

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

KNOLLWOOD COUNTRY CLUB
Charged Party

Case 02-CA-150410
02-CA-150571
02-CA-151405
02-CA-162551

and

UNITE HERE LOCAL 100
Charging Party

**COUNSEL TO THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Dated at New York, New York
This 25th day of August 2016

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I. STATEMENT OF THE CASE

On June 9, 2016, Administrative Law Judge Raymond P. Green issued a Decision¹ finding that Knollwood Country Club (“Respondent”) violated Section 8(a)(1) and (5) of the Act by: (1) subcontracting out bargaining unit work, without notice to the Union or affording it an opportunity to bargain over the decision; (2) failing to recall regular full-time employees in accordance with the seniority provisions of the collective-bargaining agreement without the Union’s consent; (3) failing to abide by the seniority provisions of the collective-bargaining agreement when laying off employees, without the Union’s consent; (4) refusing to deduct union dues on behalf of bargaining unit employees, and failing to remit them to the Union, without the Union’s consent; (5) refusing to make contributions on behalf of bargaining unit employees to the Union’s health and pension funds, without the Union’s consent; (6) threatening to call the police and then calling the police when employees visited the Respondent’s facility in order to concertedly protest the failure to recall them to work; and (7) failing to fully and timely respond to the Union’s request for financial information in response to the Respondent’s claim of inability to pay.²

On June 28, 2016, Counsel for the General Counsel excepted to minor omissions from the Judge’s Order and Notice but otherwise respectfully urged the Board to adopt the findings of fact, and conclusions of law as found by the Judge as well as the remedial relief contained in his Order.

¹ The Judge’s Decision will be referenced as “ALJD”.

² Although Judge Green found that Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with relevant information requested, he did not order Respondent to furnish the information as the Union’s need for the information no longer existed and thus, was moot. (ALJD, p.22, lines. 14, 18-21, 27-29).

On July 6, 2016, Respondent filed Exceptions ("Respondent's Exceptions") and a brief in support of Respondent's Exceptions. Respondent has excepted to virtually all adverse unfair labor practices findings found by the Judge. Specifically, Respondent excepted to the Judge's Conclusions as follows: 1) Respondent violated Sections 8(a)(5) by subcontracting work; 2) Respondent violated Sections 8(d) & 8(a)(5) by failing to recall employees by seniority; 3) Respondent violated Sections 8(a)(5) by failing to make health and pension fund contributions on behalf of employees; and 4) Respondent violated Sections 8(a) (1) by threatening to call and then calling the police on April 16, 2015 in response to employees' Section 7 activity. Further, Respondent excepted to the Judge's failure to apply the "contract coverage" theory of waiver rather than the "clear and unmistakable waiver" theory and the portion of the Judge's remedy that requires Respondent to pay dues directly to the Union, rather than to deduct dues from back pay awarded.

Pursuant to Section 102.46(f)(2) of the Rules and Regulations of the National Labor Relations Board (the "Board"), General Counsel requested an extension of time to file the answering brief from July 21, 2016 to August 29, 2016. The Board granted the request for an extension to August 25, 2016.

II. STATEMENT OF THE FACTS

Counsel for the General Counsel asserts that the facts found by the Judge in the ALJD are complete and should be relied upon by the Board.

III. ARGUMENT

POINT 1. The Judge Did Not Err By Applying the "Clear and Unmistakable Waiver" Standard When Determining Whether Respondent Violated Section 8(a)(5) of the Act by Making Unilateral Changes to Mandatory Bargaining Subjects.

The Respondent urges the Board to set aside the “clear and unmistakable waiver” legal standard traditionally applied when determining whether Respondent made unilateral changes to mandatory subjects of bargaining. Rather, Respondent urges the Board to adopt the “contract coverage” doctrine, accepted by the U.S. Court of Appeals for the District of Columbia. Under this test, where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties *have bargained* about the subject and have reached some accord. The Judge correctly noted that the Board rejected the “contract coverage” theory of waiver in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). (ALJD p. 14, lines 37-38).

The Judge properly stated that the appropriate standard to apply was the “clear and unmistakable waiver” standard. (ALJD p. 14, lines 28-30). Under long-settled law, an employer may make unilateral changes to mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Furthermore, the Supreme Court stated in *Metropolitan Edison*, “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.’ More succinctly, the waiver must be clear and unmistakable.” *Id.* “To meet the ‘clear and unmistakable’ standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000). “[T]he Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver.” *Id.* In contrast, the Board has repeatedly held that generally worded management-rights clauses will not be construed as

waivers of statutory bargaining rights. See, e.g., *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

In sum, as explained above, the Judge properly applied the “clear and unmistakable waiver” standard when determining whether Respondent violated Section 8(a)(5) of the Act by making unilateral changes to mandatory subjects of bargaining.

POINT 2. The ALJ Correctly Held that Respondent Violated Section 8(a)(5) of the Act by Unilaterally Subcontracting Unit Work.

As correctly stated by the Judge, there is no dispute that in January 2015, Respondent entered into an agreement with Mack Staffing Solutions to provide employees who would perform bargaining unit work. (ALJD p. 12, lines 20-22). There is also no dispute that Respondent started using Mack to provide such workers on February 7, 2015 and continued to do so throughout the remainder of 2015. (ALJD p. 12, lines 21-23). During the subcontracting period, Respondent’s operations did not change. Respondent continued to provide regular food and beverage dining services for its members, including lunch, dinner and snack bar service daily, as well as at contracted parties. (Jt Ex. 1, par. 5). It is undisputed that the Respondent did not notify the Union of its decision to subcontract unit work unit August 2015 and never offered to bargain about its decision to subcontract. (ALJD p. 12, lines 24-26).

Respondent, relying on Article 17 (Special Parties) and Article 22 (Management Rights) of the CBA, argues that Knollwood had a “sound arguable basis” for its belief that the CBA specifically authorized its use of employees from Mack. The Board has consistently held that the “sound arguable basis” test is inapplicable to cases that involve unilateral change in a mandatory subject of bargaining. Under *NCR Corp.*, 271 NLRB 1212, 1213 (1984), if the Board finds that an employer charged with unlawful contract modification “has a sound arguable basis for ascribing a particular meaning to his contract,” that “his action [wa]s in accordance with the

terms of the contract as he construes it,” and that he acted in good faith without anti-union animus, the Board will dismiss the allegation of contract modification. Since *NCR Corp.*, the Board has explained that the “equally plausible interpretations” or “sound arguable basis” defense applies solely to allegations involving unlawful mid-term contract modifications, and not unilateral changes in mandatory subjects of bargaining. See *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005), *enfd.*, 475 F.3d 14 (1st Cir. 2007).

Moreover, the Judge considered and rejected Respondent’s argument. (ALJD p. 14, lines 1-26). The Judge correctly determined that the appropriate standard was whether the Union “clearly and unmistakably” waived its statutory right to bargain over the subcontracting out of unit work. (ALJD p. 14, lines 28-30). As stated above, an employer may make unilateral changes to mandatory bargaining subjects only if the union clearly and unmistakably waives its right to negotiate over the changes. *Metropolitan Edison Co. v. NLRB*, *supra*.

The Judge properly concluded that Article 17 cannot be construed to authorize the Respondent to subcontract unit work without notifying and bargaining with the Union. Article 17, sec. 17.2 states, “Waitpersons, bus persons, and bartenders who are hired as extras from an Agency to work at special contracted group parties shall not be entitled to any gratuities.” The Judge correctly found this provision did not give Respondent the right to hire only extra employees for group parties. (ALJD p. 14 Lines 6-7). The Judge correctly held that Article 17 relates only to the subject of gratuities and the method gratuities are distributed where there are parties with more than 20 guests. As explained by the Judge, the provision provides that regular bargaining unit employees who are assigned to work at these parties will receive tips equal to at least 10% of the check and that if extras are hired to augment the regular staff, those people will not share in tips. (ALJD p. 14, lines 7-11).



Moreover, the Judge highlighted that there is no express mention of subcontracting throughout Article 17. (ALJD p. 14, lines 22-26). A contractual waiver will not lightly be inferred but, rather, must be expressed in “clear and unmistakable” language. *Metropolitan Edison Co. v. NLRB, supra; Universal Security Instruments*, 250 NLRB 661, 662 (1980); and *Johnson-Bateman Co., supra*.

In *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), *enfd.* 420 F.3d 294 (3d Cir. 2005), the Board held that an employer who replaced departing direct hires with temporary agency employees without providing the union notice and an opportunity to bargain violated Section 8(a)(5) and (1). The Administrative Law Judge found that the employer had previously used temporary employees “to supplement and augment” the unit workforce but not “to supplant them.” *Id.* at 923. Following a union election, the employer substantially increased its reliance upon temporary employees, reducing the bargaining unit from 42 employees at the time of the election to eight by the time of the unfair labor practice hearing. *Id.* See also *Storall Mfg. Co.*, 275 NLRB 220, 239 (1985), *enfd.* mem. 786 F.2d 1169 (8th Cir. 1986) (employer that had occasionally used temporary employees violated Section 8(a)(5) by unilaterally reestablishing its night shift with temporary employees from an employee supplier).

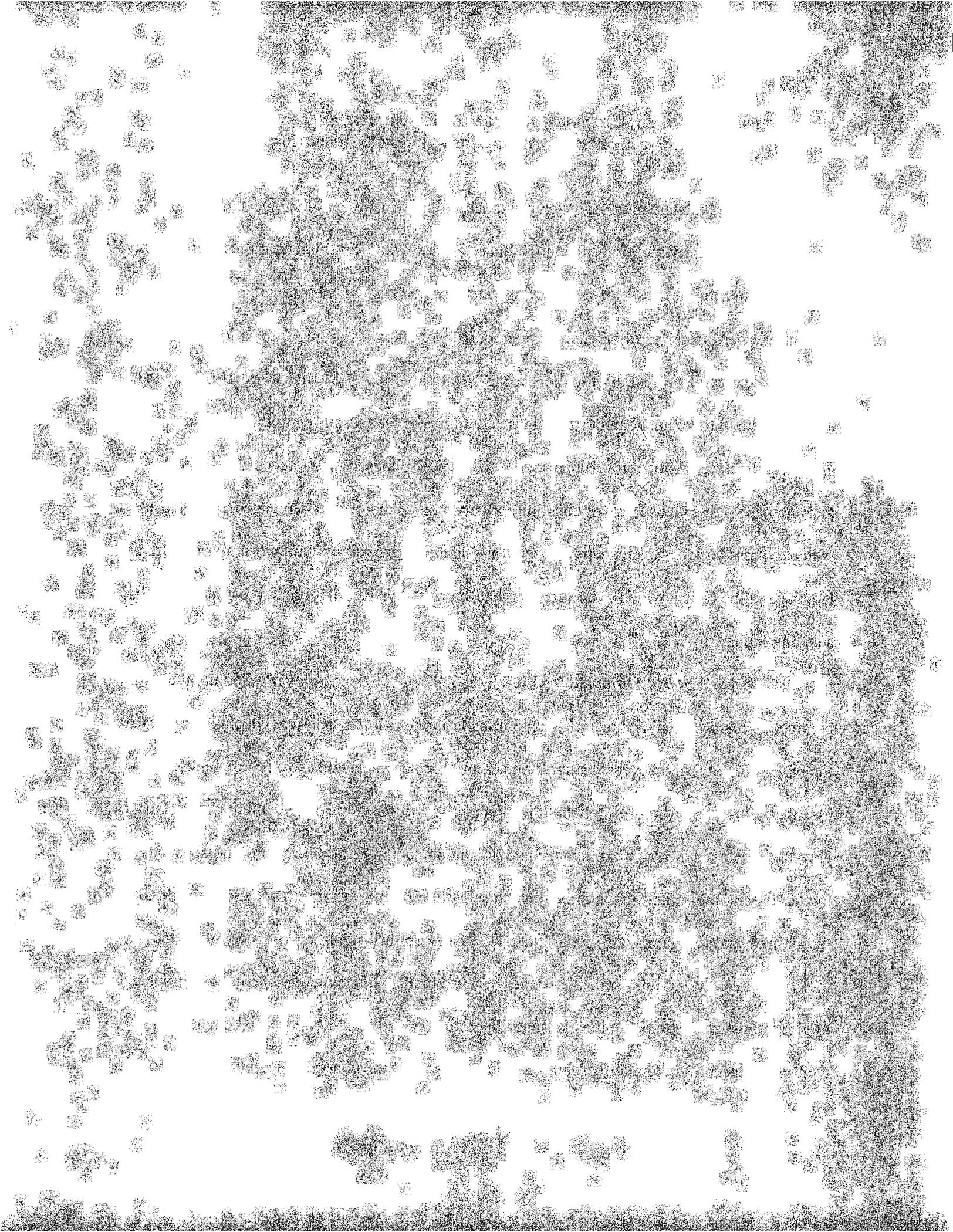
The Judge also noted that there is no language in the management-rights clause which expressly gives Respondent the right to subcontract bargaining unit work. (ALJD p. 14, line 13). Article 22 (Management Rights) of the CBA provides, in relevant part:

The rights of management which are not abridged by this Agreement, shall include, but are not limited to the Club's right .to determine .the methods, processes, materials, operations and service to be employed or furnished, to discontinue, lease or relocated services or operations in whole or in part, or to discontinue performances of services or operations by employees of the Club. .to select and to determine the number of employees required, to determine the classification of and number of employees in each

classification (if any), to assign work to such employees in accordance with the requirements determined by management, to establish and change work schedules, or to layoff, terminate or otherwise relieve employees from duty.

While the management rights clause touches on a wide range of subjects, none of its provisions specifically mention subcontracting out unit work. Respondent argues that the language, “discontinue, lease or relocated services or operations in whole or in part, or to discontinue performances of services or operations by employees of the Club” allows it to continue the service or operation without using its employees. The Judge correctly found that this language in the management right clause could not be read as allowing the Respondent unfettered license to subcontract unit work. (ALJD p. 14, lines 19-20). Accordingly, the management-rights clause cannot constitute a waiver since there is no language in the clause which expressly gives Respondent the right to subcontract bargaining unit work, nor is there any language in the clause which even suggests that the Union waived its rights to bargain over subcontracting.

In *Metro Medical Group*, 306 NLRB 373, 374 (1992), the employer relied upon the contractual management rights language to transfer the position of pharmacy technician out of the bargaining unit and to create a non-unit senior pharmacy specialist whose job duties were essentially the same of those of the unit technician. A portion of the management rights clause gave the employer the “right to manage and operate its facilities, all operations and activities including, but not limited to the direction and scheduling of its working force and the right to discontinue and reorganize any department. *Id.* The Board affirmed the ALJ’s conclusion that there was no clear and unmistakable waiver because that language merely encompassed the right to discontinue and reorganize the pharmacy departments and was silent as to whether the employer was entitled to alter bargaining unit by removing the pharmacy technician position.



The Judge correctly determined that the provisions cited by Respondent do not constitute a “clear and unmistakable waiver” of the Union’s right to bargain over a decision to subcontract unit work. (ALJD p. 14, lines 40-45).

POINT 3. The ALJ Correctly Held that Respondent Violated Section 8(a)(5) of the Act by Failing to Recall the Regular Full-Time Employees to Work.

It is undisputed that Respondent failed to recall the regular full-time employees after a seasonal layoff. (Tr. 49, 203, Jt Ex. 1, par. 14). Instead of recalling the regular full-time bargaining unit employees when Respondent reopened, Respondent replaced them with new employees referred to as “summer employees.” (ALJD p. 16, lines 4-7; Jt. Ex. 1, par. 15). The Union never consented to Respondent’s refusal to recall the regular full-time employees. (ALJD p. 16, lines 17-19; Tr. 187).

Respondent asserts that the Judge erred when he held that Respondent may only use summer employees once all regular employees who have been laid off have been recalled to work. The Respondent contends that its alteration of the contract did not constitute an unlawful midterm modification within the meaning of Section 8(d) because it had a “sound arguable basis” for interpreting the contract as ceding to it the authority to lay off the regular full-time employees and only employ summer employees. Respondent’s reliance on the “sound arguable basis” test is misplaced.

The Board has consistently refused to apply the “sound arguable basis” test to cases involving unilateral changes in mandatory subject of bargaining where the change is so fundamentally disruptive to the collective bargaining relationship. Where a party’s breach is so clear or flagrant so as to amount to a repudiation of the contract or a unilateral modification to it, the Board will find a violation. See, e.g., *Teamsters Local 284 (Columbus Distributing Co.)*, 296 NLRB 19, 23 (1989) (union’s failure to honor wage reopener pursuant to contract constituted

repudiation of collective bargaining principles); *Paramount Potato Chip Co., Inc.*, 252 NLRB 794, 797 (1980) (employer's refusal to arbitrate any grievances constituted repudiation of contract); and *Walt Disney World Co.* 359 NLRB No. 73 (2013), (employer's elimination of several job classifications and reassignment of work previously performed by employees to other employees during the term of CBA violated Section 8(a)(5) and 8(d) of the Act). Moreover, the "sound arguable basis" defense applies only where the employer has acted in good faith without anti-union animus. Here, Respondent set out to evade all of its obligations under the CBA. Beginning in January 2015, Respondent substituted its regular full-time bargaining unit work force with either employees of a subcontractor and/or hired "summer employees" to avoid making health and pension contributions to the Union's funds. (ALJD p. 7, lines 29-31). There can be no determination that Respondent acted in good faith without anti-union animus. Accordingly, the "sound arguable basis" is inapplicable.

According to the Respondent, Article 5 (Summer Employees) constituted a specific grant of authority allowing it to unilaterally hire as many summer employees as it deemed necessary as long as it was between the April 1 and October 31, 2015. While this may be true, Article 5 does not govern Respondent's obligation to *recall* the regular full-time bargaining unit employees. Article 5 does not authorize Respondent to refuse to recall all the regular full-time bargaining unit employees to work; to *eliminate* all of the regular full-time employees or even replace the regular full-time employees by summer employees. Article 5 fails to even discuss these actions. Article 5 is simply a staffing provision for "Summer Employees." The plain language of the clause itself indicates that it grants the Respondent's authority to increase the staffing levels at Knollwood during the period April 1 and October 31 which is recognized as a busy period for Knollwood. (Tr. 207-208, 271). Thus, Article 5 simply grants the Respondent the authority to determine how many additional employees to hire during the summer season. Accordingly, the

“sound arguable basis” standard does not apply since Article 5 of the CBA does not address layoff and recall of regular bargaining unit employees.

In *E. I. Du Pont De Nemours*, 308 NLRB No. 125 (1992), the Board adopted the decision of the Administrative Law Judge that the employer modified the CBA in violation of 8(a)(5) of the Act by filling vacancies with transfers instead of hiring new employees as required by the CBA. In that case, the administrative law judge rejected the employer’s “sound arguable basis” argument explaining that there was no conflict in any of the articles that gave rise to equally plausible and different interpretations. Rather, the employer simply modified the CBA.

The Judge properly found that the contract clearly and unambiguously set forth Respondent’s obligation to recall employees after a seasonal layoff in order of seniority. (ALJD p. 4, lines 18-28; p.16, lines 9-12). Article 8, Section 8.2 of the CBA, among other things, provides that in the event of a layoff, seniority shall prevail as follows: the most senior regular full-time employee in each category or classification shall be the last laid off and the first re-employed. Article 8, Section 8.2 of the CBA does not merely govern the order in which employees are laid off and recalled back to work, it sets forth a requirement that Respondent recall bargaining unit employees upon reopening. Implicit in the requirement in Article 8, Section 8.2 of the CBA that the bargaining unit employees be “re-employed after a layoff” is the requirement that the unit be recalled back to work. Congress intended that the term “re-employed,” which is derived from “employee,” to encompass the broad concept of an ongoing relationship between an employer and an employee. *Douglas Autotech Corp.* 357 NLRB No. 111 (2011). Further, Article 8, Section 8.3, discusses the bargaining units’ responsibility to report to work after being notified to report to work after a layoff. Implicit in this provision, is

the requirement that Respondent recall the bargaining unit employees to work upon the reopening of its facility.

The Judge correctly concluded that Respondent's failure to recall the full-time bargaining unit employees without the Union's consent was a mid-term modification of the CBA. (ALJD p. 16, lines 15-19). Sections 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." *Milwaukee Spring Division*, 268 NLRB 601(1984). Generally, an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good-faith impasse in bargaining. Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect. Under Section 8(d) of the Act, no party to a collective-bargaining agreement can be compelled to discuss or agree to a midterm modification of a collective-bargaining agreement. Accordingly, a proposed modification can be implemented only if the other party's consent is first obtained. This mandate is not excused either by subjective good faith or by the economic necessity of maintaining viability of an employer's operation and preserving the jobs of the employees in the bargaining unit. Consequently, notwithstanding the persuasiveness and validity of an employer's economic straits, an employer is not free, without union consent, to make midterm modifications. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), *enfd.* 505 F.2d 1302 (5th Cir. 1974).

In *Oak Cliff-Golman*, *supra*, a case that arose out of an employer's reduction of wage rates below levels required by a governing CBA, the Board stated as follows:

It cannot be gainsaid that an employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective-bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining

aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principle functions - the establishment and maintenance of a viable agreement on wages.

In finding the violation, the Board discounted as irrelevant the fact that the employer acted upon economic necessity and in good faith. Here, the Respondent's conduct by refusing to recall the regular full-time employees after a seasonal layoff was a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship.

For all of the stated reasons, the "sound arguable basis" test is not applicable here as the clauses cited by Respondent do not give rise to a conflict or two plausible interpretations of the CBA and as the unilateral change here involved a mid-term modification on a mandatory subject of bargaining.

POINT 4. The ALJ Correctly Held that Respondent Violated Section 8(a)(5) of the Act by Failing to Make Health and Pension Contributions on Behalf of Employees it Had Recalled to Work.

The Judge correctly held that Respondent's failure to make the contributions to the Welfare and Pension Funds on behalf of its employees was a midterm modification of the contract and violated Section 8(d) and 8(a)(5) of the Act.³ The law is well established that

³ While the Judge properly found that Respondent's failure to make contributions to the Welfare and Pension Funds on behalf of its employees was a midterm modification of the contract and violated Section 8(d) and 8(a)(5) of the Act, he failed to provide the correct rationale for this finding. The Judge specifically failed to articulate that Respondent had an obligation to resume making fund contributions for the time after the employees were recalled back to work. In his rationale, the Judge concluded that Respondent was obligated to recall the 17 regular full-time employees in March 2015 after a seasonal layoff. (ALJD p. 16, line 21-30). The Judge found that by failing to recall them, but instead hired summer employees, Respondent violated the Act. The Judge ordered that Respondent was required to make the employees whole including paying any withheld funds contributions. While this rationale for finding a violation and ordering a make whole remedy is correct for the failure to recall the employees, it is not the proper rationale for failing to make fund contributions for the period of time after certain employees were recalled to

unilateral changes to the “wages and hours and terms and conditions of employment” by an employer obligated to bargain with the representative of its employees in an appropriate unit violates Section 8(a)(5) of the Act. *Master Slack and/or Master Trousers Corp. et al.*, 230 NLRB 1054 (1977). Benefits, such as payments into health, welfare, and pension funds on behalf of employees, constitute an aspect of their wages and a term and condition of employment which, along with wage rates, and cannot be altered during the terms of a contract without consent. The failure to make the contributions is a flagrant and continuing breach which amounts to a modification of the contract in midterm and thereby violates Section 8(a)(5) and (1) and Section 8(d) of the Act. *Michigan Drywall Corp.*, 232 NLRB 120 (1977); *Inland Cities*, 241 NLRB 374, 379 (1979), *enfd.* 618 F.2d 117 (9th Cir. 1980); *American Needle & Novelty Co.*, 206 NLRB 534, 545 (1973). The refusal is not merely a breach of contract, but a failure in derogation of the existing contract which unilaterally changes the wages of the employee-beneficiaries and thus violates Section 8(a)(5) of the Act. *George E. Light Boat Storage*, 153 NLRB 1269 fn. 1 (1965), *enfd.* 373 F.2d 762 (5th Cir. 1967).

work and was working. Thus, the Judge’s rationale is incorrect. The Complaint alleged that after certain regular full-time employees were recalled to work starting in August 2015, Respondent’s failure to make fund contributions violated the Act. (G.C. Ex. 2, par. 10). The rationale for finding a violation is that the CBA required Respondent to make contributions to funds on behalf of employees who were working. Counsel for the General Counsel did not except to this error. However, the failure of the General Counsel to except to this error does not preclude the Board from reviewing the issue and upholding the violation based on the proper rationale. In *Pepsi America, Inc.*, 339 NLRB 986 (2003), the employer filed exceptions and a supporting brief to the administrative law judge’s finding that the employer’s unilateral change of its attendance policy violated the Act. The General Counsel did not except to the finding but filed an answering brief. The Board adopted the administrative law judge’s finding that the employer’s unilateral change of its attendance policy violated the Act but did not agree with the judge’s rationale. See, *Jefferson Electric Co.*, 274 NLRB 750, 750-751 (1985), *enfd.* 783 F.2d 679 (6th Cir. 1986), which also suggests that the Board has the authority to find a violation even when the administrative law judge has failed to do so and the General Counsel has not excepted. See also, *Hedstrom Co. v. NLRB*, 629 F.2d 305, 315 (3d Cir. 1980) (en banc) (even assuming *arguendo* that the General Counsel did not take a proper exception to the finding in question, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside in whole or in part, any finding or order made or issued by it.” Thus, while Counsel for the General Counsel did not except to this error, the Board is not precluded from reviewing and upholding the finding based on the proper rationale.

Article 26 of the CBA requires that Knollwood make contributions to the Welfare Fund on behalf of regular eligible employees. Article 27 of the CBA requires that Knollwood make contributions to the Pension Fund on behalf of regular eligible employees. Respondent began recalling the regular bargaining employees back to work in August 2015.⁴ (Jt. Ex. 1, pars. 17-24, G.C. Ex. 16(b)). From on August 14, 2015 to December 2, 2015, the Respondent recalled bargaining unit employees: Francisco Bendezu, Nicole Dixon, Patricia Henry, Michael Locastro, Ian Mapp, Walters Ortega, Rosannis Perez-Tejada, Gina Quintero, Marcelino Quintero, Atdhe Tahiraj, Segundo Tejada, and Petulas William. (Jt. Ex. 2, pars. 17-25).

The Respondent concedes that it did not make contributions to the Welfare and Pension Fund during the period from August 14, 2015 and continuing to the present, on behalf of these bargaining unit employees as required by the CBA. (Jt. Ex. 1, pars. 33-36). It is undisputed that at no time prior to making and implementing its decision to cease contributing to the Welfare fund, did the Respondent obtain the Union's consent. (ALJD p. 9, lines 13-15). Further, the record establishes that the Union did not waive its right to bargain regarding these changes. (ALJD p. 9, lines 13-15).

Respondent argues, however, that the Judge err by finding that Respondent's decision to cease contributing to the Welfare and Pension Fund violated Section 8(d) and 8(a)(5) of the Act. In support of its argument, Respondent asserts that Article 26.1 (b) & (e) of the CBA requires

⁴ It is undisputed that Respondent recalled Michael Locastro and he returned to work on August 14, 2015. Respondent recalled fulltime employee Ian Mapp and he returned to work on August 26, 2015. On or about August 26, 2015, the Respondent recalled full-time employee Patricia Henry and she returned to work on September 2, 2015. (ALJD p.8, n. 5; Jt. Ex. 1, pars. 17-19). Then, on September 25, 2015, the Respondent again laid off Henry and Mapp effective October 4, 2015. (ALJD p.8, n. 5; Jt. Ex. 1, par. 20). Subsequently, on October 28, 2015, the Respondent again recalled Henry who returned to work on October 29, 2015. On October 30, 2015, the Respondent again recalled Mapp who returned to work on November 6, 2015. (ALJD p.8, n. 5; Jt. Ex. 1, pars. 21-22). On November 26, 2015, the Respondent recalled the following nine regular full-time bargaining unit employees who worked between November 26, 2015 and December 2, 2015: Francisco Bendezu, Nicole Dixon, Gina Quintero, Walter Ortega, Marcelino Quintero, Atdhe Tahiraj, Rosannis Perez-Tejada, Segundo Tejada, and Petula Williams. (ALJD p.8, n. 5; Jt. Ex. 1, pars. 23-24).

that in order to be eligible for contribution from the employer, an employee must have authorized deductions in writing from his or her paycheck for a contribution to the Welfare Fund.⁵ Respondent argues as an affirmative defense that the absence of any evidence at the hearing that any unit employee had made such an authorization prohibits a finding that it had an obligation to continue to make contributions on behalf of the regular employees.

It is well established that affirmative defense must be pled in the answer or raised before the hearing closes. Here, because Respondent's lack of written authorization defense was not pled in the answer or articulated by Respondent during its opening statement at the hearing, and was not raised by Respondent prior to the filing of its post hearing brief, this defense was not raised in a timely manner and, therefore, has been waived. *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005); *Dayton Newspapers, Inc.*, 339 NLRB 650, 653 fn. 8 (2003), *enfd.* in part 402 F.3d 651 (6th Cir. 2005).

It is equally settled that the burden of proof of proving an affirmative defense lies with the party asserting it. *Marydale Products Co.*, 133 NLRB 1232 (1961); *Sage Development Co.*, 301 NLRB 1173, 1189 (1991). Here, Respondent failed to meet this burden. During the hearing, Respondent provided no rational reason for its failure to make the payments. Respondent failed to provide any evidence in the record to demonstrate that any employee rescinded authorization to make contributions to the Welfare Fund. In fact, Respondent conceded that it made contributions to the Welfare fund for the regular full-time employees up until June 2015. (Jt. Ex.

⁵ Respondent did not provide any argument supporting its position that the Judge erred by finding that Respondent violated Section 8(d) and 8(a)(5) of the Act by ceasing contributions to the Pension Fund. Article 27 of the CBA requires that Knollwood make contributions to the Pension Fund on behalf of regular eligible employees. Respondent began recalling certain regular bargaining employees back to work on August 14, 2015. (Jt. Ex. 1, paras. 17-24, G.C. Ex. 16(b)). The Respondent concedes that it failed to make contributions to the Pension Fund during the period from August 14, 2015 and continuing to the present. (Jt. Ex. 1, paras. 33-36). The Union did not consent to this change. Respondent did not plead any affirmative defense for this failure. Thus, the Judge did not err by finding that Respondent violated 8(a)(5) of the Act by failing to make Pension fund contributions.

1, para. 34). Further, Respondent provided no evidence that it ever conveyed to the Union any misgivings or dissatisfaction it may have had with its contractual obligation to the fund. Indeed, during negotiations for the CBA in late 2014, contributions to the Welfare Fund were discussed and Respondent never expressed any opposition to or disagreement with, the proposal regarding Respondent's contribution amounts to the Welfare fund. (ALJD p. 5, lines 43-46).

Accordingly, the Judge did not err by finding that Respondent's decision to cease contributing to the Welfare and Pension Fund without consent was unlawful and a violation of Section 8(a)(5) and (1) of the Act, as alleged.

POINT 5. The Judge Correctly Ordered Respondent to Make the Contractually Required Dues Payment with Interest to the Union.

The Judge did not err by ordering Respondent to make the contractually required dues payment with interest to the Union. Article 3 (Checkoff) of the CBA requires Respondent to collect and remit to the Union dues deducted from employee wages. (Jt. Ex. 2). The evidence establishes that up to January 1, 2015, Respondent regularly deducted dues from unit employees' pay and remitted the dues to the Union. (G.C. Exs. 4 & 16, Jt. Ex. 1, pars. 25-26). As previously stated above, beginning in August 2015, Respondent recalled certain employees to work. However, the evidence established that from on August 14, 2015 to December 31, 2015, the Respondent failed to deduct and remit dues for the following recalled bargaining unit employees: Bendezu, Henry, Dixon, Locastro, Mapp, Ortega, Perez-Tejada, G. Quintero, M. Quintero, Tahiraj, Tejada, and William. (Jt. Ex. 1, par. 26).

The Complaint alleged that Respondent unilaterally modified the CBA by failing to deduct and remit dues to the Union after the above specified employees were recalled. (G.C. Ex.

2, para. 10).⁶ The Judge found that the Respondent violated Section 8(d) and 8 (a)(5) of the Act by failing to deduct and remit dues to the Union. The Judge ordered Respondent to make these contractually required payments to the Union with interest. (ALJD p. 22, lines 1-5). Respondent asserts that the payment of dues to a labor organization is between the members and the Union. Respondent argues there is no justification for directing an employer to pay such dues to the Union. Respondent requests that the payment of dues be deducted from any payment of back wages.

The Judge did not err by ordering the Respondent to pay the contractually required dues it failed to deduct from its employees and remit to the Union. The standard remedy for an employer's unlawful failure to check off dues where employees have signed checkoff authorizations requires the employer to reimburse the union for any dues it failed to withhold and transmit to the union, with interest. See, e.g., *YWCA of Western Massachusetts*, 349 NLRB 762, 764-65 (2007); *Plymouth Court*, 341 NLRB 363, 363 (2004); *Sommerville Construction*, 327 NLRB 514, 514 & n.2 (1999), *enfd.* 206 F.3d 752 (7th Cir. 2000). In addition, the Board has found that employers may not recoup from employees the amount of dues they are required to reimburse the union. For example, in *West Coast Cintas Corp.*, 291 NLRB 152, 156 (1988), an employer violated Section 8(a)(5) by unilaterally ceasing checkoff before the results of a union-security deauthorization vote were certified. The ALJ, in a decision adopted by the Board, ordered the employer to reimburse the union for the unpaid dues, and further stated that the "financial responsibility for making the [u]nion whole. .rests entirely on the [employer] and not

⁶ Complaint allegation 10(b) alleges that from about August 26, 2015 until about September 25, 2015, Respondent failed to deduct and remit union dues to the Union for the following employees from Ian Mapp; Patrica Henry; and Michael Locastro. However, Locastro returned to work on August 14, 2015 and did not stop working at Respondent's facility until on or about January 2, 2016. As a result, Respondent failed to deduct and remit union dues to the Union on behalf of Michael Locastro for the period from August 14, 2015 to January 2, 2015. (Jt. Ex. 1 par. 17; Jt. Ex. 17(c)).

the employees.” *Id.* at 156 & n.6. Similarly, in *Texaco Inc.*, 264 NLRB 1132, 1145-46 (1982) enfd. 722 F.2d 1226 (5th Cir. 1984), an employer unlawfully terminated a collective-bargaining agreement containing a dues-checkoff provision and ceased deducting and remitting dues. The ALJ, in a decision adopted by the Board, ordered the employer to reimburse the union for the unpaid dues, and further stated that the employer “cannot collect reimbursement from the employees” for the past dues owed. *Id.* at 1146. In both cases, the Board reasoned that the employer, not the employees, incurred the risk that its failure to withhold and transmit dues would be found unlawful and that, as the wrongdoer, it alone should bear the burden of reimbursing the union.⁷ *West Coast Cintas*, 291 NLRB at 156 n.6; *Texaco Inc.*, 264 NLRB at 1146.

Further, recoupment would undermine the policies of the Act. It would adversely affect the unit employees, who have done nothing wrong and who have fulfilled their end of a contract with the Employer at the time they executed checkoff authorizations, by further reducing their future paychecks. Moreover, the cases permitting employers to offset back dues owed to a union from backpay owed to individual employees are distinguishable from the instant case where there is no backpay remedy from which to offset dues.⁸ Here, the employees had been recalled and were working for the period of time the Employer failed to deduct and remit dues to the Union. There is no back pay remedy for the time period in question from which to offset dues.

Here, the Respondent is solely responsible for reimbursing the Union, without recoupment from employees, because the Respondent was solely responsible for unilaterally

⁷ See also *Gadsden Tool, Inc.*, 340 NLRB 29, 29 n.1, 34 (2003), enfd. mem. 116 Fed. Appx. 245 (11th Cir. 2004) (ordering employer to reimburse union for dues it failed to deduct and transmit after its unlawful failure to execute agreed-upon contract containing a dues-checkoff provision, and rejecting an employer’s argument that order was unfair because employer was unable to deduct the dues from employees’ wages and would be obliged to pay the dues itself, because “respondent itself incurred the risk that this situation might occur”).

⁸ See *Ogle Protection Service, Inc.*, 183 NLRB 682, 683 (1970) (permitting offset against backpay accrued in the same time frame); *Dura-Vent Corp.*, 257 NLRB 430, 433 (1981) (same).

ceasing dues-checkoff. Thus, the Judge did not err when it ordered Respondent to make the contractually required dues payments to the Union. (ALJD p. 22, lines 1-5).

POINT 6. The Judge Correctly Held that Respondent Violated Section 8(a)(1) of the Act by Interfering in Their Employees Section 7 Rights.

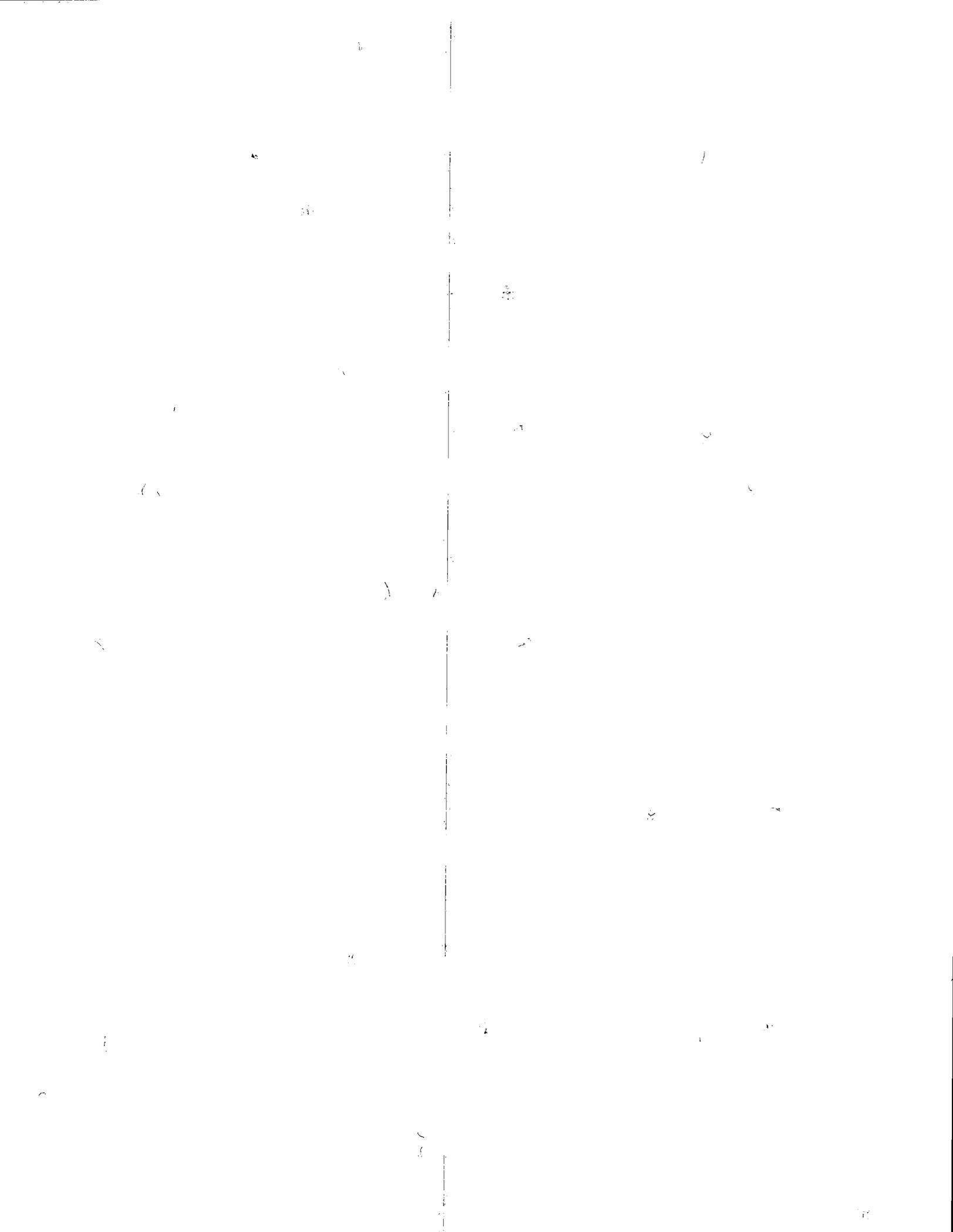
The Judge did not err when he held that Respondent violated Section 8(a)(1) of the Act by threatening to call the police and then, calling the police in response to employees visiting the Respondent's facility to concertedly protest the failure to recall them to work. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In turn, Section 8(a)(1) implements that guarantee by making it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978).

On April 16, 2016, nine of the regular bargaining unit employees gathered together at Knollwood to demand that Respondent recall them back to work. (Tr. 52, 168). The off-duty employees were gathered in a peaceful manner in the lobby and then right outside the entrance area of the facility. There was no evidence that the off-duty employees were disruptive to the traffic flow of the parking lot or interfered with any of the Respondent's clientele. Respondent was closed to members on April 16, 2015. (Tr. 62). Further, it is undisputed that Respondent threatened to and then called the police to the Club and had the off-duty employees removed from the parking lots. (Tr. 57-58).

Respondent argues that the employees engaged in conduct prohibited by Article 21 (No strike clause) of the CBA and that it was justified in asking them to leave the premises. Article

21 of the CBA provides, in relevant part, that neither the Union nor any employee will engage in a strike, work stoppage, slowdown or any Union activity directed against the operations of the Club. First, the employees who visited the Respondent's facility on April 16th were on layoff. Second, Respondent's facility was closed on April 16, 2015. Thus, neither the Union nor any employee were engage in a strike, work stoppage, slowdown or any Union activity directed against the operations of the Club. The employees were simply visiting Respondent's facility to inquire when they would be recalled to work. As the Judge noted, these long term employees clearly had a right to be on Knollwood property, pursuant to Section 7 of the Act, to concertedly ask when they were going to be recalled to work. (ALJD p. 17, lines 9-12).

Under Board law, off-duty employees have the right to access their employer's facilities to engage in Section 7 activities. This right of access entitles off-duty employees to the outside, nonworking areas of the employer's property, unless business reason justify an employer's denial of access to those arrears. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Here, summoning the police on this occasion reasonably tended to interfere with, restrain, and coerce the employees in the exercise of their rights under Section 7 of the Act. *Fabric Warehouse*, 294 NLRB 189 (1989), enfd. sub nom. *Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990); *Jerry Cardullo Ironworks, Inc.*, 340 NLRB 515 (2003). The Respondent's motivation in bringing the police onto their grounds was to use the police to intimidate the union and its membership, and to imply, if not assert, that a union representative performing his or her duties at the resort was committing a criminal act. Accordingly, by summoning the police to assist the Respondent in intimidating, evicting, interfering with, and restraining a union representative, they violated Section 8(a)(1) of the Act. *Oaktree Capital Management, LLC.*, 353 NLRB 1242 (2009).

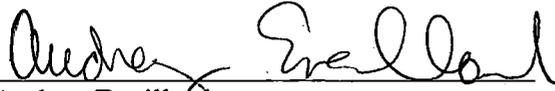


Respondent also argues that it did not ask the employees to leave its property. Rather, the employees left when the Union representatives were asked to leave by the police. The Board applies an objective standard for determining whether an employer's actions violate Section 8(a)(1). See *Flying Foods Group, Inc.*, 345 NLRB 101, 107 (2005). The Board only need consider whether the alleged misconduct has a reasonable tendency to coerce the employee or interfere with Section 7 rights. *Id.* Here, the evidence establishes that after the police were called, the off-duty employees stopped engaging in protected concerted conduct at Respondent's facility. There was no evidence presented as to what the police said to the Union representatives and employees. (Tr. 59). Once instructed to leave the facility by the police, the employees did so to avoid arrest. Accordingly, the evidence establishes that the Employer's conduct had a reasonable tendency to coerce the employees in engaging in their Section 7 rights in violation of Section 8(a)(1)

IV. CONCLUSION AND REMEDY

For the foregoing reasons, Counsel for the General Counsel urges finding Respondent's Exceptions are without merit. The Judge properly found Respondent violated Section 8(a)(5) & (1) of the Act by reason of its failure to notify and provide an opportunity to bargain over the subcontracting of bargaining unit work. The Judge properly found Respondent violated Section 8(d) and 8(a)(5) of the Act by its failure to recall the regular full-time unit employees to work; failure to deduct and remit union dues to the Union; failure to make contributions to the Health and Pension fund. Finally, the Judge properly found that Respondent violated Section 8(a)(1) of the Act by interfering with its employees' Section 7 rights. Accordingly, the Judge's decision, findings, and conclusions of law and recommended remedy should be adopted, except as to the corrections and modifications urged in General Counsel's Limited Cross Exceptions and as advanced in this Answering Brief to Respondent's Exceptions.

Dated at New York, New York
This 25th day of August 2016.

A handwritten signature in black ink, appearing to read "Audrey Eveillard", written over a horizontal line.

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