Rizo Junior be made whole.[13]

On August 19, 2011, the Respondent, in a memo signed by Blakely, denied Rizo Junior's grievance. (GC Exh. 20, p. 2.) In relevant part, the memo states:

> On August 10, 2011, you demanded to be paid for work that you did not perform and work to which you are not entitled. Specifically, you allege that eight (8) non-bargaining unit members performed unsecuring work on a cargo vessel on Tuesday, August 2, 2011.
>
> You are well aware of the long-standing practice and collective bargaining agreement (CBA) requirement that in order to be eligible to be hired on any given day, you must present

[13] Art. 10 of the master agreement provides: "All cleaning, securing, unsecuring, fitting, welding, flashing, unlatching, carpentry, conventional bulk cargo trimming, and other services shall be done by employees represented by GL DC-ACD, I LA when requested by the Employer." (Jt. Exh. 3.)

yourself for work and be present in the Shape-up room on any day and time you seek work.

From ILA Local 1982 CBA-Work Rules:

"4. All individuals who seek employment, including all employees with seniority, must personally sign the Sign-In Sheet in the Shape up area upon arrival at the Terminal each day. Individuals who sign in but do not present themselves for hire will be subject to disciplinary action. Individuals seeking employment must possess a valid photo identification, and either a social security card, or birth certificate."

. . . .

Since you failed to attend the 7:30 a.m. Shape-up on Tuesday, August 2, 2011, you could not be hired and therefore, you are not entitled to any pay for that day. Any demand for pay on August 2, 2011 is baseless and fraudulent. As you know, pursuant to the CBA, employees must exercise good judgment and common sense in discharging duties. Demanding pay for a day when you failed to make yourself available to be hired does not comply with this.

Any future conduct similar to the above or in violation of other Company policies, procedures or rules could result in additional discipline up to and including termination.

The memo also referred to the fact that on February 10 and March 18, 2011, Rizo Junior attended training sessions in which he was given copies of the shape up hiring policy.

On September 9, 2011, Rizo Junior filed a grievance over the Respondent's August 17, 2011 memo, seeking to have it removed from his personnel file. (GC Exh. 20, p. 3.)

The General Counsel argues that Rizo Junior filed his grievance in good faith and is therefore protected under the Act, even if his grievance had no merit under the contract between the parties. The General Counsel contends that the Respondent violated Section 8(a)(1) by threatening Rizo Junior with future discipline for filing this grievance.

The Respondent argues that Rizo Junior was not disciplined because he filed a grievance. It contends that he was disciplined for violating established policies and work rules. The Respondent contends that because Rizo Junior sought to be made whole in his grievance he was, in effect, demanding to be paid for a day that he did not present himself for hire and thus his demand for pay on that date was "baseless and fraudulent." The Respondent contends that it has a lawful right to issue a warning to Rizo Junior regarding such conduct. The Respondent further notes that Rizo Junior had filed numerous other grievances and was not disciplined as a result of filing those grievances.

It is, of course, clear that the filing of a grievance is protected concerted activity protected by Section 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984). It is also clear that a grievance filed in good faith is protected conduct even when it is established that the employee had no contractual right to file the grievance. *Yellow Transportation, Inc.*, 343 NLRB 43, 47 (2004); *United Parcel Service of Ohio*, 321 NLRB 300, 323 (1996); *Regency Electronics, Inc.*, 276 NLRB 4 fn. 3 (1985). Thus, it is clear that the policy of the Court and the Board is that normally the filing of a grievance is protected regardless of the merits of the grievance, as long as it is filed in good faith.

In the circumstances of this case, I do not agree with the Respondent's contention that Rizo Junior's filing of a grievance, in which he sought pay for a day in which he was not present at the shape up, is not protected conduct. In the first instance, Rizo Junior consulted with Baker, Local 1982's trustee, before filing the grievance. I find that such evidence supports the idea that the grievance was filed in good faith. In addition, I note that Rizo Junior's grievance did not falsely claim that he was present at the shape up on the day in question. Thus, there is no evidence of an intention to deceive the Respondent through the use of false or fraudulent information. In *United Parcel Service of Ohio*, supra, the lack of any intent to deceive was given great weight by the Board in finding that the grievances that were filed in that case were protected. Id. at 323–324.

I find that the cases relied on by the Respondent in support of its position to be distinguishable. In *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672 (2004), the Board found the discharge of an employee who prepared and submitted fraudulent timesheets to be lawful. In *Children's Mercy Hospital*, 311 NLRB 204 (1993), the Board found the discharge of an employee for falsifying records and misrepresenting facts to be lawful. In *Postal Service*, 310 NLRB 530 (1993), the Board found that the discharge of a former chief shop steward was lawful when the evidence established that the employee was discharged for falsifying court leave documents in order to obtain additional pay. Thus, in each of these cases the employee clearly intended to deceive the employer for personal gain. In addition, none of these cases involved disciplining or discharging an employee for the content of a grievance. Accordingly, I find that the Respondent's August 19, 2011 memo issued to Rizo Junior violated Section 8(a)(1) of the Act.

Whether the Respondent Violated Section 8(a)(5) and (1) of the Act by Refusing to Implement an Agreed-Upon Collective-Bargaining Agreement

The complaint in Case 08–CA–038092 et. al. (the first complaint), alleges that on or about December 8, 2011, Local 1982 and the Respondent reached a complete agreement on terms and conditions of employment to be incorporated in the collective-bargaining agreement. The complaint further alleges the Respondent violated Section 8(a)(5) and (1) of the Act by, since on or about January 1, 2012, refusing to honor and abide by the terms of the agreement.

As noted above, the Respondent and Local 1982 were parties to an agreement that was effective from January 1, 2006, through December 31, 2010. On June 20, 2006, this agreement was signed by Alex Johnson, the Respondent's president, and by Charles Moody, then the president of Local 1982. This contract contained a provision in paragraph 18, entitled Pension and Health and Welfare fund. Paragraph 18.1 provided:

18.1 Contributions. The Company shall accrue an obligation to the MWTTI-ILA Health Welfare & Pension ("Fund") for each hour of work paid to members of the collective bargaining unit by the Company, whether paid at straight-time, overtime, penalty or premium rates and including standby time, guaranteed time and other nonproductive time actually paid

("contribution"). This contribution rate shall be determined by the Great Lakes District of the ILA and the Employers Group. All contributions called for herein shall be accrued by the Company on or before the tenth day of the month following the month in which the hours were worked. Company contributions not accrued on or before the due date shall bear interest at the rate of 1 and one-half percent (1–1.5%) per month until paid. A contribution report shall be furnished to the Union when contributions are accrued. The Fund is intended to constitute an unfunded obligation of the Company, but the Company shall maintain records of contributions, costs of benefits provided, and the current accrued balance.

According to the uncontroverted testimony of Christopher Blakely, he attended a meeting in June 2010 conducted by the administrator of the pension fund, Frederick Ruffin. Attending for the Union were Local 1982 trustees Baker and Paylor and their attorney, Joseph Hoffman. At this meeting, Paylor asked why the pension fund was fully funded but that the health and welfare fund was not funded. Paylor indicated he was concerned about the unfunded liability. Ruffin indicated he worked primarily with the pension fund and was unable to answer Paylor's question.

Baker testified that during the term of the 2006–2010 contract and thereafter the Respondent provided health insurance to the employees represented by the Union pursuant to an insurance policy it purchased from the Great Lakes District of the ILA. The Respondent paid premiums on this policy but such payments were separate and apart from any contributions owed to the health and welfare fund. (Tr. 492–493.)

In September 2011, Local 1982 and the Respondent began negotiations for a successor local agreement. The meetings were held at the Respondent's office at its Toledo facility. The parties held approximately 13 meetings in an attempt to reach a successor agreement. Blakely and Leach represented the Respondent. Sara Blakely was present to take notes of the meetings for the Respondent. Baker, Joseph, and Rizo Senior represented Local 1982.[14]

At the first negotiation session held on September 23, 2011, the Respondent made a written proposal to the Union that retained the existing language regarding contributions to the health and welfare fund and pension set forth in paragraph 18.1 of the expired contract (R. Exh. 1). Once the negotiations began, the parties worked from draft agreements prepared by Joseph. Joseph used the following color-coded system in preparing draft agreements: blue print reflected a proposed union insertion; red print reflected a proposed union deletion; brown print reflected a proposed Respondent insertion; and purple print reflected a proposed Respondent deletion. Tentative agreements were reflected in green print, while language from the 2006–2010 agreement that was unchanged was set forth in black print.

On October 13, 2011, Local 1982 presented a proposal regarding the language in paragraph 18.1 of the expired contract that would require the Respondent to actually pay all contributions owed to the health, welfare, and pension fund. The proposal sought to delete the language indicating that the fund is intended to constitute an unfunded obligation on behalf of the Respondent. The proposal also sought to include the following language: "The Company and the Union agree to implement a Declaration of Trust and Trust Plan to cover the Pension Fund and Health and Welfare Trust Fund and Trust Plan prior to the expiration of this Agreement." The Respondent did not agree with this proposal.

At the meetings held on October 20, November 11, 16, and 20, Local 1982 continued to insist on the inclusion of its revised language regarding contributions to the health, welfare, and pension fund set forth in its proposal regarding paragraph 18.1 in a new contract. At all of these meetings, the Respondent adhered to its position that it wanted the language in paragraph 18.1 to remain the same as it was in the expired agreement.

At the meeting held on December 1, the parties maintained their positions with respect to the language concerning the unfunded liability of the health and welfare plan set forth in paragraph 18.1. Blakely and Baker discussed two employees with issues regarding their health insurance. Baker responded that he was not really concerned about the issue because there were sufficient insurance reserves for 10 to 15 months. Joseph commented, "Except that it isn't there." Blakely responded that the Respondent had always paid its insurance premiums and Baker acknowledged that had been the case. The parties then discussed the unfunded liability of the health and welfare fund. Joseph indicated it was a "roadblock and that they couldn't allow that to continue." (Tr. 709.) Joseph indicated that Local 1982 was not asking the Respondent to pay the $500,000–$800,000 it estimated was owed to the health and welfare fund in a 1-year period. Baker stated that he felt that the language in the local agreement conflicted with the master agreement. Blakely acknowledged that was Baker's position. Baker replied that the Respondent should consider this a step one grievance over the issue of the health and welfare liability accruing but not being paid, as Local 1982 felt that the language in the local agreement conflicted with the master agreement.[15] Blakely indicated he understood Local 1982's position.

Later in the meeting, the issue of the unfunded liability regarding the health and welfare fund was again discussed. Joseph indicated that he had concerns under Employee Retirement Income Security Act (ERISA) regarding the unfunded liability of the health and welfare fund. Joseph stated he could

[14] In making my findings regarding the negotiations for a new agreement between Local 1982 and the Respondent in 2011–2012 I rely principally on the testimony of Blakely and the Respondent's bargaining notes. I found Blakely's testimony to be detailed and consistent on direct and cross-examination. It is also consistent with the Respondent's contemporaneous notes of the bargaining sessions. I found the testimony of Joseph and Baker to be less detailed and complete and to the extent their testimony conflicts with that of Blakely, I credit Blakely.

[15] At the trial, Baker testified that the master agreement required the Respondent to pay a $14 an hour into the health, welfare, and pension fund. The pension payments portion was $5.75 in the remaining amount would be deposited in the health and welfare fund. While the Respondent would actually pay into the pension fund, the Respondent did not deposit remaining $8.25 per our into health and welfare fund. According to Baker, the health and welfare fund pays for health care insurance, life insurance, and vacation and holiday pay.

not leave the health and welfare fund as an unfunded liability without attempting to correct it. Blakely responded that the language in the local agreement had remained the same for many years and that no one had a problem with it. Joseph stated that the Respondent could not refuse to negotiate about the subject. Blakely replied that the Respondent was not refusing to negotiate, it merely wanted the language regarding payments into the health and welfare fund to remain the same. Baker raised the possibility of filing an unfair labor practice charge regarding this matter but the parties then agreed to discuss other issues. The meeting adjourned without any agreement regarding the unfunded liability language.

At the meeting held on December 2, Joseph presented a handwritten proposal to the Respondent regarding the issue of the unfunded liability of the health and welfare fund. This agreement (GC Exh. 51) provided:

> 1. The employer to purchase a bond for the amount of one and one half times the value of the unfunded liability guaranteeing payment of such period.
>
> 2. Bond to be made out to ILA Local 1982 health & welfare fund and for period of 5 year term & renewable in 5 year term.
>
> 3. Employer to make good-faith payment of 20% of the unfunded liability to ILA Local 1982 health & welfare fund.
>
> 4. Employer & Union to create a health & welfare trust fund & plan (ERISA approved).
>
> 5. All current & future contributions to be paid into the new health & welfare trust.
>
> 6. Employer will forward monthly ins. premium payments to Local 1982 health & welfare trust fund & these payments will be credited towards the employer's unfunded liability balance.
>
> 7. Employer to sign an agreement with the Union obligating himself to the terms above.

Joseph asked if the Respondent's negotiators would take this to their superiors and present it to them and then respond to the Union's proposal at the next meeting, which was scheduled for December 8. Since the parties were not going to meet for a week, Baker stated that he would like an extension on the step one grievance that was discussed the previous day regarding what Baker perceived to be the conflict between the unfunded liability language of the local agreement and the master agreement. Joseph indicated that if the problem of the unfunded liability was solved, the grievance was not going to be an issue and was going to go away.

At the meeting held on December 8, Local 1982 presented a draft proposal dated December 4 (GC Exh. 53). Local 1982's draft proposal set forth a proposal for the pension and health and welfare fund as paragraph 17. Paragraph 17.1 set forth the same proposed additions and deletions that Local 1982 had been insisting upon since October 13. However, Local 1982's proposal also contained the following language in paragraph 17.1: "(Union proposed counteroffer to resolve the open issue listed above on 12–1–2011)"

At this meeting, Blakely presented the Respondent's counterproposal to the offer Local 1982 had made in its handwritten proposal dated December 1, 2011 (GC Exh. 51). The Respondent's proposal would agree to Local 1982's position on all the financial issues in dispute but that the language regarding the unfunded liability contained in the expired contract would have to remain the same.[16] Blakely indicated that agreement to Local 1982's position on the financial issues was inextricably linked to the unfunded liability language remaining the same. Joseph responded to the counterproposal by saying that this was no something he felt that Local 1982 could do and that he had to consult with counsel.

On the evening of December 8, Blakely received an email from Joseph that contained a new proposal from Local 1982 dated December 8 (GC Exh. 54). This proposal included as paragraph 17.1, printed language, in black, that was identical to the language contained in paragraph 18.1 of the expired contract. Blakely briefly looked at the proposal on the evening of December 8.

The parties met again on December 9 and reviewed the draft dated December 8 (GC Exh. 54) that Blakely had received the evening before.[17] When the parties reached the new paragraph 17.1, Blakely stated that Local 1982's deletions and insertions have been removed. Blakely then asked Joseph if the parties had an agreement on this language and Joseph responded that they did. The parties then began to discuss times that they could meet after the first of the year to finalize the agreement because Blakely would be leaving the country for vacation later in December. Baker then asked for short caucus. When the union representatives returned, Baker and Joseph presented a grievance regarding the unfunded liability language to the Respondent (GC Exh. 52). This grievance was on a preprinted Local 1982 grievance form, signed by Baker and dated December 9, 2011. Under the provision indicating "description of grievance," was the following "Violation of master agreement Section 5.5a welfare contributions for each hour of wages paid[on] behalf of each actively employed person." Under the provision indicating "Identify Contractual Provisions Violated and/or Established Custom and practice violated," the grievance indicated "Master Agreement & Local 1982 Agreement section 18.

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[16] Blakely testified that in this offer the Respondent would agree to the wage increase that Local 1982 was seeking. The Respondent also indicated it would fund the first 350 hours for those employees who had active pension accounts and would provide the same benefit for new employees. The proposal regarding additional payments into the pension fund was set forth in writing (GC Exh. 57) and given to the union representatives. According to Blakely, the Respondent also offered to pay the fee for the Transportation Worker Identification Credential (TWIC) that employees had to obtain in order to work on the docks. In addition, the Respondent would agree to Local 1982's position regarding the number of qualifying hours employees had to have in order to be eligible for health care.

[17] At this meeting Joseph gave Blakely a flash drive which contained a draft agreement dated December 9 and the employee handbook. (GC Exh. 56.) This draft contains only black print, reflecting language unchanged from the prior agreement and green print reflecting the parties' tentative agreements. Blakely copied the drive to his computer but credibly testified that he did not open the documents during the meeting. Blakely was not presented with a paper copy of this document and testified that the only document reviewed by the parties on December 9 was the draft dated December 8.

paragraph 18.1." With respect to the provision labeled "Remedy" the grievance indicated "Establish Health Welfare & Pension Fund including a payment plan on the unfunded liability and the plan to be made whole."

After reviewing the grievance, Blakely said to the union representatives, "[Y]ou are grieving the very language that you just agreed to?" Baker responded that the union representatives felt that the language in the local agreement conflicts with the master agreement. Baker also stated that if the Respondent won the grievance, nothing would change, but if the Union won the grievance the parties would have to change the health and welfare language contained in their proposed agreement. (Tr. 508.) Blakely stated that this was a problem and that they did not have an agreement. Blakely indicated that all the financial issues that were in the draft that was being reviewed were contingent upon Local 1982's agreement that the unfunded liability remained the same way as it is been since the 1990s.

The union representatives did not request that the Respondent sign a copy of the draft agreement that was under review at this meeting nor did the parties shake hands. The meeting ended shortly after the Local 1982 representatives presented the Respondent with the grievance.

On December 12, 2011, the Respondent sent a letter to Local 1982 denying the grievance that was filed on December 9 regarding the unfunded liability of the health and welfare plan. On December 13, 2011, Blakely sent a letter (GC Exh. 64) to Baker and Joseph indicating the following:

> On Thursday, December 8, 2011, in hopes of reaching a settlement on the local contract, the employer presented a package proposal to resolve the outstanding issues. Numerous times we stressed that all items were tied together. On Friday, December 9, 2011, I again reminded the union that all outstanding financial issues in the local contract were tied together. When the union suddenly changed his position on 18.1, my exact words were, "This is a problem."
>
> The Union's sudden alteration of its position on 18.1, right on the cusp of an apparent agreement, appears to be another attempt by the ILA's Cleveland office to derail contract negotiations.
>
> Due to holiday and vacation schedules, the employer will not be able to meet on January 5, 2012. Please provide dates when we can meet to resume local contract negotiations.

In a letter dated December 16, 2011, Baker responded to Blakely's letter of December 13 (GC Exh. 58). Baker's letter states:

> As you well know, when we completed the Local agreement, on Friday, December 9, 2011, we had stated to you at the completion of the meeting that we believe that we needed an impartial arbitrator to decide our differences with regards to Section 18, whereas, the Union believes is in contradiction of Section 5 in the Master Agreement of the GLSES-GLDC/ILA.
>
> Not only did we state this concern throughout our negotiations but including at the commencement of our Thursday, December 8, 2011 meeting were we had completed negotiations of the new Local Agreement and whereas we confirmed all changes and language corrections on Friday, December 9, 2011.
>
> When you stated that you had a problem with the fact that we presented to you grievance #2011-051 under the Master Agreement, Andre Joseph responded, this did not affect our commitment to the Local agreement and that we believe this grievance was the only proper process to resolve our belief that Section 18 of the Local Agreement was in fact a violation of Section 5 of the Master Agreement which both the Employer and the Union are signatories of.
>
> As Andre Joseph stated to you previously, at the Thursday, December 8, 2011 meeting, and I, as Co-Trustees of ILA Local 1982 Trusteeship, had the authority to negotiate and approve the Local Agreement. The union needs to know whether you intend to honor the new agreement and if not, please advise us; so that we may decide on what avenue the Union may be forced to take.

On January 4, 2012, Blakely wrote to Baker and Joseph requesting Local 1982's response to the Respondent's December 12 answer to the grievance. In a letter to Baker dated January 4, 2012, Blakely indicated that the Respondent was available to discuss Baker's grievance prior to a future negotiation session. The letter asked Local 1982 to provide dates and time when the parties could complete negotiations and discuss this grievance (R. Exh. 20). In a letter to Baker dated January 6, 2012 (R. Exh. 22), Blakely indicated:

> As Mr. Leach and I made very clear in response to your actions at the end of our negotiation session on Friday, December 9, 2011, we do not yet have an agreement. My December 13, 2011 letter (copy enclosed) clearly noted this, and the same letter also asked you to provide dates when we can resume local contract negotiations, again please provide dates so we can meet and negotiate.

In a letter to Baker in both his capacity as Local 1982 trustees and an ILA vice president, dated January 9, 2012, the Respondent gave notice that it was withdrawing from multiemployer negotiations for any agreement subsequent to the then current master agreement which would expire on December 31, 2012. The Respondent indicated it was ready to negotiate "any and all future CBAs as a separate entity." (R. Exh. 23.)

In a letter to Baker dated February 8, 2012, Blakely stated, inter alia, that the Respondent was ready to complete local negotiations and asking when Local 1982 was available (R. Exh. 25). In a letter to Baker and Joseph dated, March 2, 2012, Blakely stated the following: "During and 9:00 AM meeting between the employer and union on 2/24/12 in the FTZ Conference room, Mr. Joseph indicated he would provide a letter in response to the employer's fifth request to complete local contract negotiations. To date we have yet to receive this letter. The employer asked Mr. Joseph December's letter ASAP." (R. Exh. 27.) In a letter to Baker dated March 20, 2012, Blakely again requested Local 1982 to return to the table to complete negotiations (R. Exh. 28).

The parties held no further meetings in an attempt to reach a collective-bargaining agreement for the period 2011–2012. On

February 2, 2012, Local 1982 filed the charge in Case 08–CA–073735 alleging that since December 2011 the Respondent was "failing and refusing to honor the tentative agreement reached during collective bargaining." (GC Exh. 1bb.)

The General Counsel contends that on December 9, 2011, the parties reached agreement on the terms of a collective-bargaining agreement (GC Exh. 54) and that the Respondent is obligated to execute and implement that agreement. The General Counsel contends that the fact that the grievance was filed over the language regarding unfunded liability in the alleged agreement immediately after the Respondent indicated it agreed to the Union's proposal is of no consequence. The General Counsel's brief at 35 claims: "The grievance did not demonstrate any lack of agreement as to contract language. It merely raised an issue of contract interpretation and application, specifically the relationship between the Master and local agreement. The Union was not asserting that there was no agreement to continue the existing unfunded liability language. They were now merely asserting that it might conflict in some manner with the Master agreement. The mere fact that the parties may have had different views about how the unfunded liability language could or should interact with the Master agreement is no excuse for the Respondent refusing to execute and implement the agreed-upon contract."

The Respondent contends that by filing the grievance immediately after the Respondent indicated it agreed to the Union's proposal, and claiming that if it won the grievance the language regarding unfunded liability in the local agreement would have to be changed, the Union reneged on a tentative agreement. The Respondent asserts that as soon as the grievance was filed, the Respondent told the Union that there was no agreement. The Respondent also notes that the Union did not request that the Respondent sign a complete collective-bargaining agreement at that meeting. Accordingly, the Respondent contends that it has no obligation to sign the draft agreement it was presented on December 9, 2009.

It has long been settled that the obligation to bargain collectively under Section 8(d) of the Act requires either party, upon the request of the other, to execute a written contract incorporating an agreement reached during negotiations. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). This obligation arises, however only after a "meeting of the minds" on all substantive issues and material terms has occurred. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). In addition, as noted by the Board in *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006):

> The General Counsel bears the burden of showing not only that the parties had the requisite "meeting of the minds" on the agreement reached but also that the document which the respondent refused to execute accurately reflected that agreement. (Citations omitted.)

Applying the principles stated above to the instant case, I find that the Acting General Counsel has not established that the parties reached agreement on all the substantive terms of a complete collective-bargaining agreement which the Respondent then refused to sign. Accordingly, I find that the Respondent has not violated Section 8(a)(5) and (1) of the Act and I shall dismiss this complaint allegation.

It is clear that one of the major issues in the parties' negotiations for a new contract involved the unfunded liability of the joint Employer-Union health, welfare, and pension fund that was referred to in the 2006–2010 local agreement in paragraph 18.1. This provision provided that the Respondent accrued an obligation to the health, welfare, and pension fund for each hour of work for employees covered under the agreement. The contract further provided, however, "The Fund is intended to constitute an unfunded obligation of the Company, but the Company shall maintain records of contributions, costs of benefits provided in the current accrued balance."

As noted above, in practice, the Respondent actually paid the required contributions into the pension fund. For reasons not explained in the record, during the 2006–2010 contract and thereafter the Respondent provided health insurance to unit employees pursuant to an insurance policy it purchased from the Great Lakes District of the ILA but the Respondent's payments on this policy were separate and apart from any obligations it owed to the health and welfare fund.

At the first meeting held on September 23, 2011, the Respondent made a written proposal to Local 1982 that retained the existing language regarding contributions to the pension and health and welfare fund and was set forth in paragraph 18.1. At the meeting held on October 13, Local 1982 presented a proposal regarding the language in paragraph 18.1 that would require the Respondent to actually pay all contributions owed to the health welfare and pension fund. The proposal sought to delete the language indicating that the fund constituted an unfunded obligation on behalf of the Respondent. The Respondent did not agree to this proposal. As discussed in detail above, this fundamental difference between the parties regarding the issue of whether the Respondent should fully fund accrued obligations to the health and welfare and pension fund persisted throughout the negotiations. On December 8, however, the Union presented a proposal which included its position regarding the economic issues that were not yet resolved, and also included the old contract language regarding the health, welfare, and pension obligations as being an unfunded liability, which the Respondent had been seeking.

As noted above, on December 9 the parties began to review the entire draft agreement (GC Exh. 54) that had been submitted by the Union on December 8. The new paragraph 17.1, contained the exact language of paragraph 18.1 in the parties expired agreement, including the language that provided "The Fund is intended to constitute an unfunded obligation of the Company, but the Company shall maintain records of contributions, costs of benefits provided in the current accrued balance." When the parties reached that provision of the draft agreement in their review, Blakely asked if the parties had an agreement on that language and Joseph indicated that they did. The parties then began to discuss times that they could meet after the first of the year to conclude the negotiations. The union representatives then asked for short caucus and after they returned presented a grievance claiming that the language in paragraph 17.1 that the parties had just indicated that they were in agreement with violated the provision of the master agree-

ment that required that health and welfare contributions to be made for each hour of work of actively employed employees. The grievance sought as a remedy that the Respondent be required to make the health and welfare plan whole pursuant to a payment plan on the unfunded liability. Surprised by this action, Blakely asked the union representatives if they were grieving the very language that they had just agreed to. Baker responded that the union representatives felt that the language in the local agreement conflicts with that of the master agreement. Baker added that if the Respondent won the grievance, nothing would change, but if the Union won the grievance the parties would have to change the health and welfare language contained in their proposed agreement. Blakely indicated that this was a problem and that, under these circumstances, they did not, in fact, have an agreement. He reiterated that all the financial issues that were set forth in the draft being reviewed were contingent upon the Union's agreement that the unfunded liability language remaining the same as it had been in the prior contract.

At that point the parties did not review the remaining provisions of the draft agreement. The Union did not request the Respondent to sign the document that the parties had been reviewing and the meeting ended shortly thereafter.

The evidence establishes that in the middle of the review of the draft agreement on December 9, the Union filed a grievance claiming that the parties' oral agreement on the Union's proposed paragraph 17.1 constituted a violation of the master agreement between the parties. The grievance sought as a remedy that the Respondent pay its unfunded liability to the health and welfare fund pursuant to a payment plan. Through the filing of this grievance, the Union was, in effect, reverting to its position expressed in its proposal on December 2, in which it sought to have the Respondent pay its unfunded liability pursuant to a payment plan. In summary, the Union's actual position was to accept the Respondent's acquiescence to its economic proposals but seek to have its apparent agreement to the unfunded liability language overturned by an arbitrator. When confronted with this major change in the Union's position, Blakely immediately stated to the union representatives that there was no agreement. He reminded them that the Respondent had agreed with the Union's position on the financial issues in exchange for the unfunded liability language remaining the same as it is been in the prior contract.

The difference between the parties regarding the issue of whether the Respondent's accrued obligation to the health and welfare portion of the joint fund should continue to be unfunded is material and substantial. Accepting the Union's estimate, the amount owed was approximately $500,000 to $800,000.

Under the circumstances it is clear that there has been no "meeting of the minds" on all the substantive and material terms of the collective-bargaining agreement. Rather, the evidence establishes that the parties maintained their differing positions as to whether the unfunded liability language of the prior contract should be included in a new contract. The steadfast adherence to differing views on a substantial and material contract provision has been found by the Board as indicative of the fact that a complete agreement has not been reached. *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1193 (1992). In addition, the General Counsel has not established that there was a document which the Union sought to have the Respondent execute, reflecting the full and complete terms of an entire collective-bargaining agreement.

I find that the instant case is distinguishable from *Windward Teachers Assn.*, 346 NLRB 1148 (2006), which is relied on by the General Counsel to support his position. In that case, the General Counsel contended that the parties agreed on the terms of a bonus clause as those terms were set forth in a complete collective-bargaining agreement. The evidence reflected that the parties believed they had reached a successor contract at their last bargaining session. The parties concluded the session with handshakes and statements reflecting the belief that they had successfully negotiated a contract. In addition, the respondent union had reviewed several versions of the contract without objecting to the terms of the bonus clause and the membership had ratified a tentative agreement that contained the disputed clause. Later, however, the respondent union claimed that the language of the bonus clause was not what it had agreed to. The Board found that, under the circumstances present in that case, that the parties had reached a meeting of the minds on a complete contract and that the document submitted to the respondent union accurately reflected that agreement.

In the instant case, there was certainly no indication at the last meeting that the parties had successfully negotiated an agreement. Rather, shortly after Blakely had indicated there was no agreement, the meeting ended without any manifestation that the parties had reached an agreement. In addition, the Union never tendered a complete collective-bargaining agreement to the Respondent and requested that it be executed.

On the basis of the foregoing, I conclude that the Respondent has not refused to execute an agreed-upon collective-bargaining agreement in violation of Section 8(a)(5) and (1) and therefore I shall dismiss this allegation of the complaint.

Whether the Respondent, by Terry Leach, on September 28, 2012, Violated Section 8(a)(1) by Threatening an Employee and Telling an Employee that the Union Caused Him to Lose Overtime

On September 28, 2012, Union Steward Raymond Sims was working at the Respondent's facility moving aluminum "sows" with a forklift.[18] Shortly before the end of the regular workday at 5 p.m., Sims was informed by Rizo Senior that skilled list employee Kevin Newcomer was assigned to work overtime. Consistent with his understanding that the contract and past practice provided that a steward was to be present when any employees were working overtime, Sims stayed beyond the end of his shift. According to Sims, at approximately 5:10 p.m., he was in the breakroom when Leach walked in and asked him what he was doing there. Sims said that he was the steward and an employee was working overtime. Leach told Sims it did not matter that he was the steward, he needed to leave.[19]

[18] Aluminum "sows" are large blocks of aluminum that can weigh a ton or more.

[19] The July 2012 order of call (R. Exh. 54) establishes that Sims was a regular list employee and was not qualified to operate a front-end loader.

Sims testified that Leach then called somebody on the phone and said to "stop." Sims did not hear who Leach was speaking to but assumed it was Newcomer. Leach told Sims that he needed to "get the hell out of here" and followed Sims to his locker and then followed him to his vehicle. Sims drove to the front gate of the facility and parked. Sims called Brown who told him not to leave because the steward was the "last man to leave from the docks." While Sims was waiting he saw Leach sitting in his pickup truck and as Newcomer walked by he heard Leach tell Newcomer, "[B]lame your fucking Union guy for fucking you out your overtime."

Sims then spoke briefly to Newcomer, who was upset with the Union, based upon what Leach had said. Sims told Newcomer that as the union steward he was the last person to go and that he would wait for Newcomer to come to the gate. The security guard told Sims that Leach had instructed him to tell Sims to leave. Sims went to the back gate at the facility to see if Newcomer was there and observed that Leach had locked the gate. Sims asked Leach why he had locked him in as he was waiting for Newcomer. Leach said Newcomer had already left and Sims should have left through the front gate. Leach then opened the gate and let Sims out.

Newcomer credibly testified that on September 28, 2012, he was asked to work overtime as a front-end loader until 8 p.m. loading mill scale into a railcar and he agreed to do so. At approximately 5:10 p.m. Newcomer received a phone call from Leach who said, "Stop. Stop. Stop loading the product. Get the fuck off the loader and get the fuck off the property." (Tr. 573.) Newcomer was surprised but said okay. Leach began to say something else but Newcomer, hung up on him. After parking the front-end loader, Newcomer walked toward his truck. Leach pulled up in his truck and apologized for being so abrupt with him in the phone call. According to Newcomer, Leach told him that his "union brothers were fucking him." (Tr. 574.) Newcomer then spoke briefly to Sims. Sims said something to the effect that he was his union steward and looking out for Newcomer's well-being. Newcomer replied, "[T]hanks for fucking up my overtime."

Leach testified that he decided to assign overtime on September 28 because he had been informed that CSX was going to pull a train out of the Respondent's facility later that evening. If the train was unable to leave because of the Respondent's delay, the Respondent could be charged for the delay. Leach went down the skilled list and asked employees qualified to operate a front-end loader if they wanted to work overtime to load mill scale into a railcar. Newcomer was the only qualified employee who volunteered for the overtime.

According to Leach, shortly after 5 p.m. he noticed Sims sitting in a breakroom. Leach asked why Sims was still there and Sims replied that he was the union steward so was entitled to stay. Leach told Sims he was not qualified to operate a front-end loader and that he was not going to pay Sims overtime to watch Newcomer perform the work.

Leach further testified that he then received a phone call from a CSX employee indicating that they were not going to pull the train that evening. According to Leach, it was therefore not necessary to work overtime in order to avoid the additional rail charge. Leach then called Newcomer and instructed him to stop loading the mill scale. Leach further testified he later spoke to Newcomer as Newcomer was heading toward his truck. Leach told Newcomer he was shutting down the operation because he was not going to pay two employees overtime when only one of them is qualified to perform the necessary work. According to Leach, Newcomer responded that his union brothers were fucking him out of overtime.

I generally credit the testimony of Sims and Newcomer over that of Leach as it is mutually corroborative in important respects. I credit Leach's testimony, however, in one aspect. I find that Leach did tell Sims that since Sims was not qualified to operate a front-end loader he was not going to pay him overtime to watch Newcomer perform the work. It seems implausible to me that Leach would instruct Sims to leave the facility without giving him any reason for doing so. I specifically do not credit Leach's testimony that he received a call from CSX informing him that the train would not be pulled from the Respondent's facility that evening and that was the reason that he called Newcomer to cancel his overtime. I found this testimony implausible when considering the record as a whole. Leach at times would testify in a manner designed to buttress the Respondent's defense and I believe that this was one of those occasions. I find that Leach canceled Newcomer's overtime because he was angered by Sims' demand to stay and receive overtime pay when he was not qualified to operate a front-end loader, which was the only overtime work assigned. I also specifically do not credit Leach's testimony regarding the conversation he had with Newcomer after Newcomer had parked his front-end loader. Thus, I find that after speaking to Sims and making a decision to cancel Newcomer's overtime because of Sims demand to also work overtime, Leach told Newcomer that he could blame his union guy for fucking him out of his overtime.

The collective-bargaining agreement between the Respondent and Local 1982 that was effective from January 1, 2006, through December 31, 2010, provides in relevant part that "The Dock Steward shall have super seniority and shall be the first person hired and the last person terminated." (Jt. Exh. 1, art. 22.3, p. 20.) The collective-bargaining agreement has no explicit provision indicating that when employees work overtime, the super seniority clause applies to stewards being assigned overtime. In *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976), the Board determined that a super seniority clause limited to layoff and recall is presumptively lawful. The Board further found that super seniority clauses which are not on their face limited to layoff and recall are presumptively unlawful and that the burden of establishing the justification for such a clause rests on the party asserting its legality.

According to Leach's uncontroverted testimony, which I credit, the practice between the parties prior to this incident had been that if overtime was available, the union stewards were skilled list employees who had the qualifications to perform the work and would take the job. Leach testified that when Rizo Senior was the steward he would take available overtime and then, if necessary, other employees would be hired. If Rizo Senior was not available or was not qualified to perform the work, Rizo Senior would always assign the employee who was

operating the equipment to be the steward and he would leave the premises (Tr. 850). Leach's testimony is corroborated by that of Sims who admitted that the prior stewards, Rizo Senior and Lockett, were skilled list employees and thus qualified to perform numerous jobs. Sims further admitted that he and Prentice Hubbard, the union stewards at the time of this incident, were regular list employees and were not qualified to perform certain jobs. (Tr. 145.)

On September 28, 2012, Leach was confronted with Sims' demand that he was entitled to work overtime on a job that he was not qualified for. As noted above, Sims' claim also has little support in the contract language and would appear to run afoul of the *Dairylea* principles. Leach decided not to assign the overtime work to Sims and instructed him to leave the premises. Instructing Sims to leave under these circumstances does not constitute threatening behavior violative of Section 8(a)(1) even when done in a rude manner. Accordingly, I shall dismiss this complaint allegation.

I find, however, that Leach's statement to Newcomer is another matter. I find that Leach rather than just denying Sims claim for overtime work, also decided to cancel Newcomer's overtime. This was clearly Leach's decision, as the Union had not requested it. Thus, when Leach told Newcomer that he lost his overtime because of the Union, I find that Leach's statement would reasonably discourage Newcomer and other employees from supporting the Union and thus violated Section 8(a)(1) of the Act.

Whether the Respondent, Through Terry Leach, on November 14, 2012, Threatened an Employee and Grabbed Him in Violation of Section 8(a)(1)

Former employee and Union Steward Mark Lockett[20] testified that on November 14, 2012, he received a phone call from a unit employee informing him that nonbargaining unit employees were allegedly performing unit work in front of the maintenance office. As the union steward on duty, Lockett drove the forklift he was working over to the maintenance area to investigate the claim. When Lockett arrived he observed that two nonbargaining unit maintenance mechanics were removing coal with shovels near an electrical box so that a contractor could finish work on the box. Lockett told the two maintenance employees that they were performing bargaining unit work and to stop.

As Lockett was attempting to contact Leach by phone, he arrived in his pickup truck. Lockett asked Leach about the maintenance employees performing unit work. Leach replied that the work they were performing was not unit work. From this point on both individuals carried on the conversation with raised voices. Lockett told Leach that this was "bullshit, this is our work." Lockett told Leach that he could have hired employees at the shape up that morning or used some of the skilled employees who were present to do that work. Leach told Lockett that he had no business being in the area. Lockett told Leach that as the union steward he had the right to go anywhere on the dock where there was a contractual dispute. Leach told Lockett that he needed to shut up and go back to work. Lockett told Leach again that this was "some fucking bullshit and that there was going to be a grievance filed over this." (Tr. 52.) Leach told Lockett "to do what the fuck I had to do and he would do what he had to do." Lockett replied, "[F]ine, but you know that this is some bullshit." Leach told Lockett to "shut his pie hole" and "to get my ass back on my forklift and go back to work before he had him removed from the job." Lockett replied, "[G]o ahead and try it." As Lockett walked toward his forklift, Leach grabbed Lockett's arm and turned Lockett around to face him. Leach told Lockett that if he did not quit talking to him that way that he would have Lockett fired. Lockett told Leach not ever put his hands on him again and then got back onto the forklift and went back to work.

On November 15, 2012, Lockett went to the Toledo Police Department and filed a complaint against Leach (GC Exh. 8). This report states, in relevant part, "Victim states he and the suspect were involved in dispute due to work activity. Victim #1 is the union steward. Victim states suspect called him names and demanded he go back to his job. Victim states suspect then grabbed him by his forearm and whipped him around." On November 20, 2012, Lockett filed a grievance regarding the underlying dispute, claiming that nonunion employees were performing bargaining unit work (GC Exh. 7).

Leach testified that when he arrived at the area where the disputed work was being performed, Lockett was yelling at the maintenance employees. According to Leach, he spoke to Lockett in a calm manner but Lockett spoke loudly and aggressively toward him throughout the conversation. Leach specifically denied that he threatened Lockett with the loss of his job and that he did not grab him by the arm.

I credit Lockett's testimony over Leach to the extent it conflicts. While I am mindful that Lockett was discharged for falsifying records, I believe he testified credibly with regard to this incident. His testimony contained substantial detail and was consistent on both direct and cross-examination. His testimony was also corroborated by the police report he made the following day. I doubt that Lockett would have filed a formal complaint with the Toledo Police Department if this incident had not occurred the way that he had described it. Leach's testimony that Lockett acted aggressively and used profanity while he remained calm throughout the entire discussion strikes me as implausible. I find it much more likely that the conversation unfolded as Lockett described it.

As the union steward, Lockett was engaged in protected activity while investigating the claim that nonbargaining unit employees were performing bargaining unit work. The Board has held that employee complaints about working conditions are protected regardless of the merits of the particular complaint. *Skrl Die Casting, Inc.* 222 NLRB 85, 89 (1976). While Lockett's voice was raised and he used some profanity in his discussion with Leach regarding his claim that the maintenance employees were performing bargaining unit work, he did not act in a threatening manner. When employees are engaged in Section 7 activity, the Act permits some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and discipline. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1322–1323 (2006); *Thor Power*

[20] Lockett was discharged on January 22, 2013, for falsifying time records.

Tool Co., 148 NLRB 1379 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965). I find that Lockett's conduct in objecting to the assignment of the disputed work to nonbargaining unit employees did not interfere with the Respondent's right to maintain discipline and order. Thus, I find that Leach's threat to Lockett that he would remove him from the job or discharge him for his conduct during the protected discussion involving the disputed assignment of work, violates Section 8(a)(1) of the Act.

I also find that Leach's conduct in grabbing Lockett by the arm in turning Lockett to face him during their discussion also violated Section 8(a)(1) of the Act. This unwanted physical contact occurred during the protected discussion of a disputed work assignment. The Board has found that an employer's physical assault of an employee because of their protected activities violates Section 8(a)(1) of the Act. *Kenrich Petrochemicals, Inc.*, 294 NLRB 519, 534–535 (1989).

Whether the Respondent Violated Section 8(a)(5) and (1) of the Act When it Ceased Dues Checkoff on January 1, 2013

The local agreement between Local 1982 and the Respondent that expired on December 31, 2010, contained a dues-checkoff clause (Jt. Exh. 1, sec. 4). The agreement between the Great Lakes Stevedore Employers and the International Union that was effective between January 1, 2011, and December 31, 2012, also contained a dues-checkoff provision (Jt. Exh. 3, sec. 13). On January 9, 2012, the Respondent submitted a timely notice of its withdrawal from the multiemployer association to the International Union (R. Exh. 23). In this letter, the Respondent indicated it would negotiate all future collective-bargaining agreements as a separate entity.

On May 22, 2012, Local 1982 and the Respondent executed a memorandum of understanding (GC Exh. 59) containing the following terms:

> Until ILA Local 1982 and Midwest Terminals of Toledo International, Inc. ratify a new local collective bargaining agreement (CBA), both parties agree that the current language on 4. CHECKOFF (first paragraph below) will be replaced with the proposed language on 4. CHECKOFF (second paragraph below).
>
> 4. CHECKOFF
> The Company shall make appropriate payroll deductions for each employee who furnishes the Company formal written authorization for such deductions. The deduction shall be made each payday and all sums deducted shall be forwarded to the designated fiscal officer of the Union not later than ten (10) days after each such deduction has been made.
>
> 4. CHECKOFF
> The Company shall make appropriate payroll deductions for each employee who furnishes the Company formal written authorization for checkoff (hourly per capita tax) deductions.

Blakely and Leach executed the document on behalf of the Respondent while then Trustees Baker and Joseph and then Dock Steward Rizo Senior signed on behalf of Local 1982.

The Respondent and Local 1982 began negotiations for a new local collective-bargaining agreement in approximately October 2012. On November 19, 2012, Ronald Mason, the Respondent's attorney, faxed a letter (R. Exh. 35) to Local 1982 President Otis Brown. The letter indicated what dates the Respondent had available to negotiate in December. The letter also stated:

> Be advised that the Company does not intend to extend the agreement past its expiration date on December 31, 2012. If no agreement is reached we will continue operations in negotiations with your Local into 2013 and will operate without a contract per National Labor Relations Board law.
>
> Be further advised that pursuant to NLRB law in existence for the past 50 years, the Company will stop deducting Union dues under the check-off if we have no contract or agreed extension in effect as of January 1, 2013.

The fax confirmation page reflects that the fax was received by Brown's office (R. Exh. 35, p. 2).

After the Respondent's letter of November 19, the parties held bargaining meetings on November 26 and 28 and December 12 and 13. At the meeting held on November 26, 2012, the Respondent's bargaining notes (R. Exh. 36) reflect that Mason asked Brown if he had received his November 19 fax. Brown asked what number it had been faxed to. Mason then indicated the number of the document had been faxed to and reiterated the available dates that the Respondent had in December. The parties then briefly discussed scheduling meetings in December. There is no indication in the Respondent's notes that Brown affirmatively indicated that he had seen Mason's letter. While the bargaining notes for November 26 reflect that Mason stated that the Respondent was proposing to delete the checkoff provision in the local agreement (R. Exh. 36, p. 2) the notes do not reflect that the Respondent stated at the meeting that it would stop deducting dues pursuant to the checkoff provision on January 1, 2013.

The Respondent's bargaining notes for the meetings held on November 28 and December 11 and 13 do not reflect that the parties discussed the provision in Mason's November 19 letter indicating that it would cease deducting dues on January 1, 2013, absent a new agreement. The bargaining notes corroborate Brown's testimony that the negotiating meetings held before the end of December, no one in management stated that the dues deduction pursuant to checkoff would cease as of January 1, 2013.

At the hearing, Brown testified that he did not recall receiving Mason's fax of November 19. I credit his testimony on this point as the Respondent's bargaining notes for the meeting of November 26 indicate that Brown appeared to be unaware of the contents of Mason's November 19 letter. Thus, I find that while Brown's office received Mason's November 19 fax, Brown himself did not see the letter.

On January 1, 2013, the Respondent ceased deducting dues pursuant to the checkoff provisions of the expired local and master agreements.

Brown testified that he first became aware that the Respondent had ceased checking off dues in early January 2013 when Hubbard, the Local 1982's vice president, told him that employees had reported that their dues were no longer being deducted. Brown spoke to Leach a couple of days afterwards and told him that there was a problem with dues checkoff. Leach

replied that the dues checkoff had stopped because there was no longer a contract.[21] Leach and Brown debated whether this was correct and Leach told Brown that he could file a charge if Brown disagreed with the Respondent's action.

On February 6, 2013, Local 1982 filed the charge in Case 08–CA–097760 alleging that the Respondent had unilaterally ceased deducting dues pursuant to the checkoff provision in violation of Section 8(a)(5) and (1).

The General Counsel claims that pursuant to the Board's recent decision in *WKYC-TV*, 359 NLRB No. 30 (2012), the Respondent violated Section 8(a)(5) and (1) by failing to honor the dues-checkoff provision of their agreement until either a new agreement was reached that eliminated dues checkoff or a valid impasse was reached.

The Respondent contends that it gave notice to the Union on November 19, 2012, that it would cease deducting dues at the expiration of the contract and that the Union never requested bargaining over the cessation of dues deduction and has therefore waived its statutory bargaining rights on this issue. The Respondent also contends that pursuant to the court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which found invalid two of President. Obama's appointments to the Board, the Board did not have a proper quorum for it to issue its decision in *WKYC-TV, Inc.*, supra. Therefore, according to the Respondent, the decision is invalid and should not be accorded precedential value.

In *WKYC-TV*, supra, the Board held that "an employer, following contract expiration must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer." Id. slip op. at 8. In *WKYC-TV*, the Board overruled its decision in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), affd. in relevant part 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Since *Bethlehem Steel* had been the law for 50 years, the Board indicated it would apply its new rule prospectively. *WKYC-TV* makes it clear, however, that after December 12, 2012, the date the Board's decision issued, an employer's unilateral cessation of dues checkoff after the expiration of a contract containing such a clause would violate Section 8(a)(5) and (1).

In the instant case it is clear that after the expiration of the master agreement the Respondent ceased dues checkoff as of January 1, 2013. A new agreement has not been reached and the Respondent does not assert, and the evidence does not establish, that a valid impasse has been reached in the negotiations.

In addressing the Respondent's waiver defense, I first note that on May 22, 2012, the Respondent executed an agreement changing the language of the checkoff provision in the expired local contract. This agreement indicates that the new dues-checkoff provision would be in effect until "Local 1982 and Midwest Terminals of Toledo International, Inc. ratify a new local collective-bargaining agreement." In May 2012, the parties felt the issue of dues checkoff was sufficiently important to require a written agreement indicating that the new dues-checkoff provision would be in effect until the parties reached a new local agreement. As the Board recently reiterated in *WKYC-TV*, supra, slip op. at 3, dues checkoff is a mandatory subject of bargaining. By executing the May 22 agreement dealing with a mandatory subject of dues checkoff the parties executed a collective-bargaining agreement within the meaning of Section 8(d) of the Act. In *Jones-Dairy Farm*, 295 NLRB 113, 115 (1989), the Board held:

> Under Section 8(d) of the Act, neither party may compel the other to bargain during the term of the contract over any change in terms and conditions of employment that are established in the contract. *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886–887 (7th Cir. 1968), cert. denied 393 U.S. 980 (1968); *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616 (1973). This means that during the term of the agreement no change in a contractually covered employment condition may be made unless there is mutual assent to the change. Ibid.

In the instant case, there is no evidence that prior to January 1, 2013, the Union consented to the abrogation of the dues-checkoff agreement executed in May 2012.

It is clear that a waiver of statutory rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). In *American Diamond Tool, Inc.*, 306 NLRB 570 (1992), the Board noted that "Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties, including past practices, bargaining history and action or inaction), or by a combination of the two."

Judged under this standard, Local 1982 did not waive its right to bargain over the cessation of the dues-checkoff provision. As discussed above, in May 2012, the parties affirmed their commitment to the continuation of a new dues-checkoff provision until a successor local agreement was reached. Thus, there is certainly no collective-bargaining provision that would establish that the Union has waived its right to bargain over a dues-checkoff provision. I also do not find that the Union through inaction waived its right to bargain over the matter. As noted above, while the Respondent faxed a letter to the Local 1982's office on November 19, Brown never saw that letter prior to January 1, 2013. Moreover, the Respondent's announcement on that date of its intent to cease the operation of the dues-checkoff provision on January 1, 2013, was in the nature of a fait accompli as it merely informed the Union that it would cease dues deduction, absent a new collective-bargaining agreement. It did not invite the Union to discuss the matter with it. The Board has found that when an employer merely informs a union of a course of action that the employer will take, it does not constitute meaningful notice and an opportunity to bargain. *General Die Casters, Inc.*, 359 NLRB No. 7, slip op. at 17 (2012); *Brannan Sand & Gravel Co.*, 314 NLRB 282 (1994); *Ciba-Ceigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). While the Respondent's position was somewhat understandable given that under *Bethlehem Steel* an employer could unilaterally cease the

[21] I do not credit the rather cursory denial of Leach that he did not discuss the issue of cessation of dues in January with Brown. Brown's demeanor reflected certainty on this point and his testimony had sufficient detail to be believable.

operation of the dues-checkoff provision at the expiration of a contract, I do not find that the lack of a request to bargain in the approximately 2-week period between the Board's announcement in *WKYC-TV* of its new policy regarding the obligation to bargain over the cessation of a dues-checkoff provision at the expiration of a contract and the Respondent's cessation of dues checkoff, is sufficient to be considered a waiver of the statutory right to bargain over this mandatory subject.

With regard to the Respondent's argument that the Board did not have a proper quorum when it issued its decision in *WKYC-TV*, and therefore the decision is invalid, I note that in June 2013, the Supreme Court granted a petition for certiorari in *Noel Canning v. NLRB*, 133 S.Ct 2861 (2013). The Board has held that while the validity of President Obama's recess appointments to the Board remains in litigation, and pending a definitive resolution, the Board will continue to fill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77 fn. 1 (2013). Accordingly, I find no merit to the Respondent's argument that the Board's decision in *WKYC-TV* is invalid and I should not apply to the instant case. I am, of course, bound to follow Board precedent unless and until it is reversed by the Supreme Court. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963), enfd. in part 331 F.2d 176 (8th Cir. 964).

CONCLUSIONS OF LAW

1. Local 1982 is, and at all material times was the exclusive bargaining representative of the employees in the following appropriate unit, as defined in sections 1 and 2 of the 2006–2010 collective-bargaining agreement between the parties:

> All employees employed in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, watchmen, linemen, line dispatcher, dock steward, and hatch leaders, but excluding office, clerical, professional, supervisory, and security employees.

2. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by unilaterally ceasing the deduction of dues pursuant to the checkoff provision of an expired collective-bargaining agreement.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Refusing to assign work to Otis Brown during the months of June, July, and August 2008.

(b) Refusing to assign light-duty work to Otis Brown from November 27, 2008, through December 2, 2008.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Threatening not to hire employees because they filed grievances under the collective-bargaining agreement and unfair labor practice charges with the National Labor Relations Board.

(b) Threatening an employee with future discipline because he filed a grievance.

(c) Coercively telling employees that the Union had caused them to lose overtime.

(d) Threatening to remove from the job or discharge an employee because he engaged in union and protected concerted activity.

(e) Grabbing an employee because he engaged in union and protected concerted activity.

5. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

REMEDY

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

Since I have found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally failing to deduct and remit dues to the Union after January 1, 2013, it must restore its procedure of deducting and remitting union dues to the Union as required by the applicable expired collective-bargaining agreement[22] until the parties reach either a new collective-bargaining agreement or a valid impasse. In addition, the Respondent must reimburse the Union for the losses resulting from its failure to deduct and remit dues since January 1, 2013, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987); compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Bulkmatic Transport. Co.*, 340 NLRB 621 (2003).

Since the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to assign work to employee Otis Brown, it must make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarter.

Since the Respondent violated Section 8(a)(1) of the Act by issuing a memorandum on August 19, 2011, to employee Miquel Rizo Jr., threatening him with future discipline because of a grievance he had filed, the Respondent must remove that memorandum from his personnel file, and notify him in writing that this is been done and that the memorandum will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

---

[22] The record does not indicate the precise procedure the Respondent utilized in checking off and remitting dues pursuant to the expired local agreement, the May 2012 addendum to the local agreement regarding the dues-checkoff provision, and the expired master agreement. Accordingly I will leave to the compliance phase the determination as to the procedure the Respondent utilized in checking off and remitting dues to the Union.

[23] 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.

ORDER

The Respondent, Midwest Terminals of Toledo International, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally refusing to deduct and remit to the Union the union dues as required by the applicable expired collective-bargaining agreement.

(b) Refusing to assign work to employees for engaging in union or other protected concerted activities.

(c) Threatening not to hire employees because they filed grievances under the collective- bargaining agreement and unfair labor practice charges with the National Labor Relations Board.

(d) Threatening employees with future discipline because they filed a grievance.

(e) Coercively telling employees that the Union had caused them to lose overtime.

(f) Threatening to remove from the job or discharge employees because they engaged in protected concerted activity.

(g) Grabbing an employees because they engaged in protected concerted activity.

(h) 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) Within 14 days of the date of this order, began deducting and remitting to the Union dues owed to the Union as required under the terms of the applicable expired collective-bargaining agreement and reimburse the Union for the losses resulting from the Respondent's failure to deduct and remit union dues since January 1, 2013, as set forth in the remedy section of this decision.

(b) Make Otis Brown whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful written threat to discipline Miquel Rizo Jr., and within 3 days thereafter notify him in writing that this has been done and that the written threat to discipline him will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 8, 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 June 1, 2008.

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

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

Dated, Washington, D.C., November 12, 2013.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally refuse to deduct and remit to the Union the union dues as required by the applicable expired collective-bargaining agreement. The appropriate unit represented by the International Longshoremen's Association, Local 1982, AFL–CIO (the Union) is, as set forth in the expired 2006–2010 local agreement:

> All employees employed in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, checkers, signalmen, watchmen, line men, line dispatcher, dock steward, and hatch leaders, but excluding office, clerical, professional, supervisory, and security employees.

[24] 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."

WE WILL NOT refuse to assign work to employees because they engaged in union or other concerted protected activities.

WE WILL NOT threaten not to hire employees because they filed grievances under the collective-bargaining agreement and unfair labor practice charges with the Board.

WE WILL NOT threaten employees with future discipline because they filed a grievance.

WE WILL NOT coercively tell employees that the Union caused them to lose overtime.

WE WILL NOT threaten to remove from the job or discharge employees because they engaged in union and protected concerted activity.

WE WILL NOT grab employees because they engaged in union and protected concerted activity.

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

WE WILL within 14 days of the Board's order, deduct and remit to the Union dues owed to the Union as required in the terms of the applicable expired collective-bargaining agreement and reimburse the Union for the losses resulting from a failure to deduct and remit union dues since January 1, 2013, with interest.

WE WILL make Otis Brown whole for any loss of earnings and other benefits suffered as a result of our discrimination against him, with interest.

WE WILL within 14 days from the date of the Board's Order remove from our files any reference to our unlawful written threat to discipline Miquel Rizo Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the written threat to discipline him will not be used against him in any way.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
MAY - 7 2015
RECEIVED

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED MAY - 7 2015
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No. 15-1126

ORIGINAL

PETITIONER'S RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and to enable the Judges of the Court to evaluate possible disqualifications or recusal, the undersigned counsel for Petitioner Midwest Terminals of Toledo International, Inc. ("Midwest Terminals") states that Midwest Terminals has no parent corporation(s) and no publicly-held company has any ownership interest in Midwest Terminals. Midwest Terminals is engaged in the stevedore/warehousing business with facilities located in Toledo, Ohio.

Respectfully submitted,

Ronald L. Mason (54642)
Aaron T. Tulencik (54649)
Mason Law Firm Co., L.P.A.
425 Metro Place N., Suite 620
Dublin, OH 43017
(614) 734-9450
e-mail: rmason@maslawfirm.com
e-mail: atulencik@maslawfirm.com

Counsel for Petitioner Midwest Terminals of Toledo International, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 20115, a true and correct copy of the foregoing Rule 26.1 Corporate Disclosure Statement was served via United States Mail, First Class, Postage Prepaid, on this 6th day of May, 2015 upon the following:

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Yvonne T. Dixon
Division of Enforcement Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Cheryl Sizemore, Esq.
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 E. Ninth Street, Room 1695
Cleveland, OH 44199-2086
Cheryl.Sizemore@nlrb.gov
Counsel for the General Counsel

Allen Binstock, Esq.
Regional Director
National Labor Relations Board, Region 8
Anthony J. Celebreeze Federal Building
1240 E. Ninth Street, Room 1695
Cleveland, OH 44199-2086

Joseph Hoffman, Jr., Esq.
Faulkner, Hoffman & Phillips, LLC
20445 Emerald Parkway Drive, Suite 210
Cleveland, OH 44135
Hoffman@fhplaw.com
Counsel for Charging Party, Local 1982

Ronald L. Mason (54642)