UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DRESSER-RAND COMPANY	§	
	§	
	§	
Petitioner,	§	
	§	**PETITION FOR REVIEW**
v.	§	
	§	
NATIONAL LABOR RELATIONS BOARD	§	
	§	
	§	
Respondent.	§	

DRESSER-RAND COMPANY'S PETITION
FOR REVIEW OF ADMINISTRATIVE ORDER

Petitioner Dresser-Rand Company ("DRC"), as a person aggrieved by the final order of the National Labor Relations Board ("Board"), petitions the Court for review of the Decision and Order entered by the National Labor Relations Board on June 26, 2015 in *Dresser-Rand Company and IUE-CWA, AFL-CIO, Local 313*, NLRB Case Nos. 03-CA-026543, 03-CA-026595, 03-CA-026711, and 03-CA-026943. The Board's June 26, 2015 Decision and Order adopted and incorporated by reference its August 6, 2012 Decision and Order in these same cases. A copy of the Board's June 26, 2015 Decision and Order is attached as Exhibit A. A copy of the Board's August 6, 2012 Decision and Order is attached as Exhibit B.

DRC asserts that it did not engage in the unfair labor practices as alleged, and it respectfully requests the Court to set aside the Board's June 26, 2015 Decision and Order and instruct the Board to reverse the decision of the Administrative Law Judge and dismiss the complaint against DRC.

Venue properly lies in this circuit under 29 U.S.C. § 160(f) because DRC is headquartered in Houston, Texas, and resides and transacts business within the geographical boundaries of the circuit.

As required by 29 C.F.R. § 101.14, DRC will serve a file-stamped copy of this petition on National Labor Relations Board Appellate Court Branch Deputy Associate General Counsel Linda Dreeben, 1099 14th Street N.W., Washington, D.C. 20570-0001.

Respectfully submitted,

LITTLER MENDELSON, P.C.

By: *<u>/s/ A. John Harper III</u>*

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HAYNES AND BOONE, LLP

By: *<u>/s/ Jeremy D. Kernodle</u>*

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ATTORNEYS FOR PETITIONER
DRESSER-RAND COMPANY

CERTIFICATE OF SERVICE

I certify that this Petition for Review was provided to all parties listed below by certified mail, return receipt requested on the 1st day of July, 2015.

Linda Dreeben
Appellate Court Branch Deputy
Associate General Counsel
National Labor Relations Board
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unionone313@yahoo.com

/s/ A. John Harper III
A. John Harper III

#166

AMERICAN POSTAL WORKERS UNION, AFL-CIO

Grievant/Union	Nature of Allegation
APWU	Attendance

January 6, 2015
Date of Request

To: Lawrence McKee — Title: Maintenance Manager

From: Michael Burris — Title: Maintenance Steward

Subject: **REQUEST FOR INFORMATION & DOCUMENTS RELATIVE TO PROCESSING A GRIEVANCE**

We request that the following documents and/or witnesses be made available to us in order to properly identify whether or not a grievance does exist and if so their relevancy to the grievance:

1. ***Clock Rings and Employee All report for Brian Ramson Sr. from September 17 through present.***
2. ***Badge access records or (Entry) rings for Brian Ramson Sr. from September 17 through present.***
3.

NOTE Article 17, Section 3 requires the Employer to provide for review all documents, files, and other records necessary in processing a grievance. Article 31, Section 3 requires that the Employer make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement. Under 8a(5) of the National Labor Relations Act, it is an Unfair Labor Practice for the Employer to fail to supply relevant information for the purpose of collective bargaining. Grievance processing is an extension of the collective bargaining process.

(X) MORE INFORMATION REQUESTED

[ ] REQUEST APPROVED [ ] REQUEST DENIED (GIVE REASON)

1/13/2015
(date)

(signed)

NOLA P&DC
JAN 06 2015
USPS 70113

UNITED STATES
POSTAL SERVICE

January 12, 2015

Subject: Request for Information (RFI)
Maintenance tracking #166

To: APWU/Michael Burris

In order to provide a timely response to the request for information listed above, I wish to inform the APWU that Maintenance Management would like to better understand the relevance for your request. The letter you sent dated 12/20/2014 addressed some possible management issues however your request for information concerning the same person and time frame has created some concerns about your motives for requesting this information.

I am not denying your request for information, Article 31.3 requires that the union give a reasonable description of what it needs and make a reasonable claim that the information is needed to enforce or administer the contract. I am asking for a reasonable explanation or description of your concerns/possible grievance.

The request for information only stated that the Nature of the Allegation was "Attendance". Mr. Bryan Ramson Sr. doesn't have any pending attendance discipline and consequently, the relevance of the request is unclear in our interpretation. Please provide additional information as requested so we may properly respond to your request.

Thank you for your patience.

Lawrence C McKee
Lead Maintenance Manager
Louisiana District

UNITED STATES
POSTAL SERVICE

January 23, 2015

Subject: Request for Information (RFI)
Maintenance tracking #166 (Second Request)

To: APWU/Michael Burris

In response to your "Second Request," Maintenance Management is providing the "Second Response" listed below. Please comply with our request in accordance with approved policies and procedures. A failure to respond to management's request for additional information, clarification or relevance, may be interpreted as a failure to bargain in good faith.

In order to provide a timely response to the request for information listed above, I wish to inform the APWU that Maintenance Management would like to better understand the relevance for your request. The letter you sent dated 12/20/2014 addressed some possible management issues however your request for information concerning the same person and time frame has created some concerns about your motives for requesting this information.

I am not denying your request for information. Article 31.3 requires that the union give a reasonable description of what it needs and make a reasonable claim that the information is needed to enforce or administer the contract. I am asking for a reasonable explanation or description of your concerns/possible grievance.

The request for information only stated that the Nature of the Allegation was "Attendance". Mr. Bryan Ramson Sr. doesn't have any pending attendance discipline and consequently, the relevance of the request is unclear in our interpretation. Please provide additional information as requested so we may properly respond to your request.

Thank you for your patience.

Lawrence C McKee
Lead Maintenance Manager
Louisiana District

REC'D
2015 26 AM 8:02
NEW ORLEANS, LA

United States Postal Service
Case 15-CA-144494

Confidential Witness Affidavit

I Michael Burris, being first duly sworn upon my oath, state as follows:

I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.

I reside at 559 Delmar Street, Terrytown, LA 70056

My home telephone number (including area code) is N/A

My cell phone number (including area code) is 504-296-4147

My e-mail address is jazztip@yahoo.com

I am employed by United States Postal Service

located at 701 Loyola Avenue, New Orleans, LA 70113

United States Postal Service will be referred to as Employer.

American Postal Workers Union, Local 83 will be referred to as Union.

I began working for the Employer on October 10, 1987. I currently work as an electronics technician for the Employer. As an electronics technician, I conduct maintenance on all of the automated equipment used by employees at the Postal Service. My direct supervisor is Supervisor of Maintenance Operations Michael Beard.

I have been Vice President of the Local Union since 2010, when I was elected to the position the first time. I am currently in the second year of my second term as Vice President of

Privacy Act Statement

The NLRB is asking you for the information on this form on the authority of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the NLRB in processing representation and/or unfair labor practice cases and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). Additional information about these uses is available at the NLRB website, www.nlrb.gov. Providing this information to the NLRB is voluntary. However, if you do not provide the information, the NLRB may refuse to continue processing an unfair labor practice or representation case, or may issue you a subpoena and seek enforcement of the subpoena in federal court.

Initials

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the Local Union. As Local Union Vice President, I assist in the day to day operations of the Union, act as President when President is absent, and also function as a union steward. I am involved in every phase of the grievance process (Step 1, Step 2, and Step 3) ~~with the exception of~~ including arbitration.

Prior Requests for Similar Information

On September 17, 2014, I submitted a written request for information to Leslie Robertson to give to Maintenance Manager Lawrence McKee. I requested copies of the clock rings and employee all report for Brian Ramson Sr. for the past 6 months and badge access records or entry rings for Brian Ramson Sr. for the past 6 months. I requested this information because I planned on filing a grievance after I received a letter of warning for violating a zero tolerance policy (I got into an argument with Brian Ramson Sr. and his brother, Robert Ramson). Brian and Robert were not disciplined as a result of the argument. I wanted to show that the Employer was issuing discipline in a disparate manner.

About a week after the September 17, 2014, request for information, I received all of the documents that I requested.

Request for Clock Rings, Employee All Report, and Badge Access Records for Brian Ramson

In or about the end of December 2014 or beginning of January 2015, Supervisor Michael Beard issued me a letter of warning for attendance related issues (being late to work 8 or 9 times, but none of the days I was late exceeded 10 minutes). I will provide the Board Agent a copy of the letter of warning that I received for attendance issues. Additionally, Beard issued clerk James Baux a seven day suspension for a conduct related issues. I believe Baux allegedly threw

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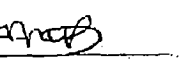
a piece of paper at a supervisor and the supervisor claimed it was assault and that she cut her hand.

On January 6, 2015, I went to the clerk's office and submitted a written request for information to clerk Leslie Robertson, who works closely with Maintenance Manager Lawrence McKee and typically receives written requests for information on Mr. McKee's behalf. I did not have any discussion with Robertson beyond telling her that I was giving her a request for information to pass along to Maintenance Manager Lawrence McKee. In the request for information, I requested 1) clock rings and employee all report for Brian Ramson Sr. from September 17 through present and 2) badge access records or entry rings for Brian Ramson Sr. from September 17 through present. I requested Brian Ramson Sr.'s clock rings and employee all report because I planned on filing a grievance regarding my discipline for attendance issues and wanted to establish disparate treatment because Ramson was not being disciplined even though he failed to follow the rules and would take two lunches on some days and as well as report to work late. I also requested Brian Ramson's badge access records and entry rings because they would show his entrance and exit from the employee parking garage. I have provided the Board Agent a copy of the information request dated January 6, 2015. To date, I have not received the information requested on January 6, 2015.

In or about the first week of January 2015, I filed a grievance regarding the Employer issuing me a letter of warning for attendance issues. The Employer and the Union have agreed to an extension of time limits for the grievance because Supervisor Michael Beard has been out on sick leave following bypass surgery. The grievance is currently pending at Step 1. I will provide the Board Agent a copy of the grievance.

Initials: 

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On or about January 12, 2015, clerk Leslie Robertson radioed me to come to the clerk's office. Robertson gave me a letter dated January 12, 2015, from Maintenance Manager Lawrence McKee. The letter states, "in order to provide a timely response to the request for information. ., I wish to inform the APWU that Maintenance Management would like to better understand the relevance for your request. The letter you sent dated 12/20/2014 addressed some possible management issues however your request for information concerning the same person and time frame has created some concerns about your motives for requesting this information. I am not denying your request for information. Article 31.3 requires that the union give a reasonable description of what it needs and make a reasonable claim that the information is needed to enforce or administer the contract. I am asking for a reasonable explanation or description of your concerns/possible grievance."

On January 20, 2015, I went to Leslie Robertson's office to give her a second written request for information for the same documents that were initially requested on January 6, 2015, so that she could give the request to Maintenance Manager Lawrence McKee. In the second request, I wrote, "you are not Step one or Step two designee for individual grievances and no further explanation of relevance is necessary. As a courtesy, I'm requesting this information for the second time."

On or about January 23, 2015, Leslie Robertson provided me with a letter dated January 23, 2015, from Maintenance Manager Lawrence McKee stating, "in response to your 'second request,' Maintenance Management is providing the 'Second Response" listed below. Please comply with our request in accordance with approved policies and procedures. A failure to respond to management's request for additional information, clarification or relevance, may be interpreted as a failure to bargain in good faith. Again, McKee wanted further explanation

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regarding the reason for my request. As a union steward, I am not required to tell management the direction or course of a grievance investigation. I have not had any other communications with the Employer regarding my January 6, 2015 (second request January 20, 2015) request for information since January 23, 2015.

To date, I have not received any of the documents that I requested on January 6, 2015 (second request January 20, 2015). These documents are relevant and necessary to the processing of my grievance that I filed regarding my letter of warning that I received for attendance issues.

Request for Report from EEO ADR Services

On January 14, 2015, I submitted a written request for information to the Employer's Labor Relations office. I believe I gave the request to Bertha Brumfield to give to Human Resources Manager Lorina Williams. I requested the following documents 1) copy of investigators report for an investigation conducted last week by contractor Richard Shayer of EEO ADR Services, 2) copy of statements from all people interviewed by the investigators, 3) names of individuals tendering statements for the investigations, 4) scope of the investigation, and 5) names of management officials that the report was provided to. I requested this information because on January 8, 2015, employee Maurice Clement was placed off the clock for alleging threatening the manager of labor relations. The Employer failed to conduct an investigation after taking Clement off the clock. I was investigating a grievance on behalf of Clement and wanted to determine if there was disparate treatment between Clement's discipline and another employee David Deroche who had also made similar threats against management in November or December 2014. In Deroche's case, the Employer took him off the clock as well, but conducted an investigation into the incident afterwards.

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Sometime after February 5, 2015, I had a telephone conversation with HR Manager Lorina Williams. Williams told me that she was preparing the documents that were responsive to my January 14, 2015, request for information. Williams told me that she was in the process of providing all the documents that I requested on January 14, 2015. I do not recall anything else that was said during this conversation at this time.

On or about February 11, 2015, Union Secretary Terry Reddick informed me that I had received some documents from HR Manager Lorina Williams. Terry told me that Williams had sent me 31 pages. I have been at work for the last several days and have not had an opportunity to go to the Union hall to get the documents that Williams provided. Therefore, I have not reviewed them to make sure that the Employer responded to all my requests from January 14, 2015.

I am being provided a copy of this Confidential Witness Affidavit for my review. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 6 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.

Date: March 26, 2015 **Signature:** Michael Burris

Michael Burris

Signed and sworn to before me by telephone on 3/26/15

Nariea Nelson

NARIEA K. NELSON
Board Agent
National Labor Relations Board

Initials:

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dresser-Rand Company *and* IUE-CWA, AFL–CIO, Local 313. Cases 03–CA–026543, 03–CA–026595, 03–CA-026711, and 03–CA–026943

June 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On August 6, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 97. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Fifth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale, as explained below. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 97 (2012), which is incorporated here by reference. The judge's recommended Order, as further modified, is set forth in full below.[1]

The Respondent is an international manufacturer of power generation equipment for the oil and gas, chemical, and petrochemical industries. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers-Communications Workers of America, AFL–CIO, Local 313 (IUE-CWA) (the Union) represents its employees. On November 23, 2007, after 5 months of unsuccessful negotiations for a new collective-bargaining agreement, and 4 days after the Union ended a 14-week strike and made an unconditional offer to return to work, the Respondent locked out the strikers and employees who had previously crossed the picket line ("crossovers"). On November 29, the Respondent ended the lockout, declared impasse, and implemented the terms and conditions of its last bargaining proposal. The following day, the Respondent discriminatorily recalled the crossovers to work ahead of the strikers. On December 2, the Respondent began recalling strikers to vacant positions using a formula that it unilaterally devised. Thereafter, the Respondent unlawfully refused to recall striker Kelvin Brown, it suspended striker Marion Cook, it unilaterally eliminated paid lunchbreaks on voluntary weekend overtime shifts, and it refused to give certain full-term strikers their accrued vacation benefits. In agreement with the administrative law judge and for the reasons he stated, we find that all of that conduct, and the lockout that preceded it, violated of the Act.

Our colleague agrees with all of those findings with one significant exception: he would find that the lockout was lawful. In his view, the unlawful conduct fails to shed light on the motive for the lockout because the violations occurred after the lockout ended and did not constitute "generalized statements of antiunion sentiment."[2] In determining whether a charged party's conduct is unlawful, the Board examines the context in which the conduct occurred. Especially in cases where motive is at issue, we consider, when contained in the record, the preceding, contemporaneous, and postconduct words and deeds. See, e.g., *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004), enfg. 338 NLRB 1130 (2003) ("[the employer] argues that events occurring after termination are insignificant to determining a company's motivation at the time of the discharge

We disagree.").[3] Although the ultimate question

[1] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with *Don Chavas LLC* d/b/a *Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice to conform to the modified Order and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[2] Our colleague argues that the General Counsel produced neither a "smoking gun" nor evidence of "general animus" toward the Union or collective bargaining. Neither, however, is necessary to find unlawful motivation. See, e.g., *North Hills Office Services*, 346 NLRB 1099, 1115 (2006) (General Counsel need not present direct evidence of discriminatory intent "such as a smoking gun" it is enough that the General Counsel prove motive "through circumstantial evidence"); *Overnite Transportation*, 335 NLRB 372, 375 (2001) ("The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances.")

[3] We do not dispute that the facts here are different from those in *SCA Tissue*; we cite the case for the general proposition that after-occurring conduct is sometimes relevant in assessing motive. It is

EXHIBIT A

here is the Respondent's motive at the time it instituted the lockout, its subsequent conduct—in this case, just days later—sheds light on that motive. As stated in the now-vacated decision, the lockout and the Respondent's other unlawful conduct were "all of a piece." The lockout and the other violations that followed were the Respondent's angry reaction to a lengthy but lawful strike that ended with the Union's refusal to accede to the Respondent's bargaining proposals and without a new agreement.[4]

When the strike commenced, there were approximately 417 unit employees, of whom 13 resigned their union membership and returned to work during the strike. One of the crossovers later left the Respondent's employ. When it began recalling employees on November 30, the Respondent not only refused to bargain over recall procedures, but overtly discriminated against 97 percent of the unit by treating the crossovers more favorably than the full-term strikers.[5]

In addition, we note, as did the judge, that the Respondent offered a number of reasons for deciding to lock out the strikers and recall the crossovers before the strikers that do not withstand scrutiny. First, the Respondent asserted that it did not think the Union's offer was "unconditional," an argument the judge properly rejected. Second, Elizabeth Powers, whom the judge found made the lockout decision, testified that she feared that the Union would essentially sabotage the Respondent from the inside if it recalled the strikers—something the judge properly concluded was unsupported by the record. Third, the Respondent asserted that it feared that returning strikers would disrupt production by all using their accrued vacation time as soon as they were recalled, another rationalization that is not supported by the record. Overall, and unlike our colleague, we have no trouble finding that the antiunion animus that underlay the Respondent's discriminatory treatment in recalling the strikers and the Respondent's other postlockout unlawful conduct, e.g., denying the strikers their accrued vacation benefits, also motivated the decision to lock out the employees.[6]

Accordingly, we find that, by instituting the lockout and thereafter continuing to punish its employees for striking, the Respondent violated the Act.

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ironic that the dissent condemns consideration of after-occurring conduct in examining the Respondent's motive for the lockout, while relying on after-occurring conduct to exonerate the Respondent (i.e., arrival at a collective-bargaining agreement by the time of the 2009 unfair labor practice hearing).

[4] The cases cited by our colleague are distinguishable. In *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004), enfd. 414 F.3d 158 (1st Cir. 2005), the Board found the employer's other violations of the Act insufficient to show that the motive for a defensive lockout was discriminatory. The other violations included an unlawful discharge 2 months before the lockout and a decertification effort soon after the lockout. The Board emphasized that the employer, an acute-care hospital, demonstrated "legitimate operative concerns" that, unless it locked out its employees and continued operations with temporary replacements, it would be unable to find sufficient personnel to weather a threatened strike over the Christmas and New Year's holidays. In short, the case turned on its specific facts, which bear no resemblance to the facts of our case. Here, the nature and timing of the Respondent's other violations support our conclusion they shed light on the motive for the lockout. In *Marlan Lewis, Inc.*, 270 NLRB 432 (1984), the Board found, with only limited discussion, that the February 25 discriminatory recall of laid-off employees failed to establish animus for the extension of a layoff 7 weeks earlier, on January 7. Here, of course, the Respondent's multiple and varied postlockout violations, some of which occurred within days of the lockout and all of which reflect the Respondent's desire to punish the employees for engaging in a strike, present a significantly stronger case of unlawful motive.

[5] Compare *Central Illinois Public Service Co.*, 326 NLRB 928, 934 (1998), review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000), in which the Board found that the employer lawfully instituted a 7-week lockout to pressure the union to support its bargaining position and to combat the union's "inside game." The employer also unlawfully suspended health insurance and workers' compensation benefits for a brief period during the lockout. Id. The Board found that the unlawful conduct did not render the lockout unlawful, noting that its effect was minimal, because only 21 employees among 1,500 were initially denied benefits and there was no lapse in benefits coverage or failure to pay claims. *Id.* at 934–935, 936. Here, in contrast, the Respondent's favorable treatment of crossovers compared to strikers, its failure to bargain with the Union over a recall procedure, and its other postlockout unfair labor practices had an immediate and massive impact on the unit.

Our colleague's statement that crossovers were legitimately allowed to return to work first because they "had some form of standing request" to bring them back to work as soon as the lockout was over is untenable. The Union represents the entire unit, including the crossovers, and the Respondent was not free to recall them while it was bargaining with the Union over recall procedures.

[6] We disagree with our colleague that the Respondent's 8(a)(5) violations are "irrelevant" because they are not "intent-based." Although it is true that the General Counsel need not establish unlawful motive in a refusal to bargain case, it is both self-evident and well established in our jurisprudence that an employer's violations of Sec. 8(a)(5) may, in appropriate circumstances, be evidence of hostility to its employees' bargaining representative. See *U.S. Marine Corp.*, 293 NLRB 669, 670–671 (1989) (successor's refusal to hire certain employees and to bargain), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992); see generally *Raven Government Services Corp.*, 331 NLRB 651 (2000) (employer's prior 8(a)(5) conduct tainted its withdrawal of recognition). This is such a case. Here, all of the locked out employees had expressed a desire to return to work. The Respondent's unilateral institution of recall procedures that treated crossovers more favorably supports our finding that the Respondent intended to punish the strikers.

Finally, our colleague cites no authority, and we know of none, to support his suggestion that "the fact that Brown's discharge involved only a single person" tends to preclude the 8(a)(3) violation from demonstrating animus for other violations.

ORDER

The National Labor Relations Board orders that the Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to hire, tenure, or terms and conditions of employment by giving preferential treatment to employees who cross the Union's picket lines during a strike.

(b) Discouraging membership in the Union by locking out employees who participate in a strike, while not locking out other bargaining unit employees.

(c) Discharging, refusing to recall, or suspending employees because of their union or protected, concerted activities.

(d) Denying accrued vacation benefits to former strikers.

(e) Unilaterally implementing a process for recalling employees from a strike or lockout.

(f) Unilaterally changing its practice of paid lunchbreaks for weekend overtime shifts.

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

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

(a) Within 14 days from the date of this Order, offer Kelvin Brown full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without loss of seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any employee hired to replace him.

(b) Rescind the May 1, 2008 suspension of Marion Cook.

(c) Make Kelvin Brown and Marion Cook whole for any loss of earnings and other benefits suffered by them as a result of Brown's unlawful discharge and Cook's unlawful suspension, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(d) Within 14 days of the date of this Order, remove from its files any references to the discharge of Kelvin Brown and the suspension of Marion Cook and, within 3 days thereafter, notify each of them, in writing, that this has been done, and that the discipline found unlawful will not be used against them in any way.

(e) Make whole, with daily compound interest, all former strikers for any accrued vacation benefits denied them as a result of their participation in the strike.

(f) Make whole, with daily compound interest, all employees who should have been recalled upon the Union's unconditional offer to return to work for any loss of earnings and other benefits suffered by them as a result of the unlawful lockout.

(g) Make whole, with daily compound interest, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled but for the Respondent's unilateral implementation of a recall procedure.

(h) Offer employees who have not been recalled from the strike full and immediate reinstatement to their former positions, without loss of seniority or other rights and privileges previously enjoyed, should it be determined that they would have been recalled but for the Respondent's unilateral implementation of a recall procedure, and make such employees whole, with daily compound interest, for any loss of earnings or benefits suffered by them as a result of the Respondent's failure to recall them.

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

(j) Upon request, rescind the unilateral change in the practice of paid lunchbreaks during weekend overtime shifts and make whole, with daily compound interest, all affected unit employees for any loss of earnings and other benefits suffered by them as a result of the unilateral change.

(k) Before implementing any changes in terms and conditions of employment, notify and, on request, bargain, with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production and maintenance employees in the Main Plant of the Respondent's plant in Painted Post, New York; excluding office and clerical employees, time study men, guards, professional employees, nurses, doctors, foremen and supervisors as defined in the Act.

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

(m) Within 14 days after service by the Region, post at its facility in Painted Post, New York, copies of the at-

tached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Painted Post, New York facility since November 23, 2007.

(n) 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 at testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

I agree with my colleagues' decision in all respects[1] save one: I would reverse the judge and find that the Respondent's lockout was lawful. I agree with the judge that the Respondent demonstrated a legitimate and substantial business justification for locking out employees—the use of economic pressure to induce the Union to agree to its proposals. I also agree with the judge's finding that the Respondent's decision to continue to use permanent replacements hired during the preceding strike, in and of itself, "is not persuasive evidence that the lockout was motivated by illegal purposes."

Like former Member Hayes in dissenting to the prior vacated Board decision, where I part company with the judge and my colleagues is on their reliance on unfair labor practices committed by the Respondent *after* it made the decision to lock out employees as dispositive evidence that the lockout was motivated by antiunion animus.[2] Because a party's intent may change over time, that intent may be different in relation to discrete events occurring while time passes. I agree with majority to the extent they contend that later evidence of intent is not ipso facto irrelevant to the question of intent at an earlier time. But here, the majority draws no real connection between the lockout and the unfair labor practices that it relies upon. One cannot label them "all of a piece" without showing that there is actually a single "piece."

The subsequent unfair labor practices relied upon by the majority fail to shed any light on the Respondent's contemporaneous motive for instituting the lockout, and thus are "far too slim a reed upon which to premise a conclusion that the lockout was unlawfully motivated." *Sociedad Española de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). It is important to remember that it is the General Counsel's burden to show that the Respondent acted with antiunion motivation *at the time it made the decision to institute the lockout.* In my view, the General Counsel has failed to meet this burden.

The General Counsel has failed to present any evidence to directly support its assertion that the Respondent's decision to lock out employees was unlawfully motivated, nor has he presented circumstantial evidence sufficient to meet his burden of proof for this assertion. In fact, when one examines the most relevant evidence of motivation—the lockout itself—the evidence suggests the contrary. It is undisputed that the Respondent's lockout of employees involved not only those employees who had been on strike but also those "crossover" employees who abandoned the strike, crossed the picket

[7] 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."

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing a process for returning the strikers to work, I note that the Respondent failed to establish that exigent circumstances existed that would have necessitated ending the lockout in an expedited manner.

[2] My colleagues note that the judge found insufficient record support for certain reasons given for the lockout, other than the undisputedly legitimate and substantial reason of bringing economic power to bear in support of the Respondent's bargaining demands. The judge did not infer discriminatory intent from these unsupported reasons, either as to the lockout or the recall of crossovers, and neither would I.

line, and returned to work. It is not clear why the inclusion of these crossovers in the lockout should not weigh against a finding that the Respondent's motivation for the lockout was discriminatorily motivated, and neither the judge nor my colleagues appear to consider this in their analysis.[3]

In this regard, several other major problems exist with finding the lockout unlawful. First, as Member Hayes noted in his prior dissent, there was no evidence of general animus towards the Union nor towards collective bargaining. As the judge mentioned:

- "[t]he Respondent and the Union had enjoyed a longterm relationship with many previous collective-bargaining agreements successfully negotiated";
- "the parties engaged in a period of 'early negotiations' in an effort to bargain a successor agreement long before contract expiration";
- there was "*no* allegation that the Respondent's institution of its last offer"—which happened simultaneously with the end of the lockout—"violated the Act" (emphasis added); and
- "during the pendency of [the] proceeding [before the judge], the Union and the Respondent reached agreement on a new contract, which has been ratified, and is now in effect."[4]

In my view, the Board should not infer a general discriminatory motive from this particular pattern of events. Second, in the absence of sufficient circumstantial evidence to meet the General Counsel's burden of proving discriminatory intent, there is nothing close to a "smoking gun" kind of statement made after the lockout occurred that we could use to otherwise find some intent logically and directly relating back to the Respondent's decision to lock out. For example, the lockout decision-maker, Elizabeth Powers, never made any kind of later comment that she always "had it in" for the Union.

Third, and just as importantly, none of the later events that the majority uses for its analysis has any tangible connection at all with the intent behind the specific decision to lock out. Here, the majority relies on several intent-based unfair labor practices and several non-intent-based ones (i.e., failures to bargain) to make this connection. As Member Hayes pointed out, these particular failure to bargain violations have nothing to do with intent, so they should be irrelevant to our determination of the intent behind the lockout.[5] Indeed, the only such bargaining violation remotely close in time to the decision to lock out is the failure to bargain over the recall. Here, I find it fairly obvious that this violation was caused by the realities of communicating in a high-pressure, high-stakes situation over the telephone, and not from any nefarious purpose.[6]

As to the intent-based violations, most are not even close. Just as Member Hayes pointed out, the one unlawful suspension (Cook) was 5 months after the end of the lockout, and the unlawful vacation deprivation without bargaining was 9 months after. The vacation deprivation issue boiled down to competing, relatively complicated arguments over when the vacation benefit actually accrued under the established terms and conditions of employment, and the judge simply disagreed with Respondent's accrual argument.[7] Cook's suspension—which,

[3] Although the Respondent did later violate the Act by giving preferential treatment to the crossover employees with regard to their recall, this does not change the fact that the Respondent's initial lockout decision—which is at issue here—was a decision that included the crossover employees. See *Marlan Lewis, Inc.*, 270 NLRB 432, 432 (1984).

[4] My colleagues find it ironic that I refer to this later event, based on their mistaken conclusion that I "condemn" consideration of all after-occurring conduct; the reality, of course, is that I am criticizing their reliance on after-occurring conduct that I find to be circumstantially irrelevant. If there is irony here, it is in their failure to accept the notion that later events, if truly relevant to the alleged unlawful conduct, may also be evidence disproving discriminatory intent.

[5] The 8(a)(5) violations at issue here are obviously and markedly different from those in *U.S. Marine Corp.*, 293 NLRB 669 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992), and *Raven Government Services Corp.*, 331 NLRB 651 (2000), cited by the majority. In *U.S. Marine*, the violations were part and parcel of a pervasive discriminatory scheme by the successor to avoid bargaining with the union. *Raven* has nothing at all to do with discriminatory intent. It is supportive of the well-established and unrelated doctrine that 8(a)(5) violations, regardless of intent, may taint a subsequent showing of employee disaffection for a union.

[6] However, as noted above, I agree with finding a violation according to the evidence credited by the judge. The Union made a point of demanding to bargain over recall procedures, even though this would logically slow down the recall, which it did. The Respondent needed to then bargain to agreement or impasse, rather than apparently letting its view of the exigencies of the situation and the telephone communications push it into implementation beforehand. As noted above, the Respondent did not carry its burden of proof to show actual exigencies existed requiring a rapid recall of employees that would excuse it from the usual bargaining obligation under *Katz*.

[7] Notably here, the vacation-deprivation unfair labor practice affected only 23 of 417 strikers, which does not present a convincing picture of generalized animus. See ALJD at fns. 9, 55. Moreover, as the judge found, the Respondent consistently applied its position on vacation accrual, albeit a mistaken one, to the strikers, and thus awarded vacation to those who satisfied the Respondent's requirement of 900 hours worked in 12 months: "During the strike, the Respondent granted vacation pay to strikers who requested it, and who had worked 900 hours in the prior 12 months. According to [then-human-resources project manager] Doane's testimony, some strikers who returned in August and September 2008, worked 900 hours subsequently in 2008 and, thus,

again, occurred more than 5 months after the lockout ended—arose from her disparagement of employees who crossed over during the strike. Cook's comments, and the resulting discipline, had nothing to do with the lockout (crossovers were locked out, too). As to employee Brown's discharge, it is an even worse vehicle for imputing unlawful intent to the lockout, besides the fact that Brown's discharge involved only a single person in a 417-person strike and lockout: (1) the judge found that the decision to discharge Brown occurred more than a week after the decision to lock out; (2) the judge found that Respondent had an "honest belief" that Brown engaged in misconduct; (3) the Town Court of Erwin, New York found Brown guilty of disorderly conduct because of the incident; and (4) the judge found an 8(a)(3) violation only because the evidence did not demonstrate that Brown actually had jumped on Respondent's van, but merely and briefly laid across the front of the van.[8]

This leaves the majority reliant upon their contention that Respondent, during the recall, "directly discriminated against 97 per cent of the unit by treating the crossovers more favorably than the full-term strikers." But, this "direct discrimination" cannot reasonably support a finding of discrimination for the lockout. First and foremost, the Respondent did not treat the crossovers more favorably in *its actual lockout,* as noted above. The Respondent locked the crossovers out, just like it did the strikers. These two groups of employees were treated alike. The complete absence of discrimination concerning the decision and implementation of the lockout—the salient event here—far outweighs any supposed "direct discrimination" evinced during the subsequent recall. Second, the discrimination pertaining to the recall originated simply because the individual crossovers unsurprisingly either (a) reacted quickly to Respondent's open letter inviting *all employees* to make an unconditional return to work or (b) had some form of standing request for Respondent to call them as soon as the lockout was over. See ALJD at fn. 34. As the judge found, "[w]hile the letters, faxes, e-mails, and phone calls were being exchanged between the Union and the Respondent on November 29, the crossover employees were returning to work." Thus, the crossovers necessarily showed up for work before the strikers, whose arrival was delayed because of the ensuing bargaining over recall procedures. In that situation, it is hardly shocking that the Respondent put crossovers to work before the strikers and considered them separate and apart from the strike itself. Those circumstances do not show a generalized animus against the Union, but rather a continuation of the sometimes confused dealings between the parties during this labor dispute.[9] Thus, contrary to the judge and my colleagues, I do not agree that the Respondent's unfair labor practices all of which occurred after the Respondent made the decision to lockout employees and after the lockout ended can retroactively establish that the Respondent acted with unlawful motivation at the time of the lockout.

Board precedent supports my view. In *Marlan Lewis, Inc.*, 270 NLRB 432 (1984), the Board reversed the underlying decision finding that the respondent's January extension of a lawful Christmas layoff violated Act, finding that, in the absence of any contemporaneous evidence of union animus, the General Counsel failed to establish a prima facie case of unlawful discrimination at that time. It is important that, in that case, the Board specifically found that the respondent's subsequent conduct of discriminatorily failing to recall laid-off employees on and after February 25 did not establish union animus for respondent's January extension of the layoff.[10] Accord: *Sociedad Española*, 342 NLRB at 462 ("Even in the context of the other violations, we are persuaded that the motivation behind the lockout in this case was operational, not discriminatory."). Thus, *Marlan Lewis*, which involved two separate actions taken by the respondent in

were either allowed to take vacation in 2008 or were paid for the vacation." (ALJD at fn. 55).

[8] I note that my colleagues distort this contextual analysis of Brown's discharge for alleged strike misconduct into a fiction that I would never deem discrimination against a single employee to be evidence supporting an allegation of other discrimination. I also note that the judge sustained employee Owlett's discharge for strike misconduct, additionally demonstrating that the Respondent's disciplinary actions against strikers focused only on perceived misconduct, belying a finding that the Respondent held any animus against strikers who stayed within the bounds of protected activity.

[9] Here, I agree with my colleagues in finding the 8(a)(3) violation resulting from the recall, but only because of the end result that crossovers were *ultimately* treated more preferentially than the strikers, after the parties' recall discussions had concluded. I find that this result derived from the mutual confusion over the Union's earlier "unconditional" return to work, but only under the conditions in the prior labor agreement, and the Respondent's apparent good faith but legally mistaken belief that the crossovers had *already* returned after the lockout was over but before the strike was over. These factors do not provide a defense, in my view, to the recall violation, but they show there was no generalized animus that could relate back to the lockout.

[10] My colleagues discount the holding in *Marlan Lewis*, asserting that the Respondent's subsequent actions here "present a significantly stronger case of unlawful motive.' Reasonable minds can disagree on the relative "strength" of the subsequent unlawful discrimination found in *Marlan Lewis* versus the subsequent unlawful discrimination found in the instant case. But, regardless, the holding in *Marlan Lewis* is clear: in determining whether animus was present, the Board focused exclusively on evidence of the respondent's motive *at the time it decided to extend the layoff,* not to evidence of the respondent's subsequent discriminatory actions. Moreover, the Board did not suggest in that case that the respondent's subsequent discriminatory actions were not relevant because they did not constitute sufficiently strong evidence of animus.

the context of the same layoff, undermines the majority's argument that animus should be found here because the Respondent's actions here—involving separate actions in the context of the same work dispute—must be considered "all of a piece."[11]

I further note that the cases relied on by the majority for the proposition that the Board has "often similarly found after-occurring conduct and statements to shed light on motive" are distinguishable insofar as they involved postconduct statements evidencing a strong and generalized antiunion sentiment. See *Postal Service*, 350 NLRB 441, 444 fn. 14 (2007) (finding animus based on postdiscipline threats by supervisor that he was not going to allow employee to go back to the union office again and that he would "dock" the employee for "time spent over at the Union Hall"); *K.W. Electric, Inc.*, 342 NLRB 1231, 1231 fn. 5 (2004) (finding animus based on postlayoff statements that respondent "would close the doors before joining the union," that it was "a non-union company and will be a non-union company," and that if its employees "wanted to be in the Union, they need to go to another company to work"); *Aminco*, 324 NLRB 391 (1997) (telling employee that there were not going to be any reviews at that time "because of all the union bullshit going on"), enfd. mem. 162 F.3d 1150 (3d Cir. 1998); *Lynn's Trucking Co.*, 282 NLRB 1094, 1099 (1987) (finding animus where Respondent informed employees that it was not a union company, and, several days after employee's discharge, sent a memo to all drivers that it was not a union company and did "not choose to be" a union company), enfd. mem. 846 F.2d 72 (4th Cir. 1988). There is no evidence that the Respondent made any similar generalized statements of antiunion sentiment here, and plenty of generalized evidence to the contrary that the Respondent attempted to act in good faith in its relationship with the Union, as noted above.

Because there is no evidence of antiunion animus at the time the Respondent made its decision to implement the lockout, my colleagues err in finding that the lockout was discriminatorily motivated. Therefore, I would reverse the judge and find that this allegation should be dismissed.

Dated, Washington, D.C. June 26, 2015

Harry I. Johnson, III, Member

(SEAL) 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 discriminate against you by giving preferential treatment to employees who cross picket lines during a strike.

WE WILL NOT discourage membership in the IUE-CWA, AFL–CIO, Local 313 (the Union), or any other labor organization, by locking out employees who participate in a strike while not locking out other bargaining unit employees.

WE WILL NOT discharge, refuse to recall, or suspend you because of your concerted protected activity or because of your union activity.

WE WILL NOT deny accrued vacation benefits to former strikers.

WE WILL NOT unilaterally implement a recall process for strikes or lockouts without first notifying the Union and affording it an opportunity to bargain about the change and the effects of the change.

WE WILL NOT eliminate paid lunchbreaks on weekend overtime shifts without first notifying the Union and affording it an opportunity to bargain over the change and the effects of the change.

[11] Because the majority here seeks to infer motive based on the Respondent's separate subsequent actions, this case is distinguishable from *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004), upon which my colleagues rely. In that case, the Board found that postdischarge statements *made directly to the discriminatee* could be used to shed light on the respondent's motivation in discharging him. Indeed, the context in that case proves my point. After the discriminatee there had returned to the workplace to pick up his personal effects following his termination, he removed his jacket to reveal a T-shirt, with the words "Work Union" printed on the back in five-inch letters. The supervisor who had originally terminated the discriminatee then demanded that he put his jacket back on, and shortly thereafter made a comment about his "attitude." Accordingly, no inferential leap was required in that case to connect separate actions or different actors.

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 from the date of the Board's Order, offer Kelvin Brown full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority, or any other rights or privileges previously enjoyed.

WE WILL rescind the May 1, 2008 suspension of Marion Cook.

WE WILL make Kelvin Brown and Marion Cook whole, with interest, for any loss of earnings and other benefits they may have suffered as a result of the unlawful discrimination against them.

WE WILL, with 14 days from the date of the Board's Order, remove any references to the discharge of Kelvin Brown and the suspension of Marion Cook from our files and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

WE WILL make whole all former strikers who have been denied vacation benefits that accrued before the 2007 strike.

WE WILL make whole, with daily compound interest, all employees who should have been recalled from the date of the Union's unconditional offer to return to work for any loss of earnings and other benefits suffered by them as a result of the unlawful lockout.

WE WILL make whole, with daily compound interest, for any lost earnings and benefits, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled had we not unilaterally implemented our recall procedure.

WE WILL offer to any employees who have not been recalled from the strike, full and immediate reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without loss of seniority or other rights and privileges they previously enjoyed.

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

WE WILL, upon the Union's request, rescind the unilateral change to our practice concerning paid lunchbreaks during weekend overtime shifts, and WE WILL make whole, with daily compound interest, all employees affected by the unilateral change to such practice.

WE WILL notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit before implementing any changes in wages, hours, or other terms and conditions of employment:

> All production and maintenance employees in the Main Plant of our plant in Painted Post, New York; excluding office and clerical employees, time study men, guards, professional employees, nurses, doctors, foremen and supervisors as defined in the Act.

DRESSER-RAND COMPANY

The Board's decision can be found at www.nlrb.gov/case/03–CA–026543 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.

#166

AMERICAN POSTAL WORKERS UNION, AFL-CIO
New Orleans Louisiana

Grievant/Union	Nature of Allegation
APWU	Attendance

** Second Request

January 20, 2015
Date of Request

To: Lawrence McKee Title: Maintenance Manager

From: Michael Burris Title: Maintenance Steward

Subject: REQUEST FOR INFORMATION & DOCUMENTS RELATIVE TO PROCESSING A GRIEVANCE

We request that the following documents and/or witnesses be made available to us in order to properly identify whether or not a grievance does exist and if so their relevancy to the grievance:

1. ***Clock Rings and Employee All report for Brian Ramson Sr. from September 17 through present.***
2. ***Badge access records or (Entry) rings for Brian Ramson Sr. from September 17 through present.***

**** You are not Step one or Step two designee for individual grievances and no further explanation of relevance is necessary. As a courtesy, I'm requesting this information for the second time.**

NOTE: Article 17, Section 3 requires the Employer to provide for review all documents, files, and other records necessary in processing a grievance. Article 31, Section 3 requires that the Employer make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement. Under 8a(5) of the National Labor Relations Act, it is an Unfair Labor Practice for the Employer to fail to supply relevant information for the purpose of collective bargaining. Grievance processing is an extension of the collective bargaining process.

[X] ADDITIONAL INFO REQUESTED

[ ] REQUEST APPROVED [ ] REQUEST DENIED (GIVE REASON)

1/23/15 (date) (signed)

NOLA P&DC JAN 20 2015 USPS 70113

3:50pm

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Dresser-Rand Company *and* IUE-CWA, AFL–CIO, Local 313. Cases 03–CA–026543, 03–CA–026595, 03–CA–026711, and 03–CA–026943

August 6, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On January 29, 2010, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. Both filed answering briefs and reply briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify the remedy,[2] and to adopt the recommended Order as modified[3] and set forth in full below. We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to hire, tenure, or terms and conditions of employment by giving preferential treatment to employees who cross the Union's picket lines during a strike.

(b) Discouraging membership in the Union by locking out employees who participate in a strike, while not locking out other bargaining unit employees.

(c) Discharging, refusing to recall, or suspending employees because of their union or protected, concerted activities.

---

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

In the absence of exceptions, we adopt the judge's findings that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing to recall employee Allen Owlett or Sec. 8(a)(5) and (1) by changing its practice of scheduling voluntary overtime on weekends.

In adopting the judge's finding that the Respondent's lockout violated Sec. 8(a)(3) and (1), we find it unnecessary to pass on the judge's finding that the Respondent articulated a legitimate business justification for locking out strikers and continuing operations using permanent strike replacements. Even assuming that finding is correct, they agree with the judge, for the reasons he stated, that the General Counsel established that the lockout was discriminatorily motivated. Member Hayes disagrees, as discussed below.

Contrary to our dissenting colleague, we find that the judge properly relied on the Respondent's other unfair labor practices to find that the lockout was discriminatorily motivated. The Respondent's unlawful conduct was all of a piece, a reaction to the employees' protected strike that ended without a resolution of the underlying disagreements. The Respondent's failure to bargain about recall procedures and, in particular, the Respondent's discriminatory preferential recall of the crossovers, both of which followed immediately upon the cessation of the lockout, had a pervasive impact on the unit. The Board has often similarly found after-occurring conduct and statements to shed light on motive. See *Postal Service*, 350 NLRB 441, 444 fn. 14 (2007) (relying on postdiscipline threats as well as prediscipline failure to provide information), citing *K. W. Electric, Inc.*, 342 NLRB 1231 fn. 5 (2004) (postlayoff statements); *Aminco*, 324 NLRB 391 (1997) (postdischarge statement to employees); *Lynn's Trucking Co.*, 282 NLRB 1094, 1099 (1987), enfd. mem. 846 F. 2d 72 (4th Cir. 1988) (same).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by denying accrued vacation benefits to strikers who returned in August and September 2008, Member Hayes finds no merit to the Respondent's argument on exceptions that the vacation benefits had not accrued at the time the strike began.

[2] Consistent with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we shall modify the judge's recommended remedy by requiring that backpay and other monetary awards be paid with interest compounded on a daily basis.

There is a discrepancy in the judge's decision concerning whether employees' lunchbreaks during weekend overtime work were paid or unpaid after strikers returned to work. At one point, the judge found that the Respondent increased the required shift duration from 7 to 8.5 hours before affording a lunchbreak and made the lunchbreak unpaid where before it was paid. Later in his decision, however, the judge stated that the lunchbreak continued to be paid. Because the resolution of this discrepancy would not affect our findings herein, we shall leave this matter, insofar as it is relevant, to the compliance stage of this proceeding.

[3] We shall modify the judge's recommended Order to provide that backpay and other make-whole relief be paid from the date of the Union's unconditional offer to return to work, to provide for the posting of the new notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to amend the Order to conform to the Board's customary remedial language. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

EXHIBIT B

(d) Denying vacation benefits that accrued before a strike to former strikers.

(e) Unilaterally implementing a process for recalling employees from a strike or lockout.

(f) Unilaterally changing its practice with regard to paid lunchbreaks for weekend overtime shifts.

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

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

(a) Within 14 days from the date of this Order, offer Kelvin Brown full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without loss of seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any employee hired to replace him.

(b) Rescind the May 1, 2008 suspension of Marion Cook.

(c) Make Kelvin Brown and Marion Cook whole for any loss of earnings and other benefits suffered by them as a result of their, respective, unlawful discharge and unlawful suspension, plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra.

(d) Within 14 days of the date of this Order, remove from its files any references to the discharge of Kelvin Brown and the suspension of Marion Cook and, within 3 days thereafter, notify each of them, in writing, that this has been done, and that the discipline found unlawful will not be used against them in any way.

(e) Make whole, with interest, all former strikers for any accrued vacation benefits denied them as a result of their participation in the strike.

(f) Make whole, with daily compound interest, all employees who should have been recalled from the date of the Union's unconditional offer to return to work for any loss of earnings and other benefits suffered by them as a result of the unlawful lockout.

(g) Make whole, with daily compound interest, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled but for the Respondent's unilateral implementation of a recall procedure.

(h) Offer employees who have not been recalled from the strike full and immediate reinstatement to their former positions, without loss of seniority or other rights and privileges previously enjoyed, should it be determined that they would have been recalled but for the Respondent's unilateral implementation of a recall procedure, and make such employees whole, with daily compound interest, for any loss of earnings or benefits suffered by them as a result of the Respondent's failure to recall them.

(i) Upon request, rescind the unilateral change in the practice of paid lunchbreaks during weekend overtime shifts and make whole, with daily compound interest, all affected unit employees for any loss of earnings and other benefits suffered by them as a result of the unilateral change.

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

(k) Within 14 days after service by the Region, post at its facility in Painted Post, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Painted Post, New York facility since November 23, 2007.

(l) 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 at

[4] 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."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 6, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

Contrary to my colleagues and the judge, I find that the Respondent's lockout was lawful. I agree with the judge that the Respondent demonstrated a legitimate and substantial business justification for locking out employees, namely, applying economic pressure to the Union to agree to the Respondent's bargaining proposals. I also agree with the judge that the partial nature of the lockout, whereby the Respondent locked out striking employees and employees who had returned to work during the strike, but not permanent replacements, did not demonstrate any discriminatory motive on the Respondent's part. However, I do not find that the other unfair labor practices committed by the Respondent support an inference that the Respondent was unlawfully motivated by antiunion animus in deciding to lockout employees.

The parties here enjoyed an established and stable bargaining relationship, and there are no allegations of bad-faith bargaining on the Respondent's part. See *Central Illinois Public Service Co.*, 326 NLRB 928, 933–934 (1998), request for review denied sub nom. *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000). The Respondent's motive in locking out employees must be measured at the time it made the decision to institute the lockout. All of the unfair labor practices found by the judge occurred *after* the Respondent made the decision to lock out employees and do not shed any light on the Respondent's motive for instituting the lockout. They are "far too slim a reed upon which to premise a conclusion that the lockout was unlawfully motivated." *Sociedad Española de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). In particular, the Respondent's unlawful refusal to recall striker Kevin Brown and its preferential recall of crossovers occurred after the lockout ended. They cannot relate back to supply missing proof of unlawful motivation at the beginning and for the duration of the lockout.[1] Further, some of the unfair labor practices at issue, for example the failure to bargain over strikers' return and the unilateral elimination of paid breaks for weekend overtime, were alleged as 8(a)(5) violations which did not require a showing of unlawful motive.

In sum, I find that the Acting General Counsel has failed to meet his burden of proving the allegation that the Respondent's lockout violated the Act. I would reverse the judge in this one respect and dismiss the allegation.

Dated, Washington, D.C. August 6, 2012

Brian E. Hayes, Member

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 give preferential treatment to employees who cross picket lines during a strike or discriminate against employees who participate in a strike.

WE WILL NOT lock you out because you participated in a strike.

WE WILL NOT terminate, refuse to recall, or suspend you because of your concerted protected activity or because of your union activity.

WE WILL NOT deny accrued vacation leave to former strikers.

[1] This rationale applies with even greater force to the two unfair labor practices that occurred a substantial time after the lockout was over: the suspension of Marion Cook, which occurred 5 months after the lockout ended, and the denial of accrued benefits, which occurred approximately 9 months after the lockout ended.

WE WILL NOT unilaterally implement a recall process for strikes or lockouts without first notifying IUE-CWA, AFL–CIO, Local 313 and affording it an opportunity to bargain about the change and the effects of the change.

WE WILL NOT eliminate paid lunchbreaks on voluntary weekend overtime shifts without first notifying the Union and affording it an opportunity to bargain over the change and the effects of the change.

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

WE WILL, within 14 days from the date of the Board's Order, offer Kelvin Brown full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority, or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings, and other benefits he may have suffered as a result of his discharge.

WE WILL, with 14 days from the date of the Board's Order, remove any references to the discharge of Kelvin Brown from our files and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make Marion Cook whole, with interest, for any loss of earnings and benefits he may have suffered as a result of his suspension.

WE WILL, within 14 days from the date of the Board's Order, remove any references to the May 1, 2008 suspension of Marion Cook from our files, and, WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that the suspension will not be used against him in any way.

WE WILL make whole, with interest, all employees who lost earnings and benefits as a result of our decision to lock them out.

WE WILL offer to any employees who have not been recalled from the strike, full and immediate reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without loss of seniority or other rights and privileges they previously enjoyed.

WE WILL make whole, with interest, for any lost earnings and benefits, all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been so recalled had we not unilaterally implemented our recall procedure.

WE WILL, upon the Union's request, rescind the unilateral change to our practice concerning paid lunchbreaks during weekend overtime shifts, and WE WILL make whole, with interest, all employees affected by the unilateral change to such practice.

WE WILL make whole all former strikers who have been denied vacation benefits which accrued before the 2007 strike.

DRESSER-RAND COMPANY

Ron Scott, Esq. and *Nicole Roberts, Esq.*, for the General Counsel.

Ginger Schroder, Esq. and *Mary Thomas Scott, Esq. (Schroder, Joseph & Associates)*, of Buffalo, New York, *Kevin Doane*, of Painted Post, New York, and *Lance Bowling, Esq.*, of Houston, Texas, for the Respondent.

Thomas Murray, Esq. (Kennedy, Jennik & Murray, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. This case was tried in Elmira, New York, on May 27–29, June 2–5, and July 7–8, 2009, based on charges and amended charges filed by IUE–CWA, AFL–CIO, Local 313 (the Charging Party or the Union) on December 31, 2007 (Case 03–CA–026543), March 28, 2008 (Case 03–CA–026543, amended), May 27, 2008 (Case 03–CA–026543, amended), June 18, 2008 (Case 03–CA–026543, amended), February 22, 2008 (Case 03–CA–026595), April 22, 2008 (Case 03–CA–026595, amended), May 29, 2008 (Case 03–CA–026711), June 5, 2008 (Case 03–CA–026711, amended), December 4, 2008 (Case 03–CA–026943), and January 20, 2009 (Case 03–CA–026943, amended).

The Regional Director's final consolidated, amended complaint issued in these cases on March 24, 2009, alleges that the Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) as follows. Alleged as 8(a)(3) violations: locking out striking employees and employees who had abandoned the strike before November 19, 2007, but not locking out permanent replacement employees; recalling employees who had abandoned the Union's strike before the Union made an unconditional offer to return, but not recalling the balance of employees for an additional 3 days or longer; refusing to recall and discharging employee Kelvin Brown; denying accrued vacation leave to recalled employees who participated in the strike; suspending employee Marion Cook; and refusing to recall and discharging employees Kelvin Brown and Allen Owlett. Alleged as 8(a)(1): discharging employees Jacob Rodriguez[1] and Kelvin Brown, and refusing to recall Brown. Alleged as 8(a)(5): unilaterally changing its practice in regard to voluntary weekend overtime work hours, unilaterally eliminating paid lunches on voluntary weekend overtime shifts, and unilaterally implementing a procedure for recalling striking

[1] During the course of the trial, the parties reached a non-Board settlement as to the allegations involving the discharge of Jacob Rodriguez. The Charging Party requested withdrawal of the allegation and, without opposition of the General Counsel, I approved the withdrawal request. Accordingly, without opposition, I dismissed par. 6 of the complaint.

employees to work. The Respondent denies that it violated the Act in any manner alleged in the complaint. The specifics of the Respondent's various defenses are discussed in detail herein.

At the trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file post-trial briefs. Based on the entire record,[2] including my observation of witness demeanor, and after considering the briefs of the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation, with manufacturing plants located in various States and countries, including a plant located in Painted Post, New York, the only facility involved in this case.[3] At that location, the Respondent has been engaged in the manufacture of reciprocating compressors. During the calendar year 2008, the Respondent, in the course of its business at the Painted Post location, received goods valued in excess of $50,000, directly from points located outside the State of New York.[4] I find, and the Respondent admits,[5] that the Respondent, at all material times, has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find, and the parties stipulated, that IUE–CWA, AFL–CIO, Local 313 has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Background

All of the complaint allegations arise from a strike[6] which resulted from the unsuccessful endeavor of the Union and the Respondent to negotiate a successor collective-bargaining agreement. The Respondent and the Union had enjoyed a long-term relationship at Painted Post, with many previous collective-bargaining agreements successfully negotiated, the most recent of which expired August 3, 2007.[7] In May, about 4 months before the contract expired, the parties engaged in a period of "early negotiations"[8] in an effort to bargain a successor agreement long before contract expiration. This effort was unsuccessful, and "regular" bargaining for a contract began in July, and was equally unavailing.

After the early negotiations failed, the Respondent's then-vice president and chief administrative officer, Elizabeth C. Powers, contacted Joe Giffi, an International representative for the Union, in an effort to arrange a meeting to discuss the upcoming negotiations and, perhaps, smooth the path to a contract. Giffi and Powers then met in early July at Giffi's office in Rochester, New York. Powers testified that during their conversation Giffi told her, "[I]f we get to a place where we disagree, we can either bleed you from the inside or bleed you from the outside." Giffi testified that after telling Powers that he (the Union) had no intention of striking, as Powers was leaving the meeting, he said, "Again, I have absolutely no intention of striking, I'd rather bleed you from the inside." Giffi testified that by his comment, he meant that the Union would work strictly according to the contract, taking all breaks, not volunteering for overtime, and not doing any favors for an employer.

The Union commenced a strike on August 4, 2007.[9] Respondent continued its manufacturing operations at Painted Post, and hired temporary replacement employees, and then began hiring permanent replacement employees about September 17, 2007. During the course of the strike, 13 strikers crossed over the picket line (crossovers) and returned to work. On November 19, the Union, on behalf of the strikers, offered to return to work, the parties now disagreeing as to whether or not the offer was unconditional. On November 23, the Respondent instituted a lockout of the strikers and crossovers, but not the permanent replacements. On November 29, the Respondent ended its lockout, declared an impasse in bargaining, and imposed its last offer. There is no allegation that the Respondent's institution of its last offer violated the Act.

The Respondent

The Respondent manufactures equipment for the oil and gas, power generation, and chemical and petrochemical industries.

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[2] I grant the parties' posthearing joint motion to correct the numerous errors in the transcript. Further, on January 13, 2010, the Respondent sent an e-mail message and attachment to me and the other parties hereto. The message, signed by the Respondent's counsel, stated that she was enclosing "a courtesy copy of a supplemental post hearing submission served today by Dresser Rand for filing with the Executive Secretary of the National Labor Relations Board . . pursuant to *Reliant Energy*, 339 NLRB 66 (2003)." The submission consisted of a Division of Advice memorandum which, the Respondent posits, is relevant to certain issues herein. On January 20, 2010, counsel for the General Counsel sent a letter to me arguing that the Respondent's submission was improper, that an advice memo does not constitute proper Board precedent for consideration by me and that, in any case, the factual circumstances in the advice case are inanalogous to the instant facts. Inasmuch as the Respondent did not submit the advice memorandum for my consideration, but simply served me with a courtesy copy of what it had filed with the Board, I have not utilized the memorandum in reaching the decision herein. Further, as counsel for the General Counsel argues in his response, advice memoranda are not controlling as to the Board's view of the law, but are statements of positions taken by the General Counsel, and the reasons therefor. See, for example, *Kysor Industrial Corp.*, 307 NLRB 598, 602 fn. 4 (1992).

[3] Unless otherwise qualified, references to the "Respondent" herein, generally refer to the Painted Post plant.

[4] The complaint pleads, and the answer admits, that the goods are received "annually."

[5] The Respondent admitted the underlying facts pled in the complaint.

[6] There are no contentions here that the strike was other than economic.

[7] There was a 6-week strike in 1993.

[8] Early and regular negotiations were terms used by various witnesses to describe sets of negotiations that took place at two different periods of time, one long before the contract expired, and the other in the months leading to the contract's expiration.

[9] At the inception of the strike, there were about 417 employees in the bargaining unit.

In addition to Painted Post, the Respondent maintains manufacturing facilities in the U.S., Europe, and the Asia-Pacific region. Four of those facilities, all outside of the continental United States, are capable of producing the same products as Painted Post, as follows: a facility in France is capable of engineering and assembling product, but not manufacturing; a facility in India produces the same products as Painted Post for different areas of the world and also supplies Painted Post with pieces of compressors which Painted Post assembles and ships; a facility in Shanghai produces a number of the same reciprocating compressors as Painted Post; and a recently acquired competitor, "Pier Brotherhood,"[10] whose production is being changed from its previous product to a product of the Respondent. The Respondent's New York State operations consist of the Painted Post facility, a steam turbine plant in Wellsville (about 45 miles from Painted Post), and a "total products" plant in Olean (about 90 miles from Painted Post).

The footprint of the Painted Post plant is approximately 1 million square feet, with the Respondent actually using about 65 percent of the plant. Work within the plant is divided into departments, and within departments into cells. Departments have one or more work cells, which are groupings of processes. Departments include compressor pistons, compressor labs, compressor cylinders, and framing machine assembly. Worker classifications within departments include machine workers or MTO's, assembly workers, and support groupings including shipping/receiving clerks, warehouse employees, and maintenance employees.

Bargaining for a Successor Contract and the Strike

As noted, the parties engaged in "early bargaining" in an effort to settle the contract long before the then-current contract expired, and then engaged in a long, but unavailing series of contract negotiations culminating in a strike on August 4, upon expiration of the collective-bargaining agreement. There are no allegations here that either side committed bargaining unfair labor practices during the negotiations, and the evidence suggests that both sides bargained in good faith, if not successfully.[11]

The strike began on August 4, 2007, and all of the about 417 bargaining unit employees initially participated. During the course of the strike, at various times information came to the Respondent's HR department as to particular strikers who could be interested in returning to work during the strike. In late August or early September 2007, Kevin Doane and Dan Meisner, of the Respondent's HR department,[12] called 15–20 of these individuals and advised them that they had the right to return to work or stay out on strike, that if they chose to return to work they would have to make "an unconditional offer to return to work" under the terms and conditions in effect at the time of their return. Thirteen of the strikers so contacted returned to work during the strike. There is no evidence that membership in the Union was a factor considered by the Respondent in accepting these "crossovers" back to work.[13]

During the strike, the Respondent hired permanent replacements and used temporary replacements. The Respondent contracted with Motorized Assisted Deliveries Incorporated to provide about 150 to 180 temporary replacement workers during the strike. The Respondent introduced unchallenged evidence that the man-hour expense to the Respondent of using temporary replacement workers was significantly higher than the prestrike man-hour expense of unit employees. On September 5, 2007, the Respondent, by letter, informed the Union's attorney that it would begin hiring permanent replacement employees unless the contract was settled forthwith. During the course of the strike, the Respondent hired about 98 permanent replacement workers, with about 60 of them employed at the time of the instant hearing. All of the permanent replacements were hired during the strike and prior to the Respondent's imposition of its lockout.[14]

The Union Offers to Return, Lockout, Impasse, and Return

The Union and the Respondent met for bargaining on November 14, 15, 16, and 19, 2007. At the November 19 meeting, the Union was represented by James Clark, president of the IUE–CWA Industrial Division[15] and Peter Mitchell, general counsel of the IUE, among others. The Respondent was represented by its attorney, Louis DiLorenzo and HR Project Manager Doane, among others. The parties met in separate rooms in the same hotel in Painted Post with Federal Mediator Tom Pollard and State Mediator Barbara Dinehard shuttling between the parties. At some point during the afternoon, the State mediator, Dinehard, handed DiLorenzo a letter from the Union,

[10] As spelled in the transcript.

[11] During the course of the trial, the Respondent's attorneys signaled their intent to introduce evidence of the course of bargaining to demonstrate that the Respondent bargained in good faith. The General Counsel did not, and does not, contend to the contrary. In view of the General Counsel's position, and to avoid burdening the record with voluminous evidence on the course of bargaining, I informed the parties that absent production of evidence that the Respondent had bargained in bad faith, I would presume that the Respondent had, in fact, bargained in good faith. Neither the General Counsel nor the Union objected to or opposed the presumption, and no evidence was introduced that the Respondent had not bargained in good faith.

[12] Doane, project manager for human resources, was hired by the Respondent in August 2007. Meisner, now the Respondent's "Focus Factory Manager for Process Recip Group," was the Painted Post human resources manager during 2007.

[13] Daniel Meisner, currently the Respondent's factory manager, but Painted Post's HR manager during the strike, credibly testified that during the conversations with potential crossovers he told them he didn't want to know their membership status in the Union, that it didn't matter to him, and that they could work for the Respondent regardless of their union membership status.

[14] The permanent replacement employees signed individual employment contracts with the Respondent, which contracts provided that the replacement employee would remain employed by the Respondent unless one of certain conditions appeared, as follows: failure to perform the job satisfactorily; layoff due to lack of work "or other legitimate reason"; settlement with the Union that requires separation; or an order of the NLRB, court, or arbitrator, which requires separation.

[15] The Union is a "constituent local" of the IUE-CWA Industrial Division.

signed by President Clark[16] and addressed to DiLorenzo. The letter stated as follows: "On behalf of IUE–CWA and its Local 313, I hereby tender to you, as chief negotiator for Dresser Rand, an immediate, unconditional offer to return to work for all of those employees on strike at the Painted Post facility."[17] Concomitantly, with the delivery of the letter to DiLorenzo, Local 313's president, Steven Coates, phoned the Union's picket captains and instructed them to "pull all pickets."

After reading the letter, DiLorenzo asked the mediators if the Union was willing to return to work under the terms of the Respondent's current proposal rather than the expired agreement, and the mediators responded that they "believed" that the Union was willing to return under the Respondent's proposed terms.[18] DiLorenzo asked the mediators to ascertain from the Union whether the Union's offer included returning under the proposed terms. Mediator Pollard left the room, returned in 10 minutes, and told DiLorenzo that "it's only under the expired terms." Later that same day, DiLorenzo responded with a letter to Clark, confirming that he had received Clark's letter "containing an unconditional offer, on behalf of Local 313 IUE–CWA to return to work." DiLorenzo's letter continued, "As I am sure you can imagine, after 16 weeks of this work stoppage, the Company will need time to consider the issues associated with responding to such an offer. In light of these considerations, we are not prepared to respond to your offer today. We will however, communicate an answer to you in the near future."

Also on November 19, the Union's bargaining committee sent a letter to the Union's members concerning the offer to return to work. Some excerpts from the bargaining committee's letter are as follows: "Early Monday afternoon, the CWA Executive Board in a strategic move, voted that it was in our membership's best interest to end the strike and make an unconditional offer of return to work under the terms of the 2004 agreement;" "The company's response was to delay giving their official acceptance. Since this is an unconditional offer to return to work and carries legal consequences against the company, our lawyers have instructed us to terminate all picketing at the gates immediately;" "While the strike is ended, the struggle continues;" and "Based on these strategic considerations, the CWA leadership decided that our fight for a fair contract would be more effective if we return to work."

On November 23, Di Lorenzo rejected the Union's offer to return by letter from DiLorenzo to Clark, as follows: "Accordingly, the Company cannot accept the Union's unconditional offer to return to work under the terms of the expired contract and is, therefore, locking out Local 313, effective today at 3:30 p.m., the end of the shift. The Company is doing so in support of its bargaining demands. To end the lockout and return to work, the Union need only agree to the Company's last offer, dated November 6, 2007, together with the tentative agreements submitted to you on November 19, 2007, which you have not yet signed, and Company modifications to its proposals concerning the Grievance and Arbitration Procedure and Prohibited Activity clauses, also submitted on November 19, 2007."

Thereupon, on November 23, the Respondent locked out the strikers and the crossovers, but not the permanent replacement employees. During the lockout, Respondent continued its operations with permanent replacements, temporary replacements, salaried employees, and supervisors.[19] The Union resumed picketing from November 23 to 29, with signs protesting the lockout.

DiLorenzo credibly testified[20] that the Respondent decided to keep the permanent replacement employees working during the lockout for economic reasons and because of the Respondent's fear that once it unilaterally imposed terms and conditions of employment (following declaration of impasse), the Union would either refuse to return to work or, if it had already returned, go back out on strike. The Respondent, thus, reasoned, according to DiLorenzo's testimony, essentially, that if it no longer could draw upon the permanent replacements to perform work (if they were locked out), the balance of economic power would strongly shift to the Union. The Respondent's fear (that the Union might either refuse to return or return and then go back out on strike), according to DiLorenzo, was generated by indications that the Union's offer to return presupposed that the terms and conditions of employment would be those existing (and based on the expired contract), rather than those the Respondent intended to impose, following impasse.

Elizabeth Powers, now the Respondent's vice president of public and community relations, but in 2007 the Respondent's vice president and chief administrative officer, made the Respondent's final decision to institute the lockout, as described above, in response to the Union's offer to return. Powers testified as to the following as the basis of her decision: "We were concerned about safety issues, we were concerned about quality issues, we were concerned about productivity issues. We were spending a tremendous amount of money on the replacement workers, and we thought that the business . . it was just unsustainable as a process, and we had no idea how long that would go on, because we were so far apart in negotiations and had gone, at periods of time, so long between meetings that we just thought that it was untenable as a business."

When asked by the Respondent's counsel "why . . the company kept the permanent replacements during [the] lockout," Powers answered, "There are two reasons. One is, we had a letter of offer to them that had some commitments and said that they would be permanent employees unless a couple of conditions occurred, and a lockout wasn't one of them." "We believed that if we had a business necessity to keep them, that it was appropriate and legal to keep them, and we absolutely believed we had a business necessity. We had tremendous turnover with the temporary replacements." Powers further answered, "We had an absolute necessity to keep them, in terms

[16] The letter was drafted by Mitchell, and approved by Clark.

[17] Clark credibly testified that he, in collaboration with the Union's attorney, made the decision to extend the offer to return to the Respondent. Neither the Union's membership nor executive board voted on the decision.

[18] There is no evidence as to the basis of the mediators' "belief."

[19] Credited testimony of DiLorenzo.

[20] DiLorezo made recommendations as to which groups would be locked out, and was part of the Respondent's decisionmaking group.

of continuing to ship product to our customers and meeting our customer commitments . . ."

DiLorenzo testified that he and the Respondent's managers in reaching their decision to reject the Union's offer to return, and to impose a lockout, considered the following: that the Union in its November 19 letter to its members, said that the decision to return was "strategic" and that the "struggle continues;" that taking the Union workers back could "destroy the impasse;" that the Union could go back on strike; that senior returning strikers could take their accumulated vacation on a call-in basis, thereby disrupting production and continuing the "struggle;" that the Respondent had found hiring permanent and temporary replacements on its own difficult, and concerns over possible sabotage.

Powers also testified that before instituting the lockout, the Respondent sought legal counsel in an effort to determine whether there was a viable method of keeping the crossovers at work during a lockout of the Union, which the Respondent preferred to do. Powers testified that after considering the legal advice, and based on her own understanding of applicable law, that to allow the crossovers to work during the strike would be providing an illegal discriminatory benefit to them because they crossed the picket line and that, therefore, the Respondent decided to lockout the crossovers because it believed to do otherwise would violate the Act.

On the same day the Respondent determined to lock out the Union, Powers, Meisner, and Doane met with the 13 crossover employees. They told the crossovers that the Respondent had decided to lock out the Union, that it didn't see any legal method that would permit the Respondent to keep the crossovers at work during the lockout, and that it didn't know how long the lockout was going to last. Powers testified that, in effect, the Respondent apologized to the crossovers for including them in the lockout. Some of the crossovers asked questions including as to whether they could return to work when the lockout ended with an agreement or impasse, and whether they could call the Respondent "every day" to find out when the lockout ended. The managers replied "yes" to both questions.[21]

During the lockout, the parties continued to bargain, with negotiation sessions on November 26 and 27. On the morning of Thursday, November 29, DiLorenzo, in a letter faxed to the Union's attorney, Murray, declared the parties at impasse and that the lockout was over. DiLorenzo stated in the letter that the Respondent had decided "to exercise our right to implement our last offer, which consists of our proposal dated September 6, 2007, and the tentative agreements reached during bargaining (including the tentative agreements submitted to you on November 19, 2007). The implementation is effective immediately and all proposals will go into effect as soon as practicable or by any specific date specified in the proposal."[22] DiLorenzo's letter concluded as follows: "Now that we are at impasse and will be implementing our offer, the Company will be ending the lockout, effective at noon today, November 29, 2007. Therefore, any or all Union employees are free to return to work. Stated another way, any employee offering to unconditionally return to work under the terms of the implemented offer should notify the Company as soon as possible."

At about 11:30 a.m. on November 29, the Respondent issued a press release announcing the end of the lockout.[23] That same day, the Respondent mailed a letter signed by Meisner, to bargaining unit employees announcing the end of the lockout. The letter stated that the Respondent had implemented the last bargaining offer made to the Union, and that "we have removed the lockout that was put in place on Friday, November 23, 2007." The letter also informed employees that "[w]e have invited the Union to make an unconditional offer to return to work under the terms of the implemented Company Offer, which includes many terms that are different form your last contract." The letter closed as follows: "Employees who wish to return to work under the terms of the Implemented Company Offer should call the Human Resource Department during normal business hours . . . to schedule their return to work."

Murray responded to DiLorenzo's letter to the Union by letter faxed to DiLorenzo, with a fax time stamp of 1:20 p.m., November 29. In his letter, Murray told DiLorenzo that the Union had directed all picketing to cease as of noon that day,[24] and that it had begun contacting members to direct them to report to work at 7 a.m. the next day, regardless of their usual shift.

Later that day, after receiving Murray's faxed letter, DiLorenzo unsuccessfully attempted to reach him by phone, and then sent him a faxed letter in response. In his letter, DiLorenzo told Murray that it was "not clear from your letter whether the Union is unconditionally offering to return to work under the implemented terms of the Company's last offer.[25] If so, we will begin to assess our manpower needs so we can effectuate an early and orderly a [sic] return of the Union employees." DiLorenzo further informed Murray that in view of the long strike and subsequent lockout it would take "some planning and coordination to match our business needs with manpower needs," and that the Respondent's "current employment level demands will not be sufficient to accommodate all Union employees if they all wish to return," in view of the "approximately 100 permanent replacements" and the "work subcontracted."

DiLorenzo's letter further stated: "We will give our required three days of contract notice to our temporary replacement agency once I hear from you as to whether the offer to return is unconditional and on behalf of all Union employees and is to return to work under the terms of the Company's last offer, which has been implemented." Finally, DiLorenzo's letter to Murray suggests that it made no sense to have members return

[21] Credited testimony of Powers, Meisner, and Doane.

[22] As noted, there are no complaint allegations involving the declaration of impasse or imposition of terms and conditions.

[23] Doane testified that "at about 11:30 a.m., we issued a press release, that I believe went both local and national, indicating that we were lifting the lockout."

[24] The Union's picketing had resumed upon the lockout, with the wording on the signs changed to reflect the lockout, rather than a strike.

[25] Murray responded by faxed letter later that day that "the IUE-CWA's offer to return to work was and remains unconditional. If Dresser-Rand reinstates returning strikers under terms that the Union believes are unlawful, the Union will take the appropriate legal action."

to work at 7 a.m. the next day because the Respondent had not yet conducted its manpower assessment, and that certain of the Respondent's managers would speak to Union President Steve Coates that afternoon concerning issues presented in DiLorenzo's letter.

Pursuant to DiLorenzo's letter, Meisner called Union President Coates the afternoon of November 29, and asked Coates whether he would be available to discuss DiLorenzo's letter and to "gain clarity"[26] about the workers return. They agreed to speak by phone at 4:40 p.m. that afternoon. At 4:40 p.m., a conference call took place. Participating for the Union were Coates, Chief Steward Glenn Painter, Local Vice President Mickey Keefer, and Union official Jeff Ingersoll. The Respondent was represented by Meisner, Doane, and Doug Rich. The call lasted about 10 to 15 minutes.

Meisner began the conversation by asking Coates whether the Union was making an unconditional offer to return under the terms the Respondent had implemented. Coates responded that the Union wasn't accepting or returning under the imposed conditions, but was returning unconditionally.[27] According to Doane's contemporaneous notes of the call, when Meisner asked if the Union was returning under terms of the implemented offer, Coates responded that "[i]f that's what's there, that's what's there Can't attach conditions."[28] Meisner repeated the question, and Coates, essentially, repeated the answer.

At some point during the call, Meisner said that the returning workers should wait to be called before returning to work and that the Respondent wanted to undertake a "manpower assessment" first to decide how many people to return. Coates replied that the Respondent "needed to negotiate a process with us but that everybody should be recalled by seniority."[29] Painter reiterated that the Respondent needed to bargain with the Union as to the return to work process.[30] Meisner responded that they needed to let the lawyers work on that, and Coates agreed.[31] Meisner asked that the Union provide the Respondent with a list of all workers available for recall, and Coates agreed.[32]

Later on November 29, in a faxed letter to DiLorenzo time stamped at 7:35 p.m., Murray wrote that "I spoke with Steve Coates after he finished his conference call with Doug Rich, Dan Meisner, and Kevin Doane. To reiterate the Union's position, the IUE–CWA's offer to return to work was and remains unconditional." In the letter, Murray also wrote, "All striking employees wish to return and are available for work immediately." That evening, DiLorenzo sent an e-mail to Murray requesting a list of "those [who] wish to return." Murray replied with an e-mail stating that he believed Coates had already given such a list to Meisner. The next morning, November 30, shortly after 7 a.m., DiLorenzo replied by e-mail, acknowledging that Coates had already presented Meisner with the list. DiLorenzo told Murray that he hoped to communicate detailed information to Murray later that day, and asked if he would be in his office. Murray responded by email a few minutes later

[26] Meisner's credited testimony. Meisner testified he was concerned that all of the strikers would return at 7 a.m. the next morning because there were about 400 workers on strike, and that even prestrike the first shift only had about 250 workers, making the return logistically difficult.

[27] Coates testified as follows as to what he meant by his response to Meisner: "Well, the company imposed a final offer that we didn't agree with. We would have rather just went back to work, you know, unconditionally. We knew that the expired agreement was no good at that time but we didn't agree with the implemented offer; if we did we would have signed it. There would have been a contract."

[28] While the notes are not a verbatim account, Coates, after reviewing the notes, agreed that "[t]hey were pretty close, yes."

[29] This is Coates' explicit and credited testimony. Coates appeared to be striving to honestly recollect events, answered the questions of all counsel without rancor, evasiveness, or hesitation, and displayed a good memory for detail. In sum, from my close observation, he demonstrated the demeanor of a truthful and reliable witness. Doane testified that Coates, in response to Meisner saying that the Respondent needed to do a manpower assessment, said "something to the effect of 'it's not up to the company to decide that,' " and that Painter said, '[I]t needs to be negotiated'." Doane further testified that the Respondent suggested letting the lawyers work on the return process because the Respondent didn't believe the phone call was the place to decide "what the return process was going to be." Doane's testimony, thus, is not necessarily in contradiction of my finding herein that the Union requested bargaining as to the return process during the call. To the extent that the Respondent would argue that the Union's request was strictly limited to bargaining as to whether the Respondent would undertake a "manpower assessment," I find said argument to be without logic or merit. It makes no logical sense, in the context of events or the phone call, that the Union would only have bargaining interest in whether the Respondent undertook a manpower assessment as opposed to the entire return process. Further, I have specifically credited Coates, who testified that he coupled his bargaining request with the demand that the return should be by seniority, an issue touching on the entire return process. Further, on cross-examination, Meisner was asked by the counsel for the General Counsel, "In the conference call did Glen Painter say that the return to work process had to be negotiated?" Meisner answered, "I believe Glen did state that at some point in that call."

[30] As noted, Meisner testified that Painter said during the call that the return to work process had to be negotiated. Coates testified that both he and Painter said, in effect, during the meeting, that the Respondent needed to bargain over the return to work process. While such is not mentioned in Doane's notes of the call, the notes are not, as noted, verbatim, and Coates is a reliable witness. Further, Meisner's testimony supports that of Coates as to this.

[31] During the General Counsel's rebuttal case, Coates testified as follows in respect to letting the lawyers work on the bargaining issue: "It was kind of like we agreed to disagree. Dan Meisner and I agreed to let the lawyers handle it so we can get the negotiation process started. . . They're the spokespersons for each party. So they need to get the process going so that we can. . .sit down and properly negotiate the process of recall."

[32] The various participants testified to what was said in the conversation. While the testimony was not identical, the facts found here reflect a consensus of the testimony. The facts found as to Meisner's comment as to letting the lawyers work (on the terms of the return process) are based on the testimony of Doane, Meisner, and Coates. All of the witnesses testifying to this conversation, in my close observation, testified forthrightly, and displayed the demeanor of witnesses striving to truthfully answer the questions put to them on direct and cross-examination. While there was some divergence in the testimony, this is not unexpected as to a conversation that took place some time ago. For the reasons set forth supra, Coates is a reliable witness, and I have chosen to credit him generally, where there are significant discrepancies in the testimony.

that he should be back in his office after 2 p.m., but that he could "pick up e-mails on my BlackBerry."

While the letters, faxes, e-mails, and phone calls were being exchanged between the Union and the Respondent on November 29, the crossover employees were returning to work. The Respondent's records show that on November 29, two crossover employees returned to work between 1 and 2 p.m., six between 2 and 3 p.m., two between 3 and 5 p.m., two between 6 and 8 p.m., and one the next day between 6 and 7 a.m.[33] The crossovers generally learned of the end of the lockout from the Respondent's managers.[34]

Subsequent to the November 29 and early morning November 30 e-mail exchanges between Murray and DiLorenzo, on November 30, at about 5:40 p.m., DiLorenzo sent by fax (and apparently, as noted in the letter, by e-mail) the letter with greater detail, as mentioned in his e-mail to Murray earlier that day. In this letter, DiLorenzo stated: that "the Company has notified all temporary employees that their services are no longer needed"; that "the Company is developing a preferential hiring list to be used to fill vacancies"; that "the list will rank employees through a mixture of performance and seniority"; that "the Company is also developing a process to be used to identify vacancies and select employees form the list to fill the identified vacancies"; that "the Company plans to contact approximately 150 employees Sunday and Monday, so that they may report to work on Tuesday and Wednesday"; that "the Company also believes it may be able to return another 50 or so employees on Thursday"; and that "as permanent vacancies occur thereafter, the Company will utilize the process it has developed and the list that has been compiled."

DiLorenzo's letter continued; "I will forward you the list and a description of the process the Company intends to use to develop the list, identify vacancies and select employees from the list. By 5:00 p.m. tomorrow, Saturday, we will forward the list and a description of the process. Please let me know the best way to get these documents to you." Finally, DiLorenzo concluded by inviting Murray to contact him if he had any questions. In response, in an e-mail with a time/date stamp of 6:25 p.m. on November 30, Murray told DiLorenzo, "Please send any documents via email and by fax. I will be away for the weekend, but will check my email." At 6:27 p.m., DiLorenzo responded by e-mail to Murray, telling Murray, "Tom, we are working on the process document and the preferential hiring list. Will plan on emailing them to you and making them available for delivery or fax to the Union Hall tomorrow morning. We should be done by 11:00 a.m. and will email then and call the Union Hall as well."

The Respondent faxed and e-mailed the process and preferential hiring list documents referred to in DiLorenzo's 6:27 p.m. e-mail, to the Union and to Murray at 11:11 a.m. on Sunday, December 2. In the cover letter to Murray, DiLorenzo said that the Respondent was reviewing the draft preferential list for "accuracy and eligibility for reinstatement," and added, "The Company plans to contact employees being returned under this first phase today and tomorrow to advise them of the date, time and some other details concerning their return to work." The letter concludes, "Let me know if you have any questions."[35]

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[33] Reflected in Jt. Exh. 4; the clock-in swipe times for the crossovers. Dates of the return to work of all returnees, including crossovers, are reflected in GC Exh. 21, a document provided by the Respondent to the Union.

[34] Doane testified as follows as to interactions with crossovers on November 29: that he returned Darlene Brown's voice mail message about 12:30 p.m., that she told him she had heard the lockout had ended (from her mother-in-law, who heard it on the radio), and asked if her husband, Terry, a crossover, could come back to work, and that he told her he could, even that day; that around 11:30 a.m. after the press release was issued, he called crossover Laurie Flagg, who had previously asked him to call her "the minute" the lockout was ended, and told her the lockout had been lifted and that she was free to return "provided she was willing to make . . an individual unconditional offer to return to work"; that during the afternoon he received a call from crossover Tina Lewis, that Lewis asked if the lockout had ended and she could return to work, and that he told her that the lockout was over and she was free to return to work under the implemented terms; that during the afternoon he called crossover Dave Burnus and told him that the lockout had been lifted and he was free to return under the implemented terms; that during the afternoon he received a voice mail message from crossover Dale Braszie advising that Braszie was on his way into work; that during the afternoon Supervisor Sally Beech asked him whether her boyfriend, crossover Dave Lyons, was free to return to work, and told her that he could return under the implemented terms; and that during the afternoon he made calls to crossovers Terry Moore, Lucinda Stratten, and Chris Sanford, all of whom had previously asked to be informed when they could return to work, and told them that they were free to return to work under the implemented terms. The spelling of certain names in this footnote is noted in the transcript as phonetic.

[35] The document included the following under the caption "Preferential Hiring List". "The Company shall prepare a preferential hiring list (the 'hiring list') of all employees who have unconditionally offered to return to work and are eligible for reinstatement. The hiring list shall be compiled using a combination of performance and plant wide seniority. Employees shall be first ranked from highest to lowest in accordance with the performance rating received in 2007 pursuant to the Company's performance rating system (minimum ranking is 0 and maximum is 4). Any employee who did not receive a rating because of workers' compensation or disability at the time the assessments were completed will receive a rating if and when they become eligible to return to work. Anyone employed an insufficient period of time to receive a rating under the Company's performance rating system in 2007 will be given their probationary period performance rating. Employees having the same numerical rating will then be further ranked from most senior, based on plantwide seniority, to least senior, based on plantwide seniority. For example, the employee receiving a 4 with the most plantwide seniority will be the first name on the list, then all other employees who received a 4 rating will be ranked, based on their plantwide seniority, after him or her. These names will be followed by the most senior employee, plantwide, receiving a 3 rating, and so on until the hiring list is complete. As used herein, the term 'seniority' refers to plant seniority. This list shall expire on November 29, 2008, which is one year from the date of the Union's unconditional offer to return to work. Any employees not returned to work by that date, will lose their right to return to work.'

The details of the return process concluded with this: "Note—This process is a guideline the Company intends to utilize for the purpose of returning the first group of qualified employees to work. It is believed that this process should render a sufficient number of qualified employees to be available to fill the current vacancies created during the first phase of the Company's return to work efforts. This first phase should be completed over the next few weeks. The Company is working on

The preferential hiring list contained the names of 398 strikers, ranked by a combination of performance rating and seniority. It did not include the names of the 13 crossovers. It also did not include the names of four employees terminated by the Respondent for asserted misconduct during the strike: Kelvin Brown, Matt Goodwin, Steve Kimble, and Al Owlett. As to the crossovers, on January 4, 2008, in answer to the Union's information request, Meisner wrote to Coates; "Employees who were locked out after they crossed the picket line were not recalled to work. They chose to return to work, and did return to work, after the lockout was lifted but prior to the release of the temporary replacement workers."

Coates and Murray first saw these return process and preferential hiring documents on December 3.[36] At least by 8:30 a.m. on December 3, the Respondent had begun to contact strikers to return to work,[37] and the first wave of strikers returned to work on December 4, and continued returning through April 2008.

Also on December 4, in a letter to DiLorenzo arguing that the Respondent's declaration of impasse was unlawful, Murray accused the Respondent of recalling employees in "a discriminatory manner." Murray's letter did not request nor mention anything about bargaining over the recall process, and during the return process Murray never reduced to writing a bargaining request as to the return process.[38] Murray testified that the reason he didn't reduce the bargaining request to writing was "because we had already started. We had already been bargaining. I didn't feel a need to put it in writing."[39] DiLorenzo replied to Murray's letter on December 6, asking Murray to explain his position that the employees were being recalled in a discriminatory manner.

In December 2007 and January 2008, the Respondent initiated a series of meetings with the Union, "in an effort to rebuild the relationship."[40] At the January 11, 2008 meeting at the Painted Post plant, attended by Meisner, Rich, and Mike McCaig for the Respondent, and Coates and Painter for the Union, Meisner asked Coates, as to the return to work process, whether Coates had "anything to add outside of what was already in the unfair labor practice [charge]." Coates responded, "That's pretty much what the issue is, that we raised in the unfair labor practice charge."[41] Subsequent to the trial herein, the parties notified me that the Union and the Respondent reached agreement on a new contract, which has been ratified, and is now in effect.

Alleged Unilateral Changes (paid lunchbreak for weekend overtime work)

Neither the expired contract, nor the Respondent's implemented terms, specifically deals with the subject of paid lunchbreaks during weekend overtime work.[42] The expired contract provided a 20-minute lunch period for "employees called upon to perform overtime work in excess of 2 hours in any given day." The Respondent's imposed terms provided, "employees that work more than 4 hours overtime in any given day will be granted a twenty-minute paid lunch."

The General Counsel's witnesses testified as to what the prior practice was under the expired contract, and as to the practice utilized by the Respondent after the strikers returned to work. Based on the uncontroverted testimony, I find that the Respondent's practice for many years[43] prior to the strike, was to provide a 20-minute paid lunchbreak to employees who worked weekend shifts of 7 hours or greater.[44] Subsequent to the end of the strike, the Respondent provided no lunchbreaks for weekend work unless the employee was scheduled for 8.5 hours of work, in which case the employee was provided a

the details that will be associated with returning qualified employees to work after the initial phase, as the Company continues to identify vacancies to be filled.'

[36] When asked when he "got his first look" at the documents, Coates credibly testified, "I would say it was probably the next day." In its brief, the Respondent argues that Coates received the documents "on or about December 2," citing Coates' testimony at p. 259 of the transcript. In the cited testimony, Coates is asked whether he recalled when he received the transmission. He answered, "When? Not exactly, no.' He was then asked by the Respondent's counsel, "Was it close in time that it's dated, December 2, 2007?" Coates answered, "Yes.' That answer is consistent with his earlier answer that he "got his first look" at the documents on December 3, and does not establish that he received the documents on December 2.

Murray credibly testified that he received the e-mail with the documents attached on his BlackBerry on December 2, but that he only viewed the documents the next day, because his BlackBerry was, apparently, incapable of opening "Excel" or "Word" documents.

[37] Meisner in an e-mail to Coates, sent at 8:32 a.m. on December 3, stated as follows: "After these actions the November 30th email was sent and accurately stated that the Company would contact employees, which we have begun to do.'

[38] Credited testimony of Murray. Coates testified that he was not aware of any member of the Union's bargaining team demanding bargaining as to the return process subsequent to December 2, 2007.

[39] Since no evidence was introduced that the bargaining referred to by Murray involved bargaining as to the return to work process, I cannot conclude that his testimony pertained to such bargaining.

[40] Credited testimony of Doane.

[41] Credited testimony of Doane.

[42] The expired contract contains a section dealing with breaks during scheduled overtime, but the context of the section and the fact that all weekend work constituted overtime, clearly indicate that it applies to overtime worked during the course of the regular workweek, not weekend work. Sec. 24 of the expired contract provided a paid lunchbreak to employees who worked more than 2 hours of overtime in any day and employees "working on a continuous three shift basis where the end of one shift does not overlap the beginning of another shift." Sec. 6 of the Respondent's implemented terms provides that employees "working on a continuous three shift basis where the end of one shift does not overlap the beginning of another shift will be granted a 20 minute paid lunch," and "employees that work more than four hours of overtime in any given day will be granted a 20 minute lunch break.' Both the expired contract and the implemented terms define the normal workweek as 40 hours, 8 hours a day, Monday through Friday. Further, the practices of the parties during the term of the expired contract, as demonstrated by evidence introduced by the General Counsel and discussed above, indicate that neither side treated the contract as dealing with the subject of lunchbreaks for weekend overtime work.

[43] Credited and uncontroverted testimony of Glen Painter.

[44] Wayne Phenes, a current bargaining unit member, with over 30 years of employment at Painted Post, was asked on direct examination by counsel for the General Counsel whether prior to the strike the Respondent provided a paid lunch period for employees working 7-hour weekend shifts. He testified that the Respondent did, in fact, provide such a paid lunchbreak, and had since the late 1980s.

single 20-minute unpaid lunchbreak. Employees who worked 5-hour or 7-hour weekend shifts, received no lunch period.[45] After the change went into effect, Painter discussed the change with Doane on several occasions, but there was no bargaining before the change went into effect.[46]

Alleged Unilateral Changes (voluntary weekend overtime shifts)

Neither the expired contract, nor the Respondent's implemented terms specify the hours of voluntary weekend overtime shifts.[47] Prior to the strike,[48] up until the late 1980s or early 1990s, the weekend voluntary overtime shifts consisted of 8 hours. Then, until the strike, the most commonly posted weekend overtime shifts consisted of 7-hour shifts from 5 a.m. to noon or noon to 7 p.m., or 5 hours from 5 to 10 a.m.[49] But the Respondent had the ability to post other shifts, and frequently did in some departments.[50] Painter testified that since the strikers returned to work, the 7-hour shifts from 5 a.m. to noon, and noon to 7 p.m. are still available, but that longer shifts have also been available, including 5 a.m. to 1 or 1:30 p.m.[51]

Phenes testified that after the strikers returned, the weekend overtime shift remained 5 a.m. to noon, but that during one period in 2008 there were four different scheduled weekend overtime shifts, including 5 a.m. to 1:30 p.m., 5 a.m. to 1:30 p.m., and 7 a.m. to 3:30 p.m. Phenes couldn't remember the hours of the remaining shift.[52]

The concept of "committed" overtime originated in the parties' expired collective-bargaining agreement, which kept the basic idea of voluntary overtime, but mandated that once an employee volunteered or "committed" to an overtime shift, he/she was held to that commitment, under penalty of an attendance violation. But during the course of the expired contract, the Respondent experienced problems with supervisors allowing employees to leave early during their committed shift of weekend overtime or scheduling more overtime than actually needed, and that some supervisors had been allowing employees working committed overtime to choose to leave after 5 hours, rather than work the entire shift.[53]

Mike McCaig, currently the Respondent's director of supply chain management, but from 2004 to November 2008 the Painted Post plant manager, testified that in order to counter this problem during the course of the expired contract, he instructed supervisors that overtime should only be scheduled for the number of hours required, that if 5 or 7 hours were needed, then only that amount should be scheduled, and that once an employee committed to a particular weekend overtime shift, the committed employee was to work the entire committed shift, absent unusual circumstances. McCaig credibly, and without contravention, testified that supervisors who violated those rules were disciplined.

Denial of Vacation Benefit to Returning Strikers

After the lockout ended and strikers began to return to work on December 4, 2007, the Respondent held a series of meetings to explain the implemented terms to employees. One of these meetings was held on August 26, 2008, and was attended by Meisner, Doane, and Julie Williams[54] for the Respondent, and about 10 unit employees, including Painter. During a discussion of the implemented terms at the meeting, one of the Respondent's representatives mentioned that returning employees would not be eligible for vacation time.[55] Painter replied that

[45] From the text of an e-mail authored by Doane and sent to various Painted Post managers on August 11, 2008. Doane testified that this weekend lunchbreak policy had not changed since the Respondent unilaterally implemented terms and conditions.

[46] Credited testimony of Painter.

[47] The expired contract, and the implemented terms, provide for a system of voluntary, committed overtime for weekend shifts. An employee is free to decline to work overtime, but once the employee commits to work a weekend overtime session, he/she is required to work that shift. The Respondent treats a failure to appear for the shift as an attendance issue.

[48] Factual findings as to prestrike weekend overtime shifts based on the credited and uncontroverted testimony of Painter and Phenes.

[49] Credited testimony of Painter. Phenes testified that the total shift was 5 a.m. to noon, but the minimum shift the Respondent allowed an employee to work was 5 to 10 a.m. Painter testified that there was a second 7-hour weekend overtime shift from noon to 7 p.m.

[50] Credited testimony of Painter. Painter was questioned as follows by counsel for the General Counsel as to weekend overtime shift scheduling before the strike:

> Q. Did the company have the ability to post other shifts besides those two, based on production needs?
>
> A. Yes, they did.
>
> Q. How often was that the case, if you're able to say?
>
> A. In certain areas, I believe it was frequent. But in other areas, it was very rare.

[51] Painter explicitly testified that the 5 a.m. to noon and noon to 7 p.m. shifts "are still available.' He then testified that longer shifts have "been posted as well,' including 5 a.m. to 1 or 1:30 p.m. After so testifying, Painter was then asked the following leading question by counsel for the General Counsel, without objection: "And is it your testimony that 5:00 to 12:00 changed to 5:00 to 1:30," Painter answered, "Yes, it is." Painter's answer to the leading question is in direct conflict to his testimony a moment before and, without any further explanation for the apparently conflicting answers to the questions, I credit Painter's initial testimony that the 5 a.m. to noon shift was still available, rather than his answer to the leading question a moment later to the effect that 5 a.m. to 1:30 p.m. shift replaced the 5 a.m. to noon shift.

[52] Indeed, Phenes couldn't remember exactly when these four different shifts were in effect. He was asked by counsel for the General Counsel whether the hours of the weekend overtime shift changed during 2008. Phenes answered, "There was one period, I'm not sure exactly, but it was probably in the first quarter [of 2008], there was four different scheduled weekend overtime."

[53] Credited testimony of McCaig.

[54] A human resources generalist for the Respondent.

[55] Approximately, 23 strikers returned to work in August and September 2008, from the Respondent's preferential recall list. All of these employees had worked zero hours in the immediate past 12 months, because they had been on strike, locked out, or waiting on the recall list since August 4, 2007. Thus, none of these 23 qualified for vacation upon return, under the Respondent's policy announced to the Union. During the strike, the Respondent granted vacation pay to strikers who requested it, and who had worked 900 hours in the prior 12 months. According to Doane's testimony, some strikers who returned in August and September 2008, worked 900 hours subsequently in 2008 and, thus, were either allowed to take vacation in 2008 or were paid for the vacation.

the Union disputed this and would be filing a grievance. After the meeting, Doane and Meisner spoke with Painter, and one of them told Painter that the returning employees were not on the active payroll for over a 1-year period and, thus, would not be eligible for vacation time for that period.[56]

The Union requested a meeting over the dispute, and a dispute as to holiday pay, and such a meeting was held on September 2, 2008, with Painter, Coates, and Union Vice President Mickey Keefer attending for the Union, and Doane and Meisner present for the Respondent. Initially, the parties resolved a dispute as to holiday pay, with the Respondent agreeing to the Union's position that the returning workers should receive pay for the Labor Day holiday. As to vacation pay for returning strikers, the Respondent's representatives referred to section 10D of its imposed terms, and asserted that because the returning strikers had not been on the payroll for the preceding 12 months, they would have to build up to 900 hours of worktime before becoming eligible for more vacation. The Union maintained that employees who worked 900 hours during the calendar year 2007, should be eligible to take, or be paid for, vacation during the following calendar year, and thus, would be eligible for vacation pay upon their return in 2008.[57]

Section 10D of the Respondent's imposed terms and conditions provides as follows: "An employee, to qualify for vacation must, in addition to the requirements as to length of continuous service with the Company, be on the active payroll and have worked at least 900 hours in the twelve months immediately preceding his vacation." This same language appeared in the 1985–1988 contract[58] between the predecessors of the Union and the Respondent, as paragraph 14D. The contract also contained a paragraph 14N, which stated as follows: "Anything herein contained to the contrary notwithstanding, an employee who has worked 900 or more hours in any calendar year, commencing with the calendar year 1985, shall at the end of such year be entitled, irrespective of any subsequent occurrence, to a minimum vacation with pay in the following calendar year as follows . . ."

In an October 1987 decision, an arbitrator reconciled sections 14D and 14N as follows: "I find that employees presently on layoff status and those employees who are laid-off in the future shall have their vacation eligibility frozen at the time of layoff. At the time of future recall their eligibility for vacation shall be calculated based upon the prior 12 months previous to layoff without consideration in the calculation for the time while on this current layoff. Section 14D will be applied without consideration for the time while the employee was on the layoff from which he has most recently been recalled." The arbitrator continued, "Thus, an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of layoff, will upon recall in a subsequent calendar year be immediately eligible to take vacation consistent with the proviso in Section 14J that an employee upon recall may not receive vacation for 30 days unless agreed upon by his supervisor." Section 14D continued unchanged in the expired contract, and section 14N continued substantially unchanged in pertinent part. Section 14N does not appear in the Respondent's imposed terms and conditions.

Kevin Doane, the Respondent's human resources project manager in 2007 and 2008, testified that the Respondent's vacation policy remained the same prior to and after the strike, and that the policy provided that "employees become eligible to take that vacation after they've worked—only if they have 900 hours worked in the previous 12 months," and that "it's a rolling 12 month period, not a calendar 12 month period." Doane further testified that in August and September 2008, a group of about 23 strikers returned to work, that they had not been to work since at least August 4, 2007, that they, thus, had worked zero hours in the past 12 months, and, hence, were not granted vacation by the Respondent. These employees were advised by the Respondent that they would not be eligible to take any vacation until they worked the 900 hours "as required by the implemented offer."[59] Both Coates and Painter testified that under the expired contract, and before, an employee qualified for vacation in 1 year, by working at least 900 hours in the calendar year prior.

Discharge of Allan Owlett

Allan Owlett was hired by the Respondent on June 19, 2006, and completed an internship to work as a maintenance mechanic. Owlett was a member of the bargaining unit represented by the Union, participated in the strike, and engaged in picketing. After the strike ended, Owlett was not included in the Respondent's list of strikers eligible for return to work. The Respondent, in a letter from Meisner dated January 7, 2008, informed Owlett as follows: "We have performed an investigation into acts of misconduct that occurred during the 2007 labor dispute between Dresser-Rand and Local 313. This letter is to notify you that as a result of that investigation, we have concluded that you engaged in acts of misconduct that make you ineligible for reinstatement to your former position or any other position at Dresser-Rand. For that reason, your name is not included on the preferential hiring list."

The misconduct asserted in the Respondent's letter to Owlett occurred on September 13, 2007, in and near the parking lot of a McDonald's restaurant located close to the Respondent's Painted Post facility. Two crossover employees, Tena Lewis and Lori Flagg, alleged that Owlett threw a soft drink at them, striking Lewis with the liquid, and then threatened them. Owlett admitting that the soft drink from the cup he was holding struck Lewis, denies that the incident occurred at his behest, and blamed the incident on another striker's intentional pushing or striking of Owlett which, assertedly, caused the soft drink to be hurled towards Lewis. The cup contained a large size soft drink, was slightly more than half full, and was covered by a lid, with a straw through the lid.[60] After the incident, some liquid remained in the cup.[61]

[56] Credited and uncontroverted testimony of Painter.

[57] Pay in lieu of vacation was an option for employees, as Doane testified that some employees received vacation pay in lieu of vacation during 2008.

[58] Extended by the parties to 1990.

[59] Credited testimony of Doane.

[60] Credited and uncontroverted testimony of Owlett.

[61] Credited and uncontroverted testimony of Owlett.

The liquid struck Lewis on her right side, wetting her shirt and arm, including the chest, stomach, and shoulder area.[62] A photograph, in evidence, taken about 45 minutes after the incident, clearly still shows a substantial amount of apparently wet stain on Lewis' shirt, from the upper chest area to the bottom edge of the waistband, principally on the right side, and on the right arm from the upper arm area to just above the wrist band.[63] My additional factual findings as to this incident including credibility resolutions, where necessary, follow.[64]

On September 13, Owlett, along with fellow strikers Dave Stryker and Ken May, left the picket line to walk the short distance to a McDonald's restaurant for lunch, the parking lot of which bordered on the property of the Respondent's plant. The restaurant's parking lot was separated from the plant property by a fence, which had an opening permitting access between the plant property and the restaurant parking lot. They were joined at the restaurant by striking employee Dan Knapp, and Knapp's friend, Nicole Wilson, who was not an employee of the Respondent.

The five of them sat at the restaurant's outdoor picnic table located to one side of the rear of the restaurant, facing the opening in the fence, and abutting the parking lot, with a small sidewalk between the table and the parking lot. The likely route from the plant property to the restaurant would take one through the opening in the fence into the restaurant parking lot, and eventually by the picnic table, and then to either the restaurant's side or front door. Owlett sat on the picnic table bench nearest the parking lot,[65] facing out towards the parking lot, and with his back towards the occupants of the picnic table's other bench, and was holding a large size soft drink, about half full. Stryker sat directly across the table from Owlett.[66] While the five were sitting at the picnic table, Owlett noticed Flagg and Lewis walking through the Respondent's parking lot and approaching the opening in the fence leading to the restaurant.[67]

As the two women approached the picnic table, the conversation at the table turned increasingly negative towards crossovers, and somebody at the table said that Flagg and Lewis had "a lot of nerve crossing the picket line and then coming over here to rub it in our face at lunchtime."[68] Some of the four men seated at the table yelled "scabs" and "traitors" at the women, and one called out, "Here comes two f—ing scabs."[69] Owlett chimed in and said, "I'd like to throw my Coke right in their face."[70] Owlett was holding a large cup with a Coca Cola[71] half-filled with soft drink at the time.

As Flagg and Lewis walked onto the sidewalk by the table,[72] the contents of Owlett's soft drink cup was ejected[73] in the direction of the women, and struck Lewis. Each witness testified to a slightly different version of the event. Flagg testified that as the women passed the picnic table, out of "the corner of her eye" she saw movement, she turned towards the picnic table and she saw Owlett lunging towards the women, and May appearing to push Owlett, with his hand on Owlett's back. Flagg further testified that to her observation, Owlett and May were engaged in a "charade" to make it appear that the incident was some sort of accident, and that if May had actually pushed Owlett, the soda would not have hit Lewis, because May's legs were under the picnic table.

According to Flagg's testimony, Owlett "straightened his whole arm to throw the soda," that he threw the soda with an "underhand" motion, that Flagg observed the brown cola liquid from the cup heading towards the two women, that the liquid landed on Lewis' shoulders, face, and head, that Flagg jumped out of the way but noticed a small spot of the liquid on the jeans she was wearing, and that Owlett said, "[O]ops, sorry," as

[62] All the witnesses agreed that the liquid struck this area. In addition, Flagg testified that the liquid hit Lewis on the face and head (and down her shoulders). In recounting the event, Lewis did not testify that the liquid hit her face or her head, and didn't remember whether her hair was wet as a result of the incident. As there is no other testimony in support of Flagg's as to the liquid striking Lewis in the face or head, I do not credit this limited portion of her testimony.

[63] There also appear to be stains immediately below the shirt waistband, just below the right pocket of Lewis' pants.

[64] As to some of the basic facts, there are no significant disputes between the witnesses and no credibility resolutions necessary.

[65] Or the sidewalk alongside the picnic table, bordering the parking lot surface.

[66] There are some differences in the testimony of the witnesses as to where each was sitting, but all generally agree as to where Owlett and Stryker were sitting.

[67] Credited testimony of Owlett, who also testified that he knew the two women by name.

[68] Credited testimony of Owlett.

[69] Credited testimony of Lewis and Flagg. Lewis testified as to the "two f—ing scabs" comment. Flagg testified that the men at the table were shouting "traitor and scab and stuff like that. . . . May testified that he didn't recall any of the group sitting at the table say "scabs," or "f—ing scabs," Knapp testified, "Not at all," when asked whether he heard any at the table say "scab," or "f—ing scab." Stryker testified that he didn't "recall," when asked whether any of those seated at the table said anything about Lewis and Flagg as they approached the picnic table, or whether the word "scab" was used, or whether anybody seated at the table said that he felt like throwing a drink in their faces. Here, Owlett's testimony is mostly consistent with the testimony of Lewis and Flagg. In my judgment, based upon close observation, Flagg and Lewis displayed the demeanor of witnesses attempting to truthfully testify as to an incident that was somewhat harrowing to them. It strains credulity that Stryker, May, and Knapp, who testified in some detail as to other parts of the incident, including that Owlett apologized after the drink hit Lewis, would have no memory of these epithets uttered at the table, which Owlett, Lewis, and Flagg, testified to.

[70] Credited testimony of Owlett. Stryker, May, and Knapp testified that they either didn't hear or couldn't recall this statement. In view of Owlett's admission that he made the comment, the denials by the other three men at the table that the comment was made or claims that they didn't hear the comment, are not credible, particularly as they were able to testify to certain other parts of the incident in some apparent detail.

[71] Or some other cola drink.

[72] The various witnesses' descriptions of where and at what moment Flagg and Lewis stepped onto the sidewalk by the picnic table slightly differ, as does whether the soft drink hit Lewis just before or after they stepped onto the sidewalk.

[73] Counsel for the General Counsel, in his brief, uses the word "spilled" for what happened to the soft drink. By the testimony of all the witnesses, the word "spilled" does not seem to do justice to what occurred. Whether the act was intentional on Owlett's part or not, it nonetheless was intentional either by Owlett or Stryker, or both. The liquid did not simply spill downward onto the ground, but flew through the air, striking Lewis.

the liquid was ejected.[74] Flagg testified that Lewis was, "soaked, crying, totally upset." Lewis testified as to being struck by the liquid as she approached the picnic table, but without detail as to where the liquid came from.

Both Stryker and Owlett testified that Stryker caused Owlett's drink to eject onto Lewis. According to Stryker, who was employed by the Respondent from March 2000 until he voluntarily quit about March 25, 2008, and who participated in the strike and picketing, as he saw the two women approaching the picnic table, he "sort of kneeled up on the table and reached across the table and gave Al [Owlett] a pretty hard shove, which caused the inevitable .drink to fly and for the taller girl to get hit on the sleeve and on the leg." Stryker testified that he pushed flat-handed against the back of both of Owlett's arms and, maybe, his back, that his intention was to hit the arm with the cup in it, that he intended "to cause what happened," and that the liquid struck Lewis "on the sleeve and on the leg." During his testimony, Stryker said he didn't recall Owlett saying he'd like to throw a drink in Lewis' and Flagg's faces, that he didn't recall anybody saying that Flagg and Lewis had a lot of nerve coming here and rubbing it in our faces, that he didn't recall anybody using the words "scab" or "traitor," and that he didn't recall Owlett telling Flagg and Lewis that their names or their addresses were posted at the union hall.

Owlett, in his testimony, described the incident as follows: "As they approached us they were directly in front of me. And I got a hit between my elbow and my shoulder on my right arm, and I just tried to save my Coke. I tried to grab it. And when I did, the lid, you know, I squeezed it to try to hold onto it, and the lid came off it, and some of it spilled." Owlett testified that the soft drink cup was a bit more than half full, and that he didn't know who struck him at the time. He further testified that later that afternoon, at the picket line, he asked May and Stryker who "hit my arm," and "they kind of made a game out of it, you know, one of them said that they did it. The other one said, well I did it. The other one said, well, you don't really know who did it."

May, who was employed by the Respondent about 8 months before the strike, participated in the strike including picketing, and then voluntarily left the Respondent's employ after being recalled to work following the lockout, testified that he saw Owlett jump up from the picnic table bench with the soft drink cup in his hand, and the drink eject[75] onto one of the females who was walking by, and that he heard Owlett say, "I'm sorry." May testified that he did not observe what, if anything, caused Owlett to jump up and the drink to be ejected from the cup.

Knapp testified that Stryker reached across the table and "goosed" Owlett or "grabbed him in the ribs type deal" with his fingertips, that Owlett's back was to Knapp, that he saw Owlett jump up from the table, and that he heard a scream from the women. Knapp further testified that he heard Owlett say, "I'm sorry."

After the liquid hit, Owlett and some of the other men called Lewis and Flagg "traitor" and "scab."[76] Flagg testified that after the drink hit, Owlett said, "You think that's bad your names and addresses are posted at the Union hall. You'll get yours." Lewis testified that even though her back was turned away from him, she heard Owlett say, "[Y]our names and addresses are posted in the Union hall, get used to it," and then, "Just wait, you'll get yours."

Owlett admitted that he told Flagg and Lewis that their names were posted on the board at the union hall. Upon being asked by counsel for the General Counsel what would have prompted him to tell Flagg and Lewis that, Owlett initially testified, "I don't remember." Then, upon being shown his investigatory affidavit by counsel for the General Counsel, Owlett testified, "Someone said something to her about all the people that crossed the picket line, they had a bulletin board at the union hall. That's what made me say that their names were on that bulletin board." Owlett denied that he mentioned anything about their addresses or that he said either "you think this is bad, get used to it," or "just wait, you'll get yours."

Stryker testified that he didn't recall what was said between Owlett, Lewis, and Flagg after the liquid struck Lewis, other than Owlett apologizing, or anybody saying, "[I]f you think that's bad, your names and addresses are posted at the Union hall." He also testified that during the time he was at the picnic table, he didn't recall anybody say that they felt like throwing their drink in the faces of Lewis and Flagg, that Lewis and Flagg had a lot of nerve coming to the McDonald's and rubbing it in their faces, and didn't recall if anybody used the words "scab" or "traitor." Stryker was asked by counsel for the Respondent, "So the only thing you recall being said is Mr. Owlett apologizing to the woman who got covered in soda, is that correct?" Stryker answered, "That's correct."

May testified that he didn't recall anyone saying, "[Y]our names and addresses are posted at the Union hall, just wait, you'll get yours," or anything to that effect. He denied that anyone said, "[Y]our names are posted at the Union hall," or that "we're going to get you." He also denied that while at the table he heard Owlett say that he felt like throwing his Coke in their (Flagg's and Lewis') face, or that he heard anybody say "scab," or "f—ing scab," or "traitor." In sum, May testified that the only statements he recalled during the time he was at the picnic table were Owlett apologizing "four or five times" for the drink ejecting onto Lewis and one of the women saying, "a—hole," after the drink hit Lewis.

Knapp, in his testimony, denied that Owlett or anybody said words to the effect of "your names are posted at the Union hall," "you'll get yours," "traitors," "scabs," "f—ing scabs," "I felt like throwing my Coke in their face," or "they have a lot of nerve crossing the picket line to come over here for lunch and rubbing it in our face." Knapp testified that if he didn't hear the words, they probably couldn't have been said. Knapp fur-

[74] Owlett testified that Lewis responded, "Yeah, I'll bet you're sorry."

[75] He testified, "spilled."

[76] Owlett testified that he heard the women called "traitor" and "scab," and that he, himself, used the epithet "traitor," but couldn't recall if he also used "scab." Several of the men also testified that the women cursed the men after the liquid hit Lewis, but Flagg denied this.

ther testified that he did hear Owlett apologize when the drink struck Lewis.

Contemporaneously with Owlett's comments, or just after, Flagg said she was calling the police and used her cell phone to dial 911.[77] At Flagg's comment that she was calling the police, Knapp and Stryker left the scene; May and Owlett remained and spoke to the police. When the police officer arrived, he spoke separately to Lewis and Owlett, and gave a summons to Owlett.[78] Lewis and Flagg eventually returned to work, where they gave signed statements to a security guard employed by MADI, the company under contract to the Respondent to provide temporary replacement workers during the strike.

On September 18, 2007, Lewis and Flagg signed and submitted to Town Court, Town of Erwin, supporting depositions in the case of *State of New York against Allen H. Owlett*, a case which alleged second degree harassment under New York's penal code. Their depositions are largely consistent with their testimony during the instant proceeding. At trial, Owlett accepted the offer of an adjournment contemplating dismissal, which provided that if Owlett "didn't get in any trouble for six months, it would be sealed and wouldn't exist any longer."[79] On April 16, 2008, the case against Owlett was dismissed.[80]

In early December 2007, after learning that his name was not on the Respondent's list of strikers eligible to return to work, Owlett wrote a letter to Doug Rich, a manager for the Respondent, whom Owlett described as "right at the top." In his letter, Owlett conveys his side of the McDonald's incident, admits saying that he would "like to throw a Coke right in their face," but says nothing about what he said to them after the Coke hit Lewis, other than apologizing. Owlett filed an additional appeal with the Respondent's internet hotline, and had meetings with various managers of the Respondent including Rich, Mike McCaig, and Dan Wallace. The Respondent rejected Owlett's appeals and refused to reinstate him.

Daniel Meisner, the Respondent's Painted Posted HR manager at the time of the McDonald's incident until June 2008, testified that he made the decision that Owlett not be permitted to return to work after the lockout ended, and that the decision was based on Owlett's actions during the McDonald's incident which constituted, according to Meisner, "picket line misconduct involving police intervention." Meisner further testified that at the time he made the decision, he had spoken to Flagg and Lewis, reviewed the police summons issued to Owlett, the police incident report, and a witness statement as to the incident authored by Greg Jensen, an employee of the Respondent, and had also spoken to Jensen.

While Jensen was not a witness at the trial,[81] his witness statement,[82] which Meisner reviewed, was admitted into evidence. In his statement, Jensen asserts that he witnessed the entire McDonald's incident from his car in the restaurant's drive through lane, that a male[83] threw a large drink onto the two women, then "grotesquely exaggerated his movements by stumbling into the parking lot," and that he heard comments including,[84] "get used to it, there's more to come," "we're going to get you," and "your addresses are posted at the union hall."

Discharge of Kelvin Brown

The Respondent's then-HR Manager Daniel Meisner testified that he made the decision that Kelvin Brown would not be eligible to return to work just prior to the submission of the return to work list to the Union on December 2, 2007, and that the decision was based on Brown's participation in an incident that occurred on the picket line during the early morning hours of September 20, 2007. Meisner testified that he relied on information that Brown, while on picket duty "early one morning ended up in front of and on top of a vehicle that was trying to enter the facility. ." The information as to Brown included an "incident report" from a security guard[85] that referenced a not-identified "white male jumping onto the front" of a vehicle trying to enter the Respondent's facility, and a conversation with the Painted Post police chief who told Meisner that the individual involved was Brown.[86] During the incident, Brown

[77] She testified that she called the police because she was frightened over Owlett's alleged threats and the comment as to their addresses being posted at the union hall.

[78] Credited testimony of Owlett, who also offered the unobjected-to hearsay testimony that the officer told Owlett that the officer had "gotten a call from the plant and he needed to give me a summons." The hearsay testimony, while not objected to, is unreliable and I have disregarded it.

[79] Credited, and uncontroverted testimony of Owlett.

[80] The Respondent also successfully prosecuted proceedings seeking an injunction in NY Supreme Court. While the acting supreme court justice therein issued an injunction against the Union, finding that the Respondent "has also proven threats of violence and intimidation have been made against those who have crossed the picket line," and while the justice's decision in the proceeding referenced testimony by Flagg and Lewis as to the McDonald's incident, the justice made no specific finding as to the McDonald's incident, although the incident may or may not have been encompassed within the justice's finding as to acts of threats of violence and intimidation. I further note that acting supreme court justice stated in his decision that the defendant (the Union) did not present evidence to dispute the incidents testified to by Lewis and Flagg.

[81] Jensen spoke to Lewis and Flagg at the restaurant as they waited for the police.

[82] Statement not considered for the truth of the matter asserted, but as to what the Respondent relied on in its decision in respect to Owlett. As noted, Jensen was not called as a witness. Counsel for the General Counsel stated on the record that he had issued a subpoena to Jensen to appear at the hearing, but hadn't decided whether or not to call him, at the time.

[83] The statement did not include a name for the male, but did include a physical description.

[84] In the statement, Jensen says he did not notice from which individual(s) these comments emanated.

[85] The report is dated September 20, 2007. The parties stipulated that this hearsay document was introduced not for the truth of the matter asserted, but as a document that the Respondent relied on in making its decision to discharge Brown.

[86] The report also references a videotape made by the security guard of the incident. The tape was introduced at trial. Meisner testified that at the time he made the decision to discharge Brown, he had not watched, nor relied on, the video.

was placed under arrest by a Painted Post police officer[87] and charged with disorderly conduct.

Kelvin Brown was hired by the Respondent in 1974, and worked in various jobs, including on a punch press, as a welder, and as a machinist, assembler, and inspector, in "[s]hop 5" at the Respondent's Painted Post facility. Brown was in the bargaining unit, was a union member, and participated in the strike and picketing. During the strike, Brown picketed twice a week at various of the plant's six gates, from 11 p.m. to 7 a.m. Brown's name did not appear on the eligible to return to work list provided by the Respondent to the Union on December 2, 2007.

Brown began his picketing shift about 11 p.m. on September 19 at the "truck gate" entrance to the Respondent's plant, located at First Street and East High Street in Painted Post. The truck gate was used by replacement workers to enter the plant, typically in vans.[88] East High Street is an east-west thoroughfare, running parallel to the Respondent's plant. First Street is a short street that begins, or ends, at the Respondent's plant on one end, and East High Street at the other. At about 6:30 a.m. the following morning, September 20, there were a total of about 8 to 12 picketers, including Brown. The sun had not yet fully risen, so the light was "fairly dim."[89]

Five witnesses, including Brown, testified as to the incident, including strikers Jacob Rodriguez, Ronald Politi, and David Stryker, all called by the General Counsel, and Painted Post police officer Michael Slowinski, called by the Respondent. Brown testified that as he and other picketers were walking west in the crosswalk across First Street, a van turned onto First from East High, and stopped just past the crosswalk. Brown said that he observed nothing in front of the van, and there was "no reason for it to stop." A second van then quickly also turned onto First from East High, apparently lightly striking the rear of the first van. Brown described the contact between the vans as the license plates striking each other, and said that the collision took place within "inches" of him.

According to Brown, when the vans turned onto First, Brown was walking, with other picketers, across First, east to west, using the crosswalk, when he observed the second van "coming at me," and "I had to throw myself back, get out of the way. ." The vans then proceeded onto the Respondent's facility, without police assistance.[90] Counsel for the General Counsel asked Brown, "When you moved yourself out of the path of the second van, did you come into contact with the van?" Brown answered, "I may haved pushed myself from the van, at the same time I was throwing my arms back because had I taken another step, I'd be in between the two vans, and so I'm not sure exactly how I propelled myself back exactly, but I went back and I bumped into a couple of the other picketers that were behind me."

Stryker, a striker and a picketer, who has since voluntarily left his employment with the Respondent, testified that he was among the pickets at the truck gate on the morning of September 20, and was present when the van incident occurred. He said that he and other picketers were patrolling back and forth across First Street in the early morning hours, along the crosswalk, and that the morning of the incident was a typical day at the entrance in that there were vans approaching from the east along East High Street, with the apparent intent of turning left onto First Street to access the truck gate at the plant. Stryker testified that the pickets were spacing themselves along the crosswalk "so that we could impede the progress of the vans into the plant."[91]

According to Stryker, the picketers had crossed in front of the lead van which had turned onto First Street causing the van to stop, and then accelerate as there was an opening through the picketers, leaving a space for the next van, which immediately accelerated and turned onto First, following the first van. However, the first van slowed, but didn't stop, as it was going through the crosswalk across First Street, causing the second van, which had accelerated, to "come close to the back end of the first van."

According to Stryker, after the second van paused near the rear of the first van, the first van again accelerated and then stopped. The second van accelerated and made contact with the rear of the first van. Stryker testified, "As I was turning around, the second van made contact with Kelvin [Brown] and the vans ran into each other. The first van had stopped. The second van ran into the first van." Stryker testified that he didn't actually see the second van make contact with Brown, but he saw Brown falling in close proximity to the van.[92] Stryker further testified that Brown was initially behind him as they were picketing across First Street, and that he did not see Brown, at any time, jump on the hood of either van.

Jacob Rodriguez, a striking employee who was picketing at the truck gate on the morning of September 20, testified that he and other picketers were walking back and forth in the crosswalk from one sidewalk to the other, and that a "caravan" of vans containing, he believed, replacement workers was approaching First Street, travelling west on East High Street. One van signaled to make a left turn onto First, to the area where the picketers were patrolling. Rodriguez testified that as the picketers cleared the way for the first van, it proceeded past the crosswalk, but stopped "very abruptly" with its rear bumper still in the crosswalk. When the van stopped, the picketers

[87] The Painted Post police officer, Michael Slowinski, and Brown had never met each other before the incident.

[88] Stryker's credited and uncontroverted testimony.

[89] Credited, and uncontroverted, testimony of Officer Slowinski.

[90] Brown testified that the second van "kind of started pushing the first van."

[91] Stryker testified that the picketers' routine was to pass three times in front of a vehicle attempting to access First Street, and then allow the vehicle through, pursuant to an arrangement with a police officer. Jacob Rodriguez, a witness called by the General Counsel, credibly testified that it would take 6 to 8 minutes before a vehicle was allowed into the Respondent's facility.

[92] On cross-examination, Stryker testified that at the time Brown and the van made contact, he had already passed between the vans and was turning around to make a second pass between the vehicles. He admitted, however, that in testimony given in Erwin Town Court, he stated that it was the sound of the impact (between the vans) that caused him to turn, and that's when he saw Brown. The testimony would make it unlikely that Stryker would have observed the impact.

resumed patrolling on the crosswalk, back and forth across First, with a "line of vehicles" on East High, waiting to make a left turn onto First.

According to Rodriguez, Brown was "in front of me, I believe," and then crossed "in front of me, he was, I'd say, ten feet in front of me, walking to the crosswalk, and he crossed behind the van [that had stopped]." The second van then "abruptly shot in front" of a car proceeding the opposite direction on East High, entered the crosswalk across First while there were picketers in the crosswalk, and "everybody jumped out of the way, and the vans collided with each other." "[Brown] was right behind the [first] van in the crosswalk, and in front of the van that pulled in, and right before they collided, he kind of jumped up in the air out of the way." Rodriguez described the collision between the vans as minor, that the license plates were stuck together, and there didn't appear to be damage to the vans, other than the license plates. Rodriguez testified that he "didn't recall" Brown physically touch "the vehicle."

Ronald Politi, a current employee of the Respondent, member of the Union, and participant in the strike, testified that he began picketing about 7 a.m. on September 20, and was picketing then with about seven or eight other picketers. He testified that he was patrolling with the other pickets in the crosswalk across First Street, when vans started coming in the truck gate by turning left onto First from East High Street, and that one van came through the crossing and stopped for no apparent reason as there was no obstruction, with the van following the first van striking the stopped van. Politi testified that he was about 7 feet from the vans when they collided and that the second van was about 5 to 10 feet behind the first van, when the first van stopped. Politi further testified that there were other individuals in the crosswalk at the time the vans collided, but he didn't recall who they were. Finally, Politi testified that on the heels of the van incident, Officer Slowinski approached the crosswalk and pointed at Brown, and Politi told the officer, "These vans just ran into each other." According to Politi, Slowinski replied, "I don't want to hear it. I don't believe anything you guys say anymore."

Police Officer Michael Slowinski, a veteran of 4-1/2 years at the Painted Post, New York police department,[93] testified that he was working the 11 p.m. to 7 a.m. shift on September 20, 2007, and performing his normal duties, which included patrolling village streets, vehicle and traffic enforcement, and property checks. Slowinski testified that near the end of his shift, at about 6:40 a.m., he was driving westbound on E. High Street, east of First Street, and noticed that the traffic was stopped, with four vehicles in front of his patrol car, including two vans,[94] and one vehicle behind. As Slowinski was stopped in traffic for about 5 minutes, he observed that the picketers were walking back and forth, from sidewalk to sidewalk across First Street, and that the traffic blockage was being created because vehicles traveling westbound on E. High Street were attempting to turn left onto First Street, and were being held up by the picketing activity.[95] Slowinski described the picketing as follows: "The actual physical bodies of the picketers were traveling in the crosswalk at a slow pace. They were walking back and forth in like a train type formation." Slowinski remembered there being "at least 10" picketers, Brown among them.

Slowinski described the incident as follows: "The first van started to make a left hand turn onto First Street, to go in to the Dresser-Rand plant. Somehow traffic was being held up. .it was inching forward through the crosswalk. And at that time, van number two came right behind van number one," that it was "rear bumper to front bumper and "really close," but that he did not observe any impact, and that to his knowledge the vans did not strike each other. Slowinski testified that Brown was in the crosswalk, walking forward westbound towards the second van, which had stopped, and "laid on the fender, where the fender and the hood meet, on the driver's side." Slowinski testified that he had a clear view of these actions. Slowinski further testified that, "[a]s soon as I saw Mr. Brown pretend like he got hit by the vehicle, he laid on the front of the van, I turned my lights on, on the marked patrol car, and proceeded to the scene."

Slowinski said he approached Brown, and called, "hey" to him,[96] but Brown walked away, causing Slowinski to say, "[H]ey you, in the brown coat." According to Slowinski, Brown responded, "What? What'd I do?" Slowinski told Brown to come over to the patrol car, and he did, "eventually."[97] Slowinski placed Brown in the patrol car and explained to him "what he did."[98] Brown responded that he got hit by the car. Slowinski replied that Brown didn't get hit by the car, and that Slowinski watched the incident happen. Slowinski issued an "appearance ticket" to Brown, alleging disorderly conduct, a class A misdemeanor under the laws of the State of New York. The information alleged as follows: "To wit, Kelvin D. Brown did commit the offense of Disorderly Conduct when with intent to cause public inconvenience, annoyance and alarm, and recklessly creating a risk thereof, he did obstruct vehicular traffic."

As to the actual ticketing of Brown, Brown testified that immediately after the vans collided, the police officer pulled up by the strikers and shouted and pointed, that Brown thought the officer was pointing at Rodriguez, but instead he was pointing at Brown. According to Brown, "[W]e tried to tell him that the two vans had hit and . he told us he didn't believe any of us. Brown testified that Slowinski instructed Brown to come with him to the patrol car and told him that he had jumped on the van and was going to jail." When counsel for the General Counsel asked Brown to describe Slowinski's demeanor at the

[93] Officer Slowinski worked part time for both the Painted Post, New York police department, and for the Hammondsport, New York police department.

[94] Slowinski testified that he believed the vans were taking temporary workers into the plant.

[95] He also testified that he saw a camera, and that the flash "was blinding people," and further causing a backup.

[96] Slowinski didn't know Brown's name at that point.

[97] Slowinski testified that Brown came over to the patrol car, "eventually."

[98] According to Slowinski, as he was placing Brown in the patrol car, and as he was attempting to talk to Brown, the picketers were yelling through the car's windows, so that Slowinski had to roll up the car's windows in order to be able to speak to Brown.

time, Brown answered, "He was very argumentative and very bold."

According to Brown, once in the patrol car, Slowinski told Brown that if Brown admitted to jumping "out at the van," he would just let it go, and Brown responded that he wouldn't admit to something he didn't do. Brown testified that Slowinski responded that he didn't "believe you guys any more." Brown further testified that Officer Slowinski then asked him why he was out there "because you're collecting unemployment as well as you collect strike benefits, you make more than I do, so why are you out here?"[99]

In addition to the witnesses testifying as to the September 20 incident at the truck gate, the General Counsel introduced a security video of the incident taken by a MADI[100] security guard. In the video, Brown disappears from view as he walks between the two vans, and while it is possible to observe the second van pull up closely to the first van, contact, if any, between the vans is not observable. Inasmuch as Brown disappeared from view in the video, it is not possible to observe whatever interaction there was between Brown and the second van. The MADI security guard who took the video, and whose report stated that a white male jumped on a vehicle, did not testify at the instant trial, but based on the view of the incident displayed in the video taken by the guard, it does not seem likely that the security guard could have himself observed what is not shown in the video; that is, any contact between Brown and the second van.

Brown pled not guilty to the misdemeanor, and a trial was held in Town Court, Town of Erwin, County of Steuben, State of New York, before Town Justice Thomas McCarthy on December 10, 2007. Officer Slowinski, and picketers Brown, Stryker, and Rodriguez, and three other witnesses testified during the trial.

In his ruling at the conclusion of the trial, Town Justice McCarthy found Brown guilty of disorderly conduct and held as follows: "A pool of defense witnesses testified that it was the intent of the picketers to cause some type of disruption whether minor or major. The intent was to draw attention to them crossing back and forth across that sidewalk. That's the point of picketing. They need attention drawn to them. At some point during the course of a rather strong strike here, and I can't tell you how many weeks but probably several weeks had gone by before this September 20th incident and by the letter of the law as it reads; disorderly conduct is with the intent to cause a public inconvenience. I keep coming back to that; and annoyance, alarm, or recklessly creating risk. Through your testimony, Mr. Brown, I can't get past the fact that you recklessly created a risk for your own personal well-being by stepping in front of that vehicle or putting yourself in a position where you could be struck." The town justice waived any fine, and assessed Brown a mandatory New York State surcharge of $100 for disorderly conduct.

On December 2, 2007, 8 days prior to the Town Court trial, Brown's name was left off the striker reinstatement list provided by the Respondent to the Union. As set forth above, Meisner testified that Brown's name was left off the reinstatement list because of reports he had received as to the September 20 incident at the plant's truck gate. Asked on direct examination by the Respondent's counsel what policy, if any, the Respondent had for dealing with issues that occurred on the picket line, Meisner testified, ". when the first incident did come up our path forward, looking at picket line misconduct, which did require the police intervention employees would not be eligible for reinstatement." The Respondent's counsel later asked Meisner to describe what he meant by "police intervention," and Meisner answered that it was where "a person was cited with an appearance ticket, or whatever. ." Meisner testified that four employees were discharged pursuant to this policy, including Brown and Owlett.[101]

Suspension of Marion Cook

Marion Cook, hired by the Respondent or its predecessor in 1978, is currently employed by the Respondent at Painted Post as a machine operator in department 135. On May 1, 2008, the Respondent imposed a 2-day suspension upon Cook, without pay.

There are about 25 employees in department 135, and they operate lathes, grinders, miller centers, and the CNC Acuma machine. Cook is a member of the Union, and participated in the strike, including by picketing. On January 14, 2008, Cook was recalled to work in department 135, on the CNC Acuma, which machine Cook had 12 years' experience on. When Cook was recalled to department 135, there were also about seven to eight permanent replacement employees working alongside former strikers in that department.

On April 30, 2008, James Hillock, then a cell manager/supervisor at the Respondent's Painted Post facility,[102] conducted a "startup" meeting with about eight of the employees under his supervision, including Cook. The startup meetings were daily meetings lasting 5 to 10 minutes, during which various topics, including productivity, quality, costs, safety, and daily events, could be discussed.

At some point during the short meeting, Hillock asked if there were any safety issues. Cook responded that "there were too many salaried workers and too many "scabs" for it to be safe to work.[103] Hillock asked Cook to repeat what he said.

[99] Nobody asked Slowinski during his testimony as to these asserted comments.

[100] MADI is the firm which provided temporary replacement workers to the Respondent.

[101] On cross-examination by counsel for the General Counsel, Meisner testified that Painted Post Police Chief Halm gave him "a few" names of drivers, whom the police chief believed were engaged in "aggressive driving" through the picket line. The Respondent verbally counseled these three individuals, one of whom was a salaried employee, but did not otherwise discipline them. There is no evidence that the police cited any of these drivers or that any were arrested.

[102] Hillock, by the time of the hearing, had voluntarily left his employ with the Respondent and was employed elsewhere. He appeared pursuant to the Respondent's subpoena.

[103] Credited testimony of Cook, who was a generally reliable witness, based on his demeanor and strength of recollections. Cook further testified that his safety concern was that the permanent replacement workers were untrained and often did not know how to properly set up machinery, and that salaried workers sometimes made changes to

Cook repeated his statement, but changed the word "scab" to the words "replacement workers."[104] The one replacement worker present during the meeting offered no comment as to Cook's words, but some of the employees at the meeting laughed when Cook made his comment as to salaried workers and scabs.[105] Hillock testified that he understood Cook's comments to be "a safety-related complaint." There was no further conversation between Cook and Hillock as to Cook's comments, at the startup meeting.

When Cook reported to work the following day, two officials of the Union told him that he was to report to the office because "they had papers to suspend me for a comment I made during the startup meeting." Cook then met in Hillock's office with Hillock, Cell Manager Wayne Perrageaux, and Union officials, Glen Painter and Brian Scounton.[106] Hillock read a suspension letter to Cook, which letter stated as follows: "This letter is to notify you that effective 5/1/08, you are suspended with intent to discharge.[107] You have completed [sic] the disciplinary procedure regarding conduct violating common decency or morality on company property—Comments made during dept 135 meeting referencing 'scabs.' As soon as the Company has reviewed your case, you will be notified as to the decision and status of your employment at Dresser-Rand Company."

During the meeting, Cook told Hillock that he didn't intend to insult him, and Hillock said he wasn't insulted. Cook said he didn't direct his comments to anybody. Hillock didn't respond. Hillock told Cook that if one of the replacement workers had heard him say the word "scab" and Hillock didn't do something about it, his job would have been in jeopardy.[108] However, Meisner, not Hillock, made the decision to suspend Cook.[109] Meisner testified that he decided to impose the discipline on Cook, because the Respondent had decided it would have zero tolerance for "disrespectful behaviors," with employees returning to work after the strike, and that Cook's scab comment violated the Respondent's employee code in respect to common decency or morality.

When asked how he arrived at a 2-day suspension for Cook, Meisner testified, "Well, looking at the incident and then looking at incidents that had happened in the past that were kind of similarly situated, it seemed to be the appropriate amount of time." The Respondent has imposed disciplinary suspensions on about five other employees since 2004, for infractions involving "common decency or morality." The asserted conduct and length of suspensions are as follows: 2 days for "refused job assignment; 2 days for "was acting belligerent towards supervisor in startup meeting—yelling, being generally disrespectful"; 7 days for "disrespectful to supervisor during startup meeting, refusing to pay attention, reading magazines during meetings; 2 days for "made a sexually derogatory comment about an employee"; and 5 days for "threatened to assault another employee."[110] Meisner also testified to a few other employees disciplined for various reasons, including Joe Tallian who was terminated for smoking on company property and "violating common decency and morality," and Roland Stewart who was suspended for 7 days because "he had become disrespectful towards the employee, his coworker."[111]

Analysis and Conclusions

Discharges

Brown and Owlett were both participants in an economic strike, and both of their discharges occurred in the context of asserted striker misconduct. Former economic strikers are entitled to their former, or substantially equivalent, positions as the positions become vacant and available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). The Board, in dealing with striker misconduct cases, adopted the following test in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984): "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[112]

In weighing whether a discharge for strike misconduct is lawful, the first issue to be resolved is whether a respondent has proved that it had an honest belief that the discharged employee engaged in strike misconduct of a serious nature. *Gem Ure-*

machinery without informing the machine operator, either of which could cause unsafe situations. In particular, Cook testified that replacement workers often did not know the machinery setup procedure for stabilizing machinery, and that the changes made by salaried workers sometimes caused machine hoists to hit machine operators in the face.

[104] Hillock testified that when Cook repeated his statement, he changed "scabs" to "replacement workers.' Cook testified that he just "repeated myself, without specifying whether or not he substituted for scabs.' In view of the specificity of Hillock's testimony here, I credit him as to this. Cook also testified that when he repeated his statement, Hillock made a gesture with his hand as if "he was going to write something down," but that he didn't actually write anything.

[105] Hillock's credited, and uncontroverted, testimony.

[106] Second-shift plant steward.

[107] Converted to a 2-day suspension, without pay.

[108] Credited testimony of Cook. On cross-examination, Cook testified that he did not mention the "job would have been in jeopardy" in describing the conversation in his investigatory affidavit. Hillock was not specifically asked about this portion of Cook's testimony. Without the affidavit in evidence, it's difficult to understand the context of this specific affidavit testimony and why the comment was not mentioned. Nevertheless, from my close observation, Cook displayed the demeanor of a witness attempting to honestly answer the questions of all counsel, rather than simply offering testimony to aid in winning the case. Further, in view of his detailed answers to many of the questions, and his demeanor, it is not likely that he made up this single, noncrucial, piece of testimony out of whole cloth.

[109] Credited testimony of Meisner and Hillock.

[110] R. Exh. 66.

[111] Meisner's testimony. The disciplinary letter, R. Exh. 67, dated January 29, 2007, simply states, "for the violation of common decency and morality on company property.' Neither Meisner's testimony, nor the letter of discipline, is sufficiently detailed so as to provide a minimal understanding of whatever it was that Stewart was accused of.

[112] The Board adopted the reasoning of the Third Circuit in *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977) "We read the McQuaide standard to essentially adopt a 'reasonably tends to restrain and coerce' measure for the loss of reinstatement rights.' *Clear Pine Mouldings*, supra at fn. 12. The Respondent may have imposed a different standard in that Meisner testified that picket line misconduct which involved police intervention was a basis for its discharge decision. Regardless of the standard imposed by the Respondent, I have employed the Board's standard as set forth in *Clear Pine Mouldings*, supra.

thane Corp., 284 NLRB 1349, 1352 (1987). The standard is objective and does not involve an inquiry as to whether any particular employee was actually coerced or intimidated, *Detroit Newspapers*, 340 NLRB 1019, 1024–1025 (2003), nor into the intent of the discharged striker. *Roto Rooter*, 283 NLRB 771, 772 (1987).

A respondent's honest belief as to the misconduct may be based on hearsay sources, such as the reports of security guards. *Avery Heights*, 343 NLRB 1301, 1304 (2004). Such belief, however, must be based on evidence linking the specific accused employee to specific acts of misconduct. *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980), enfd. mem. 672 F.2d 895 (D.C. Cir. 1981). Once an employer's honest belief has been demonstrated, the Board will find the discharge to be lawful, unless the General Counsel shows by a preponderance of the evidence either that the striker did not, in fact, engage in the alleged misconduct or that the misconduct was not serious enough for the employee to forfeit the protection of the Act. *Detroit Newspapers*, supra at 1024; *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 (1994), enfd. 72 F.3d 780 (10th Cir. 1995). "In determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider all of the circumstances in which the alleged misconduct occurs, including other instances of vandalism, threats, and violence occurring during the course of the strike." *Universal Truss, Inc.*, 348 NLRB 733, 735 (2006).

Discharge of Kelvin Brown

At the time the Respondent's HR manager, Daniel Meisner, decided to discharge Brown for picket line misconduct, he relied on the report of a security guard to the effect that a white male (unidentified in the report) jumped onto the front of a vehicle attempting to enter the Respondent's facility, together with a conversation with the police chief of Painted Post, New York, during which the chief assertedly identified the white male as Brown.[113] At the time Meisner decided to discharge Brown, he had not viewed the video recording of the incident taken by the security guard,[114] and the trial and disorderly conduct conviction in Town Court had not yet taken place.

Thus, at the time the Respondent decided to discharge Brown, the only evidence it considered as to Brown's alleged misconduct was the hearsay report of the security guard[115] and the apparently hearsay comments by the police chief to Meisner.[116] Yet, the Board has held that hearsay reports are a sufficient basis upon which to form an honest belief,[117] and the chief of police specifically named Brown as the individual mentioned in the security guard's report as having engaged in the picket line misconduct of jumping onto a van attempting to access the Respondent's facility. Further, the Board had described the threshold for establishing honest belief as "relatively low." *Avery Heights*, supra at 1303–1304. Based on the report of the security guard and the conversation with the chief of police, I conclude that the Respondent has met the low threshold of demonstrating it had an honest belief that Brown engaged in misconduct at the time it decided to discharge him.

I further conclude that the General Counsel has not met his resultant burden of demonstrating by a preponderance of the evidence that Brown did not engage in misconduct. As argued by counsels for the General Counsel in their brief, three witnesses called by the General Counsel, including Brown, essentially testified that Brown did not engage in misconduct and did not jump on or lie on the van carrying replacement workers. However, all of the General Counsel's witnesses as to this event were participants on the side of the Union in a long and bitter labor dispute. While this is not determinative of their credibility, it is a factor I've weighed.

The only witness to the incident without an apparent ax to grind, was the responding police officer, Michael Slowinski. Slowinski testified that he had a clear view of the incident, that Brown "pretended like he got hit by the vehicle, and that Brown laid on the fender of the van 'where the fender and the hood meet . on the driver's side.'" Counsels for the General Counsel argue in their brief that the police officer "was not entirely disinterested." But this argument relies on inferences from the testimony of Brown to the effect that the officer allegedly made comments to Brown from which, the General Counsel argues, one could deduce that the officer sounded resentful towards the strikers, and on the testimony of Politi to the effect that the officer wasn't interested in hearing the picketers' side of the story. While the police officer was not questioned by any party as to Brown's and Politi's testimony and, hence, did not deny or corroborate said testimony, the testimony of Brown is burdened by his personal interest in the outcome of this case, and Politi's testimony could simply indicate that the police officer was satisfied by his own observations of an incident that he had a clear view of, according to his own testimony.

I reject counsels for the General Counsel's implied argument in their brief that the officer might lie under oath because he was resentful of the strikers for some unknown reason, and consider the probabilities more likely that falsehoods or embellished truth would emanate from those having vested interests in the outcome of the litigation, or harboring resentments from a bitter labor dispute. I further reject counsels for the General Counsel's argument that the police officer may not have had a

[113] Meisner's testimony here is uncontroverted and believable, and is credited.

[114] Meisner so testified.

[115] Counsels for the General Counsel, in their brief, point out that the guard's video does not necessarily support the guard's report. While this observation may be significant in respect to whether or not Brown may have actually engaged in misconduct, it is far less significant in respect to "honest belief" because the Respondent had not viewed the video at the time it made the decision to discharge Brown. Further, I can't conclude that the Respondent had no "honest belief" based solely on Meisner's failure to view the video, in view of the other evidence which he did review.

[116] There is no evidence that the police chief was present at the incident and, thus, the chief was relying on reports.

[117] "Although the employer must do more than merely assert an honest belief, some specific record evidence linking particular employees to particular allegations of misconduct will suffice.' *General Telephone Co. of Michigan*, supra, 251 NLRB at 739. "An employer's honest belief may be based on hearsay sources, including the reports of nonstriking employees, supervisors, security guards, investigators, police, and others." *Avery Heights*, 343 NLRB 1301, 1304 (2004).

clear view because of the early morning light. The police officer, presumably trained in the art of observing such incidents, explicitly testified that he had a clear view of the incident. While I do not credit the police officer over other witnesses simply because he is an officer, the fact that he is the only disinterested witness to testify as to the incident and a presumably trained observer, lends support to his credibility, and I credit his testimony as to what occurred at the truck gate on September 20.[118]

However, that being said, the police officer's testimony is at wide variance from the nontestifying security guard's report, which the Respondent relied on in its decision to discharge Brown. Further, the Town Justice's ruling finding Brown guilty of disorderly conduct was clearly based on Brown's asserted stepping in front of the vehicle, not on any other alleged action of Brown such as jumping on the van.[119] Further, a conviction in such proceedings is not necessarily determinative of the issue of reinstatement. See *Newport News Shipbuilding*, 265 NLRB 716, (1982).

The Board has held that actions of strikers including jumping on vehicles,[120] kicking vehicles,[121] slapping the hood of vehicles,[122] and throwing a beer can at a vehicle,[123] to be misconduct validating discharge. Here, however, the worst that the evidence demonstrates in respect to Brown is that he either briefly stepped in front of a van, or lay or leaned against a van's bumper for a moment.[124] Brown's action resulted in no damage to the vans, no injuries, and slight delay, if any, in the van's accessing the Respondent's facility. Further, there is no evidence of other incidents involving picket line misconduct in a strike lasting about 3 months, involving numerous individuals manning a 24-hour picket line.[125]

In *Medite of New Mexico, Inc.*, supra, the Board held that the picket line conduct of two strikers in striking a foreman's vehicle with a cardboard picket sign did not disqualify them from reinstatement following a strike. The Board differentiated such conduct from that in *Gem Urethane*, supra, where strikers "blocked ingress to the plant, surrounded a car, held a baseball bat in a threatening manner, pounded on cars, threatened to kill and beat up nonstriking employees, threatened to blow up the plant, threatened to burn nonstrikers' cars, and threatened to 'get' nonstrikers and their family members," and from that in *Clear Pine Mouldings*, supra, where strikers "carried clubs, tire irons, baseball bats, and ax handles, and were accompanied by dogs," and where "one striker swung a 2-foot long club at a non-striking employee and struck a non-striking employee's car."

Here, there is no reliable evidence whatsoever that Brown jumped on a van. The evidence which I credited establishes that Brown's actions were limited to briefly lying or leaning on an area of a van between the fender and hood. There is no evidence that Brown possessed or brandished anything that could be used as a weapon or issued threats to anybody. Under these circumstances, I conclude that Brown's actions on the picket line on September 20 would not reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act, and that the Respondent's discharge or failure to reinstate Brown violated Section 8(a)(3) of the Act.[126]

Discharge of Allan Owlett

Owlett's actions which led to the Respondent's decision to discharge or not recall him from the strike or lockout, occurred in the context of the strike, and Owlett was a striking employee. Inasmuch as the Respondent's decision to discharge Owlett was based on his conduct related to the strike, the Respondent bears the burden of demonstrating that at the time it made the decision, it had an honest belief that Owlett engaged in the asserted misconduct. *Gem Urethane Corp.*, supra.

Meisner credibly testified that at the time he made the decision to discharge Owlett he had spoken to Flagg and Lewis, reviewed the police summons issued to Owlett along with the police incident report, and a witness statement authored by employee Greg Jensen. Those documents, taken as a whole, sufficiently implicate Owlett as a culprit in the McDonald's soft drink incident and aftermath and, consequently, the Respondent has met its low threshold "honest belief" burden.

The burden, thus, shifts to the General Counsel to demonstrate by a preponderance of the evidence, that Owlett did not engage in the asserted misconduct. Here, counsels for the General Counsel, in their brief, argue that their witnesses established that the soft drink tossing occurred at the behest of striker Stryker, and that Owlett was merely an innocent foil, not guilty of misconduct. They further argue that the testimony of the Respondent's witnesses, Lori Flagg as to the drink tossing and its aftermath, and Tina Lewis as to the aftermath, should not be believed. The Respondent, of course, contends to the

[118] From my close observation, Officer Slowinski displayed impressive demeanor on the witness stand, and gave no hint that he was predisposed towards one side or the other. From his demeanor, he appeared a credible witness.

[119] From the Town Justice's written decision: "I can't get past the fact that you recklessly created a risk for your own personal well-being by stepping in front of that vehicle or putting yourself in a position where you could be struck.'

[120] *Stroehmann Brothers Co.*, 271 NLRB 578 (1984).

[121] *GSM, Inc.*, 284 NLRB 174 (1987), and *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999).

[122] *GSM, Inc.*, supra.

[123] *GSM, Inc.*, supra.

[124] By all testimony, the incident involving Brown was very brief. While the police officer's testimony was that Brown "laid on the fender, where the fender and the hood meet,' the configuration of a typical van would make completely reclining in that space unlikely, as would the brevity of the incident. Leaning against the van would seem at least as likely, and not greatly at variance with the officer's testimony.

[125] The other lone allegation as to striker misconduct involved an event away from the picket line.

[126] The complaint alleges as violations that the Respondent refused to recall Kelvin Brown to work about November 19, 2007, and discharged Brown about January 7, 2008. While the Respondent memorialized the discharge decision in January, record testimony established, and I found, that the Respondent made and carried out the decision to not place Brown's name on the recall list and, hence, to discharge him, just before the Respondent presented the Union with the list on December 2, 2007. The Respondent's failure to include Brown in the recall list was tantamount to discharge. I, thus, conclude that Brown was discharged about December 1, 2007.

contrary, arguing that its witnesses, Lewis and Flagg, told the truth at trial, as opposed to the General Counsel's witnesses, who largely didn't. For the reasons set forth below, and while I cannot determine with 100-percent certainty that the evidence proved Owlett was the proximate cause of the soft drink striking Lewis, I can fairly conclude that the General Counsel has not succeeded in meeting his burden of demonstrating that he wasn't.

As to the Respondent's two witnesses to the McDonald's incident, both Flagg and Lewis, in my judgment, demonstrated the demeanor of witnesses attempting to truthfully testify as to what was probably, to them, a somewhat traumatic experience. While both were, at times, argumentative during the cross-examination of counsel for the General Counsel, they were generally forthcoming with answers and consistent in their testimony on direct and cross-examination.

Counsels for the General Counsel, in their brief, particularly attack Flagg's credibility in respect to her characterization of the actions of Stryker and Owlett as a "charade,"[127] arguing that "the hallmarks of Flagg's testimony are improbability and embellishment,"[128] and asserting that "[i]t simply strains credulity that Flagg, in the instant that she turned her head to see the drink flying toward Lewis and herself, and "leaped out of the way," could have seen the push that caused the drink to fly, let alone assess the situation and determine that there was a "charade" being played out." But Flagg's eyewitness testimony as to the incident had the ring of truth, at least as to what she actually observed, and her testimony as to such was consistent. Further, rather than "straining credulity," there's logic to the concept that once she turned her head, she was able to observe and remember the entire incident. Nevertheless, her testimony as to what caused her to believe it was a "charade," did not contain sufficient detail so as to allow me to judge whether her charade conclusion was accurate. However, there is no doubt, based on her testimony and demeanor, that "charade" was truly her perception of what Owlett and Stryker had engaged in.

Further, the General Counsel has not suggested a motive that would cause Flagg to be untruthful on the witness stand. There appears to be no prior relationship with either Owlett or Stryker that would cause her to testify untruthfully. Even if it's argued that because she returned to work during the strike, she would have a proclivity to favor the Respondent over the Union, there's no concomitant argument that she would want Owlett held responsible rather than Stryker. Indeed, even from a human nature standpoint, one generally desires the person who commits offense against them, to be the person punished for the offense, rather than an innocent. If in fact she believed Stryker to be the genesis of the act, why would she want Owlett punished? That's not to say that Flagg was right as to her conclusions, but that she had little or no motive to lie.

In contrast, Owlett clearly understood when he testified, that the only way for him to prevail in this case and win an order of reinstatement and backpay, was to convince the trier of fact, that he was innocent of causing the drink to eject onto Lewis. And while counsels for the General Counsel argue that May and Stryker have no interest in the instant litigation because they voluntarily left the Respondent's employ after being recalled, to conclude they are disinterested would be to ignore the obvious passions that built up on both sides of a bitter labor dispute. Further, while it's true, as argued by counsels for the General Counsel, that Knapp is a current employee of the Respondent testifying against his employer's interests and, thus, more likely to be truthful,[129] he, like Stryker and May, was a participant in the bitter, lengthy, labor dispute.

Further, the testimony of Stryker, May, and Knapp as to what they heard and didn't hear during the McDonald's incident is troubling. Thus, Owlett testified that as Lewis and Flagg approached the picnic table, the talk at the table turned negative, that somebody at the table said that Flagg and Lewis "had a lot of nerve crossing the picket line and then coming over here to rub it in our face . . ," that some of the men at the table yelled "scabs," and "traitors," and that Owlett said that he "would like to throw my Coke right in their face." The testimony of Lewis and Flagg is largely consistent with Owlett's as to the comments, except that Lewis testified that the epithets included "two f—ing scabs."

Yet May, Knapp, and Stryker[130] testified that they didn't recall anybody at the table say "scabs" or "f—ing scabs." Stryker testified that he "didn't recall" whether any of those seated at the table said anything about Lewis and Flagg as they approached the table, whether the word "scab" was used, whether anybody said that Flagg and Lewis "had a lot of nerve coming here and rubbing it in our faces," or whether anybody at the table said they felt like throwing a drink "in their faces." Yet, all of them testified in some detail as to other portions of the incident, including that they remembered Owlett apologizing after the drink hit Lewis. In other words, Stryker, Knapp, and May generally remembered those portions of the incident that appeared helpful to the General Counsel's case, but not those portions that appeared harmful. Further, if Stryker is to be

[127] The asserted "charade" being that Stryker pretended to cause Owlett to fling the soft drink onto Lewis.

[128] Counsels for the General Counsel point to asserted inconsistencies in her testimony: that Flagg testified that after the moment she observed Owlett hit Lewis with the liquid she felt, "panicked, frightened," but that in the state court injunction proceeding she testified that the drink hitting Lewis was not "a big deal;" and that Flagg testified that the drink was all over Lewis' face, shoulders, and hair, but that the photographic evidence did not show discoloration in the shoulder area, and Lewis testified that she couldn't recall whether the drink hit her in the face or hair. But on cross-examination, when counsel for the General Counsel asked "precisely when" Flagg became panicked and frightened, she testified that this occurred when Owlett threatened that their names and addresses were posted at the union hall and they would get theirs, and not at the moment that the drink hit Lewis. Further, even if Flagg incorrectly testified as to all the places that the drink struck Lewis, and even the photographic evidence is not completely dispositive of this, I would not find this a basis to discredit the balance of Flagg's testimony.

[129] *Flexsteel Industries*, 316 NLRB 745 (1995).

[130] Stryker also testified that the drink struck Lewis "on the sleeve and on the leg." The photographic evidence demonstrated that the drink struck a much wider swath on Lewis. While Stryker's testimony presents the credibility problems discussed herein, I do not view the mere fact that he testified incorrectly as to where the drink struck Lewis as being a basis, by itself, for discrediting him.

believed, he didn't hear Owlett say he would like to throw his drink at Lewis and Flagg but, in what would be a major coincidence, a few moments later he decided to "help" Owlett do just that.

Owlett's testimony, on the other hand, was largely consistent with Flagg's and Lewis' as to the comments made by those at the picnic table. Not only is the testimony of the three largely consistent as to this, but the words quoted by all three sound contextually right, in the midst of a bitter labor dispute, with crossovers walking by strikers to have their lunch. Of course, the fact that Owlett testified truthfully as to a portion of the incident does not establish that he testified truthfully as to the crux of the issue, that is whether or not he was an active participant in the soft drink hitting Lewis, or merely in the wrong place at the wrong time.

Both sides, in their briefs, engaged in minute analyzing of the physical positions of the various participants to the incident, the exact arm location and position of Owlett when the drink ejected, the exact location in Owlett's back (or ribs as one witness testified) that Stryker alleged poked or pushed or prodded Owlett, whether the cup was paper or plastic or something else, and whether such would have affected the likelihood that the drink would have ejected out onto Lewis as it did, or simply have spilled onto the ground or Lewis's shoes, as it didn't.

I am not satisfied that, based on the record and the differences in the testimony of most of the witnesses as to these details, I can, with sufficient certainty, answer these questions. Common sense and physics would seem to indicate that for Lewis to be struck in the chest by the liquid from the cup, the cup must have been angled upwards when the liquid ejected. Further, for as much liquid to have struck Lewis, as it obviously did from the photographic evidence, it seems likely that the drink would have had to have been launched rather than the type of spill that would be likely if Owlett had been truly[131] pushed or poked from behind. But, while this makes it feasible that Owlett was throwing the liquid out of the cup towards Lewis, and that Stryker's push or poke was a charade, it doesn't prove it. Nevertheless, based on my credibility assessments described above, and credited record evidence including Owlett's pronouncement moments before the drink hit Lewis, to the effect that he wanted to hit the women with his drink, I am satisfied that the General Counsel has not, by a preponderance of the evidence, proved to the contrary, that Owlett was, in effect, merely an innocent bystander.

I further conclude that the General Counsel has failed to meet his burden in respect to Owlett's assertedly threatening comments to Lewis and Flagg, after the drink hit Lewis. Here, Lewis and Flagg, who I found to be generally credible witnesses,[132] both testified that Owlett, just after the drink hit Lewis, told the women that their names and addresses were posted at the union hall, and that they "would get theirs." Owlett admitted telling the women that their names were posted at the union hall, but denied the rest.

[131] Rather than pushed or poked as part of a charade.

[132] For the various reasons discussed herein, including my assessment of their testimonial demeanor.

Contrary to the testimony of Owlett, Lewis, and Flagg, May, and Knapp denied that Owlett told the women that their names were posted at the union hall and, in addition, denied that Owlett told the women their addresses were posted or threatened them. Stryker testified that he didn't hear Owlett's comments. Here, once again, May, Knapp, and Stryker display an apparent proclivity to tailor their testimony to what they believe benefits the Union's case. They testify to remembering Owlett apologize for the drink hitting Lewis, but not as to what Owlett said a moment later, some of which even Owlett admits to.

Based on my assessment of the testimonial demeanor of the various witnesses, and for the reasons set forth herein, I credit Lewis and Flagg as to the comments made by Owlett to them just after the drink struck Lewis.[133] But even if Owlett merely told Lewis and Flagg, after the liquid hit Lewis, that their names were posted at the union hall, which Owlett admitted to during his testimony, such comment was clearly made for the purpose of intimidation. Either way it was, in short, in the context of the drink hitting Lewis, a thinly veiled threat.

In their brief, counsels for the General Counsel argue that telling Lewis and Flagg that their names were posted at the union hall could "hardly be coercive" because they were already aware that the names of crossovers were posted there. But Owlett's mention of such, following on the heels of the drink hitting Lewis, clearly carried an implied threat of possible further retaliation, and was not a simple passing along of innocent information or a helpful reminder.

Having concluded that the General Counsel has not proven by a preponderance of the evidence that Owlett did not engage in the asserted strike-related misconduct, I now move to the issue of whether the misconduct is such that under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings*, supra at 1046. Not all strike misconduct is sufficient to disqualify a striker from further employment. *Detroit Newspapers*, supra at 223.

[133] Counsels for the General Counsel argue, in their brief, that neither Lewis nor Flagg should be believed as to Owlett's asserted threat because neither mentioned the "you'll get yours,' portion in the statements given to the MADI security guard the day of the incident, but included same in their testimony in the Board proceeding and in depositions in the Town Court proceeding. In her testimony, Lewis implied that the security guard did not include everything she told him in the statement. While I have considered counsels for the General Counsel's argument, even Owlett admitted to telling Lewis and Owlett that their names were posted at the Union hall, a comment that was not conveyed for merely informational purposes. Based on my assessments of the credibility of all the witnesses involved, discussed herein, I am convinced that the testimony of Flagg and Lewis is credible as to the incident, notwithstanding what may have been an inconsistency between their testimony and the statements they gave to the security guard. I further reject counsel for the General Counsel's argument that because Flagg had apparent difficulty on cross-examination identifying just how the Union would have obtained the addresses of crossovers (who were apparently union members at some point), Owlett could not have made the comment. While there are various ways the Union could have obtained said addresses, whether or not the Union had the addresses or had posted the addresses would not have precluded Owlett from making the threat.

In their brief, counsels for the General Counsel cite the portion of the *Detroit Newspapers* decision relating to the alleged misconduct of striker Larry Skewarczynski as being the Board case most closely analogous to the asserted misconduct of Owlett here. Counsels for the General Counsel argue that in said decision the Board found the misconduct insufficiently egregious, where the striking employee was terminated for squirting water into the eye of a security guard with a water pistol.

However, in the instant case, unlike *Detroit Newspapers*, it was an employee who had exercised her Section 7 right to return to work during the strike who was the victim of the misconduct.[134] Further, here, Lewis was victimized simply because she had exercised her Section 7 rights, in an act that took place right in front of a second individual who had also returned to work during the strike.

In *Detroit Newspapers*, the Board pointed out that the striker had also been playfully squirting his fellow strikers prior to the incident of asserted misconduct. Here, there is no evidence that Owlett had ejected his drink at anybody else other than, assertedly, the two crossovers, and this shortly after he had announced his desire to do just that. Owlett's act here, unlike that in *Detroit Newspapers*, was directed at employees exercising Section 7 rights simply because they exercised such rights, clearly would have the tendency to coerce or intimidate employees in the exercise of such rights, and was accompanied shortly thereafter by a thinly veiled threat. Finally, here Lewis was hit and soaked by the soft drink away from the picket line, while she was simply attempting to enter McDonald's to have her lunch.

The clear lesson that would be learned here was that employees who exercised their Section 7 rights to cross the picket line would be subject to such conduct even away from the picket line, even in such relatively innocent circumstances as attempting to have lunch at a McDonald's restaurant. Under theses circumstances, I find that Owlett's misconduct reasonably tended to coerce or intimidate employees in the rights protected by the Act. As such, the Respondent did not violate Section 8(a)(3) by its refusal to reinstate Owlett after the strike or to discharge him.

Suspension of Marion Cook

I found that Cook, a veteran employee at Painted Post, with over 30 years of seniority, was suspended without pay by the Respondent on May 1, 2008, for comments "referencing [the word] scabs" made on April 30, 2008, during a regular departmental meeting called by the Respondent. I further found that Cook's comments were directed to his belief that assertedly unsafe procedures engaged in by replacement employees and salaried employees in the plant were causing safety concerns. Here, the General Counsel contends that the circumstances during which Cook uttered the word were protected in that the comments were made at a meeting called by the Respondent, and were safety-related and perceived as safety-related by the Respondent. Thus, the General Counsel maintains that the mantle of protected activity was not lifted by Cook's use of the word "scabs."

Contrariwise, the Respondent would employ a *Wright Line*[135] analysis to Cook's suspension. Under the analysis, the Respondent would conclude that the General Counsel failed to meet his burden of demonstrating that Cook engaged in protected activity because, assertedly, Cook's use of the word "scabs" was not protected, and that even if the General Counsel had met its initial burden, the Respondent met its resultant burden by demonstrating that other employees had been disciplined by the Respondent for using derogatory language in violation of its code of conduct, which words had no protected content. Hence, under the Respondent's theory, it demonstrated that it would have undertaken the same discipline of Cook, even "if Cook had called his fellow worker a derogatory name, such as 'fag', which was unrelated to the ongoing labor dispute."

As this is a single-motive situation, where all parties agree that Cook was disciplined because of his use of the word "scabs" during the departmental meeting, the only issue to decide is whether this conduct was or was not protected under the Act, and, hence, the use of a *Wright Line* analysis is not necessary. *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003). But the mere fact that an activity may be concerted, does not mean that the employee can engage in the act with impunity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 837 (1984). When an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is so egregious as to take it outside the protection of the Act. *Consumers Power Co.*, 282 NLRB 130, 132 (1986).

As I have found, Cook's "scab" comment was made in the context of a meeting of employees called by the Respondent, and at which employees were permitted to ask questions, including safety questions. Further, Cook's comment was directed at safety-related concerns and the Respondent's attending supervisor so understood the comment. As such, the comments enjoyed the mantle of the Act's protection, unless they were so egregious that they became unprotected.

In *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000), the Board discussed a factually analogous situation as follows: "In *Linn*[136] the Supreme Court endorsed the Board's expansive definition of Section 7 activity with respect to free expression. The Court noted with approval that the Board has allowed 'wide latitude to the competing parties,' and that the Board has concluded that epithets such as 'scab' are commonplace in these struggles and [are] not so indefensible as to remove them from the protection of Section 7." In *Nor-Cal Beverage*, the Board further stated, "In *Letter Carriers v. Austin*,[137] the Court reaffirmed that although the word ['scab'] is most often used as an insult or epithet . federal law gives a union license to use

[134] Counsels for the General Counsel, in their brief, conceded that "[i]f Owlett had threatened them as . . claimed, then the spilling of the drink would, of course, take on greater significance, whether intentional or not.'

[135] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[136] *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

[137] 418 U.S. 264 (1974).

intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point."

In *Nor-Cal Beverage*, supra, the usage of the word "scab" was unaccompanied by any threat, or physical gestures, or contact, as is the case here. Further, in *Nor-Cal*, the offending word was used during a conversation between two employees. Here, the word was used during an employee meeting called by a supervisor, at which questions or concerns from employees were invited. In both circumstances, the activities were protected, and in neither was the usage of the word "scab" so egregious as to remove the mantle of protection. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by imposing a disciplinary suspension on Cook, as is alleged in the complaint.

Alleged Unilateral Changes: Paid Lunch Break During Weekend Overtime

Counsels for the General Counsel maintain that they demonstrated the existence of a long-term past practice of the Respondent providing paid 20-minute lunchbreaks for employees working weekend overtime shifts of 7 hours or greater, and that neither the expired collective-bargaining agreement, nor the imposed terms and conditions dealt with that subject. Counsel for the General Counsel, thus, argues that since no bargaining took place over the subject, the Respondent's action in changing the benefit to a paid 20-minute lunch only after 8.5 hours of weekend overtime constituted a unilateral change in terms and conditions of employment.

Contrariwise, the Respondent maintains that the imposed terms and conditions explicitly changed the overtime lunch period provision of the expired contract so that the paid 20-minute lunchbreak applied "to only those days where an employee worked four or more hours in addition to his regularly scheduled shift."[138] Thus, the Respondent argues, since there is no regularly scheduled shift on the weekend, employees would not qualify for the paid 20-minute lunchbreak by working 7 hours under the implemented terms, as they had under the expired contract.

In support of its argument that the implemented terms changed the practice under the expired contract, the Respondent maintains that the words "in any given day" in the imposed terms substituted for the words "in any day" under the expired contract, "evidences Respondent's intent to change the meaning of the paid lunch provision"[139] and, thus, mandates that an employee, to qualify for the paid lunchbreak on weekend overtime, work at least 4 hours in addition to his regularly scheduled shift. Thus, the Respondent argues, the evidence presented by the General Counsel as to past practice for weekend overtime paid lunchbreaks under the expired contract is irrelevant since the Respondent, assertedly, changed the provision in its imposed terms and conditions.

Lunchbreaks, scheduling of shifts, and, of course, paid benefits are terms and conditions of employment and mandatory subjects of collective bargaining. *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 156 (1998), citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). As the subject is mandatory, unilateral changes of such constitute a violation of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962). If the "employment conditions the employer seeks to change are not 'contained in' the contract the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change." *Milwaukee Spring Division*, 268 NLRB 601, 602, (1984). A benefit provided consistently by an employer over a number of years can become a term and condition of employment such that it cannot be unilaterally altered or abolished without bargaining with the union. *Bonnell/Tredegar Industries*, 313 NLRB 789 fn. 6 (1994), enf. 46 F.3d 339 (4th Cir. 1995).

Here, the record evidence is uncontroverted that for years the Respondent has provided a paid 20-minute lunchbreak period for employees working weekend overtime shifts of 7 hours or greater, and that the Respondent changed that practice to require that employees work 8.5 hours of weekend overtime to qualify for a paid 20-minute lunchbreak, when its employees returned to work after the strike and lockout. Inasmuch as the record evidence establishing the past practice is uncontroverted, I conclude that the General Counsel has established that the practice became a term and condition of employment.

The Respondent's argument that the imposed terms changed that past practice is not persuasive. The argument fails because the evidence demonstrated that the paid lunchbreak provision of the overtime section of the expired contract never applied to weekend overtime shifts and the parties never treated the provision as if it did. Substituting "in any given day" in the imposed terms for the "in any day" in the expired contract provision dealing with paid breaks during overtime does not change this result, as is argued in the Respondent's brief. Further, to attempt to link the provision in the imposed terms to weekend overtime shifts would produce the anomalous result, arguably, of granting paid 20-minute lunchbreaks to employees working a weekend overtime shift of greater than 4 hours, if the language were interpreted literally.[140]

Accordingly, inasmuch as the Respondent, admittedly, changed the existing employment term of providing paid lunchbreaks to employees working weekend overtime shifts of 7 hours or greater, it had an obligation to bargain with the Union before engaging in such change. As the evidence established that it did not bargain as to the change, I conclude that the Respondent violated Section 8(a)(5) of the Act, as alleged in the complaint.

Alleged Unilateral Changes: Hours of Weekend Overtime Shifts

Counsels for the General Counsel argue that the evidence establishes that the Respondent has maintained a longstanding practice of offering 5- and 7-hour weekend overtime shifts,

[138] From the Respondent's brief.

[139] From the Respondent's brief.

[140] The imposed provision: "Employees that work more than four hours of overtime in any given day will be granted a 20 minute paid lunch break.' Both the imposed terms and the expired contract provide that Saturday work is not part of the normal workweek. Thus, literally, any Saturday work over 4 hours would trigger the paid lunchbreak provision, a result which no party here would argue was intended.

with employees having the option to leave work after 5 hours.[141] As in respect to the issue of paid lunchbreaks, counsels for the General Counsel maintain in their brief that this asserted long-term practice has become an established term and condition of employment requiring the Respondent to bargain before altering, and that since the Respondent did not so bargain, it violated Section 8(a)(5) of the Act.

Contrariwise, the Respondent maintains that there never has been an established practice as to the scheduling and duration of weekend overtime shifts and that the Respondent had simply scheduled such shifts depending on its production needs. Thus, there was no unilateral change of an established term and condition of employment, and no violation of Section 8(a)(5).

Here, I find the Respondent's argument more persuasive, and conclude that the General Counsel has not established that there was a prior practice that weekend overtime shifts were only either 5- or 7-hour shifts beginning at either 5 a.m. or noon on Saturday, such as would create an established term and condition of employment. In this respect, the General Counsel has neither established that there was a strictly followed practice as to shift scheduling before the strike, nor that whatever practice there may have been prior to the strike was changed after the strikers returned.

Thus, the General Counsel's own witnesses testified that while before the strike certain posted weekend overtime shift hours were more common, they further testified that it was not unusual for the Respondent to post other, different shift hours, based on production needs, and in some departments such changes or different hours were frequent. These same witnesses testified that after the strikers returned to work, the most common prestrike shifts were still generally available, that is 5 a.m. to noon and noon to 7 p.m., but that frequently other shifts were also posted. Further, the concept of committed voluntary overtime, part of the expired contract, was continued without change by the Respondent when the strikers returned to work.

The lone change appears to be that prior to the strike, employees who committed to work 7-hour shifts were permitted by their supervisors to leave, upon request, after working 5 hours, while after the strike such was no longer an option. The Respondent argues, however, that rather than a policy change vis a vis its employees, the Respondent began requiring its supervisors to only schedule the amount of overtime that was actually necessary for production, rather than overscheduling as they had done before. As such, it would not represent a change in an established term and condition as the General Counsel's own witnesses testified that even prior to the strike and under the expired contract the Respondent frequently changed weekend overtime shift hours based on production needs.

On balance, and particularly relying on the testimony of the General Counsel's witnesses to the effect that prior to the strike, and under the expired contract, the Respondent frequently posted different hours for weekend overtime shifts based on the Respondent's production needs, I cannot conclude that any firm practice as to the schedule of weekend overtime shifts was established so as to become an established term and condition of employment. Further, it does not appear that there has been any substantial change in this policy since the strikers returned. Since the subject was not an established or continuing term and condition of employment either by practice or contract, I conclude that the Respondent did not violate Section 8(a)(5) of the Act as alleged in the complaint.

Denial of Vacation Benefit to Returning Strikers

The complaint alleges that the Respondent violated Section 8(a)(3) by denying accrued vacation leave to recalled employees who participated in the strike. The General Counsel maintains that the vacation benefit accrued to the striking employees before the strike began, that it was denied to strikers upon their return to work upon the apparent basis of the strike, and that the Respondent failed to demonstrate a legitimate and substantial business justification for denying the benefit. The Respondent argues that the vacation benefit was not accrued, that it simply applied the new policy set forth in its imposed terms and conditions, and that those strikers who were denied the benefit were denied because they failed to meet the qualifications contained in the imposed terms.

In *Texaco, Inc.*, 285 NLRB 241, 245–246 (1987), the Board set out the following test for deciding whether denials of benefits to strikers are discriminatory:

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. We emphasize the need for proof that the. .benefit is accrued, that is "due and payable on the date on which the employer denied [it]." Absent such proof, there is no basis for finding an adverse effect on employee rights because an employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services for the employer. E.g. *General Electric Co.*, 80 NLRB 510 (1948). Proof of accrual, on a case-by-case basis, will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice. [Some citations omitted.]

Further, pursuant to the Board's *Texaco* test, if the General Counsel meets the prima facie burden, then, under the Court's reasoning in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the burden shifts to the employer to prove a legitimate and substantial business justification for the benefit cessation, which may be demonstrated by evidence of a union's clear and unmistakable waiver[142] or reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct. *Texaco*, supra at 246. If the employer proves business justification, the Board will dismiss the complaint if the adverse effect of the discriminatory conduct was merely "comparatively slight" but may, nevertheless, find that an employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated

[141] And that this was the unilateral change alleged, but not specified, in the complaint.

[142] The Respondent does not contend that the Union affirmatively waived any rights as to payment of the vacation benefit.

by antiunion intent. *Swift Adhesives*, 320 NLRB 215 (1995), enf. 110 F.3d 632 (8th Cir. 1997).

As to whether the disputed vacation benefit was accrued, the General Counsel relies on the arbitrator's 1987 decision reconciling sections 14(D) and (N) of the then existing contract, a decision in which the arbitrator concluded that the vacation eligibility of laid-off employees was frozen at the time of layoff, so that the vacation eligibility should be calculated on the basis of the 12-month period previous to layoff "without consideration in the calculation for the time while the employee was on layoff" and "an employee who had worked the requisite number of hours to be eligible for vacation in the **calendar year** of layoff will, upon recall in a subsequent **calendar year**, be immediately eligible to take vacation. ." (Emphasis added.)

Contrariwise, the Respondent argues that the specific language of section 14(N) providing that an employee "shall at the end of such year be entitled [to vacation with pay]," demonstrates the intent of the parties that the benefit for paid vacation the following year only becomes accrued at the end of the current year and that, thus, any vacation earned by working the requisite 900 hours in 2007, would not vest until December 31, 2007. Inasmuch as the last contract expired on August 4, 2007, and the Respondent implemented its terms and conditions without language resembling section 14(N) on November 29, 2007, the Respondent argues that any paid vacation benefit accrued in 2007 would be controlled by its implemented terms which mandated that an employee had to work at least 900 hours in the preceding 12 months, rather than by section 14(N) or the arbitrator's opinion. Thus, the Respondent argues, only employees who worked 900 hours during 2007,[143] would be entitled to the vacation benefit in 2008, thereby disqualifying the 23 strikers who returned in August and September 2008 and, thus, had not worked in the prior 12 months.

In *Swift Adhesives*, supra, a case cited by counsels for the General Counsel and the Respondent in their briefs, and factually analogous to the instant case, the Board concluded that the employer violated Section 8(a)(3) by denying vacation pay to permanently replaced strikers. In *Swift*, the contractual vacation benefit accrued to employees who had been employed a set number of calendar days during a calendar year, and once the set number of calendar days was reached, the employee would be eligible to take vacation the following calendar year. All of the replaced strikers at issue had reached the contractually set number of days prior to the collective-bargaining agreement's expiration on September 30. The employees struck on October 1, were permanently replaced about a month later, and the Union requested vacation pay for the employees on January 4. The Respondent denied the request for some of the employees on the basis that it had implemented its final offer, which changed the vacation eligibility basis for vacation pay from calendar days employed to days actually worked, and which, thus, disqualified the strikers from the vacation benefit.

The Board, in *Swift*, concluded that the vacation benefit had been accrued prior to the strike and prior to the contract's expiration, and that the denial of the benefit was a direct result of the strike because, but for the strike, the employer would have deemed the strikers eligible for the benefit. Further, in *Swift*, and citing the Board's decision in *R. E. Dietz Co.*, 311 NLRB 1259, 1266 (1993), the Board distinguished between accrued wages and benefits, which are owed, and future terms and conditions, which could be affected by legally imposed after impasse changes. In applying the Board's reasoning in *Swift* to the instant case, I conclude that, as in Swift, the vacation benefit here accrued to the 23 strikers prior to the strike and prior to the contract's expiration, and that the denial of the benefit was a direct result of the strike.

In reaching this conclusion, I find the Respondent's argument that the vacation benefit did not accrue until December 31 and, therefore, after the contract's expiration and the Respondent's imposition of new terms and conditions, to be unpersuasive. In this respect, I particularly note that the arbitrator's decision interpreting said section explicitly found that in the event of layoff,[144] vacation benefit eligibility was frozen as of the date of the layoff, and was payable immediately upon recall in a subsequent calendar year.[145] Applying the arbitrator's reasoning here would result in all 23 strikers being entitled to the vacation benefit upon their recall in 2008, and further that said benefit was accrued at the time the employees went on strike, prior to the Respondent's imposition of new terms and conditions. Further, the denial of the benefit here was apparently based on the strike because, as in *Swift*, the Respondent would have deemed the strikers eligible for the benefit, except for the strike.

I, further, conclude that the Respondent has failed to meet its burden of showing that it denied the vacation benefit based on a legitimate and substantial business justification. In reaching this conclusion, I note while the Respondent argues in its brief that the General Counsel has failed to meet its prima facie burden of establishing that the vacation benefit was accrued and withheld on the apparent basis of the strike, and further argues that the withholding of the benefit was not discriminatory,[146] it does not argue in the alternative that if, in fact, the General

[143] Or a prior rolling 12-month period.

[144] A break of service clearly analogous to the strike and/or lockout.

[145] I also find that the Respondent's argument to the effect that the arbitrator's decision was based on a "past practice" which had been discontinued and, thus, is not relevant to the issue here, to be unpersuasive. In fact, the arbitrator's decision, in interpreting the contractual sections at issue, rejected the Respondent's past practice argument specifically referred to in the decision, and instead relied on the specific wording of the contractual sections at issue.

[146] In this regard, the Respondent argues that the General Counsel failed to establish that the denial of the vacation benefit was discriminatory, because the Respondent demonstrated that certain strikers who were recalled earlier than the strikers at issue were granted the benefit if they met the benefit criteria under the imposed terms or the criteria as argued by the Respondent, and because there was no evidence that the Respondent treated strikers differently than nonstrikers or replacements. But the Board's test for discriminatory conduct under the instant circumstances is as set forth in *Texaco*, above, and that is whether the benefit is accrued and whether the denial of the benefit was apparently based on the strike. In other words, an accrued benefit cannot be taken away because of the strike, without legitimate and substantial business justification. To do such is discriminatory within the meaning of Sec. 8(a)(3).

Counsel met its prima facie burden, the Respondent, nevertheless, met its resultant burden of demonstrating a legitimate and substantial business justification. However, to the extent that it could be argued that its reliance on either the language of the expired contract or the imposition of its imposed terms and conditions as such a justification, I reject such argument for the reasons set forth above. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by withholding the paid vacation benefit to the 23 returning strikers, as alleged in the complaint.

The Lockout: Was the Union's Offer to Return Unconditional?

The complaint alleges that the Respondent locked out strikers and crossover employees, but not permanent replacements, and that such action was unlawfully motivated. In their brief, counsels for the General Counsel explain the General Counsel's theory of violation as follows: "Nowhere in the Complaint is it alleged that the act of locking out employees was, in and of itself, unlawful." And further, "The violation does not arise from who the Respondent locked out; it is who Respondent did not lock out, i.e. the permanent replacements." In essence, the General Counsel contends that once the Union ended the strike and offered to return, the permanent replacements assumed full bargaining unit status, and the act of locking out all other unit members, but not permanent replacements, was discriminatory and in violation of Section 8(a)(3). The Respondent, denying that the lockout violated Section 8(a)(3), argues that the Union's offer to return was defective in that it was neither unconditional, nor compliant with the Union's own rules and that, in any case, it was not discriminatorily motivated.

The Union's offer to return was made on November 19, 2007, and conditioned only on the terms and conditions of employment contained in the expired contract.[147] The terms of the expired collective-bargaining agreement were the lawful existing terms and conditions of employment because, at the time the Union's offer was made, the Respondent had neither declared impasse nor imposed new terms and conditions pursuant to impasse.[148] Such an offer, based on the only lawful existing terms and conditions of employment, is not conditional because those were the terms that the Respondent was required to reinstate them under. See, for example, the Board's discussion in *Spentonbush/Red Star Cos.*, 319 NLRB 988, 989–990 (1995). I conclude, thus, that the Union's offer of November 19 constituted an unconditional offer to return.

McAllister Bros., Inc., 312 NLRB 1121 (1993), cited by Respondent, in its counsels' brief,[149] (to the effect that the Union's offer to return was conditional because it required the terms and conditions of the expired contract) is inapposite because the Board's findings there reflect a significant factual difference from the instant case. In *McAllister Bros.*, the parties had reached impasse and the employer had imposed new terms and conditions prior to the union's offer to return under the terms of the expired contract. Here, when the Union made its November 19 offer, the Respondent had not declared impasse and had not imposed new terms and conditions. Thus, the Union's offer here is not conditional, because the terms it included were the terms the Respondent was required to apply in the absence of impasse and imposition of new terms and conditions.

Notwithstanding the above, the Respondent further argues that the Union's offer to return was conditional because, the Respondent asserts, the offer was on behalf of "all striking employees," and thus, required the Respondent to reinstate all the striking employees as a group, if accepted. The Respondent maintains that because it had permanently replaced some of the striking employees, the Union's offer was conditioned on replacing the replacements with returning strikers and was, thus, not unconditional. The Respondent again cites the judge's opinion in *Genesis Health Ventures, Inc.*, supra, as the case law supporting its argument.

Although *Genesis Health Ventures, Inc.* was not a decision reviewed by the Board and, thus, not appropriate precedent for the Board's view of the law, an examination of the facts set out in the judge's decision discloses significant differences from the facts found herein. There, the union insisted that the employer return the strikers as a group and the General Counsel argued that because the strikers were unfair labor practice strikers, the offer to return was unconditional inasmuch as the strikers had this right, by virtue of their status. The judge, however, concluded that the strike was economic, and not caused by

[147] While the Union's written offer did not explicitly state that it was conditioned on the terms of the expired contract, the mediator conveyed to the Respondent the Union's answer to the Respondent's question, and the Union itself communicated this information to its own members.

[148] The Respondent concedes, in its brief, that the expired contract's terms were in effect until November 29, 2007, but argues that the terms and conditions of the permanent replacement employees were different, and specifically points to the *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), letter that it required permanent replacements to sign. The Respondent argues that the *Belknap* letter set forth certain bases for discharge mostly related to the strike, including a settlement with the Union that required their discharge and that, therefore, the permanent replacements could be discharged on more grounds than set forth under the expired contract. Apparently, the Respondent argues that the setting of different terms and conditions, to the extent they were different, constituted a setting of new terms and conditions so that the Union's offer became conditional.

However, the permanent replacements were not such members of the bargaining unit at that time that required bargaining with the Union and, thus, the terms and conditions that applied to the permanent replacements did not constitute newly imposed terms and conditions on the bargaining unit pursuant to an impasse. "We adhere to the Board's well-established doctrine that an employer need not bargain with a union in regard to the terms and conditions of employment for strike-replacements hired during a strike.' *Detroit Newspaper Agency*, 327 NLRB 871 (1999).

[149] The Respondent's brief also cites two other decisions: *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1810, 1830 (1954), and *Genesis Health Ventures, Inc.*, 1991 WL 1283101 (1991). *Genesis Health Ventures* is a decision issued by an administrative law judge, to which there were no exceptions taken. Similarly, the Respondent's citation in *Honolulu Rapid Transit* is to a page of the administrative law judge's opinion. Further, even the judge's opinions in those cases do not support the Respondent's position here, that the Union's offer to return here was conditional because it included a return under terms of the expired contract, where no impasse had been declared and where the Respondent had not imposed new terms.

unfair labor practices, so that the strikers were economic strikers, and without status as unfair labor practice strikers they didn't have the right to insist on a group return. On that basis, the judge concluded that the offer to return was conditional.

In the instant case, the Respondent argues that the words used by the Union in its written offer of November 19, 2007, should be construed as demanding a group return as a condition of the offer, as in *Genesis*. Inasmuch, the Respondent argues that since it had permanently replaced some of the strikers, to the extent that the Union's offer was conditioned upon the return of all strikers as a group, it constituted a demand that the Respondent replace the permanent replacements with returning strikers.

The entire letter of November 19, signed by IUE–CWA Industrial Division President James D. Clark, is as follows: "On behalf of IUE–CWA and its Local 81313, I hereby tender to you, as chief negotiator for Dresser-Rand, an immediate, unconditional offer to return to work for all of those employees on strike at the Painted Post facility." The Respondent points to the words "for all of those employees on strike," as demonstrating that the Union's offer required the group reinstate of all strikers, thereby making the offer conditional.

Contrary to the Respondent's argument, I find nothing in the Union's written offer of November 19, nor in the subsequent conversations between representatives of the Union and the Respondent detailed earlier in this decision, from which one could reasonably conclude that the Union's offer was conditioned upon the Respondent immediately returning all the strikers as a group to work. Neither in the offer nor subsequent conversations between the parties concerning the Union's offer did the Union ever insist that the offer was dependent on the Respondent accepting the return of striking employees as a group.

To the extent the Respondent argues that it was confused by the Union's offer as to whether the Union was insisting on the return as a group and that the offer was ambiguous to that extent, the burden is on the Respondent to inquire of the Union as to any such ambiguities. *SKS Die Casting*, 294 NLRB 372, 375 (1989). Here, there is no evidence that the Respondent raised its now asserted concerns as to group reinstatement with the Union during discussions held subsequent to the Union's offer. Further, the Board has repeatedly held that wording such as that used in the Union's letter will not be used as a basis to infer that the offer is conditioned upon reinstatement of the entire group. "Where reinstatement offers are made regarding 'all striking employees,' 'the members,' and similar collective designations or lists of employees, this Board does not infer that the reinstatement of one is conditional on the reinstatement of all." *Home Insulation Service*, 255 NLRB 311 fn. 8 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981), and cases cited thereat. I, thus, conclude that the Union's offer was not conditioned upon a group return of the strikers.

Finally, as to whether the Union's offer was unconditional, the Respondent argues that the Union engaged in subsequent actions inconsistent with an unconditional offer to return, and that the offer was made without comporting with the Union's own rules as to the making of such an offer. As to the assertedly inconsistent actions, the Respondent, in its counsels' brief, relies on the Board decision in *Supervalu, Inc.*, 347 NLRB 404 (2006), to the effect, assertedly, that the Union's inconsistent actions here precluded the offer from being unconditional.

In *Supervalu*, supra, the Board affirmed the judge's decision that the employer had permanently replaced strikers before they individually had unconditionally offered to return to work. There was no union involved, and the judge measured the conduct of individual employees as to their true willingness to return to work. The General Counsel argued that the employees had only struck for a single shift, intending to return the next day to work on their normal shift and that, therefore, the strike was over before they were permanently replaced. The judge rejected the General Counsel's theory that the strike was limited to a single shift because she found that the actions of individual strikers to be inconsistent with an intent to return to work the next day and limit the strike to a single shift. As found by the judge, "their assertions and conduct were totally inconsistent with an unconditional offer to return to work or indicative of the idea that the employees had struck for only one shift." Supra at 414.

Under the facts as set forth by the judge there, I don't find the *Supervalu* decision to be analogous, controlling, or instructive as to the law to be applied to the facts of the instant case. Unlike the circumstances in *Supervalu*, here, the employees were represented by a Union which clearly communicated a written unconditional offer to return to the Respondent. Further, here, contemporaneously with its offer to return to work, the Union ordered all picketing at the Respondent's premises to cease. The fact that the Union and its members may have still been unhappy with their lack of an agreed-to contract and expressed such in various ways does not detract from the unconditional nature of the offer.

The Respondent, in its counsels' brief, particularly points to the Union's November 19, 2007 letter to its membership explaining the Union's offer to return, and the following two passages: "our fight for a fair contract would be more effective if we return to work," and "while the strike is ended, the struggle continues." The quoted passages, however, instead of demonstrating actions inconsistent with an unconditional offer to return as argued by the Respondent, reinforce to the Union's membership the concept that the strike was over and that the employees were to return to work. There is nothing inconsistent in the Union telling its membership that it will continue to seek (fight for) an assertedly fair contract, with the idea that the offer to return to work was without conditions. The Respondent's argument that, in effect, the Union and its members, must not only offer to go back to work, but must not express unhappiness with the situation or an intent to seek a "fair contract" is unpersuasive. Suffice it to say, nothing in the Union's conduct or speech contemporaneously or subsequent to its offer to return demonstrated that the offer was equivocal or anything but unconditional.

The Respondent's argument that the Union's offer to return did not comport with its own rules is based on record evidence that the Union's membership never voted to end the strike, nor did the CWA's executive board, both acts being required under the Union's bylaws and constitution. Counsels for the General Counsel, in their brief, argue that whether the Union followed

its own rules in making the offer is irrelevant to the issue of whether the offer constituted an unconditional offer to return to work and end the strike, and analogizes the issue to a long line of Board decisions that hold that, absent an express agreement, a union's internal contract ratification vote and procedures (including whether a union even holds a ratification vote) are internal union affairs, upon which an employer may not intrude. See, for example, *North Country Motors, Ltd.*, 146 NLRB 671, 672–674 (1964), and *Sheridan Manor Nursing Home,* 329 NLRB 476, 477 (1999).

Without determining whether the Union fully complied with its own internal procedures in deciding to present the Respondent with its offer to return to work and end the strike,[150] I conclude that the answer to the issue does not impact on whether the Union's offer to return constituted an unconditional offer within the meaning of Board law. Thus, the Board, in *North Country Motors, Ltd.*, supra, held as follows in respect to contract ratification: "It was, thus, for the Union, not the Respondent, to construe the meaning of the Union's internal regulations relating to ratification." Here too, in an analogous situation, the details and procedures of the Union's internal process in reaching its decision to present the Respondent with an offer to return are an internal matter for the Union to decide, and not a basis for the Respondent to raise a belated challenge to at hearing, a challenge it did not raise at the time the offer was made. As I have concluded that the Union's offer to return was unconditional, I further conclude, as argued by the General Counsel, that once the offer was communicated to the Respondent on November 19, 2007, and the strike ended, the permanent replacement workers became part of the existing bargaining unit. *Detroit Newspapers,* 327 NLRB 871 (1999), quoting from Judge Richard D. Taplitz' opinion in *Leveld Wholesale, Inc.* 218 NLRB 1344, 1350 (1975).

The Lockout: Was it Discriminatory?

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Court delineated the burdens carried by each side to establish whether or not an employer's action, here the lockout, was motivated by a discriminatory purpose.[151] A discriminatory purpose could be found if the employer's actions were "inherently destructive" of Section 7 rights, even where the employer presents evidence of a business motivation. However, if not inherently destructive and, hence, "comparatively slight," an employer may come forward with evidence of a legitimate and substantial business justification for the conduct, which would then shift the burden to the General Counsel to demonstrate an antiunion motivation. Here, counsels for the General Counsel repeatedly stated, on the record and in brief, that the General Counsel does not argue that the Respondent's imposition of the lockout was inherently destructive of Section 7 rights, and that the case was not being prosecuted on that theory. Hence, to prevail on this issue, specific evidence of the Respondent's discriminatory intent is required. *American Shipbuilding v. NLRB*, 380 U.S. 300, 311 (1965). Here, the General Counsel argues, essentially, that the nature of the Respondent's lockout, strikers and crossovers locked out, but not permanent replacements, evidences its discriminatory intent.

Counsels for the General Counsel argue that they have demonstrated that the lockout was motivated by antiunion reasons in that the Respondent has failed to meet its burden of establishing substantial and legitimate business reasons for the lockout and that, in any case, the Respondent's animus has been demonstrated both by other violations of the Act alleged in the complaint, and by the partial nature of the lockout. Further, the General Counsel asserts that the partial nature of the lockout demonstrates a "perfect correlation" in the sense that all those employees who exercised Section 7 rights (by striking or by striking and then returning during the strike) were locked out, while the permanent replacements were not. Thus, the General Counsel argues, the Respondent's failure to lockout the permanent replacements, part of the bargaining unit once the Union unconditionally offered to return, demonstrates that the lockout was motivated by antiunion discriminatory reasons.

Contrariwise, the Respondent denies either that the lockout was motivated by antiunion considerations, or that the General Counsel has demonstrated such. Instead, counsels for the Respondent argue that they have demonstrated that the Respondent maintained substantial and legitimate business reasons for imposing the lockout, that the General Counsel has failed to demonstrate that the Respondent was motivated by antiunion animus, and that no "perfect correlation" existed here. The Respondent's counsels further posit that the General Counsel's argument, despite explicitly disclaiming an "inherently destructive" theory of violation, in reality proceeds on just such an argument because the General Counsel maintains that the lockout, in and of itself, is evidence that it was motivated by discriminatory reasons. The Respondent, thus, argues that if the lockout itself was not inherently destructive of Section 7 rights, and the General Counsel does not contend that it was, then the lockout itself cannot be used to demonstrate it was prompted by antiunion reasons.

The Respondent's Business Reasons

Here, the Respondent argues that it employed the lockout to apply pressure to the Union to accept its bargaining demands, to combat the Union's possible employment of an "inside game" strategy to replace the strike, and to preclude returning strikers' usage of vacation time during the last 6 weeks of the year in order to disrupt the Respondent's operations as the Respondent would have released its temporary replacement employees upon the strikers return.[152] The General Counsel maintains that the Respondent's inclusion of the crossovers in the lockout is an action inconsistent with the Respondent's professed justification of applying economic pressure on the Un-

[150] An issue not fully litigated nor argued by the General Counsel or the Union other than their on the record position that such was irrelevant.

[151] "An employer may lockout its employees for legitimate and substantial business reasons." *Eads Transfer,* 304 NLRB 711, 712 (1991).

[152] The Respondent also argues that its individual contracts with permanent replacement employees precluded their inclusion in the lockout because a lockout was not one of the causes listed in the individual contracts for separation. It is unnecessary for me to reach the argument inasmuch as I have concluded that the Respondent did, in fact, maintain a legitimate and substantial business justification for its lockout.

ion, and that the Respondent's "inside game" argument may be relevant if the General Counsel had alleged that an entire lockout violated the Act, but not here where the complaint alleges a partial discriminatory lockout.[153]

Viewing the evidence as a whole, it is clear that the Respondent engaged in the lockout in furtherance of its bargaining demands. Thus, the record demonstrates that the parties have a long-standing collective-bargaining relationship and, more particularly, met numerous times, exchanging proposals and counterproposals, in an effort to reach agreement during the instant contract negotiations, without a complaint being issued alleging a failure to bargain in good faith as to the negotiations. Indeed, based on the instant record, it appears that the Respondent has bargained in good faith in the negotiations at issue in this case, and the General Counsel does not contend to the contrary. Yet, the strike continued because neither side was able to successfully use its economic weapons (the Union's strike, the Respondent's use of replacement workers) to force or otherwise to convince the other side to agree to its bargaining proposals, or to reach a compromise.

In either a recognition of the failure of its economic weapon to secure a satisfactory contract, or in hopes of changing the dynamics of the situation with the possibility of some progress towards an agreement, the Union ended the strike and offered to return. In the Union's letter to its membership explaining the offer to return to work, it told the members that "the struggle continues" and that "our fight for a fair contract would be more effective if we return to work," thereby signaling that the Union was not giving in to the Respondent's contract proposals. Obviously, the Respondent, at the same time, was entitled to continue to insist on its contract proposals, and to employ its economic weapons, including a lockout, with a sole object being seeking the Union's agreement to the Respondent's contract demands. "Simply put, an employer is and should be free to exert any force that has as its only effect compelling the union to yield in a current dispute." *Central Illinois Public Service Co.*, 326 NLRB 928, 931 (1998).

When the Respondent announced the lockout to the Union, it communicated a letter to the Union which contained the following: "To end the lockout and return to work, the Union need only agree to the Company's last offer . . ." By communicating this single demand to the Union, the Respondent clearly demonstrated that its purpose in imposing the lockout was to apply sufficient economic pressure to induce the Union to agree to its proposals.[154] Using a lockout for this purpose is not illegal and is a legitimate and substantial business justification for the lockout. "Urging consideration and acceptance of one's bargaining proposals is clearly a legitimate bargaining position, and we find that application of economic pressure in support of this bargaining position constitutes a legitimate and substantial business justification for the lockout within the meaning of *Great Dane*." *Central Illinois Public Service Co.*, supra at 932.

In maintaining that the Respondent has failed to substantiate a legitimate and substantial business reason for the lockout, the General Counsel relies on what it asserts was the Respondent's "inconsistent" action in including crossover employees in its lockout, and argues "if the purpose of the lockout was to bring economic pressure to bear on the Union, there was no need to lockout the crossovers, who had abandoned the strike." In support of its position, the General Counsel cites *Field Bridge Associates*, 306 NLRB 322, 334 (1992), and *Ancor Concepts, Inc.*, supra, as cases where the Board determined that an employer's inconsistent actions belied its assertion of substantial and legitimate business reasons. But neither of those cases is factually analogous to the instant case. In the former case, the employer only recalled some, but not all, of the strikers at the conclusion of the lockout, thereby demonstrating the purpose of the lockout was other than economic, and in the latter case the employer informed strikers who had offered to return, that they had been permanently replaced, when they had not been so permanently replaced prior to the offer to return.

Here, the Respondent argues, and has demonstrated on the record, that it included the crossovers in the lockout only because it believed that under the law that it was required to lock them out, along with the strikers, to preclude the lockout from being labeled as discriminatory.[155] There is no evidence to the contrary as to the basis of the Respondent's decision and, indeed, the complaint includes an allegation that, in effect, the Respondent discriminated in favor of the crossovers at the time it ended its lockout and recalled employees to work. Thus, rather than demonstrating that the Respondent's action in including the crossovers in the lockout was inconsistent with a business or economic justification, the treatment of the cross-

[153] I do not find the Respondent's "inside game" argument supportive of a business reason defense. The record contains insufficient evidence from which I could reasonably conclude that the Union had decided to engage in such a campaign. Further, the evidence proffered by the Respondent as to possible prestrike sabotage did not implicate the Union in such, other than by timing. No direct evidence was provided linking the Union or the labor dispute to the asserted sabotage.

[154] In *Midwest Generation, EME, LLC*, 343 NLRB 69, 71 (2004), the Board held in respect to an analogous communication from an employer to a union, "the evidence here clearly establishes that the Respondent's lockout was for the purpose of applying economic pressure in support of its legitimate bargaining proposals. The Respondent expressly stated in its . . letter to the Union announcing the lockout that it would end as soon as 'a new contract is agreed to and ratified by your membership.' The Board has made clear that an employer's 'assertion that it would not offer the strikers reinstatement until a new agreement was reached' is 'sufficient to inform the striking employees that the employer was locking them out in support of its bargaining position.' *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997) enf. denied 166 F.3d 55 (2d Cir. 1999).

[155] Elizabeth Powers, the Respondent's then vice president and chief administrative officer made the decision to include the crossovers in the lockout. She credibly testified as to that decision as follows, in pertinent excerpts: "We spent a lot of time talking about that, and seeking legal counsel, and frankly trying to determine if there was a legally appropriate way to keep the crossovers, because they obviously had come back to work under very difficult circumstances, and were back in the work place being productive. I made the determination, again, on the basis of my understanding of the law, which is that we can neither discriminate nor benefit any member of the bargaining unit in this process, and of the unit that had voted to strike, and the crossovers were part of that bargaining unit, and we felt it would be a benefit to them if they were allowed to stay to work, so we felt we were required, legally, to lock them out, and we did."

overs simply reflected, rightly or wrongly, the Respondent's legal judgment that it was required to include the crossovers in the lockout.

While the General Counsel correctly argues that including the crossovers in the lockout did not serve the purpose of placing economic pressure on the Union because the crossovers had already abandoned the strike, I conclude the action was not inconsistent with the Respondent's substantial and legitimate reason for the lockout, which was to put economic pressure on the Union. The Respondent believed that it needed to include the crossovers in the lockout in order to avoid the possibility that to do otherwise would risk allegations that the lockout was discriminatory. Indeed, the idea may not be farfetched. In oral argument before me, counsel for the General Counsel posited, "In another case, had the crossovers not been locked out we might, I can't say for sure as I stand here, we might be alleging a different sort of violation." I, thus, conclude that the Respondent has demonstrated a substantial and legitimate business reason for the lockout, thereby shifting the burden to the General Counsel to demonstrate that the lockout, nevertheless, was motivated by antiunion considerations.

Although there was little argument from the parties as to the timeliness of the Respondent's declaration of lockout, I have also considered that issue. In *Eads Transfer, Inc.*, supra, 304 NLRB at 713, the Board held that if an employer "wanted to invoke the benefits of *Harter*,[156] to suspend effectively the *Laidlaw*[157] rights of the strikers to return to work, it was obligated to declare the lockout before or in immediate response to the strikers' unconditional offers to return to work." In *Eads*, supra, where the Board found an 8(a)(3) violation, the employer waited over 2 months before declaring that its refusal to reinstate economic strikers was related to its insistence on its bargaining position. Here, the Union's offer to return was submitted to the Respondent on November 19, 2007. Thus, here, unlike in *Eads*, the Respondent invoked its lockout in the same week as the Union offered to return. In the circumstances of the long strike and the suddenness of the Union's offer, I find that the Respondent's invocation of the lockout in response to the Union's offer was timely.

Did the General Counsel Prove Antiunion Motivation?

The main thrust of the General Counsel's argument here is that the very nature of the Respondent's partial lockout, in which strikers and crossovers were locked out, but not permanent replacements, demonstrated the Respondent's discriminatory intent. Thus, the General Counsel argues, and I found, that because the Union's offer to return preceded the lockout, the permanent replacements were bargaining unit members at the inception of the lockout and that, therefore, the lockout presented the "perfect correlation" in the sense that all unit members who had at anytime exercised their Section 7 right to strike were locked out, but the permanent replacements, who had not been on strike, were not locked out. The Respondent argues that the General Counsel's argument as to the bargaining unit status of the permanent replacements is "hyper-technical," and that the reality is that the Respondent was doing nothing more than is permitted under the law, that is, maintaining its production during the lockout in a permissible manner.

The Board has held that "an employer may refuse to reinstate economic strikers on their unconditional offer to return to work based on the 'legitimate and substantial business reason' of a lawful economic lockout in support of a legitimate bargaining position. Further, absent specific proof of antiunion motivation, the employer has the right to hire temporary employees to engage in business operations during an otherwise lawful lockout." *Harter Equipment, Inc.*, 280 NLRB 597 (1986), petition for review denied sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987) (*"Harter I"*), *Ancor Concepts, Inc.*, supra at 743.

In *Harter I*, the Board, analyzing the Supreme Court decisions in *American Ship Building Co. v. NLRB*, supra, and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), concluded that such a use of temporary replacements is a measure reasonably adapted to the achievement of a legitimate employer interest and that it has only a comparatively slight adverse effect on protected employee rights. *Harter I*, supra at 600. In so finding, the Board observed, "It is the lawful lockout here which had the impact on employees by removing them from the ranks of wage earners. Replacing them with temporary employees has no greater adverse effect on the right to bargain collectively. ." Supra at 600. In *Ancor Concepts, Inc.*, supra, the Board concluded that when an employer announced to the union that the heretofore temporary replacements had become permanent only after the union offered to unconditionally return from a strike, the employer violated the Act, because of the resulting negative impact on protected rights and collective-bargaining, and because such action was inconsistent with a lawful lockout.

In the instant case, however, the Respondent began using permanent replacements during the course of the strike, and well before either the Union unconditionally offered to return or the Respondent imposed its lockout. Neither the General Counsel nor the Union contests the right of the Respondent to so utilize permanent replacements. Thus, when the Union offered to return, these replacement workers had already replaced some of the strikers, and unlike the circumstances in *Ancor*, the status of the strikers here, admittedly affected by the lockout, was unaffected by the Respondent's continued usage of the already in-place permanent replacements. The affected strikers who had been permanently replaced prior to the lockout, continued in this status during the lockout, and were unaffected by the Respondent's use of its permanent replacements during the lockout.

Thus, here, as the Board said in *Harter I*, "it is the lawful lockout which had the impact on employees by removing them from the ranks of wage earners." The Respondent's continued use of permanent replacements had no greater impact on the strikers Section 7 rights than if the Respondent had hired temporary workers to work during the lockout, because there was no change in the status of the replaced strikers. What they were entitled to before the lockout, they were entitled to at the end. The replaced strikers had the status of permanently replaced

[156] Supra.

[157] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U. S. 920 (1970).

economic strikers before the lockout, during the lockout, and after the lockout.

The strikers' status was, thus, unchanged by the Respondent's continued usage during the lockout of previously hired permanent replacements and, thus, differs from a situation in which an employer hires permanent replacements during the course of a lockout. There, unlike here, a previously unreplaced economic striker could be replaced. Because, under the circumstances here, the Respondent's continued usage of permanent replacements during the lockout did not impact the status of the strikers, said usage did not imply hostile motivation any more than did the lockout itself, and is not persuasive evidence that the lockout was motivated by illegal purposes.

Antiunion Animus

The General Counsel also argues that by virtue of the Respondent's other alleged violations of the Act, an inference of animus can be drawn that would lead to a conclusion that the lockout was improperly motivated. The Respondent argues that it did not otherwise violate the Act, but that even if it is found that it did, said violations are not related to its lockout decision and, thus, cannot form the basis of a determination that the lockout was illegally motivated. The Respondent cites *Central Illinois Public Service Co.*, supra at 934, for the proposition that the standard to be applied here is "not the existence of an inchoate animus, but rather whether that feeling in fact did motivate."[158]

I have concluded herein that the Respondent violated Section 8(a)(3) of the Act in respect to its discharge of Brown, the suspension of Cook, the preferential treatment accorded the crossovers at the conclusion of the lockout, and the denial of vacation to returning strikers, and violated Section 8(a)(5) of the Act in respect to its failure to bargain over the recall procedure. I note that all of these findings of violations are directly related to the strike or the lockout. Brown was discharged because of his picket line activities, Cook suspended because he used the word "scab" after returning to work, the returning strikers denied their accrued vacation pay upon their return to work, the crossovers given treatment preferential to the other strikers at the conclusion of the lockout, and the Respondent failed to bargain over the return of the strikers or locked out employees.

Even without direct evidence that an act was motivated by antiunion animus, such can be inferred by the commission of other unfair labor practices. In *Central Illinois Public Service Co.*, supra, the Board considered, but ultimately rejected, the argument that in the circumstances of that case other unfair labor practices committed by the employer led to an inference that the lockout there was unlawfully motivated. There, the Board rejected the inferring of motive, because the other unfair labor practices either had minimal impact on the members of the bargaining unit or little effect on the lockout or labor dispute.[159]

But here, the found unfair labor practices had a more substantial and pervasive impact on bargaining unit members. Thus, all of the full-term strikers were affected by the Respondent giving preferential treatment to the crossovers at the conclusion of the lockout and the failure of the Respondent to bargain over the method of their return. Both of these violations were directly connected to the lockout, and all of the found violations were directly related to the labor dispute. The Board held in *Midwest Generation, EME, LLC*, supra at 72, "Notwithstanding our finding that the lockout as implemented served a legitimate business interest, a violation of Section 8(a)(1) and (3) may still be found if the evidence warrants an inference that the Respondent's use of the lockout was motivated by antiunion animus." Under the circumstances here, including the number of unfair labor practices and their pervasive effect on the bargaining unit, I infer that the Respondent's lockout decision was unlawfully motivated.

Was Preferential Recall Treatment Accorded Crossovers?

The complaint alleges that the Respondent violated Section 8(a)(3) by recalling crossover employees from the lockout on November 29, 2007, while not recalling full-term strikers until December 2, thereby giving preference to those employees who had abandoned the strike before it concluded. The Respondent argues that, essentially, because the Union's November 19 offer to return was made on behalf of "strikers," the crossovers were not part of the group of full-term strikers the Union's offer was made on behalf. Thus, the Respondent argues, the crossovers were free to make their own offers to return, which they did.

The Respondent further argues that because all of the crossovers, except one, returned to work of their own initiative prior to the Union's November 29 letter confirming that the Union's earlier offer to return "was and remains unconditional," they, thus, returned before the Union submitted an unconditional offer to return. Thus, the Respondent's decision to allow the crossovers to return before any of the full-term strikers would not be discriminatory, and not in violation of Section 8(a)(3).

I found that the Respondent declared the lockout over the morning of November 29, and faxed a letter to the Union and issued a public press release so stating, all that morning. Further, that same day, the Respondent mailed letters to all locked out employees announcing the end of the lockout and that the Respondent had invited the Union to make an unconditional offer to return. As found, the letter further stated, "Employees who wish to return to work under the terms of the implemented company offer should call the human resource department during normal business hours . . to schedule their return to work." I found that the Respondent's managers were in contact with numerous crossovers during the day of November 29, and informed them they were free to return to work, and that 12

[158] Board decision citing *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 765 (7th Cir. 1973)

[159] "The violation pertaining to the discontinuance of the health insurance benefits covered just a two-day period following the lockout, the Respondent promptly provided retroactive coverage for this period upon being informed by the Board's regional office that it considered the discontinued benefits unlawful, and the parties stipulated that no claims were filed or unpaid for this 2-day period. As for the terminated workers' compensation supplemental payments, only 15 Local 702 employees and 6 Local 148 employees were affected. In units where Local 702 represented nearly 1,000 employees and Local 148 represented almost 500 employees, we decline to infer from this violation that touched so few employees that the Respondent's lockout of all the union employees was antiunion motivated." Supra at 936.

crossovers returned to work on November 29, and a 13th returned early in the morning of November 30.

Further, I found it wasn't until December 2, 2007, that the Respondent provided the Union with its preferential recall list of full-term strikers. Thus, all of the crossovers returned by November 30, before any of the full-term strikers. Because all of the crossovers had returned to work, none were included on the Respondent's preferential recall list.

In *Peerless Pump Co.*, 345 NLRB 371 (2005), the Board held that the employer therein violated Section 8(a)(3) by failing to use a nondiscriminatory recall procedure in that the employer gave preference to crossovers following the union's unconditional offer to return. In so holding, the Board said that upon the strike's conclusion, "all former strikers were equally entitled to be recalled to their former positions, even if some of them may have declared their individual availability while the strike was still in progress. The Respondent was then required to deal with all available former strikers on a nondiscriminatory basis."

I find the Board's *Peerless* decision to be directly analogous to the instant circumstances.[160] Once the lockout ended, the locked out employees here (the full-term strikers and the crossovers who had been locked out), were equally entitled, as in *Peerless*, to be recalled to their former positions. Yet, rather than treating the returning employees without discrimination, the Respondent's managers spent the day on which the Respondent declared the lockout over, in contact with the crossovers,[161] making sure they knew the lockout had ended and they could return to work. Further, the Respondent failed to apply the seniority and performance ranking criteria to the crossovers, that it applied to all the returning full-term strikers. Under these circumstances the Respondent clearly discriminated against the full-term strikers.

In respect to the Respondent's arguments, I have found that the Union's offer to return of November 19 was unconditional. The Union's subsequent letter of November 29, referred to in the Respondent's argument, is not a second offer to return, but simply confirmed that the Union's offer of November 19 "was and remains unconditional." Regardless of the wording of the Union's November 19 offer letter as to "all of those employees on strike," the return was dictated by the ending of the lockout, not by the strike which the Union had declared over on November 19. It was the Respondent, not the Union, that could and did end the lockout, and regardless of what modifiers or descriptors were included in the Union's November 19 letter as to whom the offer was being made on behalf of, all of the locked out employees maintained equal entitlement to return, when the Respondent declared the lockout over.

Clearly, by its actions described herein, the Respondent provided favored treatment to the crossover employees in terms of recall. And the clear basis of said favored treatment was their voluntary return to work for the Respondent during the strike, as opposed to the full-term strikers continued exercise of Section 7 rights. Accordingly, I conclude that the Respondent violated Section 8(a)(3) of the Act in giving preference to those employees who, at some point, had abandoned the strike, as alleged in the complaint.

Bargaining Over the Method of Return

The complaint alleges that the Respondent violated Section 8(a)(5) by unilaterally implementing a procedure for recalling striking employees to work. Here, the General Counsel argues that the subject of striker (locked out employee) recall is a mandatory subject of bargaining, that the Union requested such bargaining, that the Union did not waive bargaining, that the Respondent unilaterally implemented its recall procedure which had a substantial and material impact on employees' terms and conditions of employment,[162] that the Respondent failed to provide the Union with sufficient prior notice to allow the Union a meaningful opportunity to bargain (or presented the Union with a fait accompli) and that, thus, the Respondent violated Section 8(a)(5).[163]

The Respondent contends that the Union never requested bargaining as to the return to work process,[164] that the Respondent did not present the Union with a fait accompli but allowed the Union sufficient time to bargain under the circumstances, that the Union, by inaction, waived its right to bargain and, in the alternative, the Respondent, in fact, bargained over the process. Thus, the Respondent maintains, it fulfilled its bargaining obligations under the Act, and did not violate Section 8(a)(5).

The General Counsel and the Respondent agree, that what happened during the telephone conference call between representatives of the Union and the Respondent at about 4:40 p.m. on November 29, 2007, is central to the resolution of the issue as to whether the Union requested bargaining over the return to work process. I found that during the call both Union Local President Coates and Union Local executive board member and first-shift Plant Steward Painter requested bargaining as to the return to work process, with Coates stating the Union's position that it should be done by seniority. Thus, I find that on No-

[160] Although *Peerless* involved a strike, and the instant circumstances had changed to a lockout, both situations involved an economic dispute where the workers retained *Laidlaw* rights.

[161] And/or their friends and relatives.

[162] Obviously, the terms of the recall process, which determine which employees will be called back, and in what order, have a substantial and material impact on their terms and conditions of employment.

[163] Counsels for the General Counsel, in their brief, also argue that the Respondent never intended to bargain with the Union over the return to work process, relying on a nonverbatim typed transcription of notes made at a November 27 side session with the State and Federal mediator as to comments made by the Respondent's attorney, DiLorenzo. In reaching my decision herein, I have not relied on these notes. Attorney DiLorenzo testified that the issue being discussed with the mediators, at the time the notes were taken, related to the permanent replacements, not the striker recall procedure. I find insufficient basis to discredit the testimony.

[164] To the extent that the Respondent argues that somehow the Union's president, Coates, was not empowered to make a bargaining request, I note that he was present for the contractual bargaining sessions between the parties, and the Respondent was apparently prepared, during the conference call, to accept Coates' view of the Union's offer to return.

vember 29, the Union requested bargaining as to the return to work process.[165]

I further found, that about 5:40 p.m. the afternoon of Friday, November 30, 2007, the Respondent, by DiLorenzo, faxed the Union's counsel, Murray, a letter stating that the Respondent was developing a preferential recall list to fill job vacancies, the list ranking returnees through a mixture of performance[166] and seniority, and that the Respondent planned to call approximately 150 employees based on the list on Sunday and Monday, to report to work on Tuesday and Wednesday, and possibly another 50 to return on Thursday. The faxed letter further stated that "as permanent vacancies occur thereafter, the Company will utilize the process it has developed and the list that has been compiled." The letter continued that by 5 p.m. the next day, Saturday, the Respondent intended to forward the list and a description of the process used to form the list to Murray, and the letter concluded by inviting Murray to contact DiLorenzo if he had any questions.

Murray responded by e-mail at about 6:25 p.m. on November 30, telling DiLorenzo that he would be away for the weekend, but would check his e-mail, and requested DiLorenzo to send any documents by e-mail and fax. About 2 minutes later, DiLorenzo responded to Murray by e-mail as follows: "Tom, we are working on the process document and the preferential hiring list. Will plan on emailing them to you and making them available for delivery or fax to the Union hall tomorrow morning. We should be done by 11:00 a.m. on December 2."

Then, at about 11:11 a.m., on Sunday, December 2, DiLorenzo faxed and e-mailed the list to Murray and the Union, with a letter describing the returnee ranking, and stating that the Respondent intended on Sunday and Monday, to contact employees being returned, and again invited Murray to contact him with any questions. Murray, and the Union, first viewed the list the following morning, Monday, December 3.

Based on the above-described events of November 30 through December 2, the General Counsel argues that the return process was presented to the Union as a fait accompli, and that the Union's inaction during that period did not constitute a waiver of bargaining rights. The Respondent contends that it was under pressure to quickly reinstate the strikers,[167] that it was acting quickly to facilitate that process, that its communiqués to Murray and the Union did not foreclose additional bargaining or state that it was unwilling to bargain over or change the process, but actually invited Murray to ask questions, which he did not, and that the Union had sufficient time to respond.

It is well-settled that economic strikers, such as those here, in the absence of an express agreement to do so, do not have the right to be reinstated in accord with the terms of a collective-bargaining agreement. The Respondent's obligation is to refrain from discriminatory acts, and to bargain, upon request, about the reinstatement process. *Bio-Science Laboratories*, 209 NLRB 796 (1974). Here, I found that the Union made such a request on November 29.

Inasmuch as I have concluded that the Union made a timely request to bargain over the return to work process, and even presented the Respondent with its initial position that recall should be exclusively based on seniority, I need not reach the issue of whether the Respondent presented its recall program as a fait accompli. *In re Verizon New York, Inc.*, 339 NLRB 30, fn. 11 (2003). Nevertheless, even if I had concluded, as the Respondent argues, that the Union did not make such a bargaining request, I would still conclude that the Respondent's return to work process was presented to the Union as a fait accompli.

The issues of "fait accompli," "request to bargain," and "waiver" are related in the sense that "fait accompli" will preclude a finding that a failure to request bargaining constitutes a waiver. *In re Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). In this regard, the Board has long recognized that "where a union has received timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. What constitutes sufficient notice depends on all the circumstances of a case." *Emhart Industries*, 297 NLRB 215, 216 (1987).

"However, if the notice is too short a time before implementation, or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli." (Citations omitted.) *Ciba Geigy Pharmaceutics Division*, 264 NLRB 1013 (1982). Further, "it is well established that a union cannot be held to have waived bargaining over a change that has been presented as a fait accompli. An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals. Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated." *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), quoting *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

In its brief, the Respondent concentrates its argument as to the Union's asserted inaction, on the period of time following the Respondent's November 30 notice to the Union as to the

[165] Here, I reject the Respondent's argument that agreeing to "let the lawyers work on that" somehow served as a retraction of the Union's bargaining demand. Coates and Painter were both responsible officials of the Union who could demand bargaining. Agreeing to let the lawyers work on the issue of bargaining the return to work process, simply amounted to agreeing not to further discuss the issue during the conference call. I further reject the Respondent's argument to the effect that because the Respondent's "objective" for the call did not include developing a return to work process, but only resolving the status of the Union's offer to return and discussing whether all the strikers would appear en masse for their return or wait for the Respondent's "manpower assessment," the Union was somehow precluded from requesting bargaining as to the recall process during the call. The actions of the parties had made the return to work process of moment. Regardless of the Respondent's intended purpose of the call, the subject matter came up, and the Union's representatives requested bargaining.

[166] This being the first notification to the Union that the Respondent intended to use a basis other than seniority for the return.

[167] Counsels for the General Counsel, in their brief, agree with this assertion.

Respondent's general plan for recall, including, for the first time, that it intended to use performance rankings as one criterion, along with seniority. The Respondent correctly points out that at no time subsequent to the November 30 communiqué to the Union, did the Union request bargaining as to the details of the recall. As further evidence of waiver, the Respondent points to the Union's inaction on December 2 and 3 after being informed of the details of the Respondent's plan to return strikers to work and being provided with a list of returning strikers.[168]

Under all the circumstances here, I conclude that the Respondent presented the return to work process to the Union as a fait accompli. The Union was not initially informed by the Respondent of the Respondent's intent to deviate from the Union's November 29 proposal to recall by seniority until 5:40 p.m. on Friday, in a faxed letter which also stated the Respondent's intention to begin calling strikers on Sunday. Thus, the Respondent's letter indicated that it intended to begin calling returning strikers in less than 48 hours. And it wasn't until Sunday, the day that the Respondent began to call the strikers, that the Respondent's completed return to work process and accompanying ranked list of returning strikers was provided to the Union.

In terms of the combined length of the strike and lockout here, allowing the Union less than 48 hours, over a weekend,[169] to analyze the Respondent's return process and to offer counterproposals before the Respondent said it was going to begin calling returning employees, is not reasonably adequate. This is particularly true where, as here, the Respondent already knew before providing the Union with its return to work process, that the Union objected to the centerpiece of the process, that is, the Respondent's inclusion of anything other than seniority as a basis for recall. Thus, while the Respondent argues that time was of the essence, it clearly understood at the time it communicated the recall process to the Union, that the Union would find the process unacceptable. Further, while the communiqués from the Respondent's counsel to the Union's counsel over the weekend of November 30 to December 2 invited questions, nothing therein affirmatively indicated that the process was subject to negotiation, or that the Respondent was prepared to engage the Union in the already requested bargaining as to the return process.

The two cases cited by the Respondent, in its brief, in respect to whether the Union had adequate time to respond are unpersuasive because they are inapposite on their facts. The Respondent argues that "The facts of *Medicenter* are far worse in terms of timeframe than the instant facts, but the holding on those facts should provide some respite for the Respondent herein." But in *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975), where the Board concluded that the Union had adequate opportunity to bargain, the Union and its attorney met several times with the employer during the 2 days between the employer's announcement of a polygraph testing regimen for employees and the beginning of the program. During those meetings, the employer requested alternative proposals from the union, but the union, rather than actually requesting bargaining or presenting counterproposals, only responded with objections to the program and vows to never agree. On those facts, where the Union's actions portrayed no desire or intent or request to bargain, the Board concluded that the Union had adequate time. Here, unlike *Medicenter*, the events took place over a weekend, a weekend during which the Respondent knew the Union's attorney planned to be out of town, and, as found, the Union had already requested bargaining on the recall process.

The Respondent also cites *Chippewa Motor Freight*, 261 NLRB 455 (1982), for the proposition that the Union here had adequate time to bargain. I, first, note that the Board specifically states that no exceptions were taken to the judge's conclusion on that issue and, thus, the case holds no value as Board precedent in that respect. Further, the mandatory subject of bargaining in *Chippewa*, was effects bargaining as to a plant closing, and the notice issue related to whether 2 days' notice before the plant closing, a nonmandatory subject therein, was adequate time to allow for effects bargaining. In finding that the notice was adequate under the circumstances, the judge held "Surely, if Respondent Chippewa was not required to bargain about the decision to close, it was not required to give notice before the decision was made. ." On its facts, thus, the case deals with controlling issues not present here.

I, thus, conclude, for the reasons set forth above, specifically including my findings that the Union, in fact, requested bargaining, that the Respondent violated Section 8(a)(5) by unilaterally instituting a process for returning the strikers to work. In the alternative, I conclude that the Respondent violated the Act by presenting the Union with a fait accompli as to the return to work process, thereby precluding the Union from bargaining.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. IUE–CWA, AFL–CIO, Local 313 (the Union), has been, at all material times hereto, a labor organization within the meaning of Section 2(2), (6), and (7) of the Act.

3. By the following actions, on about the dates set forth below, the Respondent discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act, and interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act:

(a) On November 23, 2007, locking out striking employees and those who had abandoned the strike before November 19, 2007, but not locking out permanent replacement employees.

[168] As discussed supra, this argument, however, fails to take into account that the Union had already requested bargaining as to the method of recall, during the November 29 conference call. As of November 29, a successful argument that the Union waived its bargaining rights cannot be made, because the Union explicitly requested bargaining as to the return process on that date. Thus, as of November 29 the Respondent was on notice as to two demands of the Union as to the return process: first, the Union demanded to bargain as to the process; second, the Union demanded that the strikers be returned by seniority.

[169] The Union's counsel had informed the Respondent's counsel that he would be out of town over the weekend.

(b) On December 2, 2007, discharging and failing to recall to work Kelvin Brown.

(c) On August 4, 2007, denying accrued vacation leave to recalled employees who participated in the strike.

(d) On April 30, 2008, imposing a disciplinary suspension on employee Marion Cook.

(e) On November 29, 2007, providing a discriminatory preference, as to recall from a lockout, to those employees who returned to work during the strike, as opposed to full-term strikers.

4. By the following actions, on about the dates set forth below, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) of the Act, and interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act:

(a) On November 19, 2007, unilaterally eliminating paid lunch breaks on voluntary weekend overtime shifts.

(b) On November 29, 2007, unilaterally implementing a procedure for recalling striking employees to work.

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

6. The Respondent did not violate Section 8(a)(5) of the Act, as alleged, by changing its practice in respect to scheduling voluntary weekend overtime, Section 8(a)(3) of the Act, as alleged, by discharging or failing to recall Allen Owlett, or violate the Act in any manner other than that specifically found herein.

THE REMEDY

As for the discharge of Brown and suspension of Cook, which I concluded violated the Act, I will order the traditional Board remedies, as set forth below. As I found the lockout to violate the Act, I will order the Board's traditional make-whole remedy to all unit employees who were locked out, as set forth below. As I found the Respondent's imposition of a method of recalling unit employees violated the Act, I will order a cease and desist remedy, along with an affirmative bargaining order, and will defer to the compliance stage the determination of a method of recall which would have obviated the commission of the unfair labor practice, as this would have the result of restoring the status quo ante, to the extent feasible, as a setting for bargaining, and would provide a basis for establishing the details of the recall, including that of the crossovers who, I determined, received preferential treatment as to recall, and the make whole remedy, which I am also ordering.[170] As to the discriminatory denial of vacation benefits, I will order a make whole remedy, with the details of which employees were affected and the amount of "make whole" to the employees left to compliance. Finally, as to the unilateral change affecting the paid weekend overtime lunchbreak, I will order a make whole remedy.

On these findings and conclusions of law, and on the entire record, I issue the following recommended[171]

ORDER

The Respondent, Dresser-Rand Company, Painted Post, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating in regard to hire, tenure, or terms or conditions of employment by giving preferential treatment to employees who cross the Union's picket lines during a strike.

(b) Discouraging membership in the Union by locking out employees who participate in a strike, while not locking out other bargaining unit employees.

(c) Discharging, refusing to recall, or suspending employees because of their union or protected, concerted activities.

(d) Denying vacation benefits that accrued before a strike, to former strikers.

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

(f) In any like or related manner, discouraging membership in a labor organization by discriminating in regard to hire, tenure, or terms and conditions of employment.

(g) Unilaterally implementing a process of recalling employees from a strike or lockout.

(h) Unilaterally changing its practice in regard to paid lunchbreaks for weekend overtime shifts.

(i) In any like or related manner, refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

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

(a) Offer Kelvin Brown full and immediate reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without loss of seniority, or any other rights or privileges previously enjoyed, displacing, if necessary, an employee hired to replace him.

(b) Rescind the May 1, 2008 suspension of Marion Cook.

(c) Make Kelvin Brown and Marion Cook whole, with interest, for any loss of earnings and benefits suffered by them as a result of their, respective, unlawful discharge and unlawful suspension.

(d) Within 14 days of the date of this order, remove from its files any references to the discharge of Kelvin Brown and the suspension of Marion Cook and, within 3 days thereafter, notify each of them, in writing, that this has been done, and that the discipline found unlawful will not be used against them in any way.

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[170] "Our objective in compliance hearings is to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would have existed had there been no unfair labor practices.' *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

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

(e) Make whole, with interest, all former strikers for any accrued vacation benefits denied them as a result of their participation in the strike.

(f) Make whole, with interest, any employees who were unlawfully locked out from November 23 to 29, 2007, for any loss of earnings and benefits suffered by them as a result of the lockout.

(g) Make whole, with interest, all employees who would have been recalled from the 2007 lockout at an earlier date, if it is determined that they would have been so recalled but for the Respondent's unilateral implementation of a recall procedure.

(h) Offer employees who have not been recalled from the 2007 lockout, full and immediate reinstatement to their former positions, without loss of seniority or other rights and privileges previously enjoyed, should it be determined that they would have been recalled but for the Respondent's unilateral implementation of a recall procedure, and make such employees whole, with interest, for any loss of earnings or benefits suffered by them as a result of the Respondent's failure to recall them.

(i) Upon request, rescind the unilateral change in the practice of paid lunchbreaks during weekend overtime shifts and make whole, with interest, all affected unit employees for any loss of earnings and benefits suffered by them as a result the unilateral change.

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

(k) Within 14 days after service by the Region, post at its facility in Painted Post, New York, copies of the attached notice marked "Appendix."[172] Copies of the notice, on forms provided by the Regional Director for Region 3, 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. 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 its Painted Post, New York facility since November 23, 2007.

[172] 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."

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

Dated, Washington D.C. January 29, 2010

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 terminate or suspend you because of your concerted protected activity or because of your union activity.

WE WILL NOT lock you out because you participated in a strike.

WE WILL NOT give preferential treatment to employees who cross picket lines during a strike or discriminate against employees who participate in a strike.

WE WILL NOT deny accrued vacation leave to former strikers.

WE WILL NOT in any like or related manner, discourage membership in a labor organization by discriminating in regard to hire, tenure, or terms and conditions of employment.

WE WILL NOT unilaterally implement a recall process for strikes or lockouts without first notifying the Union and affording it an opportunity to bargain about the process, and the effects of the process.

WE WILL NOT eliminate paid lunch breaks on voluntary weekend overtime shifts without first notifying the Union and affording it an opportunity to bargain about the change, and the effects of the change.

WE WILL NOT in any like or related manner refuse to bargain with IUE–CWA, AFL–CIO, Local 313 in the appropriate bargaining unit described below:

The appropriate unit is:

(All) production and maintenance employees in the Main Plant of the Company's (Respondent's) plant in Painted Post, New York; excluding office and clerical employees, time study men, guards, professional employees, nurses, doctors, foremen, and supervisors as defined in the National Labor Relations Act.

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

WE WILL offer Kelvin Brown full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without loss of seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings and other benefits he may have suffered as a result of his discharge.

WE WILL remove any references to the discharge of Kelvin Brown from our files and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL make Marion Cook whole, with interest, for any loss of earnings and other benefits that he may have suffered as a result of his suspension.

WE WILL remove any references to the May 1, 2008 suspension of Marion Cook from our files, and notify him in writing that this has been done, and that the suspension will not be used against him in any way.

WE WILL make whole all former strikers who have been denied vacation benefits which accrued before the 2007 strike.

WE WILL make whole, with interest, any employees who lost earnings and other benefits as a result of our decision to lock them out.

WE WILL make whole, with interest, for any lost earnings and benefits, all employees who would have been recalled from the 2007 lockout at an earlier date, if it is determined that they would have been so recalled, had we not unilaterally implemented our recall procedure.

WE WILL offer to those employees who have not been recalled from the 2007 lockout, full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without loss of seniority or any other rights and privileges they previously enjoyed, and WE WILL make those employees whole, with interest, for any lost earnings and benefits, if it is determined that they would have been recalled, had we not unilaterally implemented our recall procedure.

WE WILL, upon the Union's request, rescind the unilateral change to our practice concerning paid lunch breaks on weekend overtime shifts, and WE WILL make whole, with interest, all employees affected by said unilateral change to such practice.

DRESSER-RAND COMPANY