

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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ROCHESTER GAS & ELECTRIC CORP.,

and

LOCAL 36, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO

**AFFIDAVIT OF  
JAMES S. GLEASON  
IN SUPPORT OF  
SUMMARY JUDGMENT**

Case No.: 03-CA-25915

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STATE OF NEW YORK                    )  
  ) SS:  
COUNTY OF BROOME                    )

JAMES S. GLEASON, being duly sworn, deposes and says:

1. I am an attorney duly admitted to the bar of the State of New York. I am also the attorney for Rochester Gas and Electric Corporation in the above captioned matter. I am fully familiar with the facts and circumstances of this action and the underlying proceeding.

2. The Compliance Specification by the General Counsel is attached hereto as Exhibit "A".

3. Rochester Gas's Answer is attached hereto as Exhibit "B".

4. There is only one issue in dispute. The parties do not agree on the date on which the remedy should start. The General Counsel contends the remedy should begin five (5) days after the date of the Board's order. Rochester Gas contends the remedy should begin on the date certiorari was denied by the Supreme Court.

5. The General Counsel's method of calculation results in a total due of \$101,559.07. *See* Exhibit "A", (Appendix 2). Rochester Gas's method of calculation results in a total due of \$3,599.68. *See* Exhibit "B" (Appendix A).

6. Attached hereto as Exhibit "C" is a copy of the Board's Decision dated August 16, 2010 and a copy of the Board's Decision dated November 8, 2010 denying reconsideration.

7. Attached hereto as Exhibit "D" is a copy of the Petition for review filed by Rochester Gas on August 19, 2010 in the D.C. Circuit Court of Appeals and a copy of the Union's Petition for review filed on August 26, 2010 with the Second Circuit Court of Appeals.

8. Attached hereto as Exhibit "E" are copies of the Second Circuit Court of Appeals briefing order (filed March 29, 2011) and Notice of Oral Argument, setting argument for November 10, 2011.

9. Attached hereto as Exhibit "F" is the Decision of the Second Circuit Court of Appeals dated January 17, 2013 along with the concurring opinion of Judge Straub and the errata sheet.

10. Attached hereto as Exhibit "G" is the Decision of the Second Circuit Court of Appeals dated February 8, 2013 staying enforcement of its decision (staying the mandate) pending Rochester Gas's petition for certiorari review.

11. Attached hereto as Exhibit "H" are copies of the Second Circuit Court of Appeals' Decisions denying the motions of the Union and the NLRB to vacate the stay.

12. Attached hereto as Exhibit "I" is a copy of Rochester Gas's Petition for Certiorari filed in March 2013.

13. Attached hereto as Exhibit "J" is the Notice of the Decision of the Supreme Court of the United States denying certiorari issued July 1, 2014.

14. Attached hereto as Exhibit "K" is a copy of the Docket entry issuing the mandate from the Second Circuit.

15. On July 9, 2014, Rochester Gas, through its Manager of Labor Relations, contacted the Union requesting bargaining and offered dates to the Union for that purpose. Despite Rochester Gas's efforts on July 9, 2014 and thereafter, the Union did not agree to bargain about the effects of Rochester Gas's determination regarding the take home vehicles. (See Exhibit "6", infra).

16. By Decision dated November 28, 2014, the Acting Regional Director made the following finding:

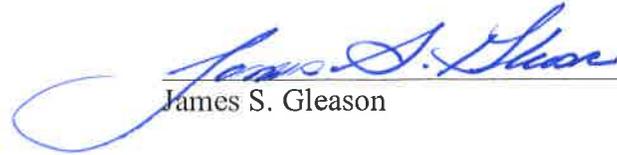
"The Union failed to commence effects bargaining within 5 business days after receipt of the Respondent's notice of its desire to bargain and Respondent's provision, on August 15, of all the information ordered by the Board. For all the foregoing reasons, I have concluded that the *Transmarine* make-whole remedy tolls on August 22, 2014."

A copy of the Acting Regional Director's Determination is attached as Exhibit "L".

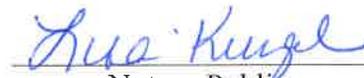
17. The Union appealed the Acting Regional Director's November 28, 2014 Determination to the Board's General Counsel. By letter dated March 3, 2015, the General Counsel denied the Union's appeal. A copy of the General Counsel's March 3, 2015 letter is attached as Exhibit "M".

18. The Union timely requested review by the National Labor Relations Board of the General Counsel's March 3, 2015 denial of the Union's appeal.

19. By Order dated September 2, 2015, the Board denied the Union's request for review. A copy of the Board's September 2, 2015 Order is attached as Exhibit "N".

  
James S. Gleason

Sworn to before me this 27th day  
of January, 2016.

  
Notary Public

**LISA KUZEL**  
Notary Public, State of New York  
No. 4826484  
Residing in Broome County  
My Commission Expires April 30, 20 18

# **EXHIBIT A**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION

ROCHESTER GAS & ELECTRIC CORP.

and

Case 03-CA-025915

LOCAL 36, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO

COMPLIANCE SPECIFICATION  
AND NOTICE OF HEARING

On January 22, 2013, the United States Court of Appeals for the Second Circuit enforced the Decision and Order of the National Labor Relations Board, dated August 16, 2010, which directed Rochester Gas & Electric Corp., (Respondent), to, inter alia, on request, bargain with Local 36, International Brotherhood of Electrical Workers, AFL-CIO, (the Union), over the effects of eliminating the benefit of allowing the low-voltage trouble maintenance and repair (TM&R) employees to take their service vehicles home at the end of their shifts and pay each low-voltage TM&R employee the monetary value of his or her vehicle benefit, with interest, for the limited *Transmarine* remedy period.

A controversy has arisen over the amount of backpay owing. Therefore, the Regional Director for the Third Region, pursuant to authority duly conferred upon her by the Board, hereby issues this Compliance Specification and Notice of Hearing and alleges that the backpay is as follows:

1. The backpay period begins on August 23, 2010, and ends on August 22, 2014.
2. (a) An appropriate measure of the amounts owing to low-voltage TM&R employees is based on the number of miles of each employees' round-trip commute to work, multiplied by the number of days worked and the applicable reimbursement rate set by the Internal Revenue Service for business use of personal automobiles.

(b) The number of round trip miles each employee commutes to work is as follows:

Thomas Eichele	24
Steven Parnell	32
Jeffrey Pierce	14
Toney Proctor	10
Richard Shamp	20
Alfred Smith	36
John Spratt	52
Kim Williams	32

(c) The number of days worked by each employee during the backpay period is set forth in Appendices 1(a) through (h).

(d) The applicable reimbursement rates set by the Internal Revenue Service for business use of personal automobiles during the backpay period are as follows:

<u>Effective Date</u>	<u>Rate</u>
January 1, 2010	50 cents
January 1, 2011	51 cents
July 1, 2011	55.5 cents
January 1, 2013	56.5 cents
January 1, 2014	56 cents

(e) Appendices 1(a) through (h) set forth, alphabetically, the calculation of the number of commuting miles per employee, multiplied by the number of days worked per year and the applicable reimbursement rate set by the Internal Revenue Service for business use of personal automobiles.

### SUMMARY

Summarizing the facts and calculations referred to above, the obligation of Respondent under the Board Order and Court Judgment, to make whole TM&R employees will be

discharged by payment to them in the total amount of \$101,559.07, as set forth in Exhibit 2, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

### NOTICE OF HEARING

PLEASE TAKE NOTICE THAT commencing on **February 24, 2016**, at **10:00 a.m.**, in the Hearing Room, Buffalo, New York, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this compliance specification. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Respondent is notified that, pursuant to Section 102.56 of the Board's Rules and Regulations, they must file an answer to the compliance specification. The answer must be received by this office on or before **November 27, 2015**, or postmarked on or before **November 26, 2015**. Unless filed electronically in a PDF format, Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable

to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that such answer be signed and sworn to by the Respondents or by a duly authorized agent with appropriate power of attorney affixed. See Section 102.56(a). If the answer being filed electronically is a PDF document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a compliance specification is not a PDF file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

As to all matters set forth in the compliance specification that are within the knowledge of Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial is not sufficient. See Section 102.56(b) of the Board's Rules and Regulations, a copy of which is attached. Rather, the answer must state the basis for any disagreement with any allegations that are within the Respondent's knowledge, and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures.

If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the compliance specification are true. If the

answer fails to deny allegations of the compliance specification in the manner required under Section 102.56(b) of the Board's Rules and Regulations, and the failure to do so is not adequately explained, the Board may find those allegations in the compliance specification are true and preclude Respondents from introducing any evidence controverting those allegations.

**DATED** at Buffalo, New York this 5th day of November, 2015.



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**PAUL J. MURPHY**, Acting Regional Director  
NATIONAL LABOR RELATIONS BOARD  
Niagara Center Bldg., Suite 630  
130 South Elmwood Avenue  
Buffalo, New York 14202-2465

**Sec. 102.56** *Answer to compliance specification.*

(a) *Filing and service of answer; form.*—Each respondent alleged in the specification to have compliance obligations shall, within 21 days from the service of the specification, file an original and four copies of an answer thereto with the Regional Director issuing the specification, and shall immediately serve a copy thereof on the other parties. The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the mailing address of the respondent.

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

(d) *Extension of time for filing answer to specification.*—Upon the Regional Director's own motion or upon proper cause shown by any respondent, the Regional Director issuing the compliance specification and notice of hearing may by written order extend the time within which the answer to the specification shall be filed.

(e) *Amendment to answer.*—Following the amendment of the specification by the Regional Director, any respondent affected by the amendment may amend its answer thereto.

ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915

REMEDY FOR LOSS OF VEHICLES

Thomas Eichele					Days Per	Amt Due
Quarter	No. of Days	Mileage	Rate	Total	Year	Per Year
2010-3	31	24	\$ 0.500	\$ 372.00		
2010-4	56	24	\$ 0.500	\$ 672.00	87	\$ 1,044.00
2011-1	0	24	\$ 0.510	\$ -		
2011-2	28	24	\$ 0.510	\$ 342.72		
2011-3	8	24	\$ 0.555	\$ 106.56		
2011-4	61	24	\$ 0.555	\$ 812.52	97	\$ 1,261.80
2012-1	69	24	\$ 0.555	\$ 919.08		
2012-2	61	24	\$ 0.555	\$ 812.52		
2012-3	51	24	\$ 0.555	\$ 679.32		
2012-4	61	24	\$ 0.555	\$ 812.52	242	\$ 3,223.44
2013-1	16	24	\$ 0.565	\$ 216.96		
2013-2	61	24	\$ 0.565	\$ 827.16		
2013-3	58	24	\$ 0.565	\$ 786.48		
2013-4	56	24	\$ 0.565	\$ 759.36	191	\$ 2,589.96
2014-1	58	24	\$ 0.560	\$ 779.52		
2014-2	63	24	\$ 0.560	\$ 846.72		
2014-3	36	24	\$ 0.560	\$ 483.84	157	\$ 2,110.08
<b>TOTAL</b>	<b>774</b>			<b>\$ 10,229.28</b>	<b>774</b>	<b>\$ 10,229.28</b>

ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915

REMEDY FOR LOSS OF VEHICLES

Steven Parnell					Days Per	Amt Due
Quarter	No. of Days	Mileage	Rate	Total	Year	Per Year
2010-3	25	32	\$ 0.500	\$ 400.00		
2010-4	65	32	\$ 0.500	\$ 1,040.00	90	\$ 1,440.00
2011-1	59	32	\$ 0.510	\$ 962.88		
2011-2	61	32	\$ 0.510	\$ 995.52		
2011-3	69	32	\$ 0.555	\$ 1,225.44		
2011-4	54	32	\$ 0.555	\$ 959.04	243	\$ 4,142.88
2012-1	66	32	\$ 0.555	\$ 1,172.16		
2012-2	59	32	\$ 0.555	\$ 1,047.84		
2012-3	63	32	\$ 0.555	\$ 1,118.88		
2012-4	57	32	\$ 0.555	\$ 1,012.32	245	\$ 4,351.20
2013-1	60	32	\$ 0.565	\$ 1,084.80		
2013-2	59	32	\$ 0.565	\$ 1,066.72		
2013-3	58	32	\$ 0.565	\$ 1,048.64		
2013-4	57	32	\$ 0.565	\$ 1,030.56	234	\$ 4,230.72
2014-1	62	32	\$ 0.560	\$ 1,111.04		
2014-2	61	32	\$ 0.560	\$ 1,093.12		
2014-3	24	32	\$ 0.560	\$ 430.08	147	\$ 2,634.24
<b>TOTAL</b>	<b>959</b>			<b>\$ 16,799.04</b>	<b>959</b>	<b>\$ 16,799.04</b>

ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915

REMEDY FOR LOSS OF VEHICLES

Jeffrey Pierce					Days Per	Amt Due
Quarter	No. of Days	Mileage	Rate	Total	Year	Per Year
2010-3	24	14	\$ 0.500	\$ 168.00		
2010-4	55	14	\$ 0.500	\$ 385.00	79	\$ 553.00
2011-1	59	14	\$ 0.510	\$ 421.26		
2011-2	51	14	\$ 0.510	\$ 364.14		
2011-3	60	14	\$ 0.555	\$ 466.20		
2011-4	62	14	\$ 0.555	\$ 481.74	232	\$ 1,733.34
2012-1	60	14	\$ 0.555	\$ 466.20		
2012-2	61	14	\$ 0.555	\$ 473.97		
2012-3	54	14	\$ 0.555	\$ 419.58		
2012-4	53	14	\$ 0.555	\$ 411.81	228	\$ 1,771.56
2013-1	57	14	\$ 0.565	\$ 450.87		
2013-2	55	14	\$ 0.565	\$ 435.05		
2013-3	58	14	\$ 0.565	\$ 458.78		
2013-4	59	14	\$ 0.565	\$ 466.69	229	\$ 1,811.39
2014-1	48	14	\$ 0.560	\$ 376.32		
2014-2	65	14	\$ 0.560	\$ 509.60		
2014-3	32	14	\$ 0.560	\$ 250.88	145	\$ 1,136.80
<b>TOTAL</b>	<b>913</b>			<b>\$ 7,006.09</b>	<b>913</b>	<b>\$ 7,006.09</b>

ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915

REMEDY FOR LOSS OF VEHICLES

Toney Proctor					Days Per	Amt Due
Quarter	No. of Days	Mileage	Rate	Total	Year	Per Year
2010-3	24	10	\$ 0.500	\$ 120.00		
2010-4	45	10	\$ 0.500	\$ 225.00	69	\$ 345.00
2011-1	0	10	\$ 0.510	\$		
2011-2	58	10	\$ 0.510	\$ 295.80		
2011-3	55	10	\$ 0.555	\$ 305.25		
2011-4	55	10	\$ 0.555	\$ 305.25	168	\$ 906.30
2012-1	57	10	\$ 0.555	\$ 316.35		
2012-2	51	10	\$ 0.555	\$ 283.05		
2012-3	53	10	\$ 0.555	\$ 294.15		
2012-4	50	10	\$ 0.555	\$ 277.50	211	\$ 1,171.05
2013-1	58	10	\$ 0.565	\$ 327.70		
2013-2	62	10	\$ 0.565	\$ 350.30		
2013-3	41	10	\$ 0.565	\$ 231.65		
2013-4	46	10	\$ 0.565	\$ 259.90	207	\$ 1,169.55
2014-1	62	10	\$ 0.560	\$ 347.20		
2014-2	38	10	\$ 0.560	\$ 212.80		
2014-3	34	10	\$ 0.560	\$ 190.40	134	\$ 750.40
<b>TOTAL</b>	<b>789</b>			<b>\$ 4,342.30</b>	<b>789</b>	<b>\$ 4,342.30</b>

**ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915**

**REMEDY FOR LOSS OF VEHICLES**

<b>Richard Shamp</b>					<b>Days Per</b>	<b>Amt Due</b>
<b>Quarter</b>	<b>No. of Days</b>	<b>Mileage</b>	<b>Rate</b>	<b>Total</b>	<b>Year</b>	<b>Per Year</b>
2010-3	28	20	\$ 0.500	\$ 280.00		
2010-4	62	20	\$ 0.500	\$ 620.00	90	\$ 900.00
2011-1	69	20	\$ 0.510	\$ 703.80		
2011-2	66	20	\$ 0.510	\$ 673.20		
2011-3	70	20	\$ 0.555	\$ 777.00		
2011-4	43	20	\$ 0.555	\$ 477.30	248	\$ 2,631.30
2012-1	51	20	\$ 0.555	\$ 566.10		
2012-2	59	20	\$ 0.555	\$ 654.90		
2012-3	70	20	\$ 0.555	\$ 777.00		
2012-4	50	20	\$ 0.555	\$ 555.00	230	\$ 2,553.00
2013-1	66	20	\$ 0.565	\$ 745.80		
2013-2	62	20	\$ 0.565	\$ 700.60		
2013-3	61	20	\$ 0.565	\$ 689.30		
2013-4	50	20	\$ 0.565	\$ 565.00	239	\$ 2,700.70
2014-1	64	20	\$ 0.560	\$ 716.80		
2014-2	57	20	\$ 0.560	\$ 638.40		
2014-3	33	20	\$ 0.560	\$ 369.60	154	\$ 1,724.80
<b>TOTAL</b>	<b>961</b>			<b>\$ 10,509.80</b>	<b>961</b>	<b>\$ 10,509.80</b>

**ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915**

**REMEDY FOR LOSS OF VEHICLES**

**Alfred Smith**

Quarter	No. of Days	Mileage	Rate	Total	Days Per Year	Amt Due Per Year
2010-3		36	\$ 0.500	\$ -		
2010-4		36	\$ 0.500	\$ -	0	\$ -
2011-1	51	36	\$ 0.510	\$ 936.36		
2011-2	55	36	\$ 0.510	\$ 1,009.80		
2011-3	53	36	\$ 0.555	\$ 1,058.94		
2011-4	58	36	\$ 0.555	\$ 1,158.84	217	\$ 4,163.94
2012-1	58	36	\$ 0.555	\$ 1,158.84		
2012-2	62	36	\$ 0.555	\$ 1,238.76		
2012-3	51	36	\$ 0.555	\$ 1,018.98		
2012-4	64	36	\$ 0.555	\$ 1,278.72	235	\$ 4,695.30
2013-1	52	36	\$ 0.565	\$ 1,057.68		
2013-2	2	36	\$ 0.565	\$ 40.68		
2013-3	46	36	\$ 0.565	\$ 935.64		
2013-4	55	36	\$ 0.565	\$ 1,118.70	155	\$ 3,152.70
2014-1	62	36	\$ 0.560	\$ 1,249.92		
2014-2	58	36	\$ 0.560	\$ 1,169.28		
2014-3	33	36	\$ 0.560	\$ 665.28	153	\$ 3,084.48
<b>TOTAL</b>	<b>760</b>			<b>\$ 15,096.42</b>	<b>760</b>	<b>\$ 15,096.42</b>

**ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915**

**REMEDY FOR LOSS OF VEHICLES**

<b>John Spratt</b>					<b>Days Per</b>	<b>Amt Due</b>
<b>Quarter</b>	<b>No. of Days</b>	<b>Mileage</b>	<b>Rate</b>	<b>Total</b>	<b>Year</b>	<b>Per Year</b>
2010-3	25	52	\$ 0.500	\$ 650.00		
2010-4	42	52	\$ 0.500	\$ 1,092.00	67	\$ 1,742.00
2011-1	60	52	\$ 0.510	\$ 1,591.20		
2011-2	55	52	\$ 0.510	\$ 1,458.60		
2011-3	49	52	\$ 0.555	\$ 1,414.14		
2011-4	0	52	\$ 0.555	\$ -	164	\$ 4,463.94
2012-1	0	52	\$ 0.555	\$ -		
2012-2	43	52	\$ 0.555	\$ 1,240.98		
2012-3	54	52	\$ 0.555	\$ 1,558.44		
2012-4	34	52	\$ 0.555	\$ 981.24	131	\$ 3,780.66
2013-1	53	52	\$ 0.565	\$ 1,557.14		
2013-2	59	52	\$ 0.565	\$ 1,733.42		
2013-3	58	52	\$ 0.565	\$ 1,704.04		
2013-4	55	52	\$ 0.565	\$ 1,615.90	225	\$ 6,610.50
2014-1	63	52	\$ 0.560	\$ 1,834.56		
2014-2	56	52	\$ 0.560	\$ 1,630.72		
2014-3	31	52	\$ 0.560	\$ 902.72	150	\$ 4,368.00
<b>TOTAL</b>	<b>737</b>			<b>\$ 20,965.10</b>	<b>737</b>	<b>\$ 20,965.10</b>

**ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915**

**REMEDY FOR LOSS OF VEHICLES**

<b>Kim Williams</b>					<b>Days Per</b>	<b>Amt Due</b>
<b>Quarter</b>	<b>No. of Days</b>	<b>Mileage</b>	<b>Rate</b>	<b>Total</b>	<b>Year</b>	<b>Per Year</b>
2010-3	21	32	\$ 0.500	\$ 336.00		
2010-4	75	32	\$ 0.500	\$ 1,200.00	96	\$ 1,536.00
2011-1	60	32	\$ 0.510	\$ 979.20		
2011-2	60	32	\$ 0.510	\$ 979.20		
2011-3	47	32	\$ 0.555	\$ 834.72		
2011-4	64	32	\$ 0.555	\$ 1,136.64	231	\$ 3,929.76
2012-1	72	32	\$ 0.555	\$ 1,278.72		
2012-2	57	32	\$ 0.555	\$ 1,012.32		
2012-3	55	32	\$ 0.555	\$ 976.80		
2012-4	58	32	\$ 0.555	\$ 1,030.08	242	\$ 4,297.92
2013-1	63	32	\$ 0.565	\$ 1,139.04		
2013-2	61	32	\$ 0.565	\$ 1,102.88		
2013-3	48	32	\$ 0.565	\$ 867.84		
2013-4	64	32	\$ 0.565	\$ 1,157.12	236	\$ 4,266.88
2014-1	66	32	\$ 0.560	\$ 1,182.72		
2014-2	58	32	\$ 0.560	\$ 1,039.36		
2014-3	20	32	\$ 0.560	\$ 358.40	144	\$ 2,580.48
<b>TOTAL</b>	<b>949</b>			<b>\$ 16,611.04</b>	<b>949</b>	<b>\$ 16,611.04</b>

**ROCHESTER GAS & ELECTRIC CORP.  
CASE 03-CA-025915**

**REMEDY FOR LOSS OF VEHICLES**

	Amount Due
Thomas Eichele	\$ 10,229.28
Steven Parnell	\$ 16,799.04
Jeffrey Pierce	\$ 7,006.09
Toney Proctor	\$ 4,342.30
Richard Shamp	\$ 10,509.80
Alfred Smith	\$ 15,096.42
John Spratt	\$ 20,965.10
Kim Williams	\$ 16,611.04
<b>GRAND TOTAL</b>	<b>\$ 101,559.07</b>

UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
NOTICE

Case 03-CA-025915

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Richard Irish  
International Brotherhood Of Electrical Workers  
(IBEW) Local 36  
595 Blossom Rd Ste 303  
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Binghamton, NY 13902-5250

## Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: [www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules\\_and\\_regs\\_part\\_102.pdf](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf).

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at [www.nlr.gov](http://www.nlr.gov), click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

**Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement.** The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

### I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

### II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

### III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

# **EXHIBIT B**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
THIRD REGION

---

ROCHESTER GAS & ELECTRIC CORP.,

and

LOCAL 36, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO,

**ANSWER TO  
COMPLIANCE  
SPECIFICATION**

Case No: 03-CA-025915

---

Rochester Gas & Electric Corp., by and through its attorneys, Hinman, Howard & Kattell, LLP, (James S. Gleason, Esq.) for its Answer to the Compliance Specification herein states as follows:

1. Admits in part and denies in part. Admits the “backpay”<sup>1</sup> period ended on August 22, 2014, but denies that it began on August 23, 2010 and affirmatively states it began on July 1, 2014, the date the Second Circuit mandate was issued.

2. Admits the allegations contained in paragraphs 2(a)-(b).

Denies the allegations set forth in paragraph 2(c), and affirmatively states the calculation of backpay should be as set forth in Exhibit “A” hereto.

With respect to the allegations contained in paragraph 2(d) admits those are the reimbursement rates, but denies the rates for 2010-2013 are relevant, because denies that the backpay period began on August 23, 2010.

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<sup>1</sup> The amount at issue is not actually “backpay”. It is an amount to compensate employees for the use of their personal vehicles in commuting. The term “backpay” is used in this Answer because it is used in the Compliance Specification.

With respect to the allegations contained in paragraph 2(e), admits the Appendices set forth what is claimed to be set forth, but deny the calculation is correct and affirmatively states that the calculation of backpay should be as set forth in Exhibit "A" hereto.

3. Denies the allegations contained in the Summary and denies each and every other allegations not admitted herein.

### **FIRST AFFIRMATIVE DEFENSE**

4. Rochester Gas and Electric Corp. incorporates paragraph 1-3 as if fully set forth herein.

5. Rochester Gas and Electric Corp. and the Union cross-appealed the Board's underlying order.

6. The appeals were based on unsettled issues of law.

7. The appeals were argued in the Second Circuit Court of Appeals on November 15, 2011.

8. The Second Circuit Court of Appeals issued its decision on January 17, 2013.

9. The Second Circuit Court of Appeals decision created a circuit split of authority with the D.C. Circuit Court of Appeals.

10. Because of that split, the Second Circuit Court of Appeals determined there were significant questions of law and stayed its decision and its mandate pending Rochester Gas & Electric Corp.'s application for certiorari to the United States Supreme Court.

11. The Second Circuit Court of Appeals issued its order staying the mandate on February 8, 2014.

12. The Supreme Court of the United States did not deny certiorari until July 1, 2014.

13. The Second Circuit Court of Appeals' mandate enforcing the Board's order was stayed until it was issued on July 1, 2014.

14. The backpay period should begin with enforcement of the Board's order on July 1, 2014.

### **SECOND AFFIRMATIVE DEFENSE**

15. Rochester Gas and Electric Corporation repeats and realleges paragraphs 1-14 as if fully set forth herein.

16. Starting the backpay period prior to July 1, 2014 would not effectuate the purposes of the Act.

17. Starting the backpay period prior to July 1, 2014 would be an impermissible penalty to Rochester Gas and Electric.

### **THIRD AFFIRMATIVE DEFENSE**

18. Rochester Gas and Electric Corporation repeats and realleges paragraphs 1-17 as if fully set forth herein.

19. In the alternative, the Board should exclude the period of time the case was pending before the Second Circuit Court of Appeals as the appeal was made in good faith and the parties had no control over the Second Circuit's timing.

20. No purpose of the Act is effectuated by failing to exclude the time the case was pending before the Second Circuit Court of Appeals.

21. Failing to exclude the time the case was pending before the Second Circuit Court of Appeals is an impermissible penalty to Rochester Gas and Electric.

**FOURTH AFFIRMATIVE DEFENSE**

22. Rochester Gas and Electric Corporation repeats and realleges paragraphs 1-21 as if fully set forth herein.

23. In the further alternative, the time the Second Circuit Court of Appeals stayed its mandate should be excluded from the damages calculation.

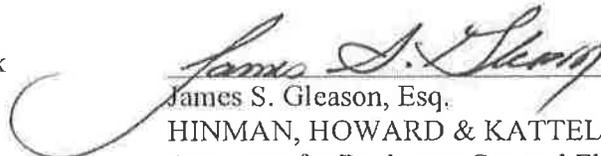
24. While the mandate was stayed, no enforcement of the Board order could take place.

25. No purpose of the Act is effectuated by failing to exclude the time while the mandate was stayed, and in fact, the Board would be impermissibly ignoring the Circuit Court's order staying the Board's enforcement power.

26. Failing to exclude the time the mandate was stayed is an impermissible penalty to Rochester Gas and Electric.

WHEREFORE, Rochester Gas and Electric demands judgment modifying the Compliance Specification to order Rochester Gas and Electric to pay the sum of \$3,599.68, with interest, as set forth in Exhibit "A" hereto.

Dated: November 19, 2015  
Binghamton, New York

  
James S. Gleason, Esq.  
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Attorneys for Rochester Gas and Electric Corporation  
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jgleason@hhk.com

# EXHIBIT "A"

**Exhibit "A"**

<b>Name</b>	<b>No. of Days</b>	<b>Mileage</b>	<b>Rate</b>	<b>Total</b>
Thomas Eichele	34	24	.56	456.96
Steven Parnell	25	32	.56	448.00
Jeffrey Pierce	32	14	.56	250.88
Tony Proctor	34	10	.56	190.40
Richard Shamp	31	20	.56	347.20
Alfred Smith	32	36	.56	645.12
John Spratt	31	52	.56	902.72
Kim Williams	20	32	.56	\$358.40

**Total**      **\$3,599.68**

# **EXHIBIT C**

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.

**Rochester Gas & Electric Corporation and Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO. Case 3-CA-25915**

August 16, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER  
AND BECKER

On June 12, 2008, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union each filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed cross-exceptions and a supporting brief, the General Counsel and Respondent each filed an answering brief, and the Charging Party filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>1</sup> The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with certain information and by refusing to bargain over the effects of its decision to discontinue its practice of allowing employees to drive company vehicles to and from work.<sup>2</sup>

1. The Union, the Charging Party in this proceeding, filed a motion to strike portions of the Respondent's answering brief. For the following reasons, we find it unnecessary to pass on the motion.

First, the Union, which contends that the General Counsel did not withdraw his allegation that the Respondent refused to engage in decisional bargaining, moves to strike the Respondent's contention that the General Counsel's posthearing brief supports the judge's finding that the allegation was withdrawn. In affirming the

<sup>1</sup> We shall modify the judge's remedy to better effectuate the policies of the Act. We shall also modify his recommended Order and substitute a new notice to conform to the violations found and to the Board's standard remedial language.

<sup>2</sup> The original complaint alleged that the Respondent also violated Sec. 8(a)(5) and (1) by refusing to bargain over its decision to discontinue the vehicle practice. We affirm the judge's finding that the General Counsel's amendment to the complaint withdrew the decisional-bargaining allegation. We observe, however, that the amendment was made before the hearing, not, as the judge stated, at the hearing.

judge's finding that the General Counsel withdrew the allegation, we find it unnecessary to consider the General Counsel's posthearing brief. Therefore, we need not pass on the motion to strike references to it.

Second, the Charging Party moves to strike portions of the Respondent's argument that the decision to change its vehicle practice was lawful. Having found that the decisional-bargaining allegation was withdrawn, we do not consider that argument on the merits, and therefore we need not pass on the motion to strike those portions of the Respondent's argument.

Finally, the Charging Party moves to strike certain statements supporting the Respondent's argument that the case should be deferred to the parties' contractual arbitration procedure. Even if we were to consider those statements, we would adopt the judge's decision not to defer, as stated below. Therefore, we need not pass on the motion to strike the statements.

2. We agree with the judge that the Respondent unlawfully refused to bargain over the effects of its decision to discontinue the practice of allowing employees to take company vehicles home from work.<sup>3</sup> *Noblit Bros.*, 305 NLRB 329 (1992), cited by the Respondent, is distinguishable. In *Noblit*, the Board found that the union never requested effects bargaining; rather, the union's bargaining demands were aimed at reversing a decision to change the scope and direction of the enterprise, a nonmandatory subject of bargaining, not at obtaining "adjustments in the employees' terms and conditions in the wake of that change." *Id.* at 330 fn. 10. In support of that finding, the Board noted that the briefs of both the General Counsel and the union characterized the union's bargaining requests as relating to the decision rather than its effects. *Id.* In the present case, by contrast, the Union's references to the monetary impact of the decision and to making employees whole show that the Union was seeking to negotiate over the effects of the decision. Moreover, unlike in *Noblit*, both the Union and the General Counsel argue in their briefs that the Union implicitly demanded effects bargaining as well as decisional bargaining.<sup>4</sup>

<sup>3</sup> In doing so, we do not rely on *AT&T Corp.*, 325 NLRB 150 fn. 1 (1997), or *Yellow Cab Co.*, 229 NLRB 1329 (1977), *enfd.* in part 603 F.2d 862 (D.C. Cir. 1978), both of which were cited by the judge.

<sup>4</sup> We affirm the judge's finding that the Union did not waive its right to effects bargaining. Although Member Schaumber adheres to his position that the Board should apply a "contract coverage" test rather than the "clear and unmistakable waiver" standard, see *California Offset Printers*, 349 NLRB 732, 737 (2007) (Member Schaumber, dissenting), he acknowledges that no Board majority currently exists to adopt the contract coverage standard. Accordingly, for institutional reasons, Member Schaumber joins in adopting the judge's waiver analysis.

## AMENDED REMEDY

Having considered the Respondent's exception, we conclude that a remedy similar to that in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), is more appropriately tailored to the violation and will better effectuate the policies of the Act.

A *Transmarine* remedy, typically granted when an employer fails to bargain over the effects of closing a facility or otherwise removing work from the bargaining unit, requires the employer to bargain over the effects of its decision and to provide employees with limited back-pay from 5 days after the date of the Board's decision until the occurrence of one of four specified conditions. See *Transmarine*, supra at 390, as clarified in *Melody Toyota*, 325 NLRB 846, 846 (1998); *Gannett Co.*, 333 NLRB 355 (2001); *Sea-Jet Trucking Corp.*, 327 NLRB 540 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000) (per curiam). The *Transmarine* remedy is "designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent[]." *Liberty Source W*, 344 NLRB 1127, 1128 (2005), enfd. 478 F.3d 172 (3d Cir. 2007), cert. denied 552 U.S. 818 (2007). *Transmarine* is the standard remedy in effects-bargaining cases. *Stevens International*, 337 NLRB 143, 144 (2001).

Here, as in *Transmarine* and its progeny, the Respondent violated its legal obligation to engage in timely bargaining about the effects on the employees of its decision to discontinue the vehicle benefit. Although the Respondent's decision to discontinue the benefit did not result in the loss of jobs, as with the partial closing at issue in *Transmarine*, it did cause unit employees to incur economic losses in the form of increased commuting costs. As the Board observed in *Transmarine*, 170 NLRB at 389, the Respondent's unfair labor practice thus deprived the Union of "an opportunity to bargain . . . at a time prior to [implementation of the decision] when such bargaining would have been meaningful in easing the hardship on employees . . ." In *Gannett*, above, the Board observed, "the Union may have been able to secure 'ad-

We also adopt the judge's decision not to defer to the parties' contractual arbitration procedure. In doing so, we find it unnecessary to pass on the Union's argument that the contractual procedure improperly requires employees to waive their statutory rights. Member Schaumber would find that information-request allegations, if covered by a contractual arbitration clause, are deferrable. He recognizes, however, that Board precedent is to the contrary. See *Team Clean, Inc.*, 348 NLRB 1231 fn. 1 (2006). And, in any event, Member Schaumber acknowledges that the effects-bargaining and information allegations here are not covered by the contractual arbitration clause, and therefore are not deferrable.

ditional benefits for employees had the Respondent engaged in timely effects bargaining.'" 333 NLRB at 359 (quoting *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990)).

Several years have now passed since the vehicle benefit was discontinued, and we cannot determine the result that timely effects bargaining would have produced. Moreover, we cannot order the Respondent to restore the benefit because, as the Respondent points out, it acted lawfully when it unilaterally implemented the decision to discontinue the benefit. However, were we to merely order that the Respondent now engage in effects bargaining, "the Union can hardly hope to obtain the same benefits from bargaining that might have helped ease the unit employees' transition . . . had 'effects' bargaining taken place at the time required by law." *Gannett*, above, at 359 (quoting *Signal Communications*, 284 NLRB 423, 428 (1987)). As in *Transmarine*, above, "a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices committed by the Respondent." 170 NLRB at 390. At this point, meaningful bargaining cannot be assured without restoring some measure of bargaining power to the Union in relation to the issue.

Accordingly, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we shall order the Respondent to bargain over the effects of its decision and to provide employees with a limited and conditional make-whole remedy similar to that required in *Transmarine*, above. Specifically, we shall order the Respondent to pay each employee the monetary value of the vehicle benefit from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on the effects of discontinuing the benefit; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. The sum paid to each employee shall not exceed the monetary value of the vehicle benefit to that employee from January 1, 2006 (the date the benefit was discontinued) until the date on which the Respondent shall have offered to bargain in good faith. However, in no event shall the sum paid to any employee be less than the monetary value of the benefit to that employee for a 2-week period.<sup>5</sup> The amounts due shall be computed in accordance with *Ogle*

<sup>5</sup> We leave to compliance the determination of the monetary value of the vehicle benefit to each affected employee

*Protection Service*, 183 NLRB 682, 683 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Rochester Gas & Electric Corp., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO (the Union), over the effects of eliminating the benefit of allowing the low-voltage trouble maintenance and repair (TM&R) employees to take their service vehicles home at the end of their shifts.

(b) Failing and refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the unit described below, and/or failing to inform the Union that the requested information did not exist.

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

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

(a) On request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effects of the Respondent's decision to discontinue the benefit of allowing the low-voltage TM&R employees to take their service vehicles home after work, and if an understanding is reached, embody the understanding in a signed agreement:

All employees of Respondent described in Section 1—Representation and Recognition, of the collective-bargaining agreement between the Respondent and the Union, which is effective from September 1, 2003 to May 31, 2008.

(b) Pay each low-voltage TM&R employee the monetary value of his or her vehicle benefit, with interest, for the period set forth in the remedy section of this decision.

(c) Furnish the Union with the information it requested on March 7 and June 5, 2006, namely, the cost of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all nonunit employees who have the benefit of taking a company vehicle home, and whether the Respondent announced to

any nonunit employees that the benefit would be discontinued.

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

(e) Within 14 days after service by the Region, post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."<sup>6</sup> 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 any time since January 10, 2006.

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

Dated, Washington, D.C. August 16, 2010

\_\_\_\_\_  
Wilma B. Liebman, Chairman

\_\_\_\_\_  
Peter C. Schaumber, Member

\_\_\_\_\_  
Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain with Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO (the Union), over the effects of our elimination of the benefit of allowing the low-voltage trouble maintenance and repair (TM&R) employees to take their service vehicles home at the end of their shifts.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of employees in the unit described below, and/or fail to inform the Union that certain requested information did not exist.

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

WE WILL, on request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effects of our decision to discontinue the benefit of allowing the low-voltage TM&R employees to take their service vehicles home after work, and if an understanding is reached, embody the understanding in a signed agreement:

All employees of Rochester Gas & Electric Corporation described in Section 1—Representation and Recognition, of the collective-bargaining agreement between Rochester Gas & Electric Corporation and the Union, which is effective from September 1, 2003 to May 31, 2008.

WE WILL pay each low-voltage TM&R employee the monetary value of his or her vehicle benefit, with interest.

WE WILL provide the Union with the information it requested on March 7 and June 5, 2006, namely, the cost to us of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all nonunit employees who have the benefit of taking a company vehicle home, and whether we announced to any nonunit employees that the benefit would be discontinued.

ROCHESTER GAS & ELECTRIC CORPORATION

*Linda Leslie, Esq.*, for the General Counsel.  
*James R. LaVaute, Esq.*, of Syracuse, New York, for the Charging Party Union.  
*James J. Gleason, Esq.*, of Binghamton, New York, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Buffalo, New York, on February 11, 2008. Local Union 36 Electrical Workers, AFL-CIO (Union) filed the original charge in this case on June 13, 2006. An amended charge was filed on June 15, 2006 and a second amended charge was filed on September 8, 2006. The Regional Director for Region 3 issued a complaint and notice of hearing (Complaint) on October 31, 2006.<sup>1</sup> The complaint alleges, inter alia, that Rochester Gas & Electric Corporation (Respondent, RG&E or Company) has engaged in certain conduct that is in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). Respondent filed a timely Answer to the Complaint wherein it admits, inter alia, the jurisdictional allegations of the Complaint.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with its principal place of business in Rochester, New York, has been engaged in the generation, transmission, distribution and sale of electricity and natural gas. During the 12-month period ending October 31, 2006, Respondent, in conducting its business described above, derived gross revenues in excess of \$250,000. During the same time period, Respondent purchased and received at its Rochester, New York, facility goods valued in excess of \$50,000, directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 2006 unless otherwise indicated.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. The Complaint Allegations*

The complaint alleges and the Respondent admits that the following individuals held the positions opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Cathleen Frain	RGE/NYSEG Labor Relations
Richard Frank	Manager of Electrical Operations <sup>2</sup>

The complaint alleges and Respondent admits that at all material times, the Union has been the designated representative of Respondent's employees in the following unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees of Respondent described in Section 1—Representation and Recognition, of the collective-bargaining agreement between Respondent and Union, which is effective from September 1, 2003 to May 31, 2008.

The complaint further alleges that on or about January 10, 2006, Respondent discontinued the practice of allowing certain unit employees to take a service vehicle home after work. It alleges that this practice relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory subject of bargaining. It also alleges that Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.<sup>3</sup>

In its answer, Respondent admits that on January 10, 2006, it discontinued the practice of requiring certain unit employees to take service vehicles home after work, but denies the other allegations of the preceding paragraph.

The complaint further alleges that on or about March 7, 2006, the Union, by letter, demanded bargaining over Respondent's decision to terminate the practice, (called benefit by the Union) noted above and requested that Respondent furnish the Union with the following information with respect to that benefit:

1. A listing of jobs and unit personnel that have the benefit;
2. Any Company analysis of the cost of this to the Company;
3. A listing of nonunit personnel who have the benefit, so that we may assess the significance of this issue to the Company; and,
4. Whether the Company announced to any nonunit personnel the same restriction now being imposed upon members of the bargaining unit.

The Complaint alleges that this information is necessary for, and relevant to, the Union's performance of its duties as the

<sup>2</sup> Frank testified that his job title was manager of regional operations. Though it is relatively immaterial, I will accept Frank's version as he should know best what his job is titled.

<sup>3</sup> The complaint was amended at hearing to remove an allegation that Respondent did not afford the Union prior notice and an opportunity to bargain over its decision to cease the involved practice.

exclusive collective-bargaining representative of the unit. The Complaint further alleges that on or about March 7, 2006, Respondent, by Cathleen Frain, by letter, failed and refused to furnish the Union with the information requested above. Respondent admits that the Union filed the information request, but denies the other allegations related to it.

*B. Facts Related to the Decision to End the Practice of Allowing Certain Employees to Take Company Vehicles Home and the Union's Response*

## I. Facts related to the making of this decision

Richard Frank testified that the Company provides gas service to about 370,000 customers and electricity to about 280,000 customers in a nine county area around Rochester, New York. Frank is regional operations manager for Respondent. Within the geographic area of his responsibility, he manages the trouble maintenance and repair operation (TM&R) and also electrical construction of such things as substations. There are two groups of employees in TM&R, high voltage and low voltage. The high voltage group works with the overhead and underground electric transmission system with voltages as high as 35,000 volts, whereas the low voltage group primarily deals with residences with voltages under 480 volts. The high voltage crews use a material handling truck with a bucket attachment. These crews have never taken a Company vehicle home at night. When there is an emergency for them to handle, they report to the Respondent's Rochester, New York West Avenue facility and are dispatched in their trucks from that facility.

The low voltage group works on commercial and residential meter and service work. They do a lot of meter installations and meter change-outs. They do maintenance work on what is called a current transformer which uses voltages up to 480 volts. They do both scheduled and emergency work. The emergency work accounts for about 40 percent of the work of the low voltage group. In this group are eight employees, seven electric meter technicians and one electric meter inspector. On a day to day basis, the employees in this group work solo. They use a ¾ ton van in their work. These vans have two front seats with a bulkhead behind them to keep material in the rear from coming into the driver compartment. The vans are equipped with a computer and any materials the employee needs to do his work are in the rear of the van. Their work is divided into two shifts, one from 7 a.m. to 3 p.m. and the other from 3 to 11 p.m. Usually the first shift is manned by four to six employees, Monday through Friday. The second shift is manned by one or two employees normally, Monday through Friday. The Saturday and Sunday shifts are manned by one employee for each shift. Emergency work coming after 11 p.m. is handled by the high voltage crews.

Emergency situations can arise from employees calling in sick or storm situations. On these occasions, off duty employees may have to be called in. Employees are called in order from a list supplied to the Company by the Union. They can refuse the call out and in that event, the next person on the list is called. Prior to January 1, 2006, these employees took their service van home at night. If called in for an emergency while at home, they would drive the Company vans to the West Avenue facility to pick up the packet of material needed to do the

emergency work, then go to the worksite. The Company also provides a helper for emergency work and the low voltage employee would pick this person up at West Avenue. On what Frank termed "rare" occasions, the employee might be dispatched to a worksite without first going by the West Avenue facility.

Subsequent to January 1, 2007, the employees now always report to West Avenue for their van, material and a helper if needed. In November, 2005, Frank decided he wanted to end the practice of the employees taking their assigned vans home at night.<sup>4</sup> He testified that garaging them at West Avenue at night would be a cost savings to the Company. He was also concerned that having the Company trucks parked at employees' homes presented some sort of negative public reaction. He did not elaborate on this point. He also did not do any formal cost analysis of the savings associated with the decision.

He recommended to one of the Company's labor relations specialists, Cathleen Frain, that the practice be discontinued. He made the recommendation to her because he wanted to be sure he was allowed to do it under the collective-bargaining agreement. He made the request by email. The communication, dated November 3, 2005, reads:

As you are probably aware, Operations across NY State is looking at reducing costs to meet budget constraints. One of the cost savings ideas for my group would be to have the 8 Low Voltage employees who currently take home their vehicles, park them here at West Ave now and commute back and forth to work in their personal vehicles. This makes good business sense in that these employees start their shift each day here at West Ave.

These employees get called in from home approximately 1 time per month. If the call-in is storm related, they are reporting to West Ave. first to meet up with their rider anyway. One call-out per month doesn't constitute having their vehicles at their homes for emergency response. As mentioned above, they report to West Ave. each day at the beginning of their shift to get their work assignments for that day. They also have their morning tailboard at that time. Rarely do they have a job scheduled earlier than their start time.

Currently, these employees would finish their last job for the day and head home from there. If they have to report back to West Ave. to drop off their vehicle, they would pretty much be leaving the worksite at about 30 minutes or so before the end of their shift in order to be back to West Ave. at the end of their shift. We're not 100 percent certain they are on the jobsite much past that anyway even if they are going home from the site.

My recommendation is that you and I sit with Rick Irish<sup>5</sup> and give him a heads up that this is coming. The sooner the better. I would then communicate this to the 8 employees involved. I would like to pull the trigger on this as soon as 11/28/05. If we were to let the employees know next week, they would have nearly 3 weeks to prepare.

<sup>4</sup> This practice had been in operation for about 29 years.

<sup>5</sup> Richard Irish is the Union's President

A chart introduced by the Respondent reflects the emergency call-outs for 2005. By months it shows for January, 6 call-outs. June and July, 2 call-outs for each month, August, 8 call-outs, September, 1 call-out, October, 4 call-outs and no call-outs in the other months.

2. Notice of the decision is given to affected employees and the Union responds

Frain approved the recommendation and Frank set a meeting for November 18, 2005, and explained the company's plans to the eight affected employees.

Steven Parnell is a low voltage employee of Respondent and a union steward. He is one of the employees affected by the decision to stop letting employees take home company vehicles. He attended a meeting on November 18 at Respondent's West Avenue facility. In attendance for management were Frank and Supervisor Jim Connell. The employees in attendance in addition to Parnell were Tom Eichle, Dick Shamp, Alford Smith, Tom Spratt, and Tony Proctor. All are electric field technicians, except for Smith, who is an electric meter inspector and all are considered low voltage employees. Frank informed the employees that as of January 1, 2006, they would no longer be allowed to take company vehicles home at night. Smith then asked Frank if management had considered other options such as charging the employees for taking the vehicles home at night. Smith added that he considered the benefit of taking the company vehicle home part of his compensation. Frank responded that the decision had already been made. Frank also noted that other employees under his management were similarly going to lose the use of company vehicles to get to and from work. Presumably these were nonunit employees. Parnell testified that he used the company vehicle about twice a year to answer emergency call-outs from his home. On these occasions, Parnell might report to the emergency directly or he might first go to the West Avenue facility.

Parnell was not allowed to take a company vehicle home after January 1, 2006. He had been taking one home since 1990. He did not have to buy gas for the company vehicle. The company withheld an amount from his pay to cover what the Internal Revenue Service deemed the value of the right to use the company vehicle to go to and from work. This value was considered to be income to the employee. An exhibit in this record lists the value or imputed income assigned for the years 2004 and 2005 for each affected employee. The annual values range from a low of \$426 to a high of \$663. For Parnell, the imputed income was listed as \$597 for 2004 and \$549 for 2005. Parnell lives about 17 miles from the involved company facility. He now uses his personal vehicle to get to the West Ave. facility.

Thomas Spratt is a low voltage employee of Respondent. As noted above, Spratt also attended the meeting with Frank.<sup>6</sup> According to Spratt, Frank gave as the reasons for taking away the Company vehicles budget cuts and restraints. Spratt remembered asking if other employees would also lose the use of company vehicles to go to and from work. According to Spratt,

<sup>6</sup> With this witness, the General Counsel indicated the date of the meeting was November 8, 2005, whereas with Parnell it was identified as taking place on November 18. Based on correspondence in the record, the correct date is November 18 2005.

Frank said, "Probably, this is just the start of it." Spratt lives about 25 miles from his place of work and had to take a personal vehicle out of storage and use it to go to work after his Company vehicle was taken away January 1, 2006. The imputed income for Spratt for the benefit of taking home the Company vehicle for 2004 was \$645 and for 2005 was \$636.

Spratt also testified that he was on a Company hiring committee in the spring of 2005. Also serving on this committee were employees Tony Proctor and supervisor Jim Connell. Spratt said there was a fourth member, but failed to identify him. This committee screened candidates for employment in two openings for electric meter technicians in their department. The candidates with the highest scores were offered employment. Spratt told each candidate that the use of a company vehicle to go to and from work was part of the job's compensation package. According to Spratt, supervisor Connell agreed with him.

Richard Irish is the President, Business Manager and Financial Secretary of the Union. The Union was certified at Respondent's facility in 2003 and the unit has 395 members. He testified that in November, 2005, he had a telephone conversation with Richard Frank. Frank informed Irish that effective January 1, 2006, Respondent would no longer allow the low voltage teams and meter men to take their service vehicles home at night. Instead, Respondent planned on garaging them at its West Avenue Facility. Irish responded that Respondent could not take this action unilaterally, but rather, was required to bargain over it as the existing benefit was a mandatory subject of bargaining. Frank said that he would relate the Union's position to Labor Relations and added, that the workers affected were not using the vehicles to answer emergency calls at night and that when they did, they first reported to the West Avenue Facility anyway. Frank called the decision a good one and noted the expense to the Respondent involved in the employees using the vehicles to go to and from their homes and the West Avenue Facility. Irish did not conduct an investigation among the affected employees to determine if Frank were correct in his assertions.

Later on the same day, Irish spoke to Steve Parnell. Parnell informed him that he and other affected employees had a meeting with Frank where the loss of the benefit was announced. Parnell told Irish that the employees were upset about the decision as they would have to get another vehicle or find some other means to get to work.

On January 10, 2006, Irish sent a letter to Respondent's Labor Relations Analyst, Jay Shapiro, which stated that it was formal grievance, adding:

This grievance is being filed in reference to January 1, 2006 requirement that Low Voltage TM&R employees with the Company with Company vehicles park the vehicles overnight at West Ave.

This unilateral action was a violation of past practice. This removes the benefit of use of the vehicles for commuting to work and responding to callouts directly from home. Wages, benefits, hours and working conditions are mandatory topics of collective bargaining. The Company refused collective bargaining in this matter.

The resolution to this instant case is that all affected members are made whole.

The Union met with the Company on three occasions to discuss the removal of the benefit. The first meeting took place on December 20, 2005. The meeting lasted 2 hours and the matter of the benefit was just one of a number of topics discussed. Appearing for the Respondent was Jay Shapiro and for the Union, IBEW International agent, Mike Flanagan and Irish. Irish testified that the discussion of the removal of the benefit took about 5 minutes. Irish did not remember the substance of the discussion. The next meeting where this matter was discussed took place in January 2006. Appearing for the Respondent were Cathleen Frain and Richard Frank. Appearing for the Union were Irish and employee-steward Steve Parnell. The portion of the meeting relating to the grievance took about 20 minutes. The Union pointed out that the cost of the decision to its affected members was about \$5000-\$6000 for transportation. There was no detailed explanation given for how this figure was calculated and it is not entirely clear whether Irish meant the figures given related to each individual affected employee or was for the whole group of eight employees combined. I would think the latter would be more likely. Irish noted that one of these affected members, Dick Shamp, had taken the job with Respondent at a pay cut as the use of the Company vehicle made up for the cut. He again pointed out that the removal of the benefit was a mandatory subject of bargaining. Respondent's representative took the position that it was a good business decision and that it had the right to remove the benefit under the contract.

There was a third step meeting held in July, 2006. Appearing for the Company were Frain, Shapiro, labor relations analyst George Savaker, Frank and his immediate boss, Walt Matias. Appearing for the Union were Irish, Parnell and then union Vice-President, Craig Rody. The Union reiterated its position that Respondent's decision was a mandatory subject of bargaining, and that the benefit had been explained to some job applicants as being part of the compensation for the job. The Union also took the position that by making the unilateral change in the involved benefit, the Respondent had violated the Act. The Company again took the position that it had the right to make the change under the contract and that it was a good business decision.

On March 7, Irish sent Frain the letter requesting information noted above at page 3 of this decision. Frain responded with a letter dated March 17, 2006, which stated:

Respectfully the Company is not rescinding the determination it has made with regards to the Low Voltage TM&R group garaging their vehicles at night. I disagree with your characterization of the issue as being a benefit. This issue is currently in the grievance process and we will be willing to discuss your concerns within that forum. As for your request for information, we will provide you the information relevant to the matter.

Irish testified that he sent this letter and another on June 5 in an attempt to get the Company to bargain over the removal of the vehicles, "have them bargain over some recompense, you

know, some type of compensation for removing the vehicles, . . . .”

Irish wrote Frain again on June 5. This letter is practically identical to the one sent on March 7, with the difference being that he notes that Respondent had not yet complied with the information request as of the date of the later letter.

Frain responded with a letter dated July 10, which reads:

This letter is in response to your letter dated June 5, 2006 requesting information regarding the Employer Vehicle Program. I have enclosed a report listing bargaining unit members, their job title and the company vehicle they have been assigned to take home at night. The company believes that it is not obligated to provide you with any financial information on company vehicle costs more does the company believe the Union's request for information on non-union employee vehicles is relevant or necessary to your duties and responsibilities.

As stated in the company's March 17, 2006 response, we disagree with your characterization of this issue as a "benefit" and the company is not rescinding its determination to have these vehicles garaged at night.

Please note that the information being provided is being provided for use by the Union strictly for the purposes of contract administration and/or collective bargaining. The information remains confidential and proprietary and may not be distributed or used for anything but the above stated purpose, without the written consent of the Company. If you have any questions on the information provided, please call me.

Respondent thus supplied the information requested in paragraph one of the information request, but no information was supplied for the other three paragraphs.

On July 21, 2006, Irish wrote to Shapiro, stating that the Union was withdrawing the grievance over the removal of vehicles and stating that it would pursue the matter before the NLRB.

Irish testified that he requested the information, including that for nonunit employees to see how many people were affected and what was the cost of the program to the Respondent. He testified the Union needed this information in order to develop a bargaining position. As he was not sure of the total number of employees affected, he was not sure what cost savings the Respondent might realize by the removal of the vehicles. He implied that the proposal might be affected by the total amount of the cost savings. Other than the information provided by Frain in her July 10 letter in response to paragraph 1 of the Union's request, Respondent has not made available any other information sought.

On July 10, Irish had a phone conversation with Shapiro who told him the Respondent did not see the relevance of the information sought about nonunit employees (Paragraphs 3 and 4 of the request). According to Respondent, Irish did not give either Shapiro or anyone else with the Company reasons why these two requests involving nonunit employees were relevant. I cannot find any evidence that Respondent asked the relevance. With respect to Paragraph 2 of the request, Irish was never told the Company could not afford to let the employees take Company vehicles home. Irish testified that the Respondent never

bargained or offered to bargain with the Union over the effects of the decision to remove the company vehicles from the eight employees who had been allowed to use them to go to and from work. Similarly, he testified that Respondent never offered any compensation to these employees for taking away the vehicles that they had been allowed to take home at night.

### 3. The relevant provisions of the collective-bargaining agreement

Irish was part of the negotiating team that reached the current collective-bargaining agreement. The parties, and primarily, Respondent makes some fairly broad contentions about Irish's testimony related to bargaining. I think it important to see exactly what Irish did say, which is not easy to summarize otherwise. This testimony was fragmented by numerous evidentiary objections from all parties. The testimony was given starting at page 25 of the transcript and questions are by Respondent's counsel and answers by Irish. The exchange, excluding objections and arguments reads:

Q. In the course of that bargaining for that agreement, you discussed, did you not, taking vehicles home—union members taking vehicles home, is that correct?

A. Yes, we did.

Q. You also discussed, in the course of that agreement that the—there would be certain rights that the company would retain with regard to work rules and work practices, did you not?

A. Yes, we did.

Q. As part of that agreement the union agreed, did they not, that the company was free to unilaterally change any work rule or any practice that had been ongoing at RG&E during the course of this collective bargaining agreement, except as provided in the agreement itself, is that right?

A. No answer given as the parties engaged in a number of objections and counsel went to another question.

Q. You bargained over the company's right to retain the ability to make certain unilateral changes with regard to work practices and work rules, did you not?

A. yes, we did.

Q. And, the result of that bargaining is set forth in the collective bargaining agreement, is it not?

A. No answer was given as the parties again objected and counsel opted to ask another question.

Q. You told us you bargained over the company's ability to make changes—unilateral changes with regard to certain work rules and certain work practices as they existed and the result of that bargaining is contained in the collective bargaining agreement itself, is it not?

A. No answer was given and objections were made. Counsel chose to ask another question.

Q. You bargained about work rules, did you not?

A. Yes, we did.

Q. You bargained about whether or not the company would have the right to make unilateral changes in work rules as they existed at RG&E, did you not?

A. Yes, we did.

Q. You arrived at an agreement with regard to that, did you not?

A. Yes, we did.

Q. And that's reflected in the collective bargaining agreement, is that right?

A. Yes, it is.

Q. With regard to work practices, you bargained about that, did you not?

A. Yes, we did.

Q. And, you arrived at an agreement which would give the company certain rights with regard to making unilateral changes to work practices?

A. Objections were made and no answer was given. Counsel then asked another question.

Q. Did you bargain, during the course of the negotiations, about the company's right to make certain unilateral changes to existing work practices at RG&E?

A. Yes, we did.

Q. And the result of that bargaining is set forth in the collective bargaining agreement, is it not?

A. Yes, it is.

Q. With regard to just for the convenience of the judge, the agreements with regard to work practices and work rules are contained in Article 7 of the collective bargaining agreement, is that correct?

A. Yes, they are.

Q. Now, you also—let me back up for a second. You told me that you had recited the union's position on a number of occasions to the company with regard to this change in the practice of taking—the low voltage TMR people taking trucks home; isn't that right?

A. Yes, I did.

Q. I believe, and correct me if I am wrong, that the thrust of your discussions with the company was that you viewed that a benefit to be allowed to take the trucks home; is that right?

A. It was a benefit or compensation.

Q. And, in your mind was this dollar amount that there would be some value in taking the truck home so you didn't have to pay for a vehicle of your own to get work in the morning, is that right?

A. That's correct.

Q. And to get home at night too, right?

A. Yes.

Q. And, your view was that that was a benefit to the employees, right?

A. A benefit or compensation?

Q. A benefit and compensation?

A. Or compensation, to me they're kind of analogous terms.

Q. Meant the same thing to you?

A. Yes.

Q. During the course of negotiations for this collective bargaining agreement, Joint Exhibit No. 7, you bargained about benefits, did you not?

A. Yes, we did.

Q. And, the company retained certain—the company's position was that they should be able to retain certain rights with regard to changing those benefits unilaterally; isn't that right?

A. Would you ask that again, please?

Q. The company's position during the bargaining was that they should be able to retain the right to change benefits unilaterally, isn't that right?

A. I don't know if I agree that it was the company's position.

Q. You don't know what—you don't recall the company's position?

A. I don't recall that position.

Q. But you do remember this concept of benefits being discussed?

A. Yes.

Q. Let's set wages aside for a second, okay? There are certain things that the employees get by virtue of their employment at RG&E that have some economic benefit to them, is that correct?

A. Yes.

Q. That's aside from the wages that they earn, right?

A. That's correct.

Q. There are certain things like clothing allowance and some other things that just for an example of a benefit that employees get; is that right?

A. Yes.

Q. And that's separate and apart from their wages, right?

A. That's correct.

Q. This benefit or let me ask it another way, taking a vehicle home after work, is that one of those benefits that you get that's separate and apart from your wages, if you're in that category?

A. It's a benefit or compensation separate and apart from wages.

Q. Taking the concept of wages out of it for a second, all right, it's a benefit in terms of something that they get that's of value apart from their wages; is that right?

A. Yes.

Q. During the course of the negotiations that you had with the company to arrive at this collective bargaining agreement, you discussed this concept of benefits that were separate from the compensation, right?

A. Yes we did.

Q. You arrived at an agreement with regard to that, is that right?

A. Yes, we did.

Q. The agreement that you arrived at with regard to benefits is set forth in Article 25 of the collective bargaining agreement that's in front of you, is that correct?

A. Yes, it is.

The next questioning of Irish on the subject of negotiation was by General Counsel.

Q. If you would refer to Joint Exhibit 7, and specifically Article 7. In the first paragraph, there is a reference to a joint committee?

A. That's correct.

Q. Do you know who was on that Joint Committee?

A. No, I do not.

Q. In the terms of the article on benefits, were vehicles ever discussed?

A. Objections were made and no answer was given. Another question was asked.

Q. So were vehicles ever discussed in relation to benefits?

A. I don't remember vehicles being discussed in relation to Article 25.

The next questions about negotiations of Irish were asked by counsel for the Union.

Q. Mr. Irish, in the course of the negotiations, I'm referring to Article 7 here, was there any discussion in the negotiations about the interplay or how you reconciled the first paragraph of Section A with the second paragraph of Section A; was there any discussion about that?

A. I don't recall a discussion of how they interplayed.

Q. In the course of negotiations did the company ever state to the union that it retained the right to withdraw the take-home vehicles?

A. No they did not.

Article 7 of the collective-bargaining agreement states:

(7) SAFETY AND WORK RULES

(A) It is understood and agreed that there are in existence specific safety and/or work rules, customs, regulations, or practices which reflect detailed application of subject matters within the scope of this Agreement and which are consistent with it. It would be impractical to set forth in this Agreement all of these rules, customs, regulations, and/or practices, or to state which of these matters may have been eliminated. A joint committee will be formed to review safety and work rules, customs, regulations, and practices. It is understood and agreed that if a dispute arises as to the existence or enforceability of a specific safety or work rule, custom regulation, or practice, such dispute shall not be subject to the grievance and arbitration provisions of this Agreement, but shall instead become the exclusive concern of the Director of Human Resources for the Company and the International Representative of the Union or their specifically authorized deputies.

In addition, it is understood and agreed that the Company shall have the exclusive right to issue, amend, and revise safety and/or work rules, customs, regulations, and practices, except as expressly modified or restricted by a specific provision of this Agreement. This provision shall include job specifications for the classifications which were recognized by the NLRB Certification dated April 11, 2003, Case No. 3-RC-11307, except as expressly modified or restricted by a specific provision of this Agreement.

Paragraphs (B) and (C) of this Article are confined to safety rules and safety training and are not relevant to the issue under consideration.

Article (8) MANAGEMENT RIGHTS AND RESPONSIBILITIES

It is mutually understood and agreed by the parties to this Agreement that: except as expressly modified or restricted by a

specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including but not limited to the rights, in accordance with its sole and exclusive judgment and discretion to reprimand, suspend, discharge, and otherwise discipline employees for just cause; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay off, recall employees to work; to set the standards of productivity, the products to be produced and/or the services to be rendered; to maintain the efficiency of operations; to determine personnel, methods, means, and facilities by which operations are conducted; to determine the size and number of crews; to determine the shifts to be worked; to use independent contractors to perform work or services; to sub-contract, contract out, close down, or relocate the Company's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation or service; to regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to determine the number, location and operation of departments, divisions, and all other units of the Company; to issue, amend and revise reasonable policies, rules, regulations, and practices not in conflict with any express provisions of the collective bargaining agreement; and to direct the company employees. The Company's failure to exercise any right, prerogative, or function hereby reserved to it, or the company's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Company's right to exercise such right, prerogative, or function or preclude it from exercising the same in some other way not in conflict with the express provisions of this Agreement.

The parties at hearing referred to Article 25 as the Benefits Article in error. Article 25 is a one line article dealing with the Company's Pension. Article 26 is a one line Article dealing with the Company's 401(k) plans. Article 24 deals with benefits other than pension or 401(k). It reads:

(2) BENEFITS (other than Pension or 401(k))

During the term of this Agreement, the Company will provide "General Benefits" and "Benefit Plans" described in the "Rochester Gas and Electric Union Employee Benefit Handbook", subject to the terms and conditions of the plan documents. The terms of the plan documents, including the summary plan descriptions are specifically incorporated herein by reference.

Except as set forth below, it is understood and agreed that during the term of this Agreement the Company (consistent with the plan documents) shall have the exclusive and unilateral right to issue, amend, revise or terminate any or all benefits and benefit plans:

There follows four numbered paragraphs dealing with medical plans and flex fit credits, none of which are relevant to the issue involved in this case.

Though the parties discussed the matter of employees taking

home Company vehicles, it is not mentioned in the agreement. The only mention of vehicles I find is in Article 16 which deals with overtime. The last sentence of this Article reads: "The Company may require employees to take home vehicles."

*C. Discussion and Conclusion with Respect to the Issues.*

1. Did the Respondent violate the Act by refusing to bargain over the effects of its decision?

Wages, hours and other terms and conditions of employment are mandatory subjects of bargaining, which cannot be changed by an employer without providing the union with timely notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Making unilateral changes in mandatory subjects of bargaining "circumvent[s] . . . the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal." *Katz*, at 743. The effects on employees of losing the benefit of a service vehicle to drive to and from their residences is a mandatory subject of bargaining as it relates to their wages and conditions of employment.

The Respondent has argued that the Union has waived its right to this statutory mandate to bargain over unilateral changes by its agreement to the parties' collective-bargaining agreement. Whether that is correct or not is moot as the General Counsel has amended the Complaint to remove the allegation that Respondent was obligated to bargain over its decision to cease the practice of allowing the low voltage workers to use its vehicles to commute to and from work.

On the other hand, there remains the issue of whether Respondent was obligated to bargain with the Union over the effects of its decision. Under Board law, I find that Respondent was obligated to give the Union notice and an opportunity to bargain about the effects on unit employees of its decision to eliminate the benefit of the employee's use of Company vehicles to go to and from work and home. That is true even if it had no obligation to bargain about the decision itself. *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995). In *Good Samaritan Hospital*, the Board held that contractual language that waives the union's right to bargain about a decision is not a waiver of its right to bargain about that decision's effects. *Id.* at 902. Specifically, in *Good Samaritan Hospital*, the Board found that the language in the parties' collective-bargaining agreement waived the union's right to bargain over the hospital's decision to change its staffing matrix, but did not waive the union's right to bargain over the effects of this decision. *Id.* at 901-903. The Board found that the hospital's decision impacted the employees' terms and conditions of employment and that the hospital had to bargain over these effects. *Id.* at 903-904.

Here Respondent's decision had a substantial monetary effect on the affected employees. Whether one accepts the Respondent's own estimate of the value to the employees of its practice, the value or income imputed to the employees because of their use of Respondent's vehicles to commute to work, or the higher \$5000 to \$6000 figure asserted by the Union or something in between, the value was substantial. The costs

incurred by the employees as a result of the decision included providing a vehicle to replace the one provided by Respondent, and paying the maintenance, insurance and gasoline costs for the vehicle. It is obvious to anyone who drives a car these days that these costs are very real and substantial. Thus, the effects of Respondent's decision included changes to employees' terms and conditions of employment in ways that were material, substantial and significant. It is clear that Respondent realized the truth of this as the value of the use of the Company vehicle was considered income by Respondent and was represented to prospective employees and relied upon by some of those taking involved jobs, as being part of their total compensation. As such, Respondent had a duty to bargain over the effects of the decision. *Kiro, Inc.*, *supra*; *Union Child Day Care Center*, 304 NLRB 517 (1991)(finding that the employer violated Section 8(a)(5) of the Act by unilaterally discontinuing its practice of allowing employees to use a company vehicle to obtain their lunches); *Yellow Cab Co.*, 229 NLRB 1329, 1333, 1354 (1977) (finding that the employer violated Section 8(a)(5) of the Act by unilaterally changing its policy allowing employees to use their cab for transportation to and from work).

I cannot find any evidence that the Union has clearly and expressly waived its right to bargain over the effects of the Respondent's decision. Nothing in the evidence relating to the negotiations for collective bargaining speaks to any intent by the Union to consciously waive its right to effects bargaining and the collective-bargaining agreement is silent as to effects bargaining, though arguably giving the Respondent the right to unilaterally make changes in otherwise mandatory subjects of bargaining. Clearly there were no negotiations over the effects of the decision to take away the private use of Respondent's vehicles by low voltage employees and there is no language dealing with this issue in the collective-bargaining agreement. The Supreme Court, in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), held that it would not "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" "The Board has held that to meet the clear and unmistakable standard, "the contract language must be specific, or it must be shown that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000). Furthermore, in addressing effects bargaining, the Board has held that it must be clear and unmistakable that effects bargaining is being waived. *Good Samaritan Hospital*, *supra* at 902.

None of the contractual provisions, Article 7, Article 24 or Article 8, all set forth in their relevant entirety above, address the effects of taking any action under their wording nor do they address the removal of service vehicles at all. There is nothing that clearly gives Respondent the right to avoid effects bargaining from any action it might take in reliance on these Articles. There is nothing in the evidence in this record about negotiations that deals with effects bargaining. I find that Respondent has failed to meet its burden that the Union clearly and unmistakably waived its right to bargain over the effects of Respondent's unilateral removal of the low voltage employees long-standing benefit.

Likewise it is clear that the Union timely and continuously

requested to bargain over the matter. Irish made clear requests for bargaining in his November 2005 telephone conversation with Frank, in his meeting with Respondent's representatives in December 2005, and again in its official grievance over the matter submitted on January 10, 2006. The grievance in part states:

"This unilateral action was a violation of past practice. This removes the benefit of the use of vehicles for commuting to work and responding to callouts directly from home. Wages, benefits, hours and working conditions are mandatory subjects of collective bargaining. The Company refused collective bargaining in this matter. The resolution to this instant case is that all affected members be made whole."

The grievance is clear that the loss of a benefit of using the vehicles for commuting purposes is at issue and equally clear is the fact that, inter alia, the Union is seeking compensation for the losses its members incurred as a result of Respondent's decision. At both grievance meetings in January and July 2006, Irish repeated the Union's position that Respondent's conduct was a unilateral change and that hours, wages and conditions of employment were mandatory subjects of bargaining. The Union also maintained that position in its letters of March 7 and June 5, 2006. During the grievance meetings, Irish informed Respondent that the use of Company vehicles was part of the employees' compensation and that its loss was costing the employees \$5000 to \$6000 annually. I find that this makes perfectly clear that the Union was seeking an effects remedy in addition to seeking bargaining over the decision itself. On the issue of waiver, The Board has held that "[i]n the absence of a clear and unmistakable waiver by the union concerning effects bargaining, such bargaining is still required." *Good Samaritan Hospital*, supra at 902. Though I find that it is clear that the Union here requested by effects and decision bargaining, the Board has held that no magic words are required to establish a demand to bargain. They made it clear that the loss of the vehicle for commuting to work and the costs associated with that loss were substantial. Implicit in such a position is that a remedy is due to the employees for the effects of the lost benefit. *AT&T Corp.*, 325 NLRB 150 (1997); *Legal Aid Bureau*, 319 NLRB 159 fn. 2 (1995). Any argument by Respondent that the practice of letting the low voltage employees use their Company vehicles to commute is not a benefit, as was made in the testimony, is disingenuous as their best argument for waiver with respect to the decision to discontinue the practice is found in the section of the collective-bargaining agreement dealing with benefits.

In conclusion, I find that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union over the effects of its decision to cease the practice and benefit of allowing the low voltage employees to use their Company vehicles to commute to and from work.

2. Did Respondent violate Section 8(a)(5) of the Act by refusing to supply the Union with requested information?

Though Respondent did supply one part of the Union's information request, it continues to refuse to supply the following portions of it:

Any Company analysis of the cost of this to the Company;  
A listing of non-unit personnel who have the benefit, so that we may assess the significance of this issue to the Company;  
and,  
Whether the Company announced to any non-unit personnel the same restrictions now being imposed upon the members of the bargaining unit.

The Respondent has informed the Union that it does not consider the last two requests to be necessary and relevant to the Union's duties as representative of the unit employees and with respect to the first one, has stated that no analysis of the costs associated with its decision has been made. This latter information was first given at the hearing in this case and was not given to the Union prior to the hearing.

With respect to the cost request, General Counsel asserts that the Union is seeking an analysis of the cost to the Company of providing service vehicles to bargaining unit personnel, not an analysis of the cost savings achieved by taking the service vehicles away. I would agree though would note they might be the same thing. Whether any formal analysis was performed or not, the underlying cost information is available. Certainly the Respondent thought there were cost savings to be achieved by stopping the longstanding practice of letting the low voltage employees take Company vehicles home at night. Budget constraints and budget cuts were the reasons given to employees when they were informed of the Company's decision. I find that such information is highly relevant and necessary to the Union to be able to effectively bargain with the Company over the effects of its decision. Whether the costs are associated with increased mileage on the vehicles, increased maintenance costs or increased fuel costs are all matters within the knowledge of the Respondent. If it did not understand what the Union was seeking, it could have sought a clarification, but instead it simply chose to not comply without giving a legitimate reason.

Respondent is obligated to furnish the Union with information about the cost of providing the benefit to bargaining unit employees. Information relating to wages, hours and working conditions of employees in the bargaining unit is presumptively relevant. *North Star Steel Co.*, 347 NLRB 1364, 1364, 1368 (2006). Accordingly, the Board has held that financial information related to the cost of providing benefits to the bargaining unit is presumptively relevant for purposes of collective bargaining and must be furnished upon request. *E.I. DuPont & Co.*, 346 NLRB 553, 577 (2006); *V&S Schuler Engineering*, 332 NLRB 1242 (2000). There is no contention made in the evidence that such information does not exist and common knowledge would affirm that it does exist. Simply stating some years after the request was made that no analysis was made is just not sufficient. Respondent has violated the Act by not complying with this request.

With respect to the information sought concerning nonunit personnel, I believe this information is similarly necessary and relevant for the Union to properly represent the involved unit employees. Frank announced to the low voltage employees that ceasing the practice of letting them use their Company vehicles to commute to and from work was just the start of similar steps the Company intended to take. Thus he opened the door to

legitimate inquiry by the Union as to the scope of Respondent's cost savings program. With respect to information pertaining to employees outside the bargaining unit, the Union must demonstrate the information is relevant. *National Grid USA Service Co.*, 348 NLRB 1235 (2006). The burden in demonstrating relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982). The Union need only show a "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

The Union's information request was based on Respondent's representations regarding the reason it eliminated the vehicle benefit. Frank notified the low voltage employees that they were losing the use of the vehicles and in doing so indicated that it was a cost savings measure and that other employees would also lose the use of the vehicles. Frank made similar assertions to Irish. On this basis, the Union stated in its request, that it needed the information to "assess the significance of this benefit and its cost to the company and to aid the Union in responding to employer demands to terminate the benefit." The information relating to nonunit personnel would demonstrate the significance of the benefit, including whether the change was going to be instituted Company-wide or if it was only being applied to the low voltage members of the bargaining unit. This information would aid the Union in bargaining over the effect of losing the benefit, as it would clarify its impact on Respondent and assist the Union in preparing bargaining proposals. It would clearly affect the Union's bargaining position as it relates to the size of the cost savings sought by Respondent, whether minimal in the case of the low voltage employees or substantial if a number of nonunit employees were similarly losing the use of Company vehicles for their commute. I believe the Unions approach would be different in one case versus the other. Further, other than its claim of non relevance, Respondent has offered no reason why it cannot supply the information or what harm could result if it did. Relevancy of the information is also established by Frank's statements that the removal of the benefit was a cost savings measure that would be borne by other employees as well. The requested information would verify the assertion that Frank made to the low voltage employees.

I find that Respondent has violated the Act by not providing the information sought with respect to nonunit employees.

### 3. Deferral is not appropriate in the circumstance of this case

On brief and in its answer, Respondent urges deferral of this case to the parties' grievance and arbitration procedures. I think deferral in this case is inappropriate for two reasons. First, the use of take home Company vehicles at employer expense is a non-contractual term and condition of employment. The grievance and arbitration procedure allows processing only of an alleged "violation of the specific terms of this Agreement." Section 10(A). It states:

No other matter may be submitted to the grievance and arbitration procedure.

Work rules, customs, regulations, or practices which reflect detailed application of subject matters within the scope of this Agreement" are excluded from the grievance and arbitration procedure. Section 7 (A). Deferral is not appropriate here because the arbitration clause in the collective-bargaining agreement does not cover the item at issue.

Second, deferral is not appropriate as the Complaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information. *Postal Service*, 302 NLRB 767 (1991); *DaimlerChrysler*, 344 NLRB 1324 fn. 1 (2005). The Board held in *DaimlerChrysler Corp.* that "under the Board's decision in *Postal Service*, (citation omitted), the 8(a)(5) complaint allegations concerning failure to provide requested information are not appropriate for deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). Id. at fn. 1. Thus the information request allegations are not deferrable. Insofar as deferring the other allegation of this Complaint, the Board has held that it does not favor piece-meal deferral and prefers to have an entire dispute resolved in a single proceeding. *DaimlerChrysler Corp.*, supra.

### CONCLUSIONS OF LAW

1. Respondent, Rochester Gas & Electric Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to timely notify the Union and afford it an opportunity to bargain over the effects of discontinuing the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. By failing and refusing to provide the Union with the information it requested on March 7, and June 5, 2006, namely, the cost to Respondent of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all employees who have the benefit of taking a company vehicle home, and whether Respondent announced to any employee or group of employees not in the bargaining unit that the benefit would be discontinued, and by failing to inform the Union that certain requested information did not exist, Respondent violated Section 8(a)(1) and (5) of the Act.

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

### REMEDY

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

Respondent should be ordered to, on request, bargain collectively with the Union concerning the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work. It should further be ordered to make whole its employees for any losses they may have suffered as a consequence of its decision

to eliminate the vehicle benefit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent should further be ordered to furnish the Union with the information it requested on March 7 and June 5, 2006, which is relevant and necessary to the Union's duties as statutory representative of the Respondent's employees. And last, Respondent should be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The Respondent, Rochester Gas & Electric Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing to timely notify the Union and afford it an opportunity to bargain over the effects of discontinuing the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work;

(b) Failing and refusing to provide the Union with requested information relevant to the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work, and/or failing to inform the Union that certain requested information did not exist, so as to enable the Union to discharge its function as statutory representative of Respondent's employees; and,

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

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

(a) On request, bargain collectively with the Union concerning the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work.

(b) Make whole its employees for any losses they may have suffered as a consequence of the Respondent's refusal to bargain over the effects of its decision to eliminate the vehicle benefit.

(c) Furnish the Union with the information it requested on March 7 and June 5, 2006, which is relevant and necessary to the Union's duties as statutory representative of the Respondent's employees.

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

(e) Within 14 days after service by the Region, post at its facility in Rochester, New York, copies of the attached notice

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."<sup>8</sup> 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 any time since June 13, 2006.

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

Dated, Washington, D.C. June 12, 2008

#### 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 do anything that interferes with, restrains or coerces you with respect to these rights. More specifically,

WE WILL NOT refuse to give the Union all the information it requested on March 7 and June 5, 2006, concerning the elimination of the benefit of allowing the low voltage TM&R employees to take their service vehicle home at the end of their shift and/or fail to inform the Union that certain requested information does not exist.

WE WILL NOT refuse to bargain with the Union over the effects of our elimination of the benefit of allowing the low voltage TM&R employees to take their service vehicle home at the end of their shifts.

WE WILL make whole all low voltage TM&R bargaining unit members who previously enjoyed the benefit of taking their service vehicle home for any losses incurred as a result of our

<sup>8</sup> 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."

elimination of this benefit.

WE WILL bargain with the Union over the effects of our decision to eliminate the benefit of allowing low voltage TM&R employees to take their service vehicle home at the end of their shifts.

WE WILL provide the Union with the information it requested on March 7 and June 5, 2006, namely, the cost to Respondent of allowing the bargaining unit employees to have the benefit

of taking a company vehicle home, a listing of all employees who have the benefit of taking a company vehicle home, and whether Respondent announced to any employee or group of employees not in the bargaining unit that the benefit would be discontinued.

ROCHESTER GAS AND ELECTRIC CORP.

NOT INCLUDED  
IN BOUND VOLUMES

LBP  
Rochester, NY

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
ROCHESTER GAS & ELECTRIC CORPORATION

and

Case 3-CA-25915

LOCAL UNION 36, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO

ORDER DENYING MOTION

On August 16, 2010, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding, affirming the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with certain information and by refusing to bargain over the effects of discontinuing its practice of allowing employees to drive company vehicles to and from work. The Board's decision included an amended remedy and corresponding modifications to the judge's recommended Order, deleting the judge's make-whole remedy and substituting a remedy similar to that ordered in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).<sup>1</sup>

On August 24, 2010, the Charging Party filed a motion for clarification or reconsideration. The Respondent filed an opposition to the motion.

Having considered the motion and opposition, we see no need to clarify the Board's Decision and Order. Regarding the request for reconsideration, Section 102.48(d)(1) of the Board's Rules permits a party to move for

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<sup>1</sup> 355 NLRB No. 86.

reconsideration in "extraordinary circumstances." There has been no showing of extraordinary circumstances here. Accordingly, we deny the Charging Party's motion.<sup>2</sup>

Dated, Washington, D.C. , November 8, 2010.

\_\_\_\_\_  
Wilma B. Liebman, Chairman

\_\_\_\_\_  
Craig Becker, Member

\_\_\_\_\_  
Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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<sup>2</sup> Member Pearce did not participate in the underlying case, but he agrees that clarification of the Board's Decision and Order is unnecessary and that the Charging Party has not shown extraordinary circumstances warranting reconsideration.

# **EXHIBIT D**

Case: 10-1253 Document: 1262423 Filed: 08/20/2010

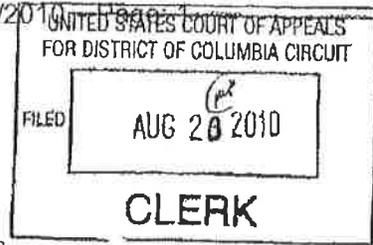
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AUG 20 2010

United States Court of Appeals  
District of Columbia Circuit

**United States Court of Appeals  
District of Columbia Circuit**

333 Constitution Avenue, NW  
Washington, DC 20001-2866  
Phone: 202-216-7000 Facsimile 202-219-8530



Case Caption: Rochester Gas & Electric Corporation  
Petitioner

v.

Case Number: 10-1253

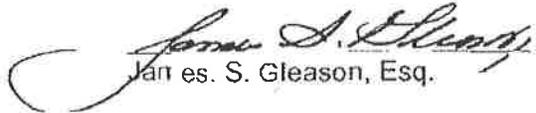
National Labor Relations Board  
Respondent

ORIGINAL

**PETITION FOR REVIEW OF AN AGENCY, BOARD, COMMISSION, OR OFFICER**

Notice is hereby given this 19<sup>th</sup> day of August 2010 that Petitioner Rochester Gas and Electric Corporation hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order of the Respondent National Labor Relations Board entered the 16<sup>th</sup> day of August 2010 (attached hereto).

Attorney for the Petitioner,

  
James S. Gleason, Esq.

Hinman Howard and Kattell, LLP

Address: 80 Exchange St.

P.O. Box 5250

Binahampton, NY 13092

Telephone: (607) 723-5341

E-mail: igleason@hhk.com



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Local Union 36, International Brotherhood of  
Electrical Workers, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent.

PETITION FOR REVIEW

Docket No. **10-3448**

Petitioner Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO, hereby petitions the United States Court of Appeals for the Second Circuit for review of the Decision and Order of Respondent National Labor Relations Board entered on the 16<sup>th</sup> day of August 2010 (attached as "Exhibit A"). Specifically, Petitioner seeks review of (a) Respondent's finding that the complaint did not allege that the employer refused to bargain over its decision to discontinue the practice of allowing employees to drive company vehicles to and from work, (b) Respondent's failure to find a decision bargaining violation, and (c) the remedy ordered by Respondent as to the effects bargaining violation that it did find.

Dated: August 26, 2010

BLITMAN & KING LLP

/s/ James R. LaVaute  
James R. LaVaute, Esq.  
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Buffalo, New York 14202  
[linda.leslie@nlrb.gov](mailto:linda.leslie@nlrb.gov)

Dated: August 26, 2010

BLITMAN & KING LLP

/s/ James R. LaVaute  
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[jrlavaute@bklawyers.com](mailto:jrlavaute@bklawyers.com)

# **EXHIBIT E**

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 29<sup>th</sup> day of March, two thousand eleven.

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Local Union 36, International Brotherhood of Electrical  
Workers, AFL-CIO,

Petitioner,

Rochester Gas & Electric Corporation,

*Petitioner - Cross - Respondent,*

v.

National Labor Relations Board,

*Respondent - Cross - Petitioner.*

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**AMENDED ORDER**

Docket Nos. 10-3448  
11-247  
11-329

IT IS HEREBY ORDERED that the motion to remove the case from abeyance and to restore it to the active calendar is GRANTED.

IT IS FURTHER ORDERED that the request for Petitioner Local Union International Brotherhood of Electrical Workers AFL-CIO and Petitioner-Cross-Respondent Rochester Gas & Electric Corp. to file the opening briefs on March 24, 2011 is GRANTED. Upon the filing of the briefs, Respondent-Cross-Petitioner National Labor Relations Board must file, pursuant to Local Rule 31.2, a scheduling notification letter selecting the date to file its opening/response brief. Petitioner-Cross-Respondent Rochester Gas & Electric and Intervenor in the Cross-Appeal Local Union 36 International Brotherhood of Electrical Workers AFL-CIO must also file a scheduling notification letter upon the filing of Respondent-Cross-Petitioner's brief selecting a date for their Response and Reply brief.

FOR THE COURT,  
Catherine O'Hagan Wolfe,  
Clerk




United States Court of Appeals for the Second Circuit

Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007

DENNIS JACOBS  
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE  
CLERK OF COURT

Date: October 07, 2011  
Docket #: 10-3448 ag  
Short Title: Local Union 36 International v.  
National Labor Relations Board

Agency #: 3-CA-25915  
Agency: National Labor Relations  
Board  
Agency #: 3-CA-25915  
Agency: National Labor Relations  
Board  
Agency #: 3-CA-25915  
Agency: National Labor Relations Board

**NOTICE OF HEARING DATE**

**Argument Date/Time:** Tuesday, November 15, 2011 at **10:00am**  
**Location:** Daniel Patrick Moynihan U.S. Courthouse, 500 Pearl Street,  
New York, NY, 9<sup>th</sup> Floor Ceremonial Courtroom

**Time Allotment: Local Union 36, et al (5 minutes), Rochester Gas & Electric Corp. (10 minutes), National Labor Relations Board (5 minutes).**

Counsel and non-incarcerated pro se litigants presenting oral argument must register with the courtroom deputy 30 minutes before argument.

A motion or stipulation to withdraw with or without prejudice must be filed within 3 business days of argument. The Court will consider the motion or stipulation at the time of argument, and counsel's appearance is required with counsel prepared to argue the merits of the case. If a stipulation to withdraw with prejudice is based on a final settlement of the case, the fully-executed settlement must be reported immediately to the Calendar Team, and a copy of it must be attached to the stipulation.

Inquiries regarding this case may be directed to 212-857-8595.

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**Counsel must file the completed form in accordance with Local Rule 25.1 or 25.2. Pro Se parties must submit the form in paper.**

Name of the Attorney/Pro Se presenting argument:  
Firm Name (if applicable):  
Current Telephone Number:

The above named attorney represents:  
( ) Appellant/Petitioner ( ) Appellee-Respondent ( ) Intervenor

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

# **EXHIBIT F**

10-3448-ag(L)  
*Rochester Gas & Elec. Corp. v. Nat'l Labor Relations Bd.*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: November 15, 2011)

Decided: January 17, 2013)

Docket Nos. 10-3448-ag(L), 11-247-ag(CON), 11-329-ag(CON)

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LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

*Petitioner,*

ROCHESTER GAS & ELECTRIC CORP.,

*Petitioner-Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent-Cross-Petitioner.*

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Before: CABRANES, STRAUB, and LIVINGSTON, *Circuit Judges.*

Local Union 36 of the International Brotherhood of Electrical Workers and Rochester Gas and Electric Corp., petition for review of the August 16, 2010 decision of the National Labor Relations Board (the “Board”), finding that Rochester Gas had engaged in unfair labor practices when it refused to bargain over the effects of its decision to discontinue its policy of permitting Union members to take company vehicles home at night (the “Vehicle Policy Change”). In support of its petition, Rochester Gas argues that the Union, by operation of a provision of the collective

bargaining agreement (“CBA”) between the parties, waived its right to bargain over the effects of the Vehicle Policy Change. In support of its cross-petition, the Union argues that the CBA required Rochester Gas to bargain with the Union over *both* the decision itself *and* its effects, and that the NLRB’s chosen remedy is insufficient to make the affected workers whole.

We hold that a two-step framework determines whether there has been a valid waiver of a statutorily protected right to bargain. We ask: (1) whether the applicable CBA clearly and unmistakably resolves (or “covers”) the disputed issue, whether with respect to the challenged management decision or the challenged effects, and (2) if not, whether the party asserting the right to bargain has clearly and unmistakably waived that right.

Applying this framework, we deny both petitions for review and enforce the NLRB’s order in its entirety. The CBA allowed Rochester Gas to make changes in its employee work practices and to control the use of company property, but those provisions did not clearly and unmistakably allow the Company to forgo any negotiation with the Union over the effects of the Vehicle Policy Change, nor did they clearly and unmistakably waive the Union’s right to bargain over the effects of the Vehicle Policy Change. Moreover, we conclude that the Board did not abuse its considerable discretion in granting the modified *Transmarine* remedy.

Cross-petitions for review denied.

Judge Straub concurs in the judgment and in the opinion of the court and files a concurring opinion.

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JOSÉ A. CABRANES, *Circuit Judge:*

The principal question presented is whether Local Union 36 of the International Brotherhood of Electrical Workers (the “Union”), waived its right to bargain over the effects of a particular decision made by Rochester Gas and Electric Corp. (“Rochester Gas” or the “Company”).

The Union and Rochester Gas bring cross-petitions for review of the August 16, 2010 decision of the National Labor Relations Board (“NLRB” or the “Board”), in which the Board concluded that Rochester Gas had engaged in an unfair labor practice by refusing to bargain over the *effects* of its decision to discontinue its policy of permitting Union members to take company vehicles home at night (the “Vehicle Policy Change”), and by refusing to provide the Union with information regarding the alleged business reasons for the Vehicle Policy Change. The Board determined that Rochester Gas was not obligated to bargain with the Union about the Company’s policy decision (as opposed to bargaining over the *effects* of that decision on employee benefits), concluding that the Board’s General Counsel had withdrawn this allegation from his complaint. Finally, the Board granted the Union a modified version of a so-called *Transmarine* remedy,<sup>1</sup> awarding back pay to the affected employees for the lost value of no longer being able to use company vehicles after work.

In its cross-petition for review, Rochester Gas argues that the Union, by operation of the parties’ collective bargaining agreement (the “CBA”), waived its right to bargain over the effects of

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<sup>1</sup> A *Transmarine* remedy is “a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties’ bargaining position is not entirely devoid of economic consequences for the [employer].” *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 390 (1968). It is not the more expansive “make-whole” remedy of the type requested by the Union, which is more akin to full compensatory damages, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994), but rather is a variable remedy based partially upon the future actions of the employer and the union, *see Transmarine Navigation Corp.*, 170 N.L.R.B. at 389–90. Although *Transmarine* back pay is typically calculated using the affected employees’ actual wages, the Board modified its usual remedy and based it instead on the lost value to the employees of using company vehicles after work.

the Vehicle Policy Change, and that because the Union had no right to bargain over that change, it had no right to receive the information it requested. The Union, in turn, argues that the CBA required Rochester Gas to bargain with the Union over *both* the decision *and* its effects, and that the modified *Transmarine* remedy was insufficient to make the affected workers whole.

We hold that a two-step framework determines whether there has been a valid waiver of a statutorily protected right to bargain. We ask: (1) whether the applicable CBA clearly and unmistakably resolves (or “covers”) the disputed issue, whether with respect to the challenged management decision or the challenged effects, and (2) if not, whether the party asserting the right to bargain has clearly and unmistakably waived that right.

Applying this framework, we deny both petitions for review and enforce the order of the NLRB in its entirety. The CBA allowed Rochester Gas to make changes in employee work practices and to control the use of company property, but those provisions did not clearly and unmistakably allow the Company to forgo any negotiation with the Union over the effects of the Vehicle Policy Change, nor did they clearly and unmistakably waive the Union’s right to bargain over the effects of the Vehicle Policy Change. Moreover, we conclude that the Board did not abuse its considerable discretion in granting the modified *Transmarine* remedy.

## BACKGROUND

### I. Facts

Rochester Gas is a utility company serving both natural gas and electricity customers in nine New York counties. The Union represents 395 Rochester Gas employees, including employees in the Trouble Maintenance and Repair (“TMR”) Department, which (as relevant here) includes a “low-voltage” group responsible for equipment carrying up to 480 volts. At the time of the Vehicle Policy Change, this low-voltage group was composed of seven technicians—who were responsible primarily for meter installations and replacements—and one inspector.

From at least 1990 until January 1, 2006, the Rochester Gas vehicle policy permitted low-voltage employees to drive Company vans to and from work and to keep them at their homes during their off-duty hours. Rochester Gas paid for the vehicles, maintenance, and gasoline, and withheld taxes from each employee's pay corresponding to the value of this benefit. The Company maintained this arrangement even though, as one employee testified, it was a "rare occurrence" for a low-voltage technician to proceed directly to a work location without first reporting to the Company offices.

In November 2005, Rochester Gas announced the Vehicle Policy Change by notifying the Union's president that, beginning on January 1, 2006, the low-voltage TMR employees would be required to park their service vehicles in the Company garage overnight. The Union repeatedly demanded that Rochester Gas bargain over the Vehicle Policy Change. The response of Rochester Gas relied upon a provision of the CBA stating that "the Company shall have the exclusive right to issue, amend, and revise safety and/or work rules, customs, regulations, and practices, except as expressly modified or restricted by a specific provision of this Agreement." In the view of Rochester Gas, this provision of the CBA permitted it to make the Vehicle Policy Change without bargaining with the Union over either the decision or its effects on Union members.

On January 10, 2006, the Union filed a grievance with the Company's Labor Relations Analyst, arguing that "[w]ages, benefits, hours and working conditions are mandatory topics of collective bargaining," and asserting that the Vehicle Policy Change changed the terms and conditions of employment for its affected members. By letters dated March 7, 2006 and June 5, 2006, the Union also requested the following from Rochester Gas: (1) a list of bargaining unit (*i.e.*, Union) jobs and personnel permitted to take Company vehicles home at night; (2) any Company analysis of the cost of the prior policy; (3) a list of non-unit personnel permitted to store Company vehicles at their homes; and (4) an indication of whether the Company had also changed its vehicle storage policy with respect to any non-unit personnel. By letter dated July 10, 2006, Rochester Gas responded

solely to the first of these information requests. The Union then withdrew its grievance in order to pursue its remedies under the National Labor Relations Act (the “Act”).

## II. Procedural History

The Union filed an unfair labor practices charge with the NLRB regarding the Vehicle Policy Change on June 13, 2006, and filed amended charges on August 17, 2006 and September 8, 2006. On October 31, 2006, the General Counsel of the Board (the “General Counsel”), having evaluated the charges made by the Union, commenced this proceeding against Rochester Gas, under the Act, by filing a formal complaint. The General Counsel’s complaint alleged, *inter alia*, that Rochester Gas had made the Vehicle Policy Change “without prior notice to the Union[,] and without affording the Union an opportunity to bargain with [Rochester Gas] with respect to [the Vehicle Policy Change] and the effects of [the Vehicle Policy Change],” all in violation of §§ 8(a)(1) and (5) of the Act.<sup>2</sup> Joint App’x at 12. On January 24, 2008, the General Counsel amended the complaint (the “Amendment”), eliminating its opposition to the decision itself and leaving only its allegation that Rochester Gas had failed to bargain with the Union “with respect to the *effects* of [the Vehicle Policy Change].” *Id.* at 24 (emphasis added).

After a hearing on February 11, 2008, an Administrative Law Judge (“ALJ”) issued a written opinion concluding that Rochester Gas had violated §§ 8(a)(1) and (5) of the Act by refusing to bargain over the effects of the Vehicle Policy Change and by failing to provide requested information to the Union. *Rochester Gas & Elec. Corp.*, Case 3-CA-25915 (N.L.R.B. June 12, 2008) (“*Rochester Gas*

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<sup>2</sup> In pertinent part, Section 8(a) of the Act, 29 U.S.C. § 158(a), reads as follows:

(a) Unfair labor practices by employer  
It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights [to, *inter alia*, collective bargaining]; . . . [or]
- (5) to refuse to bargain collectively with the representatives of his employees . . . .

P”), reprinted in Joint App’x at 186. The ALJ did not address whether the Vehicle Policy Change itself constituted an unfair labor practice because he determined that the portion of the complaint dealing with the policy decision itself had been withdrawn by the Amendment of January 24, 2008. *Id.* at 199. By its Decision and Order dated August 16, 2010, the Board affirmed the decision of the ALJ and ordered a modified *Transmarine* remedy. *Rochester Gas & Elec. Corp.*, 355 N.L.R.B. No. 86, at 1-3, 2010 WL 3246661 (Aug. 16, 2010) (“*Rochester Gas IP*”). These cross-petitions followed.

In this appeal, Rochester Gas argues that the Board erred in (1) holding that Rochester Gas violated § 8(a)(5) of the Act by refusing to bargain over the effects of the Vehicle Policy Change; and (2) holding that Rochester Gas violated § 8(a)(5) of the Act by failing to provide information requested by Local Union 36. The Union, in its petition, submits that the Board erred in (1) failing to address whether Rochester Gas violated § 8(a)(5) of the Act by refusing to bargain over both the decision to promulgate the Vehicle Policy Change *and* the effects of that decision; and (2) ordering only a modified *Transmarine* remedy rather than a “make-whole” remedy.

## DISCUSSION

### I. The Requirement of “Decision Bargaining” and “Effects Bargaining”

Section 8(a)(5) of the Act requires that employers engage in collective bargaining with their employees prior to changing employees’ “wages, hours, and other terms and conditions of employment.” *First Nat’l Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 674 (1981) (quotation marks omitted). The Act specifies that employers are required to engage in bargaining not only over the decision itself (“decision bargaining”), but also over the effects that the decision might have upon employees’ terms and conditions of employment (“effects bargaining”). *See N.L.R.B. v. New Eng. Newspapers, Inc.*, 856 F.2d 409, 413 (1st Cir. 1988); *cf. Torrington Extend-A-Care Emp. Ass’n v. N.L.R.B.*, 17 F.3d 580, 595 (2d Cir. 1994) (applying the rule requiring “effects bargaining” where the underlying decision was at the employer’s discretion).

**A. Contractual Interpretation and Waiver**

We have observed that “[i]t is axiomatic that an employer violates its duty to bargain under § 8(a)(5) of the Act by changing employees’ terms and conditions of employment without notifying and bargaining with the collective bargaining representative of its employees.” *N.L.R.B. v. United Techs. Corp.*, 884 F.2d 1569, 1574–75 (2d Cir. 1989). Nevertheless, “[i]t is equally clear that a union may waive its statutory right to bargain over a particular term or condition of employment.” *Id.* at 1575. Such a waiver must be “clear and unmistakable,” for “we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’” *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983). Where a union disputes the existence or extent of a waiver, “[t]he burden of proving a union waiver rests with the employer.” *Olivetti Office U.S.A., Inc. v. N.L.R.B.*, 926 F.2d 181, 187 (2d Cir. 1991).

We have held that “[a] clear and unmistakable waiver may be found in the express language of the collective bargaining agreement; or it may . . . be implied from the structure of the agreement and the parties’ course of conduct.” *N.L.R.B. v. N.Y. Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991); *see also United Techs. Corp.*, 884 F.2d at 1575 (“Such waiver may be found in an express provision in the parties’ collective bargaining agreement, or by the conduct of the parties, including their past practices and bargaining history, or by a combination of the two.”). However, no waiver can be inferred absent evidence that the parties knew of, and intentionally waived, the right at issue. *See Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1217 (6th Cir. 1987) (waiver of a right under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, “requires an intentional relinquishment of a known right” (internal quotation marks omitted)); *cf. United States v. Olano*, 507 U.S. 725, 733 (1993) (“[W]aiver is the intentional relinquishment or abandonment of a known right.” (internal quotation marks omitted)).

**i. Deference to the NLRB's Decision on Waiver**

When considering a decision of the Board about whether a right to bargain has been waived, the amount of deference we owe to the Board's decision depends on the grounds for that decision. It is settled that the Board is entitled to deference in its interpretation of the Act, so long as its interpretations are "rational and consistent with the Act." *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 201 (1991) ("*Litton*") (quotation marks omitted); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).<sup>3</sup> Indeed, we have long deferred to the Board's "clear and unmistakable waiver" requirement as the legal standard to be applied when determining whether a party has waived a statutory right provided by the Act. *See Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716, 722 (2d Cir. 1966) (relying upon the "clear and unmistakable waiver" rule (quotation marks omitted)); *Fayer v. Town of Middlebury*, 258 F.3d 117, 122–23 (2d Cir. 2001) (reiterating that waiver of a statutory right must be "clear and unmistakable"); *see also In re Tide Water Assoc. Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949) (establishing the "clear and unmistakable" standard for waivers of statutorily protected rights). That remains the governing legal standard.

We do not, however, defer to the Board's interpretation of a contract such as a CBA because the interpretation of contracts falls under the special, if not unique, competence of courts. *Litton*, 501 U.S. at 202–03. As the Supreme Court observed in *Litton*, "[a]lthough the Board has occasion to interpret [CBAs] in the context of unfair labor practice adjudication, the Board is neither the sole nor the primary source of authority in such matters." *Id.* at 202 (internal citation omitted). Instead, "courts are still the principal sources of contract interpretation." *Id.* (quotation marks omitted).<sup>4</sup>

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<sup>3</sup> *Chevron*, of course, requires that, where there has been a "legislative delegation" of regulatory authority to an administrative agency, *Chevron*, 467 U.S. at 844, courts must defer to that agency's interpretation of that statute, so long as that interpretation is "based on a permissible construction of the statute," *id.* at 843. The NLRB's interpretation of the Act receives this "*Chevron* deference" unless its interpretation is unreasonable. *See N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

<sup>4</sup> The holding of *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421 (1967), is not to the contrary. That case dealt with the jurisdiction of the Board to adjudicate matters turning on contractual interpretation. *Id.* at 428 (holding that the

Because “[w]e would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract” in some statutory contexts and not in others, the Court held, “[w]e cannot accord deference in contract interpretation here.” *Id.* at 203; *see also Honeywell Int’l, Inc. v. N.L.R.B.*, 253 F.3d 125, 132 (D.C. Cir. 2001) (applying *Litton* and explaining that “[t]he courts remain the ultimate arbiters of contract disputes . . . because deferring to the Board’s contract interpretation would risk the development of conflicting principles for interpreting collective bargaining agreements.” (internal citations, brackets, and quotation marks omitted)).<sup>5</sup>

## ii. The Waiver Analysis

Where, as here, the Board’s determination regarding waiver is based upon an interpretation of a contract, we begin by making a threshold, *de novo* determination of whether a matter is “covered” by the contract—meaning that the parties have already bargained over the matter and set out their agreement in the contract. Only if we conclude as a matter of law that the matter was not covered by the contract can we consider whether the Board’s finding regarding waiver was supported by substantial evidence.<sup>6</sup>

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NLRB has the authority to interpret CBAs in the first instance where its interpretation is for the purpose of “enforc[ing] a statutory right which Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment”); *see also Bath Marine Draftsmen’s Ass’n v. N.L.R.B.*, 475 F.3d 14, 19–21 (1st Cir. 2007) (contrasting *C & C Plywood* with *Litton*). *C & C Plywood* did not address the level of deference we owe to those adjudications.

<sup>5</sup> Since *Litton*, we have discussed the appropriate level of deference to the Board’s “reasonable interpretation of labor contracts[ ] in light of its expertise” on only one occasion. *See N.L.R.B. v. Local 32B-32J Serv. Emps. Int’l Union*, 353 F.3d 197, 199 (2d Cir. 2003) (“*Local 32B-32J*”). The parties in *Local 32B-32J* did not mention *Litton* in their briefs, and our panel did not cite the case; instead, it relied on a single case from our Court decided in 1984. We did, however, contrast our statement against two cases from our sister Courts of Appeals which declined to accord deference to the Board’s contractual interpretation. *See id.* (“*But see Miss. Power Co. v. NLRB*, 284 F.3d 605, 619 (5th Cir. 2002) (Court owes no deference to the Board’s interpretation of a contract clause); *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873 (D.C. Cir. 2000) (same).”). We decline to follow *Local 32B-32J*. *See Mabramas v. Am. Exp. Isbrandtsen Lines, Inc.*, 475 F.2d 165, 173 (2d Cir. 1973) (Oakes, J., dissenting) (arguing that a past decision of our Court “was erroneously decided, and because it overlooked Supreme Court precedent is not binding upon us”); *see also United States v. Berrios*, 676 F.3d 118, 126 n.1 (3d Cir. 2012) (same).

<sup>6</sup> We do not here address situations in which the union has bargained to impasse, thereby exercising its right to bargain, and has not memorialized the result of that bargaining process in the final CBA. *See, e.g., Local Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1079 & n.10 (9th Cir. 2008).

Put another way, we use a two-step framework to decide whether there has been a valid waiver of the right to bargain over a particular decision or its effects. At the first step, we ask whether the issue is clearly and unmistakably resolved (or “covered”) by the contract. If so, the question of waiver is inapposite because the union has already clearly and unmistakably exercised its statutory right to bargain and has resolved the matter to its satisfaction. See *Bath Marine Draftsmen’s Ass’n v. N.L.R.B.*, 475 F.3d 14, 25 (1st Cir. 2007) (waiver standard is irrelevant if “the Unions have already exercised their right to bargain”); *N.L.R.B. v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (“[Q]uestions of ‘waiver’ normally do not come into play with respect to subjects already covered by a collective bargaining agreement.”).<sup>7</sup> The interpretation of such a contract is a question of law. See *id.* at 837.

If we determine that the applicable CBA does not clearly and unmistakably cover the decision or effects at issue, we proceed to the second step, at which we ask whether the union has clearly and unmistakably *waived* its right to bargain. As noted above, such a waiver “may be found in an express provision in the parties’ collective bargaining agreement, or by the conduct of the parties, including their past practices and bargaining history, or by a combination of the two.” *United Techs. Corp.*, 884 F.2d at 1575. Whether a party has effectively waived its statutory right to bargain is therefore a mixed question of law and fact.<sup>8</sup>

Under this two-step process, an employer can successfully carry its burden of proof by showing either that the CBA (or any other contract governing the relations between the parties)

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<sup>7</sup> Likewise, where the CBA clearly and unmistakably “covers” the effects of a decision—whether or not the CBA specifically mentions “effects bargaining,” see *N.Y. Tele. Co.*, 930 F.2d at 1011—the union may no longer seek to bargain over the covered effects.

<sup>8</sup> See also *United States v. Curcio*, 694 F.2d 14, 22 (2d Cir. 1982), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259 (1984) (noting that while “the question [of] whether [a] judge applied too stringent a waiver standard” is a “question of law,” the question of whether a court “misapplied the correct standard” is “a mixed question”).

covers a particular decision, or that the Union has waived its right to bargain over a particular decision. *See Olivetti Office U.S.A.*, 926 F.2d at 187 (noting that “[t]he burden of proving a union waiver rests with the employer.”). At either step, however, the contractual indicia of exercise of the right to bargain or proffered proof of waiver must clearly and unmistakably demonstrate the coverage or waiver sought to be proved. *Metro. Edison Co.*, 460 U.S. at 708; *see Chesapeake & Potomac Tel. Co. v. N.L.R.B.*, 687 F.2d 633, 636 (2d Cir. 1982) (“[A] union’s intention to waive a right must be clear before a claim of waiver can succeed.”).<sup>9</sup>

### iii. The Contractual Coverage Approach

It bears noting that, although we have used the term “covers,” we have not adopted the “contractual coverage” approach, which several other Courts of Appeal use. *See, e.g., Bath Marine Draftsmen’s Ass’n*, 475 F.3d at 23. While some of our sister Courts of Appeals have decided that, although the Board is obligated to apply the “clear and unmistakable waiver” standard, they “owe[] no deference to the Board’s choice of standard when the unfair labor practice turns solely on the interpretation of a labor contract,”<sup>10</sup> *id.*, we think that approach is inconsistent with the Supreme Court’s holdings in *Metropolitan Edison*, 460 U.S. at 708, and *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 283, 287 (1956), and our own precedents interpreting those decisions.

Although the “contract coverage” approach aligns with the Supreme Court’s admonition that “courts are still the principal sources of contract interpretation,” *Litton*, 501 U.S. at 202, ignoring the “clear and unmistakable waiver” standard undermines our “national labor policy [that] disfavors

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<sup>9</sup> As previously noted, *see* note 5, *ante*, a contract’s “coverage” of the right to bargain over a particular decision need not specifically refer to the right to bargain over the *effects* of that decision. If the contract clearly and unmistakably covers “effects bargaining” as well as “decision bargaining,” its failure to use the talismanic word “effects” does not require a different result.

<sup>10</sup> Compare, *e.g., Bath Marine Draftsmen’s Ass’n*, 475 F.3d at 25 (adopting the contractual coverage approach); *Honeywell Int’l, Inc.*, 253 F.3d at 132; *Chi. Tribune Co. v. N.L.R.B.*, 974 F.2d 933, 937 (7th Cir. 1992); *with Local Joint Exec. Bd. of Las Vegas v. N.L.R.B.*, 540 F.3d 1072, 1080 & n.11 (9th Cir. 2008) (noting that the “so-called ‘contract coverage’ standard” competes with the “clear-and-unmistakable” standard, and reaffirming the Ninth Circuit’s commitment to the clear and unmistakable standard).

waivers of statutorily protected rights,” *Olivetti Office U.S.A.*, 926 F.2d at 187. Especially in the context of effects bargaining, the “contract coverage” approach can lead to the unwitting relinquishment of rights. Taken to its logical conclusion, the “contract coverage” approach means that a contract granting an employer the unilateral right to make a decision almost always means that the union has also given up the right to bargain about the effects of that decision. See *Enloe Med. Ctr v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2004) (“It would be rather unusual . . . to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving the union’s right to bargain over the effects of that decision.”). As discussed previously, however, a union has a statutory right to bargain over the decision itself *and* the effects that that decision might have upon employees’ terms and conditions of employment

Our two-step analysis preserves the long-standing precedent requiring that the relinquishment of statutory rights be deliberate and obvious, while retaining the judicial authority to interpret contracts *de novo*. We must interpret the relevant contract with particular attention to the heightened waiver standards that apply in the labor context. Just as “[w]e will not thrust a waiver upon an unwitting party,” *N.Y. Tel. Co.*, 930 F.2d at 1011, we will not find a contractual *exercise* of the right to bargain over a decision (or its effects) unless the contract clearly and unmistakably demonstrates that the parties bargained with respect to the disputed matter.

#### **B. “Effects Bargaining” in This Case**

Rochester Gas alleges that, to the extent the Union had a right to bargain with Rochester Gas over the *effects* of the Vehicle Policy Change, the Union waived that right in the CBA.<sup>11</sup> Specifically,

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<sup>11</sup> Rochester Gas also argues that the requirement of effects bargaining does not extend to decisions such as the Vehicle Policy Change, but rather only to situations where “the underlying decision is one that has a substantial impact on the employees’ possibility of continued employment.” Petitioner-Cross-Respondent’s Br. at 15. But our law is clear that any decision that implicates the terms and conditions of employment must be the subject of bargaining, both over the decision itself and over the effects of the decision, unless the union waived that right. See *Torrington Extend-A-Care Emp. Ass’n*, 17 F.3d at 595; *New Eng. Newspapers, Inc.*, 856 F.2d at 413.

Rochester Gas argues as follows:

The CBA gives [Rochester Gas] the right in its “sole and exclusive judgment” to “regulate the use of machinery, facilities, equipment, and other property of the Company;” the “exclusive right to issue, amend and revise reasonable policies, rules, regulations, and practices;” (Article 8) and “the exclusive and unilateral right to issue, amend, revise or terminate any or all benefits” (Article 24).

Petitioner-Cross-Respondent’s Br. at 16; *see also* Joint App’x at 138, 147 (CBA Articles 8 and 24).

These clauses of the CBA, Rochester Gas asserts, “clearly reserved to the Company’s discretion” the right to change the overnight location of Company vehicles. *Id.* at 5.

The Board, however, found that the technicians’ use of Company vehicles was a term or condition of employment, *see Rochester Gas I*, Joint App’x at 199, which antedated the execution of the CBA. Accordingly, the Board held that the Company was, absent waiver, obligated to bargain with the Union over the effects of the change. *Id.* We agree, and now hold that the provisions of the CBA invoked by Rochester Gas are not specific enough for us to determine that the Union clearly and unmistakably waived its right to bargain over the *effects* of a change under those clauses.

The general right given to Rochester Gas to “regulate the use of [its] machinery, facilities, equipment, and other property,” Joint App’x at 139, does not explicitly or implicitly include the right to alter the terms and conditions of employment—even if those terms and conditions are related to Rochester Gas’s use of its covered property. Although an intent to permit the Company to change its policy regarding vehicles without the need to bargain over the effects of such a decision may be a *plausible* reading of the contract, it is not a *clear and unmistakable* exercise of the Union’s bargaining power regarding those effects. Thus, although the CBA reserves to Rochester Gas the right to make the decision to implement the Vehicle Policy Change,<sup>12</sup> we conclude that it does not clearly and unmistakably “cover” the disputed issue. That is, the CBA does not clearly and unmistakably set out

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<sup>12</sup> Whether or not the rights reserved by Rochester Gas in fact include the right to make the decision at issue here is not before us. *See* Section II, *post*.

whether (and how) Rochester Gas must account for the effect that the Vehicle Policy Change has on the employee benefits relating to the vehicles. Therefore, at step one of our analysis, we conclude that the Union did not already exercise its statutory right to bargain over the effects of the Vehicle Policy Change.

At step two, we examine the Board's determination that the Union had not waived its right to bargain over the effects of the Vehicle Policy Change. We agree with the Board's finding that the Union did not waive this right, and we hold that this finding is supported by substantial evidence. The Board adopted the extensive factual findings and conclusions of law of an ALJ, after a bench trial principally devoted to the issue of waiver. *See Rochester Gas II*, 2010 WL 3246661. We defer to the Board's expertise as to its application of the "clear and unmistakable waiver" doctrine to the operative factual findings. *United Techs. Corp.*, 884 F.2d at 1575.

The ALJ, in a portion of his opinion adopted without alteration by the Board, wrote as follows:

I cannot find any evidence that the Union has clearly and expressly waived its right to bargain over the effects of the Respondent's decision. Nothing in the evidence relating to the negotiations for collective bargaining speaks to any intent by the Union to consciously waive its right to effects bargaining and the collective bargaining agreement is silent as to effects bargaining, though arguably giving the Respondent the right to unilaterally make changes in otherwise mandatory subjects of bargaining. Clearly there were no negotiations over the effects of the decision to take away the private use of Respondent's vehicles by low voltage employees and there is no language dealing with this issue in the [CBA]. . . .

None of the contractual provisions [in the CBA] . . . address the effects of taking any action under their wording nor do they address the removal of service vehicles at all. There is nothing that clearly gives Respondent the right to avoid effects bargaining from any action it might take in reliance on these Articles. There is nothing in the evidence in this record about negotiations that deals with effects bargaining.

*Rochester Gas I*, Joint App'x at 200. Having reviewed the Board's interpretations of the contract *de novo*

and its other findings for substantial evidence, we uphold the Board's determination that the Union had not waived its right to bargain over the effects of the Vehicle Policy Change.

We think "there is no adequate basis for implying the existence of waiver without a more compelling expression of it than appears in this [CBA]." *Metro. Edison*, 460 U.S. at 708 (alterations and quotation marks omitted). Like the Board, we "will not infer from [the] general contractual provision" here, which permits the Company unilaterally to determine the use of its property, "that the parties intended to waive [the] statutorily protected right" to bargain over effects of a (contractually authorized) unilateral change affecting petitioners' terms and conditions of employment. *Id.*

In sum, Rochester Gas was required to bargain with the Union over the effects of the Vehicle Policy Change.

## II. "Decision Bargaining"

In its cross-petition for review, the Union argues that the Board erred in failing to consider whether Rochester Gas unlawfully refused to bargain over the decision to implement the Vehicle Policy Change.

As a general matter, § 3(d) of the Act commits to the General Counsel of the Board the "final authority" with respect to the "issuance of complaints." 29 U.S.C. § 153(d). The General Counsel has "discretion to decide whether or not to issue a complaint, and to determine which issues to include in that complaint." *Williams v. N.L.R.B.*, 105 F.3d 787, 791 n.3 (2d Cir. 1996) (internal citations omitted). Thus, "the General Counsel's refusal to include an issue in the complaint is final and unreviewable." *Id.*

### A. The Exercise of the Prosecutorial Discretion of the General Counsel

Paragraph VIII(c) of the initial complaint in this case alleged that Rochester Gas promulgated the Vehicle Policy Change "without affording the Union an opportunity to bargain . . . with respect

to *this conduct and the effects of this conduct.*” Joint App’x at 12 (emphasis added). The General Counsel later issued the Amendment, revising Paragraph VIII to allege that Rochester Gas promulgated the Vehicle Policy Change “without affording the Union an opportunity to bargain *with respect to the effects of this conduct . . .*” *Id.* at 24 (emphasis added). On review, the Board recognized that the original complaint had alleged a “decision bargaining” violation, but held that “the General Counsel’s amendment to the complaint withdrew the decisional-bargaining allegation.” *Rochester Gas II*, 2010 WL 3246661, at \*5 n.2.

Notwithstanding the General Counsel’s Amendment and the Board’s determination, the Union insists that the allegations of the complaint, when read together, continued to allege a decision bargaining violation. In particular, the Union relies on the language of Paragraph X, which alleges that “[b]y the conduct described above in paragraphs VIII(a) and (c), and IX(c), Respondent has been failing and refusing to bargain collectively and in good faith . . .” Joint App’x at 13. The Union claims that, because the language of Paragraph X does not distinguish between decision and effects bargaining violations, both are properly alleged.

We disagree. By specifically removing the words “this conduct and” from Paragraph VIII of the complaint, the General Counsel exercised his prosecutorial discretion and clearly indicated his determination that Rochester Gas should not be charged with a “decision bargaining” violation. The Amendment consisted solely of the revision of Paragraph VIII, and neither reprinted nor referenced any other portion of the complaint.<sup>13</sup> We cannot find, and the Union does not offer, an explanation for the Amendment other than that the General Counsel specifically intended to remove the allegation that Rochester Gas had violated its obligation to bargain over the Vehicle Policy Change.

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<sup>13</sup> Contrary to the Union’s argument, the General Counsel’s Amendment is incorporated by reference into Paragraph X, and there was therefore no need to amend Paragraph X in order to remove the allegation of a decision bargaining violation.

**B. The Board Properly Declined to Review the General Counsel's Charging Decision**

The Union further argues that, even if the Amendment eliminated the decision-bargaining allegation, we should review the General Counsel's decision for two reasons. First, the Union claims we should do so in order to ensure that "Board decisions are . . . subject[ed] to 'the requirement of reasoned decision making.'" Petitioner's Br. at 10–11 (quoting *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998)). Second, the Union argues that the Board must not "fail to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted," *id.* at 11 (quoting *New Eng. Health Care Emps. Union v. N.L.R.B.*, 448 F.3d 189, 196 (2d Cir. 2006) (alteration omitted)), and that the Board should therefore have determined that the "facts it [had] credited" demonstrated a decision-bargaining violation, *id.*

The Union's arguments, although substantially correct general statements of the law governing our review of the Board's holdings, are inapposite to our review of the General Counsel's exercise of prosecutorial discretion. The General Counsel's charging decision is not a decision of the Board subject to the "requirement of reasoned decision making," *Allentown Mack Sales & Serv., Inc.*, 522 U.S. at 374. Rather, "the General Counsel's refusal to include an issue in the complaint is final and unreviewable, [and] we are precluded from reaching the issue" of whether the General Counsel should have charged Rochester Gas with a decision-bargaining violation. See *Williams*, 105 F.3d at 791 n.3 (citation omitted); cf. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (noting, in the context of a criminal prosecution, that "so long as [a] prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

As the Union concedes, Petitioner's Br. at 14–15, the General Counsel is the master of his complaint and may freely alter its scope at any point prior to the hearing. *See* 29 C.F.R. § 102.17.<sup>14</sup> We decline to question the considered judgment of the General Counsel, and affirm the Board's determination that the General Counsel withdrew the initial allegation that Rochester Gas had breached its obligation to bargain over the decision to implement the Vehicle Policy Change.

### III. Request for Information

Rochester Gas argues that the Board erred in finding a § 8(a)(5) violation based on the Company's refusal to provide information requested by the Union. As a general matter, an employer's duty to bargain in good faith under §§ 8(a)(1) and (5) of the Act includes the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties." *N.L.R.B. v. Acme Indus. Co.*, 385 U.S. 432, 435–36 (1967). "A union's demand for information does not . . . [, however,] automatically trigger the employer's obligation to provide it." *Stroehmann Bakeries, Inc. v. N.L.R.B.*, 95 F.3d 218, 222 (2d Cir. 1996). Rather, the Board and the courts must take care that the requested information is "reasonably related to the . . . bargaining [process]." *Id.* The question of whether an employer's refusal to furnish information violates the Act is uniquely suited to the Board's expertise, and we will modify or reverse the Board's decision only if it is not supported by substantial evidence in the record. *See N.L.R.B. v. Glover Bottled Gas Corp.*, 905 F.2d 681, 684–85 (2d Cir. 1990); *N.L.R.B. v. Gen. Elec. Co.*, 418 F.2d 736, 752–53 (2d Cir. 1969); *see also* Administrative Procedure Act, 5 U.S.C. § 706(2).

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<sup>14</sup> 29 C.F.R. § 102.17 provides that a complaint in a case before the Board

. . . may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board . . . , upon motion, by the [ALJ] designated to conduct the hearing; and after the case has been transferred to the Board . . . , at any time prior to the issuance of an order based thereon, upon motion, by the Board.

In this case, as previously noted, the Union requested the following information from Rochester Gas: (1) a list of unit jobs and personnel permitted to take Company vehicles home at night; (2) any Company analysis of the cost of the prior policy; (3) a list of non-unit personnel permitted to store Company vehicles at their homes; and (4) a statement as to whether the Company announced to any non-unit personnel the same restriction imposed upon the low-voltage employees. Rochester Gas responded only to the first request, noting that “[t]he company believes it is not obligated to provide you with financial information on company vehicle costs nor does the company believe the union’s request for information on non-union employee vehicles is relevant or necessary to your duties and responsibilities.”

As we have said in the past, “[i]t is beyond cavil that because the bargaining-unit representative is obliged to prosecute the grievances of its members, an employer must provide all information relevant to the processing of those grievances.” *N.Y. Tel. Co.*, 930 F.2d at 1011. The Board correctly determined that the information requested by the Union was “highly relevant” to the bargaining process the Union sought to begin. The ALJ heard testimony from a leader of the Union that the Union “needed th[e] information in order to develop a bargaining position”—specifically, to be able to address properly the cost issues that Rochester Gas claimed had caused the Vehicle Policy Change. Without the requested information, a Union witness stated in testimony evidently credited by the ALJ, the Union’s ability to negotiate on behalf of its members was impaired.

We conclude that substantial evidence in the record supported the Board’s determination that the requested information was relevant and that the Company was obligated to provide it to the Union. We affirm the Board’s holding that the failure of Rochester Gas to provide the information was a violation of the Act.

#### IV. Remedy

Finally, the Union argues that the Board erred in narrowing the ALJ's broad "back pay" remedy. As a general matter, § 10(c) of the Act empowers the Board to impose affirmative remedies if it finds violations of the Act. *See* 29 U.S.C. § 160(c).<sup>15</sup> "[N]othing in the language or structure of the Act . . . [however,] requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard v. N.L.R.B.*, 459 U.S. 344, 352 (1983). We review the remedy chosen by the Board for abuse of discretion. *N.L.R.B. v. G & T Terminal Packaging Co.*, 246 F.3d 103, 119 (2d Cir. 2001); *see also Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (explaining that the term of art "abuse of discretion" includes errors of law).

In this case, the ALJ's broad remedial holding required Rochester Gas to, *inter alia*, "make whole its employees for any losses they may have suffered as a consequence of its decision to eliminate the vehicle benefit." Joint App'x at 204. The Board thereafter modified that remedy, concluding that "a remedy similar to that in *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968), is more appropriately tailored to the violation and will better effectuate the policies of the Act." *Rochester Gas II*, 2010 WL 3246661, at \*2. The so-called "*Transmarine* remedy"<sup>16</sup> requires an employer

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<sup>15</sup> In pertinent part, 29 U.S.C. § 160(c) provides:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

<sup>16</sup> As explained above, *see* note 1, *ante*, and surrounding text, a *Transmarine* remedy is imposed in order to "make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the [employer]." *Transmarine*, 170 N.L.R.B. at 390. Specifically, the *Transmarine* remedy requires that bargaining take place and back pay be paid until one or more of the following conditions is met: (1) the parties reach an agreement; (2) the parties reach a bona fide bargaining impasse; (3) the union fails to request bargaining within 5 business days of the Board's decision or to commence negotiations within 5 business days of the employer's notice of its desire to bargain; or (4) the union ceases to bargain in good faith. *See id.*; *see also Melody San Bruno, Inc.*, 325 N.L.R.B. 846, 846 (1998) (explaining that the five-day periods called for by *Transmarine*'s third prong indicate five business days rather than five calendar days).

who failed to engage in effects bargaining to provide employees with limited back pay, from five business days after the date of the Board's decision until the occurrence of one of four specified conditions, each of which is designed to encourage the parties to bargain in good faith. *Id.* at \*2.

Because the Board “draws on a fund of knowledge and expertise all its own, . . . its choice of remedy must . . . be given special respect by the reviewing courts.” *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Indeed, in order to justify its chosen remedy, the Board must show only a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Board correctly argues that the “*Transmarine* remedy” is its standard remedy in “effects bargaining” cases. Rather than provide a full *Transmarine* remedy, however, which would base back pay upon Union members' wages, the Board crafted a limited remedy that would base any eventual award of back pay upon the specific loss alleged here—the loss of the use of the company vehicle. This limitation was not an abuse of discretion, but demonstrates the careful attention paid by the Board to this case.

The Board's choice of the limited back pay remedy in this case was well within its broad remedial discretion. We affirm the determination of the Board with regard to its chosen remedy.

## CONCLUSION

To summarize, we hold that:

(1) The determination of whether a union has waived its right to bargain over a decision by management which would ordinarily be subject to mandatory bargaining—or over the effects of that decision—should be conducted using a two-step inquiry. First, we ask whether the right subject to collective bargaining is clearly and unmistakably covered by the contract. Second, if it was not, we ask whether the union has effected a clear and unmistakable waiver of its right to bargain. If the alleged waiver is not clear and unmistakable, we will find that the union has not waived its right to bargain.

(2) The collective bargaining agreement at issue here cannot be read either to cover the effects of the Vehicle Policy Change or to waive the Union's right to bargain regarding the effects of the Vehicle Policy Change.

(3) The Board appropriately declined to consider whether the Vehicle Policy Change itself was permitted by the CBA, correctly deferring to the charging decision of the Board's General Counsel.

(4) The Board correctly determined that Rochester Gas's refusal to provide to the Union information that the latter had requested in order to aid it in the bargaining process constituted an unfair labor practice prohibited by the Act; and

(5) The remedy crafted by the Board was not an abuse of its discretion.

For the reasons stated above, we deny the cross-petitions for review and enforce in full the August 16, 2010 Decision and Order of the Board. *See* 29 U.S.C. § 160(e).<sup>17</sup>

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<sup>17</sup> 29 U.S.C. § 160(e) provides, in pertinent part, as follows: "The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred . . . , for the enforcement of such order and for appropriate temporary relief or restraining order . . . ."

1 STRAUB, *Circuit Judge*, concurring:

2 Because I am in substantial agreement with the majority opinion, I concur. I write  
3 separately to note that the majority opinion articulates settled legal doctrine in a novel way,  
4 creating a “two-step framework” which I regard as an unnecessary innovation. However, this  
5 reformulation does not, in my view, disturb the substance of the established principles that apply  
6 to, and dictate the outcome of, this appeal.

7 The National Labor Relations Board’s (the “Board”) “clear and unmistakable” waiver  
8 standard—a product of the Board’s considerable experience in labor-management relations—  
9 “requires bargaining partners to unequivocally and specifically express their mutual intention to  
10 permit unilateral employment action with respect to a particular employment term,  
11 notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena Hosps.*, 350  
12 N.L.R.B. 808, 811 (2007). Employees’ statutory right to bargain will not be deemed to have  
13 been waived based merely on “general contractual provisions.” *Id.* *Cf. NLRB v. N.Y. Tel. Co.*,  
14 930 F.2d 1009, 1011 (2d Cir. 1991) (“A clear and unmistakable waiver may be found in the  
15 express language of the collective bargaining agreement; or it may . . . be implied from the  
16 structure of the agreement and the parties’ course of conduct.”).

17 Although the majority opinion uses the term “coverage” and recasts our precedent as a  
18 two-step inquiry, it continues to adhere, as we long have, to the “clear and unmistakable” waiver  
19 standard developed by the Board and endorsed by the Supreme Court. *See, e.g., Metro. Edison*  
20 *Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“[W]e will not infer from a general contractual  
21 provision that the parties intended to waive a statutorily protected right unless the undertaking is  
22 explicitly stated. More succinctly, the waiver must be clear and unmistakable.”). In remaining  
23 faithful to the “clear and unmistakable” standard, the majority opinion affords the Board’s

1 waiver rule appropriate deference. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991)  
2 (“[i]f the Board adopts a rule that is rational and consistent with the [National Labor Relations]  
3 Act . . . then the rule is entitled to deference from the courts”) (quotations omitted). *See also*  
4 *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 787–88 (noting the “considerable deference”  
5 the Board is due “by virtue of its charge to develop national labor policy”) (quotations omitted);  
6 *Civil Serv. Emps. Ass’n v. NLRB*, 569 F.3d 88, 91 (2d Cir. 2009). The majority opinion’s two-  
7 step analysis does not depart from the foregoing principles, which, in part, lead it to correctly  
8 reject the “contractual coverage” approach of certain of our Sister Circuits.

9       Indeed, the majority opinion notes that any “contractual indicia of exercise of the right to  
10 bargain or proffered proof of waiver must clearly and unmistakably demonstrate the coverage or  
11 waiver sought to be proved.” (Maj. Op. at 12.) Therefore, the majority opinion’s new  
12 articulation of the long-settled law governing waiver of statutory bargaining rights should not be  
13 read as a retreat from the “clear and unmistakable” standard developed by the Board, to which  
14 we remain, under binding precedent, required to defer.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

Filed: November 15, 2011 Decided: January 17, 2013

Docket Nos. 10-3448-ag(L), 11-247-ag(CON), 11-329-ag(CON)

LOCAL UNION 36, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

ROCHESTER GAS & ELECTRIC CORP.,

Petitioner-Cross-Respondent,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

Before: SARANES, STRAUB, and LIVINGSTON, Circuit Judges.

Union 36 of the International Brotherhood of Electric Workers and Rochester Gas and Electric Corp. Petition Review of the August 16, 2010 decision of the National Labor Relations Board (the "Board"), finding that Rochester Gas and Electric engaged in unfair labor practices when it refused to

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ERRATA for Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO, et al. v. NLRB, Nos. 10-3448-ag(L), 11-247-ag(CON), 11-329-ag(CON)

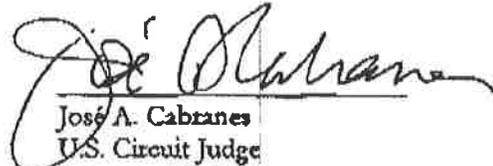
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5889	10	August 17, 2006 and	August 17, 2006, and
5889	20	§§ 8(a)(1)	§ 8(a)(1)
5889	footnote 2, line 1	Section 8(a)	§ 8(a)
5890	3	§§ 8(a)(1)	§ 8(a)(1)
5890	23	Local Union 36	the Union
5895	footnote 7, lines 2-3	a decision whether or not the CBA specifically mentions "effects bargaining," see N.Y. Tel. Co., 930 F.2d at 1011 the union	a decision—whether or not the CBA specifically mentions "effects bargaining," see N.Y. Tel. Co., 930 F.2d at 1011—the union

5899	9-10	employment even	employment— even
5904	19	§§ 8(a)(1)	§ 8(a)(1)
5905	2 <sup>nd</sup> from the bottom	position" specifically	position"—specifically
5908	17-18	bargaining or over the effects of that decision should	bargaining— or over the effects of that decision— should

Copies have been sent by chambers to:

- Panel Members
- West Publishing
- Clerk

So ordered:

  
 José A. Cabranes  
 U.S. Circuit Judge  
 February 12, 2013

# **EXHIBIT G**

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of February, two thousand and thirteen.

Before: José A. Cabranes,  
Chester J. Straub,  
Debra Ann Livingston,  
*Circuit Judges.*

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Local Union 36, International Brotherhood of Electrical  
Workers, AFL-CIO,

Petitioner,

Rochester Gas & Electric Corporation,

Petitioner-Cross-Respondent,

v.

National Labor Relations Board,

Respondent-Cross-Petitioner.

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**ORDER**

Docket Nos. 10-3448(L)  
11-247(Con)  
11-329(Con)

IT IS HEREBY ORDERED that the motion by Petitioner-Cross-Respondent Rochester Gas & Electric Corporation to stay the mandate pending filing of a petition for writ of certiorari is GRANTED.

For the Court:

Catherine O'Hagan Wolfe,  
Clerk of Court


# EXHIBIT H

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

---

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of February, two thousand thirteen.

Before: José A. Cabranes,  
Chester J. Straub,  
Debra Ann Livingston,  
*Circuit Judges.*

---

Local Union 36, International Brotherhood  
of Electrical Workers, AFL-CIO,

Petitioner,

Rochester Gas & Electric Corporation,

Petitioner - Cross - Respondent,

v.

National Labor Relations Board,

Respondent - Cross - Petitioner.

**ORDER**

Docket No. 10-3448 (Lead)  
11-247 (XAP)  
11-329 (XAP)

---

IT IS HEREBY ORDERED that the motion by Petitioner Local Union International Brotherhood of Electrical Workers AFL-CIO to reconsider and vacate the order of February 8, 2013 and deny the motion by Rochester Gas & Electric Corp. to stay the mandate is DENIED.

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court


**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

---

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand thirteen.

Before: José A. Cabranes,  
*Circuit Judge.*

---

Local Union 36,  
International Brotherhood of Electrical Workers,  
AFL-CIO,

Petitioner,

Rochester Gas & Electric Corporation,

Petitioner - Cross - Respondent,

v.

National Labor Relations Board,

Respondent - Cross - Petitioner.

---

**ORDER**

Docket Nos. 10-3448 (Lead)  
11-247 (XAP)  
11-329 (XAP)

IT IS HEREBY ORDERED the motion by Respondent-Cross-Petitioner National Labor Relations Board to reconsider and vacate the order of February 8, 2013 and deny the motion by Rochester Gas & Electric Corp. to stay the mandate is DENIED.

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court


# EXHIBIT I

No. 12-

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IN THE  
**Supreme Court of the United States**

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ROCHESTER GAS & ELECTRIC CORP.,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, LOCAL  
UNION 36, INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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*Attorneys for Petitioner*

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## QUESTIONS PRESENTED

1. Did the Second Circuit err when it held, in conflict with every other circuit that has ruled on the issue, that the National Labor Relations Act requires an employer to separately bargain about the “effects” of a managerial decision even though the employer and the union have previously bargained and memorialized in a collective bargaining agreement the employer’s unilateral right to make that management decision?

2. Did the Second Circuit err when it held, in conflict with every other circuit that has ruled on the issue, that the circuit courts are required to defer to the National Labor Relations Board in the interpretation of contracts, specifically collective bargaining agreements?

3. Does the concept of effects bargaining extend to managerial decisions that do not have a significant impact on the continued employment of bargaining unit members?

**PARTIES TO THE PROCEEDING**

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the United States Court of Appeals for the Second Circuit.

Petitioner is Rochester Gas & Electric Corporation.

Respondents are the National Labor Relations Board and Local 36 of the International Brotherhood of Electrical Workers, AFL-CIO.

**RULE 29.6 STATEMENT**

Pursuant to Rule 29.6, Petitioner submits that Rochester Gas & Electric Corporation is a wholly owned subsidiary of Iberdrola USA and is in the business of providing natural gas and electric utility service to its customers in a nine county area in Western New York. Iberdrola USA is a corporation owned by Iberdrola, S.A. Iberdrola, S.A. is incorporated in Spain and its stock is traded on international stock exchanges, including those in France, Germany, and four of Spain's stock exchanges-- Bilbao, Madrid, Barcelona, and Valencia.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Rochester Gas and Electric Corporation (hereafter “Rochester Gas”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in *Local Union 36 v. N.L.R.B.*, Nos. 10-3448, 11-274, 11-329.

### OPINION BELOW

The opinion of the National Labor Relations Board is published at 355 N.L.R.B. 507 (August 16, 2010) (Appx B). The opinion of the United States Court of Appeals for the Second Circuit (Appx. A) is published at 2013 U.S. App. LEXIS 1139 (2d Cir. 2013). As of the date of this petition for certiorari, the opinion has not been published in the Federal Reporter.

### JURISDICTION

The Second Circuit Court of Appeals entered its judgment on January 22, 2013, and entered a stay of the mandate on February 8, 2013 to allow Rochester Gas to petition for certiorari. Rochester Gas invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1).

### STATUTE INVOLVED

The National Labor Relations Act (the “Act”), 29 U.S.C. §§ 151 *et seq.* states at 29 U.S.C. § 158 in pertinent part:

- (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157].

(5) to refuse to bargain collectively with the representatives of its employees, subject to the provisions of section 9(a) [29 U.S.C. §159(a)]

(d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to

the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

#### STATEMENT OF THE CASE

The concept of effects bargaining has its genesis in *National Labor Relations Board v. First National Maintenance Corp.*, 452 U.S. 666 (1981). In *First National Maintenance*, the Supreme Court recognized that certain lawful managerial decisions, such as a partial business closing, touch upon “a matter of central and pressing concern to the Union and its member employees: the possibility of continued employment and the retention of

the employees' very jobs." *Id.* While acknowledging that an employer must be free to make such major managerial decisions without bargaining, the Court held, based upon a balancing of the interests, that an employer could be required to bargain about the effects of this type of decision. *Id.* at 677-78.

This case seeks to resolve a conflict between the National Labor Relations Board and the Second Circuit and the D.C., First, and Seventh Circuits over whether effects bargaining is necessary when an employer has the unilateral right in a collective bargaining agreement to make managerial decisions. In these cases, the employer and the union have previously bargained, and have memorialized in a collective bargaining agreement, the employer's right to make certain decisions.

#### **The Board/Second Circuit-Clear and Unmistakable Waiver**

The National Labor Relations Board takes the position that even where an employer has bargained with a union and has the right, embodied in a collective bargaining agreement, to implement a decision, the employer must separately bargain with the union about the effects of implementing that decision. This effects bargaining is necessary unless the union has clearly and unmistakably waived the right to bargain about the effects of the decision. The Board and the courts refer to this as the "clear and unmistakable waiver" doctrine. The Second Circuit Court of Appeals, in the case below, affirmed the Board's position, rejecting that of its sister circuits.

### **The D.C., First and Seventh Circuits-Contract Coverage**

By contrast, the D.C. Circuit Court of Appeals (along with the First and Seventh Circuits) have previously held that where a collective bargaining agreement gives the employer the unilateral right to make a decision, ordinary contract principles apply. These courts look to see if the decision at issue has been covered by the contract, and if so, separate effects bargaining is not required. The Board and the courts refer to this as the “contract coverage” approach.

Since every management decision has some effect on employees, this conflict affects every decision made by an employer, whether the decision involves a shift change, a change to an absences policies, subcontracting work, or the garaging of company vehicles at night.

### **Underlying Facts**

Rochester Gas is a utility company serving natural gas and electric customers in a nine county area in Western New York. Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO (the “Union”) is the bargaining representative for a portion of Rochester Gas’s employees.

The Union and Rochester Gas were parties to a Collective Bargaining Agreement in effect from September 1, 2003 to May 31, 2008. The collective bargaining agreement provided in relevant part that Rochester Gas had the right to “regulate the use of machinery, facilities, equipment, and other property of

the Company” and that “the Company shall have the exclusive right to issue, amend, and revise safety and/or work rules, customs, regulations, and practices, except as expressly modified or restricted by a specific provision of this Agreement.”

Prior to November 2005, Rochester Gas required eight bargaining unit employees in the low voltage Trouble Maintenance and Repair group (“Trouble Group”) to drive their service vehicles to and from work in order to respond to trouble calls during off hours. In November 2005, Rochester Gas notified the Union President that beginning January 1, 2006, the Trouble Group employees would leave their service vehicles in the Company garage at the end of their shift instead of taking them home since the low voltage Trouble Group employees always reported to the workplace to pick up a second person in the event of an off hours trouble call.

The Union objected to the change, and filed an unfair labor practice charge contending Rochester Gas was required to bargain about both the decision to end the practice of Trouble Group employees taking home their vehicles, and about the effects on employees of ending the practice of Trouble Group employees taking home their vehicles at night.

### **The Complaint Against Rochester Gas**

The General Counsel initially charged Rochester Gas with a violation of the Act for failing to bargain about the decision to change the vehicle take home practice and for failing to bargain about the effects of the decision. The General Counsel later amended the Complaint to withdraw the charge relating to decisional bargaining.

### **The Administrative Law Judge's Decision**

Following a hearing, the Administrative Law Judge held that Rochester Gas violated Sections 8(a) (1) and (5) of the Act by refusing to bargain over the effects of its decision to change the vehicle take home practice. Rochester Gas and the Union filed exceptions to the Administrative Law Judge's decision.

### **National Labor Relations Board Decision**

The National Labor Relations Board (the "Board") affirmed the decision of the Administrative Law Judge. The Board acknowledged that Rochester Gas "acted lawfully when it unilaterally implemented the decision to discontinue the benefit [of employees taking home vehicles]." The Board further held that Rochester Gas was required to bargain with the Union about the effects of the change in practice because the Union had not clearly and unmistakably waived its right to bargain about the effects.

### **Court of Appeals Proceeding and Decision**

Rochester Gas filed a petition for review from the Board's order in the Court of Appeals for the D.C. Circuit on August 19, 2010. The petition contended that the Board improperly ordered Rochester Gas to engage in effects bargaining with the Union because provisions of the collective bargaining agreement granted Rochester Gas the right to change the practice. Rochester Gas also contended that the Board erroneously awarded a remedy under *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968).

The Union filed a petition in the Court of Appeals for the Second Circuit for review of the Board's order on August 26, 2010. The Union argued that the collective bargaining agreement required Rochester Gas to bargain with the Union over both the decision and its effects, and that the Board's chosen remedy was insufficient to make the affected workers whole.

By decisions entered in both the D.C. Circuit and the Second Circuit Courts of Appeals, Rochester Gas's petition was transferred to Second Circuit Court of Appeals. The issues were fully briefed and oral argument was held on Tuesday, November 15, 2011.

Fourteen months later, on January 17, 2013, a three-judge panel of the Second Circuit issued its decision. The Second Circuit deferred to the Board's interpretation of the Act. The Court affirmed the Board's decision that the Union had not clearly and unmistakably waived the right to bargain about the effects of the change in the vehicle take home practice. The Court found language in the collective bargaining agreement giving Rochester Gas the unilateral right to make the change without bargaining about the decision did not waive the Union's right to bargain about the effects. The Court stated that "any decision that implicates the terms and conditions of employment must be the subject of bargaining, both over the decision itself and over the effects of the decision, unless the union waived that right." Appx. A p. 19a. In so holding, the Second Circuit acknowledged that it was rejecting the contract coverage approach previously adopted by the First, Seventh, and D.C. Circuits on the question of effects bargaining. See Appx. A p. 17a.

On Motion of Rochester Gas, the Second Circuit stayed its mandate to allow Rochester Gas to file this petition for certiorari.

## ARGUMENT

### I.

#### THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT REGARDING THIS IMPORTANT QUESTION OF NATIONAL LABOR LAW

Union-employer relationships are governed by collective bargaining agreements. Most of those will give the Company the unilateral right to make certain decisions. The Court should grant certiorari in this case to resolve the conflict regarding whether effects bargaining is necessary when the Company exercises its rights under these collective bargaining agreements.

#### A. **There is a Conflict Between the Board/Second Circuit and the D.C., First and Seventh Circuits**

The Circuit Courts and the Board are conflicted about whether an employer must bargain with the union about the effects of a decision the employer has a unilateral right to make under a collective bargaining agreement.

#### **Board/Second Circuit Position**

In *Natomi Hospitals of California, Inc. (Good Samaritan Hospital)*, 335 N.L.R.B. 901 (2001), the Board held that “[c]ontractual language waiving a

Union's bargaining rights as to a certain decision does not constitute a waiver of the right to bargain over that decision's effects." 335 N.L.R.B. at 902.

Following this position, the Board here affirmed the Administrative Law Judge's decision that the contractual language granting Rochester Gas the unilateral right to make decisions concerning company vehicles did not waive the Union's right to bargain about the effects of that decision.

Under the Board's interpretation, the only way an employer can avoid bargaining over the effects of a decision is if there is "a clear and unmistakable waiver by the Union concerning effects bargaining" specifically. *Good Samaritan*, 335 N.L.R.B. at 902.

On appeal, the Second Circuit deferred to the Board's clear and unmistakable waiver doctrine and held that even though Rochester Gas had the unilateral right to change where its vehicles would be garaged at night, the union had a statutory right to separately bargain over the effects of the change in practice. The Court stated that "any decision that implicates the terms and conditions of employment must be the subject of bargaining, both over the decision itself and over the effects of the decision, unless the union waived that right." Appx. A p. 17a. In doing so, the Court recognized that it was declining to follow the contract coverage approach taken by other Circuit Courts of Appeal. *See* Appx. A, p. 19a ("we have not adopted the 'contractual coverage' *approach*, which several other Courts of Appeal use." (emphasis in original)).

### D.C., First, and Seventh Circuits

The D.C. Circuit has repeatedly rejected the Board's position on effects bargaining. Instead, the D.C. Circuit holds that where a collective bargaining agreement addresses or "covers" the decision and gives the employer the unilateral right to make the decision, the employer is not required to separately bargain over the effects of implementation. See *N.L.R.B. v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Enloe Med. Ctr. v. N.L.R.B.*, 433 F.3d 834, 837 (D.C. Cir. 2005) ("The Board's doctrine imposes an artificially high burden on an employer who claims its authority to engage in an activity is granted by such an agreement").

The D.C. Circuit reasons that it owes no deference to the Board because the issue is not one of interpretation of the National Labor Relations Act, but one of ordinary contract interpretation. *Enloe*, 433 F.3d at 838. "A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant." *United States Postal Service*, 8 F.3d at 836-37; see also 29 U.S.C. 158(d).

In *Enloe*, the D.C. Circuit further explained that "[i]t would be rather unusual . . . to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving the union's right to bargain over the effects of that decision." *Enloe*, 433 F.3d at 839. Thus, the D.C. Circuit determined that where a contract gave an employer a unilateral right to make a decision, the burden was on the union to show some basis

for separate bargaining with regard to the effects of that decision. *Id.*

The First and Seventh Circuits have followed the D.C. Circuit's reasoning. See *Bath Marine Draftsmen's Ass'n v. N.L.R.B.*, 475 F.3d 14, 23 (1st Cir. 2007) (recognizing the Board had a “‘fundamental and long-running disagreement’ with the District of Columbia Circuit over the appropriate standard in § 8(a)(5) cases in which the employer claims a contractual right to act unilaterally” and adopting D.C. Circuit's approach); *Chicago Tribune Co. v. N.L.R.B.*, 974 F.2d 933, 937 (7th Cir. 1992) (“where . . . a union agrees to a broadly worded management-rights clause the scope of that clause depends on the usual principles of contract interpretation rather than on a doctrine that tilts decision in the union's favor”); see also *Gratiot Community Hospital v. N.L.R.B.*, 51 F.3d 1255, 1261 (6th Cir. 1995)<sup>1</sup> (“[u]nless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract”), citing *U.S. Postal Workers.*, 8 F.3d at 836.

There is a clear conflict that can only be resolved by the Supreme Court.

### **B. The Conflict Involves Important Matters of National Labor Law**

Whether the contract coverage approach or clear and unmistakable waiver doctrine should be applied to decide if effects bargaining is necessary when an issue

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1. The Sixth Circuit did not expressly address effects bargaining.

is addressed in a collective bargaining agreement goes to the heart of the National Labor Relations Act. “A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce.” *First Nat’l Maint. Corp.*, 452 U.S. at 674, *citing N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). “Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.” *Id.*; *see also Auciello Iron Works v. N.L.R.B.*, 517 U.S. 781, 785 (U.S. 1996) (Stability of labor relations “fostered by collective-bargaining agreements” is a primary goal of the National Labor Relations Act.). Thus, the Act provides that “where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . .” 29 U.S.C. § 158(d).

The Supreme Court has recognized that, in order to achieve this stability, “[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice.” *First Nat’l Maint. Corp.*, 452 U.S. at 678-679.

This goal of certainty and predictability in labor relations is threatened by the conflict on effects bargaining.

## 1. The Conflict Will Result in Uncertainty and More Conflicting Decisions

The split between the decisions of the Second Circuit and the line of cases following the D.C. Circuit creates uncertainty for labor relations. It means companies with union employees are not free to make necessary business decisions without fear of their conduct being labeled an unfair labor practice.

The Circuit split is particularly problematic because an employer or union may appeal any decision of the National Labor Relations Board to either the D.C. Circuit or the Circuit where the employer does business. (29 U.S.C. § 160(f)). Employers in the Second Circuit (who are caught in this conflict) have among the highest rates of union membership in the nation. *See* U.S. Bureau of Labor Statistics, Union Members Summary, <http://data.bls.gov/cgi-bin/print.pl/news.release/union2.nr0.htm> (last visited Jan. 22, 2013) (New York ranks first; Connecticut ranks seventh).

Employers in the Second Circuit (and the unions representing their employees) have no practical certainty about whether they must bargain over the effects of decisions the employer has the unilateral right to implement. They must now contend with two opposing sets of rules. As virtually every decision an employer makes will have some effect on employees, the competing rules have the potential to result in a plethora of inconsistent decisions from the Second Circuit and the D.C. Circuit.

The D.C. Circuit recognized the problem its stalemate with the Board caused on a national level and suggested

the Board petition for certiorari. *Enloe Medical Center*, 433 F.3d at 838 (“since any employer faced with a section 8(a)(5) holding predicated on the Board’s ‘clear and unmistakable waiver’ doctrine as applied to the interpretation of an agreement can file a petition in this court, *see* 29 U.S.C. § 160(f), the Board’s implementation of its policy is stalemated. The Board is, of course, always free to seek certiorari.”).

The Second Circuit recognized the conflict explicitly in its decision below, and recognized the importance of the issue when it granted a stay of the mandate to allow Rochester Gas to file this petition for certiorari.

## **2. The Conflict Will Result in Forum Shopping and Will Impact Judicial Economy**

In addition to the turmoil in labor relations, the current conflict will certainly give rise to forum shopping each time an employer located within the Second Circuit is faced with this issue. Employers in the Second Circuit will now have incentive to file appeals of Board decisions regarding effects bargaining in the D.C. Circuit in order to avoid the position of the Board and the Second Circuit; Unions will have incentive to invent cross-appeals in order to attempt to have cases heard in the Second Circuit.

Federal courts traditionally have disapproved of the idea of forum shopping in conjunction with appeals from the National Labor Relations Board. *See S.L. Indus. v. N.L.R.B.*, 673 F.2d 1 (1st Cir. 1981); *U.S. Electrical Motors, Div. of Emerson Electric Co. v. N.L.R.B.*, 722 F.2d 315 (6th Cir. 1983); *Farah Mfg. Co. v. N.L.R.B.*, 481 F.2d 1143

(8th Cir. 1973); *Liquor Salesmen's Union v. N.L.R.B.*, 664 F.2d 1200 (D.C. Cir. 1981) (“We take this opportunity once again to express our disapproval of this “unseemly” practice, and make clear that this court intends to utilize the statutory and inherent authority at our disposal to curb this abuse.”)

The split will certainly impact judicial economy. “The higher the stakes are thought to be by petitioners, the more sophisticated (and certainly the more expensive) the race” to the courthouse. *Liquor Salesmen's Union v. N.L.R.B.*, 664 F.2d at 1204. Courts of Appeal will be forced to decide numerous motions to transfer pursuant to 28 § U.S.C. 2112(a), and the multidistrict panel will face more instances of multi-district filings that will have to be consolidated. 28 U.S.C. § 2112(a)(3). It is likely that in some cases, petitions for review will return to the “skeletal things” courts have previously decried as parties seek to avoid the decisions of one court or another. *Compare Chatham Mfg. Co. v. N.L.R.B.*, 404 F.2d 1116, 1118 (5<sup>th</sup> Cir. 1968). The split must be resolved to avoid such waste and abuse.

### 3. The Issue Is Ripe for Review

Finally, four courts of appeals have weighed in on the same issue. The D.C. Circuit has extensively analyzed the split between the contract coverage approach and the clear and unmistakable waiver doctrine. The Supreme Court will have the benefit of the analysis of the conflict by these courts in rendering its decision. The case is ripe for Supreme Court review.

**II.****THE COURT SHOULD GRANT CERTIORARI  
BECAUSE THE SCOPE OF EFFECTS  
BARGAINING IS AN IMPORTANT QUESTION OF  
FEDERAL LAW THAT SHOULD BE SETTLED**

Aside from the untenable conflict in the Circuit Courts, the scope of effects bargaining is “an important question of federal law that has not been, but should be, settled by” the Supreme Court. SUP. CT. R. 10(c).

It has been over 20 years since the Supreme Court addressed effects bargaining in *First National Maintenance Corp.*, 452 U.S. 666. At that time, the Supreme Court took great pains to constrain the application of effects bargaining. The Court recognized that “in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed. . . There is an undeniable limit to the subjects about which bargaining must take place.” *Id.* at 676. The Supreme Court has not addressed the issue of the scope of effects bargaining since that time. The Court has never addressed the issue of whether effects bargaining is required where the managerial decision is sanctioned by the collective bargaining agreement between the parties.

The Board, on the other hand, has expanded the scope of effects bargaining to reach virtually every managerial decision. The Board has required effects bargaining in management decisions ranging from the use

of scanners in filling prescription orders (*King Soopers, Inc.*, 340 N.L.R.B. 628 (2003) (no duty to bargain about implementing new scanners but duty to bargain about the effect of the rule putting their use into effect)) to decisions that resulted in a change of job title where there were no pay cuts, layoffs, or transfers. *Wal-Mart Stores, Inc.*, 348 N.L.R.B. 274 (2006) (effects bargaining required where employer did not change wages, hours or workloads of “meat processors,” other than renaming them “sales associates”). In doing so, the Board has stretched the concept of effects bargaining beyond any reasonable limit.

Granting certiorari in this case will allow the Supreme Court to clarify the scope of effects bargaining in a meaningful and sensible way.

### III.

#### **THE COURT SHOULD GRANT CERTIORARI TO REVERSE THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS.**

The parties to a collective bargaining agreement, like parties to all contracts, count on the courts to enforce the agreements they have entered. Employers do not expect to have to renegotiate contract provisions giving them the unilateral right to make certain decisions each time a decision is made.

When employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no

continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract.

*United States Postal Service*, 8 F.3d at 836-37; *see also* 29 U.S.C. § 158(d) (“the duty to bargain collectively shall also mean that no party to [a collective bargaining agreement] shall terminate or modify such contract”).

**A. The D.C. Circuit’s Reasoning Honors the Parties’ Intent in Entering a Collective Bargaining Agreement and Is More Consistent with the National Labor Relations Act and Contract Law**

The D.C. Circuit’s reasoning honors basic contract principles, abides by the provisions of the National Labor Relations Act, and promotes stability in labor relations. The D.C. Circuit acknowledges that where a collective bargaining agreement exists, the union and employer have already bargained and have come to an agreement. They should not have to re-bargain each time a party exercises a right under the collective bargaining agreement. *Enloe Med. Ctr. v. N.L.R.B.*, 433 F.3d at 838-39 (“it would be rather unusual, . . . to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union’s rights to bargain over the effects of that decision.”). Treating the effects of the decision as separate from the decision itself does not make sense under contract law and does not advance the purpose of the National Labor Relations Act.

By contrast, the Second Circuit’s decision ignores the plain meaning of the collective bargaining agreement

between the parties. Instead, the Second Circuit holds that each time an employer seeks to exercise a right under the collective bargaining agreement, it must bargain anew with the Union over the effects of exercising that right. In essence, the Second Circuit requires continuous bargaining. An employer may not rely on its agreement with the Union because that agreement only applies after the employer bargains again.

The Second Circuit's decision, if enforced, means that there can never be a clear and unmistakable waiver unless the parties include "and their effects" after every sentence in a collective bargaining agreement. Such a requirement defies not only common sense, but the basic tenets of contract law. By the very definition of the employer - employee relationship, every action an employer takes pursuant to its collectively bargained authority will have an "effect" on "wages, hours or terms and conditions of employment." When an employer bargains to retain certain unilateral rights to make changes in work rules, benefits and the like, and the union agrees, the law requires that the parties' agreement be enforced. *See* 29 U.S.C. § 158(d).

The Second Circuit's opinion that Rochester Gas had the right under the contract to change its practice allowing certain employees to take vehicles home, but that it could not enforce that collectively bargained right, without first bargaining about the effects of that decision, does not make sense. The collective bargaining agreement provides that Rochester Gas could make changes unilaterally; it does not provide that Rochester Gas is required to bargain about the effects of such change. Neither the National Labor Relations Act nor the decisions of the Supreme

Court impose a requirement that an employer bargain about the effects of a collectively bargained prerogative.

**B. The Concept of Effects Bargaining Should Not Apply to Matters Covered by a Collective Bargaining Agreement**

The Board has simply taken the concept of effects bargaining too far. Effects bargaining only makes sense in the context of decisions that are reserved to an employer, not because of a collective bargaining agreement, but as a matter of law, because of the employer's inherent right to run the business. *N.L.R.B. v. First Nat'l Maint.*, 452 U.S. 666; *N.L.R.B. v. United Technologies Corp.*, 884 F.2d 1569 (2d Cir. 1989) (partial closing of a business); *N.L.R.B. v. Emsing's Supermarket, Inc.*, 872 F.2d 1279 (7<sup>th</sup> Cir. 1989) (plant closure); *Soule Glass and Glazing Co. v. N.L.R.B.*, 652 F.2d 1055 (1<sup>st</sup> Cir. 1981) (closing of an entire business); *N.L.R.B. v. International Harvester Co.*, 618 F.2d 85 (9<sup>th</sup> Cir. 1980) (relocation); *N.L.R.B. v. W.R. Grace & Co.*, 571 F.2d 279 (5<sup>th</sup> Cir. 1978) (termination of a product line); *N.L.R.B. v. North Carolina Coastal Motor Lines, Inc.*, 542 F.2d 637 (4<sup>th</sup> Cir. 1976) (partial business closing); *Ladies Garment Workers v. N.L.R.B.*, 463 F.2d 907 (D.C. Cir. 1972) (relocation); *N.L.R.B. v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (business closing), *citing N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961). In these cases the courts imposed on the employer a requirement to bargain about the effects of decisions reserved to management by law, the logic being that the union did not have either the right or the opportunity to bargain about "a matter of central and pressing concern to the Union. . . the possibility of continued employment and the retention of the employees' very jobs." *First Nat'l Maint.*, 452 U.S. at 677-678.

This logic does not apply when the employer acts (as in this case) on a prerogative expressly granted under the terms of a collective bargaining agreement. The parties have bargained, they have agreed, and the terms of their agreement should be enforced.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2013

**Appendix A**

**Opinion of the United States Court of Appeals for the  
Second Circuit, Decided January 17, 2013**

**Previously Attached as Exhibit "F"**

**Appendix B**

**Decision and Order of the National Labor Relations Board  
Dated August 16, 2010**

**Previously Attached as Exhibit "C"**

## **Appendix C**

**Decision of the National Labor Relations Board,  
Division of Judges, Dated June 12, 2008**

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

ROCHESTER GAS & ELECTRIC CORPORATION

And

Case 3-CA-25915

LOCAL UNION 36, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO

*Linda Leslie, Esq.,*  
Of Buffalo, New York  
For the General Counsel

*James R. LaVaute, Esq.,*  
Of Syracuse, New York  
For the Charging Party Union

*James J. Gleason, Esq.,*  
Of Binghamton, New York  
For the Respondent Employer

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Buffalo, New York on February 11, 2008. Local Union 36 International Brotherhood of Electrical Workers, AFL-CIO (Union) filed the original charge in this case on June 13, 2006. An amended charge was filed on June 15, 2006 and a second amended charge was filed on September 8, 2006. The Regional Director for Region 3 issued a Complaint and Notice of Hearing (Complaint) on October 31, 2006.<sup>1</sup> The Complaint alleges, inter alia, that Rochester Gas & Electric Corporation (Respondent, RG&E or Company) has engaged in certain conduct that is in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). Respondent filed a timely Answer to the Complaint wherein it admits, inter alia, the jurisdictional allegations of the Complaint.

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

---

<sup>1</sup> All dates are in 2006 unless otherwise indicated.

## Findings of Fact

## I. Jurisdiction

The Respondent, a corporation, with its principal place of business in Rochester, New York, has been engaged in the generation, transmission, distribution and sale of electricity and natural gas. During the 12 month period ending October 31, 2006, Respondent, in conducting its business described above, derived gross revenues in excess of \$250,000. During the same time period, Respondent purchased and received at its Rochester, New York, facility, goods valued in excess of \$50,000, directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

## A. The Complaint Allegations

The Complaint alleges and the Respondent admits that the following individuals held the positions opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Cathleen Frain	RGE/NYSEG Labor Relations
Richard Frank	Manager of Electrical Operations <sup>2</sup>

The Complaint alleges and Respondent admits that at all material times, the Union has been the designated representative of Respondent's employees in the following Unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees of Respondent described in Section 1 – Representation and Recognition, of the collective-bargaining agreement between Respondent and Union, which is effective from September 1, 2003 to May 31, 2008.

The Complaint further alleges that on or about January 10, 2006, Respondent discontinued the practice of allowing certain Unit employees to take a service vehicle home after work. It alleges that this practice relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject of bargaining. It also alleges that Respondent engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.<sup>3</sup>

In its Answer, Respondent admits that on January 10, 2006, it discontinued the practice

<sup>2</sup> Frank testified that his job title was Manager of Regional Operations. Though it is relatively immaterial, I will accept Frank's version as he should know best what his job is titled.

<sup>3</sup> The Complaint was amended at hearing to remove an allegation that Respondent did not afford the Union prior notice and an opportunity to bargain over its decision to cease the involved practice.

of requiring certain Unit employees to take service vehicles home after work, but denies the other allegations of the preceding paragraph.

5 The Complaint further alleges that on or about March 7, 2006, the Union, by letter, demanded bargaining over Respondent's decision to terminate the practice, (called "benefit" by the Union) noted above and requested that Respondent furnish the Union with the following information with respect to that benefit:

- 10 1. A listing of jobs and unit personnel that have the benefit;
2. Any Company analysis of the cost of this to the Company;
3. A listing of non-unit personnel who have the benefit, so that we may assess the significance of this issue to the Company; and,
4. Whether the Company announced to any non-unit personnel the same restriction now being imposed upon members of the bargaining unit.

15 The Complaint alleges that this information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. The Complaint further alleges that on or about March 7, 2006, Respondent, by Cathleen Frain, by letter, failed and refused to furnish the Union with the information requested above. Respondent admits that the Union filed the information request, but denies the other allegations related to it.

20 B. Facts Related to the Decision to End the Practice of Allowing Certain Employees to Take Company Vehicles Home and the Union's Response.

25 1. Facts Related to the Making of this Decision.

30 Richard Frank testified that the Company provides gas service to about 370,000 customers and electricity to about 280,000 customers in a nine county area around Rochester, New York. Frank is Regional Operations Manager for Respondent. Within the geographic area of his responsibility, he manages the trouble maintenance and repair operation (TM&R) and also electrical construction of such things as substations. There are two groups of employees in TM&R, high voltage and low voltage. The high voltage group works with the overhead and underground electric transmission system with voltages as high as 35,000 volts, whereas the low voltage group primarily deals with residences with voltages under 480 volts. The high voltage crews use a material handling truck with a bucket attachment. These crews have never taken a Company vehicle home at night. When there is an emergency for them to handle, they report to the Respondent's Rochester, New York West Avenue facility and are dispatched in their trucks from that facility.

40 The low voltage group works on commercial and residential meter and service work. They do a lot of meter installations and meter change-outs. They do maintenance work on what is called a current transformer which uses voltages up to 480 volts. They do both scheduled and emergency work. The emergency work accounts for about 40 per cent of the work of the low voltage group. In this group are eight employees, seven electric meter technicians and one electric meter inspector. On a day to day basis, the employees in this group work solo. They use a ¾ ton van in their work. These vans have two front seats with a bulkhead behind them to keep material in the rear from coming into the driver compartment. The vans are equipped with a computer and any materials the employee needs to do his work are in the rear of the van. Their work is divided into two shifts, one from 7 am to 3 pm and the other from 3 pm to 11 pm. Usually  
 45 the first shift is manned by four to six employees, Monday through Friday. The second shift is manned by one or two employees normally, Monday through Friday. The Saturday and Sunday shifts are manned by one employee for each shift. Emergency work coming after 11 pm is  
 50

handled by the high voltage crews.

Emergency situations can arise from employees calling in sick or storm situations. On these occasions, off duty employees may have to be called in. Employees are called in order from a list supplied to the Company by the Union. They can refuse the call out and in that event, the next person on the list is called. Prior to January 1, 2006, these employees took their service van home at night. If called in for an emergency while at home, they would drive the Company vans to the West Avenue facility to pick up the packet of material needed to do the emergency work, then go to the work site. The Company also provides a helper for emergency work and the low voltage employee would pick this person up at West Avenue. On what Frank termed "rare" occasions, the employee might be dispatched to a work site without first going by the West Avenue facility.

Subsequent to January 1, 2007, the employees now always report to West Avenue for their van, material and a helper if needed. In November, 2005, Frank decided he wanted to end the practice of the employees taking their assigned vans home at night.<sup>4</sup> He testified that garaging them at West Avenue at night would be a cost savings to the Company. He was also concerned that having the Company trucks parked at employees' homes presented some sort of negative public reaction. He did not elaborate on this point. He also did not do any formal cost analysis of the savings associated with the decision.

He recommended to one of the Company's Labor Relations specialists, Cathleen Frain, that the practice be discontinued. He made the recommendation to her because he wanted to be sure he was allowed to do it under the collective-bargaining agreement. He made the request by e-mail. The communication, dated November 3, 2005, reads:

"As you are probably aware, Operations across NY State is looking at reducing costs to meet budget constraints. One of the cost savings ideas for my group would be to have the 8 Low Voltage employees who currently take home their vehicles, park them here at West Ave now and commute back and forth to work in their personal vehicles. This makes good business sense in that these employees start their shift each day here at West Ave.

These employees get called in from home approximately 1 time per month. If the call-in is storm related, they are reporting to West Ave. first to meet up with their rider anyway. One call-out per month doesn't constitute having their vehicles at their homes for emergency response. As mentioned above, they report to West Ave. each day at the beginning of their shift to get their work assignments for that day. They also have their morning tailboard at that time. Rarely do they have a job scheduled earlier than their start time.

Currently, these employees would finish their last job for the day and head home from there. If they have to report back to West Ave to drop off their vehicle, they would pretty much be leaving the work site at about 30 minutes or so before the end of their shift in order to be back to West Ave. at the end of their shift. We're not 100% certain they are on the job site much past that anyway even if they are going home from the site.

My recommendation is that you and I sit with Rick Irish<sup>5</sup> and give him a heads up that this is coming. The sooner the better. I would then communicate this to the 8 employees involved. I would like to pull the trigger on this as soon as 11/28/05. If we were to let the

<sup>4</sup> This practice had been in operation for about 29 years.

<sup>5</sup> Richard Irish is the Union's President.

employees know next week, they would have nearly 3 weeks to prepare."

5 A chart introduced by the Respondent reflects the emergency call-outs for 2005. By months it shows for January, 6 call-outs. June and July, 2 call-outs for each month, August, 8 call-outs, September, 1 call-out, October, 4 call-outs and no call-outs in the other months.

2. Notice of the Decision is Given to Affected Employees and the Union Responds.

10 Frain approved the recommendation and Frank set a meeting for November 18, 2005, and explained the Company's plans to the eight affected employees.

15 Steven Parnell is a low voltage employee of Respondent and a Union steward. He is one of the employees affected by the decision to stop letting employees take home Company vehicles. He attended a meeting on November 18 at Respondent's West Avenue facility. In attendance for management were Frank and Supervisor Jim Connell. The employees in attendance in addition to Parnell were Tom Eichle, Dick Shamp, Alford Smith, Tom Spratt and Tony Proctor. All are electric field technicians, except for Smith, who is an electric meter inspector and all are considered low voltage employees. Frank informed the employees that as of January 1, 2006, they would no longer be allowed to take Company vehicles home at night. 20 Smith then asked Frank if management had considered other options such as charging the employees for taking the vehicles home at night. Smith added that he considered the benefit of taking the Company vehicle home part of his compensation. Frank responded that the decision had already been made. Frank also noted that other employees under his management were similarly going to lose the use of Company vehicles to get to and from work. Presumably these were non-Unit employees. Parnell testified that he used the Company vehicle about twice a year 25 to answer emergency call-outs from his home. On these occasions, Parnell might report to the emergency directly or he might first go to the West Avenue facility.

30 Parnell was not allowed to take a Company vehicle home after January 1, 2006. He had been taking one home since 1990. He did not have to buy gas for the Company vehicle. The Company withheld an amount from his pay to cover what the Internal Revenue Service deemed the value of the right to use the Company vehicle to go to and from work. This value was considered to be income to the employee. An exhibit in this record lists the value or imputed income assigned for the years 2004 and 2005 for each affected employee. The annual values 35 range from a low of \$426 to a high of \$663. For Parnell, the imputed income was listed as \$597 for 2004 and \$549 for 2005. Parnell lives about 17 miles from the involved Company facility. He now uses his personal vehicle to get to the West Ave. facility.

40 Thomas Spratt is a low voltage employee of Respondent. As noted above, Spratt also attended the meeting with Frank.<sup>6</sup> According to Spratt, Frank gave as the reasons for taking away the Company vehicles budget cuts and restraints. Spratt remembered asking if other employees would also lose the use of Company vehicles to go to and from work. According to Spratt, Frank said, "Probably, this is just the start of it." Spratt lives about 25 miles from his place of work and had to take a personal vehicle out of storage and use it to go to work after his 45 Company vehicle was taken away January 1, 2006. The imputed income for Spratt for the benefit of taking home the Company vehicle for 2004 was \$645 and for 2005 was \$636.

50 <sup>6</sup> With this witness, General Counsel indicated the date of the meeting was November 8, 2005, whereas with Parnell it was identified as taking place on November 18. Based on correspondence in the record, the correct date is November 18 2005.

5 Spratt also testified that he was on a Company hiring committee in the spring of 2005. Also serving on this committee were employees Tony Proctor and supervisor Jim Connell. Spratt said there was a fourth member, but failed to identify him. This committee screened candidates for employment in two openings for electric meter technicians in their department. The candidates with the highest scores were offered employment. Spratt told each candidate that the use of a company vehicle to go to and from work was part of the job's compensation package. According to Spratt, supervisor Connell agreed with him.

10 Richard Irish is the President, Business Manager and Financial Secretary of the Union. The Union was certified at Respondent's facility in 2003 and the Unit has 395 members. He testified that in November, 2005, he had a telephone conversation with Richard Frank. Frank informed Irish that effective January 1, 2006, Respondent would no longer allow the low voltage teams and meter men to take their service vehicles home at night. Instead, Respondent planned on garaging them at its West Avenue Facility. Irish responded that Respondent could not take this action unilaterally, but rather, was required to bargain over it as the existing benefit was a mandatory subject of bargaining. Frank said that he would relate the Union's position to Labor Relations and added, that the workers affected were not using the vehicles to answer emergency calls at night and that when they did, they first reported to the West Avenue Facility anyway. Frank called the decision a good one and noted the expense to the Respondent involved in the employees using the vehicles to go to and from their homes and the West Avenue Facility. Irish did not conduct an investigation among the affected employees to determine if Frank were correct in his assertions.

25 Later on the same day, Irish spoke to Steve Parnell. Parnell informed him that he and other affected employees had had a meeting with Frank where the loss of the benefit was announced. Parnell told Irish that the employees were upset about the decision as they would have to get another vehicle or find some other means to get to work.

30 On January 10, 2006, Irish sent a letter to Respondent's Labor Relations Analyst, Jay Shapiro, which stated that it was formal grievance, adding:

35 "This grievance is being filed in reference to January 1, 2006 requirement that Low Voltage TM&R employees with the Company with Company vehicles park the vehicles overnight at West Ave.

40 This unilateral action was a violation of past practice. This removes the benefit of use of the vehicles for commuting to work and responding to callouts directly from home. Wages, benefits, hours and working conditions are mandatory topics of collective bargaining. The Company refused collective bargaining in this matter.

45 The resolution to this instant case is that all affected members are made whole."

50 The Union met with the Company on three occasions to discuss the removal of the benefit. The first meeting took place on December 20, 2005. The meeting lasted two hours and the matter of the benefit was just one of a number of topics discussed. Appearing for the Respondent was Jay Shapiro and for the Union, IBEW International agent, Mike Flanagan and Irish. Irish testified that the discussion of the removal of the benefit took about five minutes. Irish did not remember the substance of the discussion. The next meeting where this matter was discussed took place in January 2006. Appearing for the Respondent were Cathleen Frain and Richard Frank. Appearing for the Union were Irish and employee-steward Steve Parnell. The portion of the meeting relating to the grievance took about twenty minutes. The Union pointed out that the cost of the decision to its affected members was about \$5000-\$6000 for

transportation. There was no detailed explanation given for how this figure was calculated and it is not entirely clear whether Irish meant the figures given related to each individual affected employee or was for the whole group of eight employees combined. I would think the latter would be more likely. Irish noted that one of these affected members, Dick Shamp, had taken the job with Respondent at a pay cut as the use of the Company vehicle made up for the cut. He again pointed out that the removal of the benefit was a mandatory subject of bargaining. Respondent's representative took the position that it was a good business decision and that it had the right to remove the benefit under the contract.

There was a third step meeting held in July, 2006. Appearing for the Company were Frain, Shapiro, labor relations analyst George Savaker, Frank and his immediate boss, Walt Matias. Appearing for the Union were Irish, Parnell and then Union Vice-President, Craig Rody. The Union reiterated its position that Respondent's decision was a mandatory subject of bargaining, and that the benefit had been explained to some job applicants as being part of the compensation for the job. The Union also took the position that by making the unilateral change in the involved benefit, the Respondent had violated the Act. The Company again took the position that it had the right to make the change under the contract and that it was a good business decision.

On March 7, Irish sent Frain the letter requesting information noted above at page 3 of this decision. Frain responded with a letter dated March 17, 2006, which stated:

"Respectfully the Company is not rescinding the determination it has made with regards to the Low Voltage TM&R group garaging their vehicles at night. I disagree with your characterization of the issue as being a benefit. This issue is currently in the grievance process and we will be willing to discuss your concerns within that forum. As for your request for information, we will provide you the information relevant to the matter."

Irish testified that he sent this letter and another on June 5 in an attempt to get the Company to bargain over the removal of the vehicles, "have them bargain over some recompense, you know, some typ of compensation for removing the vehicles, . . ."

Irish wrote Frain again on June 5. This letter is practically identical to the one sent on March 7, with the difference being that he notes that Respondent had not yet complied with the information request as of the date of the later letter.

Frain responded with a letter dated July 10, which reads:

"This letter is in response to your letter dated June 5, 2006 requesting information regarding the Employer Vehicle Program. I have enclosed a report listing bargaining unit members, their job title and the company vehicle they have been assigned to take home at night. The company believes that it is not obligated to provide you with any financial information on company vehicle costs more does the company believe the Union's request for information on non-union employee vehicles is relevant or necessary to your duties and responsibilities.

As stated in the company's March 17, 2006 response, we disagree with your characterization of this issue as a "benefit" and the company is not rescinding its determination to have these vehicles garaged at night.

Please note that the information being provided is being provided for use by the Union strictly for the purposes of contract administration and/or collective bargaining. The information remains confidential and proprietary and may not be distributed or used for anything but the

above stated purpose, without the written consent of the Company. If you have any questions on the information provided, please call me."

5 Respondent thus supplied the information requested in paragraph one of the information request, but no information was supplied for the other three paragraphs.

10 On July 21, 2006, Irish wrote to Shapiro, stating that the Union was withdrawing the grievance over the removal of vehicles and stating that it would pursue the matter before the NLRB.

15 Irish testified that he requested the information, including that for non-Unit employees to see how many people were affected and what was the cost of the program to the Respondent. He testified the Union needed this information in order to develop a bargaining position. As he was not sure of the total number of employees affected, he was not sure what the cost savings the Respondent might realize by the removal of the vehicles. He implied that the proposal might be affected by the total amount of the cost savings. Other than the information provided by Frain in her July 10 letter in response to paragraph 1 of the Union's request, Respondent has not made available any other information sought.

20 On July 10, Irish had a phone conversation with Shapiro who told him the Respondent did not see the relevance of the information sought about non-Unit employees (Paragraphs 3 and 4 of the request). According to Respondent, Irish did not give either Shapiro or anyone else with the Company reasons why these two requests involving non-Unit employees were relevant. I cannot find any evidence that Respondent asked the relevance. With respect to Paragraph 2  
25 of the request, Irish was never told the Company could not afford to let the employees take Company vehicles home. Irish testified that the Respondent never bargained or offered to bargain with the Union over the effects of the decision to remove the company vehicles from the eight employees who had been allowed to use them to go to and from work. Similarly, he testified that Respondent never offered any compensation to these employees for taking away  
30 the vehicles that they had been allowed to take home at night.

### 3. The Relevant Provisions of the Collective-Bargaining Agreement.

35 Irish was part of the negotiating team that reached the current collective bargaining agreement. The parties, and primarily, Respondent makes some fairly broad contentions about Irish's testimony related to bargaining. I think it important to see exactly what Irish did say, which is not easy to summarize otherwise. This testimony was fragmented by numerous evidentiary objections from all parties. The testimony was given starting at page 25 of the transcript and questions are by Respondent's counsel and answers by Irish. The exchange, excluding  
40 objections and arguments reads:

Q. In the course of that bargaining for that agreement, you discussed, did you not, taking vehicles home - - -union members taking vehicles home, is that correct?

45 A. Yes, we did.

Q. You also discussed, in the course of that agreement that the - - -there would be certain rights that the company would retain with regard to work rules and work practices, did you not?

50 A. Yes, we did.

Q. As part of that agreement the union agreed, did they not, that the company was free to

unilaterally change any work rule or any practice that had been ongoing at RG&E during the course of this collective bargaining agreement, except as provided in the agreement itself, is that right?

5 A. No answer given as the parties engaged in a number of objections and counsel went to another question.

Q. You bargained over the company's right to retain the ability to make certain unilateral changes with regard to work practices and work rules, did you not?

10 A. yes, we did.

Q. And, the result of that bargaining is set forth in the collective bargaining agreement, is it not?

15 A. No answer was given as the parties again objected and counsel opted to ask another question.

Q. You told us you bargained over the company's ability to make changes - - unilateral changes with regard to certain work rules and certain work practices as they existed and the result of that bargaining is contained in the collective bargaining agreement itself, is it not?

20 A. No answer was given and objections were made. Counsel chose to ask another question.

Q. You bargained about work rules, did you not?

25 A. Yes, we did.

Q. You bargained about whether or not the company would have the right to make unilateral changes in work rules as they existed at RG&E, did you not?

30 A. Yes, we did.

Q. You arrived at an agreement with regard to that, did you not?

35 A. Yes, we did.

Q. And that's reflected in the collective bargaining agreement, is that right?

A. Yes, it is.

40 Q. With regard to work practices, you bargained about that, did you not?

A. Yes, we did.

45 Q. And, you arrived at an agreement which would give the company certain rights with regard to making unilateral changes to work practices?

A. Objections were made and no answer was given. Counsel then asked another question.

50 Q. Did you bargain, during the course of the negotiations, about the company's right to make certain unilateral changes to existing work practices at RG&E?

A. Yes, we did.

Q. And the result of that bargaining is set forth in the collective bargaining agreement, is it not?

5 A. Yes, it is.

Q. With regard to just for the convenience of the judge, the agreements with regard to work practices and work rules are contained in Article 7 of the collective bargaining agreement, is that correct?

10 A. Yes, they are.

Q. Now, you also -- let me back up for a second. You told me that you had recited the union's position on a number of occasions to the company with regard to this change in the practice of taking -- the low voltage TMR people taking trucks home; isn't that right?

A. Yes, I did.

Q. I believe, and correct me if I am wrong, that the thrust of your discussions with the company was that you viewed that a benefit to be allowed to take the trucks home; is that right?

A. It was a benefit or compensation.

Q. And, in your mind was this dollar amount that there would be some value in taking the truck home so you didn't have to pay for a vehicle of your own to get work in the morning, is that right?

A. That's correct.

30 Q. And to get home at night too, right?

A. Yes.

Q. And, your view was that that was a benefit to the employees, right?

35 A. A benefit or compensation?

Q. A benefit and compensation?

40 A. Or compensation, to me they're kind of analogous terms.

Q. Meant the same thing to you?

A. Yes.

45 Q. During the course of negotiations for this collective bargaining agreement, Joint Exhibit No. 7, you bargained about benefits, did you not?

A. Yes, we did.

50 Q. And, the company retained certain -- the company's position was that they should be able to retain certain rights with regard to changing those benefits unilaterally; isn't that right?

A. Would you ask that again, please?

5 Q. The company's position during the bargaining was that they should be able to retain the right to change benefits unilaterally, isn't that right?

A. I don't know if I agree that it was the company's position.

10 Q. You don't know what -- you don't recall the company's position?

A. I don't recall that position.

Q. But you do remember this concept of benefits being discussed?

15 A. Yes.

Q. Let's set wages aside for a second, okay? There are certain things that the employees get by virtue of their employment at RG&E that have some economic benefit to them, is that correct?

20 A. Yes.

Q. That's aside from the wages that they earn, right?

A. That's correct.

25 Q. There are certain things like clothing allowance and some other things that just for an example of a benefit that employees get; is that right?

A. Yes.

30 Q. And that's separate and apart from their wages, right?

A. That's correct.

35 Q. This benefit or let me ask it another way, taking a vehicle home after work, is that one of those benefits that you get that's separate and apart from your wages, if you're in that category?

A. It's a benefit or compensation separate and apart from wages.

40 Q. Taking the concept of wages out of it for a second, all right, it's a benefit in terms of something that they get that's of value apart from their wages: is that right?

A. Yes.

45 Q. During the course of the negotiations that you had with the company to arrive at this collective bargaining agreement, you discussed this concept of benefits that were separate from the compensation, right?

A. Yes we did.

50 Q. You arrived at an agreement with regard to that, is that right?

A. Yes, we did.

Q. The agreement that you arrived at with regard to benefits is set forth in Article 25 of the collective bargaining agreement that's in front of you, is that correct?

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A. Yes, it is.

The next questioning of Irish on the subject of negotiation was by General Counsel.

10 Q. If you would refer to Joint Exhibit 7, and specifically Article 7. In the first paragraph, there is a reference to a joint committee?

A. That's correct.

15 Q. Do you know who was on that Joint Committee?

A. No, I do not.

Q. In the terms of the article on benefits, were vehicles ever discussed?

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A. Objections were made and no answer was given. Another question was asked.

Q. So were vehicles ever discussed in relation to benefits?

25 A. I don't remember vehicles being discussed in relation to Article 25.

The next questions about negotiations of Irish were asked by counsel for the Union.

30 Q. Mr. Irish, in the course of the negotiations, I'm referring to Article 7 here, was there any discussion in the negotiations about the interplay or how you reconciled the first paragraph of Section A with the second paragraph of Section A; was there any discussion about that?

A. I don't recall a discussion of how they interplayed.

35 Q. In the course of negotiations did the company ever state to the union that it retained the right to withdraw the take-home vehicles?

A. No they did not.

40 Article 7 of the collective bargaining agreement states:

(7) SAFETY AND WORK RULES

45 (A) It is understood and agreed that there are in existence specific safety and/or work rules, customs, regulations, or practices which reflect detailed application of subject matters within the scope of this Agreement and which are consistent with it. It would be impractical to set forth in this Agreement all of these rules, customs, regulations, and/or practices, or to state which of these matters may have been eliminated. A joint committee will be formed to review safety and work rules, customs, regulations, and practices. It is  
50 understood and agreed that if a dispute arises as to the existence or enforceability of a specific safety or work rule, custom regulation, or practice,

such dispute shall not be subject to the grievance and arbitration provisions of this Agreement, but shall instead become the exclusive concern of the Director of Human Resources for the Company and the International Representative of the Union or their specifically authorized deputies.

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In addition, it is understood and agreed that the Company shall have the exclusive right to issue, amend, and revise safety and/or work rules, customs, regulations, and practices, except as expressly modified or restricted by a specific provision of this Agreement. This provision shall include job specifications for the classifications which were recognized by the NLRB Certification dated April 11, 2003, Case No. 3-RC-11307, except as expressly modified or restricted by a specific provision of this Agreement.

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Paragraphs (B) and (C) of this Article are confined to safety rules and safety training and are not relevant to the issue under consideration.

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Article (8) MANAGEMENT RIGHTS AND RESPONSIBILITIES

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It is mutually understood and agreed by the parties to this Agreement that: except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions are retained and vested exclusively in the Company, including but not limited to the rights, in accordance with its sole and exclusive judgment and discretion to reprimand, suspend, discharge, and otherwise discipline employees for just cause; to determine the number of employees to be employed; to hire employees, determine their qualifications and assign and direct their work; to promote, demote, transfer, lay off, recall employees to work; to set the standards of productivity, the products to be produced and/or the services to be rendered; to maintain the efficiency of operations; to determine personnel, methods, means, and facilities by which operations are conducted; to determine the size and number of crews; to determine the shifts to be worked; to use independent contractors to perform work or services; to subcontract, contract out, close down, or relocate the Company's operations or any part thereof; to expand, reduce, alter, combine, transfer, assign, or cease any job, department, operation or service; to regulate the use of machinery, facilities, equipment, and other property of the Company; to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment; to determine the number, location and operation of departments, divisions, and all other units of the Company; to issue, amend and revise reasonable policies, rules, regulations, and practices not in conflict with any express provisions of the collective bargaining agreement; and to direct the company employees. The Company's failure to exercise any right, prerogative, or function hereby reserved to it, or the company's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Company's right to exercise such right, prerogative, or function or preclude it from exercising the same in some other way not in conflict with the express provisions of this Agreement.

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The parties at hearing referred to Article 25 as the Benefits Article in error. Article 25 is a one line article dealing with the Company's Pension. Article 26 is a one line Article dealing with the Company's 401(k) plans. Article 24 deals with benefits other than pension or 401(k). It reads:

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(2) BENEFITS (other than Pension or 401(k))

During the term of this Agreement, the Company will provide "General Benefits" and

"Benefit Plans" described in the "Rochester Gas and Electric Union Employee Benefit Handbook", subject to the terms and conditions of the plan documents. The terms of the plan documents, including the summary plan descriptions are specifically incorporated herein by reference.

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Except as set forth below, it is understood and agreed that during the term of this Agreement the Company (consistent with the plan documents) shall have the exclusive and unilateral right to issue, amend, revise or terminate any or all benefits and benefit plans:

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There follows four numbered paragraphs dealing with medical plans and flex fit credits, none of which are relevant to the issued involved in this case.

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Though the parties discussed the matter of employees taking home Company vehicles, it is not mentioned in the agreement. The only mention of vehicles I find is in Article 16 which deals with overtime. The last sentence of this Article reads. "The Company may require employees to take home vehicles."

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C. Discussion and Conclusion with Respect to the Issues.

1. Did the Respondent Violate the Act by Refusing to Bargain Over the Effects of its Decision?

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Wages, hours and other terms and conditions of employment are mandatory subjects of bargaining, which cannot be changed by an employer without providing the union with timely notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). Making unilateral changes in mandatory subjects of bargaining "circumvent[s] . . . the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal." *Katz*, at 743. The effects on employees of losing the benefit of a service vehicle to drive to and from their residences is a mandatory subject of bargaining as it relates to their wages and conditions of employment.

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The Respondent has argued that the Union has waived its right to this statutory mandate to bargain over unilateral changes by its agreement to the parties' collective bargaining agreement. Whether that is correct or not is moot as the General Counsel has amended the Complaint to remove the allegation that Respondent was obligated to bargain over its decision to cease the practice of allowing the low voltage workers to use its vehicles to commute to and from work.

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On the other hand, there remains the issue of whether Respondent was obligated to bargain with the Union over the effects of its decision. Under Board law, I find that Respondent was obligated to give the Union notice and an opportunity to bargain about the effects on unit employees of its decision to eliminate the benefit of the employee's use of Company vehicles to go to and from work and home. That is true even if it had no obligation to bargain about the decision itself. *Good Samaritan Hospital*, 335 NLRB 901, 902 (2001); *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995). In *Good Samaritan Hospital*, the Board held that contractual language that waives the union's right to bargain about a decision is not a waiver of its right to bargain about that decision's effects. *Id.* at 902. Specifically, in *Good Samaritan Hospital*, the Board found that the language in the parties' collective bargaining agreement waived the union's right to bargain over the hospital's decision to change its staffing matrix, but did not waive the union's right to bargain over the effects of this decision. *Id.* at 901-903. The Board found that the hospital's decision impacted the employees' terms and conditions of employment and that the hospital

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had to bargain over these effects. *Id.* at 903-904.

5 Here Respondent's decision had a substantial monetary effect on the affected employees. Whether one accepts the Respondent's own estimate of the value to the employees of its practice, the value or income imputed to the employees because of their use of Respondent's vehicles to commute to work, or the higher \$5000 to \$6000 figure asserted by the Union or something in between, the value was substantial. The costs incurred by the employees as a result of the decision included providing a vehicle to replace the one provided by Respondent, and paying the maintenance, insurance and gasoline costs for the vehicle. It is obvious to anyone who drives a car these days that these costs are very real and substantial. Thus, the effects of Respondent's decision included changes to employees' terms and conditions of employment in ways that were material, substantial and significant. It is clear that Respondent realized the truth of this as the value of the use of the Company vehicle was considered income by Respondent and was represented to prospective employees and relied upon by some of those taking involved jobs, as being part of their total compensation. As such, Respondent had a duty to bargain over the effects of the decision. *Kiro, Inc.*, supra; *Union Child Day Care Center*, 304 NLRB 517 (1991)(finding that the employer violated Section 8(a)(5) of the Act by unilaterally discontinuing its practice of allowing employees to use a company vehicle to obtain their lunches); *Yellow Cab Co.*, 229 NLRB 1329, 1333, 1354 (1977)(finding that the employer violated Section 8(a)(5) of the Act by unilaterally changing its policy allowing employees to use their cab for transportation to and from work).

25 I cannot find any evidence that the Union has clearly and expressly waived its right to bargain over the effects of the Respondent's decision. Nothing in the evidence relating to the negotiations for collective bargaining speaks to any intent by the Union to consciously waive its right to effects bargaining and the collective bargaining agreement is silent as to effects bargaining, though arguably giving the Respondent the right to unilaterally make changes in otherwise mandatory subjects of bargaining. Clearly there were no negotiations over the effects of the decision to take away the private use of Respondent's vehicles by low voltage employees and there is no language dealing with this issue in the collective bargaining agreement. The Supreme Court, in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), held that it would not "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'" The Board has held that to meet the clear and unmistakable standard, "the contract language must be specific, or it must be shown that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000). Furthermore, in addressing effects bargaining, the Board has held that it must be clear and unmistakable that effects bargaining is being waived. *Good Samaritan Hospital*, supra at 902.

40 None of the contractual provisions, Article 7, Article 24 or Article 8, all set forth in their relevant entirety above, address the effects of taking any action under their wording nor do they address the removal of service vehicles at all. There is nothing that clearly gives Respondent the right to avoid effects bargaining from any action it might take in reliance on these Articles. There is nothing in the evidence in this record about negotiations that deals with effects bargaining. I find that Respondent has failed to meet its burden that the Union clearly and unmistakably waived its right to bargain over the effects of Respondent's unilateral removal of the low voltage employees longstanding benefit.

50 Likewise it is clear that the Union timely and continuously requested to bargain over the matter. Irish made clear requests for bargaining in his November 2005 telephone conversation with Frank, in his meeting with Respondent's representatives in December 2005, and again in its official grievance over the matter submitted on January 10, 2006. The grievance in part

states:

5            "This unilateral action was a violation of past practice. This removes the benefit of the use of vehicles for commuting to work and responding to callouts directly from home. Wages, benefits, hours and working conditions are mandatory subjects of collective bargaining. The Company refused collective bargaining in this matter. The resolution to this instant case is that all affected members be made whole."

10           The grievance is clear that the loss of a benefit of using the vehicles for commuting purposes is at issue and equally clear is the fact that, inter alia, the Union is seeking compensation for the losses its members incurred as a result of Respondent's decision. At both grievance meetings in January and July 2006, Irish repeated the Union's position that Respondent's conduct was a unilateral change and that hours, wages and conditions of employment were mandatory subjects of bargaining. The Union also maintained that position in  
15 its letters of March 7 and June 5, 2006. During the grievance meetings, Irish informed Respondent that the use of Company vehicles was part of the employees' compensation and that its loss was costing the employees \$5000 to \$6000 annually. I find that this makes perfectly clear that the Union was seeking an effects remedy in addition to seeking bargaining over the decision itself. On the issue of waiver, The Board has held that "[i]n the absence of a clear and  
20 unmistakable waiver by the union concerning effects bargaining, such bargaining is still required." *Good Samaritan Hospital*, supra at 902. Though I find that it is clear that the Union here requested by effects and decision bargaining, the Board has held that no magic words are required to establish a demand to bargain. They made it clear that the loss of the vehicle for commuting to work and the costs associated with that loss were substantial. Implicit in such a  
25 position is that a remedy is due to the employees for the effects of the lost benefit. *AT&T Corp.*, 325 NLRB 150 (1997); *Legal Aid Bureau*, 319 NLRB 159 fn. 2 (1995). Any argument by Respondent that the practice of letting the low voltage employees use their Company vehicles to commute is not a benefit, as was made in the testimony, is disingenuous as their best argument for waiver with respect to the decision to discontinue the practice is found in the  
30 section of the collective bargaining agreement dealing with benefits.

35           In conclusion, I find that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union over the effects of its decision to cease the practice and benefit of allowing the low voltage employees to use their Company vehicles to commute to and from work.

2. Did Respondent Violate Section 8(a)(5) of the Act by Refusing to Supply the Union with Requested Information?

40           Though Respondent did supply one part of the Union's information request, it continues to refuse to supply the following portions of it:

Any Company analysis of the cost of this to the Company;

45           A listing of non-unit personnel who have the benefit, so that we may assess the significance of this issue to the Company; and,

Whether the Company announced to any non-unit personnel the same restrictions now being imposed upon the members of the bargaining unit.

50           The Respondent has informed the Union that it does not consider the last two requests

to be necessary and relevant to the Union's duties as representative of the unit employees and with respect to the first one, has stated that no analysis of the costs associated with its decision has been made. This latter information was first given at the hearing in this case and was not given to the Union prior to the hearing.

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With respect to the cost request, General Counsel asserts that the Union is seeking an analysis of the cost to the Company of providing service vehicles to bargaining unit personnel, not an analysis of the cost savings achieved by taking the service vehicles away. I would agree though would note they might be the same thing. Whether any formal analysis was performed or not, the underlying cost information is available. Certainly the Respondent thought there were cost savings to be achieved by stopping the longstanding practice of letting the low voltage employees take Company vehicles home at night. Budget constraints and budget cuts were the reasons given to employees when they were informed of the Company's decision. I find that such information is highly relevant and necessary to the Union to be able to effectively bargain with the Company over the effects of its decision. Whether the costs are associated with increased mileage on the vehicles, increased maintenance costs or increased fuel costs are all matters within the knowledge of the Respondent. If it did not understand what the Union was seeking, it could have sought a clarification, but instead it simply chose to not comply without giving a legitimate reason.

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Respondent is obligated to furnish the Union with information about the cost of providing the benefit to bargaining unit employees. Information relating to wages, hours and working conditions of employees in the bargaining unit is presumptively relevant. *North Star Steel Co.*, 347 NLRB No. 119, slip op. 1, 5 (2006). Accordingly, the Board has held that financial information related to the cost of providing benefits to the bargaining unit is presumptively relevant for purposes of collective bargaining and must be furnished upon request. *E.I. Dupont & Co.*, 346 NLRB 553, 577 (2006); *V&S Schuler Engineering*, 332 NLRB 1242 (2000). There is no contention made in the evidence that such information does not exist and common knowledge would affirm that it does exist. Simply stating some years after the request was made that no analysis was made is just not sufficient. Respondent has violated the Act by not complying with this request.

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With respect to the information sought concerning non-unit personnel, I believe this information is similarly necessary and relevant for the Union to properly represent the involved unit employees. Frank announced to the low voltage employees that ceasing the practice of letting them use their Company vehicles to commute to and from work was just the start of similar steps the Company intended to take. Thus he opened the door to legitimate inquiry by the Union as to the scope of Respondent's cost savings program. With respect to information pertaining to employees outside the bargaining unit, the Union must demonstrate the information is relevant. *National Grid USA Service Co.*, 348 NLRB No. 88 (2006). The burden in demonstrating relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982). The Union need only show a "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

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The Union's information request was based on Respondent's representations regarding the reason it eliminated the vehicle benefit. Frank notified the low voltage employees that they were losing the use of the vehicles and in doing so indicated that it was a cost savings measure and that other employees would also lose the use of the vehicles. Frank made similar assertions to Irish. On this basis, the Union stated in its request, that it need the information to "assess the significance of this benefit and its cost to the company and to aid the Union in responding to

employer demands to terminate the benefit." The information relating to non-unit personnel would demonstrate the significance of the benefit, including whether the change was going to be instituted Company-wide or if it was only being applied to the low voltage members of the bargaining unit. This information would aid the Union in bargaining over the effect of losing the benefit, as it would clarify its impact on Respondent and assist the Union in preparing bargaining proposals. It would clearly affect the Union's bargaining position as it relates to the size of the cost savings sought by Respondent, whether minimal in the case of the low voltage employees or substantial if a number of non-unit employees were similarly losing the use of Company vehicles for their commute. I believe the Unions approach would be different in one case versus the other. Further, other than its claim of non relevance, Respondent has offered no reason why it cannot supply the information or what harm could result if it did. Relevancy of the information is also established by Frank's statements that the removal of the benefit was a cost savings measure that would be borne by other employees as well. The request information would verify the assertion that Frank made to the low voltage employees.

I find that Respondent has violated the Act by not providing the information sought with respect to non-unit employees.

### 3. Deferral is Not Appropriate in the Circumstance of this Case.

On brief and in its answer, Respondent urges deferral of this case to the parties' grievance and arbitration procedures. I think deferral in this case is inappropriate for two reasons. First, the use of take home Company vehicles at employer expense is a non-contractual term and condition of employment. The grievance and arbitration procedure allows processing only of an alleged "violation of the specific terms of this Agreement." Section 10(A). It states:

"No other matter may be submitted to the grievance and arbitration procedure."

"Work rules, customs, regulations, or practices which reflect detailed application of subject matters within the scope of this Agreement" are excluded from the grievance and arbitration procedure. Section 7 (A). Deferral is not appropriate here because the arbitration clause in the collective bargaining agreement does not cover the item at issue.

Second, deferral is not appropriate as the Complaint alleges violations of Section 8(a)(5) of the Act for failing and refusing to provide information. *Postal Service*, 302 NLRB 767 (1991); *DaimlerChrysler*, 344 NLRB 1324 fn. 1 (2005). The Board held in *DaimlerChrysler Corp.* that "under the Board's decision in *Postal Service*, (citation omitted), the 8(a)(5) complaint allegations concerning failure to provide requested information are not appropriate for deferral pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). *Id.* at fn. 1. Thus the information request allegations are not deferrable. Insofar as deferring the other allegation of this Complaint, the Board has held that it does not favor piece-meal deferral and prefers to have an entire dispute resolved in a single proceeding. *DaimlerChrysler Corp.*, *supra*.

### Conclusions of Law

1. Respondent, Rochester Gas & Electric Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to timely notify the Union and afford it an opportunity to bargain over the effects of discontinuing the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work, Respondent has violated Section 8(a)(1) and (5) of the Act.
4. By failing and refusing to provide the Union with the information it requested on March 7, and June 5, 2006, namely, the cost to Respondent of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all employees who have the benefit of taking a company vehicle home, and whether Respondent announced to any employee or group of employees not in the bargaining unit that the benefit would be discontinued, and by failing to inform the Union that certain requested information did not exist, Respondent violated Section 8(a)(1) and (5) of the Act.
5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

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

Respondent should be ordered to, on request, bargain collectively with the Union concerning the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work. It should further be ordered to make whole its employees for any losses they may have suffered as a consequence of its decision to eliminate the vehicle benefit, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent should further be ordered to furnish the Union with the information it requested on March 7 and June 5, 2006, which is relevant and necessary to the Union's duties as statutory representative of the Respondent's employees. And last, Respondent should be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

ORDER

The Respondent, Rochester Gas & Electric Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- a. Failing to timely notify the Union and afford it an opportunity to bargain over

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the effects of discontinuing the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work;

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- b. Failing and refusing to provide the Union with requested information relevant to the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work, and/or failing to inform the Union that certain requested information did not exist, so as to enable the Union to discharge its function as statutory representative of Respondent's employees; and,
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- c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
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2. Take the following affirmative action necessary to effectuate the policies of the Act:
- a. On request, bargain collectively with the Union concerning the effects of its decision to discontinue the benefit of allowing the low voltage TM&R employees to take their service vehicles home after work.
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- b. Make whole its employees for any losses they may have suffered as a consequence of the Respondent's refusal to bargain over the effects of its decision to eliminate the vehicle benefit.
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- c. Furnish the Union with the information it requested on March 7 and June 5, 2006, which is relevant and necessary to the Union's duties as statutory representative of the Respondent's employees.
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- d. Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and report, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of money due under the terms of this Order.
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- e. Within 14 days after service by the Region, post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."<sup>8</sup> 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
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<sup>8</sup> 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."

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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 any time since June 13, 2006.

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

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Dated, Washington, D.C. June 12, 2008

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Wallace H. Nations  
Administrative Law Judge

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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 do anything that interferes with, restrains or coerces you with respect to these rights. More specifically,

WE WILL NOT refuse to give the Union all the information it requested on March 7 and June 5, 2006, concerning the elimination of the benefit of allowing the low voltage TM&R employees to take their service vehicle home at the end of their shift and/or fail to inform the Union that certain requested information does not exist.

WE WILL NOT refuse to bargain with the Union over the effects of our elimination of the benefit of allowing the low voltage TM&R employees to take their service vehicle home at the end of their shifts.

WE WILL make whole all low voltage TM&R bargaining unit members who previously enjoyed the benefit of taking their service vehicle home for any losses incurred as a result of our elimination of this benefit.

WE WILL bargain with the Union over the effects of our decision to eliminate the benefit of allowing low voltage TM&R employees to take their service vehicle home at the end of their shifts.

WE WILL provide the Union with the information it requested on March 7 and June 5, 2006, namely, the cost to Respondent of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all employees who have the benefit of taking a company vehicle home, and whether Respondent announced of any employee or group of employees not in the bargaining unit that the benefit would be discontinued.

ROCHESTER GAS AND ELECTRIC  
CORPORATION

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

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

15 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.

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**Appendix D**

**Order of the United States Court of Appeals for  
the Second Circuit, Dated February 8, 2013**

**Previously Attached as Exhibit "G"**

**Appendix E**

**Opinion of the United States Court of Appeals for the  
District of Columbia Circuit, in *Enloe Medical Center v. N.L.R.B.*,  
Decided December 23, 2005**



ENLOE MEDICAL CENTER, PETITIONER v. NATIONAL LABOR  
RELATIONS BOARD, RESPONDENT

No. 04-1388 Consolidated with 04-1419

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

433 F.3d 834; 369 U.S. App. D.C. 67; 2005 U.S. App. LEXIS 28455; 178 L.R.R.M.  
2718; 151 Lab. Cas. (CCH) P10,588

November 17, 2005, Argued  
December 23, 2005, Decided

**PRIOR HISTORY:** [\*\*\*1] On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. *Enloe Med. Ctr. v. NLRB*, 2005 U.S. App. LEXIS 14575 (D.C. Cir., July 18, 2005)

**COUNSEL:** Laurence R. Arnold argued the cause for petitioner. With him on the briefs were John H. Douglas and Jennifer B. Hochschild.

David S. Habenstreit, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Arthur F. Rosenfeld, General Counsel, John H. Ferguson, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, and Elizabeth A. Heaney, Attorney. Joan E. Hoyte-Hayes, Attorney, entered an appearance.

**JUDGES:** Before: SENTELLE and ROGERS, Circuit Judges, and SILBERMAN, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

**OPINION BY:** SILBERMAN

**OPINION**

[\*\*68] [\*835] SILBERMAN, *Senior Circuit Judge*:

The National Labor Relations Board and this court have a fundamental and long-running disagreement as to the appropriate approach with which to determine whether an employer has violated *section 8(a)(5)* of the

National Labor Relations Act when it refuses to bargain with its union over a subject allegedly contained in a collective bargaining agreement. Petitioner Enloe Medical Center claims that [\*\*\*2] it presents a case once again implicating this disagreement, as well as raising some [\*836] [\*\*69] ancillary issues. We agree with Enloe and grant its petition.

I

The California Nurses Association (the Union) has been the certified collective bargaining representative of the registered nurses at Enloe's facilities in Chico, California since September 2000, and Enloe and the Union are parties to a collective bargaining agreement that runs from January 2002 to January 2006. The dispute in this case stems from a change in Enloe's policy for staffing on-call nurses at its Women's Center. Prior to May 2003, on-call staffing was entirely voluntary. At staff meetings in March and April of that year, Jennifer Eddlemon, the clinical coordinator of the Women's Center, announced that Enloe would be adopting a mandatory on-call policy. Starting in May, each nurse would be required to work one four-hour on-call shift every four weeks, in addition to his or her regular shifts, and nurses would be permitted no more than thirty minutes to report when on call. Eddlemon indicated that if any nurse had a problem complying with the time requirement, that nurse should come to her, and Eddlemon would work out something. [\*\*\*3] Eddlemon also left a message on the white board in the nurses' break room stating that if nurses had any questions about the new policy, they should come speak to her.

In early April, Union representative Kevin Baker learned of the on-call policy change and contacted Pam

Sime, Enloe's vice-president of human resources. Baker told Sime that Enloe could not make the proposed change without first negotiating with the Union. Sime replied that Enloe had not done anything yet, but then e-mailed Baker on May 7 advising him that Enloe would be implementing the new policy on May 12. As announced, days later Enloe implemented the new on-call policy.

There is no disagreement between the Board and Enloe that the agreement authorized the adoption of the mandatory on-call policy. The collective bargaining agreement includes provisions spelling out Enloe's rights to manage the schedules of its employees, compensate nurses for on-call and call-back work, assign duties and hours to nurses, and establish standards related to patient care. It contains a broad "management rights" article, pursuant to which Enloe "retains the sole and exclusive right to exercise all the authority, rights and/or functions [\*\*\*4] of management" and "expressly retains the complete and exclusive authority, right and power to manage its operations and to direct its Nurses except as the terms of [the] agreement specifically limit said authority, right and powers." And a separate provision allows Enloe to revise, withdraw, supplement, promulgate, and *implement* policies during the term of the agreement "as it deems appropriate," provided that such actions do not conflict with the express provisions of the agreement.

Also in 2003, but unrelated to the new on-call policy, Eddlemon made a change in the patient "Rand Card," a written record used by nurses to pass patient information between shifts. In mid-April, nurses Cathie Lawson and Cindy Smith met with Eddlemon to discuss the changes in the card and expressed their dissatisfaction with the new system and their concerns for patient safety.

At an April charge nurses<sup>1</sup> meeting, the charge nurses alerted Eddlemon that some nurses were expressing negative attitudes and were complaining at the nurses' station. They named four nurses, including Smith and Lawson, and Eddlemon decided [\*837] [\*\*70] that she and Peggy Chelgren-Smith, Director of Enloe's Women's Center, would "coach" [\*\*\*5] Smith and Lawson. They called them in separately, and in each meeting Eddlemon read an identical prepared statement. She explained that the nurse's co-workers had complained to her about the nurse's continued griping, negative attitude, and lack of team spirit. Eddlemon stated that she expected the negative behavior to change and asked each how she could help the nurse through the process. Eddlemon also told Smith that if she had future complaints, she should complain directly to Eddlemon. As a result of these conversations, both Smith and Lawson agreed to refrain from their negative behavior.

1 Charge nurses are responsible for scheduling, directing, and evaluating the registered nurses.

Based on the imposition of the new on-call policy and the circumstances regarding Smith's and Lawson's complaints, Union representative Baker filed a charge with the Board - on May 5, even before Enloe's May 7 response - alleging violations of *sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), [\*\*\*6] (a)(5).*<sup>2</sup> The Board, in turn, issued a complaint against Enloe.

2 Although the collective bargaining agreement contained an arbitration clause, the Union did not invoke that procedure.

After a hearing, the ALJ issued a decision determining that Enloe had violated *section 8(a)(5)* because, although the agreement authorized petitioner to adopt the new mandatory on-call policy, Enloe was required to bargain with the Union regarding the *effects* of that policy. And the Union had not "waived" its right to bargain over the effects in a "clear and unmistakable" manner. The ALJ also determined that, given this obligation to bargain over effects, Enloe had engaged in unlawful direct dealing with represented employees when Eddlemon instructed nurses who had questions about the new policy or concerns regarding the thirty-minute response time requirement to come to her directly.

The ALJ also concluded that Enloe had violated *section 8(a)(1)* by interfering with the nurses' protected activity, that is, discussing [\*\*\*7] their grievances with fellow employees. While the ALJ conceded that Eddlemon's statements to Smith and Lawson appeared innocuous on their face, he pointed out that the only specific examples of the nurses' negative attitudes involved their discussions of the Rand Cards and the new on-call policy. This led the ALJ to conclude that the coaching must have been related to Smith and Lawson's protected activity.

A three-member panel of the Board agreed with the ALJ's decision and adopted it with minor modifications.

## II

The Board's approach to determine whether a union has given up its right to bargain over a mandatory subject of bargaining is to ask whether the union's "waiver" of those rights is "clear and unmistakable." *See, e.g., United Techs. Corp., 274 N.L.R.B. 504, 507 (1985).* That proposition is not challenged by this court; it falls within the Board's legitimate policy ambit in interpreting the National Labor Relations Act. The difficulty arises when the Board applies this general doctrine to the interpretation of the scope of a collective bargaining agreement. The Board's doctrine imposes an artificially high burden

433 F.3d 834, \*; 369 U.S. App. D.C. 67, \*\*;  
2005 U.S. App. LEXIS 28455, \*\*\*; 178 L.R.R.M. 2718

on an employer who claims its authority [\*\*\*8] to engage in an activity is granted by such an agreement. But the normal deference we must afford the Board's policy choices does not apply in this context because the federal judiciary does not defer to the Board's interpretation of a collective bargaining agreement. See *NLRB v. U.S.* [\*\*\*9] [\*\*71] *Postal Serv.*, 303 U.S. App. D.C. 428, 8 F.3d 832, 837 (D.C.Cir. 1993); see also *Exxon Chem. Co. v. NLRB*, 363 U.S. App. D.C. 272, 386 F.3d 1160, 1164 (D.C. Cir. 2004). This is so because under section 301 of the Labor Management Relations Act, parties to a collective bargaining agreement are entitled to bring a dispute as to the interpretation of the contract directly to a federal district court. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)(citing *Local Union 1395, International Brotherhood of Electrical Workers v. NLRB*, 254 U.S. App. D.C. 360, 797 F.2d 1027, 1030-31 (D.C. Cir. 1986)); see also *BP Amoco Corp. v. NLRB*, 342 U.S. App. D.C. 363, 217 F.3d 869, 873 (D.C.Cir. 2000).

We accordingly have held that "questions of 'waiver' normally do not come into play with respect to subjects [\*\*\*9] already covered by a collective bargaining agreement." *U.S. Postal Serv.*, 8 F.3d at 836-37; see also *Regal Cinemas, Inc. v. NLRB*, 354 U.S. App. D.C. 398, 317 F.3d 300, 312 (D.C.Cir. 2003). Instead, the proper inquiry is simply whether the subject that is the focus of the dispute is "covered by" the agreement. *U.S. Postal Serv.*, 8 F.3d at 836. The Board refuses to acquiesce in our analysis of this issue - as it has every right to do - but since any employer faced with a section 8(a)(5) holding predicated on the Board's "clear and unmistakable waiver" doctrine as applied to the interpretation of an agreement can file a petition in this court, see 29 U.S.C. § 160(f), the Board's implementation of its policy is stalemated. The Board is, of course, always free to seek certiorari.

In this case, the Board's counsel has sought to convince us that the section 8(a)(5) portion of the Board's order should be affirmed notwithstanding doctrinal differences. The Board acknowledged that petitioner's decision to adopt the mandatory on-call policy was authorized by the collective bargaining agreement; it is only Enloe's refusal [\*\*\*10] to bargain over the effects of the new on-call policy that is the gravamen of the Board's section 8(a)(5) finding.

The Board's analysis follows the theory it first announced in *Natomi Hospitals of California, Inc. (Good Samaritan Hospital)*, 335 N.L.R.B. 901 (2001). There it held that even if a collective bargaining agreement gives an employer the right to make a decision on a particular issue, if the agreement is silent as to the effects of that decision, the employer must agree to bargain with its union over those effects. *Id.* at 902. The Board an-

nounced that the union must have "waived" its right to bargain over the effects in the same clear and unmistakable terms it requires for a waiver to bargain over the decision itself. See *id.* The Board developed this approach to contract interpretation by analogy from a case in a different context. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981), the Supreme Court held that when an employer is authorized by the National Labor Relations Act to make a certain decision without bargaining with its union, it still may be obligated to bargain [\*\*\*11] over the effects of that decision. The Board in *Good Samaritan Hospital* actually suggested that its position followed a fortiori from the principle recognized in *First National Maintenance*, see 335 N.L.R.B. at 902, and the ALJ, of course, followed *Good Samaritan Hospital* in this case.

Petitioner contends, although without much analysis, that this analogy does not hold - that the collective bargaining agreement context is different from the statutory one. And, in any event, it argues that its agreement with the Union justifies its refusal to bargain over effects because the agreement authorized Enloe to "implement" its mandatory on-call policy. We agree with petitioner. Whether the parties contemplated that the collective bargaining agreement would treat the effects of a [\*\*\*12] [\*\*72] decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects [\*\*\*12] of that decision. This is not to say that such an interpretation is inconceivable, but it would seem that there would have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately. In the *First National Maintenance* situation, the Board is entitled to draw a distinction between a non-bargainable decision and its effects because it is creating the dichotomy itself as an interpretation of the National Labor Relations Act. In the collective bargaining context, however, the question is not whether the Board's policy is consistent with the Act, but rather what is the appropriate interpretation of a contract - i.e., did the parties intend the dichotomy?

The ALJ paradoxically reasoned that since the agreement did not specifically mention effects bargaining, petitioner "cannot rely on the generalized right to promulgate and implement new policy to refuse to engage in effects bargaining over the on-call policy." (Emphasis added). He even distinguished implementation, which he conceded means "putting into effect," from effects bargaining. This sort of artificial contractual in-

terpretation, which we easily reject, is [\*\*\*13] a product of the Board's continued insistence on requiring clear and unmistakable waivers - in this case an ancillary waiver connected to a waiver - of a union's bargaining rights rather than engaging in a straightforward reading of the contract.<sup>3</sup>

3 Even without the term "implement," it seems to us that the agreement would not easily be interpreted to reserve to the Union effects bargaining.

The fact that the parties to the collective bargaining agreement in this case never contemplated a dichotomy between the management rights granted Enloe and the effects of those rights is amply demonstrated by the Union's behavior when Enloe announced the new mandatory on-call policy. The Union never identified any particular discrete effect about which it was seeking bargaining. Instead, the May 9 e-mail from Union representative Baker asserted that the contract "[did] not give Enloe the right to unilaterally change [a registered nurse's] working conditions." This suggests that the Union was objecting to the on-call [\*\*\*14] policy change itself, and the concluding sentence of the May 9 e-mail - stating that "Enloe does not have the 'right' to change one's working conditions without first bargaining the impacts with the union" - merges the effects with the policy change. (Indeed, the Union had already filed an unfair labor practices charge on May 5.) Even if a contract distinguished a policy decision from its effects, it would unlikely be interpreted to require the employer to delay the decision while it bargained over effects. *Cf. First Nat'l Maint. Corp., 452 U.S. at 681-83.*

We therefore conclude that petitioner's actions, including its refusal to bargain with the Union over the effects of its mandatory on-call policy change, were sanctioned by its collective bargaining agreement and consequently could not be the basis of a *section 8(a)(5)* violation.<sup>4</sup>

4 It might be thought that since we reject the Board's waiver theory, we should stop our analysis and remand to the Board. But this is not the

ordinary administrative law case in which we determine that an agency's decision is arbitrary and capricious or contrary to law and remand to the agency to allow it to reconsider its approach. Since we interpret collective bargaining agreements de novo, if we were to agree that - despite doctrinal differences - the agreement *did* reserve to the Union the authority to bargain over effects, it would make little sense to remand. And if, as we conclude here, the agreement did not reserve that right, it also is futile to remand.

[\*\*\*15] Since petitioner did not violate *section 8(a)(5)* when it announced and implemented [\*840] [\*\*73] its new on-call policy without bargaining with the Union, it follows that petitioner did not violate the same provision when Eddlemon told employees to speak with her directly about concerns with the new policy or its thirty-minute response time requirement. If, as we conclude, the collective bargaining agreement gave the employer the right to adopt and implement its new policy without bargaining with the Union, Enloe would perforce have the authority to ameliorate or make individual exceptions to the policy without discussing those ancillary matters with the Union.

### III

There remains the matter of the Board's determination that petitioner violated *section 8(a)(1)* (interference with protected activity) when it "coached" Smith and Lawson as to their negative attitudes. The ALJ recognized that Eddlemon's statements "appeared innocuous," but he concluded that they "must" have been directed at the Rand Card and on-call policy issues and "could" have led to discipline. We think that the ALJ's recommended finding on this point is based only on sheer speculation and therefore lacks substantial evidence that [\*\*\*16] the coaching sessions interfered with the employees' protected activity.

\* \* \*

Accordingly, the petition for review is granted, and the cross-petition for enforcement is denied.

# **EXHIBIT J**

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

July 1, 2014

Mr. James S. Gleason  
Hinman, Howard & Kattell, LLP  
80 Exchange Street  
P.O. Box 5250  
Binghamton, NY 13902

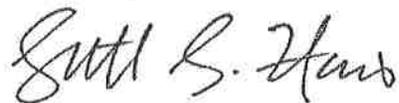
Re: Rochester Gas and Electric Corporation  
v. National Labor Relations Board, et al.  
No. 12-1178

Dear Mr. Gleason:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



Scott S. Harris, Clerk

# **EXHIBIT K**

**Lanouette, Dawn J.**

---

**From:** cmecf@ca2.uscourts.gov  
**Sent:** Tuesday, July 01, 2014 3:10 PM  
**To:** Kuzel, Lisa  
**Subject:** 10-3448 Local Union 36 International v. National Labor Relations Board "Judgment Mandate ISSUED"

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**Court of Appeals, 2nd Circuit**

**Notice of Docket Activity**

The following transaction was filed on 07/01/2014

**Case Name:** Local Union 36 International v. National Labor Relations Board  
**Case Number:** 10-3448  
**Document(s):** Document(s)

**Docket Text:**

JUDGMENT MANDATE, ISSUED.[1261866] [10-3448, 11-247, 11-329]

**Notice will be electronically mailed to:**

Ms. Linda Dreeben, United States Attorney: [appellatecourt@nlrb.gov](mailto:appellatecourt@nlrb.gov)  
Mr. Robert James Englehart, Supervisory Attorney: [bob.englehart@nlrb.gov](mailto:bob.englehart@nlrb.gov)  
Mr. James Smith Gleason, Attorney: [jgleason@hhk.com](mailto:jgleason@hhk.com)  
Brian J LaClair, -: [bjlaclair@bklawyers.com](mailto:bjlaclair@bklawyers.com), [rcrowe@bklawyers.com](mailto:rcrowe@bklawyers.com)  
Mr. James R. LaVaute, Attorney: [jrlavaute@bklawyers.com](mailto:jrlavaute@bklawyers.com), [idmeyer@bklawyers.com](mailto:idmeyer@bklawyers.com)  
Mrs. Dawn Joyce Lanouette, Attorney: [dlanouette@hhk.com](mailto:dlanouette@hhk.com), [tleewhiting@hhk.com](mailto:tleewhiting@hhk.com), [jgleason@hhk.com](mailto:jgleason@hhk.com),  
[lguy@hhk.com](mailto:lguy@hhk.com), [lkuzel@hhk.com](mailto:lkuzel@hhk.com)

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**Document Description:** Judgment Mandate ISSUED

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# **EXHIBIT L**



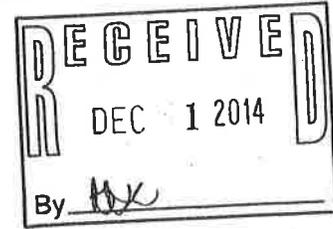
UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

REGION 03  
130 S Elmwood Ave Ste 630  
Buffalo, NY 14202-2465

Agency Website: [www.nlr.gov](http://www.nlr.gov)  
Telephone: (716)551-4931  
Fax: (716)551-4972

November 28, 2014

JAMES R. LAVAUTE, ESQ.  
BLITMAN & KING LLP  
443 N Franklin St Ste 300  
Syracuse, NY 13204-5412



Re: Rochester Gas & Electric Corporation  
Case 03-CA-025915

Dear Mr. LAVAUTE:

I am sending you this letter to provide you with the basis for my Compliance Determination with the enforced Board's Order. If you disagree with the Compliance Determination set forth in this letter, you have the right, pursuant to Section 102.53 of the Board's Rules and Regulations, to appeal my Determination to the General Counsel and then to the Board. The appeal procedure is explained below.

**The Board Order:** The Board, in its August 16, 2010 Decision and Order concluded that Respondent violated the National Labor Relations Act by refusing to bargain with Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO (the Union) over the effects of eliminating the benefit of allowing the low-voltage trouble maintenance and repair (TM&R) employees to take their service vehicles home at the end of their shifts and failing to provide the Union with requested information. The Board ordered Respondent to take the following affirmative action:

On request, bargain collectively with the Union concerning the effects of the Respondent's decision to discontinue the benefit of allowing the low-voltage TM&R employees to take their service vehicles home after work; pay each low voltage TM&R the monetary value of his or her vehicle benefit, with interest, for the limited *Transmarine* make-whole remedy period; and furnish the union with the information it requested on March 7 and June 5, 2006, namely, the cost of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a listing of all nonunit employees who have the benefit of taking a company vehicle home, and whether the Respondent announced to any nonunit employees that the benefit would be discontinued.

The Board ordered Respondent to pay each employee the monetary value of the vehicle benefit from 5 days after the date of the Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on the effects of discontinuing the benefit; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of the Decision and

Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. The sum paid to each employee shall not exceed the monetary value of the vehicle benefit to that employee from January 1, 2006 (the date the benefit was discontinued) until the date on which the Respondent shall have offered to bargain in good faith. However, in no event shall the sum paid to any employee be less than the monetary value of the benefit to that employee for a 2-week period.

The Board left to compliance the determination of the monetary value of the vehicle benefit to each affected employee. The Region determined that the monetary value is equal to each employees' round-trip commute to work, multiplied by the number of trips each employee made, multiplied by the applicable "Federal" reimbursement rate set by the federal government for business use of a personal vehicle. Neither party objects to the method of calculation used by the Region.

**The Compliance Investigation:** After a careful investigation, the Region determined that the *Transmarine* remedy period began on August 23, 2010 and ended on August 22, 2014. The Union objects to the tolling of the make-whole period. It argues that Respondent has not acknowledged its make-whole obligation under the Board's Order and has failed to provide all of the information ordered by the Board. Specifically, the Union claims that Respondent failed to provide *actual costs* associated with increased mileage, maintenance and fuel on the trucks for unit and non-unit employees over the 2006 – 2014 period and failed to provide cost information for non-unit employees in the same form (number of commute miles, multiplied by number of days worked, multiplied by the Federal mileage rate) that it provided for unit employees.

The compliance investigation disclosed that on July 1, 2014, the U.S. Supreme Court denied Respondent's petition for a writ of certiorari. Within 5 business days from receipt of the Court's denial, Respondent sent an e-mail to the Union on July 9, 2014 offering to engage in effects bargaining on July 15 or sooner. On July 15, 2014, Respondent provided a list of take home vehicles used by union and non-union employees during the 2006 time period, and informed the Union that Respondent did not discontinue the use of take home vehicles for any non-union employees during the 2006 time period and that it had not utilized any formula or financial analysis prior to discontinuing the use of take home vehicles. Respondent estimated the annual savings from this initiative to be approximately \$34,000 per year for the 8 vehicles involved.

On August 4, 2014, the Union advised Respondent that it believed the information provided was incomplete and requested Respondent to advise the Union if it is willing to pay the *Transmarine* make-whole backpay to employees, including any adverse tax consequences incurred as a result of the payments. The Union stated that the Board found it was entitled to information regarding the extent and cost to Respondent for the use of trucks for commuting by non-unit employees. Further, the Union advised Respondent that it wanted a detailed breakdown of how Respondent calculated its July 15 estimate, including the cost elements and dollar figures for those elements that comprise each estimate. Finally, the Union requested Respondent to include information for the time period from 2006 to present, so that it could utilize the information in preparing for effects bargaining.

The compliance investigation revealed that on August 15, 2014, Respondent provided a breakdown of commuting costs for unit employees for the *Transmarine* make-whole period, as determined by the Region and based on the Region's formula. Although Respondent asserted that the Union never requested the information previously, it also provided an estimate as to the cost of non-unit employees' use of company vehicles for commuting purposes in accordance with IRS Publication 15-B, (\$3.00/day per employee). Finally, Respondent informed the Union that it intended to pay the *Transmarine* remedy in accordance with the law but that its position is that there is no Board precedent as to when the *Transmarine* remedy begins to run after a respondent files an appeal of the Board's Order. Respondent offered August 18, 19 and 22 to engage in effects bargaining.

Based on the foregoing, the Region concluded that as of August 15, Respondent complied with the affirmative provision regarding the Union's information request, as ordered by the Board. Namely, Respondent provided the cost of allowing the bargaining unit employees to have the benefit of taking a company vehicle home, a list of all non-unit employees who have the benefit of taking a company vehicle home, and whether the Respondent announced to any non-unit employees that the benefit would be discontinued. Respondent's use of the government rate for reimbursement to employees for use of personal vehicles for work is a reasonable and appropriate manner for calculating the cost of use of company vehicles. It takes into account the cost of fuel, mileage and wear-and-tear on a vehicle. Contrary to the Union's assertion, the Board's Order does not require the provision of cost information relative to non-unit employees, nor does it provide for the information to be provided for the period 2006 – 2014. Further, the Board Order does not provide a make-whole remedy for adverse tax consequences.

Finally, Respondent acknowledges that it intends to make employees whole in accordance with the law. The Union, citing Sawyer of Napa, Inc., 321 1120, 1121 n. 3 (1996), argues that because Respondent has refused to acknowledge its full backpay requirement, it has not satisfied its obligation to bargain. *Sawyer of Napa* is inapposite. In that case, the respondent, after having entered into a settlement agreement which contained a *Transmarine* remedy, failed to acknowledge that it had any monetary obligation beyond the two week minimum required by *Transmarine*. That is not the case in the instant matter. Respondent offered to engage in effects bargaining after the Supreme Court denied its application for a writ of certiorari. Respondent did not contend that the backpay period was tolled at two weeks. Rather, it acknowledged its obligation to bargain, requested a meeting, and stated it would comply with the final determination regarding the length of the backpay period. The Board, in *Sawyer of Napa*, did not assert that respondent was required to adopt any particular position during effects bargaining and stated that respondent was free to take any position it wished. The Union does not know what position Respondent would have taken because it never followed through with a meeting. In addition, Respondent was not required to waive its legal position, although different from the Region's, on the start of the backpay period, as a prerequisite to engaging in effects bargaining.

The Union failed to commence effects bargaining within 5 business days after receipt of the Respondent's notice of its desire to bargain and Respondent's provision, on August 15, of all the information ordered by the Board. For all the foregoing reasons, I have concluded that the *Transmarine* make-whole remedy tolls on August 22, 2014.

For all the foregoing reasons, I have concluded that the *Transmarine* limited make-whole remedy ends on August 22, 2014.

**Your Right to Appeal:** You may appeal my decision to the General Counsel of the National Labor Relations Board, through the Office of Appeals. If you appeal, you may use the enclosed Appeal Form, which is also available at [www.nlr.gov](http://www.nlr.gov). However, you are encouraged to also submit a complete statement of the facts and reasons why you believe my decision was incorrect.

**Means of Filing:** An appeal may be filed electronically, by mail, by delivery service, or hand-delivered. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax or email. To file an appeal electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the **NLRB Case Number**, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the **General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington D.C. 20570-0001**. Unless filed electronically, a copy of the appeal should also be sent to me.

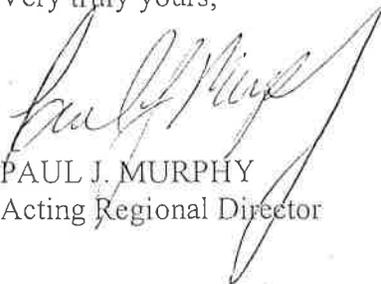
**Appeal Due Date:** The appeal is due on **December 19, 2014**. If the appeal is filed electronically, the transmission of the entire document through the Agency's website must be completed **no later than 11:59 p.m. Eastern Time** on the due date. If filing by mail or by delivery service an appeal will be found to be timely filed if it is postmarked or given to a delivery service no later than December 18, 2014. **If an appeal is postmarked or given to a delivery service on the due date, it will be rejected as untimely.** If hand delivered, an appeal must be received by the General Counsel in Washington D.C. by 5:00 p.m. Eastern Time on the appeal due date. If an appeal is not submitted in accordance with this paragraph, it will be rejected.

**Extension of Time to File Appeal:** The General Counsel may allow additional time to file the appeal if the Charging Party provides a good reason for doing so and the request for an extension of time is **received on or before December 19, 2014**. The request may be filed electronically through the *E-File Documents* link on our website [www.nlr.gov](http://www.nlr.gov), by fax to (202)273-4283, by mail, or by delivery service. The General Counsel will not consider any request for an extension of time to file an appeal received after December 19, 2014, **even if it is postmarked or given to the delivery service before the due date**. Unless filed electronically, a copy of the extension of time should also be sent to me.

**Confidentiality:** We will not honor any claim of confidentiality or privilege or any limitations on our use of appeal statements or supporting evidence beyond those prescribed by the Federal Records Act and the Freedom of Information Act (FOIA). Thus, we may disclose an appeal statement to a party upon request during the processing of the appeal. If the appeal is successful, any statement or material submitted with the appeal may be introduced as evidence at

a hearing before an administrative law judge. Because the Federal Records Act requires us to keep copies of case handling documents for some years after a case closes, we may be required by the FOIA to disclose those documents absent an applicable exemption such as those that protect confidential sources, commercial/financial information, or personal privacy interests.

Very truly yours,



PAUL J. MURPHY  
Acting Regional Director

Enclosure: Form NLRB-5434

cc: RICHARD IRISH  
INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS (IBEW)  
LOCAL 36  
595 Blossom Rd Ste 303  
Rochester, NY 14610-1825

CAROLYN LEWIS, Director of H.R.  
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700 Security Mutual Building, 80  
Exchange St  
PO Box 5250  
Binghamton, NY 13902-5250

Form NLRB-5434  
(2/11/2011)

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

TO: General Counsel  
Attn: Office of Appeals  
National Labor Relations Board  
Room 8820, 1099 14<sup>th</sup> Street NW  
Washington, DC 20570

Date:

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the compliance determination of the Regional Director in:

Case Name (s)

Case No. \_\_\_\_\_  
*(If more than one case number, include all case numbers in which an appeal is taken).*

\_\_\_\_\_  
(Signature)

# **EXHIBIT M**



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

March 3, 2015

JAMES R. LAVAUTE, ESQ.  
BLITMAN & KING LLP  
443 N FRANKLIN ST STE 300  
SYRACUSE, NY 13204-5412

Re: Rochester Gas & Electric Corporation  
Case 03-CA-025915

Dear Mr. Lavaute:

This office has carefully considered the appeal from the Regional Director's compliance determination. We agree with the Regional Director's decision and deny the appeal substantially for the reasons in the Regional Director's letter of November 25, 2014.

The appeal contends that the Employer failed to comply with the information requirements of the Board's August 16, 2010 Order<sup>1</sup> and that the Employer has refused to acknowledge its 'make-whole' obligations under the Order. A review of the evidence reveals that the Board's August 16, 2010 Order required the Employer to provide the Union with the information it requested on March 7 and June 5, 2006. The Region's compliance proceedings disclosed that the Employer provided that information to the Union on July 15 and August 15, 2014. In addition, the appeal acknowledged that cost information for non-unit employees was not requested until August 4, 2014. As such, the request was not identified in the Board's 2010 Order. Since the August 2014 request was not a part of the underlying Board Order, the Region did not err by finding that the Employer complied with the Order by providing the information requested in 2006. Rather, it appears that this allegation is the subject of a subsequent unfair labor practice charge that is being investigated by the Regional Office.

Although the appeal contends that the Administrative Law Judge assumed that the Employer may have had additional information regarding computations, the Employer's remedial obligation is limited to the scope of the Board's Order. Finally, the appeal contends that the Employer should be accountable for any adverse tax consequences the employees may face. However, as the Board's Order did not contain a make-whole remedy for any asserted tax consequences the employees may face, the Region did not err by omitting this item in its determination.

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<sup>1</sup> *Rochester Gas & Elec. Corp. & Local Union 36, Int'l Bhd. of Elec. Workers, AFL-CIO*, 355 NLRB 507 (2010); 631 F.3d 23, 2<sup>nd</sup> Cir, November 12, 2010 (Denying Transfer); 706 F.3d 73, 2<sup>nd</sup> Cir, January 17, 2013 (review denied, enforcement granted); 134 S. Ct. 2898, U.S., July 1, 2014 (cert denied).

The appeal also contends that the Employer has refused to acknowledge its make-whole obligations under the 2010 Board Order. However, the Regional Office's investigation disclosed that the Employer has stated that it would comply with the final determination regarding the length of the back pay period and has not repudiated its obligation to pay the appropriate sum resulting from the loss of the value of the vehicle benefit. As the Region explained, the Employer is not required to waive its legal position, although different from the Region's, on the start date of the back pay period, as a prerequisite to engaging in effects bargaining. In this connection, the investigation disclosed that the Employer has met its obligation of requesting that effects bargaining commence, but the Union has not responded to the request. In sum, the Board's Order required that the Employer bargain with the Union over the effects of its decision and left to the compliance procedure the determination of the monetary value of the vehicle benefit to each affected employee.

You may file a request for review of our decision with the National Labor Relations Board. You may file your request electronically, by mail, or by delivery service. Filing a request for review electronically is preferred but not required. Your request for review should clearly identify the facts and reasons that form the basis of your objection. The Board must receive your request for review no later than 14 days after the date on this letter and it must be served on the General Counsel and on the Regional Director.

To file a request for review electronically, go to the Agency's website at [www.nlr.gov](http://www.nlr.gov), click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. To file a request for review by mail or delivery service, address the request for review to:

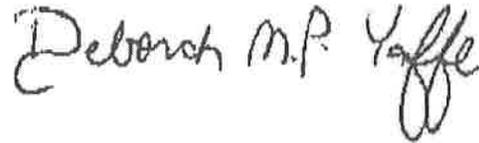
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> St. NW, Rm 11602  
Washington, DC 20570

If you file the request for review electronically, the Board will consider the request timely filed if you send it, together with any other documents you want considered, through the Agency's website so the transmission is completed no later than 11:59 p.m. Eastern Time on the due date. If you mail the request for review or send it by a delivery service, please note that a document must be postmarked or tendered to a delivery service the day before it is due, or earlier, to be timely filed.

Sincerely,

Richard F. Griffin, Jr.  
General Counsel

By:



---

Deborah M.P. Yaffe, Director  
Office of Appeals

cc: RHONDA P. LEY  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS  
BOARD  
130 S ELMWOOD AVE STE 630  
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cl

# **EXHIBIT N**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROCHESTER GAS & ELECTRIC CORPORATION

and

Case 03-CA-025915

LOCAL UNION 36, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL  
WORKERS, AFL-CIO

ORDER<sup>1</sup>

The request for review of the General Counsel's decision affirming the Regional Director's compliance determination, filed by Local Union 36, International Brotherhood of Electrical Workers, AFL-CIO is denied.<sup>2</sup>

Dated, Washington, D.C., September 2, 2015.

MARK GASTON PEARCE,	CHAIRMAN
KENT Y. HIROZAWA,	MEMBER
LAUREN McFERRAN,	MEMBER

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<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Union called to the Board's attention its recent decision in *Professional Transportation, Inc.*, 362 NLRB No. 60 (2015), *Dupuy v. NLRB*, \_\_ F.3d \_\_, 2015 (D.C. Cir. 2015) and *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), *enfd. sub nom. Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C. Cir. 2006).