[ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2016]
Nos. 15-1074, 15-1130

In the United States Court of Appeals
for the District of Columbia Circuit

AMPERSAND PUBLISHING, LLC, D/B/A SANTA BARBARA NEWS-PRESS,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

GRAPHICS COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Intervenor for Respondent/Cross-Respondent

On Petition for Review of an Order
of the National Labor Relations Board

JOINT DEFERRED APPENDIX
VOLUME 7 OF 7

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS	**31-CA-29124**

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for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in 21 days of trial in Santa Barbara, California, over the period May through August 2009. Post hearing briefs were timely submitted in November 2009.

The matter arose as follows. On various dates from November 27, 2007, through March 10, 2009, the Graphic Communication Conference, International Brotherhood of Teamsters (the Union or the Charging Party) filed various charges, and in some cases amended those charges, against Ampersand Publishing, LLC d/b/a Santa Barbara News-Press (the

Respondent or the Paper or the News-Press) with the National Labor Relations Board.[1] The Regional Director for Region 31 of the National Labor Relations Board issued consolidated complaints respecting these various charges, culminating in an Order Consolidating Cases, consolidated complaint and notice of hearing issued by the Regional Director on March 24, 2009 (the complaint). The complaint was further amended at the hearing. The Respondent filed timely answers to the complaints and amendments to the complaints.

The individual complaint allegations are addressed in detail in separate portions of this decision, infra, but the essential complaint allegations are set forth here to allow an initial understanding of the allegations at issue. The allegations are organized by statutory violation. Certain conduct alleged as violating multiple sections of the Act may be set forth in multiple categories.

The consolidated complaint alleges and the answer denies, inter alia, that the Respondent, in a December 2008 meeting, instructed employees not to discuss their terms and conditions of employment. Further, the complaint alleges the Respondent distributed a letter to employees offering to provide Respondent's attorneys to represent employees in the Board investigation of the charges herein and discouraging employees from cooperating with the Board's on-going investigation of those unfair labor practice charges. The complaint alleges that this conduct violates Section 8(a) (1) of the National Labor Relations Act (the Act).

The complaint further alleges that the Respondent, since in or around July 2007, unilaterally changed the terms and conditions of employment of its bargaining unit[2] employees who had been hired through temporary agencies by failing to apply to them the same terms and conditions of employment, including but not limited to health and vacation benefits, that other unit employees enjoyed. In the alternative, the complaint alleges that to the extent that unit employees hired through temporary agencies are found not to be in the unit, the Respondent in so employing them has consequentially been transferring unit work from unit employees to non-unit temporary agency-provided employees. The complaint also alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and, to discourage employees from engaging in these activities and, in so doing, the Respondent discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a) (3) and (1) of the Act.

The complaint further alleges that on or around May 16, 2008, the Respondent transferred bargaining unit work to nonbargaining unit individual Robert Eringer. It also alleges that since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during calendar year 2006. The complaint alleges that since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during calendar year 2007. The complaint alleges that the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. The complaint further alleges the Respondent failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance

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[1] Cases 31–CA–28589, 31–CA–28661, 31–CA–28667, 31–CA–28700, 31–CA–28733, 31–CA–28734, 31–CA–28738, 31–CA–28799, 31–CA–28889, 31–CA–28890, 31–CA–28944, 31–CA–29032, 31–CA–29076, 31–CA–29099, and 31–CA–29124.

[2] The bargaining unit of the Respondent's employees and the collective-bargaining relationship involved herein are discussed in detail below.

with the Respondent's past practice. The complaint alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and, to discourage employees from engaging in these activities and, in so doing, discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a) (3) and (1) of the Act.

The complaint alleges that the Respondent laid off its employee Richard Mineards on February 28, 2009. It further alleges that on or about August 2008, the Respondent suspended its employee Dennis Moran and on August 30, 2008, discharged Moran. The complaint alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities and, in so doing, discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a) (3) and (1) of the Act.

The complaint alleges that the Union made various requests of the Respondent's agents during the period of August 16, 2008, through January 26, 2009, that the Respondent furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit. The complaint alleges that the Respondent took an unreasonable amount of time to furnish the information asked for and therefore failed and refused to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that the Respondent, since in or around July 2007, unilaterally changed the terms and conditions of employment of its unit employees who had been hired through temporary agencies by failing to apply to them the same terms and conditions of employment, including but not limited to health and vacation benefits that other unit employees enjoyed and that the Respondent failed and refused to bargain over the terms and condition of employment of its unit employees hired through temporary agencies. In the alternative, the complaint alleges that, to the extent that unit employees hired through a temporary agency are found not to be in the unit, the Respondent since in and around July 2007, has been transferring unit work from unit employees to temporary agency-provided employees. The complaint alleges that the Respondent in taking the actions described above in this paragraph took actions without prior notice to the Union, without the Union's agreement, and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint further alleges that on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer. It also alleges that since around December 2006 or January 2007, the Respondent failed to grant its unit employees a merit wage increase in recognition of work performance during calendar year 2006. The complaint alleges that since around December 2007 or January 2008, the Respondent failed to grant its unit employees a merit wage increase in recognition of work performance during calendar year 2007. The complaint alleges that the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. The complaint further alleges the Respondent failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice. The complaint alleges that the Respondent in taking the actions described above

in this paragraph took actions without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that the Respondent on or about May 2, 2008, laid off employee Kyle Jahner. It further alleges that the Respondent laid off its employee Richard Mineards and on February 28, 2009 laid off its employee DeWitt Smith. It further alleges that on or about August 2008, the Respondent suspended its employee Dennis Moran and on August 30, 2008, discharged Moran. The complaint further alleges that around December 3, 2008, the Respondent announced and established a requirement that unit employees produce at least one story per day. The complaint alleges that the Respondent, in taking the actions described above in this paragraph, took actions without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that on or about January 14, 2009, and continuing through January 16, 2009, the Respondent dealt directly with its employees in the Unit by offering an employee nonunit terms and conditions of employment. The complaint alleges that the Respondent in taking the action described bypassed its collective bargaining representative, the Union, and in so doing failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that during collective negotiations between the Respondent and the Union concerning unit employees during the period of November 2007 to March 2009, as part of its overall conduct as alleged in the complaint, has insisted on bargaining proposals that are predictably unacceptable to the Union which proposals include, but are not limited to, the Respondent's proposals on management rights, grievance and arbitration, union bulletin board, discipline and discharge. Further the complaint alleges the Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union concerning unit employees to language in the contract including, but not limited to, language pertaining to a management's rights clause that would grant the Respondent unilateral control over many terms and conditions of employment of unit employees. The complaint alleges that the Respondent in taking these actions failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The Respondent variously alleges that the conduct attributed to its agents in the complaint either did not occur or, in some situations where actions were taken, the Respondent's actions were not undertaken for the malign reasons alleged, or in the total context and circumstances, did not rise to the level of a violation of the Act, or is subject to additional affirmative defenses and that, accordingly, the Respondent did not violate the Act as alleged in any regards and the complaint should be dismissed.

FINDINGS OF FACT

Upon the entire record herein,[3] including helpful briefs from the Respondent, the Charging Party and the General Counsel, I make the following findings of fact.[4]

I. JURISDICTION

At all material times, the Respondent, a limited liability company with an office and place of business in Santa Barbara, California, has been engaged in the publication of the Santa Barbara News-Press, a daily newspaper. During the calendar year ending December 2008, the Respondent enjoyed gross revenues in excess of $200,000, held membership in or subscribed to an interstate news service, the Associated Press, and advertised nationally sold products, including Cingular. During the same period the Respondent purchased and received at its Santa Barbara facility goods, supplies, and materials valued in excess of $5000 directly from suppliers located outside the State of California.

Based on the above, there is no dispute and I find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The pleadings establish, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

To an unusual degree the instant matter is best understood in the context of a series of events covering a period of years before as well as during the events in controversy. A relatively long recitation of background events is therefore useful.

1. Earlier cases involving the NLRB and the Respondent

Before addressing the relevant facts of the instant controversy, five decisions must be identified and their application to the instant proceeding addressed.

The first decision in time is the representation case decision that certified the Union as the exclusive representative of unit employees. That Board decision in Case 31–RC–8602, issued on August 16, 2007, and the decision of Judge Schmidt reported at JD(SF)-06-07, (March 8,

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[3] A deficient exhibit was replaced on March 17, 2010, by agreement of the parties. See fn. 11.

[4] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

2007) on which it was based, are important background evidence and are discussed, infra.[5] The second decision is that of Judge William G. Kocol in *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, JD(SF)-37–07, an unfair labor practice case which issued December 26, 2007. That decision is currently before the Board on exceptions. It contained a significant amount of uncontested background information which underlay the larger picture of the controversy at issue herein. As such it is referred to below.

The Board does not take judicial notice of a judge's decision in another case pending review before the Board because it is not binding authority. *St. Vincent Medical Center,* 338 NLRB 888 (2003), remanded on other grounds, 463 F.3d 909 (9th Cir. 2006). But a judge may rely on the factual findings made by another judge in a prior case, even though it is still pending before the Board. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000).

I have not relied to any extent herein on the credibility resolutions contained in Judge Kocol's decision, but rather have made independent and de novo credibility determinations based on the instant record and the credibility of the witnesses herein who testified under my observation. See *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 972 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness."). The Kocol decision does however contain a significant amount of uncontested background information and both the decision and that background were alluded to by all parties with some regularity during the course of this proceeding. Where dealing only with clearly uncontested background evidence, I have relied to some degree on Judge Kocol's decision; again only to the extent of its recitation of uncontested events. The occurrence of the Kocol trial itself and the timing of the issuance of Judge Kocol's decision in the context of events are factual circumstances that took place during the events litigated herein and are therefore relevant to a degree in the instant proceedings. Those facts are presented herein, again, not the content of the Kocol decision but the fact of the trial and timing of the decision's issuance.

Two aspects of my use of the Kocol decision remain for discussion. First, in fashioning a remedy herein, which is a separate matter undertaken after the unfair labor practice allegations have been resolved, I have utilized the Kocol decision's findings of violations of the Act fully to determine the remedy, herein. The Remedy portion of this decision, infra, makes this clear. Remedial provisions are importantly based on the conduct of the respondent involved both in the narrow proceeding and also in its past circumstances and conduct. The Kocol decision provides that critical latter element. The second aspect of my use of the Kocol findings are my use or non-use of the unfair labor practice and other findings of the Kocol decision as a factor in determining the merit of allegations in the instant case. I have specifically determined not to use the Kocol decision's findings in that fashion. Thus, I have not relied on that decision's determinations to reach my own conclusions herein. Thus, my findings herein in this sense—and not respecting background facts and remedy elements—are completely independent of the Kocol decision including, as noted, independent of that decision's credibility findings and unfair labor practice findings contained therein.

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[5] An administrative law judge is bound under the doctrine of collateral estoppel to Board findings made in an earlier case involving the same parties. See *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1024–1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992).

A decision of Administrative Law Judge Lana Parke, *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, JD(SF)-04-10, issued on February 5, 2010, deals with events occurring after the complaint issued in the instant case and is therefore not substantively relevant to the instant proceedings given that the allegations of the complaint terminate as of the complaints issuance in March 2009. The Parke decision is relevant to the procedural history of this case, however, and for that reason is properly part of the record in the instant case. Since it is not substantively relevant it will not be relied on or alluded to further herein.[6]

The General Counsel sought injunctive relief under Section 10(j) of the Act respecting the Kocol decision in the United States District Court. That process produced a United States District Court decision by United States District Judge Stephen V. Wilson, *McDermott ex rel. NLRB v. Ampersand Publishing, LLC*., 2008 U. S. Dist. LEXIS 94596 at *39 (C.D. Cal May 21, 2008), and a subsequent United States Court of Appeals decision on the appeal of Judge Wilson's decision by Justice Richard R. Clifton of the United States Court of Appeals for the Ninth Circuit, *McDermott v. Ampersand Publishing, LLC*, Case No. 08-56202, __ F.3d 1447, 2010 WL 276208 (January 26, 2010); General Counsel Petition for Rehearing en banc filed March 10, 2010. The two decisions deal with issues relevant to matters and issues involved in proceedings in the Federal courts under Section 10(j) of the Act. While each contains scholarship and analysis bearing on the instant case and has been considered for that content and learning, Federal court proceedings under Section 10(j) of the Act are to a degree conceptually independent of the application of those portions of the Act concerning unfair labor practice proceedings. And, the Federal decisions address the Kocol decision not the instant proceeding.

2. The preunion events and circumstances

Santa Barbara is an historic city, population just under 100,000, well favored by nature on California's coast at the northern end of the southern California conurbation. It is an affluent community somewhat separate from the far larger population centers to the south. The Santa Barbara News-Press is a venerable daily Santa Barbara newspaper that has for many years been the largest circulation daily local newspaper in the area. Originally family owned, the paper thereafter moved through various hands until acquired by the New York Times in the mid-1980s. The News-Press was acquired from the New York Times by Wendy P. McCaw in 2000. She has been the owner at all times thereafter, holding the Paper in the legal form, Ampersand Publishing, LLC doing business as the Santa Barbara News-Press (the Respondent and sometimes referred to as the Paper or the News-Press).

McCaw apparently was initially not an active participant, at least in the newsroom content side of the business of the Paper, but from 2000 forward she came to view the news content of the Paper as unsatisfactory from her perspective and over time took an ever more active role in expressing her views and dissatisfactions with news articles to the Paper's management. By at least 2004, McCaw was regularly communicating her views about news articles that she did not agree with to the Paper's publisher and editors. McCaw's dissatisfactions in these regards continued and grew.

[6] This being so, the Respondent's posthearing motion to strike the Parke decision from the record is denied inasmuch as the matters addressed in that decision, JD(SF)-04-10, occurred in the context of the litigation of the instant case and are therefore a part of the instant cases procedural context.

As owner she was able to, and did, take action on her dissatisfactions. Resignations and staff changes occurred. Continuing to be displeased, McCaw and her fiancé, Arthur von Wiesenberger, took over the position of publisher at the Paper's as its copublishers on April 27, 2006. By May of that year, the copublishers were directing criticisms of particular news articles and types of articles to the management and supervision in the news department. By June 2006, McCaw as owner and copublisher were disciplining news department employees for mishandling—in her view—news articles which appeared in the Paper.

At the same time that McCaw's dissatisfactions were being communicated and disciplinary actions taken as described above, at least some of the news and editorial staff of the Paper were alarmed that their perceived necessary and traditional journalistic separation between the news department and the ownership and editorial departments of the Paper was being eroded, if not eliminated, by the actions of the copublishers. In their view, modifying or holding back news articles to suit the sensibilities of important area families, advertisers, or the opinions of the owner or publishers was anathema.

In the first week of July 2006, the disagreements concerning news department handling of certain recently published and controverted articles boiled over. Several newsroom editors resigned and then-editor Roberts gave notice. Upon receipt of Roberts' notice he was asked to immediately leave the building by management and his exodus and the strong opinions held regarding the events generated an emotional scene between employees and management. Additional resignations occurred in the coming weeks. The heart of the passionate dispute remained the same: The desire of the owner, copublishers and their allies to correct perceived improper reporting of news at the Paper and the resistance and anger of at least some employees in the news department who opposed such actions perceiving Copublishers McCaw and von Wiesenberger and their allies' to be engaging in unethical interference in the news-reporting functions of the Paper.

This seemingly Manichean argument or dispute has never been resolved at the Paper and, at least among the camps of McCaw and elements of newsroom staff, the differences and disagreement remained in force during the relevant events herein.

3. The events during which the Union comes to represent news-department employees and the issuance of the Judge Kocol Decision

A group of the news department employees initiated contacts with the Union during these events in July 2006, the Union organized the news department employees, and on August 10, 2006, the Union filed a representation petition with Region 31 of the Board, docketed as Case 31–RC–8602, seeking to represent news department employees. On September 27, 2006, an NLRB election was held with a vote in favor of the Union of 33 to 6. Following litigation of postelection matters, the Board in an unpublished opinion on August 16, 2007, adopted Judge William L. Schmidt's Administrative Law Judge Report and Recommendation to Overrule Employer's Objections and Certify Petitioner, JD(SF)-06-07, (March 8, 2007), and certified the Union as the representative of the Paper's employees in the following unit (sometimes referred to as the bargaining unit or simply the unit):

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

There is no dispute and I find the unit is appropriate for purposes of collective bargaining within the meaning of Section 9(c) of the Act.

The period covered by this process, roughly July 2006, to March 2007, involved contentious events and circumstances which were the subject of NLRB charges filed against the Respondent. The charges were found meritorious by Region 31 of the Board, a consolidated complaint issued and an unfair labor practice trial ensued before Administrative Law Judge William G. Kocol. The hearings spanned the period August 14 through September 26, 2007. Judge Kocol issued his decision on December 26, 2007. Exceptions were taken to the decision. The Board had not ruled on the exceptions as of the time of the issuance of this decision.

4. Events respecting bargaining

The Board certified the Union as representative of unit employees on August 16, 2007. Thereafter the Respondent and the Union initiated the process of bargaining. The parties discussed the mechanics and procedures of bargaining, the Union sought various information from the Respondent and the information provided was discussed and followed up on. The parties first met in face-to-face bargaining on November 13, 2007, and met on numerous occasions thereafter through the date of issuance of the complaint, herein March 24, 2009. No agreement has been reached.

B. Allegations of the Complaint

As might be expected from a substantial consolidated complaint consolidating multiple allegations taken from over a dozen charges filed during a period of over 15 months, the allegations at issue herein do not arise from a single or even a few events and situations, but are rather based on a variety of incidents arising in various settings and circumstances. Initially it is appropriate to present the naked allegations in contest and only then to consider the allegations for purposes of resolution.

1. Independent[7] violations of Section 8(a)(1) of the Act

The Act provides at Sections 7 and 8(a)(1):

> Sec. 7. Employees shall have 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, and shall also have the right to refrain from any or all such activities. . . .
>
> Sec. 8. (a). 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. . . .

[7] Violations of other subnumbered elements of Sec. 8 of the Act are also derivative violations of Sec. 8(a)(1) of the Act. Only allegations which are exclusively or independently alleged to violate Sec. 8(a)(1) of the Act are included here.

Complaint allegations asserting that an employer's conduct violates Section 8(a)(1) of the Act, by virtue of the reference to Section 7 of the Act in Section 8(a)(1), are alleging that the specified conduct of the employer's agents improperly discourages or chills the employees' rights 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.

The complaint at paragraphs 21 and 22 allege violations of Section 8(a)(1) of the Act.

Complaint Paragraph 21

On or about August 22, 2008, the Respondent, by Wendy McCaw, distributed a letter to employees in which it offered to provide its own attorney to represent employees during the Board's on-going investigation and which discouraged employees from cooperating with the Board's on-going investigation of pending unfair labor practice charges.

Complaint Paragraph 22

On or about December 3, 2008, the Respondent, by Don Katich, in a conference room at the Respondent's facility, instructed employees not to discuss their terms and conditions of employment.

2. Violations of Section 8(a)(3) of the Act

Section 8(a)(3) of the Act states in part that it shall be an unfair labor practice for an employer to:

> [B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Complaint allegations asserting that an employer's conduct violates Section 8(a)(3) of the Act are alleging that the specified conduct of the employer's agents improperly discourages or encourages employee membership in a labor organization.

The complaint at paragraphs 8 through 13, 14(b), and 15 allege violations of Section 8(a)(3) and (1) of the Act by engaging in conduct which improperly discouraged employee membership in a labor organization.

Complaint Paragraph 8

Since in or around July 2007, the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies by failing to apply to them the same terms and conditions of employment including, but not limited to, health insurance and vacation, that are provided to other employees in the newsroom bargaining unit.

Complaint Paragraph 9

Since in and around July 2007, the Respondent failed and refused to bargain over the terms and conditions of employment of its unit employees hired through temporary agencies.

Complaint Paragraph 10

Since in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees.

Complaint Paragraph 11

Since on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer.

Complaint Paragraph 12

Subparagraph 12(a): Since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006.

Subparagraph 12(b): Since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.

Subparagraph 12(c): Since around December 2008 or January 2009, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2008.

Complaint Paragraph 13

Subparagraph 13(a): In or around November 2007, through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of bargaining unit employees.

Subparagraph 13(b): In or around November 2008 through January 2009, the Respondent failed to conduct employee performance evaluations of 2008 performance for its bargaining unit employees in accordance with the Respondent's past practice.

Complaint Subparagraph 14(b)

On or about January 7, 2009, the Respondent laid off its employee Richard Mineards.

Complaint Paragraph 15

Subparagraph 15(a): On or about August 23, 2008, the Respondent suspended its employee Dennis Moran.

Subparagraph 15(b): On or about August 30, 2008, the Respondent discharged its employee Dennis Moran.

3. Violations of Section 8(a)(5) of the Act

Section 8(a)(5) of the Act states, in part, that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." Complaint allegations asserting that an employer's conduct violates Section 8(a)(5) of the Act are alleging that the Respondent by its conduct is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit.

The complaint at paragraphs 7 through and including 16, paragraphs 18, 19, and 20 allege violations of Section 8(a)(5) and (1) of the Act by the Respondent's failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit. Further the complaint alleges that the conduct alleged in paragraph 8 and paragraphs 10 through 16 relate to mandatory subjects of bargaining and were undertaken without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the conduct and/or the effects of this conduct.

Complaint Paragraph 7

Complaint paragraph 7 contains many separate allegations. In complaint 7 and its sub-numbers 7(a) through (e), various union requests of the Respondent for information over the period November 3, 2007 through January 26, 2009, are alleged:

Complaint subparagraph 7(a):
Since on or about November 16, 2007, the Union, by Ira Gottlieb, requested in writing that the Respondent furnish the Union with the following information:

> For each of the 'temporary' employees, state:
>
> How each of the employees made contact with the SBNP, if at all, during the hiring process;
>
> Whether the employee responded to an ad placed by the SBNP;
>
> Whether the employee responded to any communication from the SBNP to begin or continue the hiring process;
>
> Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;
>
> The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process;
>
> The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP; and
>
> Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the

employee with assignments and/or instruction (including editing) for workplace performance.

Complaint subparagraph 7(b):
Since on or about December 3, 2007, the Union, by Ira Gottlieb, requested in writing that the Respondent furnish the Union with the following information:

Has Ampersand ever used employees it labeled 'temporary' employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?

If so, state the following for each instance of such use of temporary work:

The date(s) on which the 'temporary' employee performed bargaining Unit work;

The name(s) of any temporary agency which you claim employed the temporary employees;

The specific project or task(s) performed by the temporary employees(s); and

The pay rates for the temporary employees(s).

Complaint subparagraph 7(c):
Since on or about August 6, 2008, the Union, by Nicholas Caruso, requested in writing that the Respondent furnish the Union with the following information:

Notification of when a new employee is hired into the unit, when an employee terminates (including resignation), or when an employee working in the newsroom has a change in employment status (including changes in employee title, duties, or other terms and conditions of employment) including date of hire, classification and rate of pay.

The request included the above requested information for all individuals hired to perform work performed by the bargaining unit.

Complaint subparagraph 7(d):
Since on or about September 9, 2008, the Union, by Nicholas Caruso, requested in writing that the Respondent furnish the Union with the following information:

Notification of status changes for workers performing bargaining Unit work;

The status, classifications, wages and benefits of Alex Pavlovic, Dave Mason, Chauncey Kim, Alan Hunt, Bill McMorris and John Greely, and whether or not, and if not, what is their status in the New Press' view.

Please provide the same information for any other people performing bargaining Unit work with respect to whom you have not yet provided this information.

Complaint subparagraph 7(e): Since on or about January 14 and 15, 2009, orally, and January 26, 2009, in writing, the Union, by Nicholas Caruso, requested that the

Respondent furnish it with information related to the employment status of employee Richards Mineards.

The information requested as alleged in the quoted subparagraphs 7(a) through (e) are further alleged in complaint subparagraph 7(f) to be relevant to the Union's duties as the exclusive representative of bargaining unit. Complaint subnumbers 7(g) through (k) allege that the Respondent variously failed and refused to provide the information requested or delayed in providing the information. Thus, the subparagraphs allege:

Complaint subparagraph 7(g): Until about January 23, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(a).

Complaint subparagraph 7(h): Until about January 30, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(b).

Complaint subparagraph 7(i): Until about October 22, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(c).

Complaint subparagraph 7(j): Until about October 24, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(d).

Complaint subparagraph 7(k): Until about February 9, 2009, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(e)

Complaint subparagraph 7(l) alleges the conduct alleged in complaint subparagraphs 7(g) through (k) constitutes an unreasonable delay in furnishing the information requested.

Complaint Paragraph 8

Complaint paragraph 8 states: Since on or about July 2007, the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies by failing to apply to them the same terms and conditions of employment including but not limited to, health insurance and vacation, that are provided to other employees in the bargaining unit.

Complaint Paragraph 9

Complaint paragraph 9 states: Since in and around July 2007, the Respondent failed and refused to bargain over the terms and conditions of employment of its unit employees hired through temporary agencies.

Complaint Paragraph 10

Complaint paragraph 10 states: Since in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees.

Complaint Paragraph 11

Complaint paragraph 11 states: Since on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer.

Complaint Paragraph 12

Complaint paragraph 12, subparagraphs 12(a), (b), and (c) state:

Subparagraph 12(a): Since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006.

Subparagraph 12(b): Since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.

Subparagraph 12(c): Since around December 2008 or January 2009, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.

Complaint Paragraph 13

Complaint paragraph 13, subparagraphs 13(a) and (b) state:

Subparagraph 13(a): In or around November 2007, through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of bargaining unit employees.

Subparagraph 13(b): In or around November 2008, through January 2009, the Respondent failed to conduct employee performance evaluations of 2008 performance for its bargaining unit employees in accordance with the Respondent's past practice.

Complaint Paragraph 14

Complaint paragraph 14, subparagraphs 14(a), (b), and (c) state:

Subparagraph 14(a): On or about May 2, 2008, the Respondent laid of[f] its employee Kyle Jahner.

Subparagraph 14(b): On or about January 7, 2009, the Respondent laid of[f] its employee Richard Mineards

Subparagraph 14(c): On or about August 23, 2008, the Respondent laid of[f] its employee DeQitt Smith.

Complaint Paragraph 15

Complaint paragraph 15, subparagraphs 15(a) and (b) state:

Subparagraph 15(a): On or about August 23, 2008, the Respondent suspended its employee Dennis Moran.

Subparagraph 15(b): On or about August 30, 2008, the Respondent discharged its employee Dennis Moran.

Complaint Paragraph 16

Complaint paragraph 16 states: On or around December 3, 2008, the Respondent announced and established a requirement that bargaining unit employees produce at least one story.

Complaint Paragraph 17

Complaint paragraph 17 alleges that the conduct described in complaint paragraphs 8 and 10 through 16, relates to wages, hours, and other terms and conditions of employment of the bargaining unit employees and are mandatory subjects of bargaining.

Complaint Paragraph 19

Complaint paragraph 18 alleges that on or about January 14, 2009, and continuing through on or about January 16, 2009, the Respondent by Don Katich, bypassed the Union and dealt directly with its employees in the bargaining unit by offering an employee nonunit terms and conditions of employment.

Complaint Paragraph 20

Complaint paragraph 20,subparagraphs 20(a) and (b) state:

Subparagraph 20(a): At various times from November 2007 through and continuing to March 24, 2009, the Respondent and the Union met for the purposes of collective bargaining with respect to wages, hours, and other terms of employment of bargaining unit employees.

Subparagraph 20(b): During the period of time described above in subparagraph 20(a), the Respondent engaged in the following conduct:

(i) The Respondent has insisted on proposals that are predictably unacceptable to the Union which proposals include, but are not limited to, the Respondents proposals on management rights, grievance and arbitration, union bulletin board, discipline and discharge.

(ii) The Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management rights clause that would grant the Respondent unilateral control over many terms and conditions of employment.

C. Initial Comments and Findings on Questions of Relevance, Motivation, and Credibility

1. Resolution of allegations of the complaint

The allegations of the complaint are numerous and the issues in the case substantial and varied. Long cases present organizational issues respecting the better structures to allow the reader an understanding of the issues both legal and thematic, to achieve clarity of presentation and, without endless repetition, to achieve global comprehension as well as a grasp of the finer points of the arguments presented.

In the instant case, for better or worse, I have endeavored to present the various issues, allegations, arguments, and my findings and legal conclusions organized around particular events or subjects which frequently involve multiple allegations and legal arguments.

2. The Respondent's assertions of misconduct as a defense

a. General misconduct and malfeasance by the General Counsel of the NLRB

The Act at Section 3(d) provides for the position and powers of the General Counsel of the Board:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

The Regional Office with the duty to investigate and prosecute unfair labor practices in the Santa Barbara, California area, the area in which the Respondent is located, is Region 31. That office is headed by the Regional Director for Region 31. The Regional Director as an agent of the General Counsel supervises the investigation of unfair labor practice charges and generally determines if they have or lack merit.

In some cases, Regional Directors refer completed investigations of unfair labor practice charges to the Washington, DC based Division of Advice within the General Counsel's office for merit determinations by the Associate General Counsel head of that office. The determination of the Division of Advice on the merits of an unfair labor practice charge is binding on Regional Directors.

If a Regional Director determines an unfair labor practice charge lacks merit, and the charging party declines to withdraw the charge, the charge is dismissed by the Regional Director. Charging parties are then entitled to seek review of the dismissal with the General Counsel's Office of Appeals located in Washington, DC. That office may sustain the charge dismissal or reverse the dismissal and direct the Regional Office to issue complaint on the charge. If a Regional Director, on his or her own or at the instruction of the Advice or Appeals offices, determines a charge has merit, the parties are afforded an opportunity to settle the

matter and, if that is not possible, the Director causes a complaint to issue and prosecutes the case.

All of the above actions are carried out by the agents of the General Counsel who has final authority in respect of the investigation of charges and the issuance of complaints. It is within this structure of governmental action, that the Respondent's allegations of General Counsel malfeasance and misfeasance must be considered.

The instant case involves 15 charges which were found meritorious by the General Counsel and consolidated for complaint. There were earlier charges, such as the 10 found meritorious and consolidated for complaint before Judge Kocol as discussed supra. These charges were virtually all filed by the Charging Party herein against the Respondent herein. There were also a host of charges filed by the Respondent against the Charging Party, however the General Counsel through his agents dismissed all of them.

The Respondent at hearing argued that the General Counsel never met a charge by the Charging Party against the Respondent he did not like and never liked any charge by the Respondent against the Charging Party. The Respondent argued that this statistical disproportion favoring the Union supports a finding of prosecutorial bias against the Respondent.

I rejected the argument at trial and reaffirm my finding here. The Court of Appeals for the Fourth Circuit in *Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1010 (4th Cir. 1997), rejected a bias argument based on the percentage of Board decisions which favored one side. The Court cited its earlier holding in *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996), in which it stated "this type of statistical argument is irrelevant" because in reality it "tells us little or nothing."

b. Specific allegations of misconduct by the General Counsel in prosecuting claims the investigation of which revealed evidence that would defeat the allegation or in issuing complaints where clear evidence to defeat the claim exists[8]

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[8] The adequacy of the General Counsel's investigation may not be litigated in the unfair labor practice trial. Due process claims are tested, not by analysis of the investigation, but by analysis of complaint allegations; *Redway Carriers,* 274 NLRB 1359 (1985). In *Redway Carriers*, id. at 1371, the Board held,

> [T]he Court of Appeals for the Seventh Circuit has stated (277 F.2d at 1214), with respect to an injunction proceeding under Section 10(1) of the Act:
>
> > It is our opinion that the scope, conduct or extent of the preliminary investigation are not matters relevant to or material for consideration on the issue to be adjudicated on hearing of a Section 10(1) petition, i.e., whether reasonable cause exists to believe a violation has occurred. This issue is to be resolved by the evidence adduced by the Board in open court to sustain its petition. The Board is enjoined to make a preliminary investigation but the adequacy of the investigation is judicially tested only by the Board's subsequent ability to sustain its initial determination that the investigation disclosed reasonable cause to believe that a violation occurred.
>
> *Ross M. Madden v. Hod Carriers Local 41,* 277 F.2d 688 (7th Cir 1960), cert. denied 364 U.S. 863 (1961). The same principle is applicable in a Board proceeding on the merits of the case. To paraphrase the court of appeals, the adequacy of the preliminary investigation is administratively tested, not by an investigation of the investigation, but by

Continued

The Respondent on posthearing brief at 284–298 alleges a variety of circumstances respecting the instant complaint and allegations which it argues constitutes General Counsel misconduct and a defense to the complaint allegations. The Respondent argues on posthearing brief at 283:

> These allegations about the General Counsel are not made lightly, or filled with hyperbole. The General Counsel, through Region 31, has repeatedly ignored relevant evidence, prosecuted in the face of exculpatory evidence, was complicit in perpetrating a fraud upon the News-Press, and has been woefully partisan in its handling of charges and investigations involving the News-Press. This hearing was simply more of Region 31's nearly three year-long vendetta against the News-Press.

The specific arguments and instant allegations of the Respondent in these regards are addressed below.

The Respondent argues that the General Counsel or his agents, including the Regional Director, should not have issued complaint on certain allegations *ab initio* or, having issued the complaint allegations and discovering post complaint that the allegations were without merit, should have withdrawn those allegations.

The Respondent notes that the General Counsel made several contentions grounded on the argument that temporary employees referred by outside agencies were in the Respondent's unit. One of the General Counsel's alternate theories, see complaint paragraphs 8, 9, and 10 described, supra, was that agency-referred outside employees were unit employees. I have found, infra, that they were not the Respondent's employees and were not unit employees.

The Respondent argues that the General Counsel's assertions of these individuals' employee and unit status were clearly erroneous and therefore the General Counsel's prosecution of the allegations following from that error were "malevolent." I disagree for two reasons. First, the position of the General Counsel in these regards is simply not so erroneous that this advocacy could by any stretch of the imagination be regarded as prosecutorial misconduct. Second, and more generally, prevailing respondents have a means of redress under the Equal Access to Justice Act (hereinafter EAJA), 5 U.S.C.A. § 504 (1982), for unreasonable prosecutions. EAJA provides for the award of attorney's fees and expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its litigation position was either "substantially justified" or that special circumstances exist which would make such an award unjust. That process is available when the decision at issue becomes final, a state this matter has not as yet achieved. This allegation is therefore not ripe for further consideration of the question at this stage of the proceeding.

The Respondent asserts on posthearing brief at 285:

> [W]itness Kyle Jahner was mislead about the purpose of his affidavit taken by the Region. (Tr. 397). Mr. Jahner informed the General Counsel he signed an employment contract with Top Echelon, yet his Jencks statement conspicuously omitted any mention of the employment contract Mr. Jahner signed with Top Echelon. (Tr. 398.)

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the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint.

The transcript of the witnesses' examination by Respondent's counsel, Dugan Kelley, contains the following examination:

> Q. So the government told you that the *News Press* had misled you in believing—as to your employment status at the *News Press*?
> A. No, no. That's obviously kind of what the implication was. That's why they talked to me was that—they didn't tell me anything, they asked me questions.
> MR. WYLLIE: Objection, lacks foundation.
> A. They asked me questions. They didn't tell me anything. They wanted to know about my situation. They obviously knew enough about it.
> JUDGE ANDERSON: You want to establish the particulars, Counsel?
> MR. KELLEY: No, Your Honor.
> Q. Did you tell the government that you had signed an employment contract with Top Echelon?
> A. An employment contract?
> Q. Yes.
> A. I believe I did, yes.
> Q. Is there any reason why the fact that you signed an actual employment contract with Top Echelon is not in your affidavit [sic], sir?
> A. I did not choose what went in and what did not go into that affadavit.
> Q. Did you tell the government that you had signed an employment contract with Top Echelon?
> A. If they had asked, I don't—again, I don't remember every detail of that conversation, but if they had asked that, I would've said yes.

Thus the transcript, at the pages offered by the Respondent in support of its argument here, does not support either the proposition that Jahner said he was mislead by the General Counsel nor support the argument that Jahner testified that he signed a contract and so informed the affidavit-taking agent of the government. The witnesses' testimony: "I believe I did, yes," and "If they had asked, I don't—again, I don't remember every detail of that conversation, but if they had asked that, I would've said yes.", hardly establishes the proposition advanced. And, further, had the witness testified that he signed an employment contract, and that that fact was not contained in the witnesses' affidavit, such a state of affairs would still not by any stretch of the imagination establish prosecutorial bias or misconduct.

The Board has commented on the difficulties in this area:

> A preliminary investigation, whether impartial or not, is not a substitute for or duplicate of a full evidentiary hearing. The principal purpose of the investigation is to determine whether there is sufficient evidence to warrant the issuance of a complaint. The investigator may not be interested in corroborative evidence. The investigator may also be concerned with certain disputed matters and less concerned with other matters which are more easily subject to resolution, or involve questions that should be addressed to more knowledgeable witnesses. Issues which appear important during the investigation may seem less so at the time of hearing and vice versa. Given the nature of the preliminary investigation, allegations that a witness gave prior contradictory testimony in his affidavit or that the affidavit is a more reliable indication of the truth than the witness' testimony at the hearing should be weighed carefully and with due regard to the context in which the prior statement was made. For example, when a witness testifies to facts which are not contained in his investigatory affidavit, a finding of contradictory testimony, i.e., impeachment by omission ordinarily is not warranted unless the context of the affidavit

> indicates a probability that the facts would have been included in the narrative if they were true. Additionally, due consideration must be given for the fact that in the present case certain words or phrases meant one thing to one witness and a different thing to another. (*Redway Carriers,* 274 NLRB 1359, 1371 (1985).)

Considering the record as a whole and the argument of the parties, I find the Respondent here is simply trying to further argue or bolster its case on the merits by asserting prosecutorial misconduct without facts to support its claims. I find no misconduct.

The Respondent argues that certain of the Government's witnesses: Hobbs and Hadley, did not testify effectively in support of a factual matter—the status of Eringer as an investigative reporter—advanced by the government. The Respondent argues this is another example where the government should have withdrawn complaint allegations or, in the alternative—it is not clear—comprises misconduct. The Respondent's argument is essentially premised on arguable factual ambiguity concerning a collateral fact in trial testimony. I do not accept the argument that the evidence as it unfolded at trial should have produced governmental withdrawal of allegations or that the failure to so withdraw the allegations was prosecutorial misconduct. As is set forth elsewhere in this decision, the complaint allegations at issue were sustained based on the record as it is. The Respondent's allegation of governmental impropriety is rejected.

The Respondent revisits as argued governmental misconduct its statute of limitations defense to the complaint allegation concerning the withholding of merit increases discussed and resolved against the Respondent, infra. Again, the Respondent argues its factual and legal arguments as to the merits of the complaint allegations in a misconduct accusation. Further, the nature of the arguments made by the Respondent here concern argued erroneous positions and theory of the government as to the complaint allegations. Such allegations under the cited cases, supra, do not raise viable allegations of prosecutorial misconduct. The Respondent's argument is rejected.

The Respondent attacks the government's prosecution of complaint paragraph 13(a) as "[b]linded by prosecutorial zeal" for advancing a "ludicrous" theory based on the "bald assertion" of one witness and that it "prosecuted a case that conflicted with existing precedent." (The Respondent's posthearing brief at 287.) Assuming, without deciding, the Respondent's assertions are correct,[9] the failures of the Government's case advanced by the Respondent here would not in any event rise to the level of governmental misconduct. The Respondent seems to be arguing that if the government does not prevail as to aspects of evidence or law, it has engaged in misconduct. This is conceptually erroneous. The Respondent's argument is rejected.

The Respondent argues that the General Counsel's allegations in paragraph 14(a) and (c) of the complaint were not supported by sufficient evidence. The General Counsel made it clear that complaint paragraph 14(a) and (c) was contingent on its prevailing in its alternative pleading in complaint paragraph 8 that outside agency employees were the Respondent's unit employees. When the General Counsel failed to sustain complaint paragraph 8, complaint paragraphs 14(a) and (c) failed in consequence. This is a reprise of the Respondent's earlier argument concerning complaint paragraph 8 and is rejected for the same reasons. Further, to the extent the Respondent is arguing that evidentiary weakness in the prosecutions case equates with misconduct, it is again conceptually erroneous.

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[9] I have found that the complaint allegations of par. 13(a) were without merit, infra.

The Respondent argues that the General Counsel's case concerning paragraph 16 of the complaint had "no evidence to support this allegation." (The Respondent's posthearing brief at 288.) I found merit to the allegation, infra, in part because I found the record evidence sufficient. The Respondent's argument is rejected.

The Respondent argues that complaint allegation 22 respecting what was told employees by a management official of the Respondent at an employee meeting was so clearly without merit because of language in the employee handbook that it was prosecutorial misconduct to issue the complaint with this allegation and to prosecute the allegation in court. I found merit to the allegation, infra. Thus, I find the argument that the complaint allegation was without merit is incorrect. Further, the argument that the Government's case was not convincing in the Respondent's view does not in any form or fashion justify the submission of an allegation of prosecutorial misconduct. Again, argued evidentiary weakness in the prosecution's case does not equate with prosecutorial misconduct. I reject the Respondent's argument.

The Respondent argues that regarding complaint subparagraph 15, the suspension and discharge of employee Dennis Moran, the government knew that the Respondent represented it terminated Moran based on misconduct that it learned of from Blake Dorfman. Further, it alleges that the government learned that Dorfman lied to the Respondent regarding Moran's conduct and, therefore, the government was bound to inform the Respondent of these facts. The Respondent argues that prosecutorial ethics and responsibilities required such disclosure. "The actions—and inactions—of the General Counsel in prosecuting this case fell far short of what is expected of a prosecutor." (The Respondent's posthearing brief at 291.)

I found the Respondent discharged Dennis Moran in violation of Section 8(a)(3) and (1) of the Act, infra. To the extent the Respondent argues the prosecution knew of exculpatory evidence and did not inform the Respondent of the evidence which demonstrated Moran's innocence, I did not find the evidence in the record as to the allegation at issue established that the Respondent did not engage in the unfair labor practice alleged. Rather, based on all the record evidence I found to the contrary, that the Respondent discharged Moran in violation of the Act.

I am unable to conclude on the basis of the entire record in this matter that the Respondent would have taken any different action respecting Moran if the General Counsel had disclosed its evidence to the Respondent or that the General Counsel should reasonably have believed that it would. To the extent the Respondent argued at trial and on brief that had the government only informed the Respondent that Dorfman had lied to it, the Respondent could have reinstated Moran and served both justice and the conservation of governmental resources by avoiding the litigation of this allegation, one fact impinges: After the Respondent learned of Dorfman's perfidy and Moran's innocence of the "desk clearing" allegation laid against him at trial, at least insofar as this record indicates, the Respondent did not at that time or thereafter offer to reinstate Moran. Given all the above, I reject the arguments of the Respondent. I specifically find no prosecutorial misconduct occurred.

The Respondent argues that allegations of complaint paragraphs 20(b) were known by the General Counsel to be incorrect, unsustained by the evidence and "pure unadulterated folly." (The Respondent's posthearing brief at 291.) Those complaint allegations of the General Counsel were found by me, in conjunction with the "overall conduct" allegation of complaint sub-paragraph 20(c), to have merit, infra. Again the Respondent argues the merits of the complaint and, arguing the complaint allegation(s) were unsustainable, urges consequential prosecutorial misconduct must have occurred. Again this is not a proper basis for a misconduct claim. I reject the Respondent's argument here.

The Respondent further alleges that the General Counsel engaged in prosecutorial misconduct by means of distorting evidence: "XV. It is Misconduct for the General Counsel to Distort Evidence," the Respondent's posthearing brief at page 293. The brief section correctly cites cases for the proposition that the General Counsel's distortion of evidence is improper and a basis for dismissal of allegations of a complaint. The section further correctly notes the relevant case standards and other cases lamenting and punishing actual prosecutorial bias.

The Respondent's noted brief section concludes: "Actual bias pervaded this prosecution." In the following brief section: "XVI. Bias and Prejudice have No Place In an Administrative Proceeding," (p. 295 of the Respondent's posthearing brief), the section concludes:

> The overriding concern of the News-Press has always been that Region 31, because of the initial hearing, routine nondismissal of charges, and questionable activity (that has somehow triggered an alleged violation of the Act when the News-Press responds to Region 31's contact of employees on personal cell phones). Has judged the fact as well as the case law as soon as [the Charging Party] files a charge. This is the kind of impermissible bias, conflict, favoritism, and pre-judgment, that has deprived (and will continue to deprive) the News-Press of the right to an impartial investigation so long as Region 31 maintains its anti-News-Press agenda.

The Respondent's argument in these quoted two sections of its brief contain correct citation of authority that governmental misconduct and bias are improper and must have consequences. However and importantly there are no new specific factual arguments made in these sections concerning the instant matter save inferentially. Those inferences are here addressed.

The Respondent's brief parenthetically noted almost with wonder the Government's misperception of Respondent's conduct: "(that has somehow triggered an alleged violation of the Act when the News-Press responds to Region 31's contact of employees on personal cell phones)." That reference is surely to complaint paragraph 21 which alleges a Wendy McGraw letter to employees violated Section 8(a)(1) of the Act. I have found, infra, that the government sustained it burden with respect to the complaint allegation and that the Respondent by its conduct violated the Act. My analysis and conclusions respecting this allegation will stand or fall on their own before reviewing authority. Nonetheless, I found the law and the facts on the allegation not unclear. The complaint allegation, far from being wide of current application of Board and court case law, is controlled by quite conventional cases. Thus, I must answer the plaintiff cry of the Respondent as to the circumstances in the Respondent's quoted remarks, that the Respondent is simply wrong. The prosecution is advancing common argument and sought and obtained a not unusual result: A finding that an unfair labor practice occurred.

And when the Respondent's posthearing brief attacks the actions of Region 31 in dismissing and/or issuing complaints on charges in a biased manner, several circumstances seem relevant. First, based on the General Counsel's internal organization described supra, if the Region dismisses a charge, the review of that dismissal is conducted de novo by the Washington, D.C., located Office of Appeals which has its own staff. And, as the record shows has been involved in several matters in this proceeding, the General Counsel also maintains a Division of Advice, again in Washington, D.C., with a separate independent staff. So the Respondent's complaints about bias in case handling by Region 31, must also be directed, to a greater or lesser degree, to include the agents in charge of the two Washington, D.C. offices noted.

When the General Counsel through a Regional Director issues a complaint, it is just that: a collection of one or more accusations or an allegations. The complaint must be proved before an administrative law judge. If the decision on the complaint is adverse to any party, in whole or in part, review is to the Board, thereafter to the Courts. EAJA, as noted, is available to qualifying respondents for relief from unreasonable prosecution. The Respondent who asserts it has suffered at the hands of the Region in issuing complaints, must also note that those complaints—while not as yet in their final state and with review still in process—has not shown the Regional complaint in the instant case to be essentially without merit. The complaint at issue, herein, has largely been sustained— and sustained on record evidence not simply complaint allegations.

As to the charges cited by the Respondent as filed by it against the Union which have been dismissed as noted elsewhere in this decision, no substantive evidence offered by the Respondent addressing the merits of the allegations against the Union was kept from the record because of the fact that a charge or charges filed by the Respondent was dismissed by the General Counsel. I tried to make clear at the hearing and the Board has clearly ruled[10] that the Respondent's evidence is not rendered inadmissible because it was associated with a charge the General Counsel found without merit. Thus, the General Counsel's dismissals of charges that by the terms of the Act quoted, supra, are undertaken without Board review, had no affect on the Respondent's ability to adduce relevant evidence in its defense herein.

3. Misconduct and unfair labor practices by the Union

a. The controversy respecting the Union's use of economic weapons

The Union in 2008 engaged in economic action against the Respondent. The Respondent filed five charges with Region 31, Cases 31–CC–2169, 31–CC–2170, 31–CC–2171, 31–CB–12427, and 31–CB–12429, against the Charging Party alleging it was committing unfair labor practices in conjunction with its economic campaign against the Respondent. The Regional Director for Region 31 submitted the cases to the General Counsel's Division of Advice for advice on whether the Union had violated the Act. The Associate General Counsel, in charge of the Division of Advice, issued a 22-page "Advice memo" dated December 31, 2008, considering each of the charges in light of the relationship of the parties and concluded and instructed the Region consistent with its conclusion,

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[10] In *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), the Board approved the Judge's holding at 334 NLRB at 500 fn. 6:

> [6] The Respondent had filed various charges against the Union with the Region, some of which remained before the General Counsel respecting these allegations. I held at trial and here reaffirm that, while any and all evidence relevant to Respondent's defense could be offered in the instant case, the content of the Respondent's charges against the Union before the General Counsel was not—above and beyond the evidence offered in those charges which was or could have been on offer herein—relevant simply because it had been submitted to the Agency in support of a charge against the Union. The charges filed against the Union by the Respondent are the business of the General Counsel in exercising his plenary control over complaints, the relevant evidence of the Union's misconduct in the bargaining involved herein is relevant whether or not changes against the Union had been filed.

> . . . that the Region should issue a merit dismissal of the Section 8(b)(4)(i)(B) charge [Case 31–CC–2169] regarding a Union agent's July 8 statement to Hot Springs Spa and Patio employee Sanchez and that the Region should dismiss all other charges.

The Regional Director on January 23, 2009, by separate dismissal letters, dismissed Cases 31–CC–2170, 31–CC–2171, 31–CB–12427, and 31–CB–12429. On the same date the Regional Director in Case 31–CC–2169 issued a merit dismissal letter. The Respondent appealed each dismissal to the General Counsel's Office of Appeals. By letter dated March 20, 2009, the Director of the Office of Appeals on behalf of the General Counsel denied the Respondent's appeals in all five of the Respondent's charges. The letter provided reasons for the denial of the appeals. It stated in part:[11]

> With regard to the Section 8(b)(4)(ii)(B) allegations, contrary to your contention on appeal, the evidence was insufficient to establish that the Union representatives' conduct at the sites of neutral employers constituted traditional picketing, confrontational conduct, patrolling or other violative conduct. Although the evidence establishes that union agent distributed handbills and engaged in conversation with the public, this activity doe[s] not rise to the level of picketing under the Act. *Teamsters Local No. 68 (Levitz Furniture Co. of Missouri*), 205 NLRB 1131, 1133 (1973). Although it is asserted on appeal that the representative' allegedly larger than usual size was itself confrontational, a person's above-average height and/or weight, without more, does not provide a basis for inferring that the individual was attempting to coerce, threaten or intimidate other individuals.
>
> It is concluded that the relevant facts in these cases parallel those in *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 578–588 (1987). As in *DeBartolo*, there as [sic] no violence, picketing, or patrolling at the site of the neutral businesses doing business with the primary employer. Thus, no violation of Section 8(b)(4)(ii)(B) is established by the evidence.
>
> With regard to the Section 8(b)(4)(i)(B) allegations, it was determined that, absent similar conduct, the Regional Director appropriately issued a merit dismissal with respect to the effort to induce an employee of a neutral to withhold service from his employer.
>
> With respect to the Section 8(b)(3) allegations, the Union's efforts to persuade neutral employers to case to utilize the News-Press to advertise their products was, as previously observed, law and thus constituted a lawful economic weapon which could be used during negotiations to further the barraging objectives of the Union.

The Respondent argued correctly that union unfair labor practices during the course of engaging in economic action against an employer—all during the course of negotiations—could be a relevant factor in such an employer's defense to allegations the employer was not bargaining in good faith. It lamented, however, that the charges filed against the Union making such allegations had been improperly dismissed. I ruled and here reaffirm that the Respondent was not limited in the presentation of such evidence by the fact that charges respecting such

[11] The original document in evidence as R. Exh. 1118, Exh. C, was incomplete. The parties by all party stipulation dated March 17, 2010, offered the complete copy as a substitute for the original deficient one. That stipulation is received and the exhibit has been replaced with the complete copy.

allegation had been dismissed. The Respondent announced at trial that it intended to produce such evidence.

The parties entered into a stipulation, Respondent Exhibit 1118, that in lieu of the Respondent presenting independent evidence in support of its contentions, the parties would adopt the facts and allegations described in the "Advice memo," dismissal letters, and Appeal's letter quoted immediately above, and in consequence avoid the need to present any evidence pertaining to the Charging Party's boycott of the News-Press. Thus the "Advice memo" recitation of facts is accepted as true by all parties and constitutes all the relevant facts on the question. The parties further agreed the receipt into evidence of the stipulation satisfied all parties' right to present evidence on the boycott activity arguments offered in support of the Respondent's affirmative defense.

The General Counsel and the Charging Party rely on the arguments contained in the Advice memo to support the memo's conclusion that no violations of the Act sufficient to justify issuance of a complaint occurred. The General Counsel notes that as to the statement by a Union agent to an employee of a neutral that he should not work for an employer who advertised in the Respondent's newspaper, the Advice memo found that the Respondent had presented no evidence that this conduct had adversely affected the parties' bargaining. The Respondent at hearing argued that the Union's conduct in support of its economic boycott in aid of bargaining should be taken into account in evaluating its conduct and establishes no violation of the Act was committed by the Respondent.

Relying on the facts as stipulated by the parties, and for the reasons stated and authorities cited in the Advice memo, and in agreement with it, I find there was simply a single action by the Charging Party's agents that was not permissible under the Act and that this single action did not rise to the level of improper efforts by the Charging Party to bring economic pressure to bear on the Respondent in aid of its bargaining positions. Thus, to the single statement of an agent of the Union to an employee of a neutral that he should not work for an employer who advertised in the News-Press, in agreement with the Advice memo, I find the isolated July 2008 remark was of no consequence to the negotiations that had been underway since November 2007.

I find therefore, based on the stipulated facts and the positions and arguments of the parties, that the Union's economic boycott of the Respondent in 2008 does not constitute in any manner a defense to the allegations against the Respondent at issue herein.

b. The argument the Union's bargaining conduct was improper and constitutes a defense to the allegations against the Respondent

The Respondent argues in its posthearing brief at 272:

> [The Charging Party] consistently engaged in conditional bargaining by attempting, as a term of employment, that employees and/or [the Charging Party] be able to challenge—through protest; subjective determinations by employees; and grievance and arbitration—content decisions of the newspaper. [The Charging Party's] proposals on management rights, discipline and discharge, and grievance and arbitration all combined to limit the News-Presses' ability to control the content of the newspaper by transferring content decisions to employees and/or [the Charging Party], and served to make the News-Press's content decisions subject to grievance and arbitration.

As is discussed in substantial detail below in the section on bargaining, the Union as part of its initial bargaining proposals offered language concerning employees' role in the newsroom which, the Respondent argued, set standards or granted employees the right to decide certain matters which, through the operation of the "reasonable" standards and the binding arbitration proposals, could be used to reduce the Publisher's control over the news. The Respondent further took the view that the elements of these proposals concerning the newsroom work and ethics and use of employee bylines were all nonmandatory subjects of bargaining.

While conceding that the Union repeatedly withdrew these newsroom and ethics proposals—as opposed to discipline and grievance/arbitration proposals—when requested by the Respondent, the Respondent argues the "introduction, withdrawal, reintroduction, withdrawal and second introduction of its "work assignment/employee integrity" proposal hampered the bargaining progress, and stifled progress toward an overall agreement." Thus the Respondent concludes, on posthearing brief at 272–273:

> Far from the News-Press being the bad actor in this play, [the Charging Party] systematically blocked progress towards agreement by reintroducing proposals on a permissive subject of bargaining it knew to be predictably unacceptable—the employees and/or [the Charging Party] controlling the content of the newspaper. In so doing, [the Charging Party] engaged in bad faith bargaining.

This state of affairs the Respondent emphasizes is a proper affirmative defense to the charges against it.

The General Counsel and the Union strenuously disagree. First each argues the logic of the Respondent's argument is fallacious. The Respondent refused to allow any standards of reason or any binding arbitration as to any matter whatsoever not simply in regards to news content or control over the news. The Respondent never expressed a willingness to allow any objective standards or arbitration during the periods when all the proposals it regarded as offensive had been withdrawn. It made no statement of conditional willingness to allow reasonable standards as to discipline or anything else or binding arbitration if in some manner the newsroom content was left out of the application of those proposals. They argue that the Respondent's argument about control is simply a sham and pretext cloaking it unchecked opposition to employee right of representation under the statute.

Further, the General Counsel and the Charging Party argue, the fact that the Respondent did not wish to agree with the Union's proposals does not mean those proposals may simply be labeled disruptive and/or that they somehow justify the Respondents unfair labor practices. Whether the proposals of the Union involved were permissive or mandatory is immaterial, the General Counsel argues, there is no doubt that the parties were never at impasse and any party may lawfully propose permissive subjects of bargaining in such a setting. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

On the basis of the record as a whole and the positions of the parties and with close consideration of the bargaining as is discussed in greater detail infra, I reject the argument of the Respondent that the Union was engaging in bad-faith bargaining. I do not regard the Union's conduct here challenged by the Respondent as rising to the level of a defense against the unfair labor practice allegations of the complaint. I accept the arguments of the General Counsel and the Charging Party that the Union's proposals which the Respondent took to be permissive subjects of bargaining were not for that reason evidence of bad-faith bargaining by the Union. Where no impasse has been reached, either party may offer proposals concerning nonmandatory subjects of bargaining. And here, the Respondent did discuss the contested

proposals with the Union and, when the Respondent asked the Union to withdraw certain proposals, it did so. Given these findings, I reject the Respondent's asserted defense.

D. Allegations Respecting the Respondent's Use of Employment Agencies

1. An initial caution about a potential ambiguity regarding these allegations

In considering the allegations that the Respondent violated the Act in regards the employment of individuals hired by or through outside agencies, it is important to keep in mind the fact that two categories of individuals were utilized by the Respondent at relevant times, but only one category is the subject to the allegations herein.

The Respondent has long had a practice of hiring "[e]mployees engaged for a specific period of time or to complete a particular project." (The Respondent's employee handbook at 12.) The Respondent maintains and used personnel forms, such as requisition forms, which allow for recordation of the "length of assignment" of temporary employees. During the Respondent's operation up to the union election, such hires had been few—on average roughly two a year, but regular and no such direct hire temporary employees were employed as of the September 2006 election. There is no dispute that those "temporary employees" directly hired on the basis noted were the Respondent's employees. The complaint does not challenge the direct hire or employment of these temporary employees by the Respondent.

The Respondent also utilized the services of individuals governed by contracts between the Respondent and outside providers. These agencies and the individuals providing services to the Respondent—including the doing of unit work—are variously referred to by the parties, witnesses, and in the pleadings. The complaint refers to the outside agencies as "temporary agencies" and to those individuals working under these contracts as "temporary agency-provided employees." The contract in evidence between the Respondent and an outside agency refers to these individuals as "contractors" and the outside agency as the "contractor's employer."

The Union initially was not fully informed of the difference in the two categories of individuals: the Respondent's direct hire, temporary employees and the second category, the outside agency contractors doing unit work. So questions by the Union of the Respondent were initially ambiguous and were later directed to understanding the difference in the details of the two categories of the individuals and their use by the Respondent. It is important to keep in mind that the complaint deals only with the "outside agency" individuals doing unit work and not the Respondent's direct hire "employee handbook" defined temporary employees directly employed by the Respondent.

2. Issues respecting Respondent's use of employment agencies

The complaint alleges that the Respondent utilized employment agencies to provide employees who undertook bargaining unit work. The General Counsel pleads alternative theories of a violation of the Act in this conduct. First, the complaint, at paragraphs 8 and 9, alleges that these employees obtained through temporary employment agencies were bargaining unit employees who were not compensated consistently with other unit employees and that the Respondent at all times had refused to bargain with the Union concerning them.

The General Counsel's complaint's second, alterative theory, at complaint paragraph 10, alleges that, if the agency hired employees are not the Respondent's unit employees, then the Respondent by having these nonunit individuals do bargaining unit work was transferring work

out of the bargaining unit without the agreement of the Union and without providing the Union with an opportunity to bargain respecting such transfers. In either case, the General Counsel argues and the complaint alleges, the conduct violates Section 8(a)(1), (3), and (5) of the Act.

As discussed in greater detail below, the Union's requests for information respecting these individuals, and the timeliness and sufficiency of the Respondent's responses to those requests, are also in issue as alleged violations of Section 8(a)(1) and (5) of the Act.

While there was no dispute that employment agencies were utilized by the Respondent and that individuals from those agencies did unit work, the parties disagreed respecting the unit placement of these individuals and the Respondent's past practices respecting them. These disputes require exploration of the relationships and practices concerning these individuals.

3. Initial facts, events, and allegations respecting the use of employment agencies

The Respondent's business record (GC Exh. 234) listed its Newsroom Temporary Agency Invoices for the period 2000–2008. Two employment services submitted a total of three invoices for referred employee services in the initial year (2000) of the Respondent's operations of the News-Press. Three agencies submitted a total of 34 invoices in 2001. A single agency submitted two invoices in January of 2002. Agency use by the Respondent stopped at that point for a period in excess of 5 years resuming with an invoice submitted on May 29, 2007,[12] and significant invoices submitted thereafter through 2007 and 2008.

Yolanda Apodaca, the Respondent's director of human resources, testified the discontinuance or "freeze" in the use of outside agencies resulted from a policy initiated around January 2002, by the general manager and/or acting publisher at the time, Will Fleet, who determined the Respondent was "not to hire temporary employees through agencies." She attributed the decision to halt the use of agency services as based on the greater costs of using such services.

Apodaca testified she raised the matter of use of agencies again with copublishers, Arthur von Wiesenberger and Wendy McCaw and perhaps counsel in a meeting in the latter half of 2006. Apodaca testified she reported to the meeting participants that she needed assistance in hiring employees for the paper and wished to use the services of a recruiter and also to use temporary employment agencies to provide staff. She received authorization to "seek assistance if I need it." No other testimony respecting this meeting was offered.

The business records described above indicate the placement agencies' invoices halted in January 2002, did not resume until May 29, 2007, and specifically note that the agency employment use was frozen for the entire years 2003-06. Apodoca placed the described meeting as falling somewhere in the latter half of 2006. This period is seemingly inconsistent with the fact that the Respondent's use of the agencies did not resume until May 2007. Why, if at a 2006 meeting the Respondent gave Apodoca permission to use agencies, was their use delayed till May 2007? Given this unexplained inconsistency and the fact that none of the other meeting participants testified respecting the event or its date of occurrence, I find that the meeting more likely occurred shortly before the initial resumed payments to agencies the records show began in May 2007. Based on the record as a whole and the testimony of Apodaca I find the meeting did not occur before October 2006. To this extent, I find Apodoca's

[12] The portions of the Agency invoices record covering calendar years 2003–2006, each bear the entry: "hiring freeze–no temp employees per acting publisher."

memory of the timing was in error. In all events I credit the business record provided that the Respondent's use of agencies occurred in 2000 and 2001, halted in January of 2002, and did not resume till May of 2007, when an agency titled Office Team submitted an invoice to the Respondent.

The agency involved with the Respondent in July 2007, and subsequent periods respecting individuals doing unit work, is Top Echelon Contracting, Inc. The July 13, 2007 contract or "client services agreement" between Top Echelon and the Respondent was entered into evidence. By its terms the contract commits Top Echelon to provide its employees (called contractors in the document) to the Respondent for performance of services in accordance with the Respondent's provided job descriptions. Top Echelon is responsible for all compensation of the individuals involved and provides all necessary insurance and fringe benefits to those individuals such as, in conjunction with options taken by the individuals for joint payment for such coverage, as health insurance. Top Echelon has the right to direct and control the contractors in the performance of their work. The contract provides the Respondent may request that the contractors conduct themselves in accordance with its internal rules and policies.

The contract at paragraph 13 explicitly sets forth the relationship of the parties.

> The Client and Top Echelon agree that Contractor is Top Echelon's employee; and, the services provided by Contractor to the Client are provided pursuant to this Agreement. Neither this Agreement nor services provided hereunder shall be construed to create a relationship of employment, agency, partnership or joint venture between Top Echelon and the Client or the Contractor and the Client. The status of Top Echelon and the Contractor relative to the Client shall be that of an independent contractor. Neither Top Echelon, the Contractor, nor the Client shall have any right or authority to assume or create any obligation on behalf of any of them.

In July 2007, four agency employees began working in the newsroom doing unit work. Six more were working in the newsroom by November 2007. At that time there were approximately 34 individuals in the newsroom performing the duties described in the unit description. Some 24 were undisputed unit employees of the Respondent. The remaining 10 were agency contractors. By December 2008, the agency contractors working in the newsroom totaled 8 and the undisputed unit members totaled 16.

The records of the Respondent and Top Echelon in the record, as well as the testimony respecting the contractors' duties and general working conditions at the Respondent are not in particular conflict. Top Echelon is a nationwide enterprise and maintains a substantial data base on the job referents and offer a wide range of benefits to them. It pays and handles typical "human resources" compensation matters. The Respondent through its newsroom supervision directed and assigned the contractors essentially identically with its own employees working in the newsroom in the same positions. The contractors were subject to the Respondent's performance and job quality rules. Time and attendance of Top Echelon referents was maintained by the Respondent's supervision, but the recordation was submitted to Top Echelon for payment calculation and actual payments to referents rather than to the Respondent's pay systems for its own employees.

The record established that the Respondent placed its own employment advertisements and interviewed applicants for these positions. The Respondent sometimes informed applicants that it intended to have work for them or that they would be employed in the newsroom, but directed the employment applicants to Top Echelon for referral back to the Respondent by the

agency. Top Echelon in such circumstances did in fact process the Respondent's referents back to the Respondent as Top Echelon employees and also used "recruiters" who provided work applicants who were referred to and considered by the Respondent. Further, applicants were sometimes told by the Respondent's agents that they could not be initially hired by the Respondent directly, but would initially be employed through an agency referral with the possibility that thereafter in time they would become direct News-Press employees. Hiring decisions respecting contractors were made by the Respondent's agents. No individual referred to an agency by the Respondent for referral back to the Respondent was rejected by the agency involved. In so far as the record reflects, Top Echelon did not screen the individuals the Respondent requested be referred to it.

Reporter Marci Wormser was told by the Respondent before she started work that she would be employed by Top Echelon. She started initially in the newsroom in mid-November 2008, under the assumption she was a referred employee of Top Echelon. After working for a time, at about the end of November 2008, she learned that was to be converted into a freelance employee working directly for the Respondent on a fee-per-story basis. She continued on this basis, working at a desk in the newsroom and using the Respondent's facilities as other newsroom employees did. Thereafter, on or about December 18, 2008, she had a conversation with Don Katich and Scott Steepleton. She was told:

> I was still—they were still awaiting approval from [Publisher] Wendy McCaw to make me a temporary employee, well through Top Echelon. And that is because I'm a freelancer. I cannot work in the office any more using their equipment, but I could work for them as a regular freelancer.

She continued in this new freelancer status until she became a regular newsroom employee on or about January 31, 2009.

The Union and the Respondent held their first bargaining sessions on November 13 and 14, 2007. In these initial bargaining sessions the Union through its spokesman Nicholas Caruso requested information about the Respondent's hiring of temporary employees and its use of hiring agencies. The Respondent through spokesman and counsel Zinser informed the Union that the Respondent hired its temporary employees through an agency, "Top Echelon" but that he did not know when the Respondent had started using that agency. The Union asked for information about Top Echelon.

The Respondent on November 14, 2007 provided the Union with a list of temporary employees performing work in the newsroom, which list included their names, employing agency, job titles, dates performing unit work and pay rates. The document lists the names of eight Top Echelon employees working in the newsroom with commencement dates from July 9, 2007 and thereafter, and one Office Team employee working in the newsroom who started in July 2007.

Union chief negotiator Caruso again raised the temporary hire issue and told the Respondent that the Union felt that the Respondent was not hiring consistently with its employee handbook and expressed concern that the Respondent was replacing unit employees with hires through outside agencies and that the Respondent's conduct was a departure from its past practices. The Union indicated it was reluctant to immediately file NLRB charges respecting the issue but that it was of concern. Zinser suggested that the Union should make a written request for information on the issue and Union counsel Gottllieb agreed to do so noting that "using outside agency Top Echelon is a concern. . . ."

On November 16, 2007, union counsel, Gottlieb, sent to the Respondent's counsel Zinser, by facsimile transmission, email, and USPS mail, a letter captioned: "Re: Unlawful hiring of 'temporary' employees to perform bargaining unit work." The letter stated in part:

> Following up on our discussion of November 14, 2007 at the negotiating table, this is to request the Employer's full and complete rationales(s) explaining why the nine "temporary" employees allegedly hired by either Top Echelon and/or Office Team Employee and working as reporters for the Santa Barbara News-Press, are, in Ampersand's view, not part of the bargaining Unit consistent with the NLRB's certification and the requirements of the NLRA.
>
> You will recall that approximately one month ago, the Union requested information pertaining to the "temporary" employees, and you provided that information during our second day of negotiations only after repeated requests therefore. When we asked you at the table for your rationale, you declined to provide it then, and asked for the opportunity to do so in writing.
>
> As the Union has advised you, since these employees are clearly (and undisputedly) performing bargaining unit work, and all began work on or after July 2007, they must be included within the Unit represented by the Union. As you are aware, the number of eligible employees at the time of the election in September 2006 was 42. . . . The Union has demanded that the nine "temporary" employees (and any others doing unit work) be included and that failure to include them, and the failure to notify the Union of their hire, are violations of Section 8(a)(5) of the National Labor Relations Act. You requested the opportunity to explain in writing as opposed to orally across the table why they need not be part of the bargaining unit. Please provide that rationale, and the following information, no later than November 26, 2007.
>
> For each of the "temporary" employees, state:
>
> 1. How each of the employees made contact with the SBNP, if at all, during the hiring process;
> 2. Whether the employee responded to an ad placed by the SBNP;
> 3. Whether the employee responded to any communications from the SBNP to begin or continue the hiring process;
> 4. Whether the employee responded to any communications from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;
> 5. The names of all people with whom the employee spoke and/or were interviewed in connection with the hiring process;
> 6. The names of all people who participated in the decision to hire the employee to perform work in the service of the SBNP; and
> 7. Identify all people who supervise the employees, including having the responsibility to discipline, discharge (or remove from working in the service of SBNP), effectively recommend discipline or discharge, and/or provide the

> employee with assignments and/or instructions (including editing) for workplace performance.

The enumerated information requested in this letter is alleged as requested on November 16, 2007 in complaint paragraph 7(a). The Respondent's April 7, 2009 answer to complaint paragraph 7(a) denies the allegation and further avers in part:

> Rather on November 13, 2007, [the Union], through Nicholas Caruso, verbally requested the names and rates of pay for temporary employees at [the Respondent.] On November 14, 2007, [the Respondent] provided the requested information. . . .

The Respondent did not provide any additional information on receipt of the letter and, on November 27, 2007, the Union filed Charge 31–CA–28589. The charge alleges violations of Section 8(a)(1) and (5). It's stated charge bases states in part:

> Within the last six months, the [Respondent] has failed and refused to bargain in good faith, by subcontracting and/or using employees it labels "temporary" employees to perform bargaining Unit work purportedly hiring them through an employment agency, contrary to the [unit] certification issued by the NLRB . . . and without prior notice to the Union and opportunity to bargain. The [Respondent] has further violated the Act by failing and effusing to provide requested information relevant to . . . utilizing alleged "temporary" employees to perform bargaining Unit work.

On January 23, 2008, by letter sent by facsimile transmission and USPS mail, counsel Zinser wrote counsel Gottlieb. The letter was captioned: Re: supplemental information concerning temporary employees and stated the Respondent wished to supplement information previously given concerning temporary employees. The letter then addressed the earlier information request. The letter tracked exactly the seven numbered questions presented in counsel Gottlieb's November 16, 2007 letter to counsel Zinser, quoted in relevant part above, following each quoted emboldened question by the Respondent's answer.

The complaint pleads at subparagraph 7(g) that on January 23, 2008, presumably by the quoted letter, the Respondent responded to the Union's information request described in complaint paragraph 7(a). The issue framed by the pleadings then is whether or not, as alleged in complaint subparagraph 7(l), the period of time which passed between the Union's request and the Respondent's provision of the information "constitutes an unreasonable delay in furnishing the Union with the information requested."

On December 3, 2007, the Union, through counsel Gottlieb, send a letter to counsel Zinser by facsimile, email, and USPS mail with the caption: Re: Unlawful hiring of "temporary" employees to perform bargaining unit work." The letter states in part:

> In addition to the requests for information that are now outstanding on this issue, please provide the following, all no later than December 21, 2007:
>
> 1. Has [the Respondent] ever used employees it labeled "temporary" employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?
>
> 2. If so, state the following for each instance of such use of temporary work:
>
> a. The date(s) on which the "temporary" employee performed bargaining Unit work;

b. The name(s) of all such temporary employees;

c. The name(s) of any temporary agency which you claim employed the temporary employees;

d. The specific project or task(s) performed by the temporary employee(s);

e. The pay rates for the temporary employee(s).

The enumerated information requested in this letter is alleged in complaint subparagraph 7(b).

By letter dated January 30, 2008, sent by facsimile transmission and commercial carrier, counsel Zinser wrote counsel Gottlieb. The letter stated in part:

> In regard to your additional information requests contained in your December 3, 2007 letter that are the subject of Charge No. 31–CA–28589, please note that I provided that information to you at our November 14, 2007 bargaining session. If you remember, at that bargaining session I handed you and Nicholas Caruso a list of temporary employees performing work in the newsroom, which included their name, agency, job title, dates performing Unit work and pay rates.
>
> I have enclosed that list for your convenience, I have also enclosed updated information to reflect the present list of temporary employees in the newsroom. I hope this resolves the matter and I look forward to continued bargaining.

The letter included two attached lists. The first is the list identified in the letter by the Respondent to the Union as having been earlier given to the Union along with other materials at the bargaining session of November 14, 2007. That list contains the names of eight Top Echelon employees working in the newsroom with their starting dates the earliest of which is July 9, 2007, and one Office Team employee working in the newsroom again with a July 2007 starting date. The second or revised list addresses the subsequent changes in the newsroom temporary employees: the list deletes two earlier Top Echelon employees who departed and adds four additional "temps" who started in the period October 2007, through January 2008.

The complaint pleads at subparagraph 7(h) that until January 30, 2008,[13] presumably the time of the quoted letter, the Respondent had not responded to the Union's information

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[13] The General Counsel at trial moved to amend the January 30, 2008 date in complaint subpar. 7(h) (which is the date the Respondents alleged failure to provide the information ended in complaint subpar. 7(h)) to a different, later date, May 26, 2009. I denied the motion as untimely. Where, as in this motion, the General Counsel is seeking to extend the time an employer is alleged to have failed to provide a labor organization with requested information, he is in effect reconsidering his initial complaint contained concession that the information had been provided by the earlier date as set forth in the unamended complaint. Changing that date in the complaint to a later date—here over 15 months later, not only extends the period of the alleged violation, it explicitly withdraws the essential General Counsel concession that the unfair labor practice allegation ended and the information was sufficiently supplied by the Respondent to the Union on the earlier, original, date. Since something—here the January 30, 2008 letter—caused the General Counsel to allege the demand had been satisfied in the original paragraph, the amendment is not based on new evidence of what occurred on January 30, so much as is

Continued

request described in complaint paragraph 7(b). The issue framed by the pleadings then is whether or not, as alleged in complaint subparagraph 7(l), the period of time which passed between the Union's request and the Respondent's provision of the information "constitutes an unreasonable delay in furnishing the Union with the information requested."

4. Are the employment agency-referred individuals within the bargaining unit?

The General Counsel and the Charging Party allege the employment agency hired individuals working in the newsroom were at all relevant times unit employees. The Respondent has at all times opposed this claim. The initial issue respecting these employees is: Whose employees were they? The General Counsel contends the Respondent was the sole employer of these employees and that the agencies involved were employers only in an administrative sense. The Respondent argues that the individuals involved were temporary employees who were jointly employed by a user employer and a supplier employer as in *Oakwood Care Center*, 343 NLRB 659 (2004), and, as that case holds, are not properly included in the bargaining unit. The Respondent further argues that temporary employees are not in the unit in any event.

The General Counsel advances the Board's decision in *Mar-Jam Supply Co*., 337 NLRB 337 (2001), in which agency-provided employees were found to be the user employer's sole employees. In that case however the user employer set uniform terms and conditions of employment for all employees doing unit work. That is not true in the instant case where the agencies involved offered various nonwage benefits which were not applicable to user employer employed employees. The General Counsel's cited case, *Employee Management Services*, 324 NLRB 1051, 1051 fn. 2 (1997), notes that there had been no exceptions filed to the joint employer findings of the judge. The decision is therefore not precedent respecting that analysis.

In *Town & Country Electric*, 309 NLRB 1250 (1992), the issue was the referring agency's status as agent for the employing employer. Both the Board and the judge found the complaint resolvable "even absent a joint-employer relationship" (Bd. at 1251). I find the case is therefore not precedential on the unit issues herein. So, too, the offered case, *Storall Mfg. Co*., 275 NLRB 200 (1985), enfd. mem. 786 F.2d 1169 (8th Cir. 1986), presents and agency analysis and not a bargaining unit analysis and therefore is not on point.

The General Counsel and the Charging Party further argue that the employees involved—the agency-provided individuals—were not in fact temporary within the Board sense of the term. Unlike the Respondent's directly hired temporary employees, the agency referred employees were not hired for specific periods of time or for particular projects. Thus these individuals did not meet the Respondent's own employee handbook definitions.

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impliedly a reconsideration of that original evidence. This act of prosecutorial reconsideration of events would, if the amendment to the complaint were granted, constitute an expansion of the government's case and extend the period of the alleged violation for the period of many months. To restate, the Government's proposed amendment was not an action justified by new evidence but rather the proposed amendment constitutes a withdrawal of the factual and legal conclusion that the information provided by the Respondent on the originally pled date, i.e., on the earlier date, January 30, 2008, was sufficient to satisfy the employer's obligation. This prosecutorial reconsideration of the legal consequences of the events of January 30, 2008, here the delivery of the quoted letter—was before the General Counsel at the time the complaint issued. The proposed mid-trial amendment is therefore out of time.

Having considered the arguments of the parties on the issue as well as their cited cases, I find that the agency referred individuals are not properly within the certified bargaining unit. The issue here is unit cohesion not the agency of one employer as compared to the other. The fact that the fringe benefits of these employees were set by the agency and the individuals in consultation with the agency selected their fringe benefit choices from a menu of coverage and the associated fact that the Respondent did not have a role in setting those benefits renders the agency-referred employees essentially independent from the Respondent in that important aspect of compensation.[14] They are not employees of the Respondent for purposes of this analysis. It is unnecessary having resolved the issue of bargaining unit inclusion and the identity of their employer, to go further and resolve the arguments respecting the temporary or full-time status of these individuals here.

The General Counsel's allegation in paragraph 8 of the complaint is that the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies, by failing to apply to them the same terms and conditions of employment applied to other employees. In paragraph 9 of the complaint the General Counsel alleges that the Respondent has failed and refused to bargain over these unit employees. Having found that employees hired through temporary agencies are not the Respondent's unit employees, I shall dismiss these paragraphs of the complaint. I note the complaint states alternate theories regarding the individuals involved which are dealt with elsewhere in this decision.

The complaint at subparagraphs 14(a) and (c) allege the Respondent laid off its employees Kyle Jahner and DeWitt Smith. Having found that the General Counsel's first temporary agency theory as alleged in complaints paragraph 8 and 9 is not correct and having dismissed those paragraphs of the complaint, the General Counsel's opening remarks on the first day of trial come into play. Counsel for the General Counsel asserted:

> Respondent also laid off temporary employees, as alleged in the Complaint, Dewitt Smith and Kyle Jahner. Now, these allegations—I believe this [is] Paragraph 14 of the Complaint. In Paragraph 14 of the Complaint, these obligations are predicated on our first theory, Your Honor, that these—that the temporary agency-provided contractors or employees, that these people were actually employees of Respondent in the unit, and that by failing to notify the Union of the—of the failure—of the impending layoff of both of these unit employees that the Respondent had, again, violated the Act.
>
> Now, if you were to find that our second theory were correct, that these employees were actually jointly employed and this is an unlawful transfer of work than these two allegations with respect to the layoff. They wouldn't go anywhere because their—their contention on a finding that they were employees of the—of the Respondent.

Given the quoted statement of counsel for the General Counsel on the opening day of the hearing, and having found that agency-referred individuals are not employees of the Respondent, complaint paragraphs 14(a) concerning Kyle Jahner and 14(c) concerning Dewitt Smith are without merit. As the General Counsel concedes in his quoted statement, given my finding that they are not employees of the Respondent, no violation of the Act has been sustained. I shall therefore dismiss the allegations respecting these two individuals.

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[14] The General Counsel's theory and trial of the case eschews any argument that the agencies are joint employers with the Respondent.

5. Was the Respondent's use of agency employees a violation of Section 8(a)(5) and (1) of the Act?

a. The General Counsel's prima facie case

The General Counsel's complaint paragraph 10 is an alternative pleading to the complaint paragraphs 8 and 9 dismissed above: ". . . [S]ince in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees. This is alleged to violate Section 8(a)(1) and (5) of the Act in complaint paragraph 25.

There is no dispute that the election in NLRB Case 31–RC–8602 was held on September 27, 2006, and that the Board issued the certification of representative to the Union on August 16, 2007. The Charging Party notes on brief at pages 1–2, footnote 3:

> . . . [T]he relevant date by which to measure the status quo . . . is not the NLRB certification date of August 2007, but the September 27, 2006 election date. *Laurel Baye Healthcare of Lake Lanier*, 352 NLRB 179 (2008); *Sprain Brook Manor Nursing Home LLC*, 351 NLRB 1190 (2007); *Ramada Plaza Hotel*, 341 NLRB 310 (2004); *Mike O'Connor Chevrolet*, 209 NLRB 701(1974). . . .

The citation of authority is correct.

There is also no dispute that the use of agency employees doing unit work in the newsroom started for the first time following a multi-year hiatus, see discussion infra, in July 2007. At that time four agency-provided employees started in the newsroom: Angel Pacheco and Joe Melendez as reporters, Kyle Johner and Kevin Merfeld as sports department writers and copy editors. By November 2007, 6 additional agency employees were at work as reporters, writers or copy editors for a total of 10. To put the hires in perspective, in September 2006, 42 employees were listed on the election eligibility list. With the start of bargaining in November 2007, 24 unit employees were employed in the newsroom as were 10 agency employees. Agency employees continued to be utilized by the Respondent in the newsroom in similar proportion—roughly comprising 50 percent of the number of unit employees with variation—into early 2009. There is no reason to conclude that these individuals did less unit work than the Respondent's unit employees on an hour-by-hour basis. Thus, I find that at all times between July 2007 and early 2009, significant amounts of unit work were being provided by nonunit employees.

It is clear then that the Respondent hired agency-provided individuals to do and they did do significant quantities of unit work during the noted period throughout which the Union represented unit employees. It is also clear that the Respondent did not notify the Union that the Respondent was going to use agency-provided employees to do unit work until bargaining commenced in November 2007, at which time use of such individuals was well underway. There is no dispute that the Respondent did not at any time offer to bargain concerning either the agency supplied employees nor the unit work that they were doing. Finally there is no dispute that the Respondent did not at any time obtain the agreement of the Union to the Respondent's use of agency-provided employees to do unit work.

An employer's decision to subcontract work performed by bargaining unit members is a mandatory subject of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). Here that decision was taken by the Respondent and instituted during the postelection period. There is no claim the Union was informed, provided opportunity to bargain or gave consent to

these actions. Thus the General Counsel has established his prima facie case that a violation of Section 8(a)(5) of the Act occurred.

b. Was the Respondent's use of agency-provided employees to do unit work a benign continuation of a legally sufficient past practice?

The disputed aspect of the agency-provided individuals doing unit work is whether or not the Respondent's had a sufficient past practice justifying the disputed use without bargaining. Where the employer raises a defense of past practice to a unilateral change allegation of the type at issue here, the General Counsel bears the burden of showing, by a preponderance of the evidence, that the allegedly unlawful subcontracting constituted a material and substantial change in the Respondents' practices. *Great Western Produce*, 299 NLRB 1004, 1009 fn. 2 (1990); *Clements Wire,* 257 NLRB 1058, 1059 (1981).

The Board in a recent case, *Eugene Iovine, Inc*., 353 NLRB No. 36, slip op. at 1 (2008), enfd. ___ F.3d ___, No. 09-0217-ag (2d Cir. March 30, 2010), noted the evidentiary standard for determining the sufficiency of the pattern or frequency of occurrence of the past practice:

> The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

The Board approved the analysis of Administrative Law Judge Aleman in *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, who set forth the following at 353:

> A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" (citations omitted). *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors,* 334 NLRB 651 (2001), *Dow Jones & Co., Inc.,* 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises,* 324 NLRB 1123 (1997); *Blue Circle Cement Co.,* 319 NLRB 661 (1995); *Lamonts Apparel, Inc.,* 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel,* 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida,* 144 NLRB 311 (1963); *The American Lubricants Co.,* 136 NLRB 946 (1962).

The Respondent's past practice concerning agency-provided newsroom employees is described in the Respondent prepared summary of its payments to vendors, i.e., agencies, for newsroom referents in the period 2000–2008. As described briefly, supra, agency use is revealed by weekly invoices submitted by agencies for payment. Thus, the total for 2000 was three weekly invoices submitted by agencies for payment in October 2000. The total for 2001 was 34 weekly invoices submitted through the year. The total for 2002 was two weekly invoices submitted in January 2002.

The document reveals no agency referrals in calendar years 2003–2006. In the space on the record for each of those years is the entry: hiring freeze. Apodaca testified the freeze

was a policy decision of the Respondent's publisher at that time. The first invoice ending this hiatus is dated May 29, 2007,[15] and invoices were submitted regularly thereafter to the end of 2008. As described supra, Apodaca testified the Respondent's management and counsel determined to resume the practice of using agency referents in the newsroom upon her request. I have found, supra, that this recommendation and decision were taken in 2007, some time shortly before the resumption of the practice in May 2007.

The document under discussion has but three columns: (1) for the name of the agency involved, (2) for the dates of the invoices submitted and (3) for the amount paid on each invoice. Because the column indicating the amount paid is redacted, it is not possible to gauge the numbers of individuals covered by each invoice—a number that could be roughly calculated were the amount of each invoice included. While there was some nonspecific testimony that agency referents might have worked at other times, I specifically credit the record involved and discredit any suggestion inconsistent with the document.

Thus, the pattern under scrutiny for determining if the use of agency referents in the newsroom on and after May 2007, was a unilateral change or rather was simply the continuation of a past practice may be simply stated. The Respondent used outside agencies to refer individuals to do newsroom, i.e., unit, work as measured on a total number of weekly invoices basis as follows:

2000—2 weekly invoices starting in October 2000
2001—34 weekly invoices throughout 2001
2002—2 weekly invoices ending in January 2002
2003—hiring freeze—no employees referred
2004—hiring freeze—no employees referred
2005—hiring freeze—no employees referred
2006—hiring freeze—no employees referred
2007—invoices commence May 29, 2007

Applying the Board cases cited to the past practice of the Respondent's use of agency referred individuals as workers in the newsroom, it is clear that the 16 months of agency use in colander years 2000 and 2001, followed by a total freeze and discontinuance of agency use for the following 63 calendar months in 2002 into 2007—over 5 years—clearly does not rise to a level of a sufficient past practice to allow its reintroduction without notice to and bargaining with the unit employees representative. The Respondent had not used temporary agencies for newsroom work for over 5 years. That hiatus period is simply far too long to consider the 63-month old prior use of agencies to refer newsroom workers as part of a pattern or practice of conduct when viewed in May 2007. Further, there is no evidence newsroom employees were told of the practice during that period. Clearly the use of temporary agencies in the manner noted was not something that occurred with such regularity and frequency that unit or newsroom employees in 2007 could reasonably expect to continue or reoccur on a regular and consistent basis.

Indeed the use of temporary agencies prior to 2007, was not a pattern or repeat or recurrent practice. The meaning of all such words carries the concept of doing again. Here the Respondent's use of agencies to procure newsroom workers—from the perspective of the time just before agencies were used in May 2007—was undertaken in 2001, and continued for a bit

[15] Since invoices were submitted on a weekly basis, the commencement of unit work by agency referents was in May 2007.

of 2002 then was simply discontinued for over 5 years. The description best applied to this course of conduct is initial use followed by discontinuance followed years later by resumption. There was no repeated course of action; no continuing pattern of conduct. So, too, the May 2007 resumption was a first time resumption not a repetitive element in a pattern or practice. The May 2007 resumption may have started a pattern, but the test here is for the actions of May 2007 to constitute part of the continuing pattern not to be the founding element in a resumption of long discontinued conduct.

I have found the hiatus of over 5 years in the Respondent's use of temporary agencies for obtaining newsroom workers does not support a finding of a pattern or practice. I have found that the unit or newsroom employees could have had a reasonable expectation the Respondent would start using temporary agency referrals in March 2007. I therefore find and conclude that the Respondent did not have a "past practice" at relevant times within the meaning of the Board decisional law, set forth in part above, which could justify its May 2007 decision to use temporary agencies to procure independent contractors to do unit work in the newsroom. I therefore find the decision was taken by the Respondent without meeting its notification and bargaining obligations to the Union.[16]

c. Summary and conclusion respecting the unilateral subcontracting allegation

There is no doubt that the Respondent resumed the use of agency employees. I have determined that these individuals are not employees of the Respondent. Thus the Respondent is not a joint nor a single employer of these temporary agency referents. I have further found that these individuals are not members of the Respondent's bargaining unit represented by the Union. Thus any issue remaining respecting these individuals must be analyzed considering them to be subcontractors assigned by the Respondent to do unit work.

There is no doubt and I have explicitly found earlier that the amount of unit work lost to unit employees through the Respondent's use of the subcontractors provided by the agencies in and after May 2007, was substantial and resulted in a significant reduction in the number of unit employees employed by the Respondent who were in the bargaining unit. I have further found that the Respondent's subcontracting commenced in May 2007, and the Respondent's decision to commence the subcontracting was taken after September 27, 2006. Thus I have found both the subcontracting and the decision to subcontract occurred during the period the Union represented the Respondent's unit employees.

Given the above, I found that the Respondent's decision to subcontract, its subcontracting, and the effects of its subcontracting on unit employees, are mandatory subject of bargaining under the Supreme Court's decision in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). Having made that threshold determination, I then turned to the issue of whether or not the Respondent was simply continuing a past practice of subcontracting that commenced before its obligation to bargain with the Union arose. I found, as set forth above, that the past conduct respecting contracting relevant to agency referents doing unit work did not rise to the level of a past practice justifying an omission, let alone refusal, to notify and bargain

[16] As noted, supra, the term "temporary" applies to the agencies and not to the duration of worker's employment. The record shows that the Respondent employed directly a very few individuals for limited, fixed duration or specific task employment. These true temporary employees of the Respondent are not involved herein. The Respondent has argued the agency referents were temporary employees. Based on the record herein, I have found, supra, they were not Respondents employees.

with the Union respecting the Respondent's decision to subcontract, its actual subcontracting or the effect of the subcontracting on the bargaining unit.

Based on all the above findings, I further find that the Respondent, by its admitted failure and refusal to notify the Union before the decision was taken to use agency-referred independent contractors to do unit work on and after May 2007 into 2009, and its further failure and refusal to provide an opportunity to the Union to bargain about the subcontracting decision and its effects during that period, violated Section 8(a)(1) and (5) of the Act. These findings and conclusions sustain the General Counsel's complaint allegations as set forth in complaint paragraphs 10 and the conclusionary paragraphs as noted supra.

6. Was the Respondent's use of outside Agency employees to do unit work a violation of Section 8(a)(3) and (1) of the Act?

a. The parties' positions and the applicable case law

The General Counsel and the Charging Party argue, and the complaint at paragraphs 10, 24, and 25 alleges, that the Respondent undertook the subcontracting discussed above to discriminate against its unit employees in violation of Section 8(a)(3) and (1) of the Act. The General Counsel and the Charging Party rely heavily on the timing of the contractor use by the Respondent to do unit work, and, finally, by the fact that the agency supplied contractors were used in violation of Section 8(a)(5) of the Act and the Respondent's delays and refusals to provide information respecting them were also in violation of Section 8(a)(5) of the Act. The Respondent argues that use of the agency-supplied contractors at all relevant times was a business driven continued use which had been a longstanding practice. The Respondent also argues no violations of Section 8(a)(5) of the Act may be properly found respecting any of its actions respecting these individuals.

An employer violates Section 8(a)(3) and (1) of the Act if that employer subcontracts bargaining unit work in response to union activity. *San Louis Trucking, Inc*., 352 NLRB 211 (2008),*Gaetano & Associates Inc*., 344 NLRB 537 (2005), enfd. 183 Fed. Appx. 17 (2d Cir. 2006). Subcontracting of bargaining unit work violates Section 8(a)(3) and (1) of the Act when undertaken for antiunion reasons. *Lear Siegler, Inc*., 295 NLRB 857, 860 (1989). The question in most antiunion conduct cases, including the instant alleged subcontracting discrimination allegation, is the employer's motivation for taking the actions under challenge. The Board's *Wright Line* analysis is applied in such situations. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Under *Wright Line*, the General Counsel has the burden of proving, by a preponderance of the evidence, that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Antiunion motivation may be established through direct or circumstantial evidence. An example of such circumstantial evidence includes the timing of the decision. "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and

competent evidence of unlawful motivation." *Gaetano & Associates*, 344 NLRB 531 (2005), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Thus the Board stated in *Allstate Power Vac., Inc.*, 354 NLRB No. 111, slip op. at 4 fn. 12 (November 30, 2009).

> In analyzing these allegations under *Wright Line*, the judge should, where necessary, address the General Counsel's arguments that the Respondent deviated from past practice in taking the above alleged unlawful actions and/or treated the affected employees differently than it had treated other similarly situated employees in the past.

b. The timing of events

The timing of events has been discussed extensively above and need be presented here only in summary form. Prior to any employee union activities, differences of opinion between elements in the newsroom and management had existed which culminated in July 2006 with the resignation of the Respondent's executive editor, its managing editor, its deputy managing editor, its city editor, its business editor, and its sports editor. Five staff writers, a columnist, and a copy editor resigned in the days following.

Newsroom employees commenced union activities in July 2006. The relevant facts concerning the petition and certification are not in dispute. A representation petition, Case 31–RC–8602, was filed on August 10, 2006. The election was held on September 26, 2006. A hearing on postelection matters was conducted on January 9 and 10, 2007, before Administrative Law judge William J. Schmidt. Judge Schmidt issued his Administrative Law Judge Report and Recommendation to Overrule Employer's Objections and Certify Petitioner, JD(SF)-06-07, on March 8, 2007. The report and recommendation was appealed by the Respondent to the Board who on August 16, 2007, adopted the report and certified the Union as the representative of the unit employees.

As has been discussed above and will be further discussed below, the Respondent from early 2002 into May 2007—over 5 years—did not use outside agencies to provide independent contractors to do unit work. During the period into May 2007, the Respondent's agents prepared and obtained approval of personnel requisition forms for some replacements to be hired for the newsroom employees who left for various reasons. The General Counsel notes, none of these approved personnel requisitions suggests the replacements would be employed on a temporary basis or for a specific job or fixed length of time. No outside agency employee was used to fill these positions.

In late May 2007, for the first time since January 2002, the Respondent utilized outside agencies to provide contractors to do newsroom work. In July 2007, four contractors were used in the newsroom. By November 2007, the number of contractors totaled 10. At the time of the commencement of bargaining in mid-November 2007, the bargaining unit comprised 34 individuals and the contractors remained at 10. By May 2008, 24 individuals worked in the newsroom: 19 unit employees and 5 contractors. In December 2008, the totals were 16 unit employees and 8 contractors. The Respondent discontinued use of newsroom outside agency contractors in February 2009, converting 6 contractors into unit employees.

Yolanda Apodaca testified that she recommended the reinitiation of the use of outside agencies to provide contractors because of the large number of new hires that were required as a result of the tumult described and the concomitant employee turnover, coupled by the fact that the Respondent's human resources department was of limited size and capacity. It is clear from the testimony of many individuals who came to be outside agency contractors used by the

Respondent in the newsroom that these individuals' interviewing, evaluation of experience, and general applicant screening and hiring evaluation was undertaken by the Respondent's staff. Further it was at least often true that the evaluating agents of the Respondent were unaware that a job applicant, in the event the supervisor recommended the applicant's hire, was going to be hired as an outside agency referral rather than as a Respondent employee. Further, it is clear that the Respondent in the cases detailed in the record, advertised or otherwise directly procured job applicants for its positions and, only after an applicant had been vetted and selected by the Respondent, was that applicant referred to the outside agency. Indeed some job applicants were notified they were hired by the Respondent directly as the Respondent's employees and actually commenced employment only thereafter to be informed they were to be contractors rather than the Respondent's employees.

Marci Wormser testified that she sought work in the Respondent's newsroom by having a friend deliver her resume to Respondents Assignment Editor Scott Steepleton. Steepleton interviewed Wormser in early November 2007. She was told by Steepleton later that day that she was hired, how much she would be paid, and he asked her when she could start. Wormser was then directed to the Top Echelon Agency which made her its employee and referred her back to the Respondent as a Top Echelon contractor. In that capacity Wormser started on November 18, 2008, in the Respondent's newsroom working as a reporter. After some 10 days, she was informed by supervision that since management had not yet formally approved her employment as a Top Echelon employee she would be transmuted to a freelancer selling articles directly to the Respondent as an independent contractor. She was also told that as a freelancer she was to discontinue using the Respondents equipment and office space. In late January 2009, Wormser was converted from freelancer to newsroom unit employee by the Respondent and remained so at the time of her testimony using once again the Respondent's equipment and offices.

c. Findings and conclusions respecting the Respondent's use of agency employees as a violation of Section 8(a)(3) and (1) of the Act

I have found that the Respondent's recommencement of the use of outside agency contractors to do unit work in the newsroom, in and after May 2007, was a unilateral change undertaken in violation of Section 8(a)(5) of the Act. My 8(a)(5) analysis set forth supra that resulted in that conclusion considered but rejected, the Respondent's argued assertion that the use of outside agencies in and after May 2007, was simply a benign business-driven continuation of a longstanding past practice of the Respondent. Rather, I found the reinstitution of the use of outside agencies to employ contractors doing unit work at the Respondent was a reinitiation of a practice that had lain fallow for over 5 years and could not be regarded as simply a continuation of longstanding practice.

The analysis here must consider the further issue of the reason the Respondent reinitiated the practice. As noted supra, Apodaca, testified that the practice had been discontinued years before by a high official of the Respondent as simply too expensive. She testified that she successfully recommended its reintroduction to the Respondent's Copublishers von Wiesenberger and McCaw and possibly counsel in the latter half of 2006, as a way of avoiding having her office overwhelmed by continuing need for the recruitment and hire of replacement employees given the recurrent vacancies that had occurred. She testified she was told to "seek assistance if I need it." She was the only individual to testify regarding this event, its date or the matters considered.

Earlier I expressed great doubt that such a meeting would have occurred in the latter half of 2006, only to have the first use of the requested and granted right to use outside

agencies occur in May 2007, given that many vacancies—the represented basis for the argued strain on the industrial relations department—had occurred well prior to May 2007. Further given the hiring of the outside agency staff was initiated by the Respondent through its own advertisements, and given that the Respondent interviewed, evaluated, and offered initial hire to the outside agency staff before they were ever referred to such outside agencies, it is difficult to conclude that outside agencies—especially given their admitted greater cost to the Respondent—were used as part of a logical and efficacious business-driven technique to add staff when the human recourses office of the Respondent was overwhelmed. Further, I note the use of such outside agency-provided staff continued and even increased in later times when the human resources office was far less overworked. Finally, as will be discussed supra in the information provision analysis, the suspicious transmutations of employee Wormser from employee applicant, contractor, and freelancer during the time the Union was inquiring about outside agency employees suggests the status of those doing unit work was manipulated by the Respondent for strategic and tactical reasons having no relationship to the business needs of the Respondent or the workload of the human resources office. I specifically found, supra, that the decision to use agencies again occurred during the time the Respondent was obligated to bargain with the Union.

Considering all the arguments of the parties, the testimony of the witnesses and the record as a whole, using the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and further guided by the cases cited above including those dealing with timing as a legitimate part of the General Counsel's prima facie case, I find that under *Wright Line*, the General Counsel has met his burden of proving by a preponderance of the evidence that the Respondent's antiunion sentiment was a motivating factor in the Respondent's subtracting decision and in the implementation of that decision on and after May 2007. The timing, context of events, and pattern of illegal conduct, in light of the record as a whole, filled vacancies and did combine to easily sustain the General Counsel's *Wright Line* burden here.

In this regard it is important to note that the subcontracting of the work involved a significant proportion of the bargaining unit. By having nonunit individuals instead of unit employees to do a significant proportion of the Respondent's unit work, indeed here having individuals who are not even employees of the Respondent doing a significant portion of unit work, the Respondent not only reduced the number of its own unit employees, it divided the interests of those who are doing unit work. This is so because those who are employed by the outside agencies could gain no benefit from the Respondent's unit employees union representation or those unit employees potentially gaining a contract and/or improved wages and working conditions. And, dividing those who do unit work, as described, weakens the economic strength of the Respondent's represented unit employees who no longer represent the entirety of those who do the work. During any work stoppage, the unit employees withholding of labor would only be effective in proportion to the amount of unit work withheld. The contractors would be less likely to withhold their labor or support any economic action advanced for improve the unit employees circumstances. The more numerous the nonunit employees doing unit work, the weaker the Union's economic position.

Since I have found the General Counsel has satisfied his initial burden under *Wright Line*, that the Respondent's antiunion sentiment was a motivating factor in the subtracting decision and in the implementation of that decision in the use of outside contractors to do unit work in the noted period from May 2007 into 2009, the burden then shifts to the Respondent, in the nature of an affirmative defense, to demonstrate that the same use of outside agencies to provide contractors to do bargaining unit work over the indicated period would have taken place even in the absence of the protected conduct.

Considering the Respondent's arguments on the question de novo here, and also considering the arguments of the other parties and the record as a whole, I find that the Respondent has failed by a significant margin to meet its burden of showing it would have taken the actions it did in the absence of its employees' protected activities. The Respondent has argued and submitted some evidence that management granted its human resources director the right to use outside agencies to supply individuals who would not be part of the bargaining unit to do bargaining unit work in the middle of an impassioned campaign by both management and the Union. The deciding agents did not testify on the question of why they did so. There is no question that the practice had been discontinued years prior due to it high costs. The Respondent has made clear the fact that more recent times have been ones of significant economic pressure—and which present the likelihood of continued economic pressure—on the Paper, i.e., it was a time to conserve not to resume expensive procedures.

There is no evidence that the economics of the process had changed from the time the earlier use of such agencies was discontinued by the Respondent on cost grounds over 5 years before. Also, there was no evidence offered by the Respondent to explain why the entire process of subcontracting was reinitiated, as I have found was required by Section 8(a)(5) of the Act—without notifying and bargaining with the Union.

In sum and substance, there is simply an insufficiency of motivation evidence offered by the Respondent beyond the general "hiring workload" testimony discussed, supra, to support the proposition that the same use of outside agencies to provide contractors to do bargaining unit work over the indicated period would have taken place even in the absence of the protected conduct. Accordingly I find the Respondent has not consummated its affirmative defense as provided in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that this practice would have been resumed even were the employees not to have engaged in union activities and selected the Union to represent them. I therefore find the subcontracting involved herein was undertaken in violation of Section 8(a)(3) and (1). The complaint in these regards is sustained.

E. Was the Response of the Respondent to the Union's Information Requests Concerning the Respondent's Use of Outside Agencies to Provide Unit Workers a Violation of Section 8(a)(5) of the Act?

1. Events relevant to the information requests

On October 20, 2007, as part of the prenegotiation exchange of information, the Union through Caruso sent the Respondent's chief negotiator, Zinser, a letter seeking a detailed list of information including, inter alia, the following:

> 1. A list of current unit employees, including their names, dates of hire, rates of pay, job classification, last known address, phone number, e-mail address and Social Security number. We are informed that a number of recent hires performing newsroom work may have been labeled or notified that they are "temporary", please identify and provide the above listed information for all "temporary" nonsupervisory employees who have done any bargaining Unit work since July 1, 2006.
>
> * * * *
>
> 37. A copy of any company policies or procedures with respect to the hiring of temporary summer help.

38. A Statement of any company policy or procedure with respect to the hiring of any summer or temporary help.

Zinser responded to the request by letter dated November 9, 2007 to Caruso. It stated in relevant part:

I will address the requests as you have numbered them:

1. This is being prepared as we speak.

* * * *

37. No documents exist.

38. No documents exist.

The parties conducted their initial bargaining sessions on November 13 and 14, 2007. Discussions included the Respondent describing the use of agency-provided employees to do unit work. The Union sought details regarding the relationship of the agencies to the Respondent and the process generally. The dialogue continued on November 14, with the Union expressing concern respecting the details and even the legality of the process and Zinser indicating he was not fully informed of the details involved. The session concluded with the expectation the Union would submit a written information request on the matter.

By letter dated November 16, 2007, Union counsel Ira Gottlieb, by facsimile, e-mail, and U.S. Mail, sent Zinser a letter with the captioned regards: "Unlawful hiring of 'temporary' employees to perform bargaining unit work." The letter stated in part:

Following up on our discussion of November 14, 2007, at the negotiating table, this is to request the Employer's full and complete rationale(s) explaining why the nine" temporary" employees allegedly hired by either Top Echelon and/or Office Team Employees and working as reporters for the Santa Barbara News-Press, are, in Ampersand's view, not part of the bargaining Unit consistent with the NLRB's certification and the requirements of the NLRA.

* * * *

As the Union has advised you, since these employees are clearly (and undisputedly) performing bargaining Unit work, and all began work on and after July 2007, they must be included within the Unit represented by the Union. As you are aware, the number of eligible employees at the time of the election in September 2006 was 42; the list of unit employees you provided in the course of bargaining numbers 23, including a "gossip columnist" who was not in the Unit at the time of the election. The Union has demanded that the nine "temporary" employees (and any others doing unit work) be included and that failure to include them and failure to notify the Union of their hire, are violations of Section 8(a)(5) of the National Labor Relations Act. You requested the opportunity to explain in writing, as opposed to orally across the table, why they need not be part of the bargaining unit. Please provide that rationale, and the following information, no later than November 26, 2007.

For each of the "temporary" employees, state:

1. How each of the employees made contact with the SBNP, if at all, during the hiring process;

2. Whether the employee responded to an ad placed by the SBNP;

3. Whether the employee responded to any communication from the SBNP to begin or continue the hiring process;

4. Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;

5. The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process;

6. The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP; and

7. Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instruction (including editing) for workplace performance.

* * * *

. . . Please respond by November 26. If you wish to discuss this matter, please feel free to call me.

On November 27, 2007, the Union filed the initial charge involved in this consolidated proceeding, Case 31–CA–28589, the "basis of the charge" portion of which reads:

Within the last six months, the employer has failed and refused to bargain in good faith, by subcontracting and/or using employees it labels "temporary" employees to perform bargaining unit work purportedly hiring them through an employment agency, contrary to the certification issued by the NLRB in August 2007 and without prior notice to the Union and an opportunity to bargain. The employer has further violated the Act by failing and refusing to provide requested information relevant to its violation of the Act in utilizing alleged "temporary" employees to perform bargaining unit work.

On November 20, 2007, the Respondent counsel Zinser sent to Union counsel Gottlieb a letter in answer to Gottlieb's letter quoted in part above. Zinser's letter states in part:

Let us put this in context. Information requested regarding the temporary employees was part of a very large, 59-point information request made by Mr. Caruso. Santa Barbara News-Press has, in large measure, responded to that information request. On November 14, 2007, we provided some specific information on the temporary employees which you acknowledge in your letter.

Having some other questions about the temporaries, you began to ask them. I then asked that you also reduce those additional questions to writing so that there would not be any misunderstanding about just what was being requested, and you agreed to do so. You did not, at that time, ask that we provide you with any "rationale." You do ask that in your November 16, 2007 letter.

Your information request arrived on November 16, 2007. I was out of town on business matters from November 12 through November 16. The following week was the week of Thanksgiving. I was out of town (Cincinnati, where my parents and sisters live) for the Thanksgiving holiday, November 21 to November 25. This week we have been quite busy completing the post-hearing brief to Judge Kocol in the unfair labor practice matters.

Thus, under the circumstances, your filing unfair labor practice charges is premature. First of all, you do not get to unilaterally establish time frames. Any Employer has a reasonable amount of time within which to respond to information request. Your supplemental information request of November 16, 2007 is being reviewed and we will respond within a reasonable period of time.

On January 23, 2008, the Respondent through counsel Zinser provided to counsel Gottlieb for the Union a 2-page letter captioned "Supplemental Information Concerning Temporary Employees." The letter stated (bolding in original):

After conferring with Scott Steepleton and Yolanda Apodaca, on behalf of Santa Barbara News-Press, I will supplement information we had previously given you concerning the temporary employees.

1. How each of the employees made contact with the SBNP, if at all, during the hiring process?; (Bolding in original.)

Santa Barbara News-Press did place ads seeking employees for the vacancies. In some instances the individual contacted Santa Barbara New-Press as the result of seeing the ad. In other instances the individual was referred to Santa Barbara News-Press by Top Echelon or Office Team.

2. Whether the employee responded to an ad placed by the SBNP?;

As indicated in the answer to question 1, in some cases yes.

3. Whether the employee responded to any communication from the SBNP to begin or continue the hiring process?;

Whether responding to an ad or whether referred by one of the two agencies, the individual would be interviewed by Scott Steepleton or another newsroom supervisor. This interview may have been only telephonic. In the instance of someone from the local Santa Barbara area, there could have been an in-person interview. Once it was determined by Management that the individual was a possibility, they were then referred to Top Echelon or Office Team. Top Echelon or Office Team would refer the individuals to the Santa Barbara News-Press for work. A more thorough interview process was not involved because the individual was going to be a referral from a temporary agency. If the individual did not work out, they would be sent back to the agency. The individual is hired by the agency; the individual is paid by the agency; to the extent the individual has any kind of benefits, they were provided by the agency. In some cases the individual working at the Santa Barbara News-Press was referred to the Company by the agency without an interview.

4. Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process?;

Yes to both.

5. The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process?;

Scott Steepleton, Dale Rim, Barry Punzal and/or Yolanda Apodaca, Top Echelon and Office Team.

6. The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP?; and

See answer to question 5.

7. Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instruction (including editing) for workplace performance?

Scott Steepleton and/or Dale Rim and/or Barry Punzal supervise the individuals with respect to their assignments for writing for Santa Barbara News-Press. If there is a disciplinary and/or performance problem, the individual is referred back to the agency.

On December 3, 2007, the Union through counsel Gottlieb sent a letter to counsel Zinser by facsimile, email, and US mail with the caption: Re: Unlawful hiring of "temporary" employees to perform bargaining unit work." The letter states in part:

> In addition to the requests for information that are now outstanding on this issue, please provide the following, all no later than December 21, 2007:
>
> 3. Has [the Respondent] ever used employees it labeled "temporary" employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?
>
> 4. If so, state the following for each instance of such use of temporary work:
>
> f. The date(s) on which the "temporary" employee performed bargaining Unit work;
>
> g. The name(s) of all such temporary employees;
>
> h. The name(s) of any temporary agency which you claim employed the temporary employees;
>
> i. The specific project or task(s) performed by the temporary employee(s);
>
> j. The pay rates for the temporary employee(s).

The enumerated information requested in this letter is alleged in complaint subparagraph 7(b).

By letter dated January 30, 2008, sent by facsimile transmission and commercial carrier, counsel Zinser wrote counsel Gottlieb. The letter stated in part:

> In regard to your additional information requests contained in your December 3, 2007 letter that are the subject of Charge No. 31–CA–28589, please note that I provided that information to you at our November 14, 2007 bargaining session. If you remember, at that bargaining session I handed you and Nicholas Caruso a list of temporary employees performing work in the newsroom, which included their name, agency, job title, dates performing Unit work and pay rates.
>
> I have enclosed that list for your convenience, I have also enclosed updated information to reflect the present list of temporary employees in the newsroom. I hope this resolves the matter and I look forward to continued bargaining.

The letter included two attached lists. The first is the list identified in the letter as that provided by the Respondent to the Union along with other materials at the bargaining session of November 14, 2007. That list contains the names of eight Top Echelon employees working in the newsroom with their starting dates, the earliest of which is July 9, 2007, and one Office Team employee working in the newsroom, again with a July 2007 starting date. The second or revised list addresses the subsequent changes in the status of these newsroom employees: the list deletes two of the earlier-listed Top Echelon employees who departed and adds four additional "temps" who started variously in the period October 2007 through January 2008.

2. The complaint allegations regarding the temporary agency employee information requests

As discussed supra, the complaint alleges in paragraph 7(a) that on November 16, 2007, the Union sought the noted information and, as alleged in complaint subparagraph 7(g), the Respondent did not provide it until about January 23, 2008. Subparagraph 7(f) alleges the information was relevant and necessary to the Union's performance of its duties as the employees' representative. Similarly, the complaint alleges in paragraph 7(b) that on December 3, 2007, the Union, sought the noted information and, as alleged in complaint subparagraph 7(h) did not provide it until about January 30, 2008.[17]

The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act. The heart of the parties dispute in these regards is whether or not the Respondent was reasonable to take from November 16, 2007 to January 23, 2008, a period of 69 days, in providing the requested information in the first instance and from December 3, 2007 to January 30, 2008, a period of 59 days, to provide the requested information in the second instance.

[17] The General Counsel's trial motion to change this date to May 26, 2009, was denied. See fn. 13 at p. 34, supra.

3. Analysis and conclusions regarding delay

a. The preliminary matters

Several aspects of these events are not relevant to resolving the noted complaint issues. First, the fact that a charge was filed concerning these employees neither enhanced the Union's right to the information requested nor in some way obligated the Respondent to speedier production of the information. Similarly, the charge neither enhanced nor diminished the Respondent's obligations under the Act to provide the information timely to the Union. The charge and the parties' responses to the Board and to one another regarding it are independent of their rights and obligations respecting information requests in the bargaining process.

There is one collateral matter that was not focused on by the parties but merits mention herein: Whether or not the Respondent was obligated to provide information at all concerning employees not in the unit and who are not the Respondent's employees?

Information requested by a labor organization representing a unit of an employer's employees enjoys a presumption that information concerning those employees is relevant and should be provided. *Chrysler, LLC*., 354 NLRB No. 128 (January 6, 2010). There is no such presumption concerning information concerning nonunit employees or the employees of other employers. *Disneyland Park*, 350 NLRB 1256 (2007), As to such information, the labor organization bears the burden of establishing the relevance of the information sought to the bargaining. The General Counsel can establish relevance by presenting evidence that either (1) the union demonstrated the relevance of the information, or (2) the relevance of the information should have been apparent to the employer under the circumstances. Ibid. The Board notes this burden is "not exceptionally heavy" and is met by "some initial but not overwhelming demonstration." *St. George Warehouse, Inc*., 341 NLRB 904, 925 (2004). The Board has commented further that the burden is not "an exceptionally heavy one, requiring only a showing be made of a 'probability that the requested information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998), quoting *Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

In the instant case, the parties did not argue either at the time of the Union's request nor in the instant proceeding concerning whether the Union was entitled to the information under challenge in the information request portions of the complaint. In fact the information has been supplied to the Union only the timing of the provision is in issue. Presumably, the relevance of the information sought was "apparent to the employer under the circumstances." I explicitly find, however, respecting these elements of the complaint that the Union met its burden of showing relevance for the requested information through its demonstration that it had legitimate questions concerning whether the individuals inquired about were or were not unit employees. And, further, given the unit work that was admittedly done by the individuals under inquiry, the Union had a legitimate basis to inquire concerning the timing of the Respondent's decision to utilize such individuals to do unit work and the implications of that decision.

This is so, not simply because of the work of these individuals having a potential impact on bargaining unit employees' terms and conditions of employment,[18] but also because the

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[18] See *Disneyland Park*, 350 NLRB 1256 (2007); *Richmond Health Care*, 332 NLRB 1304, 1307 fn. 1 (2000); *Associated Ready Mixed Concrete, Inc.,* 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381

Continued

information was pertinent to the Union's decision to file or process grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Bell Telephone Laboratories*, 317 NLRB 802, 803 (1995), enfd. mem. 107 F.3d 862 (3d Cir. 1997). Based on all the above, I find the information sought was relevant to the Union's role as representative of unit employees and the Respondent was obligated under the Act to provide the information sought by the Union.

There was no dispute the information was requested by the Union as alleged. I have found the Respondent was obligated to provide the information sought. The complaint concedes the information was provided. The final element of the complaint allegations concerning these information requests is whether or not the response to each of the two requests was sufficiently timely. That is the heart of the matter and will be addressed immediately below.

b. The issue of delay

If the Act requires employer disclosure to a union of requested information relevant to bargaining, it should be compiled in a reasonable period and disclosed in a reasonable time. The Board has long held that unreasonable delay in providing such information is a violation of the Act as much as not providing the information at all. *Valley Central Emergency Hospital*, 349 NLRB 1126 (2007). The employer must act in good faith to provide the information as promptly as circumstances allow. *Postal Service (Bobby Cline)*, 352 NLRB 923 (2008). The test of the reasonableness of any particular delay is based on the totality of the circumstances rather than the simple passage of any specific amount of time. Those circumstances include the larger pattern of conduct regarding the relations of the parties. *Albertson's, Inc*., 351 NLRB 254 (2007). In *Cresfield Convalescent Center*, 287 NLRB 328 (1987), the Board adopted a judge's analysis that a temporary misjudgment causing a brief and noninjurious nondisclosure in the midst of complying with other requests did not warrant a finding of unlawful conduct. The time required to acquire the information requested is yet another factor in evaluating the reasonableness of the period of nondisclosure. *E. I. Du Pont de Nemours & Co*., 346 NLRB 553, 581 (2006).

The context of the information requests at issue here has been set forth and discussed in some detail supra. Counsel for the Respondent notes on brief at 18–19 that the information requests occurred immediately after the parties' initial bargaining session at which time the Respondent had provided very substantial amounts of earlier union requested information. Further the Respondent argues that the period after the request involved both the general seasonal press of business and the industry specific rush of the Thanksgiving–New Years Day holiday period in the newspaper industry as well as the unusual circumstance that the very substantial posthearing brief was in preparation in the earlier unfair labor practice hearing before Judge Kocol. And, the Respondent argues, the primary, indeed essentially single, gatherer of the requested information at the Respondent's facilities was the head of the small human resources department, Apodaca, who was further burdened with a multitude of tasks during this busy end of year period.

The General Counsel argues that the delays of the Respondent in providing information in response to the two information requests: 69 days–approximately 10 weeks in the initial case, and 59 days–approximately 9 weeks in the second case, constitute periods of information provision delay frequently found by the Board to be unreasonable and a violation of Section

(6th Cir. 1976).

8(a)(5) and (1) of the Act citing multiple cases.[19] And the General Counsel argues that beyond the season involved, the testimony regarding the business and good intentions of Apodaca, and the briefing burdens of the four counsel of record from the two firms litigating the Respondent's side in the Kocol case, there was no evidence offered by the Respondent regarding any special unavailability of the information requested or its volume or complexity. Thus, the General Counsel argues there is simply no reason to grant the Respondent additional time beyond simple test of reason in complying with these two requests.

The Charging Party, and the General Counsel, also argue that the evaluation of the information elements of the complaint must take place in what they characterize as the pattern of unfair labor practices of the Respondent. And in that larger context, there is the finer point that the information requests deal with the use of outside agencies which use by the Respondent constitutes violations of Section 8(a)(5) and (1) of the Act and, further, violations of Section 8(a)(3) and (1) of the Act. Thus, they argue, there is no innocent context as to these information requests.

I have carefully considered the arguments of the parties, the record as a whole and the entire context of events and circumstances respecting the relationship between the parties. The General Counsel and the Charging Party are correct that the bare number of days taken by the Respondent to provide the requested information devoid of context is regularly found to be unreasonably long and in violation of the Act. But all delays have a context, a setting and circumstances that allow the test of reasonableness to be applied to the particular situation. The cases cited above and numerous others command attention to and evaluation of such context in reaching any conclusion as to the reasonableness of the delay.

The circumstances respecting the November 16, 2007 request cut both ways. The importance of the information, the fact that it had been earlier discussed in negotiations and the fact that the request for the information was delayed in that the Respondent asked for the request to be put in writing – all these factors - support a finding that it was necessary to provide the information forthwith. The season and press of business justify some delay in provision of the information, but not a delay extending to the 23rd of January 2008. I do not find that the information requested was so burdensome to gather, compile, and report, that the time taken to provide it was necessary or reasonable. I also find of significance the fact that the information at issue concerned the temporary agency contractors, the Respondent's use of whom has been found supra to violate Section 8(a)(1), (3), and (5) of the Act. All of the above, in the context of the record as a whole, convince me that the Respondent's delay in providing the November 16, 2007 requested information until January 23, 2008, was unreasonable and violated Section 8(a)(1) and (5) of the Act. This allegation of the complaint is sustained.

Turning to the information request of December 3, 2007, respecting which the Respondent provided the requested information on January 30, 2008, my analysis and findings and conclusions are the same. The factors involved are factually equivalent. The context, subject matter, press of business arguments, etc., are equivalent. The distinctions are without legal difference. All of the above, in the context of the record as a whole, convince me that the Respondent's delay in providing the December 3, 2007 information until January 30, 2008, was unreasonable and violated Section 8(a)(1) and (5) of the Act. This allegation of the complaint is sustained.

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[19] *Postal Service*, 354 NLRB No. 58 (2009); *Woodland Clinic*, 331 NLRB 735 (2000); *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995), and many others in the General Counsel's brief at 22.

F. Allegations respecting employee Richard Mineards

1. Complaint allegations respecting Mineards

Complaint paragraph 14(b) alleges the Respondent laid off its employee Richard Mineards. Complaint paragraph 18 alleges that the Respondent undertook the layoff without prior notice to nor affording the Union an opportunity to bargain with the Respondent with respect to the decision to lay off Mineards or to bargain respecting the effects of the layoff. Complaint paragraph 19 alleges that the Respondent through its agent, Don Katich, bypassed the Union and dealt directly with its employees in the unit by offering an employee nonunit terms and condition of employment. The complaint further alleges at paragraph 23 that the layoff was undertaken by the Respondent because the employees formed, joined, or assisted the Union and engaged in protected concerted activities and in order to discourage the employees from engaging in these activities. Paragraph 24 of the complaint alleges this conduct violates Section 8(a)(1) and (3) of the Act. Paragraph 25 of the complaint alleges this conduct violates Section 8(a)(1) and (5) of the Act.

The complaint further alleges in subparagraph 7(e) that on or about January 14 and 15, 2009, orally, and January 26, 2009, in writing, the Union requested the Respondent furnish it with information related to the employment status of employee Mineards and, in paragraph 7(f) that the information requested was relevant to the Union's performance of its duties as representative of employees in the bargaining unit. The complaint subparagraph 7(k) alleges that the Respondent failed and refused to provide the Union with the requested information until about February 9, 2009, and in subparagraph 7(l) alleges this delay as unreasonable. Paragraph 25 of the complaint alleges this conduct violates Section 8(a)(1) and (5) of the Act.

2. Facts respecting Mineards

Richard Mineards began working for the Respondent as a columnist and radio broadcaster in April 2007, and worked through 2008, for the Respondent in the bargaining unit[20] as a salaried employee. On or about the morning of January 7, 2009, the Respondent's director of news operations, Don Katich, met with Mineards in Mineards office and, in Mineards credible and unchallenged testimony, told him: "we are eliminating your column forthwith because of cost cutting." Mineards testified:

> [Katich] basically said it was because of cost cutting and then went on to explain that it was in general but obviously the economy had impacted enormously with newspapers and magazines across the country, and that it was nothing to do with the column but merely a cost-cutting measure. . . .

Arrangements were made for final payments and vacation of the premises and the conversation ended amicably. After perhaps a week, Katich was in contact with Mineards proposing he resume his column for the Respondent on a freelance basis. The two met over lunch on January 15, 2009, to discuss the matter and reached a tentative agreement on a weekly payment for the column which Katich agreed to present to higher management. Management's responding offer accepted the freelance payment amount but sought considerable additional

[20] While not employed at the time of the election, there was no dispute that as a columnist Mineards was in the bargaining unit, i.e., he was within the unit inclusion language quoted supra which includes the list of included categories: "writers, reporters, copy editors, photographers, and graphic artists."

writing of "personality profiles" each week which Mineards indicated involved an unsatisfactory amount of time and effort for the money involved. The parties shared views for a time, but no agreement was reached and within a few days Mineards accepted other employment.

The Respondent did not notify the Union nor offer to bargain with it respecting these Mineards events. Caruso who testified he had learned of Mineards layoff from a blog, asked Zinser about Mineards status the morning of the January 14, 2009 bargaining session. Zinser responded he did not know of the individual, took his name down and indicated he would look into it. During that day's negotiations and the following day's negotiations Caruso asked again regarding the matter with Zinser responding he would have to get back to Caruso. Travis Armstrong, the Respondent's editorial page editor, who was present in bargaining, did not confirm Mineards layoff. Caruso followed up on the request for information with a letter to Zinser dated January 26, 2009. The letter demanded an immediate explanation of the circumstances of Mineards layoff and an explanation of why the Respondent had failed to bargain over the Mineards matter. The letter asserted the Union would take legal action should the Respondent not respond to the request by close of business on January 27, 2009. In late January, the Union did in fact file a charge.

The Union received its first response to the information request in the form of a February 9, 2009 letter from counsel Zinser to Caruso. The letter informed the Union that the Respondent had made a business decision to lay off Mineards effective January 7, 2009. The letter recited his salary, workload at the time of his layoff and added the Respondent felt the combination "to be an inefficient use of resources, especially in these turbulent economic times." The letter indicated the Respondent was available to meet and discuss the issue should the Union so desire. Zinser protested that Caruso was repeatedly setting deadlines for the production of requested information but that the requirement was only that the employer respond in a reasonable period of time. The letter stated: "Less than three weeks have passed since you made your written inquiry regarding Mineards; I believe this response constitutes an answer within a reasonable amount of time." On that same day the Union in a letter to the Respondent indicated it wished to bargain over the decision to lay off Mineards and the effects of that decision.

On February 26, 2009, Caruso and former employee Melinda Burns met with Zinser and Armstrong to discuss the Mineards layoff. The Union proposed Mineards be recalled at a 20 percent reduction-in-pay. The Union solicited the Respondent's agreement to its proposal, a counter proposal or discussions respecting severance. The Respondent took the position that the proposed salary was not satisfactory because Mineards was not willing to undertake substantial additional work beyond his column for that salary. The Respondent also took the request for severance negotiations "under advisement" noting that in the past the Respondent had not paid severance in layoff situations.

3. Analysis and conclusions respecting the Mineards' allegations

a. Did the Respondent's alleged failure to timely notify and offer to bargain with the Union regarding the Mineards' layoff and/or its direct dealing with Mineards violate Section 8(a)(5) and (1) of the Act?

The facts as set forth supra and briefly recited here concerning Mineards are not in essential dispute. Thus, there is no doubt that at relevant times Mineards was in the bargaining unit and that the Union represented the unit. The Respondent does not contend that it notified the Union regarding the Mineards' layoff before the Union discovered the layoff had occurred on it own on or about January 14, 2009, and the Respondent concedes it did not provide the Union

any of the details concerning the layoff requested by the Union until its letter to the Union of February 9, 2009. Further the Respondent does not deny that its agent Katich directly dealt with Mineards during the period before it notified the Union of its actions proposing he become a freelancer, i.e., a nonunit worker, continuing to write his column and undertaking additional assignments for a substantial reduction in compensation.

The black letter law in this area is longstanding and recent consistent Board holdings are cited by the General Counsel on brief at 97. The Board in *Eugene Iovine, Inc*. 353 NLRB No. 36 (2008), enfd. ___ F.3d ___, No. 09-0217ag, (2d Cir. March 30, 2010), adopted the analysis of Administrative Law Judge David I. Goldman who wrote at 353 NLRB No. 36, slip op. at 5:

> The decision to lay off employees for economic reasons is a mandatory subject of bargaining, and therefore subject to the requirement of timely advance notice required by the Act for good-faith bargaining to impasse. *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004) ("Decisions to conduct economically motivated layoffs are mandatory subjects of bargaining"); *Toma Metals, Inc.,* [342 NLRB 787, 787 fn. 1 (2004)]; *Tri-Tech Services,* 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain"); *Ebenezer Rail Car Services*, 333 NLRB 167 (2001).

Judge Goldman again at *Iovine, Inc*., id., addressed the question of when such notification and offer to bargain must take place.

> Even when negotiations for a new collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises,* supra; *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017 (1982) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli"), enfd. 722 F.2d 1120 (3d Cir. 1983). In sum, "an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co*., 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals, Inc.,* 342 NLRB 787, 787 fn. 1 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682, (1981), where the Court held that bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time.

The General Counsel also argues, citing cases such as *SPE Utility Contractors, LLC*, 352 NLRB 787, 791 (2008), that an employers direct negotiation with unit employees concerning their terms and conditions of employment bypassing the union representative inevitably erodes the labor organization's exclusive representative status. More specifically the government argues that laying off a unit employee without giving that employee's representative an opportunity to bargain and then approaching the employee directly and offering to employ the individual to do the same work outside the unit violates Section 8(a)(1) and (5) of the Act citing *Modern Merchandising*, 284 NLRB 1377 (1987).

The Respondent makes several arguments seeking to avoid the conclusion under the cases cited that its actions violated Section 8(a)(1) and (5) of the Act. Initially it argues on brief at 220:

> As for the allegation that the News-Press dealt with Mr. Mineards, the News-Press does not deny that Mr. Katich contacted Mr. Mineards about becoming a freelancer. The evidence indicated, however, that Mr. Katich was a new supervisor that was unfamiliar with his obligations with respect to represented employees. The contact with Mr. Mineards was limited and unsuccessful. To the extent that the New-Press violated the Act, the violation was *de minimus*.

Second, the Respondent argues that it was not required to bargain over its decision to lay off Mineards because its decision was in fact an entrepreneurial decision involving a change in the scope and direction of the enterprise and therefore outside the ambit of mandatory subjects of bargaining. *Tel Plus Long Island*, 313 NLRB No. 47, slip op. at 9 (1993) (not reported in Board volumes), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Further, the Respondent emphasizes that it did in fact negotiate with the Union over Mineards' layoff, considering the Union's proposals and offering its own. Thus the Respondent argues on brief at 223: "No accord was reached, **but the parties engaged in bargaining** [bolding in original]." And thus the allegation should be dismissed.

I have considered the record as a whole including the briefs of the parties and the testimony of the witnesses on the questions posed and arguments presented. I find and conclude as follows.

First, I reject the argument of the Respondent that the layoff of Mineards was not a decision subject to bargaining or that the effect of that decision was outside the Respondent's bargaining obligation. I do so based on the record which clearly supports a factual finding, which I explicitly make, that the underlying issue respecting Mineards layoff was economic and not any type of *First National Maintenance Corp.* decision concerning the scope and direction of the enterprise. The record is sufficiently clear that it is unnecessary to belabor the point. As noted supra, the negotiations between the Respondent and the Union and between the Respondent and Mineards were pure and simply economic. The Respondent was prepared to continue Mineards' column duties at a reduced compensation and with additional duties added on. As Zinser stated in his February 9, 2009 letter to the Union, the Respondent was concerned with avoiding the inefficient use of resources. The cases cited supra make it crystal clear such a layoff is not sheltered from traditional notification and bargaining obligations.

Second, I reject the argument of the Respondent that since bargaining finally did occur, nothing else is required and the matter should be dismissed. The cases cited supra make it plain that disclosure and bargaining must occur sufficiently in advance of the proposed action to allow a reasonable opportunity to bargain. If the notice is too short, the decision at issue is simply a *fait accompli* and no sufficient bargaining can take place. Similarly bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time. Neither occurred here.

This being so, I find and conclude that the Respondent in failing to timely notify the Union of the layoff of Mineards and to provide sufficient time to allow bargaining over both the decision and its effects, violated Section 8(a)(1) and(5) of the Act.

Regarding the Respondent's argument that the direct dealing by its agent Katich as described supra was an innocent, isolated *de minimus* act of a new supervisor ignorant of the complications of dealing with union-represented employees, I reject the argument. This action was not isolated in any fashion. The Respondent has been found herein to have improperly attempted to have unit work done by nonunit or former unit employees. Actions were taken by the Respondent that violated both Section 8(a)(3) and (5) of the Act in these circumstances. The Respondent's responses to the Union's related information requests were also unreasonably delayed in violation of the Act. There was simply no isolation or de minimus aspect to the conduct at issue. I further find then, consistent with the cases cited above, that the direct dealing involved herein between Katich and Mineards violated Section 8(a)(1) and (5) of the Act.

b. Did the Respondent's layoff of Mineards violate Section 8(a)(1) and (3) of the Act?

Why was Mineards laid off? The government complaint alleges he was laid off because the employees engaged in union activities. The Respondent's communications at the time of his layoff and in negotiations with the Union subsequently suggest the cause of the initial layoff and the decision not to rehire him was economic. The General Counsel's theory of an antiunion layoff of Mineards in violation of Section 8(a)(3) is not based on a theory of Respondent's hostility to Mineards as an individual. Nor would such an argument withstand the fact that Mineards seemingly was on excellent terms with higher management or the paucity of evidence that the Respondent's agents believed Mineards was sympathetic to or supportive of the Union. Rather, the General Counsel argues that the Respondent, in seeking to convert Mineards from a unit employee doing unit work to a freelancer doing unit work, was continuing an illegal pattern and practice of seeking to undermine the Union generally by reducing the size of the bargaining unit and establishing a significant nonunit member population of individuals who were doing unit work.

In addition to the argument that the Respondent was implementing an illegal and overarching plan and practice of the transfer of unit work to or the transmutation of unit members doing unit work to nonunit members, the government argues that Mineards' layoff was also in violation of the Act as involving direct dealing and a failure to notify and bargain with the Union. Further, the General Counsel argues that the Respondent's response to the Union's information request regarding Mineards was itself unreasonably delayed and in violation of Section 8(a)(1) and (5) of the Act. Considering the number, frequency and type of unfair labor practices committed by the Respondent in the instant case, the General Counsel seems to be arguing, antiunion animus must adhere to the Mineards layoff as a man must get wet when standing in a heavy rain.

It is appropriate to repeat here the Board's analytical framework for resolving this type of issue. The analysis was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Again as set forth supra in considering an earlier Section 8(a)(3) of the Act allegation, under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of

the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Assuming, without deciding, that the General Counsel has met his burden as to this allegation, I turn to the Respondent's defense in the *Wright Line* posture. Has the Respondent met its burden of demonstrating that it would have laid off Mineards, even in the absence of the employees' union and or other protected activities—here the employee selection of union representation? I find that the Respondent has. I reach this conclusion because the Respondent, both in its direct dealings with Mineards before the Union was involved and in the subsequent negotiations with the Union, ultimately decided not to reemploy Mineards and its' decision in the event turned on economics rather than Mineards' status as a unit employee or nonunit freelancer.

In its direct dealings with Mineards, the Respondent received an employment counteroffer from Mineards the substance of which restored Mineards to writing his column, but as a freelancer. Under the General Counsel's theory, this was the antiunion desire of the Respondent, to pull unit work out of the unit by recasting unit employees as nonunit workers. Yet, in the event, the Respondent did not accept the offer but rather counter offered and, when no agreement was reached, simply let the layoff stand rather than bring Mineards back on the terms he had offered. These actions by the Respondent convince me and I find, that the Responded would have laid off Mineards when it did for economic reasons even if the employees had not engaged in protected activities and selected a labor organization to represent them.

Based upon all of the above, I find the General Counsel, under the *Wright Line* analysis of this 8(a)(3) allegation, has not met its ultimate burden of proving discrimination in the layoff of Mineards as alleged in the complaint. Therefore I shall dismiss this aspect of the complaint.

c. Was the delay in the response of the Respondent to the Union's information request concerning Mineards a violation of Section 8(a)(5) of the Act?

Again the facts concerning this allegation are essentially undisputed and have been set forth in brief fashion above. The Respondent laid off Mineards on January 7, 2009, and negotiations between the Respondent and Mineards—without the Unions awareness of the layoff or subsequent dealing—continued through a lunch on January 14, 2009, and additional communications in the following few days. The Union learned Mineards had been laid off from an outside source and Caruso asked Zinser about Mineards status on the morning of January 14, 2009 during bargaining. Zinser indicated ignorance concerning Mineards and his status. No other agent of the Respondent at the bargaining spoke up. Caruso renewed his inquiry the following day at bargaining and Zinser simply indicated he would have to get back to Caruso.

Caruso, having not received a response to the Mineards' information requests, wrote Zinser on January 26, 2009, demanding an immediate explanation of the circumstances of Mineards' layoff and an explanation of why the Respondent had failed to bargain over the Mineards' matter. Zinser responded by letter dated February 9, 2009. The complaint alleges the Respondent's delay to February 9, 2009, in providing the requested information was unreasonable and a violation of Section 8(a)(5) and (1) of the Act.

The Board case law on the test of reason respecting timeliness of employer responses to union information requests has been set forth supra in considering the outside agency employees information request allegations. The analysis here is guided by the same Board teachings. As to the instant information request, the General Counsel cites *Postal Service*, 308

NLRB 547 (1992), for the proposition that a delay of about 4 weeks in supplying relatively uncomplicated and easily acquired information was unreasonable. The Respondent emphasizes that the totality of the circumstances should be examined citing *West Penn Power, Co.*, 339 NLRB 585, 587 (2003).

At the threshold it is important to identify the amount of time involved in the delay at issue. Between the initial request and the production of the information, some 26 days passed. The General Counsel prefers to characterize this, albeit correctly, as about 4 weeks. The Respondent on brief argues at 38: "A scant 14 days passed between the [Union's] formal written information request and the [Respondent's] response." This latter focus on the written information request parallels Zinser's response to Caruso which states in part: "Less than three weeks have passed since you made your written inquiry regarding Mr. Mineards; I believe this response constitutes an answer within a reasonable amount of time."

The Respondent early in the bargaining process expressed a preference for receiving information requests by letter and often requested that oral requests for information across the bargaining table be followed up by a written request. As may be seen in the factual recitations in this decision, the Union at least on several occasions followed the requested procedure. And, when an oral request of the Respondent was not responded to, the Union on some occasions on its own motion made a written request for the information earlier requested orally.

I made an explicit finding here that an oral request for information is sufficient under Board standards to start the clock running on the duty of the Respondent to respond. The Union's subsequent repeat or parallel requests in writing do not provide additional time or excuse for delay. Thus, the Respondent's quoted argument on brief and in the letter to Caruso recite and seemingly rely on improperly foreshortened periods of delay which are simply legally irrelevant to resolving the actual delay issues in dispute.

The system the Respondent apparently instituted of, in effect, awaiting for the receipt of a written union request for earlier orally requested information is not per se violative of the Act. Rather it simply does not extend the period of time the Board will consider reasonable in replying to information requests. The test of reason here is twofold: (1) the time allowed is a reasonable one and, (2) the system by which that time is tested is a reasonable system of information gathering. Thus when the Respondent in the instant case awaited a written request rather than taking immediate action to privately acquire the information requested or at the table immediately query the Respondent's managers for the information requested, it selected an unreasonably slow means of obtaining the information.

Further, there is a significant basis for belief in this matter that the Respondent was deliberately delaying giving the Union information which might disrupt the Respondents then ongoing illegal direct dealing with Mineards. Thus at the same time as the January 14 and 15, 2009 negotiations were being conducted and oral inquiries about Mineards being put off at the bargaining table, management was meeting with Mineards without the Union's knowledge and in violation of its duty to bargain in good faith with the Union concerning Mineards. As the Respondent has argued on brief, Katich, the Respondent's new director of new operations was the agent of the Respondent meeting with Mineards, was new to his job and was not experienced or sophisticated in dealing with a represented employees. It is likely that other agents of the Respondent would have been aware of Kasich's plans and intentions regarding Mineards even if they had not given Katich his marching orders in his dealings with Mineards. It seems quite unlikely that Travis Armstrong, the Respondent's editorial page editor, who was at the bargaining table when the oral request for information was made and who did not respond,

was ignorant of the Respondent's ongoing direct dealing with Mineards—indeed dealings that continued through the negotiation sessions involved.

In sum, and based on the record as a whole and the arguments of the parties and the testimony of the witnesses, I find that the 26-day delay of the Respondent in providing the Union its requested information was clearly unreasonable and violated Section 8(a)(1) and (5) of the Act. I therefore sustain these elements of the complaint.

G. Allegations Respecting Employee Robert Eringer

1. Complaint allegations respecting Eringer

Paragraph 11 of the complaint alleges that since on or about May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer. Paragraph 17 of the complaint alleges that this conduct concerned a mandatory subject of bargaining. Paragraph 18 of the complaint alleges that the conduct engaged in by the Respondent alleged in complaint paragraph 11 occurred without the Respondent notifying or affording the Union an opportunity to bargain with respect to the conduct. Complaint paragraph 20(c) alleges this conduct constitutes a failure and refusal to bargain in good faith with the Union as the exclusive bargaining representative of unit employees: Paragraph 21 alleges this conduct constitutes a violation of Section 8(a)(1) and (5) of the Act. Paragraph 23 of the complaint alleges that the Respondent engaged in the action described in paragraph 11 because the employees engaged in protected activities and to discourage employees from engaging in those activities. Complaint paragraph 24 alleges that in engaging in the conduct alleged in paragraph 11 engaged in for the reasons alleged in paragraph 23, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

2. Facts, positions of the parties, and basic issues respecting the Eringer allegations

The Respondent contracted with Robert Eringer, an individual not employed by the Respondent, to provide copy for publication in the Paper of an investigatory reporter column on page 2 beginning in middle May 2008. Eringer became and performed as a freelancer for the Respondent at material times and there is no dispute he was not an employee of the Respondent nor was he at any time a member of the bargaining unit. There is also no dispute that the Respondent did not notify or offer to bargain with the Union prior to engaging or utilizing Eringer as a freelancer in May 2008. There is a fundamental dispute as to whether the Respondent was obligated under the Act to do so.

The General Counsel and the Charging Party argue that the Respondent was obligated to notify and bargain with the Union before it, in effect, subcontracted unit work to a nonemployee. The Respondent argues that in engaging Eringer as yet another freelancer paid for preparing material for publication, it was simply continuing a longstanding, frequently used, business technique respecting which it had no obligation to notify or bargain with the Union simply because there was no change to the prebargaining status quo, the continuing pattern and practice of Respondent's newsroom operations.

The General Counsel and the Charging Party argue that the Respondent's contemplation of and final action of hiring Eringer as an outside contractor was not simply the hiring of a generic freelance writer who was tasked with the preparation of an article and therefore cannot be justified by arguing the Respondent had long and regularly utilized freelance writers. Rather, they assert that Eringer was hired as an "investigative reporter" a

category that had always been filled by unit employees and had never previously been done other than in-house and had never been subcontracted to a freelance writer. Thus, they argue that Eringer's hire was the first time subcontracting of investigative writing had been done and it was not simply the repetition of the admitted practice of assigning generic news writing to freelancers.

There is no dispute that the Respondent has historically utilized freelance writers and photographers who provide publishable material for the Paper essentially since it acquired the News-Press. And there is also no dispute that it has done so regularly and to no small extent. There is no contention that freelancers are or should be in the bargaining unit even if they are doing bargaining unit work. The dispute here is whether there existed a sufficiently discrete category of bargaining unit work at the Paper for which there was no history of use of freelance writers, i.e., investigative journalist or investigative reporter and whether Eringer's use by the Respondent was a break in or exception to the contended history of nonuse of freelance contractors for such work. It is necessary then to consider in a sense the taxonomy of the phylum "reporters" or "journalists" as well as the specific terms and content of the work of the individuals involved.

The General Counsel advances the circumstances of reporter Scott Hadley as supporting his argument here. Hadley was initially employed by the Paper as a reporter who was to undertake investigative stores and to assist in training other reporters in the skills and techniques of investigative reporting. On June 9, 2001, the Respondent published an article in the Paper announcing: ". . . we are promoting staff writer and county government reporter Scott Hadley to the new position of investigative reporter." Hadley continued working for the Respondent until he resigned on July 14, 2006. During his employ in the period following his announced promotion to investigative reporter, he wrote both regular and investigative stories.[21] During his employment for the Paper he also won various awards titling him an investigative reporter and was held out by the Paper in articles addressing these awards as an investigative journalist.

While associate editor, Scott Steepleton, testified the term investigative reporter did not exist at the Paper, he prepared a personnel requisition form dated March 6, 2007, seeking the hire of a full-time individual for the position he identified in the "position" box of the form as: "investigative reporter" and which hire he further noted on the form was to replace employee Barney McManigal who was "no longer employed."[22] The fact that the Respondent was seeking to hire an investigative reporter and that the associate editor used that specific term on the hiring form convinces me, and the fact that the Respondent held out bargaining unit members to the public as having that title further convinces me that the name or title is not without significance for unit members, for the Respondent's newsroom management and for the Paper's readership.

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[21] The traditional dictionary definition of the term investigative journalist or an investigative story or series describes the underlying task as one that involves intense inquiry often directed to expose improper behavior or injustice. The testimony of witnesses at the hearing was varied with far broader meaning assigned by the Respondent's witnesses. I view the differences in the testimony by these news reporters and editors on this issue as approaching the theological and decline to credit one version over another.

[22] Barney McManigal was one of the employees held by Judge Kocol to have been terminated in violation of the Act and ordered reinstated. He was discharged in February 2007, and has not been reinstated.

The Respondent argues:[23]

> Robert Eringer was a well-known author and investigative report[er] in the Santa Barbara region known to his fans as "The Investigator." He approached the News-Press about writing an investigative column in their paper and it was very hard for management to refuse an opportunity to work with such a well-known local author.
>
> Mr. Eringer wrote stories that consistently appeared on page two of the News Section in a column-style format. He wrote investigative pieces that he pitched to the News-Press. Robert Eringer did not replace anyone from the bargaining Unit nor did he perform work that was previously assigned to bargaining unit employees. Mr. Eringer is just another in a long line of freelancers.

3. Analysis and conclusions respecting the Eringer allegations

a. The 8(a)(1) and (5) allegations

At the threshold there is no real dispute and I find that the work done by Eringer for the Respondent was bargaining unit work. It is unnecessary to resolve the arguments of the parties regarding investigative reporters to find that Eringer, either as a columnist or investigative reporter did unit work. There is no doubt that he was paid as a freelancer and was not an employee of the Respondent or considered as a member of the bargaining unit. There is no doubt that the Respondent did not notify or offer to bargain respecting its decision to retain Eringer as a freelance contributor. There is also no dispute that the Respondent at all relevant times has utilized freelance writers and photographers to write copy or take publishable photographs and has published such articles and photographs.

The legal issue remaining is narrowly focused on the issue of past practice as a defense to the failure to bargain allegation. This is so because the use of a nonemployee to perform unit work is analytically similar to the act of subcontracting out unit work. *St. George Warehouse, Inc.*, 341 NLRB 904 (2004). The relevant case law respecting past practices as a defense to such allegations was earlier discussed respecting the Respondent's use of outside agencies to provide nonunit individuals to do unit work. That case law is noted and fully applies here, but the complete argument set forth earlier will not be repeated in full.

Where the employer raises a defense of past practice to a unilateral change allegation of the type at issue here, the General Counsel bears the burden of showing, by a preponderance of the evidence, that the allegedly unlawful subcontracting constituted a material and substantial change in the Respondents' practices. *Great Western Produce*, 299 NLRB 1004, 1009 fn. 2 (1990); *Clements Wire,* 257 NLRB 1058, 1059 (1981).

The Board in *Eugene Iovine, Inc.*, 353 NLRB No. 36, slip op. at 1 (2008), noted the evidentiary standard for determining the sufficiency of the pattern or frequency of occurrence the past practice:

> The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007);

[23] On posthearing brief at 89, et seq.

Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

The Board approved the analysis of Administrative Law Judge Aleman in *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349 (2003), who set forth the following at 353:

> A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" (citations omitted). *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors,* 334 NLRB 651 (2001); *Dow Jones & Co.,* 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises,* 324 NLRB 1123 (1997); *Blue Circle Cement Co.,* 319 NLRB 661 (1995); *Lamonts Apparel, Inc.,* 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel,* 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida,* 144 NLRB 311 (1963); *American Lubricants Co.,* 136 NLRB 946 (1962).

I find the use of Eringer to write, in the Respondent's term on brief, "an investigative column" or columns, which investigative pieces, the Respondent again on brief notes, had never previously been assigned to freelancers or to bargaining unit employees, was clearly a new arrangement for which there was no previous history. Thus the defense of an established past practice or established condition of employment simply does not apply. The Respondent's determination in retaining Eringer because he was a well known local author and reporter in the area who had his own fan base and his unique personal style, as Steepleton testified: "We had never had a page 2 columnist like this before," convinces me and I find, that the Respondent's past practice of freelance use for general articles does not extend to or include the circumstances here presented.

An argument of the Respondent offered in defense to this allegation in its posthearing brief section headed VI.B.2. at 87, is that, in "protesting the contracting of Robert Eringer [the Union] is unlawfully trying to gain editorial control of the News-Press." The Respondent's general argument is considered elsewhere in this decision, but its attempted application here that the Union is overreaching is specious, indeed even frivolous. The Union's charge and the General Counsel's complaint addresses the Respondent's argued bargaining obligations concerning using a freelance contractor to do certain work. It simply does not address the content of the work. Were the Respondent's argument to apply here, Respondent's freedom to subcontract unit work in new and untried ways without notification or bargaining with the Union would be unencumbered by the Act. I reject the asserted defense as simply inapplicable to the instant allegation. And, further, I find it misconstrues the obligations of Section 8(a)(5) of the Act applicable here.

The Respondent is not foreclosed by the Act from hiring columnists or others who are not in the bargaining unit to do unit work. Rather and importantly, the Respondent is simply obligated to notify and bargain with the Union regarding the unit work at issue. As the Supreme Court taught in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), giving the Union an opportunity to address the employer's desires and concerns simply allows, through bargaining, the employer to consider the positions and offers of the representative of the employees who do unit work. If the matter is not resolved and an impasse occurs in bargaining, the employer's

bargaining obligations are satisfied and the employer is not prevented from taking the action it feels necessary.

Given all of the above, and based on the record as a whole, including the testimony of witnesses and the arguments of the parties, I find that the Respondent was obligated to notify and offer to bargain with the Union regarding its decision to assign bargaining unit work, i.e., the writing of an investigative column on page two of the paper, to a freelance, nonemployee, nonbargaining unit member in May 2008. I specifically find that the history of the Respondent's use of freelance writers to that time was different and distinct from the use of a freelancer for the investigatory column and provided the Respondent no shelter from its notification and bargaining obligations. I further find that since the Respondent did not in the event notify or offer to bargain with the Union regarding its use of Eringer in the manner described, it violated Section 8(a)(1) and (5) of the Act. I therefore sustain the relevant paragraphs of the complaint described above.

b. The 8(a)(1) and (3) allegations

The essence of this allegation is not that the Respondent undertook to have an investigatory column written by Eringer but that the Respondent hired Eringer as a nonbargaining unit freelancer to do the writing rather than hiring him as a bargaining unit member employee of the Paper. Thus the theory of a violation—again as earlier based on a *Wright Line* analysis, focuses on the unit/nonunit status of the hired individual.

The General Counsel argues that the argument and analysis advanced to establish that the Respondent violated Section 8(a)(1) and (3) of the Act in using outside agencies to obtain nonemployees to do bargaining unit work apply fully to the Eringer situation. Counsel notes that the timing is also highly supportive of a finding of a violation in that the Eringer freelance hire and use of his work started in the same month, May 2008, that the use of outside agency referred contractors were used. The General Counsel argues that all this evidence should be at least sufficient to meet the governments prima facia showing under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and counsel notes further that the Respondent supplied no evidence that it would have hired Eringer as a freelance writer to do the work that he did in the absence of its employees electing union representation.

This is the third *Wright Line* Section 8(a)(3) analysis of the Respondent's actions in dealing with non-unit individuals—both freelance and outside agency referred individuals—doing unit work. None the less it is necessary to once again set forth the two part process of a *Wright Line* analysis.

Under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Antiunion motivation may be established through direct or circumstantial evidence. An example of such circumstantial evidence includes the timing of the decision. "It is well settled

that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Gaetano & Associates*, 344 NLRB 531 (2005), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Thus the Board stated in *Allstate Power Vac., Inc.*, 354 NLRB No. 111, slip op. at 4, fn. 12 (November 30, 2009).

[12] In analyzing these allegations under *Wright Line*, the judge should, where necessary, address the General Counsel's arguments that the Respondent deviated from past practice in taking the above alleged unlawful actions and/or treated the affected employees differently than it had treated other similarly situated employees in the past.

I agree with the General Counsel that the timing of the freelance hire, i.e., at the same time as the commencement of the use of outside agencies to provide nonemployees to do unit work, as well at the blatantly violative[24] failure to notify or offer to bargain with the Union regarding the decisions of the Respondent to use both the agencies and Eringer supports its *prima facia* case. Having reviewed all the evidence and my earlier conclusions and analysis in these regards, in conjunction with a full consideration of the instant issue, I further find and conclude that the evidence carries the General Counsel's case that the Respondent undertook to employ Eringer as a freelancer rather than as a unit member because it wished to undermine the Union by reducing the number of bargaining unit employees and increasing the number of nonunit individuals who were doing unit work.

Given that finding, under *Wright Line* as noted, it falls to the Respondent, in the nature of an affirmative defense, to demonstrate that Eringer would have been hired as a freelancer and not as an employee and bargaining unit member even if the Union had not come to represent the employers and or the employees had not engaged in union activities. In meeting this burden, the Respondent cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity.

The Respondent on brief argues that the government's allegation is frivolous and that the Respondent regularly used freelance writers. The record establishes however that the investigative column undertaken by Eringer was unique in the Respondent's history and had never been undertaken by anyone else—bargaining unit member or nonbargaining member, freelancer or other nonemployee. I do not find the Respondent's arguments nor the record evidence addresses why—in this specific instance—Eringer was taken on as a freelancer as opposed to a unit employee. It is therefore clear to me and I find that the Respondent has not demonstrated by a preponderance of the evidence that it would have taken on Eringer for the column he came to write as a freelancer as opposed to as a unit member. This being so, I find the General Counsel has sustained his ultimate burden as to this allegation.

I therefore find that the Respondent hired Eringer as a freelancer rather than as a unit employee in order to weaken and undermine the Union in its representative capacity and to discourage employees' union activities. I further find that in so doing the Respondent violated

[24] The Respondent had the services of highly skilled local and bargaining counsel. Both firms were involved in the earlier litigation at relevant times. The parties and individuals involved are smart individuals who would have taken advice from counsel and followed advice. On this record I simply do not accept the principle of honest mistake, accident, or confusion respecting major courses of conduct taken by the Respondent.

Section 8(a)(1) and (3) of the Act as alleged. I shall therefore sustain the relevant allegation of the complaint.

H. The Respondent's August 22, 2008 Letter to Employees

1. Allegations and facts concerning the August 22, 2008 communication

Complaint paragraph 21 alleges that on or about August 22, 2008, the Respondent by Wendy McCaw distributed a letter to employees in which it offered to provide its own attorney to represent employees during the Board's on-going investigation and which discouraged employees from cooperating with the Board's on-going investigation of pending unfair labor practices. Complaint paragraph 26 alleges this conduct violates Section 8(a)(1) of the Act.

On August 9, 2008, Top Echelon informed the Respondent, i.e., Apodaca, that certain of its records had been subpoenaed by the NLRB and that it had given the NLRB contact information respecting Top Echelon's temporary employees utilized by the Respondent. In August 2008, Amie Marie Fowler was a nonunit employee of the Respondent working in the press department. Fowler had been a Top Echelon referred contractor working on behalf of the Respondent from August 2007 to February 2008. As such her contact information would have been part of the material obtained from Top Echelon by the NLRB. Apodaca in August 2008, knew of Fowler's work history, including her Top Echelon relationship and therefore within 2 weeks of the events described, knew or should have known[25] the NLRB had gotten Fowler's contact information earlier that month from Top Echelon.

In August 2008, Fowler used a personal mobile or cell telephone as her sole telephone, i.e., she did not have a "land-line" or hard-wired telephone at her residence. Her mobile phone was the only phone on which she could be contacted. As a mobile phone, her phone number was not published in "hard line" telephone directories.

Fowler testified credibly that in or around mid-August 2008, she received a voice message from a caller. The caller, a female,[26] identified herself as being from the NLRB and said she wanted to speak to Fowler about her temporary employment at the *News-Press*. The caller asked that Fowler return her call but made no suggestion such an action was mandatory. Fowler testified she was angry because she did not perceive her connection to the disputes concerning the newsroom employees. She was further concerned respecting how her telephone number had gotten to the caller.[27]

Fowler went to her superiors and reported the message she had received and the fact that she was "concerned how they had received my phone number, that possibly the *News-Press* had given it to them." She testified that she was told in reply:

> They told me that it was my decision whether I'd like to contact the NLRB or not and that they would address the issue to Human Resources to find out if, you know, maybe the *News-Press* had given my number out or not.

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[25] Apodaca conceded during cross-examination that the information was fresh in her mind during August 2008.

[26] Apodaca testified that she was informed that the person who left the voice message for Fowler was female.

[27] Fowler had had unfortunate experiences before moving to Santa Barbara which caused her to wish to limit the availably of her "contact information."

Fowler testified her response from management was the August 22, 2008 memo to employees that everyone received on their desks from Wendy McCaw a couple of days later.

Apodaca testified that Fowler's call and report to her supervisors was reported to her by Fowler's supervisors. In Apodaca's recollection she was told Fowler had received a call on her private cell phone from a female seeking a return call and that Fowler was concerned how her phone number was obtained. Apodaca testified that she either met with or telephoned McCaw. She testified:

> I said that our employee Amie [Fowler] had received a call and we weren't sure who it was from, and somehow her personal cell phone number was out there, and I wanted to let her know, I assured her the company had nothing to do with it and she thanked me and that was it.
>
> * * * *
>
> I believe I may have suggested that this may be occurring more and we should probably let employees know that *The News-Press* has nothing to do with it.

When asked by the General Counsel during cross-examination what was the basis for her remark "occurring more," Apodaca could not recall.

A few days later, Apodaca was in communication with McCaw and was told that McCaw had learned that the NLRB had been in touch with the employee and that McCaw was preparing an employee memo. She asked Apodaca to arrange for its distribution which Apodaca did. Supervisors received and distributed the memo to employees throughout the Paper. McCaw did not appear or testify at the hearing.

The August 22, 2008 communication is a single letter-size sheet of paper that has no letterhead. Rather it has a single, bold, large font, all capital letter, centered heading: **CONFIDENTIAL.** This was followed in letter format with the August 22, 2008 date and a "Dear News-Press Employees" greeting and a "Sincerely, Wendy McCaw" close. The body of the communication stated:

> Some disturbing news has recently come to my attention. I was just informed that an agent of the National Labor Relations Board (NLRB) has contacted News-Press employees directly, including on their personal cellular telephones.
>
> We have previously addressed the NLRB's unfair treatment of the News-Press in a letter to the NLRB General Counsel Meisburg in Washington D.C. outlining the biased treatment that the News-Press has received.
>
> Rest assured that neither I nor any of senior management has divulged any personal or other contact information about any non-newsroom employees to the NLRB. As I previously informed the newsroom employees we are required by law to give confidential information (salary, address, and other personal information) for the newsroom employees to the NLRB and the Teamsters union (which represents only the newsroom employees). Unfortunately, I do not know what the Teamsters and/or the NLRB has done with that newsroom employee information. However, I am committed to protecting the privacy of every employee here at the News-Press.
>
> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these

> matters. As News-Press employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers
>
> If you do not feel comfortable with speaking to the NLRB agents, you may feel free to tell them that you do not wish to talk with them. These are only some of the options available to you.
>
> I ask you not to be afraid or intimidated by the NLRB's "investigation" tactics. As it has been the Union's position, so it seems that the NLRB would see us give up our First Amendment rights by prosecuting meritless charges, if only to try and make up for Judge Wilson's rebuke of those same tactics. We will not give up our First Amendment rights, to the NLRB, Teamsters or anyone else, nor will we submit to any intimidation against our employees from anyone.
>
> I will not belabor the point any further than to say I am very disappointed that employees that are not represented by the Teamsters have been contacted directly. Should any of you have any questions or concerns to share, please contact Mrs. Apodaca in our Human Resources Department so that we can alleviate any fears or concerns you may have.

Apodaca testified that this memo had been preceded by an earlier general memorandum to all employees issued at a different time which directed employees to see Apodaca if they needed assistance with the "union situation." That earlier memo mentioned that employees could obtain legal representation from the Respondent's counsel who would seek to assist them if possible.

2. Analysis and conclusions respecting the August 22, 2008 memo allegations

While the facts and circumstances of the memorandum's authorship and distribution are not disputed, the parties disagreed regarding the events that generated the communication. Thus, the Respondent argues that upon learning that an employee with sensitivity to unauthorized communications to her on her personal mobile phone was concerned that the Respondent had released her number to the government and did not understand her relationship to the Union/NLRB concerns respecting the newsroom of which she was not a part, the Respondent as part of its zero tolerance of harassment issued the memorandum.

The General Counsel rather describes the actions of the Respondent's agents, predicate to the issuance of the memorandum, as a malign course of conduct involving distortions, withheld information and antiunion and antigovernment motivations. Thus the government argues, Apodaca well knew—the information was "fresh in her mind" - that Top Echelon had under subpoena released contact information to the NLRB for those Top Echelon employees who had worked for the Respondent. And, Apodaca equally knew that Fowler was such an employee. Finally she also knew that this category of individual was connected to the outside agency issue under investigation and that the NLRB had gotten the contact information to contact these individuals regarding that issue.

Thus, argues the General Counsel from these assertions, when Apodaca learned that the NLRB had left a message on Fowler's phone asking that Fowler call the NLRB, Apodaca knew: (1) why the NLRB was calling Fowler, (2) how the NLRB had gotten Fowler's contact information, and (3) that the inquiry of Fowlers as a former Top Echelon employee was of direct relevance to a charge and ongoing investigation by the Regional Office of the NLRB. The

General Counsel argues further that despite Apodaca's dodging and inconsistent version of her initial communication with McCaw and Apodaca's abbreviated and reluctant description of her later communication with McCaw, Apodaca clearly gave the facts to McCaw who, alone or with others, determined to attempt to take advantage of the situation. The contrary and overtly false assertions contained in the memo to employees, when compared to the facts recited above, the government argues, makes it clear that the Respondent was not constrained by the truth in preparing the memo, but was rather engaging in malicious deceit and falsified self righteousness.

The General Counsel also emphasizes the self-serving, and self evidently absurd, characterization of the NLRB call to Fowler as presenting a harassment issue. The only evidence on the content of the single call—which seems to be both the complete and entire experience of Fowler with the NLRB—is that Fowler's phone was called and, as is available with mobile phones when no answer occurs, a voicemail message was left. That voice message was a female voice identifying the caller as an NLRB agent and asking Fowler to call her, presumably at some phone number also recorded.

Having considered the events that preceded the issuance of the August 22, 2008 memorandum to all employees as described above, I agree with the General Counsel that there is no reasonable or rational basis for perceiving the fact that a female Board agent called a female nonbargaining unit employee of the Respondent and left a voice message identifying the caller as an NLRB agent and requesting the employee return the NLRB agents call as presenting a "harassment" issue. Further I agree with the General Counsel that the evidence set forth above establishes that the Respondent either knew or should have known this was true, that the contact information case from Top Echelon and, finally, that the matter under inquiry by the NLRB dealt with the Top Echelon/employee issue presented in the earlier portions of this decision.

The General Counsel makes two, separate arguments that the memorandum violates Section 8(a)(1) of the Act: (1) that it improperly suggested to its employees that they be represented by the employer's attorney in the investigation of a charge against the employer and, (2) that it improperly interfered with the Board's investigative processes by discouraging employees from cooperating with the Board's on-going investigation. These arguments must be separately considered.

a. Does the Respondent's August 22, 2008 memo improperly suggest to its employees that they be represented by the employer's attorney in the investigation of an NLRB charge against the employer?

The Government cites the Board's decisions in *KFMB Stations*, 349 NLRB 373, 387 (2007), and *S. E. Nichols, Inc.*, 284 NLRB 556, 559 fn.9, 580-581 (1987). In *KFMB Stations*, the Board adopted the conclusion of the judge that the employer violated Section 8(a)(1) of the Act by offering employees, who had been subpoenaed by the General Counsel, the services of its attorney. It relied on *S. E. Nichols,* 284 NLRB 556 (1987), enfd. on this issue, 862 F.2d 952 (2d Cir. 1988).

In *S. E. Nichols,* the judge found the employer's agent informed employees that Board agents would be visiting the employer's facility and might want to interview employees. He told the employees: "if [they] needed any protection he would get his lawyer to sit in on the meeting." On his own initiative the employer's agent also told the employees they could see Respondent's attorney if they needed help in connection with anticipated requests by Board agents for employee statements. Sustaining the General Counsel's complaint allegation, the judge found

the employer's statements violated Section 8(a)(1) of the Act citing *Florida Steel Corp.,* 233 NLRB 491, 494 (1977), enf. denied 587 F.2d 735 (5th Cir. 1979); *Garry Mfg. Co.,* 242 NLRB 539 (1979), enf. denied 630 F.2d 934 (3d Cir. 1980). The judge discussed the evolution of the doctrine and distinguished the Federal Circuit Court disapprovals of the two cited cases at some length.

In approving the judge's analysis on the question the Board held:

> Concerning the offer of counsel, we agree with the Judge's clear exposition of the reasons the Respondent's offer is distinguishable from the statements found not coercive by the courts in *Garry Mfg. Co.,* 630 F.2d 934 (3d Cir. 1980), and *Florida Steel Corp.,* 587 F.2d 735 (5th Cir. 1979). Essentially, telling employees that *they* might need protection in an action against the Respondent would tend to dissuade them from cooperating with the Board. Secondly, here the Respondent did not recommend obtaining independent counsel but offered only its *own* attorney, thus, in the judge's words, "temptingly proposing a serious conflict of interests." (284 NLRB 556, portion of fn. 9 at 559).

Chief Judge Feinberg of the Second Circuit addressing the allegation on review of *S.E. Nichols, Inc.,* held in part:

> Finally, the company objects to a finding that it violated the Act by telling employees that they could receive the advice of the company's attorney in connection with interviews by Board investigators. Nichols claims that it was simply advising its workers of their right to counsel. The ALJ discounted this explanation because the advice seems to imply the need for protection and would have the effect of dissuading employees from cooperating with the Board's investigation since the "most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being 'advised' by the employer's counsel." The Board agreed, and so do we. (862 F.2d 952 (2d Cir. 1988), at 959.)

The Respondent notes that the Fifth Circuit Court of Appeals in *Florida Steel Corp*., 587 F.2d 735 (5th Cir. 1979), has rejected the Board's theory of a violation. The Respondent, on brief at 213–215, passim, cites a variety of cases in which circuit courts have denied enforcement to cases dealing with written communications of employers to employees of a generally similar nature. Counsel summarizes, on posthearing brief at 214: "Courts have systematically concluded that letters like Santa Barbara News-Press's do not violate the Act."

The Board has specifically stood by its counsel provision theory of a violation of the Act in the cases noted. I am bound by Board cases not abandoned by the Board or reversed by the Supreme Court. And as noted, the Second Circuit Court of Appeals enforced the Board's decision in *S. E. Nichols, Inc.* I therefore follow the cited cases here and find that the Respondent in offering to employees that its attorneys would represent them during the Board's on-going investigation violated Section 8(a)(1) of the Act. I note further that the cases, including the cases in which the circuit courts have disapproved of the Board's findings a violation of the Act turn on their specific facts. Here the employer went out of its way in its communication to employees to hold back facts it knew, expressed hostility to the government and its agents and associated them with partisan misconduct in investigations. In that context—one of clear and admitted hostility and disapproval, the Respondent offered its employees access to lawyers it had retained. Thus the letter placed on each employee's desk by his or her supervisor which letter bore the name of the owner and publisher, Wendy McCaw, said in part:

> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.

I find that this factual context of hostility and disdain respecting the NLRB investigation and investigators especially given the actual circumstances underlying the triggering events distinguishes the facts pertaining in the situations producing the contrary decisions of the courts. But in all events I am bound to and therefore follow the Board-cited cases here. Having considered the record as a whole, the testimony of the witnesses and the arguments of the parties and the cases cited, I find and conclude that the Respondent in offering to employees in the manner and context noted that its attorneys would represent them during the Board's on-going investigation the Respondent's August 22, 2008 memo improperly suggested to its employees that they be represented by the employer's attorney in the investigation of an NLRB charge against the employer and thereby violated Section 8(a)(1) of the Act.

b. Does the Respondent's August 22, 2008 memo improperly interfere with the Board's investigative processes by discouraging employees from cooperating with the Board's on-going investigation?

The General Counsel's argument respecting the Respondent's intentions in circulating the memo to employees and the general distorted and knowingly false presentation in the memo regarding its professed ignorance of how and why the Board was contacting nonunit employees was noted earlier. So, too, the General Counsel and the Charging Party's arguments that individual instances of violations of the Act were simply part of a whole course of conduct designed to undermine the Union and discourage employee support for the Union has been discussed earlier in considering other allegations.

The authority the government offers for its theory of a violation here is *Certain-Teed Products Corp*., 147 NLRB 1517, 1519–1521 (1964). In that case the employer's agent informed about 90 percent of the employer's employees that unfair labor practice charges had been filed against the employer and that the employees were not obligated to make any statements to a Board agent unless and until they were subpoenaed to appear at a hearing. He also advised employees that they could tell the Board agent to "go to the devil, or go to hell." The judge found such conduct did not violate the Act. The Board reversed holding:

> The Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals. It is for this reason that the Board has carefully sought to protect the integrity of its processes by preventing any obstruction of Board agents in their investigation of charges. [Footnote omitted.] Here, as noted, Respondent told 90 percent of its employees that they need not cooperate with Board agents in their investigation. While it may be technically true that an individual may not be forced to give statements to a Board agent unless subpoenaed, it is clear, and we find, that under the circumstances in the present case, Respondent's advice was designed to and would in fact tend to discourage employees from supplying information to a Board agent and thus to hinder him in investigating the charges filed in this case against the Respondent. [Footnote omitted.] In reaching this conclusion, we rely on the facts that Respondent advised virtually all of its approximately 100 employees that they need not cooperate in the Board investigation; that it told several of these employees that their cooperation would result in their being subpoenaed and forced to testify at a hearing, thus

> indicating that their cooperation would involve them more deeply in the litigation; [footnote omitted] that Respondent's opinion regarding the investigation was not solicited by employees, and the language it utilized was in many instances intemperate; and that Respondent made other coercive statements to employees which we have previously found violated Section 8(a)(1), including statements expressing disbelief and annoyance at employees who testified at the first hearing.We find, therefore, that the above-described conduct by Respondent interfered with the rights of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act. [Footnote omitted.] (147 NLRB 1517, 1520–1521.)

The Board also made clear in *Certain-Teed* that, as is true generally respecting 8(a)(1) allegations, it is the tendency of the conduct, i.e., its objective possibility, alleged to chill the section rights of employees rather than its actual effect on specific employees that is to be considered.

The Respondent argues the *Certain-Teed* decision is "readily distinguishable and not dispositive of the instant issue." (The Respondent's posthearing brief at 212.) Counsel notes that employees in *Certain-Teed* had not been seeking advice from the employer and the language used was intemperate.

The Respondent emphasizes the advisory and informative nature of its memo. Counsel for the Respondent argues the General Counsel's characterizations of the memo are strained and incorrect. It was rather informative and contained no compulsory instruction for employees. It specifically noted there were options for employees who were contacted by the NLRB. Indeed counsel for the Respondent emphasizes the memo specifically indicated to employees that the Respondent could not advise them: "I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you."

From this argument the Respondent advances the proposition that the statements in the communication are protected by Section 8(c) of the Act which states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Respondent cites the Seventh Circuit's rejection of the Board's decision in *NLRB v. J. W. Mortell Co.*, 440 F.2d 455 (7th Cir. 1971), denying enforcement of 168 NLRB 435 (1967), in which the Circuit Court found Section 8(c) protected certain employer statements regarding an employees right not to meet with the NLRB agent preparing for an unfair labor practice trial. I note however, that I am bound to follow the Board precedent absent reversal by the Supreme Court. Further, the Respondent cites certain advisory memoranda issued by the General Counsel's Division of Advice, so called Advice memoranda. While the case citations contained therein are obviously instructive insofar as they direct a reader to legal authority, Advice memoranda are not binding precedent and of themselves neither support nor limit the argument of any party on a legal issue. I therefore do not rely on them as authority.

The Respondent also cites the Board's holding in *Baptist Med. Ctr.,* 338 NLRB 346, 347 (2002), which declined to apply the *Certain-Teed* doctrine to memoranda addressed to employees dealing with investigations by institutions other than the NLRB. The General Counsel argues and I agree that this circumstance renders the case distinguishable from the issues at hand.

I have considered this issue in light of the memorandum itself, the underlying circumstances and the record evidence of what was known by the Respondent's agents at the time of issuance of the memo. I have considered this in light of the record as a whole, the testimony of the witnesses and the entire course of conduct of the Respondent at all relevant times. Based on all the above, the argument of the parties and the applicable precedent, I find and conclude as follows.

It is important to have the language and context of the memorandum clearly in mind in considering its likely impact on the employees—the test of the argued violation at issue. The owner and active manager of the Respondent: McCaw, causes a nonletterhead communication bearing her name and marked confidential to be delivered to all employees through delivery by supervision to the desks or other workplaces of all employees.

The communication leads with the correct assertion that she has learned "that an agent of the National Labor Relations Board (NLRB) has contacted News-Press employees directly, including on their personal cellular telephones." The communication however labels this information as "disturbing" in her first paragraph and labels the Board's conduct improper in the second:

> We have previously addressed the NLRB's unfair treatment of the News-Press in a letter to the NLRB General Counsel Meisburg in Washington D.C. outlining the biased treatment that the News-Press has received.

The memo is replete with additional warnings and admonitions respecting the conduct of the NLRB: "I ask you not to be afraid or intimidated by the NLRB's "investigation" tactics." ". . . [I]t seems that the NLRB would see us give up our First Amendment rights by prosecuting meritless charges. . . .". "We will not give up our First Amendment rights, to the NLRB, Teamsters or anyone else, nor will we submit to any intimidation against our employees from anyone."

Based on the record as discussed earlier, I specifically find that Respondent's agent, Apodaca, knew at the time she reported on the inquiry of former Top Echelon employee Fowler to McCaw, that Top Echelon referents—unit and nonunit members alike—had had their contact information given to the NLRB and I, on the same basis, further find that Apodaca also knew that the then ongoing NLRB investigation of the charges against the Respondent involved the status of such Top Echelon referral individuals—a circumstance that obviously meant that at least some of these individuals would be contacted by government investigators. Since McCaw did not testify, I draw the obvious inference that she knew these facts as well at the time she wrote the memo. Yet given this knowledge, the memo states: "I will not belabor the point any further than to say I am very disappointed that employees that are not represented by the Teamsters have been contacted directly."

All of the above convinces me that the memo was not truthful and was calculated to produce a hostile view of the NLRB by creating the false impression the NLRB was harassing the Respondent's employees. I find this was intended and the Respondent's creation and presentation of the memo in the circumstances described was designed so that the employees would pay attention to the memo's advisory statements:

> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the NLRB agent or any Teamster

> operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers
>
> If you do not feel comfortable with speaking to the NLRB agents, you may feel free to tell them that you do not wish to talk with them. These are only some of the options available to you.

The memo is clearly not, and I specifically find it is not, a benign, nonmalicious statement of the opinion by the Respondent.

It is in this factual context, as well as the larger context of the course of unfair labor practices committed by the Respondent throughout the period that I consider the legal arguments respecting the memo. Doing so I rely on the teachings of *Certain-Teed Products Corp*., 147 NLRB 1517, 1519–1521 (1964). I find the cases cited by the Respondent both distinguishable on their facts and, in the case of the United States Circuit Court of Appeals' cases reversing Board decisions cited to me, I also find the decisions are not binding precedent on an NLRB administrative law judge. Accordingly, I further find that in distributing the August 22, 2008 memo to all employees, the Respondent improperly discouraged its employees from cooperating with the Board's on-going investigation and in so doing violated Section 8(a)(1) of the Act. I therefore sustain the relevant paragraphs of the complaint.

3. The remaining allegations respecting requests for information

a. The allegations, facts, and argument

(1) The August 6, 2008 information request

Complaint subparagraph 7(c) alleges that since on or about August 6, 2008, the Union through Caruso, requested, in writing, that the Respondent furnish the Union with the following information:

> Notification of when a new employee is hired into the unit, when an employee terminates (including resignation), or when an employee working in the newsroom has a change in employment status (including changes in title, duties, or other terms and conditions of employment) including date of hire, classification and rate of pay.

The request was headed in the letter by the specification: "I would like to make a standing information request." The request also contained the paragraph:

> Since we are disputing the employer's use of only *Temporary* employees and *Independent Contractors* [capitalization and italicization in the original] to dilute the bargaining unit, this request included the above requested information for all individuals hired to perform work performed by the bargaining unit.

Subparagraph 7(f) alleges the requested information was relevant and necessary to the Union's performance of its duties as the employees' representative. Complaint subparagraph 7(i) alleges that until October 22, 2008, the Respondent failed and refused to furnish the Union the requested information. The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act.

(2) The September 9, 2008 information request

Complaint subparagraph 7(d) alleges that since on or about September 9, 2008, the Union through Caruso, requested, in writing, that the Respondent furnish the Union with the following information:

> Notification of status changes for workers performing bargaining Unit work:
>
> The status, classifications, wages and benefits of Alex Pavlovic, Dave Mason, Chauncy Kim, Alan Hunt, Bill McMorris and John Creely, and whether the New-Press considers them to be in the bargaining Unit or not, and if not, what is their status in the New-Press' view.
>
> Please provide the same information for any other people performing bargaining Unit work with respect to whom you have not yet provided this information.

Complaint subparagraph 7(j) alleges that until October 24, 2008, the Respondent failed and refused to furnish the Union the requested information. The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act.

(3) Facts concerning the information requests and Respondent's responses

There is no dispute that the August 6, 2008 Union's information request was made as alleged and that the Respondent supplied the information at the October 22, 2008 bargaining session, i.e., after 77 days or 11 weeks had passed. There is no dispute that the September 9, 2008 Union's information request was made as alleged and that the Respondent supplied the information by letter dated October 24, 2008 bargaining session, i.e., after 45 days had passed.

The Respondent argues that the information request cannot be viewed in a vacuum and emphasized that from October 22, 2007, the Union had made numerous, substantial, and lengthy information requests to which the Respondent timely answered with voluminous information. The Respondent notes that on September 3, 2008, it provided a roster of bargaining unit employees which included the employee's name, hire date, status, regular hours worked in 2007, overtime hours worked, and gross wages. It notes further that Caruso in a September 9, 2008 letter to Zinser, voiced appreciation that the Respondent had provided that wage and hour information. The Respondent further notes that the complaint does not allege a failure to supply any information, rather only a delay in responding to a very few requests.

The General Counsel argues that the requested information regarding unit employees is presumptively relevant citing *Pennsylvania Power and Light Co*., 301 NLRB 1104 (1991), citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). To the extent that the information concerning individuals who are doing unit work but who are not unit members or who were in potential or actual dispute as unit members, the General Counsel argues "the information was relevant as it was part of the Union's ongoing investigation into 'the nature and extent of the use of workers outside of the Unit who are being used to supplant the unit work force." *St. George Warehouse*, 341 NLRB 904, 925 (2004)." (The GC posthearing brief at 29.) The General Counsel further adds that the delay coupled with an absence of any justification or explanation, which belies any claim of difficulty in obtaining the information, clearly violates the Act citing *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1991).

The Respondent argues the Union never established the relevancy of the requested information respecting nonbargaining unit employees of the Respondent or the agency supplied nonemployees of the Respondent citing *Disneyland Park*, 350 NLRB 1256 (2007).

b. Analysis and conclusions regarding the information request response allegations

It is worthwhile to return to the basic law on the elements of an employer's obligations to respond to information requests. As discussed supra, the information sought must be relevant to the Union's role as unit employees' representative. The Board holds that information about subcontracting is not presumptively relevant to such a union. Therefore, a union seeking such information must demonstrate its relevance to the employer. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). In determining whether such relevance has been shown the Board uses a broad, discovery-type standard. A union demonstration of potential or probable relevance is sufficient to give rise to an employer's obligation to provide the information. To demonstrate that relevance at an unfair labor practice hearing, the General Counsel must present evidence either: (1) that the union demonstrated the relevance of the nonunit information, or (2) that the relevance of the information sought by the Union should have been apparent to the Respondent under the circumstances. See *Allison Co.,* 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.,* 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 6l5 F.2d 1100 (8th Cir. 1980). Absent a showing of relevance, the employer is not obligated to provide the requested information.

The parties were clearly in dispute regarding the unit status of various of the Respondent's employees and were in specific dispute regarding the unit work undertaken by and the unit placement of outside agency referents. Important elements of that matter were discussed supra and I have found that the Respondent's use of those individuals for unit work violated Section 8(a)(1), (3), and (5) of the Act. As discussed earlier, the Unions view on this issue was communicated early and often to the Respondent. Based on the record as a whole, I find the relevance of the information requested was known to the Respondent or at the very least should have been apparent to the Respondent under all the circumstances. I therefore find the information requested at issue herein was relevant at the time the Respondent received the Union's information requests. I reach this result based on the cited cases and the Board's decision in *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 717 (1992), enfd. 991 F.2d 786 (1st Cir. 1993).

The Respondent, on posthearing brief at 29, notes the information requests at issue are "on going" or "standing" requests, and argues:

> There is no precedent for a "standing information request." The notion of a continuing information request or "standing information request" is an anathema to the Act. . . . Providing [the Union] with information on a regular basis or when employees enter or leave the company is a contract term that can be negotiated, but is not an obligation with which the [Respondent] must comply at the beck and call of the [Union].

I do not find the argument of the Respondent here convincing. First, parties often negotiate contracts which expand or limit one or both parties' statutory rights. Until a contract so limiting a right has been concluded, and no such contention has been made here, negotiating about statutory rights does not limit them. Second, I perceive nothing about a standing request for information which is disabled or reduced in efficacy under the Act by reason of its continuing

nature.[28] Nor has the Respondent cited authority for its asserted proposition. Finally, even were a continuing request otherwise relevant information for some reason impaired by the fact of its continuing nature, it would remain effective as an initial or noncontinuing request for the information and is therefore not for reason of its standing status void ab initio. I explicitly find that the Union's requests for information here were not limited by virtue of being "ongoing," nor for that reason was the Respondent's obligation to respond timely to the requests diminished. This defense is rejected.

Given all the above and the record as a whole including the arguments of the parties and the testimony of the witnesses, I find and conclude as follows. The Union's information requests were received by the Respondent. The information sought was relevant under the Board's decisional law and the teaching of the courts. The Respondent responded to each information request in a sufficient manner as to the content of the response. As to the timeliness of response, I find the responses to each request, in the light of the entire history of the relationship, the bargaining and the other information requests and the Respondent's responses to them, was unreasonably delayed. The information could and should have been conveyed to the Union well before the actual times of delivery as discussed and described supra. I further find that this unreasonable delay in each instance violated the Respondent's obligation to bargain in good faith with the union and therefore violated Section 8(a)(1) and (5) of the Act. I therefore sustain the noted allegations of the complaint.

I. The December 3, 2008 Katich Meeting with Employees: Confidentiality Issue, the Dispute Concerning the One Story a Day Announcement and Change in Work Practices

1. The allegations

The two complaint allegations set forth below are essentially legally independent but share common events that make it more efficient and understandable to address them together.

The General Counsel's complaint paragraph 22 alleges that on or about December 3, 2008, the Respondent by Don Katich, in a conference room at the Respondent's facility, instructed employees not to discuss their terms and conditions of employment. Complaint paragraph 26 alleges this conduct interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act. This is the confidentiality issue.

The General Counsel's complaint paragraph 16 alleges that on or about December 3, 2008, the Respondent announced and established a requirement that unit employees produce at least one story per day. Paragraph 18 alleges that the actions alleged in paragraph 16 were undertaken without prior notice to the Union or affording it an opportunity to bargain with respect to the conduct or the effects of the conduct. Paragraph 20(c) of the complaint alleges this conduct constitutes a failure and refusal by the Respondent to bargain in good faith with the Union and, in paragraph 25, is further alleged to violate Section 8(a)(1) and (5) of the Act. This is the change in work practices issue.

[28] That is not to say that issue of the reasonableness of the frequency of an employer's response to such requests may not arise. But here, the initial response of the Respondent is under contention not some later, repeat response.

2. Relevant events

a. Testimony

Don Katich was hired by the Respondent on September 15, 2008, as the Respondent's director of news operations. That position reported to the copublishers and chief financial officer. The director of news operations is in charge of newsroom operations and the employees there including the bargaining unit employees. Reporting to Katich was the associate editor, Scott Steepleton, who at the time of Katich's hire was an experienced member of the Respondent's newsroom management.

Early in his employ with the Respondent without recalling a specific date, Katich testified he had a lunch meeting with Steepleton to become acquainted and learn more of the practical side of day-to-day operations of the newsroom. Part of that conversation included a general description by Steepleton of the workload, type of work, and general productivity of newsroom employees including bargaining unit members.

In late November 2008, Katich came to know that some 17 nonnewsroom employees were to be laid off by the Respondent. The layoffs were to be effective and made public on December 3, 2008, a Wednesday. Katich testified he "wanted to provide some assurance to the people in the newsroom that those layoffs would not affect them in any way" and so he issued a staff memo a few days before December 3 announcing a meeting for that day for the entire newsroom staff. He testified:

> [I]t was my motive, my objective to give some hope, some guidance to both managers and bargaining unit employees within the newsroom that there was—that these layoffs would not affect them and that there was some plan, some hope, some direction of how we would work together to ensure that we stay viable as a news organization.

That day, with three pages of word processor prepared and printed notes in hand, which notes included within them the text of the just released press release issued by the Respondent announcing the layoffs, Katich met in the afternoon with the newsroom staff comprising 15 to 25 reporters, page designers, copy editors and photographers as well as then Associate Editor Steepleton, Assistant Life Editor Boelchler, Photo Editor Maldonado, and Scene Editor Bradford. Several witnesses testified regarding the specifics of the meeting.

Katich testified concerning the meeting. When asked if he read his notes verbatim at that meeting by his counsel, he responded: "Not in its entirety." He added:

> The only portion of my notes that I read verbatim was a press release that you have identified in the larger font. The remainder of the notes were used more to keep me on track and to make sure that there were certain things I did not forget.

Katich testified, and his notes track the assertion, that following his opening greetings, announcement of the layoffs and his assurances that the layoffs would not affect the newsroom, he announced: "The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." He testified:

> And the purpose of that was to hopefully ensure that the words that I spoke, the direction that I communicated to the newsroom would not appear in the blog-sphere or in our competition as—and did so report about the 17 layoffs.

Having announced that caution, Katich discussed the general difficulties in the newspaper industry and specific problems with other papers. He then turned to the News-Press and in an exhortation asked for a renewed effort by all to invigorate the Paper.

He testified he then told the employees that "starting immediately" as part of the necessary effort to build up the paper" a series of things would take place. In testifying about the specifics of what he said regarding the listed matters, Katich indicated: "What I stated in the meeting is virtually identical to what my notes have indicated." The notes state:

> Starting immediately, all of our efforts, every day go towards building up this paper.
>
> We will be hiring an AM Assignment Desk Editor who will be working 6 am–3 pm, preparing the days events and assignments in preparation for our 9 am Meeting with the Associate Editor, Business Editor, photo in an effort to plan out the days events in a coordinated and proportional structure.
>
> We will have a posted work schedule and every reporter/writer wall be responsible for a minimum of one story per day and one story for the weekend.
>
> We will assign/schedule Feature stories 60 days in advance.
>
> We will dominate our Lead story, at times assigning two resources to cover the story.
>
> We will make better use of our graphics design capabilities.
>
> We have the the [sic] best photojournalists in the market; we will use them more effectively.
>
> We will migrate to [a new type of technology] aggressively providing greater efficiency in how we operate.
>
> We will remove any artificial barrier that hinders our ability to proceed.
>
> We will provide LIVE streaming over Newspress.com and Dale Earnerst will be present at our 9 am meetings.

Steepleton testified in response to questions from Respondent's counsel as follows regarding what was said in the meeting:

> Q. Now, did Mr. Katich explain anything or state anything about the expectations of reporters as far as the amount of work that the company expected them to produce?
> A. Yes.
> Q. Okay. What did Mr. Katich say?
> A. A story a day.
> JUDGE ANDERSON: Do you remember how it came up? The words before it and the words after, if you will.
> THE WITNESS: He went through the closures, he went through having to reposition people, and kind of as a result, I may not be quoting him accurately, but as a result people are going to have do a story a day. That's what we want out of people.

There is no dispute that the remarks of Katich regarding the "story a day" were not expanded upon, explained, or even commented upon thereafter by Katich or any of the Respondent's managers or supervisors attending the meeting at the meeting itself.

Following his remarks, Katich solicited questions from employees. Some were proffered and responded to. They did not touch upon the "story a day" matter. In time the meeting concluded and the assembled group began to disperse. Again no discussions occurred regarding the "story a day" matter.

Karna Ming E. Hughes, is a reporter in the bargaining unit who at relevant times was a writer of feature stories for the Paper's lifestyle section who also wrote shorter stories for the news and the lifestyle sections. She is also a member of the Union's bargaining committee. She testified that she attended the December 3, 2008 meeting. She testified further that the "one story a day requirement announced by Katich was new to her and she wondered how it would apply to her circumstances as a lifestyle section writer. She did not raise the matter at the meeting. She described her later actions concerning the matter:

> Well, immediately following the meeting as I was walking back to my area, my desk in the newsroom, I asked the Assistant Life Editor, Charlotte Boechler, if the story a day requirement applied to us in the life section.
> Q. Did she respond?
> A. Yes. She said not to worry about it and that they'd talk to us about it later.
> Q. Did you respond to that?
> A. I asked when we would talk about it. I asked will that be next week?
> Q. And did Ms. Boechler respond?
> A. She said not to worry about it, that she'd let us know.

Dave Mason, a reporter for the life section attended the December 3, 2008 meeting and also had questions about the "story a day" matter and asked Boechler about it.

In due course, Boechler, in Steepleton's memory, told Steepleton that Hughes and Mason had questions about Katich's December 3 statements respecting work amounts. Steepleton contacted the two and conducted a meeting with the two and Boechler, his spouse, on December 9, 2008. Steepleton testified that following opening greetings and his thanking the employees for their efforts, the subject turned to Katich's "story a day" comment. Steepleton testified that he told the employees that the "story a day" was "a goal to shoot for" and that not every story was the same size, ". . . [s]ome stories are going to take longer and some stories aren't. . . ." The conversation continued with the employees seeking specifics as to length and deadline for submission requirements Steepleton assured them that flexibility would apply.

Hughes testified:

> Scott Steepleton started the meeting by saying that he was thankful for what we had done in terms of contributing additional articles around the tea fire incident, and then he said that with the—that times had changed in general for the Company, that the layoffs, that we were aware of the layoffs and times had changed, and that the story a day requirement would apply to us. . . . He said that he wanted us—he said that in general we seemed to be averaging about two features a week, so he wanted us to continue writing two features but then also do three additional stories and the three stories would be what he called write-throughs of about 10 to 12 inches in length.

Hughes added that Boechler then stated she thought that as to those shorter stories, "we should just take about 10 minutes to interview one person for the story and then that it would take about an hour to write the stories."

Mason recalled Steepleton's remarks at the meeting regarding additional stories:

> Scott [Steepleton] was saying—was talking about they were looking at how the features department would satisfy the goal of one story per day. Because as I said earlier, feature stories do involve more time. They involve more research, more writing time.
>
> As Scott said that they thought we could—Scott said that they were having us write two additional stories, which would be short stories, per week. So we would have our three—he said that we all were doing the three cover stories a week, the life section covers, and that there would be two additional shorter stories. And that would bring us up to five stories a week. . . . I also remember that at the time Karna Hughes had—was concerned about the workload. And she expressed her concern about how we'd manage to do all this. And to the best of my memory, I believe Scott and Charlotte said that they were—you know, discuss those things with her.

Hughes, Mason, and Marilyn McMahon, union bargaining committee member, unit member, and staff writer in the life section under Charlotte Boechler, each testified to feeling under greater pressure to write more stories. Mason and Hughes testified that they were making extra efforts to complete the added shorter stories now required of them weekly. McMahon testified: "There's a been a great deal more pressure to write more stories. Not only for the feature section, but also for the city desk." Katich and Steepleton testified that no increase in workload of unit employees was initiated following the December 3, 2008 meeting.

There is no dispute that the Respondent did not communicate with the Union before the December 3, 2008 meeting respecting any change in the number of stories required of unit employees. On December 4, 2008, Caruso by letter to Zinser raised two matters which Caruso stated he learned had been raised by Director of News Operations Katich at a December 3, 2008 newsroom employee meeting. The letter described one matter as the "apparent announcement of a new requirement" that reporters would be required to write a minimum of one article per day. The letter at this point stated:

> This, is therefore to request that the News-Press disavow and rescind any such policy as it affects the newsroom. If the News-Press declines to do so this is to request that the News-Press immediately explain in full on reporter "production" is, what, if any consequences including disciplinary and/or positive consequences may flow from that policy. . . .

The letter raised as the second item the fact that Katich instructed the employees that everything said at the employee meeting was "proprietary" and had to stay in the room and not be shared by anyone outside the room. The letter noted:

> As you know, Michael, we have been down this road before "at least with a "gag order" that the News-Press significantly modified on the eve of the filing of an ULP charge in July, 2006, and with the December 15, 2006 memo, which would have been protected if disclosed to the media by any newsroom employee. Again this is to request that the News-Press rescind or clarify to its employees its position on what employees may disclose to non-News-Press employees without negative consequences to them.

Caruso wrote a second letter to Zinser on the matters covered in the first letter dated December 11, 2008, again seeking a reply. Zinser responded by letter dated December 12, 2008, stating the Respondent needed more time to respond. On December 19, 2008, Zinser wrote to Caruso covering various matters. As to the "trade secrets" issue the letter stated:

> In the meeting you referenced, Dan Katich informed reporters that the information pertaining to the business strategy of *Santa Barbara News-Press* was proprietary and confidential. Employees were informed of how management had decided to reorganize the content of the newspaper, as well as how management has decided to dedicate resources. The information was considered a trade secret that is confidential and propriety information that *Santa Barbara News-Press* expected employees to not share with any competing news outlets.
>
> *Santa Barbara News-Press* is well aware of employees' rights to discuss terms and conditions of employment with [the Union], and in no way were employees directed to withhold any information pertaining to terms and conditions of employment from [the Union]. You are replowing tilled soil here. We have been down this road before. To the extent an employee interpreted anything to reflect such a prohibition, that employee's interpretation is unreasonable and unsupported. Of course employees can discuss terms and conditions with the union and among themselves.

Zinser's letter also addressed the "one story" policy issue:

> Finally, with respect to "a new policy that reporters will be required to write a minimum of one article per day," such a goal was announced to employees. This is no new "policy." Your letter appears to recognize this by referring to the "preexisting practice and policy . . . ." *Santa Barbara News-Press* does not intend to discipline any employees for failing to meet goals that are greater than historic productivity standards.

b. Credibility resolutions

The bulk of the evidence respecting these allegations is undisputed. To the extent there is dispute regarding some elements of the events, I here resolve credibility issues needed to determine what actually occurred. Based on the demeanor of the witnesses, consideration of their positions and sympathies, and importantly in this case, the fact that the witnesses involved are purveyors of words and evinced experience and skill in their use, I make the following findings.

I find that Katich opened his remarks at the December 3, 2008 meeting with the assertion, which is consistent with his notes: "The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." Again consistent with the great bulk of the witnesses, I find Katich did not make any statement to the employees respecting the Respondent's employee handbook. Further, I find he did not make the remarks attributed to him in Zinser's letter to Caruso dated December 19, 2008.

Regarding the statements of Katich respecting the "story per day" subject matter, I find, consistent with his notes, that he made a statement which contained a series of things which he indicated he was announcing were to "start immediately" and which were part of the necessary steps necessary to build up the paper. One of the series of things that he announced would immediately take place was the statement: "We will have a posted work schedule and every

reporter/writer will be responsible for a minimum of one story per day and one story for the weekend."

3. Analysis and conclusions

a. Matter of subjectivity, intention, ignorance, lack of enforcement, and inexperience

The Respondent argued at some length that I consider the perspective of Katich in evaluating the allegations of violations of Section 8(a)(1) and (5) arising out of the December 3, 2008 meeting. Thus counsel for the Respondent argues it is important to note that Katich at the time of these events was inexperienced in managing a newspaper newsroom and equally inexperienced in managing employees in a union-represented bargaining unit. Finally, the Respondent notes that Katich's conduct must be viewed through the lens of what he knew or understood to be true concerning employees working conditions at the time the remarks were made. He further notes no employees had been disciplined for violation of the supposed new rules in the context of the instant dispute. Finally the counsel for the Respondent urges Katich's intentions and desires be taken into account both as to the consideration of a violation and, if necessary, in crafting a remedy.

The Board has traditionally applied an objective standard to evaluating whether or not employer conduct constitutes interference, restraint, or coercion of employees in the exercise of their right to self-organization and therefore violates Section 8(a)(1) of the Act and does not look to the subjective views of the employer or the employees involved. It has relied on the decision of the Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established, and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.
>
> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. (395 U.S. 617–618.)

The Board has maintained that position in *Lafayette Park Hotel*, 326 NLRB 824 (1998), a case which dealt with an employer's unacceptable conduct rules for employees including "divulging Hotel-private information" to unauthorized individuals. The Board in a split decision on the merits held "we all agree" that the employer's conduct is to be tested by a determination whether or not it would reasonably tend to chill the exercise of Section 7 rights (326 NLRB at 824). The Board noted further:

> Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB* v. *Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing

Republic Aviation [v. *NLRB*, 324 U.S. 793, 797–798 (1945)], 324 U.S. at 803 fn. 10. (326 NLRB at 825).

Based on all the above, the arguments of the parties, the record as a whole and the testimony of the witnesses, I find as follows respecting these defenses. First, I find the standard to be applied to the statements in contest is an objective one of determining what reasonable employees would have perceived in the context of the employer's labor relations setting. Applying that standard it is permissible to consider the perceptions of a reasonable employee perceiving the meeting's participants statements but the subjective state of Katich to the extent it was not part of the perceptions of a reasonable employee is immaterial. The noted standard will be applied in reaching a resolution of the allegations immediately below.

b. The December 3, 2008 meeting confidentiality allegation

I have found, supra, that Katich essentially opened the December 3, 2008 meeting with the statement: **"**The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." I further found that Katich made no reference to the Respondent's personnel manual in his remarks.

A "trade secret" is a common term for a secret device or technique which is held closely or confidentially and is used by a company in manufacturing its products. The most common example within our culture is the secret formula or recipe for the Coca-Cola® beverage. Proprietary information is simply a broader class of information properly closely held by a company. An employee would be imprudent to lightly disseminate a trade secret or other proprietary information of his or her employer. There is no doubt that Katich, the highest official of the Respondent in the newsroom, was giving an instruction of importance to the meeting participants in opening with his cautionary advisory: "what is discussed in this meeting shall not leave the confines of this building."

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board considered whether a rule prohibiting employees from talking to the press was unlawfully broad and thus violative of the Act. Citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), the Board affirmed that Section 7 of the Act protects "employee communications to the public that are part of and related to an ongoing labor dispute." Id. at 386 fn. 21. In *Crowne Plaza*, the Board found that the employer's rule in that case could reasonably be construed as "prohibiting all employee communications with the media regarding a labor dispute." At the very least, the rule could be viewed as "ambiguous." The Board concluded that the rule was facially overbroad and thus the maintenance of the rule was violative of Section 8(a)(1) of the Act. Id. at 386. See also *Trump Marina Associates,* 354 NLRB No. 123 (2009), and *Brunswick Corp.*, 282 NLRB 794, 795 (1987). With respect to interfering with the protected right to talk to the media about labor disputes, see *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000); and *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

At all relevant times, the Union was engaged in a labor dispute with the Respondent presumably in an attempt to put pressure on the Respondent to make concessions at the bargaining table. The Union requested that businesses cease advertising in the Paper and called for a boycott of those businesses that did not agree to cease advertising in the Paper. The Respondent filed several charges against the Union contenting that aspects of the campaign against the Paper violated the Act. In December 2008, those charges were outstanding and had not as yet been ruled on by the Board.

It is important to note the specific statutory rights involved respecting this issue as well as the Respondent's and the Union's positions on the matter as communicated to one another. At issue are the right of employees to talk to one another and to their bargaining representative about certain matters, but also, and importantly, the incident touches on the right of employees to have communication with the media regarding a labor dispute. Caruso's letter to Zinser dated December 4, 2008, clearly notes that the Union is again dealing with a perceived infringement of employees' rights to communicate to the media, i.e., his reference to earlier Respondent limitations and restrictions on information that would have been "protected if disclosed to the media by any newsroom employee." Yet, in Zinser's reply, which I have found supra to incorrectly deny the occurrence of the broad restrictions Katich announced at the beginning[29] of the meeting at issue does not address the access to media rights of employees or the Union's complaint in that regard. In my view the Respondent's overly restrictive view of employee rights to discuss with their Union and among themselves certain information, as well as communicate with the media respecting the ongoing labor dispute was defiantly reiterated by Zinser in the face of the Union's complaint and Katich's initial remarks may hardly be labeled as a de minimus or inadvertent error in the full context of events.

Given all the above and based on the record as a whole, the argument of the parties and the testimony of the witnesses, I find the broad and essentially total blackout or 'keep secret' admonition of Katich to employees regarding the meeting's content, during this period of the Union's ongoing labor dispute "at the very least, . . . could be viewed as 'ambiguous'" by the employees. Accordingly I find Katich's restriction was overbroad and thus was violative of Section 8(a)(1) of the Act. I therefore sustain the relevant paragraph of the complaint.

In reaching this conclusion I have considered the fact that the employees surely knew that Katich was new to his job. I find that it makes no difference here because the remarks made by Katich were made in the presence of the other Respondent managers and supervisors in the newsroom and were not corrected by them. The employees reasonably took Katich's caution as authoritative when it was allowed to stand uncorrected by their more immediate supervisors who were in the meeting with them. The Respondent's agents had their chance to catch any error in their new manager's remarks. When they did not make corrections, the employees could hold no reasonable belief he was not speaking with the authority of his office. And as noted supra, the Respondent was informed of his conduct by the Union and responded with a denial of the actual details of the event and a reassertion of the Respondent's rights to impose such total blackout restrictions at the beginnings of meetings under the banner of trade secrets and proprietary information.

I have also considered the fact that the Respondent's handbook has an addendum which asserts that the Respondent's handbook's prohibitions in its "Confidentiality" portion does not apply to communications protected by the National Labor Relations Act and states its policy should not be construed as preventing employees from discussing with each other their wages, hours and other conditions of employment for their mutual aid and protection. I find that an employer's written assurances in its employee handbook, of the type and nature involved herein, are simply not an effective defense to the chill the employees rights suffer when they are told in a closed meeting by the newsroom editor, with all their other supervisors and

[29] It is of course revealing that the meeting commenced with the announcement of a broad no-disclosure edict by the Respondent. At that point when the meeting was just beginning there was no way of the employees knowing what broader subjects the meeting might visit. Only at the end of a meeting, when it is clear what has been said, could an employer safely put out a blanket restriction under a claim that only company plans and strategies were being protected.

newsroom editors present, that like a trade secret what was said in the meeting was to be held closely: "what is discussed in this meeting shall not leave the confines of this building." The employee handbook, including its cautionary language, was not before employees summoned to a meeting attended by their managers and supervisors. What they are told at the meeting, that all information is restricted as described, is not saved from violating the Act because of the language of the employee manuals read long before and doubtless stuck by those employees in the back of the employees' desk drawers.

c. The allegation concerning the December 3, 2008 one story a day announcement and subsequent change in work practices

The case law applicable to unilateral changes is not in dispute and has been presented supra. The issue here rather is factual: Did the Respondent through Katich on December 3, 2008, announce and establish a new standard for unit employees respecting the quantum of daily article production?

The Respondent argues that there was no discrete, established minimum standard for the number of stories or articles written in the newsroom. Further counsel for the Respondent argues there was no written or disseminated standard addressing the quantum of stories required to be produced. While there was no such specific standard, the Respondent did expect employees to be productive and employees who were not sufficiently productive were regularly admonished in their performance reviews to do better. Thus, for example—a warning to an employee failing to produce at least one story a shift. On many occasions, particular employees had their individual productivity described in such reviews in terms of their story output. Examples include: ". . . usually writes a story a day during weekdays and a story (or two) and briefs on Saturday", ". . . is extremely productive and regularly writes a story or two a day," ". . . is called upon to write or contribute two stories on a daily basis." It is also true that the nature, length, and difficulty of writing particular stories in particular portions of the paper vary so widely that the terms "article" or "story" as a measure of unit employees productivity was so variant as to be almost meaningless as a form of measurement.

The Respondent notes that at the meeting at issue Katich sought to inspire employees and wanted employees to be productive and to contribute daily to the paper. His remarks at the meeting were simply that employees were responsible for one contribution per day and that this was historically nothing new. Further, the Respondent argues it did not discipline or threaten to discipline any employee for failing to achieve such a standard after December 3, and made it clear to the Union in writing that they would not be disciplining employees.

The Respondent further argues the matter at best is a de minimus violation of the Act and notes, on brief at 196:

> Assuming, arguendo, that Mr. Katich announced a "change" at the December 3, 2008 meeting, the goals announced by Mr. Katich were actually less of a "change" than those instituted in *Service Spring Co*., 263 NLRB 812, 812 (1982), where a new president instituted stricter attendance standards and "tightened discipline" to improve production efficiency.

The General Counsel argues that it is clear that until the December 3, 2008 meeting, no quantified rule or standard existed respecting a particular number of stories per unit of time, such as one story per day. The fact that historically individual employees in private evaluations conducted after a calendar year had passed were praised for achieving or criticized for not producing an output of a story or stories a day is not evidence of a rule. New employees who

need to learn of the employer's performance rules or standards at the soonest opportunity would not know such praise or criticism awaits them at year's end. The General Counsel in these regards advances the Board's adopted explanation of Administrative Law Judge Richard A. Scully in *Alwin Mfg. Co*., *Inc.,* 314 NLRB 564 (1994), wherein the judge explained at 314 NLRB 568:

> There is a substantial difference between attempting to discipline an employee for low production based on the production of other similarly situated employees or his own previous production and imposing precise minimum hourly production rates which have been unilaterally determined by the employer and which all employees must meet or be subject to disciplinary action.

See also *Tenneco Chemicals, Inc.,* 249 NLRB 1176 (1980). And the General Counsel emphasizes that the mere announcement of a change is a violation of Section 8(a)(5) of the Act, irrespective of whether any attempt at enforcement or discipline or threat of discipline or other steps had been undertaken. *ABC Automotive Products Corp*., 307 NLRB 248 (1992).

Based upon all the above, the record as a whole, the arguments of the parties and the testimony of the witnesses, I find and conclude as follows.

First, I find that there was in fact no specific numeric written minimum quantity requirement attached to story production in the bargaining unit as of the time of the December 3, 2008 meeting. I further find that Katich - when he announced of the various employee actions and achievements that followed his exhortatory declamation, as his notes reflect: "Starting immediately, all of our efforts, every day go towards building up this paper," was listing new actions the Paper would be taking. Put another way Katich was announcing the new "We will" actions as changes in old ways of doing business which would aid the paper in overcoming economic adversity. The only fair meaning to be taken from Katich's remarks—recall both he and his audience are professional wordsmiths living in a world of language—in the context presented, was that all was to be new, that changes were to occur as listed by him in his remarks. Thus I reject the argument that he was not seeking change. I reject the argument that the employees would not realize he was setting forth new standards of employee conduct "starting immediately." The contrary argument that the employees would believe he was stirring the troops with an announcement that the status quo would simply be maintained "starting immediately" is unsound and unpersuasive.

Second, based on the cases cited above, I find the unilateral announcement of a change in the story output policy for unit members violated Section 8(a)(1) and (5) of the Act from that point forward even in the absence of enforcement or threat of enforcement. And I do not find the matter simply de minimus or a new manager's innocent naiveté as the Respondent has argued.[30] Rather, I find there are significant additional factors that further support the violation and diminish the Respondent's arguments that the entire matter was miscommunication and confusion.

The correspondence quoted in part above, make it clear that the Union put the Respondent on notice early on of its concerns regarding a December 3 announced new standard. The Respondent delayed any substantive response by initially asking for more time

[30] The Respondent's cited case, *Service Spring Co*., 263 NLRB 812 (1982), is inapposite in that it is a case addressing an alleged violation of Sec. 8(a)(3) of the Act, not a violation of Sec. 8(a)(5) of the Act and hence does not address statutory bargaining rights and issues.

to prepare a response and then in that response simply reasserted its version of facts, rejected by me as incorrect supra, and refused to admit of any need to take the Union's requested action to either retract the announcement or to assure employees that no new standard was in place or would be enforced. Further, again as discussed supra, the Respondent's agents Boechler and Steepleton, as late as December 9, 2008, met with employees who had expressed worries about the specific new story quantum requirements personal to them that were in place as a consequence of Katich's December 3 "one story" announcement. Those agents of the Respondent did not give any assurances to the worried employees that no change had occurred in story requirements. Rather they gave the employees specific instruction in how they should apply the new rules to their work output. Employees would reasonably believe in such a context that their performance requirements had been raised. I sustain the relevant complaint allegations.

J. The Respondent's Employee Performance Evaluation Modification Allegations

1. The allegations

The complaint at subparagraph 13(a) alleges that in or around November 2007 through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. In subparagraph 13(b) the complaint alleges the Respondent in or around November 2008 through January 2009, "failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice."

Complaint paragraph 17 alleges the performance appraisal system is a mandatory subject of bargaining and paragraph 18 contends the Respondent took the actions alleged in paragraph 13 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct. Complaint paragraphs 20(c) and 25 alleges that the Respondent in engaging in the conduct set forth in paragraph 13 has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Complaint paragraph 23 alleges the Respondent took the actions alleged in paragraph 13 because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities. Complaint paragraph 24 alleges that the Respondent in engaging in the conduct set forth in paragraph 13 taken for the reasons set forth in paragraph 24 has discriminated in regard to the hire or tenure or conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

2. Relevant events

At relevant times the Respondent has utilized a performance evaluation system to evaluate the performance of its employees. The process utilizes a multipage form, which on its face describes the process. It states in part:

> After you and your supervisor discuss your performance, the evaluation form will be returned to you for your signature to confirm that discussion took place. You may, if you wish, enter additional comments of your own. A copy of the complete form with your comments (if any), will be given to you and the original will be on file in the Human Resources Department.

Apodaca testified that the forms traditionally are prepared by the supervisor for each employee and the completed forms are submitted to the human resources department for approval. The approved forms are then returned to the supervisor who then meets with the employee to discuss the completed form and the employee's performance. Thereafter the form, along with any comments the employee chooses to submit in response, are returned to human resources for inclusion in the employee's personnel file. Up to and including the 2006 performance appraisal process at the end of 2006, some employees were given employer-prepared self-assessment forms by their supervisors which were filled out and returned to supervisors as part of the evaluation process. Both unit and nonunit employees did so but not all employees in all departments did. Some employees took the language of the forms and submitted answers in other ways such as by email. After the 2006 evaluation process, the Respondent-prepared self-assessment forms were no longer supplied to employees although some employees submitted self-prepared self-assessment submissions thereafter. Apodaca testified she believed fewer than half of employees used the employer-prepared self-assessment forms during the period of their use. Most of the Union's supporting employees who testified regarding the matter used them. Apodaca testified the self-assessment process was always voluntary and simply an aid to supervisors in evaluating employees.

The evaluation process ascribes numeric scores to various elements of employee performance. The arithmetic total of these scores, depending on their totals, makes the employee eligible or ineligible for any annual bonus awarded that year by the Respondent to employees. In January 2006, the then-publisher, Joseph Cole, wrote a memo to employees explaining that the performance reviews give the employee "the formal opportunity at least once a year to discuss your job performance with your immediate supervisor. Success can be reviewed and areas for improvement explored."

Melinda Burns, a former employee, testified that as a newsroom reporter participant in the evaluation processes at the end of the years 2001, 2002, and 2004, she had occasion to discuss her supervisors evaluation of her and that she had protested that her supervisor's scoring of her performance were unreasonably low. On these occasions she was able to obtain increases in her scores that allowed her to receive annual bonuses that she would not have received had the scores not been raised.

The evaluation process for employee performance in calendar year 2007 took place after the Union became the representative of unit employees. Witnesses Marilyn McMahon, Dennis Moran, and Karna Hughes testified that they did not have the opportunity to see their supervisor-prepared 2007 performance evaluations or meet with their supervisors concerning them. Hughes testified that she had submitted a self-evaluation form to her supervisor, then-editor of the life department, Mindy Spar, in November 2007. After a period of months passed Hughes asked Spar if they were going to have a performance review and Spar answered she did not know. Spar left the paper on or about May 1, 2008.

These employees testified they learned of the existence of supervisor-prepared evaluation forms for them only some months later when instructed to come to the human resources' department to sign their evaluations. Ultimately the human resources department had occasion on May 6, 2008, to send to five employees email apologies for the fact "that your 2007 performance review was not reviewed by you" and a similar email to a sixth employee was sent on May 8, 2008.

Many of the employees involved in this circumstance had had supervisors leave the employ of the Respondent during the period these circumstances occurred. Other employees,

including bargaining unit employees, received performance evaluation forms, discussed them with their supervisors and signed them in the normal course. Supervisors involved in the performance evaluation process received a memo from the human resources department to undertake and complete the 2007 evaluation in the normal course similar to the memos distributed to them in earlier years.

Respecting the employee performance evaluation process for the performance year 2008, Apodaca testified that the Respondent changed the evaluation forms for nonunit employees of the Respondent and determined their meetings with supervision as part of the evaluation process for 2008 would take place in late May 2009. She testified regarding the unit employees:

> Why, Ms. Apodaca, did the company not just simply meet with the 20 employees in the bargaining Unit in November or December or January or February to discuss their performance evaluations rather than waiting for this new change in the form for the other 130 employees?
> A. It was my belief that we should be consistent and administer all of the performance reviews at the same time.
> Q. So, if I may, in other words, you wanted to treat the 150 employees the same rather than have 20 Unit members receive their performance evaluations prior to the other ones?
> A. Yes.

There is no dispute that the Respondent never notified the Union that it was making changes to its performance evaluation process for unit employees.

3. Analysis and conclusions

a. Modification of performance evaluation of employee's 2007 performance

The General Counsel has alleged that the denial of the bargaining unit's opportunity to meet with supervision concerning their 2007 performance-evaluation forms was significant to unit employees because such meetings provided an opportunity for the individual unit employee to disagree, argue, and obtain increases in the supervisor's numeric scoring which could make an employee eligible for a bonus for the first time. The General Counsel has further alleged that the Respondent's denial of this unit practice for the performance year 2007, without notifying the Union or providing it with a chance to meet and bargain is a violation of Section 8(a)(5) of the Act. The government further alleges the denial was undertaken to discriminate against unit employees for their union activities in violation of Section 8(a)(3) of the Act.

The Respondent addresses all aspects of the governments claims, but argues most forcefully that the contretemps concerning the missing of some of the 2007 performance year employee meetings with their supervisors was not a policy established by the Respondent, but was rather a mistake of individual supervisors arising from the uncontested fact that some supervisors and managers left the Respondent's employ during the relevant period and the entire newsroom managerial and supervisorial staff was in some confusion during the period at issue. And, the Respondent emphasizes, there is no evidence that the mistake was more widespread that the specific half dozen or effected employees to whom the Respondent specifically apologized when the error was discovered in May 2008.

Thus, the Respondent argues, there was no change in policy—the human resources department was unaware of the events and apologized to employees for the error when it was

discovered. Further there was no animus driven action that could possibly be in violation of Section 8(a)(3), simply because there was no action taken by the Respondent beyond the personal negligence of a few supervisors who were soon to leave their employment.

Turning initially to the 8(a)(3) allegation, the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical framework for addressing the issue. The cases cited supra will not be repeated here in total, but it is important to recall that in the two-step process, it is the General Counsel has the initial burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the challenged action taken. Here I find the General Counsel bears the burden of establishing that there was a decision taken by an agent or agents of the Respondent or attributable to them to withhold or deny the unit employees or some of them the right to discuss their performance evaluations with their supervisors. It is to that threshold matter I turn.

The record reflects a half dozen employees did not have timely post-evaluation meetings with supervision for performance year 2007. At least the bulk were union supporters. The record also shows that when the human resources' department learned of this fact they issued apologies. Further there is evidence that the supervision of the newsroom had been in turmoil at relevant times and that many of the supervisors left the Respondent's employ. Finally it is clear that the Respondent distributed the "normal" instructional memo to supervision for performance year 2007 evaluations and that at least one supervisor testified that he was instructed in the normal course and personally provided employees with an opportunity to meet and discuss their evaluations as in prior years. It was also shown that at least one supervisor when asked whether or not employees would be meeting with their supervisors to discuss the evaluations indicated she did not know. Lastly the entire issue must be judged on the entire record including the substantial pattern of antiunion conduct undertaken by the Respondent.

Given all the above, the record as a whole, including the argument of the parties, and the testimony of the witnesses, I find and conclude the General Counsel has not met his initial burden of showing an intentional action by the Respondent. There is simply insufficient evidence of a directed course of conduct. Rather I find a series of mistakes at a time of some confusion and turmoil: Nothing more. That being so, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged in the complaint concerning the 2007 evaluation year. I shall therefore dismiss these allegations of the complaint.

This factual finding is likewise fatal to the General Counsel's 8(a)(5) allegation concerning the 2007 evaluation year performance process. I have found no intentional change in practices. Rather I have found that the errors in process were acknowledged by the Respondent and apologized for. There was insufficient evidence to find that a practice had been knowingly changed or that the irregularities that occurred were regularized or made into new practices. That being so, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint concerning the 2007 evaluation year. I shall therefore dismiss these allegations of the complaint. I include in this dismissal any contention that the discontinuation of the Respondent-prepared self-assessment form in performance year 2007 was a unilateral change violative of Section 8(a)(5) of the Act or an animus based action against unit employees. The process of self appraisal was clearly voluntary. The language on the forms was sometime copied by employees in other forms of self evaluation. I find the significance of the form as opposed to the process, was of insufficient significance to the performance evaluation process to trigger a bargaining obligation standing alone.[31] And I do

[31] Further, it is not clear that the General Counsel's complaint allegations read in conjunction

Continued

not find sufficient evidence offered that the discontinuance was retaliatory to meet the General Counsel's initial burden under *Wright Line*.

b. Failure to conduct evaluation of employee's 2008 performance in accordance with past practice

The facts relevant to this allegation are undisputed and may be taken from Apodaca's testimony quoted, supra. The Respondent changed the forms used for nonunit employees for the calendar year 2008 performance period evaluation process and determined the nonunit employees' meetings with their supervision as part of the evaluation process for 2008 would take place in late May 2009. The Respondent retained the earlier forms and process used for the unit employees. But rather than have the fewer unit members receive their performance evaluations prior to the more numerous nonunit employees, the unit members' process was conformed to the new nonunit schedule. Thus unit employees' schedule of meeting with their supervisors was changed by the Respondent from the late fall, early winter time of previous years to the late spring period for 2009. The Union was not informed of nor offered an opportunity to bargain over the scheduling change.

The Respondent counsel argues that the complaint alleges that the Respondent failed to conduct employee performance evaluations of 2008 performance and the record established that it in fact did so, therefore there can be no violation found. I find this is an overly narrow reading of the complaint. The precise language of complaint paragraph 13(b) alleges that the Respondent: "failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice." Parsing the allegation, it is clear and I find the heart of the allegation and its fair meaning is that the Respondent changed its practice rather than discontinued it. This being so I find the complaint encompasses the uncontested delay that took place at the Respondent's hands.[32]

The Board holds that a unilateral change is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co.,* 281 NLRB 737, 738 (1986). Employee performance evaluations, especially those that have the potential to affect the amount of bonus an employee might receive, are important and mandatory subjects of bargaining. The time or season in which the employee has an opportunity to meet with his or her supervisor to discuss the supervisors evaluation is not, in my view automatically critical. Rather, I find it may in some cases turn on events and context. Here, the change in the schedule for meeting with supervisors is now a period of some months after the supervisor has prepared his or her evaluation. This is so because the process for unit employees was otherwise retained and only the date of the supervisor-employee review was changed.

I find the schedule change is significant on this record for two reasons. First, as witnesses testified, the meetings provide an opportunity to change supervisors' minds about numeric scoring that may directly affect the employees' eligibility for employee-wide annual bonuses. The delay caused by the change between the supervisor's evaluation and his or her discussion of it with the employee may easily cause the supervisor to become less likely to

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with the General Counsels statements regarding the complaints application to the self-appraisal form discontinuance at the trial would support a violation.

[32] It should be clear and I find that the perceived employer need to change represented employees terms and conditions of employment to better coordinate with the terms of unrepresented employees is not a business necessity justifying conduct otherwise violative of Sec. 8(a)(5) of the Act.

change the ratings and scores in a later employee meeting. Certainly that would be a reasonable worry for employees. The employee performance at issue in the meeting held approximately half a year after the performance year being evaluated is increasingly distant for both meeting participants, a fact that bodes ill for possible informed discussion and reconsideration.

All this being so, I find the change in timing was material, substantial, and significant. I further find the change was therefore an improper unilateral change encompassed within the allegations of paragraph 13(b) of the complaint. I therefore find the Respondent by making the change without notifying the Union or offering to bargain, violated Section 8(a)(5) of the Act.

The General Counsel also alleges that this conduct violates Section 8(a)(3) of the Act. Turning again to the *Wright Line* analysis, I find the government has not provided sufficient evidence of discriminatory, animus-based intention to sustain its initial burden. The General Counsel's barebones reliance on the general course of the Respondent's conduct is insufficient as to this allegation. I shall therefore dismiss the 8(a)(3) theory of a violation alleged in the complaint regarding this conduct.

K. The Respondent's Failure to Grant Merit Increases to Employees for Years 2006-2008

1. The allegations

The General Counsel's complaint at paragraph 12(a) alleges that the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006. Paragraph 12(b) makes the same allegation for year 2007 and paragraph 12(c) makes the same allegation for 2008. Complaint paragraphs 23, 24, and 25 allege that the conduct alleged in the subparagraphs of paragraph 12 was undertaken without notifying or offering to bargain with the Union and was further undertaken because of the employees' union activities and, in consequence, the complaint alleges, the acts are violations of Section 8(a)(1), (3), and (5) of the Act.

2. Relevant events[33]

At the time of the acquisition of the paper by the Respondent in 2000, the then-publisher, Joe Cole, addressed newsroom employees and announced that pay raises and bonuses based on merit would be paid. They were for years 2000, 2001, and 2002. In the end of the year meeting in 2003, then-editor, Jerry Roberts, spoke to newsroom employees and told them that their wage increases and bonuses would be tied to the scores on their annual evaluations.

The Respondent's employee handbook, unchanged in relevant part from its 2000 initial issuance, addresses the Respondent's performance management system. It states in part:

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[33] In describing the history and circumstances of employee merit raises it is important to keep in mind several distinctions to avoid confusion. The merit wage allegations are directed to increases given at the years end for merit during the ending year. Thus for example the complaint alleges a failure to grant a merit increase for work performance during 2006. That increase, like increases in preceding years, would have been granted and been effective at the end or 2006 or the beginning of 2007. Increase denial allegations may relate to particular employees, classes of employees such as unit members, or all an employer's employees.

> Performance reviews are only one of a number of factors that are considered in determining compensation. Other factors may include but are not limited to merit, position, and general business and economic conditions. Any and all compensation increases are at the sole discretion of the News-Press.

On December 16, 2003, Apodaca transmitted an email to the Respondent's entire staff entitled: Message from Jerry [Roberts]. The memo stated in part:

> Today I am announcing this years' program for performance-based bonuses and merit raises for a number of employees.
>
> * * * *
>
> After the rest of the budget was approved by Ampersand management, a pool of money was set aside and earmarked for performance bonuses and raises. The bulk of that money is in the form of bonuses; the balance consists of raises that range from 0 to 2 percent annually.
>
> I'm please to say that, for the first time in several years, we have put in place a structured system for making decisions on pay issues. The system, rafted by senior News-Press managers over the last month and approved by Wendy [McCaw] and Joe [Cole] last week, was designed to meet three key criteria:
>
> —It is **performance-based** [bolding in original]. Bonuses and raises are being awarded, within categories of responsibility, on the basis for performance review scores given by supervisors and managers.
>
> —It is **objective and rational** [bolding in original]. There are two factors that determine extra compensation: performance review and level of responsibility within the company. By doing this we sought to remove most of the subjectivity that previously marked some compensation decisions.
>
> —It is **clear and consistent** [bolding in original]. Each staffer in a job classification gets EXACTLY [capitalization in original] the same as anyone and everyone else in that classification with the same performance score.
>
> * * * *
>
> Building on the framework we have put in place this year, we will also be undertaking a complete review of our salary and compensation system in 2004.

At the end of 2004, then-assistant city editor, Michael Todd, spoke to his supervisees including then-senior writer, Melinda Burns. Burns recalled Todd announced that anyone who received less than a numeric score of three on his or her performance evaluation would not receive either a wage increase or a bonus. Those receiving a numeric score of three or more would and in the event did receive merit payments.

On November 30, 2005, Jerry Roberts sent an email to newsroom employees respecting performance reviews. The email set forth the numerical measures for performance used on the performance reviews:

> 5—Always excels or exceeds standards.
> 4—Consistently meets standards.
> 3—Generally meets standards. Improvement possible.
> 2—Meets standards sometimes. Improvement needed.

> 1—Does not meet standards. Improvement required.

The memo concluded noting that the matter of year-end compensation was being dealt with by the Publisher with the goal to have those issues resolved by the end of the year.

On January 27, 2006, Publisher Cole sent an email to all the Respondent's employees captioned "timing of performance reviews and bonuses." The memo announced the 2005 written performance evaluations and bonuses were ready for distribution. It noted: "Potential pay increases for 2006 are still under consideration as we wrestle with the 2006 spending plan in light of the business environment." Under a concluding section headed "Innovation and Change," the email stated in part:

> Our practice of potentially rewarding everyone in the organization with annual cash bonuses—in every department—from top to bottom—may be innovative within the newspaper industry, but it is the norm within a wide range of other industries that face more competition than the News-Press has had in the past.

In and after calendar year 2006, the newspaper industry entered rocky times. The Respondent was not immune from the general and industry specific troubles nor like difficulties specific to its market area. As the Respondent argues on posthearing brief at 101:

> It was from this market backdrop that the News-Press did not grant wage increases to any employees—not just bargaining unit employees—for work performed in 2006, work performed in 2007, and work performed in 2008.

As noted supra, employees were not eligible for merit payments if they had received a low numeric score on their annual performance evaluation. Employees were also ineligible for merit-wage increases if their wage was sufficiently high to have been capped under the Respondent's salary cap system which had been put in place in 2000. It is not clear that employees were generally notified of the fact that no merit-wage increases would be paid for performance years 2006, 2007, and 2008. Employees Hughes and McMahon testified that they were not notified by managers or supervisors that the Respondent was not giving out merit increases in any given year at issue.

Steepleton testified that he participated in the performance review of 2006 which took place in February 2007, and testified he told at least five employees, Eliason, Hobbs, Hughes, McManigal, and Davison, there was not going to be an increase for work performed in 2006. He testified he did this because he had been told by Apodaca a few weeks earlier that there would be no increases.

Steepleton also initially testified that he spoke to employee Melinda Burns along with the other employees concerning her evaluation and specifically recalled he told her something about the fact there would be no wage increases. He noted he had been told to share the fact of no increases as based on market conditions and the bad economy. In fact Burns left the Respondent in October 2006, well before any evaluation conversations occurred. Braced with this fact, Steepleton recanted his earlier testimony about Burns.

Apodaca testified that no written communications to employees or management were prepared informing them that there would be no merit wage increases in 2007 based on 2006 performance evaluations. Apodaca did however issue a memorandum to supervisors concerning the evaluation forms, but there was no reference to an omitted merit wage increase. She recalled however she told the supervisors to inform employees that there would be no merit

wage increases in 2007 based on 2006 performance evaluations when discussing the performance evaluations of employees with them.

In 2008, Apodaca issued a similar memorandum concerning 2007 performance based increases to that noted immediately above. Again this memorandum instructed supervision respecting evaluations without any mention of the omission of merit wage increases for that period. Zinser by letter dated January 2008 asserted to the Union in part:

> At the present time no decision has been made with respect to awarding merit increases in 2008 based upon performance in 2007. Additionally should a decision be made to award merit increases, we will be making a specific proposal with respect to the subject as it relates to bargaining unit employees.

3. Analysis and conclusions

a. The defense that the merit wage increase allegations are barred by Section 10(b) of the Act

The Respondent at trial by motion to dismiss and on posthearing brief argues that the allegations of paragraph 12 of the complaint are time barred by operation of Section 10(b) of the Act. Section 10(b) of the Act states in part: ". . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." Such issues are properly addressed before considering the merits of the allegations.

If the Respondent's omission to pay merit wage increases for each of the calendar years 2006–2008, occurred more than 6 months before the relevant charge filed addressing that year's failure, time bar is an issue. Assuming for purposes of the initial analysis, that the act of omission—the nonpayment of merit wage increases—is taken to have occurred on the last day of the performance year involved, the 6-month period for each year is the June 30 date—i.e., 6 months later—in the following year.

The Union filed Charge 31–CA–28661 on February 20, 2008, and it was served on the Respondent on February 22, 2008. The charge alleged the Respondent "unilaterally changed its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2006 performance year merit-wage increase nonpayment. The Union filed Charge 31–CA–28700 on April 15, 2008, and it was served on the Respondent on April 17, 2008. The charge alleged the Respondent "unilaterally and in connection with calendar year 2007, perpetuated its change of its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2007 performance year merit-wage increase nonpayment. The Union filed Charge 31–CA–29099 on February 18, 2009 and it was served on the Respondent on February 23, 2009. The charge alleged the Respondent "unilaterally changed and in connection with calendar year 2008, perpetuated its unlawful change of its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2008 performance year merit-wage increase nonpayment.

Since the service date of Charge 31–CA–28661, February 22, 2008, is past June 30, 2007, Section 10(b) of the Act seems to potentially apply to the allegation concerning the omission of merit increases awarded based on employees' 2006 performance year.

Since the service date of Charge 31–CA–28700, April 17, 2008, is not past June 30, 2008, Section 10(b) of the Act does not seem to apply to the allegation concerning the omission of merit increases awarded based on employees' 2007 performance year.

Since the service date of Charge 31–CA–29099, February 23, 2009, is not past June 30, 2009, Section 10(b) of the Act does not seem to apply to the allegation concerning the omission of merit increases awarded based on employees' 2008 performance year.

The second aspect of a 10(b) tolling analysis is the question of whether or not the Charging Party knew of the event or events underlying the relevant unfair labor practice charge and complaint allegation. This is so because there is a body of decisional law addressing various questions regarding special circumstances in which the commencement of Section 10(b) the 6-month limitation is held not to have occurred. The typical fact situation arising in this context is the ignorance of the charging party of the facts underlying the conclusion that an unfair labor practice committed by the respondent in the case had occurred. This argument is raised by both the Charging Party and the General Counsel here and the underlying law was argued by all parties.

The Respondent in its motion for summary judgment notes the Board in *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992), reiterated longstanding law that the Board will find constructive knowledge sufficient to invoke Section 10(b) of the Act's limitations where the party involved did not act with reasonable diligence to discover unfair labor practices which could have been discovered by such diligence. The Board also holds the corresponding notion that Section 10(b) does not bar an allegation "that was not within the knowledge of or which could not have been discovered by the charging part[y] with reasonable diligence," *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. mem. (unpublished) WL 435373 (9th Cir. 1989), cert. denied 496 US 925 (1990).

It is therefore appropriate to consider what the Union knew or should have known during the critical period. The critical period here is the period of time, the extent of which is critical to a 10(b) 6-month analysis of the allegations concerning the calendar year 2006 performance-merit increase nonpayment between knowledge or constructive knowledge and the filing of the charge. Put another way, how much time is in issue, if the 6-month limit is to be applied? Returning to the dates in question, if the theoretical toll date is June 30, 2007, how much time after that passed before the filing of the charge? Since the charge in Case 31–CA–28661 was served on February 22, 2008, 7 months and 22 days passed after the theoretical tolling date of June 30, 2007. Thus the Union's service of the relevant charge was 7 months and 22 days late. The Charging Party and the General Counsel therefore need to establish through operation of Board rules and decisional law, that the start of any 10(b) period was delayed by at least 7 months and 23 days. Applying that number of days to the event date established supra of December 30, 2006, the Charging Party and the General Counsel therefore need to establish that the 10(b) period was tolled until at least July 23, 2007.

Turning to the period in question, the Union organized employees in 2006, petitioned for representation, and prevailed in the election of September 27, 2006. Thereafter postelection matters were litigated and on March 8, 2007, the Board certified the Union as the unit employees' representative. In initial bargaining in mid-November 2007 the Union asked the Respondent about its past practice respecting merit-wage increases and Zinser in initial bargaining in mid-November 2007 told the Union in Caruso's memory:

> [W]ell, all I can tell you is that some years—with regard to merit increases, some years we do it and some years we don't. We didn't do it this year. . . . [I]t's at management's discretion as to whether we do it or not.

Zinser sent Caruso a letter dated January 23, 2008, captioned: "Santa Barbara News Press Merit Increases." The letter noted in part:

> As previously communicated to you, whether or not individuals are awarded merit increases has been totally discretionary. In some years none are awarded at all. The attached listing of newsroom employees and their increase history makes very clear that from 2000 to the present, there have been several years in which no increases were awarded.
>
> The reason for the fact that merit increases were not awarded in certain years is strictly a matter of management discretion. Management decided that it did not wish to award increases in the particular calendar years.

Apodaca testified that the assertion in the letter was incorrect and that merit-wage increases had been awarded to employees who were not wage capped and who a sufficient numeric performance score in all years up to the Respondent's decision not to pay performance year 2006 merit increases.

I have considered the arguments of the parties on the relevant motion for summary judgment and the general assertion of the 10(b) time-bar defense. As noted supra, I find the defense is temporally valid only for the 2006 performance year. The other two allegations for performance periods 2007 and 2008 are proper in that their underlying charge were filed within 6 months of the events at issue.

Turning to the facially time-barred charge of Case 31–CA–28661 and the related complaint allegation in paragraph 12(a) which alleges that the Respondent failed to grant its employees a merit-wage increase in recognition of work performance during 2006, the issue is: May the Union on this record be found to have known or be charged with knowing the Respondent had omitted merit raises for the 2006 performance year at relevant times?

During the time relevant here, the Respondent had not recognized the Union as the unit employees representative and the Union did not have designated agents or any official institutional presence in the workplace, such as union stewards, aiding in the representation process. And to the extent the Respondent did in time officially describe its practices regarding merit-based wage increases to the Union, it incorrectly described those past practices of the Respondent. I find therefore there was no official, institutional notice to the Union or one which could rise to the level of institutional constructive knowledge by the Union of the facts underlying the complaint allegation of paragraph 12(a).

The Respondent suggests that the prounion employees in the newsroom identified by Steepleton as having met with him concerning their 2006 evaluations were specifically told by him that there would be no raises based on those increases. Therefore, argues the Respondent, through those individuals, the Union knew or should have known of the Respondent's omission of 2006 based increases at least by the time of these conversations identified by Steepleton as in mid-February 2007. If the Union is held to have known at that time or soon thereafter that there were to be no merit increases for performance year 2006, its charge in Case 31–CA–28661 is out of time.

I reject the Respondent's argument on several grounds. First, I do not find individual bargaining-unit employees at that pre-representational time rose to the level of agents of the Union. What they knew could not be attributed to the Union absent direct evidence not present here. Further, there is an important credibility issue with the testimony of Steepleton on this issue. His claim to have told employees there would be no merit increase was denied by employees and, importantly, he initially testified he clearly recalled telling the same thing to employee Burns only to be forced to recant when Burns was established not to have been an employee at the relevant time. I find that impeaching event—and Steepleton's very unpersuasive demeanor during the his entire testimony in these regards—renders his testimony that he told employees there was to be no bonus fatally unreliable. I reject it and find that he did not in fact make the important assertions he claimed. To the contrary, the employees who testified that they were not told by Steepleton that there were to be no merit increases at all, despite being associated with the Union, presented believable testimony and a convincing demeanor during its delivery.

Based on this important credibility resolution and finding, I come to the same conclusion the Board did in a very recent case, *ABB, Inc.*, 355 NLRB No. 2 (January 22, 2010), affirming the judge who found: "There is simply no credible showing the Union had clear and unequivocal notice of the changes prior to that time. Thus, the charge was timely filed and is not barred by the 10(b) statute of limitations." (Slip op. at 9.) On the record as a whole, including the testimony of the witnesses and in light of their demeanor, I reach the same conclusion. There is no factual basis to find actual or constructive knowledge by the Union of facts sufficient to bar the charge or the complaint allegation at issue under Section 10(b) of the Act. *Mission Foods*, 350 NLRB 356 (2007),

b. The merit increase allegations on their merits

(1) The Section 8(a)(5) merit increase allegations

The record establishes that the Respondent gave annual merit-pay increases from the onset of its operations in 2000, through the merit increases granted for the 2005 performance year. For the 2006 performance year and thereafter it has not given merit raises. The merit raises involved for performance years 2000–2006 were based in significant part on performance review numerical scores. The increases and the underlying performance evaluations were in the period 2000–2006 awarded generally in the late part of the performance year or very early in the following year. The record reflects instances where delays had occurred in the process for individual employees and later merit increases were made retroactive. Employees scoring at or above a certain numeric score received an increase which was a fixed percent of the employees' salaries. Those not scoring at or above the minimum received no merit increase. Exceptions in the latter years were for those who had achieved a salary level that the Respondent had "capped" thereby prohibiting increases above the cap level.

In *Dynatron/Bondo*, 323 NLRB 1263 (1997), the Board found that the employer had a past practice of granting merit-based wage increases, and that the employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the discontinuance of the program. In determining that the raises at issue were an established past practice, the Board found the following factors relevant: (1) the sole, fixed criterion for granting a raise was merit; (2) the timing of the increase was fixed; (3) the amount of the raise, although discretionary, fell within a narrow range; (4) the majority of employees received the increase; and (5) the increases had been consistently granted over a significant period of time. Id. at 1264. The General Counsel also cites *Rural/Metro Medical Services*, 327 NLRB 49 (1998), and *United Rentals*, 349 NLRB

853 (2007), for the proposition that regular merit increases become a past practice which must be bargained about and may not simply be unilaterally discontinued.

The unilateral change cases cited supra need not be repeated here. The Acts requirement in this setting is not a prohibition against discontinuance of merit increases of represented employees for a year or even permanently. It is rather the obligation to notify and bargain with the Union respecting the proposed change. It is clear the Respondent did not do so with respect to any of the three changes at issue herein: the discontinuance of the merit increases for performance years 2006, 2007, and 2008.

The Board has from early days noted a business necessity or economic exigency exception to the normal obligation to bargain to impasse or an agreement before implementing a unilateral change as to a particular matter. See, e.g.*, Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979), citing *NLRB v. Katz,* 369 U.S. 736, 748 (1962). This doctrine has been clarified by the Board over time. Thus, the Board adopted the judge's distinction between business necessity and compelling considerations in *Farina Corp.*, 310 NLRB 318, 321 (1993):

> However, business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially.

The distinction was cited with approval by the Board in *Hankins Lumber Co*., 316 NLRB 837, 838 fn. 9 (1995). And *Hankins* held further at 316 NLRB 837, 838:

> Accordingly, the Board recognizes as ''compelling economic considerations'' only those extraordinary events which are ''an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'' *Angelica Healthcare Services [Group]*, 284 NLRB 844, 852–853 (1987).

In establishing such a defense, the party attempting to prove economic exigency carries a heavy burden. *Our Lady of Lourdes Health Ctr*., 306 NLRB 337, 340 fn. 6 (1992). Further the exigency must be shown to have not been reasonably foreseeable. *RBE Electronics of S. D., Inc.*, 320 NLRB 80 (1995), and to have a major economic effect that causes the employer to take immediate action. *Hankins,* id. The Respondent never made such assertions of ''compelling economic considerations'' to the Union at relevant times, but rather on several occasions noted that decisions respecting the granting of merit pay increases due in the coming months remained under consideration by the Respondent.

Given all the above, the arguments of the parties, and the record as a whole, including the testimony of the witnesses and the demeanor-based credibility resolutions made supra, I find that the Respondent had a uniform practice of granting merit raises to employees based on evaluations of the preceding calendar year having done so without exception from its commencement of operations in 2000, through the 2005 performance year. I further find that at the end of the 2006 performance year, a time when the Union represented unit employees, the Respondent unilaterally determined not to grant merit raises. I further find it continued to breech its previous practice for performance years 2007 and 2008. The Respondent did not notify or offer to bargain with the Union with respect to any of these cessations.

Based on these findings, I find that the Respondent, with respect to each year alleged in the complaint, failed and refused to bargain with the Union concerning its cessation of its

practice of granting merit wages to unit employees in violation of Section 8(a)(5) and (1) of the Act. I shall therefore sustain the relevant allegations of the complaint.

(2) The Section 8(a)(3) merit increase allegations

The General Counsel has alleged and argues in support on brief that the merit wage discontinuance discussed supra was motivated by animus against the represented employees for having selected the Union and in order to discourage employee union activities generally. The evidence and argument offered is in essence: (1) the general animus alleged in the instant case much of which occurred contemporaneously with the cessation of the merit increases and (2) the lack of any explanation offered by the Respondent for the cessation coupled with the deceit of the Respondent in asserting falsely, in writing to the Union, that there was no consistent historical pattern of granting merit wage increases when in fact there was.

The Respondent emphasizes the uncontested fact that all employees of the Respondent were equally affected by the Respondent's business decisions to not grant merit wage increases for performance years 2006–2008, and that the nonunit employees represent by far the larger fraction of individuals involved. Counsel for the Respondent argues further that economic conditions were deteriorating and additional cuts occurred in later periods.

The General Counsel's 8(a)(3) theory of violation again invokes a *Wright Line* analysis. Addressing the General Counsel's threshold burden, I find the government has not provided sufficient evidence of discriminatory, animus based intention to sustain that initial burden. The General Counsel's barebones reliance on the general course of the Respondent's conduct is insufficient as to this allegation. While I grant both the widespread course of the Respondent's violations which include multiple examples of animus-based 8(a)(3) violations, some closely linked in time to the merit increase cessations, I do not find that general evidence and history sufficient to sustain the Government's burden here. This is especially true where, as the Respondent correctly argues, the actions under scrutiny applied to all employees, the great bulk of whom were not represented by a union and have not been shown to be engaged in union activities on this record.

I shall therefore dismiss the 8(a)(3) theory of a violation alleged in the complaint regarding this conduct

L. The Suspension and Discharge of Respondent's Employee Dennis Moran

1. The allegations

Complaint paragraph 15(a) alleges that the Respondent suspended its employee Dennis Moran on or about August 23, 2008. Complaint paragraph 15(b) alleges that the Respondent terminated Moran on or about August 30, 2008.

Complaint paragraphs 17 and 18 alleges the actions alleged in paragraph 15 are mandatory subjects of bargaining and the Respondent failed to notify the Union over its decision to discharge Moran and failed to bargain with the Union regarding the suspension and discharge of Moran.[34] Complaint paragraph 20(c) and 25 allege the Respondent's conduct in

[34] The Regional Director for Region 31 notified the Respondent, by letter dated October 28, 2008, that the Union in Case 31–CA–28890 had withdrawn with the Regional Director's approval, the portion of the charge alleging that the Respondent had violated Sec.

Continued

these regards constitutes a failure to bargain with the Union in good faith and violates Section 8(a)(5) and (1) of the Act.

Complaint paragraph 23 and 25 allege that the Respondent's conduct alleged in paragraph 15 was undertaken because the employees formed, joined, or assisted the union and engaged in protected activities and to discourage employees from engaging in these activities and in so doing violated Section 8(a)(3) and (1) of the Act.

2. Relevant events

Dennis Moran began his employment with the Respondent as a copy editor on the news desk in September 2005 and worked there for approximately 1 year when he transferred into the sports department as a copy editor and sports writer. He worked in that capacity until his termination on August 30, 2008. He described his duties in the sports department:

> As a copy editor, your duties would include reading stories, copy editing them, writing headlines, laying out pages for the computer program, taking phone calls from coaches who were calling to report in the results of sports events. As a sportswriter, I would cover sports events as directed by the sports editor and write feature stories.

During the period November 2007 until his discharge, Moran was a member of the Union's bargaining committee and, he testified, he was the only member of the bargaining team still employed by the Respondent who regularly attended bargaining sessions. The Respondent's knowledge of Moran's union activities at relevant times was not in dispute.[35]

In the period from Moran's transfer to the sports department to April 2008, the sports department was supervised by the sports editor, Barry Punzal. At the time of Moran's transfer, Punzal supervised seven full-time reporters/copy editors. Punzal was laid off on May 1, 2008. Sports reporters, Blake Dorfman and John Dvorak, were assigned Penzal's duties by associate editor, Steepleton. Dorfman thereafter assigned the great majority of stories in the sports department. Attrition in the sports department continued in the summer of 2008, until by August 2008, there were four employees in the sports department: Moran, Dennis Bateman, Dorfman, and Mark Patton.

In late July 2008, Copublisher McCaw received an email from a longtime local reader expressing unhappiness with the paper's perceived inadequate coverage of local sports. In particular the reader complained of the absence of coverage of a local golf tournament, "by the way what happened to your sports reporters?," and expressed disapproval generally at some length concerning the sports section of the paper which had "dwindled to a 4 page joke." McCaw forwarded the email to Steepleton on July 29, 2008, with the note: "Fan mail . . . You might want to respond."[36]

8(a)(1) and (5) of the Act by failing to notify the Union prior to suspending employee Moran.

[35] In a January 2008 letter distributed to employees, Moran was identified by the Respondent's director of human resources to employees as one of two employee "newsroom union reps." Copies of the letter were sent to the copublishers and to associate editor, Scott Steepleton.

[36] Steepleton testified he could not recall if he had investigated the particulars of the paper's coverage of the golf tournament mentioned in the email.

Blake Dorfman testified that, at Dorfman's request, Steepleton met with the then-four employees who constituted the sports department staff two days later on July 31, 2008, to address Dorfman's concerns over the lack of staffing in the sports department and the difficulties that would arise when he left to attend the China summer Olympics that year leaving only three staff members in the sports department for that period. Dorfman testified he told Steepleton at the meeting:

> Scott, we are understaffed and we need more bodies in the Sports Department and they need to be trained up by the time football season starts, and training takes a long time, so we need to get them in as quickly as possible. Also, we need to go over scheduling. We need to go over scheduling issues with a four-person Department because that's a tricky puzzle to put together.

Dorfman recalled that the August sports department schedule was prepared at this meeting.

> There would be three people left in the Department and if each person is to get two days off or even a day off there needs to be at least two people putting out the Section every day. So, we tried to go over how those three people would be spread scheduling wise.

Because of the short staffing, the August schedule did not include assigning individual events to particular staff members. Dorfman testified he had not assigned anyone to the upcoming 2008 Santa Barbara Classic Golf Tournament any time prior to this meeting and it was not discussed nor assigned at the meeting itself. As Dorfman wrote to Steepleton in an email reviewing the meeting, he considered the sports department as then staffed to be in a "desperate situation."

In the summer of 2008, Richard Chavez was the director of the Santa Barbara Golf Club. That institution hosts the Santa Barbara Classic, a longstanding annual event of some importance to the local sports and golf community. The 2-day event is regularly held the first weekend of August, which for 2008 was Saturday, August 2, and Sunday, August 3. Chavez testified that in connection with the then-upcoming tournament, in mid-July, he "called Kevin Merfeld who was the sports writer for the News-Press and left a message on his recording." He testified he called Merfeld:

> Because [Merfeld] had been writing most of the articles for the tournaments. We have four major tournaments a year. I like to make sure the News-Press covers those tournaments, so I call him in advance.

In Chavez' testimony, Merfeld, who had resigned or was in the process of resigning in July, never returned Chavez' call. On or about July 29, 2008, Chavez called the Paper again. He testified he reached an individual in the sports department with the first name of Dennis. He did not learn Dennis' last name. Chavez testified:

> Well, if I remember correctly, I believe that I called and told him that I had called Kevin [Merfeld] and he had not responded. He told me that Kevin was no longer employed. I told him that the reason for the call was that we were having a large tournament on that weekend and I wanted the News-Press to cover the tournament. . . . He said that they were short handed and that they would not be able to cover the tournament with a sports writer coming out to the golf course, which is what they usually do. So I told him, no problem, could I send you the results and we can get it in the paper, and he said yes, he would.
> Q. Okay. And was that the end of your conversation?

A. I believe he told me to fax the information to him and that was it.

The two then-sports department employees working on July 29, 2008, Dennis Moran and Dennis Bateman, each testified he had no recollection of speaking with Chavez or speaking about the Santa Barbara Gold Classic Tournament with anyone at that time.

On Saturday, August 2, 2008, the first day of the tournament went forward and Chavez testified he sent the results of the day to the Paper by facsimile transmission. The following day, August 3, the second day of the tournament went forward. Chavez heard from Tournament participants that there had been no coverage in the days News-Press. Chavez at the end of the tournament that day again sent the results into the News-Press by facsimile transmission. On the following day, August 4, 2008, Chavez discovered that the News-Press had not covered the tournament in that day's paper either. Chavez testified he was displeased by the absence of coverage and "instantly" called Copublisher McCaw. He was unable to reach her but was able to leave a message on her answering machine. He described the message:

> I explained to her that I had done the radio show for her and that I felt that the least the newspaper could do was to cover my tournaments, and so I was very upset that it hadn't happened. They told me it was going to happen and it didn't happen. And I was irritated.

McCaw had received an earlier email on Sunday, August 3, 2008, from a subscriber to the Paper complaining of the Paper's omission to cover and report in that day's Paper the results of the Classic Tournament. She forwarded the email to Steepleton at 8:07 a.m. the following day, Monday, August 4, 2008, under an "FYI" reference. Steepleton responded by email to McCaw at 6 p.m. later that day, August 4, 2008, which email stated in its entirety:

> Wanted to let you know that Brad Cheng pulled me aside today to inform me that word on the street is Blake [Dorfman] is not returning to the News-Press after China. (This would go against what Blake had said and what Lee says.) Also, Brad Cheng says he hears the "plan" among sports reporters is to stage a walkout and launch a sports Web site in Santa Barbara.
>
> Patton says he is happy here. We have Trenchard that we can pull off Scene; we have Tony Peck; we have Bateman. And I have at least two people in the works in the writing/designing ranks. We also have the stringer ad that should break any day.

McCaw responded to this communication by email at 12:15 p.m. on August 5, 2008. The email stated:

> Have you discussed this with Blake [Dorfman]? I think you must ask him if the rumor you heard is true. Please let me know what he says.
>
> Also, there was no local sports coverage at all in Sunday's and Monday's papers. On Saturday there was a staff report that didn't appear online and Patton's column.
>
> There were no results of the Formula One race in the Monday paper. I believe the paper is being sabotaged. We need to discuss this tomorrow when you are back at the paper.

Steepleton testified he then met, still on August 5, with Dorfman at the Respondent's facility and in essence confronted him with the rumors he had reported to McCaw. Dorfman in his memory denied all and professed loyalty and affection for the Respondent. Dorfman in

testifying in the instant proceeding admitted that his statements to Steepleton in this conversation were mendacious. Steepleton then responded to the quoted McCaw email with an email reporting on his conversation with Blake Dorfman earlier that day in which Dorfman denied all aspects of the matters attributed to him, professed loyalty to the Paper and stated his intention to remain with it. McCaw did not testify.

Chavez testified he received a return telephone call that same day he called McCaw, August 4, 2008, from Copublisher Authur von Wiesenberger. Chavez told the copublisher of his earlier conversation with the un-last-named "Dennis," his transmission of the tournament results to the Paper and the subsequent failure of tournament coverage in the Paper. Chavez was emphatic in his testimony that he did not know and certainly did not identify to von Wiesenberger in this telephone call the last name of the Paper based caller he identified as Dennis. Chavez further recalled that in this telephone call he also expressed his hope and desire that the two upcoming Women's and Junior Tournaments would receive proper press coverage in the News-Press. In Chavez' memory, von Wiesenberger was apologetic on behalf of the Paper and assured Chavez that the upcoming two tournaments of concern to Chavez would be covered by the Paper.[37]

Steepleton testified that on August 4, 2008 he got a telephone call from von Wiesenberger relating the complaints of Chavez which Steepleton recalled as:

> Dennis had apparently told Mr. Chavez that we would cover it, and [von Wiesenberger] was upset that we didn't follow through with what Dennis had told Mr. Chavez apparently that we would do.

Steepleton replied that he "would figure out why we didn't cover it and that if there is anything we could do to get something in, we'll get something in." Von Wiesenberger also sent an email to Steepleton on August 5, 2008, at 1:21 p.m., with the following opening paragraph:

> I spoke with Richard Chavez at the Santa Barbara Golf Club. He was one (of many) who was upset with the lack of coverage of the Gold Tournament even though he had faxed information over to the paper. He was also the one who spoke to Dennis Moran.

The email also made suggestions to Steepleton on how to insure proper coverage of the then-upcoming Women's Classic Golf Tournament. Steepleton responded at 4:12 p.m. the same day that he would take the copublisher's recommended actions to cover the event and he noted he would contact Chavez. Authur von Wiesenberger did not testify.

Steepleton testified that after sending the above quoted email he almost immediately telephone Chavez and offered apologies for the Paper's coverage failure. He indicated to Chavez that von Wiesenberger had told him of the problem and Chavez confirmed he had spoken to von Wiesenberger. Steepleton also recalled he asked Chavez for the details of the mix-up. Chavez told him that he had spoken on the telephone with the Paper's employee, Dennis, about coverage of the Classic and had been told to send in the results to the Paper's facsimile phone line. Steepleton could not recall whether Chavez initiated providing Dennis' last name or if Steepleton asked him what it was but, in either event, Chavez, in Steepleton's testimony, told him the individuals full name, he thought, was Dennis Moran. The conversation

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[37] The Women's Classic was to occur on the following Wednesday and Thursday, August 6 and 7, 2008, and the Junior Tournament was to occur on Thursday and Friday of the next week, August 14 and 15, 2008.

turned to the upcoming Santa Barbara Women's Open and the Santa Barbara Junior Tournaments. Chavez asked for coverage of those events and Steepleton assured Chavez the Paper would cover them. Chavez generally recalled having a discussion with an employee of the Respondent as Steepleton had described, although Chavez' memory on the specifics of the call was vague. Chavez was, however, quite clear, even emphatic, that in all the communications concerning these events, he did not ever provide Dennis' last name to anyone because he had never learned it.

After the call, Steepleton arranged to have the Women's Classic Tournament covered. Chavez testified that the Paper had a reporter present at the Women's Classic Tournament and the event was covered in the Paper "very well." Without being able to recall the specifics, he testified that he learned the Paper would not be able to have a reporter in attendance during the Junior Tournament and that he should fax the Junior Tournament results to the Paper's facsimile telephone each day. Chavez did as instructed, but the Junior Tournament which was held on August 14 and 15, 2008, received no coverage in the Paper in the following days.

Soon thereafter, Chavez testified he called Steepleton at the Paper for an explanation. Steepleton told him that the facsimiles Chavez had submitted to the Paper respecting the Junior Tournament were unintelligible. Chavez thereafter personally delivered the Junior Tournament results to the Paper and the Junior Tournament was covered in the Paper the following day.

Steepleton testified that in mid-August he spoke to Dennis Bateman at the Paper. He recalled asking Bateman if he had spoken to anyone about the Santa Barbara Gold Classic. Bateman answered no. Steepleton then asked him if the name Richard Chavez rang a bell with him and again Bateman answered it did not. Bateman testified he had no memory of this conversation with Steepleton , but that since he would have regarded it as of no particular significance, he could not be positive it had never occurred. He did recall he told Steepleton that he in fact had never knowingly talked with an individual named Richard Chavez or even recognized the name Richard Chavez. Further he was sure he had talked to no one at all about a golf tournament.

A few days later, Steepleton testified he spoke to Dennis Moran at the facility. Steepleton recalled that he told Moran:

> That we missed a big golf tournament, that I understand that he may have talked to somebody about it, and I wanted to figure out—this is important to us and I want to figure out why we didn't cover it. . . . He told me that he talked to Richard Chavez about the tournament and that he had also talked to Mr. Chavez about Mr. Chavez sending in the scores by fax. He said at one point that he talked to Mr. Chavez about perhaps us not being able to cover it because a guy that had been covering golf, Kevin Merfeld, was no longer with the newspaper and that he didn't know if we would be able to get somebody out there on site to cover it, or at the golf course to cover it. . . . He apologized. He said something about it could have slipped through the cracks. I asked him if he had done any follow up to try to get the fax scores or since he didn't get the fax scores if he had followed up with Mr. Chavez at all to try to get the fax scores, or the scores faxed in, I'm sorry, and he said he hadn't.

Moran also testified to a conversation with Steepleton on or about August 16, 2008 at the facility. He characterized the conversation far differently from that described by Steepleton above. Moran denied that he was asked by Steepleton about the Santa Barbara Golf Classic Tournament or about knowing Richard Chavez. Moran testified he had had no dealings with Richard Chavez since covering a single golf tournament in May of 2007, and that he had never

covered the Classic at anytime and had not had any contact with anyone in 2008 regarding the Classic nor had he been assigned to cover the tournament for the Paper. Rather, Moran recalled, the conversation with Steepleton concerned only the circumstances of how faxed Junior Tournament results could have been received by the Paper and yet the event had not been covered in the Paper. Moran recalled he related that some fax results had been received but that they were illegible and could not be used as the basis for coverage.

By email to editor Travis Armstrong and Yolanda Apodaca dated Friday, August 15, 2008, at 12:12 p.m., Blake Dorfman announced his resignation effective at the end of his Beijing-based coverage of the Olympic Games. The email was forwarded under a "FYI" reference by Apodaca to each of the copublishers and to Steepleton.

On August 23, 2008, a formal meeting to review the circumstances surrounding the Classic Golf Tournament coverage was conducted by Steepleton. Also in attendance were Norman Colavincenzo, the Respondent's chief financial officer, Yolanda Apodaca, and Moran. Steepleton testified:

> I said, "Dennis, I need to follow up on some things regarding the Golf Classic, and what we had talked about in the earlier meeting. I just want to double check that you did talk to Richard Chavez about this and said that we would cover this." He, Dennis, said that, "Maybe it was Mark Patton who talked to him." I said, "Mark Patton?" Dennis then—I said to him, "That's different than what you told me in my office. You didn't talk to him?" And then he said, "Well, you know what, maybe I did. Maybe it was me who talked to him." I said, "Did you tell Mr. Chavez that we could not cover it, and that Kevin Merfeld was no longer with the newspaper and that he would have been covering golf?" He said that he had. I said, "Do you understand that I'm the one that decides who we send to cover things, what we cover, how we cover things, when we cover things?" He said, "Yes, I do." I said, "It's clear to you that—"I think I said, "that I'm the one that makes the decisions?" He said, "Yes." And that would be my recollection.

Steepleton recalled that at the end of the meeting he told Moran that he was going to be placed on indefinite suspension. Steepleton further testified that at the conclusion of the meeting, he had no current intention to terminate Moran. He testified: "I had no plan at that point. . . . It could be a suspension. It could be a written reprimand, I was taking into account a lot of different things."

Steepleton also testified that his fellow managers, Colavincenzo and Apodaca, took notes of the meeting and that immediately after the meeting the three reviewed the notes and created a single document that was "the most accurate representation of the verbal exchange at that meeting." The notes, in evidence as Respondent's Exhibit 805, simply do not track the testimony of Steepleton regarding the statements of Moran quoted above. Importantly in the notes, Moran throughout the meeting denies that he had any knowledge of or dealings regarding the golf tournament and denied having talked to Chavez before the tournament and denied ever telling Chavez at any time that Kevin Merfeld was no longer an employee of the Respondent.

Moran described the meeting at trial:

> Well, Mr. Steepleton brought up again the golf tournament and asked me if I had told Richard Chavez before the golf tournament that we would not be able to cover the golf tournament this year because our staff was reduced and Kevin Merfeld had left the paper and he was our golf writer. . . . I said I had no recollection of talking to Richard

> Chavez and that I'm certain I didn't tell anyone that Kevin Merfeld had left and that we wouldn't be able to cover this event. . . . [A]t some point in the meeting he told me that decisions on what to cover should have gone through him. . . . I remember telling him that because our staff was reduced there were a number of things we weren't covering that we normally would have because we went from eight people to three people in a fairly short period of time. . . . [Steepleton] told me at the end of the meeting that I was being suspended while he investigated this. And then Yolanda Apodaca said she would escort me out. . . . [S]he escorted me out and at the door I told her that I would tell her if I remembered anything else, but that the golf tournament I remembered was the Santa Barbara City Championships in May, and I didn't have prior knowledge of the Santa Barbara Classic.

Norman Colavincenzo did not testify. Apodaca did not testify regarding this meeting.

There is no dispute that the Respondent did not notify nor offer to bargain with the Union regarding the Moran suspension before its decision and implementation of the decision to suspend Moran. On August 23, 2008, Caruso sent a letter to Zinser regarding the Moran suspension. The letter sought immediate rescission of the suspension, restoration of any lost pay and that the Respondent "agree to negotiate over this action before implementation if the News-Press wishes to persist with it."

Zinser responded with a letter dated September 2, 2008, a time after the suspension of Moran had been converted to a discharge. The letter acknowledged the Union's August 23, 2008 letter and advised that the Respondent had no obligation to bargain over any discipline relating to Moran or the Respondent's maintenance of discipline consistent with the status quo. The Respondent, the letter asserted, was "maintaining the dynamic status quo that has always existed." The letter also noted the discipline and discharge of Moran were for cause and rejected the Union's proposal to rescind the discipline of Moran.

Blake Dorfman testified that by early July 2008, he had determined he was going to resign his employment with the Respondent but concealed that fact from the Respondent in fear of jeopardizing his newspaper credentials for the China Olympics starting in August. Dorfman after considering the matter and changing his initial testimony concluded he had left for China on August 5 or 6, 2008.

Dorfman's Board prepared pretrial affidavit asserted he had:

> received a call about August 7th from a gentleman who was irate, who said he was the founder of the tournament—this is the Santa Barbara Golf Classic—30 or so years ago and he was very upset that the *News Press* was not covering the event because it always had somebody there. . . . I don't know the name of the caller. I know it was not Richard Chavez. . . . I told the caller I was sorry and I referred the caller to Scott Steepleton.

Under cross-examination Dorfman testified the call took place before he left for China and therefore must have occurred at an earlier date than the affidavit asserted.

Dorman testified that just before he left for the Olympics, knowing he would not be returning to the Respondent's employ when he came back from China, he:

> stayed late that night after we put the Paper to bed and filled a couple of boxes with personal knickknacks from my desk and pulled my Jeep—or pulled my car up to the loading dock there so I didn't have to carry it too much and loaded up the car.

As noted, supra, Dorfman resigned his employment with the Respondent by email from China on August 15, 2008.

Dorfman returned from China on or about August 25 and telephoned Apodaca some few days late in late August 2008. He recalled:

> She said I have—there's something you need to sign as far as—I think it was about my last paycheck, something I needed to sign along those lines and then also she asked if I needed any personal items from my desk. I said, no, I already asked Dennis Moran to grab some stuff from my desk and don't worry about it.

Dorfman added: "I said that he had grabbed some stuff from my desk for me." Apodaca recalled that Dorfman told her that he did not need to collect his personal things because "Dennis Moran had already cleaned out his desk."

Apodaca reported to Steepleton, Dorfman's statements and asked him to check on the contents of Dorfman's desk. Steepleton did so. He testified that at the earlier time he had discussed the rumors of Dorfman leaving the employ of the Respondent just before he went to China, as discussed supra, he had inspected Dorfman's desk and it was full of the normal accruements of journalism, but when he inspected the desk a second time at Apodaca's behest, the desk no longer had any personal contents and was missing all the previously present notebooks.[38]

Steepleton testified that he believed Dorfman's statement to Apodaca as reported by her to him, i.e., that Moran had cleaned out Dorman's desk. When he saw that Dorfman's notebooks, which Steepleton regarded as proprietary material, had been taken, he assumed Moran had taken them. In consequence Steepleton determined to terminate Moran. Dorfman, who was on suspension and not allowed on premises, was never contacted by the Respondent respecting the Dorfman desk events. As noted, supra, Dorfman has emptied his desk on his own, before travelling to China and there is no doubt on this record that Moran had no participation or even knowledge of the "desk clearing" events that actually occurred, the story Dorfman had told Apodaca or the Respondent's belief that he was complicit in those events.

A letter was prepared over Steepleton's signature dated August 30, 2008, terminating Moran. Moran—on indefinite suspension and away from the facility—was telephoned by Steepleton that day. Moran testified:

> . . . [Steepleton] told me that his investigation was complete and that unfortunately they were letting me go. . . . I asked him why, and he said that would be explained in a letter and that I could come by and get it. He told me to come to the rear employee entrances of the News-Press that afternoon and ask the security guard for Yolanda who would come and give me the letter.

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[38] Steepleton described a reporter's notebooks as containing:

> Story notes, Story ideas. Telephone numbers of sources, names of sources. Maybe planning notes for stories down the road, I mean all sorts of information that [a] reporter needs to write stories for us.

Q. Did you go to the News-Press that day?
A. I did.
Q. What happened when you arrived at the News-Press?
A. Well, Scott himself came to the back door and he smiled and shook my hand and gave me the letter. He asked me if there were any personal items at my desk that I wished to have, and I said I couldn't think of anything of any importance, and that was it.

The letter asserted, inter alia, that Moran was discharged because of his dishonesty, his failures concerning the Classic Golf Tournament coverage, his improper disclosure to Chavez that former employee Merfield was no longer employed by the Respondent, his improper disclosure to Chavez that the Respondent did not have the sport staff to cover the Classic Tournament, failures of instruction and follow-through respecting the faxing of scores, and other assertions of misconduct. As to the Dorfman desk matter the letter noted:

> You have never been given authority by anyone in management to assist Mr. Dorfman in the removal of proprietary information or any material from Mr. Dorfman's prior desk belonging to the News-Press. You know that Mr. Dorfman is planning on setting up a competing business in reporting local sports. Your removal of this material in secret and failing to even ask Human Resources or any member of management of this activity speaks more to your dishonesty.

Moran's employment was terminated effective September 16, 2008. There is no evidence Moran ever knew anything about the desk episode, or was ever asked by Respondent about his role in the desk emptying episode, or that the Respondent ever attempted to obtain from him any of the desk's missing contents or sought to learn if he had or could locate such materials.

Both Steepleton and Apodaca testified that had the Respondent known that Dorfman lied about Moran cleaning out Dorfman's desk, Moran would still be employed by the Respondent. Counsel for the Respondent contends on posthearing brief at 150 that the Respondent only learned that Dorfman had lied to Apodaca regarding that matter on June 1, 2009 at the hearing in the instant case. As of August 21, 2009, the final day of hearings in this matter, Moran had not been offered reinstatement by the Respondent and his discharge remains in issue.

3. Analysis and conclusions

a. Threshold resolution of factual conflicts and credibility issues

The record respecting the Moran allegations present several significant factual conflicts, some of which are a consequence of different testimony regarding specific events. My resolutions here as elsewhere in this decision, turn on consideration of the record as a whole, the arguments of the parties and, my consideration of the witnesses' demeanor during their testimony.

Of the greatest significance to the resolution of the factual dispute is the issue of what Chavez reported regarding the last name of the individual "Dennis" with whom Chavez had the conversation which essentially initiated the relevant events. That conflict involves the testimony of Chavez, the speaker, and Steepleton, the listener, regarding whether or not Chavez identified Moran as the "Dennis" involved. Also of importance is the divergence of versions of conversations had between Steepleton and Moran regarding the events. I shall deal with the credibility of each of the three witnesses first.

Richard Chavez testified to the various conversations he had as discussed supra. The critical element for the instant dispute was whether he had ever provided the last name of the individual "Dennis," with whom he had had an earlier conversation, to agents of the Respondent, McCaw, von Wiesenberger, or Steepleton. Chavez testified with some conviction that in his conversation with Dennis he did not learn his last name, he never learned his last name and he, in consequence of this ignorance, did not provide his last name to anyone. Pressed on the matter of whether or not he had discussed "Dennis" in various conversations, Chavez came to admit or concede the likelihood that he had done so with McCaw, von Wiesenberger, and Steepleton. He resisted however any suggestion that he had given Dennis' last name to anyone or in some other way identified him as a specific individual.

Chavez, at the time of his testimony a recently retired head of the Santa Barbara Golf Club, was on this record an unbiased neutral without a stake in the outcome of the litigation and without any apparent hostility to any party or to the "Dennis" involved in the events. I was impressed with his serious attention to the questions presented to him and to his answers. He was willing to admit his memory as to certain matters was not complete and to have that memory refreshed. He did not however simply adopt attributions contained in leading questions by counsel attempting to go beyond his refreshed recollection. I found him to be a believable and an impressive witness, highly credible.

Suspecting the importance of the matter to the case, I was particularly attentive to the portion of Chavez' testimony respecting his communication or noncommunication of Dennis' last name to anyone. A subject that was revisited by counsel throughout his testimony. I found Chavez' testimony to be consistent and believable without being defiant or stubborn. Based on his testimony and demeanor, I came to believe that Chavez was both telling the truth as he saw it and that the way he saw it was based on a strong memory of that aspect of the events. Witnesses' memories of events which allow the rememberer to state that a thing did not occur or that a statement was not made must be cautiously evaluated. I have done so here and remain convinced Chavez was that rare witness who was able to persuasively make such a claim as to Dennis' last name here. I credit him in full and specifically find he did not at anytime know and therefore did not and, indeed, could not have repeated Dennis' last name to anyone during the events and conversations at issue.

Credibility resolutions do not take place in a vacuum. Any opposing evidence including opposing testimony is properly considered in resolving credibility. I have done so in this case in making the resolution immediately above. For purposes of organizational clarity, I address those conflicting areas.

Scott Steepleton testified that Chavez identified the Dennis of these events as Dennis Moran in his conversations with him. As noted, Chavez denied this was so. I found Steepleton's testimony concerning his memory of events and conversations during this proceeding to be simply unreliable. Concerning another element of the complaint, he testified to having had a performance evaluation meeting with an employee in 2007, only to recant when braced by the fact that the employee in question had left the Respondent's employ in 2006. Steepleton attributed statements to Dennis Moran in a meeting with management on August 23, 2008, that were importantly inconsistent with Moran's testimony and more importantly with the notes of the meeting prepared by Steepleton's fellow management meeting attendees and reviewed by him immediately following the meeting. Steepleton's memory did not serve him well, missing the mark in important ways.

In observing Steepleton's demeanor during his testimony, I found he appeared quite anxious when asked to give testimony of events and conversations relevant to the issues in

dispute herein. His seeming doubts in my view reflected a lack of confidence on his part regarding the accuracy of his testimony in these regards and very much undermined my confidence in his credibility as well. I had no doubt and here specifically find that Steepleton's credibility was very significantly less than that of Chavez and I credit Chavez over Steepleton wherever the two witness' versions of events differed.

The noted McCaw and von Wiesenberger email to Steepleton merits consideration and analysis. Chavez' very first report of his experiences with Dennis were his phone message left for Publisher McCaw. While Chavez' message likely reported his dealing with the no last name Dennis, there was no evidence of Chavez' use of Dennis' last name in this communication left for Copublisher McCaw. McCaw did not testify.

Other matters, not fully fleshed out on this record, were being discussed between McCaw and Steepleton. As set forth more completely supra, Steepleton had reported to McCaw that there were rumors of a "plan" among sports reporters is to stage a "walkout." At that time, with Dorfman days away from leaving for the China Olympics, there were only three sports writers: Dennis Moran, Dennis Bateman, and Mark Patton. Steepleton's email to McCaw further asserts that in evaluating who would be "with" the Respondent in such a walkout: "Patton says he is happy here. . . . [W]e have Bateman." Moran's name is omitted. McCaw responds with an email to Steepleton sent at 12:15 p.m. on August 5, 2008, noting recent problems in sports coverage and concluding: "I believe the paper is being sabotaged. We need to discuss this tomorrow when you are back at the paper."

It is clear and was surely clear to McCaw at that time, who as copublisher was involved in newsroom matters and also in the employer/union disputes at the Paper, that (1), if there was a chance of a walkout of sports department employees and/or sabotage of sports coverage, and, (2), if, of the three sports department employees who would be working, two were regarded as allies by Steepleton, then the third sports employee, Dennis Moran, was the potential walkout and the saboteur. Further management would have well known that Moran was also a union representative in the newsroom. Put another way, there were two Dennis' in the sports department, Bateman and Moran. Bateman was an ally, Moran was the union representative. Clearly in management's view Moran was the Dennis who had spoken to Chavez and was responsible for the sabotage. Since these is no credible evidence tying him to these events, his union activities are the only factor on this record the Respondent's agents would be considering.

The two copublishers were actively involved in dealing with the Chavez matter in this period. The record shows at relevant times they were also affianced. I do not find it unreasonable to assume the two were in communication regarding these goings-on on that Tuesday, August 5, 2008.

At 1:21 p.m. on August 5, 2008, 66 minutes after McCaw's email to Steepleton quoted immediately above, von Wiesenberger's email to Steepleton identified Dennis Moran as the Dennis who had talked to Chavez. There was no other record evidence beyond that email that Chavez used Dennis' last name to Copublisher von Wiesenberger. And, importantly, von Wiesenberger did not testify.

Considering all the above, I find that the unexplained email assertion in Copublisher von Wiesenberger's email that Dennis Moran was the person who had spoken to Chavez is not supported by credible evidence and is not in and of itself persuasive evidence of the fact asserted therein.

Turning to the conflict between Steepleton and Moran respecting their conversations concerning Moran's role in the golf events described above, I have discredited Steepleton's testimony above. I did so for the reasons asserted supra and because I found Moran to be a persuasive witness regarding these events with a sound demeanor. As is set forth in detail above, Steepleton attributed to Moran various essentially confessional statements regarding his role in calling and talking to Chavez which attributions Moran credibly denied. The record contains important corroboration of Moran's denials of such attributions in the August 23, 2008, meeting of Moran with Steepleton and his fellow managers Colavincenzo and Apodaca. The management notes of the meeting track Moran's version of the meeting in these important aspects. Colavincenzo did not testify and Apodaca did not address what was said at this meeting in these regards or the contents of the notes of the meeting.

b. Positions and arguments of the parties

The General Counsel argues that the suspension and discharge of Dennis Moran were motivated by union activities and invokes the analytical framework established in *Wright Line*, 251 NLRB 1083 1089 (1980), as developed and applied in considering various 8(a)(3) allegations, supra. The General Counsel develops the *Wright Line* procedures in some detail. Counsel for the General Counsel on posthearing brief cites the Board's decision in *Pacific Design Center*, 339 NLRB 415 (2003), in which the Board approved the holding of Judge Lana Parke respecting the General Counsel's prima facie case in a *Wright Line* analysis (339 NLRB at 418):

> The prima facie case may be established by proving the following four elements: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee; and, (4) there is a link or nexus between the protected activity and the adverse employment action. *Hays Corp.,* 334 NLRB 48 (2001).

The government asserts that the first three of the quoted elements of the General Counsel's prima facie case are not in dispute and focuses on the fourth element, establishing a link or nexus between the protected activities and the adverse actions taken.

The General Counsel then cites various factors which counsel argues gives rise to an inference that an employer acted with antiunion motivation with citation of Board authority for each factor asserted. Those factors, as set forth in the General Counsel's posthearing brief at 163-164, include:

- Expressed hostility toward the protected activity
- Abruptness of the adverse employment action
- Suspicious timing
- Pretextual reasons given for the adverse employment action
- Disparate treatment
- Departure from past practice
- Shifting defenses

Finally, the General Counsel notes, as has been discussed supra in several *Wright Line* analyses, if the government establishes its prima facia case, the burden shifts to the employer to demonstrate that the adverse action taken would have been taken even absent protected activity. The government emphasizes however that the employer must demonstrate that the same action would have, not just could have, been taken in the absence of the protected conduct citing *Hicks Oil & Hickgas, Inc.,* 293 NLRB 84, 85 (1989).

The Respondent agrees the correct analytical framework for resolving the suspension and discharge disputes is the *Wright Line* formulary. The Respondent argues correctly however, with numerous Board and court citations supporting the proposition, that employers are free to make and enforce employee rules, to investigate misconduct and to discipline and discharge employees, indeed to do so for any or no reason save for protected reasons. Further protected activity is not a grant of immunity sheltering an employee or employees from having misconduct addressed to and including discipline and discharge. Counsel for the Respondent argues in effect that the citations of the government's cases asserting general principles do not necessarily apply to the instant case, but rather are distinguishable on the facts involved herein.

The heart of the parties' arguments regarding the suspension and discharge of Moran are factual. The parties on brief and at the hearing acknowledged the analytical principles involved under *Wright Line* and related cases and have marshaled and cited the lead cases regarding them. They each correctly assert however that the application of those principles to the complex facts involved in the relevant events is where the instant dispute must be resolved. It is to the party's factual arguments that I now turn.

The General Counsel argues that there is a clear link between Moran's union activity and the suspension and discharge he received. Thus counsel argues Moran was the Union's newsroom representative at relevant times and one of the few employees—as opposed to former employees—active on the Union side in bargaining. The government directs attention to the very substantial and ongoing hostility of the Respondent to the Union and to employees supporting the Union and the long string of unfair labor practices committed by the Respondent against the Union and union supporting employees as adjudicated in the instant case.

The Respondent notes that these arguments, which it also contests respecting the assumption of improper respondent conduct as to other employees, rely on generalities that are of no logical force. Thus the Respondent argues the status of Moran as a bargaining unit committee member is not related to his suspension or discharge and there was simply no nexus between any union activities and the discharge. The Respondent argues on posthearing brief at 161:

> Moran was not engaged in union activities when he spoke to Mr. Chavez, when he failed to bring the Santa Barbara Gold Classic Story to the attention of management, when he unilaterally decided that the News-Press was understaffed and could not cover the tournament, and when he failed to bring to anyone's attention that Mr. Chavez would fax in the scores.

The Respondent emphasizes that the occurrences that underlie the Respondent's unhappiness with events and its subsequent suspension and discharge of Moran were developments concerning which it did not initiate but rather reacted to. And, the Respondent asserts, the conduct at issue—both the circumstances involving Chavez and the golf coverage and the unauthorized removal of the Respondent's proprietary materials from Dorman's desk—was objectively as well as subjectively from the Respondent's perspective worthy of discipline including discharge.

The General Counsel focuses on the Respondent's handling of Chavez' and Dorfman's desk content removal matters arguing that no proper or balanced investigation of the events took place and that the Respondent's actions contained many of the traditional indicia of contrivance and deceit. Thus the General Counsel argues the Respondent never established that it had any basis for finding Moran, to be the un-last-named Dennis who called Chavez.

Thus it did not treat the two sports department Dennis' who were equally possible Chavez conversants, equally. It essentially never investigated the Dorfman accusation that Moran had taken the material from his desk, never asking Moran about the desk emptying assertion nor asked Dorman to speak again to the desk emptying matter after informing him of the importance of his previously lightly given statement that Moran did it. Finally the General Counsel argues the Respondent misattributed statements and actions to Moran that he had essentially confessed his guilt in order to justify its erroneous discipline of him, which accusations were simply false and pernicious. Thus the General Counsel notes that Steepleton consistently asserted that Moran had in effect admitted his guilt in the Chavez events, which assertions were false and should be discredited. The government notes the Respondent's counsel Cappello falsely argued in his opening statement in the instant case that Moran "was also involved in clearing out the desk of another employee who had resigned and then he denied it when he was confronted" when there was never any evidence offered that Moran was ever provided an opportunity to deny the accusation. And, the government notes, the record clearly established that Moran had neither a role in nor even knowledge concerning the Dorfman desk clearing incident.

c. Analysis and conclusions

The parties have correctly identified the Board's *Wright Line* approach as the correct manner of addressing these allegations. They have largely marshaled the applicable cases, many of which have been cited in earlier *Wright Line* inquiries, supra, and immediately above. It seems most appropriate to address the two separate allegations, the suspension of Moran and the later discharge of Moran seriatim using the *Wright Line* framework. I shall consider the challenged suspension first.

(1) The suspension of Moran under Section 8(a)(1) and (3) of the Act

As noted the government has alleged that Moran's suspension was in violation of Section 8(a)(3) of the Act, the Respondent strongly denies the allegation, and the parties addressed the issue under *Wright Line*. Turning to the government's case, I agree with the government that the initial elements of the General Counsel's prima facia case set forth in the quoted portion of *Pacific Design Center*, 339 NLRB 415 (2003), above, are met. Thus: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee. The remaining and disputed element then is the fourth element from the quoted portion of that decision: whether or not there has been a sufficient showing by the General Counsel on this record of a link or nexus between the protected activity and the adverse employment action, here Moran's suspension on August 23, 2008.

In order to determine the existence of a causal relationship, the specific union activity involved must be identified. As the Respondent argues persuasively on brief causation is an important issue. Thus the Respondent notes: Moran's general union activities were and had been ongoing for some time and had also long been known by the Respondent. Counsel argues those general union activities were not directly or even indirectly related to the Chavez/golf matters underlying the suspension and, in essence, were so attenuated so as not to provide a persuasive nexus connecting Moran's union activity with the suspension.

It is necessary however in this analysis to focus on the particular circumstances which lead to the suspension with attention to the events which underlay the Respondent's determination that Dennis Moran was the "Dennis" of the Chavez phone conversation. Clearly when Chavez reported he had talked to a "Dennis" at the Paper, two choices reasonably

presented themselves, the two Dennis' in the sports department: Dennis Moran and Dennis Bateman. How did it come to pass that Respondent suspected Dennis Moran and not Dennis Bateman or even Dorfman?

Steepleton testified that he came to that conclusion after talking to the two and to Chavez. I have specifically found supra, based on the credibility analysis set forth supra, that this was not so and that Steepleton came to the belief that Moran and not Bateman was the Dennis/Chavez conversant because he was specifically so informed by Copublisher von Wiesenberger by email on August 4, 2008—the day before Steepleton first talked to Moran. But, on this record, how did Copublisher von Wiesenberger come to that opinion as of that date? He had spoken to Chavez, but Chavez testified credibly that he had never known the last name of "Dennis" and had not identified Moran as the "Dennis" involved to von Wiesenberger. Von Wiesenberger did not testify.

Copublisher McCaw, present in the office with Copublisher von Wiesenberger that day, was also involved in the events and, it might be inferred, informed her colleague. But again Chavez' credible denials encompassed his conversations with McCaw and she did not testify. So while it is logical that she would have told Copublisher von Wiesenberger what she knew, I cannot find she learned that the "Dennis" who was the wrongdoing employee of the Paper was in fact Moran from Chavez.

A separate email exchange between McCaw and Steepleton on August 4, quoted in part above is relevant. Copublisher McCaw had earlier learned of the problems in golf coverage and let Steepleton know in an email. Steepleton by email in response informed McCaw that he had learned of a possible sports reporter "plan" to "stage a walkout." Steepleton identified various employees who would be allies of the Paper in such an event including his statement: "we have [Dennis] Bateman." He also noted: "Patton says he is happy here." McCaw's response to Steepleton's email clearly indicates she took the events and rumors to be animated by hostility to the Paper: "I believe the paper is being sabotaged."

It is not a far leap to conclude that McCaw associated Dennis Moran with the sabotage against the paper. There were only three sports employees present at the Paper (Dorfman being in China), Moran, Bateman, and Mark Patton. By process of elimination from the perspective of McCaw, the Dennis who was sabotaging golf coverage and agitating Chavez had to have been Dennis Moran, the Union's representative. The copublishers' actions that August 5th is the only basis for explaining the statement in von Wiesenberger's email to Steepleton that Moran was the "Dennis" of Chavez' complaints. The logical force of this conclusion that Moran was the villainous "Dennis," based on his union activities, is sustained primarily by the lack of record alternatives. Importantly, neither McCaw nor von Wiesenberger testified. And Chavez' testimony was both credited and clear that he did not provide the last name of his telephone conversant who identified himself only as Dennis to anyone since he never knew the individual's last name.

Given the above analysis, it is clear that the union activities of Moran, despite their general nature, had a contextually direct relationship to the fact that Moran was identified as the employee, indeed in McCaw's judgment, saboteur, named Dennis whose conduct involving Chavez and golf had damaged the Paper. That identification, I find based on all the above, leads directly to Moran's suspension.

The Respondent notes that it was clearly entitled to ascertain who had spoken with Chavez and caused the difficulties set forth at length earlier. Thus, Respondent argues the investigatory suspension of Moran was reasonable and nondiscriminatory. The problem with

this argument, as the General Counsel notes on brief, is that only Dennis Moran and not Dennis Bateman was suspended during the investigation. That asymmetry or disparate treatment is justified only if the identification of Moran as the villainous Dennis is itself benign and free from union animus. I specifically find that this record simply does not support any finding that the identification of Moran as the Dennis/Chavez conversant was made based on other than Moran's association with, and advocacy on behalf of, the Union as noted above.

Based on all the above, including the argument of the parties, the testimony of the witnesses including an evaluation of their demeanor and, importantly, the fact that neither McCaw nor von Wiesenberger, testified, I find the General Counsel has sustained his prima facie case under *Wright Line* that the Respondent suspended Dennis Dorfman because of his union activities and sympathizes.

Given this finding, the burden under *Wright Line* then shifts to the Respondent to prove that it would have suspended Moran in the absence of his union or protected activity. Here the Respondent's factual arguments founder on the rock of my finding that there is no credible basis on this record for finding that the Respondent has any reason—other than Moran's union activities and sympathies—for assuming that Dennis Moran rather than Dennis Bateman or another employee was the self-identified Dennis who spoke to Chavez by telephone regarding the golf tournament.

I am aware of the line of cases under *Wright Line* that hold that an employer may meet its burden of showing that an employee would have been disciplined even if no protected or union activities had occurred based on a reasonable belief that the employee committed an offense. In *McKesson Drug Co*., 337 NLRB 935, 936 fn. 7, the Board noted:

> In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. See *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012–1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself).

That line of cases does not apply here however because I have explicitly found that the Respondent's belief that Moran was the otherwise unidentified Dennis who had engaged in misconduct resulted from the Respondent's suspicion of Moran generally based on Moran's union activities. The belief is therefore neither reasonable nor exculpatory. The Supreme Court made it clear many years ago in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), that regardless of motive, discharging employees who did not engage in misconduct and were engaged in protected activities tends to discourage Section 7 activity and violates Section 8(a)(1) of the Act. As set forth supra, I have found and here reiterate that there is no persuasive

evidence that Moran in fact was the Dennis at issue. And the Respondent bears the burden of proof at this stage of the *Wright Line* analysis.

Having found that the General Counsel has sustained his prima facie case under *Wright Line* that the Respondent suspended Moran because of his union activities and that the Respondent has not established that the Respondent would not have suspended Moran had he not engaged in such activities, I find the General Counsel has prevailed respecting the suspension allegation. I sustain this paragraph of the complaint.

(2) The discharge of Moran under Section 8(a)(1) and (3) of the Act

As discussed supra, Moran was under indefinite suspension effective August 23, 2008. A few days later in conversations with Dorfman, Apodaca was told by Dorfman that had no need to clear out his desk because "Dennis Moran had already cleaned out his desk." The Respondent discovered that the desk was in fact "cleaned out" and that materials the Respondent regarded as proprietary were missing. The Respondent without speaking to Dorfman further or to Moran at all regarding the matter, determined to discharge Moran and did so on August 30, 2008. The discharge is alleged in the complaint to be in violation of Section 8(a)(3) of the Act. The Respondent denies the allegation. All parties agree that the *Wright Line* analysis is appropriate in resolving this dispute. The General Counsel and the Respondent to a large degree treat the suspension and discharge of Moran in a common manner or as a unity and the arguments noted above in my consideration of the suspension were applied by each party to the facts of the post suspension events.

The General Counsel argues additionally however that the complete absence of any investigation by the Respondent into the truth of Dorfman's claim that Moran had cleared his desk reveals the desk clearing matter to be a pretext for discharge. Thus, the government argues that the contention that the Respondent's agents believed and accepted Dorfman's casual remark that Moran had cleared his desk, an unexamined statement from an ex-employee who the Respondent knew had lied to them only days before in asserting that he did not intend to resign his employment, is palpably incredible. The General Counsel further contends that for the Respondent to believe Dorfman's casual statement to such an extent that the Respondent would fire Moran without revisiting the matter with Dorfman or even asking Moran about the matter is beyond blatantly incredible and reveals duplicity by the Respondent's agents.

The Respondent emphasizes that its agents Steepleton and Apodaca made clear that Moran would not have been discharged, but for their belief he had engaged in the desk clearing conduct described by Dorfman and that, while during the course of the trial the Respondent learned of Dorfman's false statement and Moran's nonparticipation in the desk cleaning, no agent of the Respondent was aware of the falsity of Dorfman's attributions regarding Moran at any earlier time.

Based on the record as a whole, the testimony of the witnesses in light of their demeanor and the arguments of the parties, I find and conclude as follows. Essentially for the reasons given in finding the government has established its prima facie case as to the suspension, I make the same finding here respecting the discharge. Moran was suspect in the eyes of the Respondent for his union activities and sympathies in light of the Respondent's high officials' determination that the sports department was under threat of a walkout and that, by the process of elimination discussed supra, Moran was the disloyal employee.

I find it simply unbelievable, indeed more like something from the works of Franz Kafka, the post-Moran suspension events and actions of the Respondent's agents ending in

Moran's discharge. Relying on a casual reference by Dorfman, a now former employee who Respondent well knew had recently lied to it regarding his intentions to continue his employment with the Respondent, Apodaca and Steepleton determined to terminate Moran. The Respondent never asked Moran about the matter and seemingly went far out of its way to avoid informing Moran he was viewed as having done a dischargeable act. Thus Steepleton called Moran and told him he was to be discharged. When Moran asked him why, Steepleton told him he would get a letter and to come to the exit of the facility. When Moran did so, again Steepleton omitted to disclose the Dorfman accusation, but rather simply gave Moran a lengthy letter containing a litany of advanced sins and omissions asserted as a basis for discharge and sent him on his way before he could address the assertions. To argue that Moran never denied the Dorfman claim is again the Kafkaesque sin of the accused that, never learning of the allegations against him, is incapable of making a denial or offering explanation.

Given my finding that the *Wright Line prima facia* case of the government has been sustained, the burden then shifts to the Respondent to prove that it would have discharged Moran in the absence of his union or protected activity. As in my rejection of this contention respecting Moran's suspension, I reject it here because I am simply unable to accept that had Moran not been the object of suspicion and disloyalty for his union activities, as discussed supra, the Respondent would never have simply blindly believed Dorfman's remark about Moran clearing out his desk without even asking Moran about his actions if any in actually clearing out Dorfman's desk. And, if such a fundamentally fair and reasonable undertaking had occurred,[39] I am satisfied that Dorfman's glib falsehoods would have been quickly discerned, if not immediately corrected by Dorfman himself or by Moran.

Given all the above, I find that the General Counsel has sustained the complaint allegations that the discharge of Moran violated Section 8(a)(1) and (3) of the Act.

(3) The bargaining allegations respecting Moran's suspension and discharge

The General Counsel in his complaint alleges the Respondent's post suspension failure to notify and bargain with the Union over the suspension and termination of employee Dennis Moran violated Section 8(a)(1) and (5) of the Act. As set forth in greater detail supra, the Respondent did not notify nor offer to bargain with the Union regarding the Moran suspension before its decision and implementation of the decision to suspend Moran. Rather, when the Union learned of Moran's suspension on the day of its occurrence, Union Chief Negotiator Caruso by letter sought of the Respondent's Chief Negotiator Zinser the immediate rescinding of Moran's suspension, restoration of any lost pay and that the Respondent "agree to negotiate over this action before implementation if the News-Press wishes to persist with it." By letter dated September 2, 2008—after Moran's discharge, Zinser replied to Caruso again by letter that the Respondent had no obligation to bargain over any discipline relating to Moran or the Respondent's maintenance of discipline consistent with the status quo. The Respondent, the letter asserted, was "maintaining the dynamic status quo that has always existed." The letter also noted the discipline and discharge of Moran were for cause and rejected the Union's proposal to rescind the discipline of Moran.

[39] An employer, the Respondent here, is not required to be fair, reasonable, or even to avoid Kafkaesque human resource decisions. In determining if certain conduct would have occurred absent protected conduct, however, the motivations, habits, and practices of the employer must be considered.

It is important in addressing the allegations here to distinguish between an employer's obligation to bargain over its system of discipline, i.e. disciplinary rules and practices, and its application of those rules and practices to a particular individual or situation. An employer must upon demand bargain with its employees' representative concerning its terms and conditions of employment applicable to the represented employees. An employer's disciplinary rules and practices are a part of those employees' terms and conditions of employment. Changes in the rules are mandatory subjects of bargaining and require notification and provision of an opportunity to bargain to the Union prior to changes in rules in their manner of implementation.

The complaint allegations framing the instant dispute here, complaint paragraphs 15(a) and 14(b), specifically name the conduct at issue as the Respondent's post suspension failure and refusal to bargain as the specific acts of suspending and discharging Moran. Thus, the complaint allegations do not allege and the General Counsel does not argue the Respondent failed to bargain about the Respondent's general system of disciplinary rules and practices. Rather the complaint and the government asserts a narrower statutory bargaining obligation respecting the application of the Respondent's discipline in regards to the Respondent's specific acts of suspending and discharging Moran. It is also important to note the bargaining obligation asserted by the complaint and argued by the General Counsel arises by virtue of the Union's request for bargaining. This is consistent with the Union's actions offered by the government in support of the allegation, i.e., the Union's letter sent upon its learning Moran had been suspended in which the Union seeks negotiations with the Respondent over the suspension of Moran and any subsequent Respondent "implementation" of its discipline, i.e., discharge, of Moran.

An employer's obligation to bargain respecting individual application of its rules to employees in any given situation differs depending on the circumstances of the application of the rules. Some rules require very little if any discretion on the part of the employer in their application, for example a rule providing employees receive a fixed percentage wage increase on the anniversaries of their employment. If the rules are longstanding, i.e., meet the Board's test as a past practice and do not involve the exercise of substantial discretion, the employer is not obligated to provide notice to a Union that had not sought such prerule application bargaining. *Washoe Medical Center, Inc.,* 337 NLRB 202, 202 fn. 1 (2001).[40]

Other employer rules, including disciplinary rules, require the exercise of a substantial degree of employer discretion and a bargaining obligation exists concerning their application. The Board in *Eugene Iovine, Inc.,* 328 NLRB 294, 294 (1999), addressed such discretionary rules:

> The Board and the courts have consistently held that such discretionary acts are, as stated by the judge, "precisely the type of action over which an employer must bargain with a newly-certified Union." See *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with the union over economic layoff, which is "inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work"); *NLRB v. Allis-Chalmers*

[40] See also *Virginia Mason Medical Center*, 350 NLRB 923, 931–932 (3007). In the instant case the General Counsel is not contending the Respondent failed to bargain about the Moran suspension and discharge at any time before the Union requested such bargaining on August 23, 2008, after Moran's suspension.

> *Corp.,* 601 F.2d 870, 875–876 (5th Cir. 1979) (employer must bargain over wage increase which did not result from "purely automatic" policy and was not pursuant to "definite guide-lines"); *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice of instituting economic lay-offs, employer, because of newly certified union, could no longer continue unilaterally to exercise its discretion with respect to layoffs).

The initial step here then, as to both the suspension and the discharge of Moran, is to determine: (1) if the Respondent's disciplinary acts applied longstanding rules (i.e., were past practices) as opposed to new rules (unilateral changes) and, (2) if the rules applied were discretionary or sufficiently nondiscretionary to avoid the obligations set forth in *Eugene Iovine, Inc.,* supra. The Board in *Eugene Iovine, Inc*. makes it clear that the burden is on the employer to establish in this context that a past practice existed and that the disciplinary actions taken were consistent with that practice.

Turning to the Moran suspension, the Respondent asserted to Moran and at trial in its defense that Moran was suspended indefinitely pending completion of the investigation of his role in various Chavez and golf tournament events as discussed above. The rules advanced by the Respondent as applicable to Moran's argued actions in this sequence of events are multifold. They include rules against disclosure of proprietary information, rules regarding honesty, consulting with supervision, proper work scheduling and follow through and others. The General Counsel vigorously contested the existence, consistency of application and applicability of many of the challenged rules to Moran's situation. Indeed Steepleton, the supervisor tasked with the disciplinary decision regarding Moran indicated at the time he needed to consider the matter.

All of the above makes it clear and I find that the application of the rules to Moran at the time of his suspension involved highly discretionary decisions by the Respondent's agents as to what to do with Moran and/or others involved in the complex events which have been discussed in some detail, supra. Thus I find, under the *Eugene Iovine, Inc.,* 328 NLRB 294 (1999) decision, that the Respondent was required to bargain with the Union concerning the suspension process and the discipline that could potentially result from the completion of the consideration. As the Board noted in *Oneita Knitting Mills, Inc*., 205 NLRB 500, 500 fn. 1 (1973):

> What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Given all the above, I find the Respondent had an obligation to bargain with the Union concerning the suspension and subsequent discipline of Moran, at least from the time of the Union's August 23, 2008 request to bargain about Moran's suspension and any subsequent discipline, which is as far back in time as the Union and the General Counsel have chosen to litigate. The Respondent's explicit refusal to so bargain, therefore violates Section 8(a)(1) and (5) of the Act and I so find.[41]

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[41] Given these findings I find it is unnecessary to address the various contentions of the government that the various rules the Respondent identified as applicable to Moran's potential discipline were not legitimate or were not applied consistent with the Respondent's past practice.

Turning to the subsequent discharge of Moran by the Respondent, the same decisional law applied to Moran's suspension applies to Moran's discharge save that here the Union had requested bargaining and the Respondent's obligation to bargain preceded its discharge decision. Thus, the Union's August 23, 2008 request to bargain concerning the post suspension handling of Moran clearly proceeds and encompasses Moran's discharge.[42] That being so, the Respondent was obligated to meet and bargain with the Union concerning the discharge, this includes both bargaining regarding the decision itself before the decision was taken as well as bargaining concerning the effects of the discharge.[43] This being so, the Respondent's explicit refusal to engage in such bargaining violated Section 8(a)(5) and (1) of the Act and I so find. I therefore sustain the relevant paragraph of the complaint.

M. The Table Bargaining Allegations

1. The complaint allegations

The complaint at paragraph 20 alleges an improper course of bargaining by the Respondent during the November 2007–March 2009 period. Thus, the complaint alleges the parties met for the purposes of collective bargaining concerning unit employee's terms and conditions of employment during the period. Complaint subparagraph 20(b)(i) and (ii) allege that during this period during bargaining:

> (i) The Respondent has insisted on proposals that are predictably unacceptable to the Union, which proposals include, but are not limited to, the Respondent's proposals on management right, grievance and arbitration, union bulletin board, discipline and discharge.
>
> (ii) The Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management rights clause that would grant the Respondent unilateral control over many terms and conditions of employment.

The complaint at paragraph 20(c) alleges:

> By its overall conduct including but not limited to the conduct alleged in paragraphs 7 through and including 16 and paragraphs 18, 19, and 20(b), the Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of the Unit.

Complaint paragraph 25 further alleges the quoted conduct of the Respondent constitutes a failure and refusal to bargain collectively in good faith and a violation of Section 8(a)(5) and (1) of the Act. The Respondent in its answer denies both the specific bargaining allegations and the conclusionary allegation that it violated Section 8(a)(5) and (1) of the Act.

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[42] Steepleton and Apodaca testified that at the time of Moran's suspension, which was also the time of the Union's bargaining request, the Respondent had not decided to terminate Moran.

[43] Various subjects such as severance terms, references, unemployment processing, and other matters arise after a termination and may be the subject of effects bargaining.

2. The bargaining conduct of the parties[44]

The Respondent and the Union have met in bargaining since November 13, 2007, usually in 2-day stints. Since May 9, 2008, the parties have utilized the services of a commissioner of the Federal Mediation and Conciliation Service. The Union at all material times has been led in bargaining by Nicholas Caruso, an international staff representative of the Charging Party, with many years of negotiating experience in the publishing industry. The Respondent has at all times been represented by Michael Zinser of the Zinser law firm who has many years of negotiating experience in the publishing industry. These individuals have been assisted: in the Union's case by its counsel, Ira Gottlieb, of the law firm of Bush, Gottlieb, Singer, Lopez, Kohanski, Adelstein, and Dickinson, as well as an employee committee and, in the Respondent's case, by managerial agents of the Respondent and other members of the Zinser law firm.

In negotiating and agreeing to procedural arrangements prior to the start of face-to-face bargaining, the Respondent made it clear that it was interested in confining bargaining to mandatory subjects of bargaining and was not interested in consuming "valuable bargaining time with permissive, nonmandatory subjects of bargaining." The Respondent's initial position respecting bargaining proposals was that it would stand on the status quo and wait and see what changes the Union might propose.

The Union submitted to the Respondent its opening proposal on November 1, 2007, in anticipation of the opening meeting on November 13. The proposal included, inter alia, a discipline and discharge clause limiting the Respondent's rights to discipline, suspend, or discharge unit members without just cause. The proposal also included a progressive discipline, grievance, and arbitration clause applicable to any disciplinary action, controversy, or dispute concerning the application or interpretation to the contract. The final step of the proposed procedure was final and binding arbitration with the arbitrator able to sustain, reverse, or modify any unjust discipline of unit employees the arbitrator determined not to be for just cause. The decision of the arbitrator was to be final and binding. The Union's November 1, 2007 proposal contained a no-strike, no-lockout clause. The proposal also contained a work assignments clause which included, inter alia, the following separate paragraphs:

> 1. An employee shall not be required to perform, over the employee's protest, any practice which compromises the employee's integrity.
>
> 3. Substantive changes in material submitted shall be brought to the employee's attention before publication. An employee's byline or credit line shall not be used over the employee's protest.
>
> 4. An employee shall not be required to gather, write, edit, photograph or process anything for publication that is malicious, distorts the facts or creates an impression[45] which the employees knows to be false. If a question arises as to the accuracy of

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[44] Certain complaint allegations sounding in Sec. 8(a)(5) of the Act have been discussed earlier in association with factually related violations. Those discussions and conclusions while also appropriately set forth in this factual recitation and consideration, for reasons of avoiding making a long decision even longer, will not be duplicated save in a partial abbreviated fashion. They formed part of the relevant circumstances in my consideration of the issues herein.

printed material or photographs, no correction or retraction of that material or photograph shall be printed without prior consultation with the employee involved.

5. An employee may not be disciplined for refusing to cover a story or perform a task that is unethical, immoral or unsafe. An employee may request and shall receive a written explanation from management in instances when an employee is given an assignment that violates this section.

6. An Employee may request and shall receive a written explanation from Management in instances when significant changes are made to a story, photo or graphic or the story, photo or graphic is not published. An employee may also request and shall receive a written explanation from Management in instances when the employee has submitted a written story, photo or graphic and that proposal is denied.

9. Each employee shall furnish the Employer with conscientious service for the entire period of time he/she is employed each day, and no employee shall be required to perform an excessive amount of service, constituting, in fact, an unreasonable workload.

In the initial 2-day bargaining session, November 13–14, 2007, various discussions and information requests respecting temporary employees and merit wages increases were undertaken and followed up with later correspondence as has been discussed supra. On November 14, 2007, the Respondent submitted written proposals to the Union including articles on management rights, discipline, and discharge, and a no-strikes article which included no-lockout language.

The management-rights proposal (which included "bargaining notes" entries at its end.) stated in part:

> Section 1. Except as expressly modified or restricted by a specific provision of this Agreement the Employer reserves and retains, solely and exclusively, all of its normal, statutory inherent, and common law rights prerogatives and functions to manage the business, whether exercised or not, as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer.
>
> Section 2. The sole and exclusive rights of management which are not abridged by this Agreement shall include, but are not limited, to the following rights:
>
> (a) To determine the content of Santa Barbara News-Press, including, but not limited to, editing, presentation and placement of all stories, columns and photos.
> (b) To establish or continue policies, practices and procedures for the conduct of the business and, from time to time, to change or abolish such policies, practices or procedures.
> (c) To determine and, from time to time, to redetermine the methods, processes and materials to be employed.
> (d) To discontinue processes or operations of the Employer.
> (e) To establish work, quality and productivity standards.
> (f) To determine the number of hours per day or week that operations shall be carried on.
> (g) To determine and to select the equipment to be used in the Employer's operations and, from time to time, to change or to discontinue the use of

any equipment and to select new equipment for its operations, including equipment for new operations.

(h) To establish employee work schedules, to set the hours of work and the number of employees, and from time to time to change the hours and employees'' work schedules.

(i) To select and hire employees, determine their qualifications and assign and direct their work.

(j) To determine the number and type of employees required.

(k) To assign work to such employees in accordance with requirements as determined by management.

(l) To lay off employees due to lack of work or for reasons of efficiency.

(m) To determine the fact of lack of work.

(n) To make and enforce safety rules and rules governing the conduct of employees within the News Department and for the maintenance of discipline, to the fullest extent permitted by the National labor Relations Act, to establish and enforce a Code of Ethics for all News Department employees.

(o) To suspend, discharge or otherwise discipline employees.

(p) To issue, amend and revise policies, rules, regulations, and practices.

(q) To determine the content of all jobs and descriptions thereof, and to determine the essential functions of all jobs.

(r) To determine when training will be provided to employees and those employees to receive training.

Section 3. The Employer shall have the right to utilize independent contractor free-lance writers and photographers to the extent deemed necessary by News Department management.

Section 4. The Employer's failure to exercise any right, prerogative, or function hereby reserved to it, or the Employer's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Employer'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 functions of the Agreement.

Section 5. Managers/Supervisors shall have the right to write and/or take pictures for publication in Santa Barbara News-Press.

Section 6. The rights and prerogatives of Management, whether established by express provisions (including this Article) or by practice, shall be deemed to be part of the status quo that remains in effect after the expiration of this Agreement on _____ and until a different agreement is reached or other lawful change is permitted.

Bargaining Notes [Bolding in original.]

1. This proposal represents the status quo for Santa Barbara News-Press.

* * * *

3. The Union's proposal on "Work Assignments" in effect transfers control of content from Management (where it resides now) to the individual employee's subjective notions of "integrity," "malicious," unethical," "immoral," "unsafe,

and "unreasonable work load." Santa Barbara News-Press is not willing to so transfer control. That should remain with the Publisher.

The Respondent's discipline and discharge proposal stated in part:

> Section 1. The Employer shall have the right to discharge or discipline employees. The disciplinary action which the Employer may take in punishing or penalizing employees shall include, but not be limited to: (a) warning; (b) suspension from work without pay; (c) discharge.
>
> Section 2. In the case of any offense for which an employee may be discharged, the Employer may at its sole discretion, impose a lesser penalty.
>
> Section 3. While the policy of the Employer is at-will employment, the Employer wishes to communicate that it will impose discipline or discharge for the following types of misconduct:
>
> (a) Biased reporting.
> (b) Violation of the Employer's policies on Business Conduct, Conflicts of Interest, Confidentiality and Code of Ethics.
>
> * * * *
>
> (h) Disloyalty
> (i) Insubordination
> (j) Dishonesty
>
> * * * *
>
> (l) Neglect of Duty
>
> * * * *
>
> (r) Failure to meet the productivity standards of the Employer
>
> Section 4. Employees should have no expectation of privacy when on Employer property or while on duty, whether on or off Employer property, insofar as it involves the Employer's right to search desks, vehicles, brief cases, purses, computers, E-mail to investigate possible violations of Employer rules and policies. A refusal of an employee to cooperate in any such investigation shall be deemed to be insubordination and therefore, cause for discipline and/or discharge.

The Respondent's no-strike proposal included the following language:

> Section 1. There shall be no strikes (including sympathy, unfair labor practice, or wildcat strikes), sit-downs, work stoppages, boycotts, picketing, any acts honoring a picket line or any other acts that interfere with the Employer's business, including but not limited to the Employer's operations, the production or sale of its products or services or any Employer sponsored events or meetings, during the term of this Agreement by the union, its officers, agents and members, or by the employees.
>
> * * * *
>
> Section 4. Any or all employees participating in any activity proscribed herein shall be subject to disciplinary action, including discharge.
>
> * * * *
>
> Section 6. The Employer agrees that during the term of this Agreement, it will not lock-out the employees covered by this Agreement.

Following this 2-day bargaining session, as discussed in earlier portions of this decision, information requests were made by the Union. The parties also agreed by letter to meet for 3 days of bargaining in mid-January 2008. That session was cancelled by Zinser based on the unavailability because of illness of Scott Steepleton. Bargaining sessions were agreed to be held on February 12, 13, 14, and 15 and February 25, 26, and 27, 2008.

The bargaining sessions in the week of February 12, 2008, included discussions of the merit-pay history and discussion of information submitted to the Union as well as the Union's desire and request for information as has been discussed in other portions of the decision.

The Respondent on February 13, submitted a written grievance proposal. The proposal provided for a 4-step process for grievance handling. In essence, step 1 provided for an employee, individually or with a union steward, a period of time following the ripening of the dispute to discuss the claim with the employee's immediate supervisor who would provide a verbal response within 3 days.

Absent resolution, step 2 allowed for taking the matter in a more formal way to the associate editor who would respond in writing within 4 days. Absent resolution, step 3 provided for review by a group of two union representatives, the associate editor, and the director of human resources with the director of human resources communicating the Company's decision in writing within 4 days.

Finally, if no resolution has taken place, step 4 provided for a written appeal to the copublishers and a meeting of the copublishers, the associate editor, the director of human resources, and two union representatives. The copublishers within 4 working days "would provide to the Union in writing the final decision of the Company on the grievance."

During this week in bargaining the Union addressed the Respondent's earlier submitted discipline and discharge, and management-rights proposals and the newly submitted grievance proposal. Caruso identified these subjects as the heart of the negotiations which if settled would make reaching an agreement easier. The Union noted with alarm however the Respondent's proposed contract clauses were punishing and harsh for employees and there was no limit or control on the Respondent's rights: no standards of just cause or reasonableness and no third party dispute resolution such as arbitration.

Zinser emphasized that the Respondent's proposals provided for employee grievances with Union representation, with multistep processing that provides for dialogue of the interested parties and discussion of the matters in dispute. These proposals created new rights for the Union that had not existed heretofore. He noted however that the "publishers want to retain final say on these decisions. They do not want to relinquish that decision-making power to the third party."

The negotiators also discussed the Respondent's bulletin board proposal of February 14, 2007. The Union complained that the provision requiring the Respondent's approval of material prior to its posting was demeaning and condescending. The Respondent responded that there was no union statutory right to bulletin board access and that such rights were created by a contract. The Union rejoined that the Respondent's proposals seemed to have a theme that management needed "total control." The Union modified its bulletin board proposal on February 15, 2008, but it became clear that the language was not complete in Caruso's view and that it would have to be fixed by giving both sides keys to the board.

Following intersession information correspondence discussed in other sections of this decision, the parties met in bargaining on February 25 through 27, 2008. At that session the Union provided its written discipline and discharge language. It provided for "just cause" as a basis for discharge or discipline of employees as well as a progressive or multistep discipline system: verbal warning (documented), written warning, suspension from work without pay, discharge. The Union made it clear that the fundamental difference between the parties in these areas was not the language so much as the existence of an impartial third party to decide differences.

The Union amended its bulletin board proposal to specify that the union shop steward and the newsroom manager would each have a key to the board for the purpose of posting and removing material. Caruso took pains to explain that despite the fact that Respondent had a key under the proposal, the bulletin board was the Union's and the Union though its steward would determine what was appropriate to be posted.

The grievance and arbitration proposals were discussed. The Respondent indicated it had no new proposal and the Union lamented that it was "unheard of" for the employer to retain "total control" over disputes. Caruso, as the Union's negotiation notes indicate, complained:

> Every step of the way . . . the Company wants everything to be the same and to have ultimate control. . . . Quite frankly, I am very frustrated with the proposals being essentially nothing more than what the employees already have and that the company wants absolute say over disputes.

The Union also submitted a written proposed letter of understanding on Journalism Ethics which was a proposed addendum to the agreement. The language of the proposal adopted the code of ethics of the Society of Professional Journalists. The proposal further asserted:

> Additionally, the parties recognize that it may be impossible to eliminate all forms of bias from the news. In the spirit of continual improvement, however, reporters pledge to be fair and objective. When Management views a news story to be unbalanced or distorted, a discussion will be held between the applicable parties to make appropriate changes. It is agreed further that the Management will not attempt to interject opinion into a news story. If agreement cannot be reached on appropriate changes, the reported may withhold his/her byline.

The parties met again in bargaining on April 2 and 3, 2008. The Respondent submitted a new grievance procedure proposal with timing language changes and a new step 4 which provided a grievance mediation process before a Federal Mediation and Conciliation Commissioner. The former step 4, now became step 5 and as before reserved the final decision in disputes to the Publishers. The Union argued that its core issues were grievance language, management rights, and discipline and discharge. While appreciative of the value of mediation the Union insisted it was not a substitute to final and binding arbitration by an impartial arbitrator.

The Respondent supplied an updated written grievance proposal which deleted the earlier specifically named FMCS representative. The proposal contained the following bargaining note"

> Santa Barbara News-Press rejects the notion that a grievance procedure without "just cause" and "binding arbitration" by a neutral is illegitimate. Thousands and thousands of employers have written procedures for resolving workplace disputes, without the concept

> of just cause and arbitration. The Union seems to be saying that these employment relationships are not legitimate. Santa Barbara-Press strongly disagrees with this premise.

The Respondent in writing withdrew its November 14, 2007 no-strike article. Zinser represented that since the Respondent was not going to agree to a binding arbitration clause, it was withdrawing its no-strike language and the employees can go on strike in furtherance of their view of a labor dispute.

Caruso responded thereafter that the focus should be on union contracts since the employees elected the Union to represent them. "[W]e have to start negotiating things that are found in Union Contracts, not things that may be out there in the nonunion environment." Caruso suggested the Union might remove the "just cause" language in the grievance clause if the parties could reach agreement on a grievance procedure with third-party resolution.

In this session the Respondent submitted modified proposals on discipline and discharge and on bulletin boards. The Respondent's proposal on discipline and discharge modified its earlier Section 4, quoted above, by striking the items "brief cases, purses" from the search language and adding a new sentence:

> The Employer shall have the right to search personal vehicles, brief cases, or purses if the Employer has a reasonable suspicion that the contents thereof involve possible violation of the Employer['s] rules and policies.

The Respondent's bulletin-board proposal carried unchanged the proposition that items to be posted must be submitted to the Publisher and approved prior to posting. Caruso again took umbrage with the proposition that the Union had to get approval for its postings and asserted that the Union would be responsible for posting and taking down materials.

The Respondent responded to the Union's earlier proposal on journalism ethics by noting it remained of the view that the subject matter was a permissive nonmandatory subject of bargaining that it did not wish to bargain about. It specifically requested the Union withdraw the proposal.

Between sessions, Caruso in a letter dated April 23, 2008, complained to the Respondent that the Respondent's insistence in its proposals with no just cause requirements in disciplinary action matters and its rejection of binding arbitration concerning grievances were "predictably unacceptable as we have repeatedly informed you." Caruso challenged Zinser in his letter:

> This position in the context of collective bargaining is in bad faith, both because it is illustrative of the News-Press' overarching and virtually uniform refusal to deviate from the status quo on any significant matter, and because of a fundamental difference between pre-union and post-election set of circumstances. . . . Since you continue to assert . . . that the Santa Barbara News-Press can persist—as do non-union employers—with its pre-existing, one-sided non-binding "procedures" leading to a unilateral resolution to a contractual dispute it strongly suggests that you have no interest in reaching an agreement with the Union.

Zinser replied by letter of May 9, 2008, which letter dealt with other matters but also addressed the language quoted immediately above:

> With respect to your proposals for just cause and arbitration, it is certainly the union's right to propose those concepts for a new Collective Bargaining Agreement. However, as you acknowledged at the table, grievance and arbitration is a mandatory subject of bargaining, and the Santa Barbara News-Press has the right to propose a procedure that does not contain concepts of "just cause" or binding arbitration. Even you acknowledged awareness of Collective Bargaining Agreements without arbitration in them. Your statements reflect a belief and/or position that by virtue of the union being certified, that translates into a requirement that an employer agree to what you want. This is not the law. From the point of view of the Santa Barbara News-Press, the existing wages, hours, and working conditions are very generous. Therefore proposing the status quo on such items is certainly consistent with good faith. "Predictably unacceptable" is not a standard under the National labor Relations Act. If that were the case, either party could unilaterally adopt fixed positions and them announce that any proposals from the other side that do not adopt those positions are predictably unacceptable. . . .

The parties met in bargaining again at a May 14 and 15, 2008 session. The Union withdrew at the Respondent's request, its November 2007 proposals on work assignments quoted in part supra, and its earlier proposed letter of understanding on journalism ethics. It also submitted a new proposal on discipline and discharge. The proposal retained the "discipline for just clause" language as well as "reasonable and uniformly applied" limitation language on implementation of discipline.

At this session management's rights were discussed with the Respondent asking for the Union's position on management rights. The Union responded that the Respondent's proposed management-rights language became more acceptable if other parts of the Union's proposed contract, such as just cause and grievance and arbitration, were in place and applied to the clause. The Union agreed to provide a written position on management rights.

Intersession exchange of correspondence, in part discussed in other sections of this decision, took place and the parties met again in bargaining at the June 3 and 4, 2008 session. FMCS Commissioner Rucks participated. The Union provided the Respondent with its written response on management rights. The Union's response took the form of copying the entirety of the Respondent's management's rights proposal, quoted supra, and appending 24 footnotes to various of its sections and subsections with the Union's position and commentary contained in those footnotes. A significant number of the Union's proposal's footnotes appended to various of the listed rights of management contained the statement: "[T]he Union is not willing to waive its right to bargain over changes in wages, hours and working conditions if applicable," or similar language. The Union also made clear that management-rights language must not be read in isolation. Thus a footnote: "The Union has no concerns provided such action is with Just Cause which may be processed through a legitimate grievance procedure."

The Respondent in turn at the session provided the Union with a written response to the Union's footnote formatted document addressing the Respondent's earlier management-rights proposal. The Respondent's document begins:

> Santa Barbara News-Press appreciates the Union providing us its position with respect to our Management Rights proposal. We want to make sure the Union understands the proposal. The proposal is intended to set out subject matters on which Management has the right to act unilaterally, without bargaining, during the term of the Collective Bargaining Agreement. As a general observation, your comments largely communicate

> a desire to have the ability to require the Santa Barbara News-Press to bargain over virtually every decision it would need to make to run the News Department.

The document then addresses various union footnotes and questions raised by the Union. It concludes:

> Inasmuch as the Union did not actually make any counter proposal on Management Rights, you have presented us with no new language to consider. That being the case, subject to discussion of future counter proposals o[f] the Union, the proposal of Santa Barbara News-Press regarding Management Rights remains as stated.

In response to the Respondent's document, the Union on June 4, 2008, provided a complete written management-rights proposal. While the proposal tracked the format of the Respondent's proposal, it interjected the limiting term "reasonable" in the matters the Respondent would have license to modify. Further it provided in its Section 6:

> Rights as provided in this [Management-Rights] Article shall not supersede Managements legal obligation to bargain over changes that substantially affect the wages, hours and working conditions of Bargaining Unit Employees.

Zinser on behalf of the Respondent read the Union's proposal and lamented that the Union was proposing that the Respondent would have to bargain over every change. Caruso demurred saying the Union's over-arching problem with the Respondent's management-rights proposal was that it represented the status quo which means there is no purpose to having a collective-bargaining agreement.

The parties again undertook intersession communications discussed in other sections of this decision. The parties held their next bargaining session on July 10 and 11, 2008. They exchanged proposals on collateral matters such as electronic communications, mileage reimbursement, access to premises, and severance pay. On July 10, 2008, the Union submitted a new proposal on employee integrity setting forth in the proposal's "bargaining notes" that the Union had withdrawn its earlier work assignments proposal at the Respondent's behest and now offered the employee-integrity language as a modified proposal. The proposal contained certain paragraphs which recited that that the employer "shall continue" certain existing practices and also contained the following:

> 3. An employee may withhold his byline from an article which he/she reasonably believes is malicious, distorts the facts or creates an impression which the employee knows to be false.
> 4. An employee may not be disciplined for refusing to perform a task that the employee reasonably believes is unsafe.
> 5. [omitted]
>
> Nothing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, consistent with applicable law and with the employee's right to withhold his/her byline as described above.

The parties discussed the proposal that day and the next with the Respondent taking the position that it was a repackaging of the Union's earlier nonmandatory proposals on ethics.

The Respondent responded to this proposal in writing on July 11, 2009, indicating it would consider the Union's argument that the proposal was a mandatory proposal and asked several questions respecting the Union's intentions regarding the employees control over bylines.

On July 16, 2008, Zinser notified Caruso he could not meet in August but offered dates in September which Caruso agreed to. The parties held their next session on September 3 and 4, 2008. Each side met separately with the FMCS Commissioner who shuttled between the parties. In this manner they exchanged proposals on vacations and holidays. On September 4, 2008, the Respondent requested the Union withdraw its employee integrity proposal.

Intersession communication took place regarding information and other matters including matters discussed in other sections of this decision. By letter of September 9, 2008, Caruso wrote Zinser dealing with several matters. Respecting the Employee Integrity proposal the letter stated:

> With regard to your bargaining request of 9/4/08 to withdraw our proposal on Employee integrity; it is my understanding that the Employer wanted to study the case law on this matter provided by our legal counsel and respond. Evidently, you do not feel any obligation to explain your position. We will withdraw the proposal per your request, take your request to mean you are refusing to bargain over the Union's proposal and file a charge for refusal to bargain on a mandatory subject of bargaining. The Union reserves all rights pertaining to this subject.

The next bargaining session was held on October 22 and 23, 2008 with the FMCS Commissioner assisting. The parties discussed language addressing vacation, duration of contract, wages, retirement, overtime, electronic communications, and reductions-in-force.

Again, intersession communication took place regarding information and other matters including matters discussed in other sections of this decision. The parties met again in bargaining on January 14 and 15, 2009. The Mineards matter was discussed as was presented in a separate section of this decision. Several contract subjects were discussed including hours of work, overtime, full time status, sick leave, contract integrity, access to the premises, vacation, and holidays. Later in the session, wages, mileage, retirement, health insurance, holidays, and issues of concerning the assistant life and scene editors were discussed. The Respondent noted the parallel language between its management-rights proposal and the Union's language and sought tentative agreement on any portions of the proposals. The Union took the position that no agreement on any part of the management-rights proposals could be even tentatively approved until the entire proposal was agreed upon.

Intersession communication concerning Mineards and other information issues continued as discussed in other sections of this decision. The parties met for their next bargaining session on February 25 and 26, 2009. In the session matters discussed in other sections of this decision took place. The Respondent provided the Union a document entitled: Proposed Agreement Between Santa Barbara News-Press and GCC/IBT as of February 25, 2009,[46] which Zinser identified as the company's position. He reviewed the document with the parties noting the articles on which the parties had indicated tentative

[46] The 39-page document comprised some 32 articles and each article had following notations indicating the dates of the Respondent's proposals and if tentatively agreed upon.

agreement. The Respondent also submitted a February 26, 2009 bargaining agenda items recitation which summarized the state of management-rights clause discussions and asked if the Union's position on the matter had changed. Caruso told Zinser he would provide a written response on its position later in the week.

By letter to Zinser dated March 10, 2009, Caruso reviewed the bargaining history of the managements-rights proposal and informed Zinser that after the Union's subsequent review of the Respondent's last management-rights proposal with counsel, the Union "concluded the clause as the News-Press proposed it, in conjunction with its other outstanding proposals, was potentially more harmful than had been communicated to the Union Committee at the table." Caruso explained that the Union's last position, in which it had omitted the Respondent's Section 6 postcontract expiration language, was based on it's determination of the section's "ramifications were potentially harmful."

The parties thereafter addressed matters discussed in other sections of this decision and did not meet in bargaining again until the timeframe of the allegations of the complaint, ending on March 24, 2009, had passed. All parties agree that at no time during the relevant period of bargaining had an impasse been declared and at no time had an impasse in bargaining existed. Bargaining has continued, at least to the end of the hearing in the instant case, without agreement having been reached.

3. Analysis and conclusions

Consideration of allegations of bad-faith bargaining under the Act, includes consideration of the parties conduct in bargaining but also require examination of all other conduct at relevant times. For purposes of clarity of analysis, the two individual complaint bargaining conduct allegations, complaint subparagraphs 20(b)(i) and (ii), are addressed separately and thereafter the "over all conduct" bad-faith bargaining allegation, complaint subparagraph 20(c), will be addressed which covers essentially the Respondent's total bargaining conduct.

a. The allegation that the Respondent has insisted on bargaining proposals that are predictably unacceptable to the Union, including but not limited to the Respondent's proposals on managements rights, grievance and arbitration, union bulletin board rights, and discipline and discharge. Complaint subparagraph 20(b)(i)

The Board has long held that an employer's rigid adherence to collective-bargaining proposals that are predictably unacceptable to the union may indicate a predetermination not to reach agreement in order to frustrate bargaining and undermine the statutory representative. *Lake Holiday Manor*, 325 NLRB 469,470 (1998); *Mar-Len Cabinets,* 243 NLRB 523 (1979); enfd. 695 F.2d 995 (9th Cir. 1981); *Tomco Communications, Inc.*, 220 NLRB 636 (1975); *Stuart Radiator Core Mfg. Co.,* 173 NLRB 125 (1968); *Procter & Gamble Mfg. Co.,* 160 NLRB 334, 336 (1966); *Fitzgerald Mills Corp.,* 133 NLRB 877, 882 (1961), enfg. 313 F.2d 260 (2d Cir. 1962), cert. denied 375 U.S. 834 (1964); *NLRB. v. Herman Sausage Co.,* 275 F 2d 229 (5th Cir. 1960), enfg. 122 NLRB 168 (1958), rehearing denied 277 F.2d 793 (5th Cir. 1960).

It is clearly not simply the unacceptability of the respondents contract proposals to the other side that renders the conduct described in the cases improper but the purpose behind the proposals and the defense of the proposals. Thus a genuine and sincerely held view may be put forward and defended without violating the Act, *Pease Co. v NLRB*, 666 F.2d 1044 (9th Cir. 1981), but the rigid offering and defense of a range of proposals not for their own sake, but rather because the party is aware the proposals are anathema to the other side, is bad faith bargaining because there is no true intention by the offering party to reach agreement.

Since motive is the underlying issue, these cases more commonly arise in the context of an employer's insistence, as here, on a broad management-rights' clause as well as other proposals which are predictably unacceptable to the labor organization representing the unit employees. In applying the predictably unacceptable test, the Board emphasizes that it understands and adopts the teachings of *NLRB v. American National Insurance Co.,* 343 US 395 (1952), in which the Supreme Court held that an employer's bargaining for a broad management-functions clause was not an unfair labor practice. The Board has made it clear, and the Respondent on brief emphasizes as well,[47] that the entire bargaining circumstances must always be kept in mind. Thus, the Board noted in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), at 334 NLRB 488:

> Finally, it is axiomatic that under the NLRA neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952). However, "[e]nforcement of the obligation to bargain collectively is crucial to the [NLRA] statutory scheme." Id. at 402. Our examination of the Respondent's proposals in this proceeding is thus not to determine their merits, but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement. *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

The instant allegation focuses on the Respondent's proposals concerning management rights, grievance and arbitration, union bulletin board rights, and discipline and discharge. The proposals are attacked by the General Counsel and the Charging Party for their broad and total failure to do more than reflect the substantive terms and conditions of employment that were in place before the Union became the employees' representative and the tenacity and rigidity with which the Respondent's negotiators maintained these substantive proposals throughout the negotiation.

The Respondent during negotiations readily conceded, if not affirmatively declaimed, that its proposals and its bargaining intentions generally were designed to preserve the terms and conditions of unit employees, the status quo, without making substantive concessions to the Union. The items tentatively agreed upon during the course of the negotiations were essentially proposals either on procedural or process changes to the Respondent's then existing practices or, on covered minor or less significant matters. The management rights language in important ways sought to return the Respondent's rights not just to the status quo of the state of affairs when the Union was representing employees without a contract but seemingly to the earlier "pre-representation" time when there was not employee representative and the Respondent could take actions and make decisions without the duty or obligation to bargain with the unit employees' representative about such matters.

In turn the Union at all relevant times indicated that the heart of the noneconomic aspects of the contract from its perspective required an objectification of standards, i.e., specification of production or other standards against which employees were to be measured, or the identification of the standard to be applied as "reasonable." Coupled with such identification

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[47] Counsel for the Respondent, on brief at 240, cites the Board's decision in *KFMB Stations, Inc.*, 349 NLRB 373 (2007) in which the Board adopted the judge's assertion, at 383: "Cases are legion holding that the Board will not analyze an employer's particular contract proposal to determine whether it would be "'acceptable"' to the union."

the Union sought the resolution of disputes by a third party, i.e., an arbitrator in binding arbitration. In essence the Union made it clear that the contract must constitute a transformation of the Respondent's operation from an imperium where the employer's decisions were its own to make without final review without limiting standards and were unchallengeable to a reasonable world to a new setting and circumstance under a contract where the application of reasonable rules could be challenged and adjudicated before an outside arbitrator who had final authority. This latter world, the Union's negotiators insisted, was the world of represented employees and collective-bargaining contracts, and it was the world the Respondent entered when the employees selected the Union to represent them.

The position of the parties on these fundamental approaches did not shift during the negotiations. While procedural changes were made in proposals, such as additional prearbitral steps in the Respondent's grievance process proposal, the parties positions remained essentially as they began on the fundamental issues of the Respondent's relinquishment of final control and decision making respecting matters of disputes and discipline. The Respondent's demurral, or even rejection, of the Union's view was matched by the Union's negotiators rejection of the Respondent's proposals or the Union took the view that certain of the Respondent's proposals might be acceptable were the Union's core principals incorporated.

The negotiations respecting the union bulletin board was somewhat different. The Respondent was willing to provide contract language which would allow the Union to post union materials in an identifiable location with restrictions on the type of materials posted. The negotiations foundered on the Respondent's insistence that it retain the right to preapprove any and all materials the Union sought be posted. The Union balked an any preapproval process. Procedural changes in the parties' proposals were unable to span that critical difference.

The Union's declamations that the Respondent's proposals, to the extent they did not accept the core principles of the Union, were predictably unacceptable, were met by the Respondents answer that various collective-bargaining agreements known to it contained provisions similar or even identical to those proposed by the Respondent and hence its proposals were by virtue of that fact absolutely not predictably unacceptable. Further, as the Respondent argued during the negotiations, the term "predictably unacceptable" was not a statutory phrase in the language of the Act.

The bargaining herein must consider the larger context as will be undertaken below. Initially, however, elements of both sides' arguments here are correct. The Respondent is correct that individual proposals of the type at issue here are not to be judged individually as *per se* proper or improper. Further, the parties generally are entitled to seek to preserve their bargaining positions and resist making concessions. The parties in the course of negotiations and the interplay of economic forces are expected to reach their own agreement. It is not intended by the statute that it substitute statutory terms for parties negotiated terms. Further, it is not impermissible for there to be winners and losers in contract negotiations in the sense that one party's proposals may prevail to a greater or lesser degree over the other sides proposals.

The General Counsel and the Charging Party however are correct that the Respondent's consistent failure and refusal to accept binding arbitration and any limitation of the Respondent's unfettered power to decide at the final step all unit employee discipline matters, including matters of measuring and judging employee performance, are predictably unacceptable to labor organizations representing employees under the Act.

The Respondent made essentially two separate, albeit related, arguments on this issue. First the Respondent notes the fact that at the time it made these proposals it knew of, and in

some cases provided, contracts to the Union which contained the Respondent's proposed language and or which omitted the provisions the Union sought. It raised the existence of these contracts with the Union to establish that such language could not be predictably unacceptable since they existed in other settings. It made the same argument before me. I reject the notion advanced or its logical force that the simple fact that a contract exists or existed somewhere in another place and/or another time which contains certain language somehow anoints the selected language of that contract as acceptable or not predictably unacceptable to the Union in the context of the instant negotiations.

Second, in colloquy in negotiations, the Union argued that collective-bargaining contracts containing grievance- and binding-arbitration language were commonplace in America. The Respondent argued that there were a far greater number of nonunion employee relationships with their employers which were not covered by contracts at all let alone binding arbitration, implicitly arguing that that those unorganized employees relationships with their employers must influence, if not control in their numerical superiority, the question of inherent unreasonableness of given proposals. I reject the Respondent's "nonunion" relationships argument here. What is or is not predictably unacceptable to a labor organization in contract negotiations with employers concerning their employees is not determined by the state of the unrepresented world.

If the proposals under discussion were in fact predictably unacceptable at the time of their offer, the remaining issue must be considered. What was the motive for their offer and defense by the Respondent? In this connection, the Respondent argued and the record as a whole sustains the proposition that the Respondent, through the consistent views of its owner, was sincerely and very strongly intent upon, even determined, to preserve and retain for the publisher all possible control over the Paper's employment relationship with represented employees, in essentially all possible permutations.

That fact of a strong need to retain essentially total control over the employee relationships may be argued to show the Respondent's motives were not to avoid or prevent agreement in bargaining with the Union, but rather were not inconsistent with the Respondent's effort to reach an agreement which would maintain the Respondent's control of the employees. Or, it may be argued that the Respondent's actions were designed to frustrate agreement and in time thwart the Union and render it so obviously powerless and ineffective that the employees would eventually reject the Union and allow the Respondent to return to the truly unfettered control that only a nonrepresented employee complement would allow – the removal of any obligation to bargain with an employee representative. The former motive is not inconsistent with an intention to reach agreement with the Union. The latter motive is specifically focused on not reaching an agreement, on thwarting the Union, and ending union representation.

Resolution of this critical factual issue, in this case, depends on evaluating the entire record of the relations between the parties. Without that broader consideration, no determination on the failure to bargain allegations may be confidentially reached. The predictably unacceptable approach which focuses only on bargaining proposals and bargaining conduct, on this record respecting the instant bargaining relationship, I conclude, does not complete the necessary analysis of the bargaining issues before me. I therefore decline to make conclusions based on this overly narrow view of the bargaining. The Act and the cases simply require a broader analysis and consideration on the facts of this case.

All of the above, therefore, is but preamble to the consideration of the Respondent's bargaining in the context of the entire relationship over all relevant times. The cases make clear that the larger view is essential to determine what is or is not predictably unreasonable. And

further, the larger picture is necessary to determine if predictable unreasonableness of proposals, in the context of both the totality of bargaining and other events, rises to the level of surface bargaining. The larger picture must be considered to reach a final result. That analysis will await the consideration of complaint paragraph 20(c) below.

b. The allegation that the Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management-rights clause, that would grant the Respondent unilateral control over many terms and conditions of employment. Complaint paragraph 20(b)(ii)

The theory of surface bargaining the General Counsel invokes in the quoted pleading is that set forth by the Board in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487, 488–489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003):

> Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract.[4] In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith. See *A-1 King Size Sandwiches,* [265 NLRB 850 (1982], at 859 fn. 4.

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[4] *A-1 King Size Sandwiches,* 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *NLRB v. Johnson Mfg. Co. of Lubbock,* 458 F.2d 453, 455 (5th Cir. 1972); *Eastern Maine Medical Center*, 658 F.2d 1, 12 (1st Cir. 1981), enfg. 253 NLRB 224, 246 (1980); *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993). See *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990).

In order to test the theory of the violation asserted, it is necessary to first identify the Respondent's proposals relevant to the claim and consider their impact as a whole on employee rights.[48]

The General Counsel's pleading by its terms identifies the Respondent's management-rights proposal as one of the contract proposals that would grant the Respondent unilateral control over many terms and conditions of employment. The Respondents management-rights article was proposed by the Respondent at the November 2007 bargaining session, the very first bargaining between the parties, and is quoted in full supra. Its first section states:

> Section 1. Except as expressly modified or restricted by a specific provision of this Agreement the Employer reserves and retains, solely and exclusively, all of its normal,

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[48] This analysis is threshold to the final consideration of the bargaining in light of the entire course of conduct of the parties both at and away from the bargaining table.

> statutory inherent, and common law rights prerogatives and functions to manage the business, whether exercised or not, as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer.

The Respondent's bargaining note attached to the management-rights proposal makes its purpose clear: "This proposal represents the status quo for Santa Barbara News-Press." The discussion between the parties made it clear that the clause is an attempt by the Respondent to retain control over many, indeed most, aspects of employees' activities.

It is important to understand the reference point contained in the quoted management-rights proposal Section 1. When the clause refers to the Respondent's sole and exclusive retention of all "rights prerogatives and functions to manage the business" "as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer," the clause refers to a time before the Respondent had any obligation to bargain with the Union under the Act. Thus, the clause unambiguously asserts that "[e]xcept as expressly modified or restricted by a specific provision of this Agreement" the Respondent will have no obligation to bargain with the Union or otherwise be obligated under Section 8(a)(5) of the Act to deal with the Union during the contract's life.

Section 2 of the Respondent's management-rights proposal, quoted supra, contains an exhaustive list of 18 specific categories of decisions effecting unit employees that are expressly reserved exclusively to the Respondent with the Union having no bargaining rights respecting them. Section 3 provides the Respondent unlimited license to utilize independent contractor news writers and photographers. Section 5 provides a similar license to use managers and supervisors to write or take pictures.

And, even beyond the life of the contract, the Respondent's management's rights proposal if adopted would restrict the Union's bargaining rights beyond the contract. The Respondent's proposal's Section 6 states:

> Section 6. The rights and prerogatives of Management, whether established by express provisions (including this Article) or by practice, shall be deemed to be part of the status quo that remains in effect after the expiration of this Agreement on _____ and until a different agreement is reached or other lawful change is permitted.

Thus, Section 6 of the proposal would continue the life of the management-rights language proposed and all its preemption or elimination of the Union's collective-bargaining rights as discussed until a new contract was reached. If the Respondent was prepared to stand firm on insisting that the language be carried forward into new contracts, the Union's representational role as envisioned by the statute and Section 8(a)(5) of the Act would be eviscerated in perpetuity.

Since the Respondent's management's rights proposal recognizes that the Respondent's freedoms under Section 1 are susceptible to being "expressly modified or restricted by a specific provision of this Agreement," it is also necessary to consider other of Respondent's proposal's terms effect on the management-rights language. In other words, is the management's rights proposal limited in any significant way by the remainder of the contract as proposed by the Respondent? To a significant degree, the contract as proposed by the Respondent does not establish standards or specific conditions that might limit the reach and power of Section 1 of the management right's proposal.

The Respondent's discipline proposals have been quoted above. The Respondent's proposals very clearly reserves final decisions respecting the discipline and discharge of unit employees to the Respondent's unfettered discretion. Indeed the Respondent's proposals unambiguously recite the Respondent goal and the effect of the language is to preserve the rights and responsibilities the Respondent had during prerepresentation days when the Union had no bargaining rights, i.e., when all right and discretion to act was with the Respondent exclusively and the Union had no rights whatsoever. That this fact was intentional is not in dispute and is exemplified by the statements of the Respondent's negotiators at the table and in bargaining notes set forth in the Respondent's written proposals that the proposals were deliberately intended to reserve to the Respondent the establishment, modification and application of all standards of employee discipline and conduct generally. This includes any determination of whether employees have violated those standards of conduct, and includes the determination and enforcement of any and all discipline, up to and including discharge, of unit employees in respect to such matters. No standards of "just cause" or the limiting word "reasonable" are included in the proposals, no mechanism of third-party adjudication of disputes such as an arbitration clause is included in the Respondent's proposals.[49]

The General Counsel and the Charging Party argue that the proposals of the Respondent reflect in effect a proposed waiver by the Union of its bargaining rights so that the Respondent could resume its pre-Union representation complete and unfettered control of the Respondent's operations in so far as unit employees are involved. They note that, were the Union to accept the Respondent's rigidly advanced and defended proposals to preserve the pre-bargaining status quo, for the very limited rights specifically provided by the remainder of the Respondent's proposals, the Union and the unit employees they represent would be very much worse off than if they simply settled for never having entered into an agreement at all. Indeed, they argue, the postcontract effects of the Respondent's proposals were such that, accepting the Respondent's proposals would not simply condemn the Union and unit employees to severely diminished rights during the life of the contract, they would also be waiving their representational and bargaining rights after the contract expired and potentially in perpetuity.

The Respondent emphasizes that there is no dispute that the parties were never at impasse. The Respondent argues that it never insisted on or took a final position on its management-rights proposal. It notes that it expressed implicit flexibility in the management-rights clause when asking the Union if there were portions of it that the Union could agree to and that the Union expressed tentative or potential acceptance of certain of the enumerated reservations in the proposal. Rather the Respondent argues it was the Union that inflexibility sought to restrict the Respondent by means of a grievance and arbitration clause and limited management-rights clause and, in so doing "undermine and control the content of the newspaper." (The R. Posthearing Br. at 271.)

I do not accept the Respondent's claims of flexibility respecting the management-rights clause. The enumerations of various rights in Section 2 of the Respondent's management-rights proposal were discussed. That section opened with the caveat: "The sole and exclusive rights of management which are not abridged by this Agreement shall include, but are not

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[49] While procedural steps providing the Union rights to participate and argue during the discipline or dispute process, including participation in third-party mediation processes, are in the Respondent's proposals, they are all preamble to the absolute power of the Publishers to take unreviewable final decisions in all aspects of discipline. The Respondent's bulletin board proposal does contain language that limits the Respondent to "reasonable" restrictions on union postings.

limited, to the following rights. . . ." Thus the inclusion or exclusion of a particular item in later portions of the contract, without other changes, did not effect the substance or reach of the earlier quoted language. And there was no demonstrated flexibility respecting the critical Section 1 which in the broadest possible language waived the Union's bargaining rights in their entirety save for specific contractually provided rights. And as is noted, there was a paucity of substantive rights set forth in the remainder of the contract proposals of the Respondent.

It is clear and I find that the proposals of the Respondent for a collective-bargaining agreement, if accepted by and entered into by the Union, would without doubt have rendered the Union and the unit employees worse off in terms of the statutory bargaining rights the Act provides than if they had not agreed to a contract at all.

The Respondent is correct that the parties had not bargained to an impasse, as of the final date of the complaint allegation in these regards and that the Respondent did not characterize its proposals as last and final or in some other fashion as final. The absence of such specific language or the state of impasse being reached does not however automatically render the Respondent's bargaining in these regards flexible. Rather the record is clear and I find that the Respondent made it clear that critically as to the managements rights proposal but also as to its proposals dealing with discipline and discharge, and grievance and arbitration, that the Respondent was wedded to regaining control over decision making by obtaining the Union's waiver through the quoted contract language of its representation rights for the life of the contract and beyond. Further, the Respondent explicitly in statements by its agents across the table and in notes on proposals and in comments respecting proposals, made it clear that the Respondent was happy with and saw no reason to depart from the pre-Union, prebargaining obligation, substantive status quo package of rights and powers that gave it unfettered final decision making authority over its unit personnel and its operations. And, during the 2007–2009 period at issue it held to that position.[50]

I find that the Respondent's proposals as described and insisted on as described, simply overreached.

> When the employer's proposals, considered as a whole, vest nearly total discretion in the employer while offering little in return, this does not look like the conduct of an employer sincerely attempting to reach agreement, but rather is evidence that it is not seeking to bargain in good faith. *Hydrotherm, Inc.,* 302 NLRB 990, 995 (1991).

c. The allegation that the Respondent, by its overall conduct has failed and refused to bargain in good faith. Complaint subparagraph 20(c)

The Board has long made it clear that table bargaining allegations must be resolved by considering all aspects of the parties' relationship at and away from the bargaining table. It recently restated this doctrine in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), 334 NLRB at 488:

> In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). From

[50] As discussed, both supra and infra, the Respondent did withdraw its broad no-strike proposal in February 2008.

> the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Id. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

The relevant complaint paragraph at issue explicitly recognizes and incorporates the "totality of the party's conduct, both at and away from the bargaining table" standard. All parties recognized the Board's quoted analytical approach. It will be applied here.

The specific proposals and conduct occurring at the table respecting negotiations have been discussed in the two immediately preceding sections. I have found as the Respondent argued that there is no duty on the Respondent's part to make concessions simply because the employees have selected a labor organization to represent them. I have further found, again as the Respondent has argued, that viewing itself as having essentially resisted the Union's economic pressure campaign, it was generally entitled to seek to impose its economic proposals on the Union. I further noted however that the Respondent's substantive proposals sought, essentially uniformly, to entrench and encapsulate in its proposed contract the pre-bargaining terms and conditions of unit employees' employment.

Importantly, I further found that the Respondent's proposals to an extraordinary degree sought to remove by union contractual waiver the Union's rights to bargain with the Respondent regarding matters not explicitly controlled by the contract. This fact coupled with the general revanchist nature of the entirety of the Respondents proposed contract clearly rendered the Union better off refusing to enter into the Respondent's proposed contract and accepting a relationship which while without a contract's limitations on Respondent's actions also did not including any waivers of the Union's bargaining rights.

In these regards, however, I further noted that the Respondent had explicitly withdrawn its no-strike proposal leaving the Union and unit employees free to engage in strikes in furtherance of contract disputes under the Respondent's proposed contract. I also noted that although the parties had been in negotiations for some time and that the Respondent's proposals in relevant part as to the substantive matters noted here had remained firmly held, the parties were at no time at impasse. And no party had declared that impasse was at hand.

Turning to the procedural aspects of bargaining, I have found and concluded that the parties did not engage in improper bargaining in matters not discussed herein. Although each party viewed the others actions and conduct regarding certain procedural matters with alarm, I found that the conduct at the table was not wrongfully abusive or non-cooperative, that the parties agreement and occasional disagreement on dates, times and places for bargaining was not improper, and that the procedural aspects of bargaining were not improper.

I have in earlier sections of this decision considered a host of other allegations including alleged violations of Section 8(a)(5), (1), and (3) of the Act, and various allegations of Union and General Counsel misconduct as alleged by the Respondent. As set forth supra, I have not sustained the Respondent's contentions of misconduct. I have however, as set forth supra, found a wide range of unfair labor practices committed by the Respondent.

These unfair labor practices as set forth in full above include violations of Section 8(a)(5) of the Act respecting unilateral changes involving nonunit employees, direct dealing with employees bypassing the Union, unreasonable delays in providing information to the Union and factual misstatements made during bargaining in response to information requests.

The violations of Section 8(a)(1) and (3) of the Act, which comprise a host of violations which are again set forth in detail supra and will not be duplicated here, include employee discharges, denials of annual bonuses, improper use of other employer's employees to do unit work, and improper communications to employees both orally and by memorandum. These events occurred conterminously with the negotiations at issue here.

Considering all the above, on the record as a whole, including the arguments of the parties and the credibility of the witnesses, viewing the entire relationship for purposes of evaluating the bargaining allegations, I find without difficulty that the Respondent engaged in a course of bad-faith bargaining in these negotiations for a first contract.[51] As discussed, the Respondent's proposals in their totality and, despite the fact that no impasse had occurred in bargaining and that the Respondent's no-strike proposal was withdrawn, throughout the bargaining, required the Union to in essence abandon its bargaining rights in order to obtain a contract, which contract, as a recitation of the Respondent's proposals, would essentially and without other than procedural exception, return the substantive relationship between the parties to that obtaining before the Union obtained bargaining rights for the Respondent's unit employees, i.e. the Union would have its role diminished to a point approaching elimination. Thus the Respondent at all times and without material modification of the total package of substantive proposals in these regards, offered no outcome but abandonment of the Union's bargaining rights not only for the life of the contract but until and unless the Respondent agreed to remove the waiver by agreeing to a contract that did not contain such a limitation.

Without more this conduct would sustain a finding of Section 8(a)(5) bad-faith bargaining. But coupled with that conduct, the Respondent herein was simultaneously conducting an ongoing broad and pernicious pattern of unfair labor practices designed to delay bargaining and undermine the Union's strength and support among unit employees. Employees of outside employment referral agencies were improperly used to do unit work. Unit employees were wrongfully denied annual bonuses. Employees were wrongfully coerced by statements of management and by memo from the Publisher. Employers were dealt with directly; bypassing the Union. Repetitive failures to notify and bargain concerning changes in working conditions took place. Employees were discharged because of their union activities. This is serious stuff and well supports the finding that the Respondent was fundamentally opposed to union representation of its employees had no intention to enter into a collective-bargaining agreement with the Union, save one which would geld it, leaving the unit employees essentially unrepresented by contractual waiver.

Given these findings, I further find that the Respondent by engaging in the conduct noted, failed and refused to bargain with the Union in good faith and in so doing, violated Section 8(a)(1) and (5) of the Act as alleged. I therefore also sustain the General Counsel's complaint paragraph 20(c).

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[51] "[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith. Thus, the fact that the bargaining is for a first contract, especially after a contentious election campaign, would be one of the circumstances to consider in evaluating the bona fides of the bargaining." *APT Medical Transportation,* 333 NLRB 760, 760 fn. 4 (2001).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since September 27, 2006, based on Section 9(a) of the Act, the Union has been the exclusive representative of the following unit of the Respondent's employees for purposes of collective bargaining:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Issuing a letter to employees from the owner and Publisher discouraging employees from cooperating with the Board's on-going investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

(b) Instructing employees that anything that might be said at an employee meeting, including statements concerning employees terms and conditions of employment or other statements about their working conditions were confidential, proprietary, and could not be discussed by employees outside the meeting.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following acts and conduct because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities:

(a) Transferring work from the bargaining unit to agency employees who were not employees of the Respondent.

(b) Transferring unit work to nonemployee Robert Eringer.

(c) On or about August 23, 2008, suspending employee Dennis Moran.

(d) On or about August 30, 2008, discharging its employee Dennis Moran.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct:

(a) Failing and refusing as set forth in the body of this Decision to furnish the Union with information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees in a reasonable time under all the circumstances but rather delayed unreasonably in providing the requested information:

(b) Transferring unit work from unit employees to outside agency employees and failing and refusing to notify and provide the Union an opportunity to bargaining concerning the Respondent's decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

(c) Failing to grant its unit employees a merit increase in December 2006 or January 2007, in recognition of work performance during 2006.

(d) Failing to grant its unit employees a merit increase in December 2007 or January 2008, in recognition of work performance during 2007.

(e) Failing to grant its unit employees a merit increase in December 2008 or January 2009, in recognition of work performance during 2008.

(f) Failing to notify and offer to bargain with the Union concerning its determination to delay performance evaluations of unit employees as part of the Respondent's performance evaluation system in or around November 2007, and implementing the delay unilaterally.

(g) On or about January 7, 2009, laying off its employee Richard Mineards without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(h) On or about August 23, 2008, suspending employee Dennis Moran without notifying or offering to bargain with the Union concerning his suspension.

(i) On or about August 30, 2008, discharging its employee Dennis Moran without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(j) On or about December 3, 2008, announcing a requirement that unit employees produce at least one story per day without notifying or offering to bargain with the Union respecting the new policy.

(k) On or about January 14, 2009 and continuing to about January 16, 2009, bypassing the Union and dealing directly with its employees in the unit by offering a unit employee nonunit terms and conditions of employment.

(l) Bargaining in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the Respondent unilateral control over many terms and conditions of employment and leave

the Union and the bargaining unit employees worse off than if they went without an agreement.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not violate the Act as alleged in the complaint save as specifically found in this Decision and the complaint allegations not sustained above shall be dismissed.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist therefrom and post remedial Board notices addressing the violations found. The language on the Board notices will conform to the Board's decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), that reiterates the logic of the proposition that remedial notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

The Respondent having wrongfully suspended or discharged certain of its employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, with interest which shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as described below.

Respecting the remedy for the wrongful unilateral layoff of employee Richard Mineards, the Board's decision in *Eugene Iovine, Inc*., 353 NLRB No. 36 (2008), provides that reinstatement and a standard make-whole remedy including backpay, with interest, is appropriate where economic layoffs have not been properly bargained as found herein. That remedy shall be directed herein.

Unit employees who suffered injury in the form of loss of work as a result of the Respondent's improper assignment of unit work to outsiders, shall be made whole for any loss of earnings and other benefits, plus interest as set forth below.

The General Counsel seeks compound interest on the sums due herein. The Board in its recent case, *ADF, Inc., and its alter ego ADLA, LLC*, 355 NLRB No. 14 (February 26, 2010) stated at slip op. at 1 fn. 4:

> Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Cardi Corp.*, 353 NLRB No. 97, slip op. at 1 fn. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

I therefore decline the General Counsel's request and shall direct interest be calculated and paid consistent with the Board's current view. See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent is obligated to remedy its improper unilateral changes as found herein. At the Union's request, the Respondent shall restore the unit employees' terms and conditions of employment as they existed before the Respondent's improper unilateral changes and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid

impasse in bargaining. Further, the Respondent shall make unit employees whole, with interest, for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment as found herein and as more specifically provided above.

The General Counsel seeks a broad cease-and-desist order noting that an important factor in such a determination is whether the employer displays "an attitude of opposition to the purposes of the Act to protect the rights of employees generally." *May Dept. Stores Co. v. NLRB*, 326 US 376, 392 (1945). The typical requirement justifying the "in any other manner" limitation is the proclivity to violate the Act and general disregard for employees' fundamental rights. *Hickmott Foods*, 242 NLRB 1357 (1979). The Board has continued to direct the broad remedy in appropriate cases: *Pan American Grain Co.*, 346 NLRB 193, 193 fn. 2 (2005). The General Counsel notes that the Respondent was issued a broad remedial order by Judge Kocol in his decision, *Santa Barbara News-Press*, Case 31–CA–27950, JD(SF)-37-07, slip op. at 72 (December 26, 2007). I agree the instant case falls well within the parameters of the cited cases. I shall therefore direct a broad cease-and-desist order apply herein.

The General Counsel also urges that the Respondent be required to have a high-ranking official read the notice aloud to employees or be present at its reading to employees by a Board agent. Counsel points out the broad sweep of the unfair labor practices committed by the Respondent herein and notes "the public reading of the notice is an effective but moderate way to let in a warning wind of information and more important, reassurance." *McAllister Towing & Transportation Co.,* 341 NLRB 400 (2004) (internal quotations omitted). *The Three Sisters Sportswear*, 312 NLRB 853 (1993).

Judge Kocol was asked for the same remedy in his earlier case and held:

> Citing *McAllister Towing & Transportation Co.,* 341 NLRB 394, 400 (2004), the General Counsel also seeks an order requiring Steepleton to read to the employees, or at the option of the News-Press, to have a Board agent read, the Notice to Employees in this case. While the issue is close, I conclude the broad cease and desist order should be adequate to prevent further violations and assure employees of their rights under the Act. Of course, if the News-Press continues to violate the Act additional remedial measures might be necessary. (*Santa Barbara News-Press*, Case 31–CA–27950, JD(SF)-37-07, slip op. at 72 (December 26, 2007)).

Given the fact that the Respondent has continued to violate the Act and the fact that it has continued to do so in a wide ranging and significant manner involving numerous of Respondent's agents, including its highest officials, as noted supra, it is appropriate that this special remedy be directed. I shall therefore require the Respondent to permit a Board agent at a location at the Respondent's Santa Barbara facilities, of sufficient size and otherwise appropriate for such an address, to real aloud the notice set forth herein to all unit employees and newsroom supervisors and management in the presence of a high management official of the Respondent. The Respondent may, at its option, elect that the notice be read aloud at the same location to the audience indicated by the high management official rather than a Board agent.

The General Counsel also requests that the certification year in the representation case in which the Union was certified, Case 31–RC–8602, be extended "to insure that the employees are accorded the service of their selected bargaining agent for the period provided by law. *Mercedes-Benz of Orlando*, 354 NLRB No. 72, slip op. at 2 (2009). Since the Respondent's unfair labor practices as found by Judge Kocol in JD(SF)-06-07 (2007) remain unremedied

along with the unfair labor practices found herein and, most importantly, because the Respondent engaged in its bad-faith bargaining from the very onset of face to face negotiations with the Union and continued its bad-faith bargaining thereafter throughout the period litigated, the Union has been deprived of all opportunities to engage in good-faith bargaining. Thus, the good-faith bargaining which was intended to occur in the certification year has not yet begun.

Given this critical fact, I find it appropriate to order as part of the remedy herein that the Respondent as part of it obligation to commence bargaining in good faith with the Union, do so and continue to do so, as if the certification year in Case 31–RC–8602 begins at the moment of commencement of the first face-to-face bargaining in good faith after the unfair labor practices found herein have been fully remedied.

The unfair labor practices found herein, but not specifically discussed in the portion of this Decision entitled "Remedy" shall be remedied in accordance with current Board decisional law. Omission to include discussion of such traditional unfair labor practice remedies in the remedy discussion herein respecting each and every sustained allegation, is not to suggest standard remedies for the violations found are not required.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order[52]

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing letters or other communications to employees from the owner and copublisher discouraging employees from cooperating with the Board's on-going investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

(b) Instructing employees that anything that might be said at an employee meeting, including statements concerning employees terms and conditions of employment or other statements about their working conditions were confidential, proprietary, and could not be discussed by employees outside the meeting.

(c) Transferring work from the bargaining unit to outside agency employees who were not unit employees of the Respondent because the unit employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(d) Transferring unit work to nonemployee Robert Eringer because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities

[52] 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 shall be waived for all purposes.

(e) Suspending employee Dennis Moran because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(f) Discharging employee Dennis Moran because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(g) Failing and refusing to furnish the Union with the information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees in a reasonable time under all the circumstances but rather delaying unreasonably in providing the requested information.

(h) Transferring unit work from unit employees to outside agency employees and failing and refusing to notify and provide the Union an opportunity to bargain concerning the Respondent's decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

(i) Failing to grant its unit employees a merit increase in December 2006 or January 2007, in recognition of work performance during 2006, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(j) Failing to grant its unit employees a merit increase in December 2007 or January 2008, in recognition of work performance during 2007, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(k) Failing to grant its unit employees a merit increase in December 2008 or January 2009, in recognition of work performance during 2008, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(l) Failing to notify and offer to bargain with the Union concerning delay in the timing of performance evaluations of unit employees as part of the Respondent's performance evaluation system in or around November 2007, and implementing the delay unilaterally.

(m) Laying off its employee Richard Mineards without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(n) Suspending employee Dennis Moran without notifying or offering to bargain with the Union concerning his suspension.

(o) Discharging employee Dennis Moran without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(p) Announcing a requirement that unit employees produce at least one story per day without notifying or offering to bargain with the Union respecting the new policy.

(q) Bypassing the Union and dealing directly with its employees in the unit by offering an employee nonunit terms and conditions of employment.

(r) Bargaining in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the

Respondent unilateral control over many terms and conditions of employment and leave the Union and the bargaining unit employees worse off than if they simply did not enter into a collective bargaining agreement.

(s) Assigning freelance employee, Robert Eringer, unit work in order to weaken the Union as the representative of unit employees.

(t) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) Offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner described in the Remedy portion of this Decision.

(b) Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner described in the remedy section of this Decision.

(c) Remove from its files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and within 3 days notify each that this has been done and that the wrongful discrimination will not be used against him in any way.

(d) Make its unit employees whole for any losses they may have suffered by reason of the Respondent's discontinuance of its program of merit pay raises or the Respondent's delay in the timing of performance evaluations of unit employees, in each case with interest, in the manner set forth in the remedy section of this Decision and, on request, bargain with the Union about the granting of merit raises and the timing of performance evaluations of unit employees in the future.

(e) Restore all unit work transferred to nonemployees of the Respondent referred by outside agencies and make its unit employees whole for any losses they may have suffered by reason of the Respondent's wrongful unilateral use of such nonemployees to do unit work, with interest as provided in the remedy section of this Decision.

(f) Within 14 days after service by the Region, post copies of the attached Notice at its Santa Barbara, California facilities set forth in the Appendix.[53] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the California facilities involved

[53] If this Order is enforced by a Judgment of the 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."

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 the closed facility at any time after March 24, 2009.

(g) 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.

(h) Within 14 days after service by the Region, permit a Board agent, at an appropriate location within the Respondent's Santa Barbara, California facility, to read aloud to all employees in the appropriate unit the notice marked "Appendix" in the presence of a responsible management official. The Respondent may elect to have the notice read by a high management official rather than by a Board agent in the same setting and circumstances.

The allegations of the complaint not sustained herein shall be, and they hereby are, dismissed.

Dated, Washington, D.C., May 28, 2010.

_____
Clifford H. Anderson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

FEDERAL LAW GIVES EMPLOYEES 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
Chose not to engage in any of these protected activities

After a trial at which we appeared, argued, and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees, have it read aloud to employees, and to abide by its terms.

Accordingly, we give our employees the following assurances.

WE WILL NOT issue letters or other communications to employees from the owner and Copublisher discouraging employees from cooperating with the Board's on-going investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

WE WILL NOT instruct employees that anything that might be said at an employee meeting, including statements concerning employees terms and conditions of employment or other statements about their working conditions were confidential, proprietary and could not be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to outside agency employees who were not employees of the Respondent.

WE WILL NOT transfer unit work to nonemployee Robert Eringer.

WE WILL NOT suspend and/or discharge employee Dennis Moran or any other employee because of his union or other protected concerted activities or to discourage other employees from supporting the Union.

At all times since September 27, 2006, based on Section 9 of the Act, the Union, the Graphic Communication Conference, International Brotherhood of Teamsters, has been the exclusive representative of the following unit of the our employees for purposes of collective bargaining:

All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

We are obligated by Federal labor law under the National Labor Relations Act to bargain with the Union as the exclusive representative of unit employees concerning their terms and conditions of employment. In conjunction with that obligation, we give you these further assurances:

WE WILL NOT unreasonably delay in furnishing the Union with information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees.

WE WILL NOT fail to notify and offer to bargain with the Union respecting the economic layoff, disciplinary suspension, or disciplinary discharge of unit employees.

WE WILL NOT transfer unit work from unit employees to outside agency employees and fail and refuse to notify and provide the Union an opportunity to bargaining concerning the Respondent's contemplated decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

WE WILL NOT fail to grant our unit employees merit increases without first notifying the Union and providing an opportunity to bargain respecting such a decision to depart from past practice for the period December 2006 through January 2009.

WE WILL NOT lay off, suspend or discharge employees without first notifying the Union these actions are under consideration and providing an opportunity to bargain respecting such a decision and its effects.

WE WILL NOT discharge or hire individuals as nonunit employees rather than unit employees in order to weaken the Union as the unit employees' representative.

WE WILL NOT announce new requirements that unit employees produce at least one story per day without first notifying and offering to bargain with the Union respecting the proposed new policy.

WE WILL NOT bypass the Union and deal directly with our employees in the unit by offering unit employees' nonunit terms and conditions of employment to do unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the News-Press unilateral control over many terms and conditions of employment and in consequence leave the Union and the bargaining unit employees worse off than if they declined to enter into such an agreement and simply did without a contract.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Dennis Moran and Richards Mineards full reinstatement to their former unit positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and within 3 days **WE WILL** notify each that this has been done and that those wrongful actions will not be used against either in any way.

WE WILL make our unit employees whole for any losses they may have suffered by reason of the Respondent's transfer of unit work to employees of outside agencies and by reason of our discontinuance of our program of merit pay raises for performance years 2006–2008 or as the result our delay in the timing of performance evaluations of unit employees for performance year 2007, in each case with interest, and, on request, **WE WILL** bargain with the Union about the transfer of work outside the unit and the granting of merit raises and the timing of performance evaluations of unit employees in the future before we deviate from past practice.

WE WILL restore all unit work transferred to nonemployees of the Respondent referred by out agencies and make its unit employees whole for any losses they may have suffered by reason of our wrongful unilateral use of such nonemployees to do unit work.

WE WILL convert Robert Eringer to unit employee, if we utilize his services, and will not hire him as a freelance employee doing unit work in order to weaken the Union as the representative of unit employees.

AMPERSAND PUBLISHING, LLC
d/b/a SANTA BARBARA NEWS-PRESS
(The Respondent)

Dated _____ By _____
(Representative) (Title)

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 and an electronic version of this decision from the Board's website: www.nlrb.gov.

National Labor Relations Board
Region 31
888 South Figueroa Street, 9th Floor,
Los Angeles CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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, (213) 894-5229.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above or may also obtain an electronic version of this decision from the Board's website: www.nlrb.gov.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AMPERSAND PUBLISHING, LLC	**Cases 31-CA-28589**
d/b/a SANTA BARBARA NEWS-PRESS	**31-CA-28661**
	31-CA-28667
	31-CA-28700
	31-CA-28733
	31-CA-28734
	31-CA-28738
and	**31-CA-28799**
	31-CA-28889
	31-CA-28890
	31-CA-28944
	31-CA-29032
	31-CA-29076
GRAPHIC COMMUNICATIONS CONFERENCE,	**31-CA-29099**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	**31-CA-29124**

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

AMPERSAND PUBLISHING, LLC	)	**CASE NOS.**	**31-CA-28589**
D/B/A SANTA BARBARA NEWS-PRESS	)		**31-CA-28661**
	)		**31-CA-28667**
EMPLOYER,	)		**31-CA-28700**
	)		**31-CA-28733**
	)		**31-CA-28734**
AND	)		**31-CA-28738**
	)		**31-CA-28799**
	)		**31-CA-28889**
	)		**31-CA-28890**
GRAPHIC COMMUNICATIONS	)		**31-CA-28944**
CONFERENCE/INTERNATIONAL	)		**31-CA-29032**
BROTHERHOOD OF TEAMSTERS	)		**31-CA-29076**
	)		**31-CA-29099**
UNION.	)		**31-CA-29124**
	)		

EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE

COMES NOW, the Respondent, Ampersand Publishing, LLC d/b/a *Santa Barbara News-Press* ("the *News-Press*"), pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, Series 8, as amended, with these Exceptions to the May 28, 2010, Decision and Recommended Order of Administrative Law Judge Clifford H. Anderson in the above-named and numbered case. Due to the size of the record, and the number of allegations involved, these Exceptions are grouped by subject matter and then within subject matter, exception to conclusions of law and facts are further detailed. The groups of subject matters correspond to the allegations contained in the Second Amended Consolidated Complaint:

1. Exceptions to the ALJ's Conclusions of Law, Remedy and Recommended Order;
2. Exceptions to the ALJ's "Background" Recitation and Credibility Determinations;

the first face-to-face bargaining in good faith after the unfair labor practices found herein have been fully remedied …" (ALJD 148: 8-11) as such a remedy is contrary to the evidence and the record as a whole, and contrary to law.

20. To the remedy that "the unfair labor practices found herein, but not specifically discussed in the portion of this Decision entitled 'Remedy' shall be remedied in accordance with current Board decisional law …" (ALJD 148:13-15) as the need for a remedy is contrary to the evidence and the record as a whole, and contrary to law.

21. To the "cease and desist" provisions of the ALJ's recommended order, and to each of them individually, as each cease and desist provision is contrary to the evidence and the record as a whole, and contrary to law. (ALJD 148:24-150:9)

22. To the "affirmative action" provisions of the ALJ's recommended order and to each of them individually, as each affirmative action provision is contrary to the evidence and the record as a whole, and contrary to law. (ALJD 150:11-151:13)

23. To the notice to employees recommended by the ALJ (ALJD Appendix), as such notice is contrary to the evidence and the record as a whole, and contrary to law.

B. EXCEPTIONS TO THE RECITATION OF "BACKGROUND" FACTS AND CREDIBILITY DETERMINATIONS.

24. To the statement that the decision of "Judge William G. Kocol in *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, JD(SF)-37-07, an unfair labor practice case which issued December 26, 2007 … contained a significant amount of uncontested background information which underlay [sic] the larger picture of the controversy at issue herein." (ALJD 6:2-6) as such a statement is contrary to fact.

25. To the conclusion that "a Judge may rely on the factual findings made by another Judge in a prior case, even though it is still pending before the Board." (ALJD 6:10-12) as such a statement is contrary to law.

26. To the ALJ's utilization of "the Kocol decision's findings of violations of the Act fully to determine the remedy herein." (ALJD 6:33-35) as such an action is contrary to law.

27. To the conclusion that the litigation in "*McDermott ex rel. NLRB v. Ampersand Publishing, LLC.*, 2008 U.S. Dist. LEXIS 94596 (C.D. Cal May 21, 2008), and subsequent United States Court of Appeals decision on the appeal of Judge Wilson's decision by Justice [sic] Richard R. Clifton of the United States Court of Appeals for the Ninth Circuit, *McDermott v. Ampersand Publishing, LLC*, Case No. 08-56202, __F.3d 1447, 2010 WL 276208 (January 26, 2010); General Counsel Petition for Rehearing en banc filed March 10, 2010 … each contain[]

scholarship and analysis bearing on the instant case and have been considered for that content and learning [but] Federal court proceedings under Section 10(j) of the Act are to a degree conceptually independent of the application of those portions of the Act concerning unfair labor practice proceedings. And, the Federal decisions address the Kocol decision not the instant proceeding." (ALJD 7:9-23), as such a conclusion is contrary to law and misrepresents the case before ALJ Anderson.

28. To the characterization of employees attempting to rest editorial control from the publisher as a "Manichean argument" (ALJD 8:9-31), as such a statement is contrary to fact and contrary to law.

29. To the conclusion that the *News-Press* argued a "statistical disproportion favoring [GCC/IBT] supports a finding of prosecutorial bias against [the *News-Press*]." (ALJD 18:18-20), as such a finding misrepresents the facts.

30. To the ALJ's references to the Equal Access to Justice Act (EAJA) as a deterrent for the General Counsel to avoid prosecutorial misconduct and a statute of which the *News-Press* could take advantage (ALJD 19:31-40; ALJD 24:4-9), as such a conclusion is contrary to law.

31. To the conclusion that the testimony of General Counsel witness Kyle Jahner did not "establish prosecutorial bias or misconduct" (ALJD 19:42-20:35), as such a conclusion is contrary to fact and law.

32. To the conclusion that precedent addressing witness credibility in the face of conflicting testimony and affidavits applies to an argument about the Region's bias during an investigation and prosecution of a case (ALJD 20:37-21:8), as such a conclusion is contrary to fact and law.

33. To the conclusion that the term "investigative reporter" and whether or not Mr. Eringer was an investigative reporter was a "collateral fact in trial testimony." (ALJD 21:14-15), as such a conclusion is contrary to fact.

34. To the conclusion that the *News-Press*'s statute of limitations argument concerning wage increases for 2006, 2007, and 2008 was simply a "merits" argument and "argued erroneous positions in theory of the government" rather than "viable allegations of prosecutorial misconduct." (ALJD 21:21-28), as such a conclusion is contrary to law and fact.

35. To the conclusion that the General Counsel prosecuting a case based on a single "'bald assertion' of one witness … that conflicted with existing precedent" was not evidence of governmental misconduct (ALJD 21:30-38), as such a finding is contrary to fact and law.

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 31

Ampersand, LLC dba Santa Barbara News-Press, and GCC-IBT, International Brotherhood of Teamsters,	CASE NO. 31-CA-28589, et al. **Charging Party's Answering Brief to Respondent's Exceptions**

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In reality, regardless of whether certain proposals in dispute in this case are mandatory or permissive – and to be sure, as demonstrated below, the pending Employee Integrity proposal and its safety component are mandatory – bargaining is not limited to mandatory subjects. The Union cannot be faulted, and the *News-Press*' gross bargaining misconduct excused, because it presented arguably non-mandatory proposals. NLRB v. Wooster Division of Borg-Wagner Corp., 356 U.S. 342, 347 (1958). The Board has held that a party "has a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it does not posit the matter as an ultimatum." In Re Pratt Towers, Inc., 339 NLRB 157, 170 (2003); Detroit Newspaper Agency, 327 NLRB 799, 800 (1999), quoting Longshoremen ILA v. NLRB, 277 F.2d 681, 683 (D.C. Cir. 1960). The Union's proposals have never remotely exceeded the limits imposed on bargaining over permissive subjects. As such, the ALJ correctly rejected the *News-Press'* defense that the Union's proposals that the Employer "took to be permissive subjects of bargaining were not for that reason evidence of bad faith bargaining by the Union" (ALJD 27:48 – 28:2).[18]

B. Respondent Failed to Prove that Its Right to Editorial Control Shields it from the Obligation to Bargain in Good Faith

In its brief, the *News-Press* argues that the Union's proposals on grievance and arbitration, discipline and discharge, and management rights all seek to control content decisions of the newspaper. (R. Excptns. 184). All this argument does is demonstrate the astonishingly and incorrectly expansive scope of the *News-Press*' conception of "content

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table on day one, never budged one iota in 18 months, and never even offered to change its proposals in exchange for union movement. Yet it still manages to argue on the other hand that the Union "insisted" on certain proposals to which it objected, though the Union did withdraw, reframe and modify those proposals, demonstrating and expressing a willingness to progressively respond to employer objections and concerns, and to the rare occurrence of movement by Ampersand.

[18] The ALJ did not rule on the issue of whether the Union's Employee Integrity proposal was mandatory or permissive; the Union demonstrates below that it is mandatory.

control", cynically posed to cloak its entire threadbare panoply of misconduct in constitutional fabric. In essence, the *News-Press* argues that the Union's proposals at the table, though lawful, are not merely not worthy of agreement, but somehow threaten its editorial and/or managerial prerogatives, thus in its view privileging it to bargain in bad faith, and/or commit other unfair labor practices such as retaliatory firings, transfer of bargaining unit work, unilateral changes, refusal to timely provide information and discouragement of employee cooperation with NLRB investigations as condemned by Judge Anderson, and to trample employee rights in all the ways Judge Kocol catalogued as well.

The argument goes too far. The First Amendment does not afford this newspaper employer any more privilege to violate the NLRA than any other employer, Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937)[19]; see, Chamber of Commerce of the United States v. Brown, 128 S. Ct. 2408, 2417 (2008) (Employers' First Amendment right protects them against sanctions for *noncoercive* speech).

By the same token, there is no legal authority empowering the NLRB to carve out employees -- or editorial employees -- of a newspaper or other media employer, to subject them to otherwise statutorily violative discretion of their employers, or to withdraw its Congressionally-mandated oversight of the collective bargaining process in connection with such employees. See, e.g., Livadas v. Bradshaw, 512 U.S. 107 (1994). Nor is there any law or precedent that suggests that an organizing *campaign* that criticizes the arbitrary exercise of managerial prerogative somehow lifts or relieves the employer of the Act's regulation of the ensuing collective bargaining process, regardless of the party's post-campaign conduct at and away from the bargaining table.

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[19] See also, Cohen v. Cowles Media Co., 501 U.S. 663, 669-670 (1991) ("Enforcement of . . . general laws [including the NLRA] against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.")

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Can it really be the law, as Ampersand contends, that if during an organizing campaign a Union or supportive employees denounce the unethical treatment of newsroom staff, or the paper's editorial stance, that that newspaper's management is thereafter free to violate the NLRA at will with respect to those employees and their colleagues, directing its retaliation against individuals, and instructing its negotiators to pretend the Union is not really present at the bargaining table? As preposterous as this question sounds, the *News-Press'* "constitutional license" argument would require the Board to transgress in all of those unprecedented, unwarranted and discredited ways, e.g., to: 1) carve out protective shields or NLRA-free zones for media employers; 2) plunge editorial employees into the void of NLRA lawlessness where employer *retaliation* for union activity, rather than the union activity itself, would be protected; 3) endorse the punishment of newsroom employees at the collective bargaining stage and thereafter for alleged offenses committed during the pre-election period; 4) grant employers the unfettered ability to bargain in bad faith; and 5) approve the hiring of people to perform bargaining unit work and label them non-employees to undermine the union on grounds that to regulate such hiring interferes with content control. That is not, and cannot be, the law.

While the *News-Press* has routinely crossed the legal line in its uniform resistance to virtually any bilateral influence on terms and conditions in the workplace in defiance of the law and its employees' expressive[20], associational and statutory rights, the Employer

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[20] The din created by the *News-Press'* caterwauling about its constitutional rights must not drown out the Union and individual employees' enjoyment of their expressive rights under the Constitution and the NLRA, see, e.g., Jolliff v. NLRB, 513 F.3d 600 (6th Cir. 2008); Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571, 577 (S.D.N.Y. 2009) ("[An employer] does not have a right to operate free from any criticism, organized or otherwise". See Metro. Opera Ass'n v. Local 100, HERE, 239 F.3d 172, 177-78 (2d Cir.2001) ('[W]ithin the labor context, in seeking to exert social pressure on [plaintiff], the Union's methods may be harassing, upsetting or coercive, but unless we are to depart from settled First Amendment principles, they are constitutionally protected.'); see also Beverly Hills Foodland v. United Food & Commercial Workers Local 655, 39 F.3d 191, 197 (8th Cir.1994) ('[T]he prime directive in the Union [organizing] campaign, a boycott of [the

(footnote continued)

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1 does have available to it recourse at the bargaining table when lawful proposals truly
2 encroach on the "core of entrepreneurial control": it can simply refuse to bargain over
3 genuinely permissive bargaining subjects. But the First Amendment does not provide it
4 with the privilege of flouting its statutory obligations based on its status as a publication.
5 Newspaper Guild of Greater Philadelphia v. NLRB, 636 F.2d 550, 558 (D.C. Cir. 1980)
6 ("It is firmly established that a newspaper is not immune from the coverage of the National
7 Labor Relations Act merely because it is an agency of the press."). Indeed, the Court of
8 Appeals in the Newspaper Guild case remarked that in considering the bargainability of
9 ethics rules, the Board could not simply demarcate a line between the rules themselves that
10 were arguably within managerial prerogative, and their consequences, which were
11 bargainable, but instead, had to review the rules to see if "the degree of control which may
12 be exercised was. . . narrowly tailored to the protection of the core purposes of the
13 enterprise", and balanced between the employer's freedom to manage its business in areas
14 involving the basic direction of the enterprise and the right of employees to bargain on
15 subjects which affect the terms and conditions of their employment." 636 F.2d at 561-562
16 and n. 36.

17 In short, the Board must perform the same balancing test for employers who publish
18 as it does for employers who are not in the publishing business. Nothing in the law
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20 target employer] is . . . constitutionally safeguarded,' as is the accompanying 'activity of
peaceful pamphleteering.')"; Florida Gulf Coast Building and Construction Trades v.
21 NLRB, 796 F.2d 1328 (11th Cir. 1986), and the law limits the constitutional rights of
22 newspapers acting as employers, Alameda Newspapers, Inc. v. City of Oakland, Northern
California Newspaper Guild, 95 F.3d 1406, 1421 (9th Cir. 1996) ("The First Amendment
23 protects newspapers from retaliation by government agencies on account of articles or
views that the newspapers have published or intend to publish, not against retaliation
24 because of the internal policies or business conduct of their owners.)"; Hawaii Tribune-
25 Herald v. Kimura, 272 F. Supp. 175 (D. Ha. 1967) (Same). In the same vein, even aside
from rights protected by the Act, employees have substantial ability to resist and oppose
26 their employer's political agendas without fear that the employer can retaliate with adverse
27 employment action consistent with law. E.g., Novosel v. Nationwide Insurance Company,
721 F.2d 894 (3rd Cir. 1983).
28

privileges a newspaper to purport to tie each and every Union bargaining proposal to its editorial content, and then not merely refuse to bargain over them, but somehow seize upon the very alleged attempt by a Union to invade its all-encompassing sanctum of editorial control to use as a blackjack to assault its employees through retaliatory unfair labor practices.[21] Yet this is precisely what the *News-Press* asks the Board to authorize by overturning, on constitutional grounds, the ALJ's findings of bad faith and of multiple other violations.

Particularly in relation to ethical concerns at a newspaper, the NLRB has noted, in keeping with the courts' rulings, that since the ethical issues are intertwined with employee disciplinary consequences, and because such consequences are squarely within the definition of "terms and conditions of employment" that are mandatory subjects of bargaining, collective bargaining over such rules cannot be peremptorily ruled out, as the *News-Press* seems to suggest. See, Peerless Publications, 283 NLRB 334 (1987) (In 8(a)(5) case, after remand from 636 F.2d 550 (D.C. Cir. 1980), Board orders rescission of entire set of ethics rules unilaterally implemented by management).

Ampersand's argument that its First Amendment rights were violated by the ALJ is remarkably flimsy, spuriously relying on the Newspaper Guild case discussed above for

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[21] That lack of privilege to violate the NLRA based on newspaper publisher status which has been embedded in American constitutional law at least since the Supreme Court decided the Associated Press case in 1937 is the fundamental flaw in the Ninth Circuit's decision affirming Judge Wilson's decision to deny the Regional Director 10(j) relief, and is the defective linchpin from which so much of Ampersand's boundless malice and mischief springs forth. McDermott ex rel. NLRB v. Ampersand Publ'g, 2008 U.S. Dist. LEXIS 94596 (C.D. Cal. 2008); aff'd, McDermott v. Ampersand Publishing, LLC, 593 F.3d 950 (9th Cir. 2010). See Brown v. Boston University, 891 F.2d 337, 360 (Cir. 1989); (Reinstatement of professor unlawfully denied tenure does not infringe on university's First Amendment right to "academic freedom"); Hausch v. Donrey, 833 F. Supp. 822 (D. Nev. 1993) (No First Am. protection from EEO action); Communications Workers v. Radio Station WUFO, 121 LRRM 2986 (W.D.N.Y. 1985) (Arbitration award ordering reinstatement of part-time religious radio announcer is valid and not infringement of radio station's First Amendment right to determine style and content of programming).

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the obtuse proposition that "protection of a newspaper lies at the core of entrepreneurial control" (R Excptns, p. 43) and citing a non-constitutional case, First National Maintenance v. NLRB, 452 U.S. 666 (1981) to buttress its constitutional argument. Id. Presumably, Respondent neglected to insert the word "content" into its inaccurate gloss on the Newspaper Guild case, but fundamentally, as explained above and ignored by Ampersand, the Court of Appeals did not order or approve what the Employer here seeks from the Board: outright rejection of employee rights whenever it whispers the phrase "content control". Instead, there must be a balancing, as was the case in First National Maintenance as well. As demonstrated elsewhere in this brief, the Union's proposals do not threaten editorial control and are in fact mandatory because they are directly concerned with employees' terms and conditions of employment and expressly eschew interference with managerial prerogative.

The dispute over the hire of Robert Eringer as an "independent contractor" performing bargaining unit work is an example of the contortions Ampersand will undertake to grasp for its "content control" mantra (R Excptns, pp. 43-45). As with most of such assertions, the *News- Press* confounds its managerial prerogative with its editorial prerogative, and emits an unwitting confession of anti-union animus. The Union's protest over Mr. Eringer's contributions has nothing whatever to do with what or whether he writes, or where or how his writing appears in the paper; the *News-Press* offers no evidence to the contrary. The Union is merely attempting by the unfair labor practice charge relating to Eringer to preserve its right to represent a bargaining unit that includes all reporters – including investigative reporters – and hence to protect them and the integrity of the bargaining unit, which is under management attack. There is no allegation that the *News-Press* must or must not employ an "investigative reporter", or must or must not publish that investigative reporter's work product. Rather, the charge in a nutshell is that given its past practice, if the *News-Press* wishes to have an investigative reporter as it

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grandiosely announced it did with Mr. Eringer, that person belongs in the bargaining unit.[22]

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[22] This necessary reliance on past practice to define the scope of the bargaining unit, and hence the boundaries of union representation as determined by the September, 2006 election, disposes of Ampersand's panicky argument that it will, by dint of the ALJ's ruling, have to "bargain over any new content in the newspaper." (R Excptns, p. 44). Of course that argument is again revelatory of both anti-union and anti-collective bargaining sentiment, but it is also demonstrative of Ampersand's ignorance of the applicable law. The ALJ did not rule that management must bargain over "new content" – rather, the ruling was that where a type of work was performed as part of the preexisting unit, then the fact of unit inclusion when next someone is hired to perform that specific work cannot be altered without bargaining. Thus, any "new" content Ampersand wished to add would, for labor relations purposes, be assessed in terms of what work had been included in the unit in the past. The fact that the substance of the work involved must be analyzed does not implicate the constitution or editorial control; it only reveals whether a person performing the subject work is or should be in the bargaining unit. Whether Ampersand chose to add that new content would be purely its call, though with this employer, apparently, the question of union representation of the employees involved in producing that content would be determinative as to whether to implement the assignment. If, however, Ampersand's decision whether to add certain content to its newspaper rises or falls on whether the writers involved will be unionized, that is a disgraceful approach to journalism and business, but it has nothing to do with the publisher's First Amendment right to publish, which remains intact regardless of what employment decision it makes. The Union is properly and lawfully interested in the question of whether a new hire is represented by it, or should be; that interest is easily distinguished, however, from the question of what content Ampersand chooses to assign that employee to create. Nothing in the freedom Ampersand enjoys to make such assignments affords it the right to unilaterally control whether that employee is represented by a union.

Ampersand enjoys confusing the concepts of control over the personnel who perform the work with control over the editorial content that the personnel produces; while Ampersand unquestionably has plenary control over the latter, its fervent attempts to extend that control over the former runs into the NLRA's brick wall.

The difference between the *News-Press'* world view and the law is that for the newspaper, its constitutional privileges erase or minimize its employees' ability to engage in collective bargaining, since any attempt to maintain bilateralism for content-producing employees encroaches on those boundless constitutional rights. In the real world, however, there is a balance between the rights of the publisher and those of the employees, wherein the employees maintain their right to collectively bargain and seek protection from arbitrary management, and the publisher continues to exercise her right to publish

(footnote continued)

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To label that routine union contention an invasion of its editorial prerogative (R Excptns, p. 44-45) reveals Respondent's position once again for what it is: squarely anti-union and obsessed with the status quo that ceased to exist on September 27, 2006. That is because Respondent's position is an objection not to regulation of editorial content, which is not touched, but rather, to the fact -- resented and resisted by Ampersand -- that the Union dares to claim to represent any employee performing that specific work. This is consistent with the misconduct of an employer increasingly attempting through manipulation of its hiring practices to minimize the union representation amongst its newsroom population. No wonder the ALJ found this position "frivolous". (ALJD: 64:36). Ampersand doesn't just want the freedom to publish what it wants when it wants – it wants to reclaim the further unilateral non-constitutional "right" that it no longer possesses to employ newsroom staff who are not represented by a union. Hence, through its anti-union looking glass it views the union-represented status of an investigative reporter as a deterrent to that reporter's hire, and thus an invasion of its prerogatives to decide whether to hire him.

The constitution and NLRA do not respect such unilateralism, however, after a union electoral victory. Just as Ampersand was free to unilaterally set wages and change employment rules, or define and redefine the criteria for achieving "senior writer" status at its whim before September, 2006 but can no longer do so, so, too, it has lost its ability to unilaterally denominate those who do and do not belong in the bargaining unit. Obviously, the more Ampersand can characterize any such right as linked to its First Amendment "union-free" zone, the happier it is. This tribunal must be wary of such contentions, however, since they are aimed at derogation of the employee rights protected by the Act

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any content she sees fit. In that real world, the publisher does not get to dictate, on constitutional grounds, that the writers or editors of any "new" content must not be represented by a union. The constitution simply does not regulate labor relations in that manner, and there is nothing in constitutional jurisprudence saying otherwise.

and have nothing to do with the legitimate expressive and publication rights of the employer. In this instance, there is no encroachment on "freedom of the press"; rather, it is the nature of the representation of the employee position that is material, since after all, there is nothing to stop the *News-Press* from having its "investigative reporter" write scurrilous articles about the Union, for example.

Given the admitted importance of the subjects involved, and the fact that the parties have engaged in discussions over the ones that have raised the most acrimony from Ampersand, there is no legal or factual basis for validating the Employer's defensive claim that the Union bargained in bad faith or otherwise violated §8(b)(3) or any other provision of the Act. There is no evidence suggesting that there was any misconduct by the Union, or for that matter, that any bargaining conduct by the Union had any influence – let alone a causal one -- on the Employer's proven rigidity, belligerence, dishonesty or misconduct at and away from the table.

C. <u>The Union's Employee Integrity Proposal Is a Mandatory Subject of Bargaining</u>

Insofar as Respondent has defended its bad faith bargaining by affirmatively claiming that the Union's presentation of Employee Integrity proposals somehow excuses its intransigence, it is wrong for several reasons. As noted above, setting aside for the moment whether the proposal is permissive or mandatory, the Union is not prohibited from presenting permissive proposals, and is not in bad faith if it does so, even repeatedly and even over the objections of implacable management. The Employer's defense is also meritless because, as will be demonstrated below, the Union's proposal is a mandatory subject of bargaining under the Act, and hence, the Union has a right in any event to insist on it if it chooses to do so, and the Employer's demand that the Union withdraw that proposal is still more evidence of its bad faith.

1. The Genesis and Language of the Proposal

The trigger for the newsroom employees' organizational campaign was an actual, palpable threat by *News-Press* management upon the terms and conditions of employment

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMPERSAND PUBLISHING, LLC	)	**CASE NOS.**	**31-CA-28589**
D/B/A *SANTA BARBARA NEWS-PRESS*	)		**31-CA-28661**
	)		**31-CA-28667**
EMPLOYER,	)		**31-CA-28700**
	)		**31-CA-28733**
	)		**31-CA-28734**
AND	)		**31-CA-28738**
	)		**31-CA-28799**
	)		**31-CA-28889**
	)		**31-CA-28890**
GRAPHIC COMMUNICATIONS	)		**31-CA-28944**
CONFERENCE/INTERNATIONAL	)		**31-CA-29032**
BROTHERHOOD OF TEAMSTERS	)		**31-CA-29076**
	)		**31-CA-29099**
UNION.	)		**31-CA-29124**
	)		

REPLY BRIEF OF *SANTA BARBARA NEWS-PRESS* IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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The General Counsel misrepresented the types of stories written by Eringer, as well arbitrarily referring to them as "crime stories." (GC Br. 69). Eringer's stories were unique, based on his contacts and background, a background that no newsroom employee at the *News-Press* possessed. (Tr. 557-58). Eringer's articles were typically "a column style article which often had opinion in it, could have a back and forth with the reader that a news story wouldn't," or could have a first person story style to it, ran on page 2, and contained a mug shot. (Tr. 560). The unique qualities possessed by Eringer made his column attractive to the *News-Press* because of the unique content that would naturally result. As an example, the General Counsel highlighted an article involving a retired U.S. Air force officer who was a suspect in an FBI counter-intelligence operation and former Russian President Vladimir Putin. (GC Br. 69; GC Ex. 213). No employee at the *News-Press* had contacts that would have permitted this type of story; the General Counsel did not even attempt to present evidence suggesting the contrary. The use of freelancers was a status quo condition at the *News-Press*. GCC/IBT, with the help of the General Counsel, attempted to modify the status quo, absent bargaining, through this charge.

3. THE *NEWS-PRESS* DETERMINES THE CONTENT OF THE NEWSPAPER

The General Counsel criticized the *News-Press* for arguing that the ALJ's decision amounted to an order obligating the *News-Press* to bargain over the content of the paper. (GC Br. 75). The General Counsel went so far as to claim this assertion was a "blatant falsehood." (*Id*). To restate what the *News-Press* made exceedingly clear, by ordering the *News-Press* to bargain over the use of a freelancer who provided unique content to the newspaper, particularly when the *News-Press* had an undisputed history of utilizing freelancers and there was no bargaining unit employee capable of producing the

same content for publication, the ALJ ordered the *News-Press* to bargain over the content of the newspaper in derogation of the *News-Press*'s First Amendment right. (ALJD 64:32-43).

The General Counsel offered no evidence that any bargaining unit employee was capable of producing stories like those of Eringer. By concluding that the *News-Press* had an obligation to bargain over the work performed by Eringer, the ALJ concluded that the *News-Press* had an obligation to bargain over the content of the newspaper. The General Counsel took a "head in the sand" approach by speciously arguing that neither GCC/IBT nor the employees could violate First Amendment rights of the *News-Press* because they were not state actors. (GC Br. at 75). What the General Counsel intentionally or accidentally ignored in advancing this argument was the fact that the General Counsel prosecuted based on GCC/IBT's allegation, and in so doing the ALJ – who is a state actor – crafted a remedy that infringed upon the *News-Press*'s First Amendment rights. The General Counsel's assertion that the *News-Press* offered no evidence or argument that the ALJ's proposed remedy was unconstitutional was simply inaccurate. (GC Br. at 75). The *News-Press* directs the Board and the General Counsel to pages 43 through 45 of its Brief in Support of Exceptions that addressed this issue.

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Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphic Communications Conference, International Brotherhood of Teamsters. Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028738, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124

September 27, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On May 28, 2010, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply to the General Counsel's answering brief. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel 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, cross-exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to modify his remedy, and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by hiring Robert Eringer as a nonemployee freelancer to perform bargaining unit work, without providing the Union notice and an opportunity to bargain about this decision. The judge rejected the Respondent's arguments that Eringer did not perform unit work and that his hiring accorded with a past practice established prior to the Union's certification. We likewise reject these arguments, renewed on exception, for the reasons discussed below.

In finding that Eringer performed bargaining unit work, the judge relied primarily on evidence that Eringer's position as "investigative reporter" was previously held by unit employee Scott Hadley. Although we agree that this evidence is significant and supports the judge's finding, we additionally rely on evidence that Eringer's investigative reporting was the same type of investigative reporting performed by Hadley and other unit employees, and that his noninvestigative crime stories were similarly like those written by unit employees.

Hadley was hired by the Respondent as a newsroom reporter in 1998. In June 2001, the Respondent announced in its newspaper that Hadley was being promoted to the "new position of investigative reporter." The announcement explained to readers that Hadley's new position would involve the "use of advanced investigative reporting techniques to . . . dig way beneath the surface to help our readers better understand what's going on in an increasingly complex world."

[1] The General Counsel cross-excepted to the judge's failure to find that the Respondent's proposals on management rights, discipline and discharge, grievances, and a union bulletin board were unlawful because they were "predictably unacceptable to the Union." Because we agree with the judge that the Respondent's overall bargaining conduct, including its insistence upon an overly broad management-rights clause, violated Sec. 8(a)(5) and (1), we find it unnecessary to consider these exceptions.

At the outset of the hearing, the judge granted the Respondent's motion to strike the phrase "but not limited to" from complaint pars. 20(b)(i)(ii) and (c) alleging bad-faith bargaining. In setting out these sections of the complaint in sec. III,M,1 of his decision, the judge inadvertently included the struck phrase. We do not rely on it.

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

We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by circulating its August 22, 2008 memorandum to employees offering them the services of its attorneys if contacted by a Board agent investigating unfair labor practice charges. We therefore find it unnecessary to pass on the judge's finding that the memorandum was also unlawful because it discouraged employees from cooperating with Board investigations.

We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by discontinuing merit increases. We therefore find it unnecessary to pass on the judge's dismissal of the allegation that the Respondent's action also violated Sec. 8(a)(3) and (1).

The judge found that the Respondent violated Sec. 8(a)(1) when Director of News Operations Don Katich instructed employees to keep confidential the contents of his December 3, 2008 meeting with them, which included discussion of terms and conditions of employment. In adopting that finding, we do not rely on the judge's speculation that a relevant employee manual was "read long before and doubtless stuck by those employees in the back of the employees' desk drawers."

[3] We shall modify the judge's recommended Order to conform to the violations found, and to include the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

From 2001 until he resigned in July 2006, Hadley utilized these investigative techniques in his stories, some of which were introduced in evidence. For example, to produce such in-depth stories as "Jennifer San Marco: Portrait of a Killer" and "Jesse James Hollywood Case: the Gun that Changed Lives," Hadley testified, and the stories reflect, that he researched court and property records to track down interested parties, consulted anonymous sources developed over time, listened to tapes of 911 telephone calls, reviewed autopsy reports, and examined public records at schools, post offices, and police departments. During this time, Hadley won several state journalism awards for investigative reporting, including an award for a series of "hard-hitting, investigative" articles on alleged neglect and abuse of residents at an area nursing home.

After Hadley resigned, the position of investigative reporter remained unfilled until May 2008, when the Respondent announced in its newspaper that Eringer was "joining the News-Press as investigative reporter." Thereafter, Eringer wrote in-depth investigative pieces like Hadley's. For example, his story, "White House Spy Scare," involved a retired American military officer who was suspected of disclosing to Russian agents information from White House intelligence briefings of President George W. Bush. This story, like Hadley's stories, reflected Eringer's use of in-depth investigative research practices, including the examination of the officer's business transactions as well as financial and property records. The story illustrates that Eringer's investigative reporting as a nonunit freelancer was, for present purposes, indistinguishable from Hadley's investigative work as a unit employee.

The record also reveals that other unit employees performed investigative reporting. Although Hadley alone held the "investigative reporter" title, he testified that he had assisted four other unit employees with investigative stories on elder abuse, a Ponzi scheme, and a local nonprofit organization's alleged mishandling of fundraising proceeds. Dawn Hobbs, one of these reporters, corroborated Hadley, testifying that her investigative reporting included a six-part series on personal safety in Santa Barbara and a three-part series on domestic violence. The latter series won a state journalism award for investigative reporting. The similarity between this investigative reporting by unit employees and that performed by Eringer supports the judge's finding that Eringer performed bargaining unit work.

In addition, as the Respondent acknowledges, Eringer's assignments were not confined to investigative reporting, but also included other work performed by unit employees. Eringer produced noninvestigative stories on local crime and court proceedings, which Associate Editor Scott Steepleton conceded was bargaining unit work. Unit employee Hobbs similarly testified that she had reported on crime and court proceedings for years before her February 2007 discharge.

The Respondent asserts that even if Eringer's investigative and noninvestigative reporting constituted unit work, the Respondent's past practice of using nonunit freelancers for both types of reporting negated any obligation to bargain about assigning the work to Eringer. We disagree. Even assuming that an employer's practices prior to certification of a representative could support a past-practice defense, the asserted past practice does not satisfy the fundamental requirements of that defense. A past practice is one that occurs "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or [recur] on a regular and consistent basis." *Caterpillar, Inc.,* 355 NLRB 521, 522 (2010), enfd. mem. 2011 WL 2555757 (D.C. Cir. 2011), quoting *Sunoco, Inc*., 349 NLRB 240, 244 (2007). The freelancer-authored investigative articles presented as evidence by the Respondent were dated between 2000 and April 2005, with the most recent dated a full 3 years before Eringer was hired as a freelancer. Under these circumstances, we conclude that the Respondent's asserted past practice was neither regular nor frequent, and thus that employees would not reasonably anticipate the assignment of investigative reporting to freelancers such as Eringer.

With respect to noninvestigative crime reporting, the Respondent's past practice defense similarly fails. Five crime-related stories written by freelancers and comparable to those produced by Eringer appear in the record. All were written between 2000 and 2002. There is no evidence that any crime stories were assigned to freelance reporters after 2002. We find that the hiatus between 2002 and 2008, when the Respondent resumed freelance crime reporting with Eringer, is far too long to establish the "regularity and frequency" required for a past practice defense.

Thus we find, in agreement with the judge, that investigative and noninvestigative reporting constituted bargaining unit work. By assigning that work to nonemployee freelance reporter Robert Eringer without providing the Union notice and an opportunity to bargain about the assignment decision and its effects, the Respondent violated Section 8(a)(5) and (1).[4]

[4] For the reasons set forth by the judge, we agree with his finding that the Respondent's use of Eringer to perform bargaining unit work also violated Sec. 8(a)(3) and (1).

AMENDED REMEDY

We agree with the judge that a broad cease-and-desist order is warranted to remedy the Respondent's violations. Such broad injunctive relief is appropriate when a respondent is shown to have "a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods,* 242 NLRB 1357, 1357 (1979).

In *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at 9 (2011) (*Santa Barbara I*), the Board relied on the second part of the *Hickmott* standard in finding a broad order appropriate. Here, we find a broad order justified under both parts of the standard. First, the Respondent's violations in this case are at least as egregious, and certainly more widespread, than those committed in *Santa Barbara I*.[5] And second, unlike in *Santa Barbara I*, the Respondent has now demonstrated its proclivity to violate the Act. For the second consecutive year, the Board has found that the Respondent committed numerous, serious violations against the same unit employees. *Postal Service*, 345 NLRB 409, 410 (2005) (series of violations found twice by Board within 2-year period manifested recidivist misconduct warranting broad order).

For the reasons stated by the judge, we further order that the Union's certification year be extended by 12 months. The Board has long held that an employer's refusal to bargain with a newly certified union during part or all of the year immediately following certification deprives the union of the opportunity to bargain during the time of the union's greatest strength. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004); *Van DornPlastic Machinery Co.*, 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). In these circumstances, the Board extends the certification year in order to ensure at least 1 year of good-faith bargaining. *Northwest Graphics*, supra. Here, by bargaining in bad faith with the Union for the entire certification year and beyond, while simultaneously engaging in serious and widespread unfair labor practices, the Respondent has both precluded any progress in bargaining and undermined the Union's bargaining strength and support among unit employees. Accordingly, we shall reset the certification year to provide the Union with a period of 1 year of good-faith bargaining during which the Union need not fend off claims that it has lost its majority support. This year will begin when the Respondent commences good-faith bargaining. Also, for the reasons stated by the judge, we order that the attached notice be read aloud to unit employees and supervisors at their place of work, either by a high-ranking management official of the Respondent or by a Board agent in the presence of such an official.

As an additional remedy, the Union requests that the Respondent be ordered to reimburse it for its bargaining expenses. In *Frontier Hotel & Casino*,[6] the Board considered whether bad-faith bargaining warranted the reimbursement of negotiating costs:

> In cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," . . . an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

Id. at 859 (citations omitted).

Applying this standard, we agree with the judge that the Respondent's bad-faith bargaining was sufficiently aggravated to warrant reimbursement of the Union's bargaining expenses. From the outset of negotiations, the Respondent insisted on a broad management-rights clause and proposals concerning discipline/discharge and grievance/arbitration that were so extreme that they would leave employees and the Union with fewer rights and protections than they would have without any contract at all. Through its management-rights proposal, the Respondent sought unilateral control over many of the unit employees' most significant terms and conditions of employment. The proposal would have granted the Respondent unfettered discretion to establish employee productivity standards and hours of work; to lay off, suspend, discharge or otherwise discipline employees; to issue, amend, and revise workplace policies, rules, regu-

[5] The violations committed by the Respondent in that case included, among others, threatening employees with discipline for engaging in union or concerted activity, interrogating them about such activities, engaging in video surveillance of employees' union activity, terminating a supervisor for refusing to commit an unfair labor practice, canceling a weekly column because the writer engaged in union and other concerted activity, discharging two employees for their union activity and six others for protesting those discharges, and lowering the evaluation scores of four union supporters. Id., slip op. at 7–10.

[6] 318 NLRB 857 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

lations, and practices; to determine employee job qualifications and select and change the equipment to be used in the newsroom; and to utilize independent contractor freelance writers and photographers, as well as managers and supervisors, to write stories, and take pictures. Further, section 1 of the Respondent's proposal would have eradicated the employees' statutory right to bargain about these subjects by reserving to management, unless specifically restricted by the contract, all "rights [that] existed prior to the time any Union became the statutory bargaining representative of the News Department employees."

As found by the judge, section 1 "unambiguously asserts that . . . the Respondent will have no obligation to bargain with the Union or otherwise be obligated under Section 8(a)(5) of the Act to deal with the Union during the contract's life." Nor would the Respondent be required to bargain with the Union after the contract's term, because section 6 of the proposal provided that the "status quo [would] remain[] in effect after the expiration of this Agreement . . . and until a different agreement is reached or other lawful change is permitted." The judge found that by insisting on retaining the prerogative, even postexpiration, to act unilaterally with respect to the most fundamental subjects of collective bargaining, the Respondent sought to ensure that the "Union's representational role as envisioned by the statute and Section 8(a)(5) would be eviscerated in perpetuity."

The Respondent's proposal on discipline and discharge reinforced the expansive reach of its management-rights proposal concerning these matters. Refusing to acknowledge that its employment relationship with unit employees was now subject to collective bargaining under the Act, the Respondent declared the relationship "at-will employment." Consistent with this position, the Respondent's proposal sought to retain its previous privilege to unilaterally identify disciplinary offenses and to determine the appropriate level of discipline. To this end, the Respondent vigorously resisted the Union's proposals to establish a "just-cause" standard for employee discipline with resolution through a neutral third-party mechanism. Instead, it insisted on an in-house grievance procedure culminating in an unreviewable decision by the Respondent's copublishers—the same two individuals responsible for many of the violations committed in both this case and *Santa Barbara I*.

The Respondent's conduct away from the bargaining table also demonstrated its calculated strategy to reduce negotiations to a sham and undercut the Union's bargaining strength, so that employees would perceive collective bargaining to be futile. Thus, while insisting on the management right to "utilize independent contractor freelance writers," the Respondent was already violating Section 8(a)(3) and (5) by utilizing a nonemployee freelance reporter and employees from outside employment referral agencies to perform bargaining unit work. In violation of Section 8(a)(5), it was also dealing directly with an unlawfully laid-off unit employee concerning a return to his duties as a nonemployee freelancer. And, at the same time that it was insisting upon complete managerial discretion to "establish . . . productivity standards [and] . . . [t]o suspend, discharge or otherwise discipline employees," the Respondent violated Section 8(a)(3) and (5) by suspending and discharging an employee, and violated Section 8(a)(5) by unilaterally announcing a new one-story-per-day productivity standard for reporters and writers. In addition, the Respondent unlawfully obstructed the bargaining process on five separate occasions by unreasonable delays in providing the Union requested information that was relevant and necessary for bargaining.

Under all these circumstances, we conclude that the Respondent's unlawful conduct at and away from the bargaining table so "infected the core of the bargaining process"[7] that it cannot be fully redressed by the Board's traditional remedies. The economic loss by the Union in the futile pursuit of a collective-bargaining agreement is the direct result of the Respondent's willful defiance of its statutory obligations. Accordingly, in order to restore the status quo and make the Union whole for its financial losses, we shall require the Respondent to reimburse the Union for its negotiation expenses.[8]

Finally, in accordance with our decision in *Kentucky RiverMedical Center*, 356 NLRB No. 8 (2010), we shall modify the judge's remedy to require that backpay and other monetary awards be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing letters or other communications to employees from the owner and copublisher offering to provide its attorney to represent employees who are contacted by

[7] *Frontier Hotel & Casino*, supra, 318 NLRB at 859.

[8] Although the Union did not request this remedy from the judge, its failure to do so does not preclude us from imposing it. *Regency Service Carts*, 345 NLRB 671, 676–677 (2005).

Board agents investigating unfair labor practice allegations.

(b) Instructing employees that anything said at an employee meeting concerning employees' terms and conditions of employment is confidential and proprietary, and cannot be discussed by employees outside the meeting.

(c) Transferring work from the bargaining unit to nonunit employees of contract agencies because unit employees formed, joined, or assisted Graphic Communications Conference, International Brotherhood of Teamsters (the Union) or any other labor organization and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(d) Transferring unit work to freelance nonemployees because unit employees formed, joined, or assisted the Union or any other labor organization and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(e) Suspending or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union or any other labor organization and engaged in protected concerted activities and to discourage them from engaging in these activities.

(f) Discharging or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage them from engaging in these activities.

(g) Unreasonably delaying furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as the collective-bargaining-representative of unit employees.

(h) Transferring unit work from unit employees to nonunit employees of contract agencies and failing and refusing to provide the Union notice and an opportunity to bargain over the decision to utilize the nonunit employees and the effects of the decision on unit employees.

(i) Failing to grant unit employees a merit increase in December 2006 through January 2007, in recognition of work performance during 2006, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(j) Failing to grant unit employees a merit increase in December 2007 through January 2008, in recognition of work performance during 2007, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(k) Failing to grant unit employees a merit increase in December 2008 through January 2009, in recognition of work performance during 2008, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(l) Unilaterally changing the timing of employee meetings with their supervisors as part of the performance evaluation system around November 2008 without providing the Union notice and an opportunity to bargain about the change and its effects.

(m) Laying off, suspending, or discharging employees without providing the Union notice and an opportunity to bargain concerning these decisions and their effects.

(n) Unilaterally announcing a requirement that unit employees produce at least one story per day without providing the Union notice and an opportunity to bargain about the new policy and its effects.

(o) Bypassing the Union and dealing directly with unit employees by offering employee Richard Mineards nonunit terms and conditions of employment.

(p) Bargaining in bad faith with the Union by insisting, as a condition of reaching agreement on a collective-bargaining contract, that the Respondent retain unilateral control over many terms and conditions of employment, thereby leaving employees and the Union with substantially fewer rights and protections than they would have without any contract.

(q) Assigning bargaining unit work to freelance nonemployee Robert Eringer without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors

engaged primarily in working on the opinion editorial pages.

The certification year shall extend 1 year from the date that good-faith bargaining begins.

(b) Reimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, until the date on which the last negotiation session occurred.

(c) Make unit employees whole for any losses they may have suffered as a result of the discontinuation of the program of merit pay raises for the performance years 2006–2008 and the change in the timing of employee-supervisor performance evaluation meetings, with interest, in the manner set forth in the remedy section of this decision, as amended.

(d) Make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral use of the nonunit employees of contract agencies or other nonemployees, with interest, in the manner set forth in the remedy section of this decision, as amended.

(e) On request by the Union, and to the extent sought by the Union, rescind the one-story-per-day productivity standard and the unlawful unilateral transfer of unit work to nonunit freelance employees and nonunit employees of contract agencies.

(f) Within 14 days from the date of this order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the unlawful employment actions against them, with interest, in the manner set forth in the remedy section of this decision, as amended.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards and, within 3 days thereafter, notify them in writing that this has been done and that the wrongful employment actions will not be used against them in any way.

(i) 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 on electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Santa Barbara, California, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by 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 the closed facility at any time since July 9, 2007.

(k) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read by a high-ranking management official or, at the Respondent's option, by a Board agent in the presence of such an official.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint not sustained herein shall be, and they hereby are, dismissed.

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[9] If this Order is enforced by a Judgment of the 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."

Dated, Washington, D.C. September 27, 2012

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by 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 issue letters or other communications to you from the owner and copublisher offering to provide our attorney to represent you if you are contacted by Board agents investigating unfair labor practice allegations.

WE WILL NOT instruct you that anything said at an employee meeting concerning employees' terms and conditions of employment is confidential and proprietary and cannot be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to nonunit employees of contract agencies because you form, join, or assist Graphic Communications Conference, International Brotherhood of Teamsters (the Union) or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT transfer unit work to freelance nonemployees because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT suspend or otherwise discriminate against you because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT discharge you because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT unreasonably delay in furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as your collective-bargaining representative.

WE WILL NOT transfer unit work from unit employees to nonunit employees of contract agencies and fail and refuse to provide the Union with notice and an opportunity to bargain concerning the decision to utilize the nonunit employees and the effects of the decision on unit employees.

WE WILL NOT fail to grant you merit increases for the period December 2006 through January 2009 without providing the Union notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT unilaterally change the timing of employee meetings with their supervisors as part of the performance evaluation system without providing the Union notice and an opportunity to bargain about the change and its effects.

WE WILL NOT lay off, suspend, or discharge you without providing the Union notice and an opportunity to bargain about these decisions and their effects.

WE WILL NOT assign bargaining unit work to nonunit freelance employees without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

WE WILL NOT unilaterally announce a requirement that you produce at least one story per day without providing the Union notice and an opportunity to bargain about the proposed new policy.

WE WILL NOT bypass the Union and deal directly with you by offering you nonunit terms and conditions of employment for unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that we

retain unilateral control over many terms and conditions of employment, thereby leaving you and the Union with substantially fewer rights and protections than you would have without any contract.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed us atour Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year will extend 1 year from the date that good-faith bargaining begins.

WE WILL reimburse the Union for its costs and expenses incurred in collective-bargaining negotiations from November 13, 2007, until the date on which the last negotiation session occurred.

WE WILL make our unit employees whole for any losses of earnings and other benefits resulting from our discontinuation of our program of merit pay raises for performance years 2006–2008 or our change in the timing of employee meetings with their supervisors regarding their 2008 performance evaluations, plus interest.

WE WILL make unit employees whole for any loss of earnings or other benefits resulting from our wrongful unilateral use of nonunit employees to do unit work, plus interest.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment that we unlawfully made and restore the status quo ante.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits resulting from our unlawful employment actions against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and WE WILL, within 3 days thereafter, notify each of them that this has been done and that those wrongful actions will not be used against them in any way.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS

Steve Wyllie, Esq. and *Joanna F. Silverman, Esq.,* for the General Counsel.

A. Barry Cappello, Esq., Dugan P. Kelley, Esq., and *Richard R. Sutherland, Esq. (Cappello & Noel),* of Santa Barbara, California, and *L. Michael Zinser* and *Glenn Plosa, Esqs. (Zinser Law Firm),* of Nashville, Tennessee, for the Respondent.

Ira L. Gottlieb, Esq. and *Marissa M. Nuncio, Esq. (Bush, Gottlieb, Singer, Lopez, Kohanski, Adelstein & Dickinson),* of Glendale, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in 21 days of trial in Santa Barbara, California, over the period May through August 2009. Posthearing briefs were timely submitted in November 2009.

The matter arose as follows. On various dates from November 27, 2007, through March 10, 2009, the Graphic Communication Conference, International Brotherhood of Teamsters (the Union or the Charging Party) filed various charges, and in some cases amended those charges, against Ampersand Publishing, LLC d/b/a Santa Barbara News-Press (the Respondent, or the Paper, or the News-Press) with the National Labor Relations Board (the Board).[1] The Regional Director for Region 31 of the Board issued consolidated complaints respecting these various charges, culminating in an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director on March 24, 2009 (the complaint). The complaint was further amended at the hearing. The Respondent filed timely answers to the complaints and amendments to the complaints.

The individual complaint allegations are addressed in detail in separate portions of this decision, infra, but the essential complaint allegations are set forth here to allow an initial understanding of the allegations at issue. The allegations are organized by statutory violation. Certain conduct alleged as violating multiple sections of the Act may be set forth in multiple categories.

The consolidated complaint alleges and the answer denies, inter alia, that the Respondent, in a December 2008 meeting, instructed employees not to discuss their terms and conditions of employment. Further, the complaint alleges the Respondent distributed a letter to employees offering to provide Respondent's attorneys to represent employees in the Board investiga-

[1] Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028738, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124.

tion of the charges herein and discouraging employees from cooperating with the Board's ongoing investigation of those unfair labor practice charges. The complaint alleges that this conduct violates Section 8(a) (1) of the National Labor Relations Act (the Act).

The complaint further alleges that the Respondent, since in or around July 2007, unilaterally changed the terms and conditions of employment of its bargaining unit[2] employees who had been hired through temporary agencies by failing to apply to them the same terms and conditions of employment, including but not limited to health and vacation benefits, that other unit employees enjoyed. In the alternative, the complaint alleges that to the extent that unit employees hired through temporary agencies are found not to be in the unit, the Respondent in so employing them has consequentially been transferring unit work from unit employees to nonunit temporary agency-provided employees. The complaint also alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and, to discourage employees from engaging in these activities and, in so doing, the Respondent discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

The complaint further alleges that on or around May 16, 2008, the Respondent transferred bargaining unit work to nonbargaining unit individual Robert Eringer. It also alleges that since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during calendar year 2006. The complaint alleges that since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during calendar year 2007. The complaint alleges that the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. The complaint further alleges the Respondent failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice. The complaint alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and, to discourage employees from engaging in these activities and, in so doing, discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that the Respondent laid off its employee Richard Mineards on February 28, 2009. It further alleges that on or about August 2008, the Respondent suspended its employee Dennis Moran and on August 30, 2008, discharged Moran. The complaint alleges this conduct was undertaken because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities and, in so doing, discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that the Union made various requests of the Respondent's agents during the period of August 16, 2008, through January 26, 2009, that the Respondent furnish the Union with information necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit. The complaint alleges that the Respondent took an unreasonable amount of time to furnish the information asked for and therefore failed and refused to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that the Respondent, since in or around July 2007, unilaterally changed the terms and conditions of employment of its unit employees who had been hired through temporary agencies by failing to apply to them the same terms and conditions of employment, including but not limited to health and vacation benefits that other unit employees enjoyed and that the Respondent failed and refused to bargain over the terms and condition of employment of its unit employees hired through temporary agencies. In the alternative, the complaint alleges that, to the extent that unit employees hired through a temporary agency are found not to be in the unit, the Respondent since in and around July 2007, has been transferring unit work from unit employees to temporary agency-provided employees. The complaint alleges that the Respondent in taking the actions described above in this paragraph took actions without prior notice to the Union, without the Union's agreement, and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint further alleges that on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer. It also alleges that since around December 2006 or January 2007, the Respondent failed to grant its unit employees a merit wage increase in recognition of work performance during calendar year 2006. The complaint alleges that since around December 2007 or January 2008, the Respondent failed to grant its unit employees a merit wage increase in recognition of work performance during calendar year 2007. The complaint alleges that the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. The complaint further alleges the Respondent failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past prac-

[2] The bargaining unit of the Respondent's employees and the collective-bargaining relationship involved herein are discussed in detail below.

tice. The complaint alleges that the Respondent in taking the actions described above in this paragraph took actions without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that the Respondent on or about May 2, 2008, laid off employee Kyle Jahner. It further alleges that the Respondent laid off its employee Richard Mineards and on February 28, 2009, laid off its employee DeWitt Smith. It further alleges that on or about August 2008, the Respondent suspended its employee Dennis Moran and on August 30, 2008, discharged Moran. The complaint further alleges that around December 3, 2008, the Respondent announced and established a requirement that unit employees produce at least one story per day. The complaint alleges that the Respondent, in taking the actions described above in this paragraph, took actions without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct or the effects of the conduct which concerned a mandatory subject of bargaining and therefore failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that on or about January 14, 2009, and continuing through January 16, 2009, the Respondent dealt directly with its employees in the unit by offering an employee nonunit terms and conditions of employment. The complaint alleges that the Respondent in taking the action described bypassed its collective-bargaining representative, the Union, and in so doing failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges that during collective negotiations between the Respondent and the Union concerning unit employees during the period of November 2007 to March 2009, as part of its overall conduct as alleged in the complaint, has insisted on bargaining proposals that are predictably unacceptable to the Union which proposals include, but are not limited to, the Respondent's proposals on management rights, grievance and arbitration, union bulletin board, discipline and discharge. Further the complaint alleges the Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union concerning unit employees to language in the contract including, but not limited to, language pertaining to a management-rights clause that would grant the Respondent unilateral control over many terms and conditions of employment of unit employees. The complaint alleges that the Respondent in taking these actions failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

The Respondent variously alleges that the conduct attributed to its agents in the complaint either did not occur or, in some situations where actions were taken, the Respondent's actions were not undertaken for the malign reasons alleged, or in the total context and circumstances, did not rise to the level of a violation of the Act, or is subject to additional affirmative defenses and that, accordingly, the Respondent did not violate the Act as alleged in any regards and the complaint should be dismissed.

FINDINGS OF FACT

Upon the entire record herein,[3] including helpful briefs from the Respondent, the Charging Party, and the General Counsel, I make the following findings of fact.[4]

I. JURISDICTION

At all material times, the Respondent, a limited liability company with an office and place of business in Santa Barbara, California, has been engaged in the publication of the Santa Barbara News-Press, a daily newspaper. During the calendar year ending December 2008, the Respondent enjoyed gross revenues in excess of $200,000, held membership in or subscribed to an interstate news service, the Associated Press, and advertised nationally sold products, including Cingular. During the same period the Respondent purchased and received at its Santa Barbara facility goods, supplies, and materials valued in excess of $5000 directly from suppliers located outside the State of California.

Based on the above, there is no dispute and I find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The pleadings establish, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

To an unusual degree the instant matter is best understood in the context of a series of events covering a period of years before as well as during the events in controversy. A relatively long recitation of background events is therefore useful.

1. Earlier cases involving the NLRB and the Respondent

Before addressing the relevant facts of the instant controversy, five decisions must be identified and their application to the instant proceeding addressed.

The first decision in time is the representation case decision that certified the Union as the exclusive representative of unit employees. That Board decision in Case 31–RC–8602, issued on August 16, 2007, and the decision of Judge Schmidt reported at JD(SF)–06–07 (March 8, 2007) on which it was

[3] A deficient exhibit was replaced on March 17, 2010, by agreement of the parties. See fn. 11.

[4] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

based, are important background evidence and are discussed, infra.[5] The second decision is that of Judge William G. Kocol in *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, JD(SF)–37–07, an unfair labor practice case which issued December 26, 2007. That decision is currently before the Board on exceptions. It contained a significant amount of uncontested background information which underlay the larger picture of the controversy at issue herein. As such it is referred to below.

The Board does not take judicial notice of a judge's decision in another case pending review before the Board because it is not binding authority. *St. Vincent Medical Center,* 338 NLRB 888 (2003), remanded on other grounds 463 F.3d 909 (9th Cir. 2006). But a judge may rely on the factual findings made by another judge in a prior case, even though it is still pending before the Board. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394–395 (1998), enfd. mem. 215 F.3d 1327 (6th Cir. 2000).

I have not relied to any extent herein on the credibility resolutions contained in Judge Kocol's decision, but rather have made independent and de novo credibility determinations based on the instant record and the credibility of the witnesses herein who testified under my observation. See *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 972 (6th Cir. 2003), cert. denied 543 U.S. 1089 (2005) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness"). The Kocol decision does however contain a significant amount of uncontested background information and both the decision and that background were alluded to by all parties with some regularity during the course of this proceeding. Where dealing only with clearly uncontested background evidence, I have relied to some degree on Judge Kocol's decision; again only to the extent of its recitation of uncontested events. The occurrence of the Kocol trial itself and the timing of the issuance of Judge Kocol's decision in the context of events are factual circumstances that took place during the events litigated herein and are therefore relevant to a degree in the instant proceedings. Those facts are presented herein, again, not the content of the Kocol decision but the fact of the trial and timing of the decision's issuance.

Two aspects of my use of the Kocol decision remain for discussion. First, in fashioning a remedy herein, which is a separate matter undertaken after the unfair labor practice allegations have been resolved, I have utilized the Kocol decision's findings of violations of the Act fully to determine the remedy, herein. The remedy portion of this decision, infra, makes this clear. Remedial provisions are importantly based on the conduct of the respondent involved both in the narrow proceeding and also in its past circumstances and conduct. The Kocol decision provides that critical latter element. The second aspect of my use of the Kocol findings are my use or nonuse of the unfair labor practice and other findings of the Kocol decision as a factor in determining the merit of allegations in the instant case. I have specifically determined not to use the Kocol decision's findings in that fashion. Thus, I have not relied on that decision's determinations to reach my own conclusions herein. Thus, my findings herein in this sense—and not respecting background facts and remedy elements—are completely independent of the Kocol decision including, as noted, independent of that decision's credibility findings and unfair labor practice findings contained therein.

A decision of Administrative Law Judge Lana Parke, *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, JD(SF)–04–10, issued on February 5, 2010, deals with events occurring after the complaint issued in the instant case and is therefore not substantively relevant to the instant proceedings given that the allegations of the complaint terminate as of the complaints issuance in March 2009. The Parke decision is relevant to the procedural history of this case, however, and for that reason is properly part of the record in the instant case. Since it is not substantively relevant it will not be relied on or alluded to further herein.[6]

The General Counsel sought injunctive relief under Section 10(j) of the Act respecting the Kocol decision in the United States District Court. That process produced a United States District Court decision by United States District Judge Stephen V. Wilson, *McDermott ex rel. NLRB v. Ampersand Publishing, LLC*., 2008 U. S. Dist. LEXIS 94596 at *39 (C.D. Cal May 21, 2008), and a subsequent United States Court of Appeals decision on the appeal of Judge Wilson's decision by Justice Richard R. Clifton of the United States Court of Appeals for the Ninth Circuit, *McDermott v. Ampersand Publishing, LLC*, Case No. 08-56202, 2010 WL 276208 (2010); General Counsel Petition for Rehearing en banc filed March 10, 2010. The two decisions deal with issues relevant to matters and issues involved in proceedings in the Federal courts under Section 10(j) of the Act. While each contains scholarship and analysis bearing on the instant case and has been considered for that content and learning, Federal court proceedings under Section 10(j) of the Act are to a degree conceptually independent of the application of those portions of the Act concerning unfair labor practice proceedings. And, the Federal decisions address the Kocol decision not the instant proceeding.

2. The preunion events and circumstances

Santa Barbara is an historic city, population just under 100,000, well favored by nature on California's coast at the northern end of the southern California conurbation. It is an affluent community somewhat separate from the far larger population centers to the south. The Santa Barbara News-Press is a venerable daily Santa Barbara newspaper that has for many years been the largest circulation daily local newspaper in the

[5] An administrative law judge is bound under the doctrine of collateral estoppel to Board findings made in an earlier case involving the same parties. See *Great Lakes Chemical Corp*., 300 NLRB 1024, 1024–1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992).

[6] This being so, the Respondent's posthearing motion to strike the Parke decision from the record is denied inasmuch as the matters addressed in that decision, JD(SF)–04–10, occurred in the context of the litigation of the instant case and are therefore a part of the instant cases procedural context.

area. Originally family owned, the paper thereafter moved through various hands until acquired by the New York Times in the mid-1980s. The News-Press was acquired from the New York Times by Wendy P. McCaw in 2000. She has been the owner at all times thereafter, holding the Paper in the legal form, Ampersand Publishing, LLC doing business as the Santa Barbara News-Press (the Respondent and sometimes referred to as the Paper or the News-Press).

McCaw apparently was initially not an active participant, at least in the newsroom content side of the business of the Paper, but from 2000 forward she came to view the news content of the Paper as unsatisfactory from her perspective and over time took an ever more active role in expressing her views and dissatisfactions with news articles to the Paper's management. By at least 2004, McCaw was regularly communicating her views about news articles that she did not agree with to the Paper's publisher and editors. McCaw's dissatisfactions in these regards continued and grew.

As owner she was able to, and did, take action on her dissatisfactions. Resignations and staff changes occurred. Continuing to be displeased, McCaw and her fiancé, Arthur von Wiesenberger, took over the position of publisher at the Paper's as its copublishers on April 27, 2006. By May of that year, the copublishers were directing criticisms of particular news articles and types of articles to the management and supervision in the news department. By June 2006, McCaw as owner and copublisher were disciplining news department employees for mishandling—in her view—news articles which appeared in the Paper.

At the same time that McCaw's dissatisfactions were being communicated and disciplinary actions taken as described above, at least some of the news and editorial staff of the Paper were alarmed that their perceived necessary and traditional journalistic separation between the news department and the ownership and editorial departments of the Paper was being eroded, if not eliminated, by the actions of the copublishers. In their view, modifying or holding back news articles to suit the sensibilities of important area families, advertisers, or the opinions of the owner or publishers was anathema.

In the first week of July 2006, the disagreements concerning news department handling of certain recently published and controverted articles boiled over. Several newsroom editors resigned and then-editor Roberts gave notice. Upon receipt of Roberts' notice he was asked to immediately leave the building by management and his exodus and the strong opinions held regarding the events generated an emotional scene between employees and management. Additional resignations occurred in the coming weeks. The heart of the passionate dispute remained the same: The desire of the owner, copublishers and their allies to correct perceived improper reporting of news at the Paper and the resistance and anger of at least some employees in the news department who opposed such actions perceiving Copublishers McCaw and von Wiesenberger and their allies' to be engaging in unethical interference in the news-reporting functions of the Paper.

This seemingly Manichean argument or dispute has never been resolved at the Paper and, at least among the camps of McCaw and elements of newsroom staff, the differences and disagreement remained in force during the relevant events herein.

3. The events during which the Union comes to represent news-department employees and the issuance of the Judge Kocol Decision

A group of the news department employees initiated contacts with the Union during these events in July 2006, the Union organized the news department employees, and on August 10, 2006, the Union filed a representation petition with Region 31 of the Board, docketed as Case 31–RC–8602, seeking to represent news department employees. On September 27, 2006, an NLRB election was held with a vote in favor of the Union of 33 to 6. Following litigation of postelection matters, the Board in an unpublished opinion on August 16, 2007, adopted Judge William L. Schmidt's Administrative Law Judge Report and Recommendation to Overrule Employer's Objections and Certify Petitioner, JD(SF)–06–07, (March 8, 2007), and certified the Union as the representative of the Paper's employees in the following unit (sometimes referred to as the bargaining unit or simply the unit):

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

There is no dispute and I find the unit is appropriate for purposes of collective bargaining within the meaning of Section 9(c) of the Act.

The period covered by this process, roughly July 2006, to March 2007, involved contentious events and circumstances which were the subject of NLRB charges filed against the Respondent. The charges were found meritorious by Region 31 of the Board, a consolidated complaint issued and an unfair labor practice trial ensued before Administrative Law Judge William G. Kocol. The hearings spanned the period August 14 through September 26, 2007. Judge Kocol issued his decision on December 26, 2007. Exceptions were taken to the decision. The Board had not ruled on the exceptions as of the time of the issuance of this decision.

4. Events respecting bargaining

The Board certified the Union as representative of unit employees on August 16, 2007. Thereafter, the Respondent and the Union initiated the process of bargaining. The parties discussed the mechanics and procedures of bargaining, the Union sought various information from the Respondent and the information provided was discussed and followed up on. The parties first met in face-to-face bargaining on November 13, 2007, and met on numerous occasions thereafter through the date of issuance of the complaint, herein March 24, 2009. No agreement has been reached.

B. Allegations of the Complaint

As might be expected from a substantial consolidated complaint consolidating multiple allegations taken from over a dozen charges filed during a period of over 15 months, the allegations at issue herein do not arise from a single or even a few events and situations, but are rather based on a variety of incidents arising in various settings and circumstances. Initially, it is appropriate to present the naked allegations in contest and only then to consider the allegations for purposes of resolution.

1. Independent[7] violations of Section 8(a)(1) of the Act

The Act provides at Sections 7 and 8(a)(1):

> Sec. 7. Employees shall have 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, and shall also have the right to refrain from any or all such activities. . .
>
> Sec. 8. (a). 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. . . .

Complaint allegations asserting that an employer's conduct violates Section 8(a)(1) of the Act, by virtue of the reference to Section 7 of the Act in Section 8(a)(1), are alleging that the specified conduct of the employer's agents improperly discourages or chills the employees' rights 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.

The complaint at paragraphs 21 and 22 allege violations of Section 8(a)(1) of the Act.

Complaint Paragraph 21

On or about August 22, 2008, the Respondent, by Wendy McCaw, distributed a letter to employees in which it offered to provide its own attorney to represent employees during the Board's ongoing investigation and which discouraged employees from cooperating with the Board's ongoing investigation of pending unfair labor practice charges.

Complaint Paragraph 22

On or about December 3, 2008, the Respondent, by Don Katich, in a conference room at the Respondent's facility, instructed employees not to discuss their terms and conditions of employment.

2. Violations of Section 8(a)(3) of the Act

Section 8(a)(3) of the Act states in part that it shall be an unfair labor practice for an employer to:

> [B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Complaint allegations asserting that an employer's conduct violates Section 8(a)(3) of the Act are alleging that the specified conduct of the employer's agents improperly discourages or encourages employee membership in a labor organization.

The complaint at paragraphs 8 through 13, 14(b), and 15 allege violations of Section 8(a)(3) and (1) of the Act by engaging in conduct which improperly discouraged employee membership in a labor organization.

Complaint Paragraph 8

Since in or around July 2007, the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies by failing to apply to them the same terms and conditions of employment including, but not limited to, health insurance and vacation, that are provided to other employees in the newsroom bargaining unit.

Complaint Paragraph 9

Since in and around July 2007, the Respondent failed and refused to bargain over the terms and conditions of employment of its unit employees hired through temporary agencies.

Complaint Paragraph 10

Since in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees.

Complaint Paragraph 11

Since on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer.

Complaint Paragraph 12

Subparagraph 12(a): Since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006.

Subparagraph 12(b): Since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.

Subparagraph 12(c): Since around December 2008 or January 2009, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2008.

Complaint Paragraph 13

Subparagraph 13(a): In or around November 2007, through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of bargaining unit employees.

Subparagraph 13(b): In or around November 2008 through January 2009, the Respondent failed to conduct employee performance evaluations of 2008 performance for its bargaining unit employees in accordance with the Respondent's past practice.

Complaint Subparagraph 14(b)

On or about January 7, 2009, the Respondent laid off its employee Richard Mineards.

[7] Violations of other subnumbered elements of Sec. 8 of the Act are also derivative violations of Sec. 8(a)(1) of the Act. Only allegations which are exclusively or independently alleged to violate Sec. 8(a)(1) of the Act are included here.

Complaint Paragraph 15

Subparagraph 15(a): On or about August 23, 2008, the Respondent suspended its employee Dennis Moran.

Subparagraph 15(b): On or about August 30, 2008, the Respondent discharged its employee Dennis Moran.

3. Violations of Section 8(a)(5) of the Act

Section 8(a)(5) of the Act states, in part, that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." Complaint allegations asserting that an employer's conduct violates Section 8(a)(5) of the Act are alleging that the Respondent by its conduct is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit.

The complaint at paragraphs 7 through and including 16, paragraphs 18, 19, and 20 allege violations of Section 8(a)(5) and (1) of the Act by the Respondent's failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit. Further the complaint alleges that the conduct alleged in paragraph 8 and paragraphs 10 through 16 relate to mandatory subjects of bargaining and were undertaken without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to the conduct and/or the effects of this conduct.

Complaint Paragraph 7

Complaint paragraph 7 contains many separate allegations. In complaint 7 and its subnumbers 7(a) through (e), various union requests of the Respondent for information over the period November 3, 2007, through January 26, 2009, are alleged:

Complaint subparagraph 7(a):

Since on or about November 16, 2007, the Union, by Ira Gottlieb, requested in writing that the Respondent furnish the Union with the following information:

For each of the 'temporary' employees, state:

How each of the employees made contact with the SBNP, if at all, during the hiring process;

Whether the employee responded to an ad placed by the SBNP;

Whether the employee responded to any communication from the SBNP to begin or continue the hiring process;

Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;

The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process;

The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP; and

Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instruction (including editing) for workplace performance.

Complaint subparagraph 7(b):

Since on or about December 3, 2007, the Union, by Ira Gottlieb, requested in writing that the Respondent furnish the Union with the following information:

Has Ampersand ever used employees it labeled 'temporary' employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?

If so, state the following for each instance of such use of temporary work:

The date(s) on which the 'temporary' employee performed bargaining Unit work;

The name(s) of any temporary agency which you claim employed the temporary employees;

The specific project or task(s) performed by the temporary employees(s); and

The pay rates for the temporary employees(s).

Complaint subparagraph 7(c):

Since on or about August 6, 2008, the Union, by Nicholas Caruso, requested in writing that the Respondent furnish the Union with the following information:

Notification of when a new employee is hired into the unit, when an employee terminates (including resignation), or when an employee working in the newsroom has a change in employment status (including changes in employee title, duties, or other terms and conditions of employment) including date of hire, classification and rate of pay.

The request included the above requested information for all individuals hired to perform work performed by the bargaining unit.

Complaint subparagraph 7(d):

Since on or about September 9, 2008, the Union, by Nicholas Caruso, requested in writing that the Respondent furnish the Union with the following information:

Notification of status changes for workers performing bargaining Unit work;

The status, classifications, wages and benefits of Alex Pavlovic, Dave Mason, Chauncey Kim, Alan Hunt, Bill McMorris and John Greely, and whether or not, and if not, what is their status in the New Press' view.

Please provide the same information for any other people performing bargaining Unit work with respect to whom you have not yet provided this information.

Complaint subparagraph 7(e): Since on or about January 14 and 15, 2009, orally, and January 26, 2009, in writing, the Union, by Nicholas Caruso, requested that the Respondent furnish it with information related to the employment status of employee Richards Mineards.

The information requested as alleged in the quoted subparagraphs 7(a) through (e) are further alleged in complaint subparagraph 7(f) to be relevant to the Union's duties as the exclusive representative of bargaining unit. Complaint subnumbers 7(g) through (k) allege that the Respondent variously failed and refused to provide the information requested or delayed in providing the information. Thus, the subparagraphs allege:

> Complaint subparagraph 7(g): Until about January 23, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(a).
>
> Complaint subparagraph 7(h): Until about January 30, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(b).
>
> Complaint subparagraph 7(i): Until about October 22, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(c).
>
> Complaint subparagraph 7(j): Until about October 24, 2008, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(d).
>
> Complaint subparagraph 7(k): Until about February 9, 2009, the Respondent failed and refused to furnish the Union with the information requested by the Union as described in [complaint] paragraph 7(e).
>
> Complaint subparagraph 7(l) alleges the conduct alleged in complaint subparagraphs 7(g) through (k) constitutes an unreasonable delay in furnishing the information requested.

Complaint Paragraph 8

Complaint paragraph 8 states: Since on or about July 2007, the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies by failing to apply to them the same terms and conditions of employment including but not limited to, health insurance and vacation, that are provided to other employees in the bargaining unit.

Complaint Paragraph 9

Complaint paragraph 9 states: Since in and around July 2007, the Respondent failed and refused to bargain over the terms and conditions of employment of its unit employees hired through temporary agencies.

Complaint Paragraph 10

Complaint paragraph 10 states: Since in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees.

Complaint Paragraph 11

Complaint paragraph 11 states: Since on or around May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer.

Complaint Paragraph 12

Complaint paragraph 12, subparagraphs 12(a), (b), and (c) state:

> Subparagraph 12(a): Since around December 2006 or January 2007, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006.
>
> Subparagraph 12(b): Since around December 2007 or January 2008, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.
>
> Subparagraph 12(c): Since around December 2008 or January 2009, the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2007.

Complaint Paragraph 13

Complaint paragraph 13, subparagraphs 13(a) and (b) state:

> Subparagraph 13(a): In or around November 2007, through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of bargaining unit employees.
>
> Subparagraph 13(b): In or around November 2008, through January 2009, the Respondent failed to conduct employee performance evaluations of 2008 performance for its bargaining unit employees in accordance with the Respondent's past practice.

Complaint Paragraph 14

Complaint paragraph 14, subparagraphs 14(a), (b), and (c) state:

> Subparagraph 14(a): On or about May 2, 2008, the Respondent laid of[f] its employee Kyle Jahner.
>
> Subparagraph 14(b): On or about January 7, 2009, the Respondent laid of[f] its employee Richard Mineards
>
> Subparagraph 14(c): On or about August 23, 2008, the Respondent laid of[f] its employee DeQitt Smith.

Complaint Paragraph 15

Complaint paragraph 15, subparagraphs 15(a) and (b) state:

> Subparagraph 15(a): On or about August 23, 2008, the Respondent suspended its employee Dennis Moran.
>
> Subparagraph 15(b): On or about August 30, 2008, the Respondent discharged its employee Dennis Moran.

Complaint Paragraph 16

Complaint paragraph 16 states: On or around December 3, 2008, the Respondent announced and established a requirement that bargaining unit employees produce at least one story.

Complaint Paragraph 17

Complaint paragraph 17 alleges that the conduct described in complaint paragraphs 8 and 10 through 16, relates to wages, hours, and other terms and conditions of employment of the

bargaining unit employees and are mandatory subjects of bargaining.

Complaint Paragraph 19

Complaint paragraph 18 alleges that on or about January 14, 2009, and continuing through on or about January 16, 2009, the Respondent by Don Katich, bypassed the Union and dealt directly with its employees in the bargaining unit by offering an employee nonunit terms and conditions of employment.

Complaint Paragraph 20

Complaint paragraph 20,subparagraphs 20(a) and (b) state:

> Subparagraph 20(a): At various times from November 2007 through and continuing to March 24, 2009, the Respondent and the Union met for the purposes of collective bargaining with respect to wages, hours, and other terms of employment of bargaining unit employees.
>
> Subparagraph 20(b): During the period of time described above in subparagraph 20(a), the Respondent engaged in the following conduct:
>
> > (i) The Respondent has insisted on proposals that are predictably unacceptable to the Union which proposals include, but are not limited to, the Respondents proposals on management rights, grievance and arbitration, union bulletin board, discipline and discharge.
> >
> > (ii) The Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management rights clause that would grant the Respondent unilateral control over many terms and conditions of employment.

C. Initial Comments and Findings on Questions of Relevance, Motivation, and Credibility

1. Resolution of allegations of the complaint

The allegations of the complaint are numerous and the issues in the case substantial and varied. Long cases present organizational issues respecting the better structures to allow the reader an understanding of the issues both legal and thematic, to achieve clarity of presentation and, without endless repetition, to achieve global comprehension as well as a grasp of the finer points of the arguments presented.

In the instant case, for better or worse, I have endeavored to present the various issues, allegations, arguments, and my findings and legal conclusions organized around particular events or subjects which frequently involve multiple allegations and legal arguments.

2. The Respondent's assertions of misconduct as a defense

a. General misconduct and malfeasance by the General Counsel of the NLRB

The Act at Section 3(d) provides for the position and powers of the General Counsel of the Board:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

The Regional Office with the duty to investigate and prosecute unfair labor practices in the Santa Barbara, California area, the area in which the Respondent is located, is Region 31. That office is headed by the Regional Director for Region 31. The Regional Director as an agent of the General Counsel supervises the investigation of unfair labor practice charges and generally determines if they have or lack merit.

In some cases, Regional Directors refer completed investigations of unfair labor practice charges to the Washington, DC based Division of Advice within the General Counsel's office for merit determinations by the Associate General Counsel head of that office. The determination of the Division of Advice on the merits of an unfair labor practice charge is binding on Regional Directors.

If a Regional Director determines an unfair labor practice charge lacks merit, and the charging party declines to withdraw the charge, the charge is dismissed by the Regional Director. Charging parties are then entitled to seek review of the dismissal with the General Counsel's Office of Appeals located in Washington, DC. That office may sustain the charge dismissal or reverse the dismissal and direct the Regional Office to issue complaint on the charge. If a Regional Director, on his or her own or at the instruction of the Advice or Appeals offices, determines a charge has merit, the parties are afforded an opportunity to settle the matter and, if that is not possible, the Director causes a complaint to issue and prosecutes the case.

All of the above actions are carried out by the agents of the General Counsel who has final authority in respect of the investigation of charges and the issuance of complaints. It is within this structure of governmental action, that the Respondent's allegations of the General Counsel malfeasance and misfeasance must be considered.

The instant case involves 15 charges which were found meritorious by the General Counsel and consolidated for complaint. There were earlier charges, such as the 10 found meritorious and consolidated for complaint before Judge Kocol as discussed supra. These charges were virtually all filed by the Charging Party herein against the Respondent herein. There were also a host of charges filed by the Respondent against the Charging Party, however, the General Counsel through his agents dismissed all of them.

The Respondent at hearing argued that the General Counsel never met a charge by the Charging Party against the Respondent he did not like and never liked any charge by the Respondent against the Charging Party. The Respondent argued that this statistical disproportion favoring the Union supports a finding of prosecutorial bias against the Respondent.

I rejected the argument at trial and reaffirm my finding here. The Court of Appeals for the Fourth Circuit in *Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1010 (4th Cir. 1997), rejected a bias argument based on the percentage of Board decisions which favored one side. The court cited its earlier holding in *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996), in which it stated, "this type of statistical argument is irrelevant" because in reality it "tells us little or nothing."

b. Specific allegations of misconduct by the General Counsel in prosecuting claims the investigation of which revealed evidence that would defeat the allegation or in issuing complaints where clear evidence to defeat the claim exists[8]

The Respondent on posthearing brief at 284–298 alleges a variety of circumstances respecting the instant complaint and allegations which it argues constitutes General Counsel misconduct and a defense to the complaint allegations. The Respondent argues on posthearing brief at 283:

> These allegations about the General Counsel are not made lightly, or filled with hyperbole. The General Counsel, through Region 31, has repeatedly ignored relevant evidence, prosecuted in the face of exculpatory evidence, was complicit in perpetrating a fraud upon the News-Press, and has been woefully partisan in its handling of charges and investigations involving the News-Press. This hearing was simply more of Region 31's nearly three year-long vendetta against the News-Press.

The specific arguments and instant allegations of the Respondent in these regards are addressed below.

The Respondent argues that the General Counsel or his agents, including the Regional Director, should not have issued complaint on certain allegations ab initio or, having issued the complaint allegations and discovering postcomplaint that the allegations were without merit, should have withdrawn those allegations.

The Respondent notes that the General Counsel made several contentions grounded on the argument that temporary employees referred by outside agencies were in the Respondent's unit. One of the General Counsel's alternate theories, see complaint paragraphs 8, 9, and 10 described, supra, was that agency-referred outside employees were unit employees. I have found, infra, that they were not the Respondent's employees and were not unit employees.

The Respondent argues that the General Counsel's assertions of these individuals' employee and unit status were clearly erroneous and therefore the General Counsel's prosecution of the allegations following from that error were "malevolent." I disagree for two reasons. First, the position of the General Counsel in these regards is simply not so erroneous that this advocacy could by any stretch of the imagination be regarded as prosecutorial misconduct. Second, and more generally, prevailing respondents have a means of redress under the Equal Access to Justice Act (EAJA), 5 U.S.C.A. § 504 (1982), for unreasonable prosecutions. EAJA provides for the award of attorney's fees and expenses to eligible parties who prevail in litigation before administrative agencies, unless the Government can establish that its litigation position was either "substantially justified" or that special circumstances exist which would make such an award unjust. That process is available when the decision at issue becomes final, a state this matter has not as yet achieved. This allegation is therefore not ripe for further consideration of the question at this stage of the proceeding.

The Respondent asserts on posthearing brief at 285:

> [W]itness Kyle Jahner was mislead about the purpose of his affidavit taken by the Region. [Tr. 397.] Mr. Jahner informed the General Counsel he signed an employment contract with Top Echelon, yet his Jencks statement conspicuously omitted any mention of the employment contract Mr. Jahner signed with Top Echelon. [Tr. 398.]

The transcript of the witnesses' examination by Respondent's counsel, Dugan Kelley, contains the following examination:

> Q. So the government told you that the *News Press* had misled you in believing—as to your employment status at the *News Press*?
>
> A. No, no. That's obviously kind of what the implication was. That's why they talked to me was that—they didn't tell me anything, they asked me questions.
>
> MR. WYLLIE: Objection, lacks foundation.
>
> A. They asked me questions. They didn't tell me anything. They wanted to know about my situation. They obviously knew enough about it.

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[8] The adequacy of the General Counsel's investigation may not be litigated in the unfair labor practice trial. Due process claims are tested, not by analysis of the investigation, but by analysis of complaint allegations; *Redway Carriers,* 274 NLRB 1359 (1985). In *Redway Carriers*, id. at 1371, the Board held,

> [T]he Court of Appeals for the Seventh Circuit has stated (277 F.2d at 1214), with respect to an injunction proceeding under Section 10(1) of the Act:
>
> It is our opinion that the scope, conduct or extent of the preliminary investigation are not matters relevant to or material for consideration on the issue to be adjudicated on hearing of a Section 10(1) petition, i.e., whether reasonable cause exists to believe a violation has occurred. This issue is to be resolved by the evidence adduced by the Board in open court to sustain its petition. The Board is enjoined to make a preliminary investigation but the adequacy of the investigation is judicially tested only by the Board's subsequent ability to sustain its initial determination that the investigation disclosed reasonable cause to believe that a violation occurred.
>
> *Ross M. Madden v. Hod Carriers Local 41,* 277 F.2d 688 (7th Cir 1960), cert. denied 364 U.S. 863 (1961). The same principle is applicable in a Board proceeding on the merits of the case. To paraphrase the court of appeals, the adequacy of the preliminary investigation is administratively tested, not by an investigation of the investigation, but by the General Counsel's ability in an open hearing to demonstrate by a preponderance of the credible evidence that the respondent has engaged in the unfair labor practices alleged in the complaint.

JUDGE ANDERSON: You want to establish the particulars, Counsel?

MR. KELLEY: No, Your Honor.

Q. Did you tell the government that you had signed an employment contract with Top Echelon?

A. An employment contract?

Q. Yes.

A. I believe I did, yes.

Q. Is there any reason why the fact that you signed an actual employment contract with Top Echelon is not in your affidavit [sic], sir?

A. I did not choose what went in and what did not go into that affadavit.

Q. Did you tell the government that you had signed an employment contract with Top Echelon?

A. If they had asked, I don't—again, I don't remember every detail of that conversation, but if they had asked that, I would've said yes.

Thus the transcript, at the pages offered by the Respondent in support of its argument here, does not support either the proposition that Jahner said he was mislead by the General Counsel nor support the argument that Jahner testified that he signed a contract and so informed the affidavit-taking agent of the Government. The witnesses' testimony: "I believe I did, yes," and "If they had asked, I don't—again, I don't remember every detail of that conversation, but if they had asked that, I would've said yes," hardly establishes the proposition advanced. And, further, had the witness testified that he signed an employment contract, and that that fact was not contained in the witnesses' affidavit, such a state of affairs would still not by any stretch of the imagination establish prosecutorial bias or misconduct.

The Board has commented on the difficulties in this area:

> A preliminary investigation, whether impartial or not, is not a substitute for or duplicate of a full evidentiary hearing. The principal purpose of the investigation is to determine whether there is sufficient evidence to warrant the issuance of a complaint. The investigator may not be interested in corroborative evidence. The investigator may also be concerned with certain disputed matters and less concerned with other matters which are more easily subject to resolution, or involve questions that should be addressed to more knowledgeable witnesses. Issues which appear important during the investigation may seem less so at the time of hearing and vice versa. Given the nature of the preliminary investigation, allegations that a witness gave prior contradictory testimony in his affidavit or that the affidavit is a more reliable indication of the truth than the witness' testimony at the hearing should be weighed carefully and with due regard to the context in which the prior statement was made. For example, when a witness testifies to facts which are not contained in his investigatory affidavit, a finding of contradictory testimony, i.e., impeachment by omission ordinarily is not warranted unless the context of the affidavit indicates a probability that the facts would have been included in the narrative if they were true. Additionally, due consideration must be given for the fact that in the present case certain words or phrases meant one thing to one witness and a different thing to another. [*Redway Carriers,* 274 NLRB 1359, 1371 (1985).]

Considering the record as a whole and the argument of the parties, I find the Respondent here is simply trying to further argue or bolster its case on the merits by asserting prosecutorial misconduct without facts to support its claims. I find no misconduct.

The Respondent argues that certain of the Government's witnesses: Hobbs and Hadley, did not testify effectively in support of a factual matter—the status of Eringer as an investigative reporter—advanced by the government. The Respondent argues this is another example where the Government should have withdrawn complaint allegations or, in the alternative—it is not clear—comprises misconduct. The Respondent's argument is essentially premised on arguable factual ambiguity concerning a collateral fact in trial testimony. I do not accept the argument that the evidence as it unfolded at trial should have produced governmental withdrawal of allegations or that the failure to so withdraw the allegations was prosecutorial misconduct. As is set forth elsewhere in this decision, the complaint allegations at issue were sustained based on the record as it is. The Respondent's allegation of governmental impropriety is rejected.

The Respondent revisits as argued governmental misconduct its statute of limitations defense to the complaint allegation concerning the withholding of merit increases discussed and resolved against the Respondent, infra. Again, the Respondent argues its factual and legal arguments as to the merits of the complaint allegations in a misconduct accusation. Further, the nature of the arguments made by the Respondent here concern argued erroneous positions and theory of the Government as to the complaint allegations. Such allegations under the cited cases, supra, do not raise viable allegations of prosecutorial misconduct. The Respondent's argument is rejected.

The Respondent attacks the Government's prosecution of complaint paragraph 13(a) as "[b]linded by prosecutorial zeal" for advancing a "ludicrous" theory based on the "bald assertion" of one witness and that it "prosecuted a case that conflicted with existing precedent." (The Respondent's posthearing brief at 287.) Assuming, without deciding, the Respondent's assertions are correct,[9] the failures of the Government's case advanced by the Respondent here would not in any event rise to the level of governmental misconduct. The Respondent seems to be arguing that if the Government does not prevail as to aspects of evidence or law, it has engaged in misconduct. This is conceptually erroneous. The Respondent's argument is rejected.

The Respondent argues that the General Counsel's allegations in paragraphs 14(a) and (c) of the complaint were not supported by sufficient evidence. The General Counsel made it clear that complaint paragraphs 14(a) and (c) was contingent on its prevailing in its alternative pleading in complaint paragraph 8 that outside agency employees were the Respondent's unit employees. When the General Counsel failed to sustain com-

[9] I have found that the complaint allegations of par. 13(a) were without merit, infra.

plaint paragraph 8, complaint paragraphs 14(a) and (c) failed in consequence. This is a reprise of the Respondent's earlier argument concerning complaint paragraph 8 and is rejected for the same reasons. Further, to the extent the Respondent is arguing that evidentiary weakness in the prosecutions case equates with misconduct, it is again conceptually erroneous.

The Respondent argues that the General Counsel's case concerning paragraph 16 of the complaint had "no evidence to support this allegation." (The Respondent's posthearing brief at 288.) I found merit to the allegation, infra, in part because I found the record evidence sufficient. The Respondent's argument is rejected.

The Respondent argues that complaint allegation 22 respecting what was told employees by a management official of the Respondent at an employee meeting was so clearly without merit because of language in the employee handbook that it was prosecutorial misconduct to issue the complaint with this allegation and to prosecute the allegation in court. I found merit to the allegation, infra. Thus, I find the argument that the complaint allegation was without merit is incorrect. Further, the argument that the Government's case was not convincing in the Respondent's view does not in any form or fashion justify the submission of an allegation of prosecutorial misconduct. Again, argued evidentiary weakness in the prosecution's case does not equate with prosecutorial misconduct. I reject the Respondent's argument.

The Respondent argues that regarding complaint subparagraph 15, the suspension and discharge of employee Dennis Moran, the Government knew that the Respondent represented it terminated Moran based on misconduct that it learned of from Blake Dorfman. Further, it alleges that the Government learned that Dorfman lied to the Respondent regarding Moran's conduct and, therefore, the Government was bound to inform the Respondent of these facts. The Respondent argues that prosecutorial ethics and responsibilities required such disclosure. "The actions—and inactions—of the General Counsel in prosecuting this case fell far short of what is expected of a prosecutor." (The Respondent's posthearing brief at 291.)

I found the Respondent discharged Dennis Moran in violation of Section 8(a)(3) and (1) of the Act, infra. To the extent the Respondent argues the prosecution knew of exculpatory evidence and did not inform the Respondent of the evidence which demonstrated Moran's innocence, I did not find the evidence in the record as to the allegation at issue established that the Respondent did not engage in the unfair labor practice alleged. Rather, based on all the record evidence I found to the contrary, that the Respondent discharged Moran in violation of the Act.

I am unable to conclude on the basis of the entire record in this matter that the Respondent would have taken any different action respecting Moran if the General Counsel had disclosed its evidence to the Respondent or that the General Counsel should reasonably have believed that it would. To the extent the Respondent argued at trial and on brief that had the Government only informed the Respondent that Dorfman had lied to it, the Respondent could have reinstated Moran and served both justice and the conservation of governmental resources by avoiding the litigation of this allegation, one fact impinges: After the Respondent learned of Dorfman's perfidy and Moran's innocence of the "desk clearing" allegation laid against him at trial, at least insofar as this record indicates, the Respondent did not at that time or thereafter offer to reinstate Moran. Given all the above, I reject the arguments of the Respondent. I specifically find no prosecutorial misconduct occurred.

The Respondent argues that allegations of complaint paragraph 20(b) were known by the General Counsel to be incorrect, unsustained by the evidence and "pure unadulterated folly." (The Respondent's posthearing brief at 291.) Those complaint allegations of the General Counsel were found by me, in conjunction with the "overall conduct" allegation of complaint subparagraph 20(c), to have merit, infra. Again the Respondent argues the merits of the complaint and, arguing the complaint allegation(s) were unsustainable, urges consequential prosecutorial misconduct must have occurred. Again this is not a proper basis for a misconduct claim. I reject the Respondent's argument here.

The Respondent further alleges that the General Counsel engaged in prosecutorial misconduct by means of distorting evidence: "XV. It is Misconduct for the General Counsel to Distort Evidence," the Respondent's posthearing brief at 293. The brief section correctly cites cases for the proposition that the General Counsel's distortion of evidence is improper and a basis for dismissal of allegations of a complaint. The section further correctly notes the relevant case standards and other cases lamenting and punishing actual prosecutorial bias.

The Respondent's noted brief section concludes: "Actual bias pervaded this prosecution." In the following brief section: "XVI. Bias and Prejudice have No Place In an Administrative Proceeding" (p. 295 of the Respondent's posthearing brief), the section concludes:

> The overriding concern of the News-Press has always been that Region 31, because of the initial hearing, routine nondismissal of charges, and questionable activity (that has somehow triggered an alleged violation of the Act when the News-Press responds to Region 31's contact of employees on personal cell phones). Has judged the fact as well as the case law as soon as [the Charging Party] files a charge. This is the kind of impermissible bias, conflict, favoritism, and pre-judgment, that has deprived (and will continue to deprive) the News-Press of the right to an impartial investigation so long as Region 31 maintains its anti-News-Press agenda.

The Respondent's argument in these quoted two sections of its brief contain correct citation of authority that governmental misconduct and bias are improper and must have consequences. However, and importantly there are no new specific factual arguments made in these sections concerning the instant matter save inferentially. Those inferences are here addressed.

The Respondent's brief parenthetically noted almost with wonder the Government's misperception of Respondent's conduct: "(that has somehow triggered an alleged violation of the Act when the News-Press responds to Region 31's contact of employees on personal cell phones)." That reference is surely

to complaint paragraph 21 which alleges a Wendy McGraw letter to employees violated Section 8(a)(1) of the Act. I have found, infra, that the Government sustained it burden with respect to the complaint allegation and that the Respondent by its conduct violated the Act. My analysis and conclusions respecting this allegation will stand or fall on their own before reviewing authority. Nonetheless, I found the law and the facts on the allegation not unclear. The complaint allegation, far from being wide of current application of Board and court case law, is controlled by quite conventional cases. Thus, I must answer the plaintiff cry of the Respondent as to the circumstances in the Respondent's quoted remarks, that the Respondent is simply wrong. The prosecution is advancing common argument and sought and obtained a not unusual result: A finding that an unfair labor practice occurred.

And when the Respondent's posthearing brief attacks the actions of Region 31 in dismissing and/or issuing complaints on charges in a biased manner, several circumstances seem relevant. First, based on the General Counsel's internal organization described supra, if the Region dismisses a charge, the review of that dismissal is conducted de novo by the Washington, D.C., located Office of Appeals which has its own staff. And, as the record shows has been involved in several matters in this proceeding, the General Counsel also maintains a Division of Advice, again in Washington, D.C., with a separate independent staff. So the Respondent's complaints about bias in case handling by Region 31, must also be directed, to a greater or lesser degree, to include the agents in charge of the two Washington, D.C. offices noted.

When the General Counsel through a Regional Director issues a complaint, it is just that: a collection of one or more accusations or allegations. The complaint must be proved before an administrative law judge. If the decision on the complaint is adverse to any party, in whole or in part, review is to the Board, thereafter to the courts. EAJA, as noted, is available to qualifying respondents for relief from unreasonable prosecution. The Respondent who asserts it has suffered at the hands of the Region in issuing complaints, must also note that those complaints—while not as yet in their final state and with review still in process—has not shown the Regional complaint in the instant case to be essentially without merit. The complaint at issue, herein, has largely been sustained—and sustained on record evidence not simply complaint allegations.

As to the charges cited by the Respondent as filed by it against the Union which have been dismissed as noted elsewhere in this decision, no substantive evidence offered by the Respondent addressing the merits of the allegations against the Union was kept from the record because of the fact that a charge or charges filed by the Respondent was dismissed by the General Counsel. I tried to make clear at the hearing and the Board has clearly ruled[10] that the Respondent's evidence is not rendered inadmissible because it was associated with a charge the General Counsel found without merit. Thus, the General Counsel's dismissals of charges that by the terms of the Act quoted, supra, are undertaken without Board review, had no affect on the Respondent's ability to adduce relevant evidence in its defense herein.

3. Misconduct and unfair labor practices by the Union

a. The controversy respecting the Union's use of economic weapons

The Union in 2008 engaged in economic action against the Respondent. The Respondent filed five charges with Region 31, Cases 31–CC–2169, 31–CC–2170, 31–CC–2171, 31–CB–12427, and 31–CB–12429, against the Charging Party alleging it was committing unfair labor practices in conjunction with its economic campaign against the Respondent. The Regional Director for Region 31 submitted the cases to the General Counsel's Division of Advice for advice on whether the Union had violated the Act. The Associate General Counsel, in charge of the Division of Advice, issued a 22-page "Advice memo" dated December 31, 2008, considering each of the charges in light of the relationship of the parties and concluded and instructed the Region consistent with its conclusion,

> that the Region should issue a merit dismissal of the Section 8(b)(4)(i)(B) charge [Case 31–CC–2169] regarding a Union agent's July 8 statement to Hot Springs Spa and Patio employee Sanchez and that the Region should dismiss all other charges.

The Regional Director on January 23, 2009, by separate dismissal letters, dismissed Cases 31–CC–2170, 31–CC–2171, 31–CB–12427, and 31–CB–12429. On the same date the Regional Director in Case 31–CC–2169 issued a merit dismissal letter. The Respondent appealed each dismissal to the General Counsel's Office of Appeals. By letter dated March 20, 2009, the Director of the Office of Appeals on behalf of the General Counsel denied the Respondent's appeals in all five of the Respondent's charges. The letter provided reasons for the denial of the appeals. It stated in part:[11]

> With regard to the Section 8(b)(4)(ii)(B) allegations, contrary to your contention on appeal, the evidence was insufficient to establish that the Union representatives'

[10] In *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), the Board approved the judge's holding at 334 NLRB at 500 fn. 6:

> [6] The Respondent had filed various charges against the Union with the Region, some of which remained before the General Counsel respecting these allegations. I held at trial and here reaffirm that, while any and all evidence relevant to Respondent's defense could be offered in the instant case, the content of the Respondent's charges against the Union before the General Counsel was not—above and beyond the evidence offered in those charges which was or could have been on offer herein—relevant simply because it had been submitted to the Agency in support of a charge against the Union. The charges filed against the Union by the Respondent are the business of the General Counsel in exercising his plenary control over complaints, the relevant evidence of the Union's misconduct in the bargaining involved herein is relevant whether or not changes against the Union had been filed.

[11] The original document in evidence as R. Exh. 1118, Exh. C, was incomplete. The parties by all party stipulation dated March 17, 2010, offered the complete copy as a substitute for the original deficient one. That stipulation is received and the exhibit has been replaced with the complete copy.

conduct at the sites of neutral employers constituted traditional picketing, confrontational conduct, patrolling or other violative conduct. Although the evidence establishes that union agent distributed handbills and engaged in conversation with the public, this activity doe[s] not rise to the level of picketing under the Act. *Teamsters Local No. 68 (Levitz Furniture Co. of Missouri*), 205 NLRB 1131, 1133 (1973). Although it is asserted on appeal that the representative' allegedly larger than usual size was itself confrontational, a person's above-average height and/or weight, without more, does not provide a basis for inferring that the individual was attempting to coerce, threaten or intimidate other individuals.

It is concluded that the relevant facts in these cases parallel those in *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 578–588 (1987). As in *DeBartolo*, there as [sic] no violence, picketing, or patrolling at the site of the neutral businesses doing business with the primary employer. Thus, no violation of Section 8(b)(4)(ii)(B) is established by the evidence.

With regard to the Section 8(b)(4)(i)(B) allegations, it was determined that, absent similar conduct, the Regional Director appropriately issued a merit dismissal with respect to the effort to induce an employee of a neutral to withhold service from his employer.

With respect to the Section 8(b)(3) allegations, the Union's efforts to persuade neutral employers to case to utilize the News-Press to advertise their products was, as previously observed, law and thus constituted a lawful economic weapon which could be used during negotiations to further the barraging objectives of the Union.

The Respondent argued correctly that union unfair labor practices during the course of engaging in economic action against an employer—all during the course of negotiations—could be a relevant factor in such an employer's defense to allegations the employer was not bargaining in good faith. It lamented, however, that the charges filed against the Union making such allegations had been improperly dismissed. I ruled and here reaffirm that the Respondent was not limited in the presentation of such evidence by the fact that charges respecting such allegation had been dismissed. The Respondent announced at trial that it intended to produce such evidence.

The parties entered into a stipulation (R. Exh. 1118) that in lieu of the Respondent presenting independent evidence in support of its contentions, the parties would adopt the facts and allegations described in the "Advice memo," dismissal letters, and Appeal's letter quoted immediately above, and in consequence avoid the need to present any evidence pertaining to the Charging Party's boycott of the News-Press. Thus, the "Advice memo" recitation of facts is accepted as true by all parties and constitutes all the relevant facts on the question. The parties further agreed the receipt into evidence of the stipulation satisfied all parties' right to present evidence on the boycott activity arguments offered in support of the Respondent's affirmative defense.

The General Counsel and the Charging Party rely on the arguments contained in the Advice memo to support the memo's conclusion that no violations of the Act sufficient to justify issuance of a complaint occurred. The General Counsel notes that as to the statement by a union agent to an employee of a neutral that he should not work for an employer who advertised in the Respondent's newspaper, the Advice memo found that the Respondent had presented no evidence that this conduct had adversely affected the parties' bargaining. The Respondent at hearing argued that the Union's conduct in support of its economic boycott in aid of bargaining should be taken into account in evaluating its conduct and establishes no violation of the Act was committed by the Respondent.

Relying on the facts as stipulated by the parties, and for the reasons stated and authorities cited in the Advice memo, and in agreement with it, I find there was simply a single action by the Charging Party's agents that was not permissible under the Act and that this single action did not rise to the level of improper efforts by the Charging Party to bring economic pressure to bear on the Respondent in aid of its bargaining positions. Thus, to the single statement of an agent of the Union to an employee of a neutral that he should not work for an employer who advertised in the News-Press, in agreement with the Advice memo, I find the isolated July 2008 remark was of no consequence to the negotiations that had been underway since November 2007.

I find therefore, based on the stipulated facts and the positions and arguments of the parties, that the Union's economic boycott of the Respondent in 2008 does not constitute in any manner a defense to the allegations against the Respondent at issue herein.

b. The argument the Union's bargaining conduct was improper and constitutes a defense to the allegations against the Respondent

The Respondent argues in its posthearing brief at 272:

> [The Charging Party] consistently engaged in conditional bargaining by attempting, as a term of employment, that employees and/or [the Charging Party] be able to challenge—through protest; subjective determinations by employees; and grievance and arbitration—content decisions of the newspaper. [The Charging Party's] proposals on management rights, discipline and discharge, and grievance and arbitration all combined to limit the News-Presses' ability to control the content of the newspaper by transferring content decisions to employees and/or [the Charging Party], and served to make the News-Press's content decisions subject to grievance and arbitration.

As is discussed in substantial detail below in the section on bargaining, the Union as part of its initial bargaining proposals offered language concerning employees' role in the newsroom which, the Respondent argued, set standards or granted employees the right to decide certain matters which, through the operation of the "reasonable" standards and the binding arbitration proposals, could be used to reduce the Publisher's control over the news. The Respondent further took the view that the

elements of these proposals concerning the newsroom work and ethics and use of employee bylines were all nonmandatory subjects of bargaining.

While conceding that the Union repeatedly withdrew these newsroom and ethics proposals—as opposed to discipline and grievance/arbitration proposals—when requested by the Respondent, the Respondent argues the "introduction, withdrawal, reintroduction, withdrawal and second introduction of its "work assignment/employee integrity" proposal hampered the bargaining progress, and stifled progress toward an overall agreement." Thus, the Respondent concludes, on posthearing brief at 272–273:

> Far from the News-Press being the bad actor in this play, [the Charging Party] systematically blocked progress towards agreement by reintroducing proposals on a permissive subject of bargaining it knew to be predictably unacceptable—the employees and/or [the Charging Party] controlling the content of the newspaper. In so doing, [the Charging Party] engaged in bad faith bargaining.

This state of affairs the Respondent emphasizes is a proper affirmative defense to the charges against it.

The General Counsel and the Union strenuously disagree. First each argues the logic of the Respondent's argument is fallacious. The Respondent refused to allow any standards of reason or any binding arbitration as to any matter whatsoever not simply in regards to news content or control over the news. The Respondent never expressed a willingness to allow any objective standards or arbitration during the periods when all the proposals it regarded as offensive had been withdrawn. It made no statement of conditional willingness to allow reasonable standards as to discipline or anything else or binding arbitration if in some manner the newsroom content was left out of the application of those proposals. They argue that the Respondent's argument about control is simply a sham and pretext cloaking it unchecked opposition to employee right of representation under the statute.

Further, the General Counsel and the Charging Party argue, the fact that the Respondent did not wish to agree with the Union's proposals does not mean those proposals may simply be labeled disruptive and/or that they somehow justify the Respondents unfair labor practices. Whether the proposals of the Union involved were permissive or mandatory is immaterial, the General Counsel argues, there is no doubt that the parties were never at impasse and any party may lawfully propose permissive subjects of bargaining in such a setting. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

On the basis of the record as a whole and the positions of the parties and with close consideration of the bargaining as is discussed in greater detail infra, I reject the argument of the Respondent that the Union was engaging in bad-faith bargaining. I do not regard the Union's conduct here challenged by the Respondent as rising to the level of a defense against the unfair labor practice allegations of the complaint. I accept the arguments of the General Counsel and the Charging Party that the Union's proposals which the Respondent took to be permissive subjects of bargaining were not for that reason evidence of bad-faith bargaining by the Union. Where no impasse has been reached, either party may offer proposals concerning nonmandatory subjects of bargaining. And here, the Respondent did discuss the contested proposals with the Union and, when the Respondent asked the Union to withdraw certain proposals, it did so. Given these findings, I reject the Respondent's asserted defense.

D. Allegations Respecting the Respondent's use of Employment Agencies

1. An initial caution about a potential ambiguity regarding these allegations

In considering the allegations that the Respondent violated the Act in regards the employment of individuals hired by or through outside agencies, it is important to keep in mind the fact that two categories of individuals were utilized by the Respondent at relevant times, but only one category is the subject to the allegations herein.

The Respondent has long had a practice of hiring "[e]mployees engaged for a specific period of time or to complete a particular project." (The Respondent's employee handbook at p. 12.) The Respondent maintains and used personnel forms, such as requisition forms, which allow for recordation of the "length of assignment" of temporary employees. During the Respondent's operation up to the union election, such hires had been few—on average roughly two a year, but regular and no such direct hire temporary employees were employed as of the September 2006 election. There is no dispute that those "temporary employees" directly hired on the basis noted were the Respondent's employees. The complaint does not challenge the direct hire or employment of these temporary employees by the Respondent.

The Respondent also utilized the services of individuals governed by contracts between the Respondent and outside providers. These agencies and the individuals providing services to the Respondent—including the doing of unit work—are variously referred to by the parties, witnesses, and in the pleadings. The complaint refers to the outside agencies as "temporary agencies" and to those individuals working under these contracts as "temporary agency-provided employees." The contract in evidence between the Respondent and an outside agency refers to these individuals as "contractors" and the outside agency as the "contractor's employer."

The Union initially was not fully informed of the difference in the two categories of individuals: the Respondent's direct hire, temporary employees, and the second category, the outside agency contractors doing unit work. So questions by the Union of the Respondent were initially ambiguous and were later directed to understanding the difference in the details of the two categories of the individuals and their use by the Respondent. It is important to keep in mind that the complaint deals only with the "outside agency" individuals doing unit work and not the Respondent's direct hire "employee handbook" defined temporary employees directly employed by the Respondent.

2. Issues respecting Respondent's use of employment agencies

The complaint alleges that the Respondent utilized employment agencies to provide employees who undertook bargaining unit work. The General Counsel pleads alternative theories of a violation of the Act in this conduct. First, the complaint, at paragraphs 8 and 9, alleges that these employees obtained through temporary employment agencies were bargaining unit employees who were not compensated consistently with other unit employees and that the Respondent at all times had refused to bargain with the Union concerning them.

The General Counsel's complaint's second, alterative theory, at complaint paragraph 10, alleges that, if the agency hired employees are not the Respondent's unit employees, then the Respondent by having these nonunit individuals do bargaining unit work was transferring work out of the bargaining unit without the agreement of the Union and without providing the Union with an opportunity to bargain respecting such transfers. In either case, the General Counsel argues and the complaint alleges, the conduct violates Section 8(a)(1), (3), and (5) of the Act.

As discussed in greater detail below, the Union's requests for information respecting these individuals, and the timeliness and sufficiency of the Respondent's responses to those requests, are also in issue as alleged violations of Section 8(a)(1) and (5) of the Act.

While there was no dispute that employment agencies were utilized by the Respondent and that individuals from those agencies did unit work, the parties disagreed respecting the unit placement of these individuals and the Respondent's past practices respecting them. These disputes require exploration of the relationships and practices concerning these individuals.

3. Initial facts, events, and allegations respecting the use of employment agencies

The Respondent's business record (GC Exh. 234) listed its Newsroom Temporary Agency Invoices for the period 2000–2008. Two employment services submitted a total of three invoices for referred employee services in the initial year (2000) of the Respondent's operations of the News-Press. Three agencies submitted a total of 34 invoices in 2001. A single agency submitted two invoices in January 2002. Agency use by the Respondent stopped at that point for a period in excess of 5 years resuming with an invoice submitted on May 29, 2007,[12] and significant invoices submitted thereafter through 2007 and 2008.

Yolanda Apodaca, the Respondent's director of human resources, testified the discontinuance or "freeze" in the use of outside agencies resulted from a policy initiated around January 2002, by the general manager and/or acting publisher at the time, Will Fleet, who determined the Respondent was "not to hire temporary employees through agencies." She attributed the decision to halt the use of agency services as based on the greater costs of using such services.

Apodaca testified she raised the matter of use of agencies again with copublishers, Arthur von Wiesenberger and Wendy McCaw and perhaps counsel in a meeting in the latter half of 2006. Apodaca testified she reported to the meeting participants that she needed assistance in hiring employees for the paper and wished to use the services of a recruiter and also to use temporary employment agencies to provide staff. She received authorization to "seek assistance if I need it." No other testimony respecting this meeting was offered.

The business records described above indicate the placement agencies' invoices halted in January 2002, did not resume until May 29, 2007, and specifically note that the agency employment use was frozen for the entire years 2003–2006. Apodoca placed the described meeting as falling somewhere in the latter half of 2006. This period is seemingly inconsistent with the fact that the Respondent's use of the agencies did not resume until May 2007. Why, if at a 2006 meeting the Respondent gave Apodoca permission to use agencies, was their use delayed till May 2007? Given this unexplained inconsistency and the fact that none of the other meeting participants testified respecting the event or its date of occurrence, I find that the meeting more likely occurred shortly before the initial resumed payments to agencies the records show began in May 2007. Based on the record as a whole and the testimony of Apodaca I find the meeting did not occur before October 2006. To this extent, I find Apodoca's memory of the timing was in error. In all events I credit the business record provided that the Respondent's use of agencies occurred in 2000 and 2001, halted in January 2002, and did not resume till May 2007, when an agency titled Office Team submitted an invoice to the Respondent.

The agency involved with the Respondent in July 2007, and subsequent periods respecting individuals doing unit work, is Top Echelon Contracting, Inc. The July 13, 2007 contract or "client services agreement" between Top Echelon and the Respondent was entered into evidence. By its terms the contract commits Top Echelon to provide its employees (called contractors in the document) to the Respondent for performance of services in accordance with the Respondent's provided job descriptions. Top Echelon is responsible for all compensation of the individuals involved and provides all necessary insurance and fringe benefits to those individuals such as, in conjunction with options taken by the individuals for joint payment for such coverage, as health insurance. Top Echelon has the right to direct and control the contractors in the performance of their work. The contract provides the Respondent may request that the contractors conduct themselves in accordance with its internal rules and policies.

The contract at paragraph 13 explicitly sets forth the relationship of the parties:

> The Client and Top Echelon agree that Contractor is Top Echelon's employee; and, the services provided by Contractor to the Client are provided pursuant to this Agreement. Neither this Agreement nor services provided hereunder shall be

[12] The portions of the agency invoices record covering calendar years 2003–2006, each bear the entry: "hiring freeze—no temp employees per acting publisher."

> construed to create a relationship of employment, agency, partnership or joint venture between Top Echelon and the Client or the Contractor and the Client. The status of Top Echelon and the Contractor relative to the Client shall be that of an independent contractor. Neither Top Echelon, the Contractor, nor the Client shall have any right or authority to assume or create any obligation on behalf of any of them.

In July 2007, four agency employees began working in the newsroom doing unit work. Six more were working in the newsroom by November 2007. At that time there were approximately 34 individuals in the newsroom performing the duties described in the unit description. Some 24 were undisputed unit employees of the Respondent. The remaining 10 were agency contractors. By December 2008, the agency contractors working in the newsroom totaled 8 and the undisputed unit members totaled 16.

The records of the Respondent and Top Echelon in the record, as well as the testimony respecting the contractors' duties and general working conditions at the Respondent are not in particular conflict. Top Echelon is a nationwide enterprise and maintains a substantial data base on the job referents and offer a wide range of benefits to them. It pays and handles typical "human resources" compensation matters. The Respondent through its newsroom supervision directed and assigned the contractors essentially identically with its own employees working in the newsroom in the same positions. The contractors were subject to the Respondent's performance and job quality rules. Time and attendance of Top Echelon referents was maintained by the Respondent's supervision, but the recordation was submitted to Top Echelon for payment calculation and actual payments to referents rather than to the Respondent's pay systems for its own employees.

The record established that the Respondent placed its own employment advertisements and interviewed applicants for these positions. The Respondent sometimes informed applicants that it intended to have work for them or that they would be employed in the newsroom, but directed the employment applicants to Top Echelon for referral back to the Respondent by the agency. Top Echelon in such circumstances did in fact process the Respondent's referents back to the Respondent as Top Echelon employees and also used "recruiters" who provided work applicants who were referred to and considered by the Respondent. Further, applicants were sometimes told by the Respondent's agents that they could not be initially hired by the Respondent directly, but would initially be employed through an agency referral with the possibility that thereafter in time they would become direct News-Press employees. Hiring decisions respecting contractors were made by the Respondent's agents. No individual referred to an agency by the Respondent for referral back to the Respondent was rejected by the agency involved. In so far as the record reflects, Top Echelon did not screen the individuals the Respondent requested be referred to it.

Reporter Marci Wormser was told by the Respondent before she started work that she would be employed by Top Echelon. She started initially in the newsroom in mid-November 2008, under the assumption she was a referred employee of Top Echelon. After working for a time, at about the end of November 2008, she learned that was to be converted into a freelance employee working directly for the Respondent on a fee-per-story basis. She continued on this basis, working at a desk in the newsroom and using the Respondent's facilities as other newsroom employees did. Thereafter, on or about December 18, 2008, she had a conversation with Don Katich and Scott Steepleton. She was told:

> I was still—they were still awaiting approval from [Publisher] Wendy McCaw to make me a temporary employee, well through Top Echelon. And that is because I'm a freelancer. I cannot work in the office any more using their equipment, but I could work for them as a regular freelancer.

She continued in this new freelancer status until she became a regular newsroom employee on or about January 31, 2009.

The Union and the Respondent held their first bargaining sessions on November 13 and 14, 2007. In these initial bargaining sessions the Union through its spokesman Nicholas Caruso requested information about the Respondent's hiring of temporary employees and its use of hiring agencies. The Respondent through spokesman and counsel Zinser informed the Union that the Respondent hired its temporary employees through an agency, "Top Echelon" but that he did not know when the Respondent had started using that agency. The Union asked for information about Top Echelon.

The Respondent on November 14, 2007, provided the Union with a list of temporary employees performing work in the newsroom, which list included their names, employing agency, job titles, dates performing unit work and pay rates. The document lists the names of eight Top Echelon employees working in the newsroom with commencement dates from July 9, 2007, and thereafter, and one Office Team employee working in the newsroom who started in July 2007.

Union chief negotiator, Caruso, again raised the temporary hire issue and told the Respondent that the Union felt that the Respondent was not hiring consistently with its employee handbook and expressed concern that the Respondent was replacing unit employees with hires through outside agencies and that the Respondent's conduct was a departure from its past practices. The Union indicated it was reluctant to immediately file NLRB charges respecting the issue but that it was of concern. Zinser suggested that the Union should make a written request for information on the issue and Union counsel Gottllieb agreed to do so noting that "using outside agency Top Echelon is a concern. . . ."

On November 16, 2007, union counsel, Gottlieb, sent to the Respondent's counsel, Zinser, by facsimile transmission, email, and USPS mail, a letter captioned: "Re: Unlawful hiring of 'temporary' employees to perform bargaining unit work." The letter stated in part:

> Following up on our discussion of November 14, 2007 at the negotiating table, this is to request the Employer's full and complete rationales(s) explaining why the nine "temporary" employees allegedly hired by either Top Echelon and/or Office Team Employee and working as reporters for the Santa Barbara News-Press, are, in Ampersand's view, not part of

the bargaining Unit consistent with the NLRB's certification and the requirements of the NLRA.

You will recall that approximately one month ago, the Union requested information pertaining to the "temporary" employees, and you provided that information during our second day of negotiations only after repeated requests therefore. When we asked you at the table for your rationale, you declined to provide it then, and asked for the opportunity to do so in writing.

As the Union has advised you, since these employees are clearly (and undisputedly) performing bargaining unit work, and all began work on or after July 2007, they must be included within the Unit represented by the Union. As you are aware, the number of eligible employees at the time of the election in September 2006 was 42. . . . The Union has demanded that the nine "temporary" employees (and any others doing unit work) be included and that failure to include them, and the failure to notify the Union of their hire, are violations of Section 8(a)(5) of the National Labor Relations Act. You requested the opportunity to explain in writing as opposed to orally across the table why they need not be part of the bargaining unit. Please provide that rationale, and the following information, no later than November 26, 2007.

For each of the "temporary" employees, state:

1. How each of the employees made contact with the SBNP, if at all, during the hiring process;
2. Whether the employee responded to an ad placed by the SBNP;
3. Whether the employee responded to any communications from the SBNP to begin or continue the hiring process;
4. Whether the employee responded to any communications from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;
5. The names of all people with whom the employee spoke and/or were interviewed in connection with the hiring process;
6. The names of all people who participated in the decision to hire the employee to perform work in the service of the SBNP; and
7. Identify all people who supervise the employees, including having the responsibility to discipline, discharge (or remove from working in the service of SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instructions (including editing) for workplace performance.

The enumerated information requested in this letter is alleged as requested on November 16, 2007, in complaint paragraph 7(a). The Respondent's April 7, 2009 answer to complaint paragraph 7(a) denies the allegation and further avers in part:

> Rather on November 13, 2007, [the Union], through Nicholas Caruso, verbally requested the names and rates of pay for temporary employees at [the Respondent.] On November 14, 2007, [the Respondent] provided the requested information. . . .

The Respondent did not provide any additional information on receipt of the letter and, on November 27, 2007, the Union filed Charge 31–CA–28589. The charge alleges violations of Section 8(a)(1) and (5). It's stated charge bases states in part:

> Within the last six months, the [Respondent] has failed and refused to bargain in good faith, by subcontracting and/or using employees it labels "temporary" employees to perform bargaining Unit work purportedly hiring them through an employment agency, contrary to the [unit] certification issued by the NLRB . . . and without prior notice to the Union and opportunity to bargain. The [Respondent] has further violated the Act by failing and effusing to provide requested information relevant to . . . utilizing alleged "temporary" employees to perform bargaining Unit work.

On January 23, 2008, by letter sent by facsimile transmission and USPS mail, Counsel Zinser wrote Counsel Gottlieb. The letter was captioned: Re: supplemental information concerning temporary employees and stated the Respondent wished to supplement information previously given concerning temporary employees. The letter then addressed the earlier information request. The letter tracked exactly the seven numbered questions presented in counsel Gottlieb's November 16, 2007 letter to Counsel Zinser, quoted in relevant part above, following each quoted emboldened question by the Respondent's answer.

The complaint pleads at subparagraph 7(g) that on January 23, 2008, presumably by the quoted letter, the Respondent responded to the Union's information request described in complaint paragraph 7(a). The issue framed by the pleadings then is whether or not, as alleged in complaint subparagraph 7(l), the period of time which passed between the Union's request and the Respondent's provision of the information "constitutes an unreasonable delay in furnishing the Union with the information requested."

On December 3, 2007, the Union, through Counsel Gottlieb, send a letter to Counsel Zinser by facsimile, email, and USPS mail with the caption: Re: Unlawful hiring of "'temporary' employees to perform bargaining unit work." The letter states in part:

> In addition to the requests for information that are now outstanding on this issue, please provide the following, all no later than December 21, 2007:
>
> 1. Has [the Respondent] ever used employees it labeled "temporary" employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?
> 2. If so, state the following for each instance of such use of temporary work:
>
> a. The date(s) on which the "temporary" employee performed bargaining Unit work;

b. The name(s) of all such temporary employees;
c. The name(s) of any temporary agency which you claim employed the temporary employees;
d. The specific project or task(s) performed by the temporary employee(s);
e. The pay rates for the temporary employee(s).

The enumerated information requested in this letter is alleged in complaint subparagraph 7(b).

By letter dated January 30, 2008, sent by facsimile transmission and commercial carrier, Counsel Zinser wrote Counsel Gottlieb. The letter stated in part:

> In regard to your additional information requests contained in your December 3, 2007 letter that are the subject of Charge No. 31–CA–28589, please note that I provided that information to you at our November 14, 2007 bargaining session. If you remember, at that bargaining session I handed you and Nicholas Caruso a list of temporary employees performing work in the newsroom, which included their name, agency, job title, dates performing Unit work and pay rates.
>
> I have enclosed that list for your convenience, I have also enclosed updated information to reflect the present list of temporary employees in the newsroom. I hope this resolves the matter and I look forward to continued bargaining.

The letter included two attached lists. The first is the list identified in the letter by the Respondent to the Union as having been earlier given to the Union along with other materials at the bargaining session of November 14, 2007. That list contains the names of eight Top Echelon employees working in the newsroom with their starting dates the earliest of which is July 9, 2007, and one Office Team employee working in the newsroom again with a July 2007 starting date. The second or revised list addresses the subsequent changes in the newsroom temporary employees: the list deletes two earlier Top Echelon employees who departed and adds four additional "temps" who started in the period October 2007 through January 2008.

The complaint pleads at subparagraph 7(h) that until January 30, 2008,[13] presumably the time of the quoted letter, the Respondent had not responded to the Union's information request described in complaint paragraph 7(b). The issue framed by the pleadings then is whether or not, as alleged in complaint subparagraph 7(l), the period of time which passed between the Union's request and the Respondent's provision of the information "constitutes an unreasonable delay in furnishing the Union with the information requested."

4. Are the employment agency-referred individuals within the bargaining unit?

The General Counsel and the Charging Party allege the employment agency hired individuals working in the newsroom were at all relevant times unit employees. The Respondent has at all times opposed this claim. The initial issue respecting these employees is: Whose employees were they? The General Counsel contends the Respondent was the sole employer of these employees and that the agencies involved were employers only in an administrative sense. The Respondent argues that the individuals involved were temporary employees who were jointly employed by a user employer and a supplier employer as in *Oakwood Care Center*, 343 NLRB 659 (2004), and, as that case holds, are not properly included in the bargaining unit. The Respondent further argues that temporary employees are not in the unit in any event.

The General Counsel advances the Board's decision in *Mar-Jam Supply Co*., 337 NLRB 337 (2001), in which agency-provided employees were found to be the user employer's sole employees. In that case, however, the user employer set uniform terms and conditions of employment for all employees doing unit work. That is not true in the instant case where the agencies involved offered various nonwage benefits which were not applicable to user employer employed employees. The General Counsel's cited case, *Employee Management Services*, 324 NLRB 1051, 1051 fn. 2 (1997), notes that there had been no exceptions filed to the joint employer findings of the judge. The decision is therefore not precedent respecting that analysis.

In *Town & Country Electric*, 309 NLRB 1250 (1992), the issue was the referring agency's status as agent for the employing employer. Both the Board and the judge found the complaint resolvable "even absent a joint-employer relationship" (309 NLRB at 1251). I find the case is therefore not precedential on the unit issues herein. So, too, the offered case, *Storall Mfg. Co*., 275 NLRB 220 (1985), enfd. mem. 786 F.2d 1169 (8th

[13] The General Counsel at trial moved to amend the January 30, 2008 date in complaint subpar. 7(h) (which is the date the Respondent alleged failure to provide the information ended in complaint subpar. 7(h)) to a different, later date, May 26, 2009. I denied the motion as untimely. Where, as in this motion, the General Counsel is seeking to extend the time an employer is alleged to have failed to provide a labor organization with requested information, he is in effect reconsidering his initial complaint contained concession that the information had been provided by the earlier date as set forth in the unamended complaint. Changing that date in the complaint to a later date—here over 15 months later, not only extends the period of the alleged violation, it explicitly withdraws the essential General Counsel concession that the unfair labor practice allegation ended and the information was sufficiently supplied by the Respondent to the Union on the earlier, original, date. Since something—here the January 30, 2008 letter—caused the General Counsel to allege the demand had been satisfied in the original paragraph, the amendment is not based on new evidence of what occurred on January 30, so much as is impliedly a reconsideration of that original evidence. This act of prosecutorial reconsideration of events would, if the amendment to the complaint were granted, constitute an expansion of the Government's case and extend the period of the alleged violation for the period of many months. To restate, the Government's proposed amendment was not an action justified by new evidence but rather the proposed amendment constitutes a withdrawal of the factual and legal conclusion that the information provided by the Respondent on the originally pled date, i.e., on the earlier date, January 30, 2008, was sufficient to satisfy the employer's obligation. This prosecutorial reconsideration of the legal consequences of the events of January 30, 2008, here the delivery of the quoted letter—was before the General Counsel at the time the complaint issued. The proposed mid-trial amendment is therefore out of time.

Cir. 1986), presents and agency analysis and not a bargaining unit analysis and therefore is not on point.

The General Counsel and the Charging Party further argue that the employees involved—the agency-provided individuals—were not in fact temporary within the Board sense of the term. Unlike the Respondent's directly hired temporary employees, the agency referred employees were not hired for specific periods of time or for particular projects. Thus, these individuals did not meet the Respondent's own employee handbook definitions.

Having considered the arguments of the parties on the issue as well as their cited cases, I find that the agency referred individuals are not properly within the certified bargaining unit. The issue here is unit cohesion not the agency of one employer as compared to the other. The fact that the fringe benefits of these employees were set by the agency and the individuals in consultation with the agency selected their fringe benefit choices from a menu of coverage and the associated fact that the Respondent did not have a role in setting those benefits renders the agency-referred employees essentially independent from the Respondent in that important aspect of compensation.[14] They are not employees of the Respondent for purposes of this analysis. It is unnecessary having resolved the issue of bargaining unit inclusion and the identity of their employer, to go further and resolve the arguments respecting the temporary or full-time status of these individuals here.

The General Counsel's allegation in paragraph 8 of the complaint is that the Respondent unilaterally changed the terms and conditions of employment of its unit employees hired through temporary agencies, by failing to apply to them the same terms and conditions of employment applied to other employees. In paragraph 9 of the complaint the General Counsel alleges that the Respondent has failed and refused to bargain over these unit employees. Having found that employees hired through temporary agencies are not the Respondent's unit employees, I shall dismiss these paragraphs of the complaint. I note the complaint states alternate theories regarding the individuals involved which are dealt with elsewhere in this decision.

The complaint at subparagraphs 14(a) and (c) allege the Respondent laid off its employees Kyle Jahner and DeWitt Smith. Having found that the General Counsel's first temporary agency theory as alleged in complaints paragraph 8 and 9 is not correct and having dismissed those paragraphs of the complaint, the General Counsel's opening remarks on the first day of trial come into play. Counsel for the General Counsel asserted:

> Respondent also laid off temporary employees, as alleged in the Complaint, Dewitt Smith and Kyle Jahner. Now, these allegations—I believe this [is] Paragraph 14 of the Complaint. In Paragraph 14 of the Complaint, these obligations are predicated on our first theory, Your Honor, that these—that the temporary agency-provided contractors or employees, that these people were actually employees of Respondent in the unit, and that by failing to notify the Union of the—of the failure—of the impending layoff of both of these unit employees that the Respondent had, again, violated the Act.
>
> Now, if you were to find that our second theory were correct, that these employees were actually jointly employed and this is an unlawful transfer of work than these two allegations with respect to the layoff. They wouldn't go anywhere because their—their contention on a finding that they were employees of the—of the Respondent.

Given the quoted statement of counsel for the General Counsel on the opening day of the hearing, and having found that agency-referred individuals are not employees of the Respondent, complaint paragraphs 14(a) concerning Kyle Jahner and 14(c) concerning Dewitt Smith are without merit. As the General Counsel concedes in his quoted statement, given my finding that they are not employees of the Respondent, no violation of the Act has been sustained. I shall therefore dismiss the allegations respecting these two individuals.

5. Was the Respondent's use of agency employees a violation of Section 8(a)(5) and (1) of the Act?

a. The General Counsel's prima facie case

The General Counsel's complaint paragraph 10 is an alternative pleading to the complaint paragraphs 8 and 9 dismissed above: "[S]ince in or around July 2007, the Respondent has been transferring unit work from the employees in the bargaining unit to temporary agency-provided employees." This is alleged to violate Section 8(a)(1) and (5) of the Act in complaint paragraph 25.

There is no dispute that the election in NLRB Case 31–RC–8602 was held on September 27, 2006, and that the Board issued the certification of representative to the Union on August 16, 2007. The Charging Party notes on brief at pages 1–2, fn. 3:

> [T]he relevant date by which to measure the status quo . . . is not the NLRB certification date of August 2007, but the September 27, 2006 election date. *Laurel Baye Healthcare of Lake Lanier*, 352 NLRB 179 (2008); *Sprain Brook Manor Nursing Home LLC*, 351 NLRB 1190 (2007); *Ramada Plaza Hotel*, 341 NLRB 310 (2004); *Mike O'Connor Chevrolet*, 209 NLRB 701(1974).

The citation of authority is correct.

There is also no dispute that the use of agency employees doing unit work in the newsroom started for the first time following a multiyear hiatus, see discussion infra, in July 2007. At that time four agency-provided employees started in the newsroom: Angel Pacheco and Joe Melendez as reporters, Kyle Johner and Kevin Merfeld as sports department writers and copy editors. By November 2007, 6 additional agency employees were at work as reporters, writers or copy editors for a total of 10 employees. To put the hires in perspective, in September 2006, 42 employees were listed on the election eligibility list. With the start of bargaining in November 2007, 24 unit employees were employed in the newsroom as were 10 agency employees. Agency employees continued to be utilized by the

[14] The General Counsel's theory and trial of the case eschews any argument that the agencies are joint employers with the Respondent.

Respondent in the newsroom in similar proportion—roughly comprising 50 percent of the number of unit employees with variation—into early 2009. There is no reason to conclude that these individuals did less unit work than the Respondent's unit employees on an hour-by-hour basis. Thus, I find that at all times between July 2007 and early 2009, significant amounts of unit work were being provided by nonunit employees.

It is clear then that the Respondent hired agency-provided individuals to do and they did do significant quantities of unit work during the noted period throughout which the Union represented unit employees. It is also clear that the Respondent did not notify the Union that the Respondent was going to use agency-provided employees to do unit work until bargaining commenced in November 2007, at which time use of such individuals was well underway. There is no dispute that the Respondent did not at any time offer to bargain concerning either the agency supplied employees nor the unit work that they were doing. Finally, there is no dispute that the Respondent did not at any time obtain the agreement of the Union to the Respondent's use of agency-provided employees to do unit work.

An employer's decision to subcontract work performed by bargaining unit members is a mandatory subject of bargaining. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). Here, that decision was taken by the Respondent and instituted during the postelection period. There is no claim the Union was informed, provided opportunity to bargain or gave consent to these actions. Thus the General Counsel has established his prima facie case that a violation of Section 8(a)(5) of the Act occurred.

b. Was the Respondent's use of agency-provided employees to do unit work a benign continuation of a legally sufficient past practice?

The disputed aspect of the agency-provided individuals doing unit work is whether or not the Respondent's had a sufficient past practice justifying the disputed use without bargaining. Where the employer raises a defense of past practice to a unilateral change allegation of the type at issue here, the General Counsel bears the burden of showing, by a preponderance of the evidence, that the allegedly unlawful subcontracting constituted a material and substantial change in the Respondents' practices. *Great Western Produce*, 299 NLRB 1004, 1009 fn. 2 (1990); *Clements Wire,* 257 NLRB 1058, 1059 (1981).

The Board in a recent case, *Eugene Iovine, Inc*., 353 NLRB 400, 400 (2008), enfd. No. 09-0217-ag (2d Cir. 2010), noted the evidentiary standard for determining the sufficiency of the pattern or frequency of occurrence of the past practice:

> The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

The Board approved the analysis of Administrative Law Judge Aleman in *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003), who set forth the following:

> A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" (citations omitted). *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors,* 334 NLRB 651 (2001), *Dow Jones & Co., Inc.,* 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises,* 324 NLRB 1123 (1997); *Blue Circle Cement Co.,* 319 NLRB 661 (1995); *Lamonts Apparel, Inc.,* 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel,* 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida,* 144 NLRB 311 (1963); *The American Lubricants Co.,* 136 NLRB 946 (1962).

The Respondent's past practice concerning agency-provided newsroom employees is described in the Respondent prepared summary of its payments to vendors, i.e., agencies, for newsroom referents in the period 2000–2008. As described briefly, supra, agency use is revealed by weekly invoices submitted by agencies for payment. Thus, the total for 2000 was three weekly invoices submitted by agencies for payment in October 2000. The total for 2001 was 34 weekly invoices submitted through the year. The total for 2002 was two weekly invoices submitted in January 2002.

The document reveals no agency referrals in calendar years 2003–2006. In the space on the record for each of those years is the entry: hiring freeze. Apodaca testified the freeze was a policy decision of the Respondent's publisher at that time. The first invoice ending this hiatus is dated May 29, 2007,[15] and invoices were submitted regularly thereafter to the end of 2008. As described supra, Apodaca testified the Respondent's management and counsel determined to resume the practice of using agency referents in the newsroom upon her request. I have found, supra, that this recommendation and decision were taken in 2007, some time shortly before the resumption of the practice in May 2007.

The document under discussion has but three columns: (1) for the name of the agency involved; (2) for the dates of the invoices submitted; and (3) for the amount paid on each invoice. Because the column indicating the amount paid is redacted, it is not possible to gauge the numbers of individuals covered by each invoice—a number that could be roughly calculated were the amount of each invoice included. While there was some nonspecific testimony that agency referents might have worked at other times, I specifically credit the record in-

[15] Since invoices were submitted on a weekly basis, the commencement of unit work by agency referents was in May 2007.

volved and discredit any suggestion inconsistent with the document.

Thus, the pattern under scrutiny for determining if the use of agency referents in the newsroom on and after May 2007, was a unilateral change or rather was simply the continuation of a past practice may be simply stated. The Respondent used outside agencies to refer individuals to do newsroom, i.e., unit, work as measured on a total number of weekly invoices basis as follows:

2000—2 weekly invoices starting in October 2000
2001—34 weekly invoices throughout 2001
2002—2 weekly invoices ending in January 2002
2003—hiring freeze—no employees referred
2004—hiring freeze—no employees referred
2005—hiring freeze—no employees referred
2006—hiring freeze—no employees referred
2007—invoices commence May 29, 2007

Applying the Board cases cited to the past practice of the Respondent's use of agency referred individuals as workers in the newsroom, it is clear that the 16 months of agency use in colander years 2000 and 2001, followed by a total freeze and discontinuance of agency use for the following 63 calendar months in 2002 into 2007—over 5 years—clearly does not rise to a level of a sufficient past practice to allow its reintroduction without notice to and bargaining with the unit employees representative. The Respondent had not used temporary agencies for newsroom work for over 5 years. That hiatus period is simply far too long to consider the 63-month old prior use of agencies to refer newsroom workers as part of a pattern or practice of conduct when viewed in May 2007. Further, there is no evidence newsroom employees were told of the practice during that period. Clearly the use of temporary agencies in the manner noted was not something that occurred with such regularity and frequency that unit or newsroom employees in 2007 could reasonably expect to continue or reoccur on a regular and consistent basis.

Indeed the use of temporary agencies prior to 2007, was not a pattern or repeat or recurrent practice. The meaning of all such words carries the concept of doing again. Here, the Respondent's use of agencies to procure newsroom workers—from the perspective of the time just before agencies were used in May 2007—was undertaken in 2001, and continued for a bit of 2002 then was simply discontinued for over 5 years. The description best applied to this course of conduct is initial use followed by discontinuance followed years later by resumption. There was no repeated course of action; no continuing pattern of conduct. So, too, the May 2007 resumption was a first time resumption not a repetitive element in a pattern or practice. The May 2007 resumption may have started a pattern, but the test here is for the actions of May 2007 to constitute part of the continuing pattern not to be the founding element in a resumption of long discontinued conduct.

I have found the hiatus of over 5 years in the Respondent's use of temporary agencies for obtaining newsroom workers does not support a finding of a pattern or practice. I have found that the unit or newsroom employees could have had a reasonable expectation the Respondent would start using temporary agency referrals in March 2007. I therefore find and conclude that the Respondent did not have a "past practice" at relevant times within the meaning of the Board decisional law, set forth in part above, which could justify its May 2007 decision to use temporary agencies to procure independent contractors to do unit work in the newsroom. I therefore find the decision was taken by the Respondent without meeting its notification and bargaining obligations to the Union.[16]

c. Summary and conclusion respecting the unilateral subcontracting allegation

There is no doubt that the Respondent resumed the use of agency employees. I have determined that these individuals are not employees of the Respondent. Thus the Respondent is not a joint nor a single employer of these temporary agency referents. I have further found that these individuals are not members of the Respondent's bargaining unit represented by the Union. Thus, any issue remaining respecting these individuals must be analyzed considering them to be subcontractors assigned by the Respondent to do unit work.

There is no doubt and I have explicitly found earlier that the amount of unit work lost to unit employees through the Respondent's use of the subcontractors provided by the agencies in and after May 2007, was substantial and resulted in a significant reduction in the number of unit employees employed by the Respondent who were in the bargaining unit. I have further found that the Respondent's subcontracting commenced in May 2007, and the Respondent's decision to commence the subcontracting was taken after September 27, 2006. Thus, I have found both the subcontracting and the decision to subcontract occurred during the period the Union represented the Respondent's unit employees.

Given the above, I found that the Respondent's decision to subcontract, its subcontracting, and the effects of its subcontracting on unit employees, are mandatory subject of bargaining under the Supreme Court's decision in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964). Having made that threshold determination, I then turned to the issue of whether or not the Respondent was simply continuing a past practice of subcontracting that commenced before its obligation to bargain with the Union arose. I found, as set forth above, that the past conduct respecting contracting relevant to agency referents doing unit work did not rise to the level of a past practice justifying an omission, let alone refusal, to notify and bargain with the Union respecting the Respondent's decision to subcontract, its actual subcontracting or the effect of the subcontracting on the bargaining unit.

[16] As noted, supra, the term "temporary" applies to the agencies and not to the duration of worker's employment. The record shows that the Respondent employed directly a very few individuals for limited, fixed duration or specific task employment. These true temporary employees of the Respondent are not involved herein. The Respondent has argued the agency referents were temporary employees. Based on the record herein, I have found, supra, they were not Respondents employees.

Based on all the above findings, I further find that the Respondent, by its admitted failure and refusal to notify the Union before the decision was taken to use agency-referred independent contractors to do unit work on and after May 2007 into 2009, and its further failure and refusal to provide an opportunity to the Union to bargain about the subcontracting decision and its effects during that period, violated Section 8(a)(1) and (5) of the Act. These findings and conclusions sustain the General Counsel's complaint allegations as set forth in complaint paragraphs 10 and the conclusionary paragraphs as noted supra.

6. Was the Respondent's use of outside agency employees to do unit work a violation of Section 8(a)(3) and (1) of the Act?

a. The parties' positions and the applicable case law

The General Counsel and the Charging Party argue, and the complaint at paragraphs 10, 24, and 25 alleges, that the Respondent undertook the subcontracting discussed above to discriminate against its unit employees in violation of Section 8(a)(3) and (1) of the Act. The General Counsel and the Charging Party rely heavily on the timing of the contractor use by the Respondent to do unit work, and, finally, by the fact that the agency supplied contractors were used in violation of Section 8(a)(5) of the Act and the Respondent's delays and refusals to provide information respecting them were also in violation of Section 8(a)(5) of the Act. The Respondent argues that use of the agency-supplied contractors at all relevant times was a business driven continued use which had been a longstanding practice. The Respondent also argues no violations of Section 8(a)(5) of the Act may be properly found respecting any of its actions respecting these individuals.

An employer violates Section 8(a)(3) and (1) of the Act if that employer subcontracts bargaining unit work in response to union activity. *San Louis Trucking, Inc*., 352 NLRB 211 (2008), *Gaetano & Associates*, 344 NLRB 537 (2005), enfd. 183 Fed. Appx. 17 (2d Cir. 2006). Subcontracting of bargaining unit work violates Section 8(a)(3) and (1) of the Act when undertaken for antiunion reasons. *Lear Siegler, Inc*., 295 NLRB 857, 860 (1989). The question in most antiunion conduct cases, including the instant alleged subcontracting discrimination allegation, is the employer's motivation for taking the actions under challenge. The Board's *Wright Line* analysis is applied in such situations. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Under *Wright Line*, the General Counsel has the burden of proving, by a preponderance of the evidence, that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Antiunion motivation may be established through direct or circumstantial evidence. An example of such circumstantial evidence includes the timing of the decision. "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Gaetano & Associates*, 344 NLRB 531 (2005), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Thus, the Board stated in *Allstate Power Vac, Inc*., 354 NLRB 980, 983 fn. 12 (2009).

In analyzing these allegations under *Wright Line*, the judge should, where necessary, address the General Counsel's arguments that the Respondent deviated from past practice in taking the above alleged unlawful actions and/or treated the affected employees differently than it had treated other similarly situated employees in the past.

b. The timing of events

The timing of events has been discussed extensively above and need be presented here only in summary form. Prior to any employee union activities, differences of opinion between elements in the newsroom and management had existed which culminated in July 2006 with the resignation of the Respondent's executive editor, its managing editor, its deputy managing editor, its city editor, its business editor, and its sports editor. Five staff writers, a columnist, and a copy editor resigned in the days following.

Newsroom employees commenced union activities in July 2006. The relevant facts concerning the petition and certification are not in dispute. A representation petition, Case 31–RC–8602, was filed on August 10, 2006. The election was held on September 26, 2006. A hearing on postelection matters was conducted on January 9 and 10, 2007, before Administrative Law judge William J. Schmidt. Judge Schmidt issued his Administrative Law Judge Report and Recommendation to Overrule Employer's Objections and Certify Petitioner, JD(SF)-06-07, on March 8, 2007. The report and recommendation was appealed by the Respondent to the Board who on August 16, 2007, adopted the report and certified the Union as the representative of the unit employees.

As has been discussed above and will be further discussed below, the Respondent from early 2002 into May 2007—over 5 years—did not use outside agencies to provide independent contractors to do unit work. During the period into May 2007, the Respondent's agents prepared and obtained approval of personnel requisition forms for some replacements to be hired for the newsroom employees who left for various reasons. The General Counsel notes, none of these approved personnel requisitions suggests the replacements would be employed on a temporary basis or for a specific job or fixed length of time. No outside agency employee was used to fill these positions.

In late May 2007, for the first time since January 2002, the Respondent utilized outside agencies to provide contractors to do newsroom work. In July 2007, four contractors were used in the newsroom. By November 2007, the number of contractors totaled 10. At the time of the commencement of bargaining in mid-November 2007, the bargaining unit comprised 34 indi-

viduals and the contractors remained at 10. By May 2008, 24 individuals worked in the newsroom: 19 unit employees and 5 contractors. In December 2008, the totals were 16 unit employees and 8 contractors. The Respondent discontinued use of newsroom outside agency contractors in February 2009, converting six contractors into unit employees.

Yolanda Apodaca testified that she recommended the reinitiation of the use of outside agencies to provide contractors because of the large number of new hires that were required as a result of the tumult described and the concomitant employee turnover, coupled by the fact that the Respondent's human resources department was of limited size and capacity. It is clear from the testimony of many individuals who came to be outside agency contractors used by the Respondent in the newsroom that these individuals' interviewing, evaluation of experience, and general applicant screening and hiring evaluation was undertaken by the Respondent's staff. Further it was at least often true that the evaluating agents of the Respondent were unaware that a job applicant, in the event the supervisor recommended the applicant's hire, was going to be hired as an outside agency referral rather than as a Respondent employee. Further, it is clear that the Respondent in the cases detailed in the record, advertised or otherwise directly procured job applicants for its positions and, only after an applicant had been vetted and selected by the Respondent, was that applicant referred to the outside agency. Indeed some job applicants were notified they were hired by the Respondent directly as the Respondent's employees and actually commenced employment only thereafter to be informed they were to be contractors rather than the Respondent's employees.

Marci Wormser testified that she sought work in the Respondent's newsroom by having a friend deliver her resume to Respondent's assignment editor, Scott Steepleton. Steepleton interviewed Wormser in early November 2007. She was told by Steepleton later that day that she was hired, how much she would be paid, and he asked her when she could start. Wormser was then directed to the Top Echelon Agency which made her its employee and referred her back to the Respondent as a Top Echelon contractor. In that capacity Wormser started on November 18, 2008, in the Respondent's newsroom working as a reporter. After some 10 days, she was informed by supervision that since management had not yet formally approved her employment as a Top Echelon employee she would be transmuted to a freelancer selling articles directly to the Respondent as an independent contractor. She was also told that as a freelancer she was to discontinue using the Respondents equipment and office space. In late January 2009, Wormser was converted from freelancer to newsroom unit employee by the Respondent and remained so at the time of her testimony using once again the Respondent's equipment and offices.

c. Findings and conclusions respecting the Respondent's use of agency employees as a violation of Section 8(a)(3) and (1) of the Act

I have found that the Respondent's recommencement of the use of outside agency contractors to do unit work in the newsroom, in and after May 2007, was a unilateral change undertaken in violation of Section 8(a)(5) of the Act. My 8(a)(5) analysis set forth supra that resulted in that conclusion considered but rejected, the Respondent's argued assertion that the use of outside agencies in and after May 2007, was simply a benign business-driven continuation of a longstanding past practice of the Respondent. Rather, I found the reinstitution of the use of outside agencies to employ contractors doing unit work at the Respondent was a reinitiation of a practice that had lain fallow for over 5 years and could not be regarded as simply a continuation of longstanding practice.

The analysis here must consider the further issue of the reason the Respondent reinitiated the practice. As noted supra, Apodaca, testified that the practice had been discontinued years before by a high official of the Respondent as simply too expensive. She testified that she successfully recommended its reintroduction to the Respondent's copublishers, von Wiesenberger and McCaw, and possibly counsel in the latter half of 2006, as a way of avoiding having her office overwhelmed by continuing need for the recruitment and hire of replacement employees given the recurrent vacancies that had occurred. She testified she was told to "seek assistance if I need it." She was the only individual to testify regarding this event, its date or the matters considered.

Earlier, I expressed great doubt that such a meeting would have occurred in the latter half of 2006, only to have the first use of the requested and granted right to use outside agencies occur in May 2007, given that many vacancies—the represented basis for the argued strain on the industrial relations department—had occurred well prior to May 2007. Further, given the hiring of the outside agency staff was initiated by the Respondent through its own advertisements, and given that the Respondent interviewed, evaluated, and offered initial hire to the outside agency staff before they were ever referred to such outside agencies, it is difficult to conclude that outside agencies—especially given their admitted greater cost to the Respondent—were used as part of a logical and efficacious business-driven technique to add staff when the human recourses office of the Respondent was overwhelmed. Further, I note the use of such outside agency-provided staff continued and even increased in later times when the human resources office was far less overworked. Finally, as will be discussed supra in the information provision analysis, the suspicious transmutations of employee Wormser from employee applicant, contractor, and freelancer during the time the Union was inquiring about outside agency employees suggests the status of those doing unit work was manipulated by the Respondent for strategic and tactical reasons having no relationship to the business needs of the Respondent or the workload of the human resources office. I specifically found, supra, that the decision to use agencies again occurred during the time the Respondent was obligated to bargain with the Union.

Considering all the arguments of the parties, the testimony of the witnesses and the record as a whole, using the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and further guided by the cases cited above including those dealing with timing as a legitimate part of the General Counsel's prima

facie case, I find that under *Wright Line*, the General Counsel has met his burden of proving by a preponderance of the evidence that the Respondent's antiunion sentiment was a motivating factor in the Respondent's subtracting decision and in the implementation of that decision on and after May 2007. The timing, context of events, and pattern of illegal conduct, in light of the record as a whole, filled vacancies and did combine to easily sustain the General Counsel's *Wright Line* burden here.

In this regard it is important to note that the subcontracting of the work involved a significant proportion of the bargaining unit. By having nonunit individuals instead of unit employees to do a significant proportion of the Respondent's unit work, indeed here having individuals who are not even employees of the Respondent doing a significant portion of unit work, the Respondent not only reduced the number of its own unit employees, it divided the interests of those who are doing unit work. This is so because those who are employed by the outside agencies could gain no benefit from the Respondent's unit employees union representation or those unit employees potentially gaining a contract and/or improved wages and working conditions. And, dividing those who do unit work, as described, weakens the economic strength of the Respondent's represented unit employees who no longer represent the entirety of those who do the work. During any work stoppage, the unit employees withholding of labor would only be effective in proportion to the amount of unit work withheld. The contractors would be less likely to withhold their labor or support any economic action advanced for improve the unit employees circumstances. The more numerous the nonunit employees doing unit work, the weaker the Union's economic position.

Since I have found the General Counsel has satisfied his initial burden under *Wright Line*, that the Respondent's antiunion sentiment was a motivating factor in the subtracting decision and in the implementation of that decision in the use of outside contractors to do unit work in the noted period from May 2007 into 2009, the burden then shifts to the Respondent, in the nature of an affirmative defense, to demonstrate that the same use of outside agencies to provide contractors to do bargaining unit work over the indicated period would have taken place even in the absence of the protected conduct.

Considering the Respondent's arguments on the question de novo here, and also considering the arguments of the other parties and the record as a whole, I find that the Respondent has failed by a significant margin to meet its burden of showing it would have taken the actions it did in the absence of its employees' protected activities. The Respondent has argued and submitted some evidence that management granted its human resources director the right to use outside agencies to supply individuals who would not be part of the bargaining unit to do bargaining unit work in the middle of an impassioned campaign by both management and the Union. The deciding agents did not testify on the question of why they did so. There is no question that the practice had been discontinued years prior due to it high costs. The Respondent has made clear the fact that more recent times have been ones of significant economic pressure—and which present the likelihood of continued economic pressure—on the Paper, i.e., it was a time to conserve not to resume expensive procedures.

There is no evidence that the economics of the process had changed from the time the earlier use of such agencies was discontinued by the Respondent on cost grounds over 5 years before. Also, there was no evidence offered by the Respondent to explain why the entire process of subcontracting was reinitiated, as I have found was required by Section 8(a)(5) of the Act—without notifying and bargaining with the Union.

In sum and substance, there is simply an insufficiency of motivation evidence offered by the Respondent beyond the general "hiring workload" testimony discussed, supra, to support the proposition that the same use of outside agencies to provide contractors to do bargaining unit work over the indicated period would have taken place even in the absence of the protected conduct. Accordingly, I find the Respondent has not consummated its affirmative defense as provided in *Wright Line*, above, that this practice would have been resumed even were the employees not to have engaged in union activities and selected the Union to represent them. I therefore find the subcontracting involved herein was undertaken in violation of Section 8(a)(3) and (1). The complaint in these regards is sustained.

E. Was the Response of the Respondent to the Union's Information Requests Concerning the Respondent's Use of Outside Agencies to Provide Unit Workers a Violation of Section 8(a)(5) of the Act?

1. Events relevant to the information requests

On October 20, 2007, as part of the prenegotiation exchange of information, the Union through Caruso sent the Respondent's chief negotiator, Zinser, a letter seeking a detailed list of information including, inter alia, the following:

> 1. A list of current unit employees, including their names, dates of hire, rates of pay, job classification, last known address, phone number, email address and Social Security number. We are informed that a number of recent hires performing newsroom work may have been labeled or notified that they are "temporary", please identify and provide the above listed information for all "temporary" nonsupervisory employees who have done any bargaining Unit work since July 1, 2006.
>
> . . . .
>
> 37. A copy of any company policies or procedures with respect to the hiring of temporary summer help.
> 38. A Statement of any company policy or procedure with respect to the hiring of any summer or temporary help.

Zinser responded to the request by letter dated November 9, 2007, to Caruso. It stated in relevant part:

> I will address the requests as you have numbered them:
>
> 1. This is being prepared as we speak.
>
> . . . .
>
> 37. No documents exist.
>
> 38. No documents exist.

The parties conducted their initial bargaining sessions on November 13 and 14, 2007. Discussions included the Respondent describing the use of agency-provided employees to do unit work. The Union sought details regarding the relationship of the agencies to the Respondent and the process generally. The dialogue continued on November 14, with the Union expressing concern respecting the details and even the legality of the process and Zinser indicating he was not fully informed of the details involved. The session concluded with the expectation the Union would submit a written information request on the matter.

By letter dated November 16, 2007, Union Counsel Ira Gottlieb, by facsimile, email, and U.S. Mail, sent Zinser a letter with the captioned regards: "Unlawful hiring of 'temporary' employees to perform bargaining unit work." The letter stated in part:

> Following up on our discussion of November 14, 2007, at the negotiating table, this is to request the Employer's full and complete rationale(s) explaining why the nine" temporary" employees allegedly hired by either Top Echelon and/or Office Team Employees and working as reporters for the Santa Barbara News-Press, are, in Ampersand's view, not part of the bargaining Unit consistent with the NLRB's certification and the requirements of the NLRA.
>
> . . . .
>
> As the Union has advised you, since these employees are clearly (and undisputedly) performing bargaining Unit work, and all began work on and after July 2007, they must be included within the Unit represented by the Union. As you are aware, the number of eligible employees at the time of the election in September 2006 was 42; the list of unit employees you provided in the course of bargaining numbers 23, including a "gossip columnist" who was not in the Unit at the time of the election. The Union has demanded that the nine "temporary" employees (and any others doing unit work) be included and that failure to include them and failure to notify the Union of their hire, are violations of Section 8(a)(5) of the National Labor Relations Act. You requested the opportunity to explain in writing, as opposed to orally across the table, why they need not be part of the bargaining unit. Please provide that rationale, and the following information, no later than November 26, 2007.
>
> For each of the "temporary" employees, state:
>
> 1. How each of the employees made contact with the SBNP, if at all, during the hiring process;
> 2. Whether the employee responded to an ad placed by the SBNP;
> 3. Whether the employee responded to any communication from the SBNP to begin or continue the hiring process;
> 4. Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process;
> 5. The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process;
> 6. The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP; and
> 7. Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instruction (including editing) for workplace performance.
>
> . . . .
>
> Please respond by November 26. If you wish to discuss this matter, please feel free to call me.

On November 27, 2007, the Union filed the initial charge involved in this consolidated proceeding, Case 31–CA–28589, the "basis of the charge" portion of which reads:

> Within the last six months, the employer has failed and refused to bargain in good faith, by subcontracting and/or using employees it labels "temporary" employees to perform bargaining unit work purportedly hiring them through an employment agency, contrary to the certification issued by the NLRB in August 2007 and without prior notice to the Union and an opportunity to bargain. The employer has further violated the Act by failing and refusing to provide requested information relevant to its violation of the Act in utilizing alleged "temporary" employees to perform bargaining unit work.

On November 20, 2007, the Respondent counsel Zinser sent to Union counsel Gottlieb a letter in answer to Gottlieb's letter quoted in part above. Zinser's letter states in part:

> Let us put this in context. Information requested regarding the temporary employees was part of a very large, 59-point information request made by Mr. Caruso. Santa Barbara News-Press has, in large measure, responded to that information request. On November 14, 2007, we provided some specific information on the temporary employees which you acknowledge in your letter.
>
> Having some other questions about the temporaries, you began to ask them. I then asked that you also reduce those additional questions to writing so that there would not be any misunderstanding about just what was being requested, and you agreed to do so. You did not, at that time, ask that we provide you with any "rationale." You do ask that in your November 16, 2007 letter.
>
> Your information request arrived on November 16, 2007. I was out of town on business matters from November 12 through November 16. The following week was the week of Thanksgiving. I was out of town (Cin-

cinnati, where my parents and sisters live) for the Thanksgiving holiday, November 21 to November 25. This week we have been quite busy completing the post-hearing brief to Judge Kocol in the unfair labor practice matters.

Thus, under the circumstances, your filing unfair labor practice charges is premature. First of all, you do not get to unilaterally establish time frames. Any Employer has a reasonable amount of time within which to respond to information request. Your supplemental information request of November 16, 2007 is being reviewed and we will respond within a reasonable period of time.

On January 23, 2008, the Respondent through Counsel Zinser provided to Counsel Gottlieb for the Union a 2-page letter captioned "Supplemental Information Concerning Temporary Employees." The letter stated (bolding in original):

After conferring with Scott Steepleton and Yolanda Apodaca, on behalf of Santa Barbara News-Press, I will supplement information we had previously given you concerning the temporary employees.

1. **How each of the employees made contact with the SBNP, if at all, during the hiring process?;** [Bolding in original.]

Santa Barbara News-Press did place ads seeking employees for the vacancies. In some instances the individual contacted Santa Barbara New-Press as the result of seeing the ad. In other instances the individual was referred to Santa Barbara News-Press by Top Echelon or Office Team.

2. **Whether the employee responded to an ad placed by the SBNP?;**

As indicated in the answer to question 1, in some cases yes.

3. **Whether the employee responded to any communication from the SBNP to begin or continue the hiring process?;**

Whether responding to an ad or whether referred by one of the two agencies, the individual would be interviewed by Scott Steepleton or another newsroom supervisor. This interview may have been only telephonic. In the instance of someone from the local Santa Barbara area, there could have been an in-person interview. Once it was determined by Management that the individual was a possibility, they were then referred to Top Echelon or Office Team. Top Echelon or Office Team would refer the individuals to the Santa Barbara News-Press for work. A more thorough interview process was not involved because the individual was going to be a referral from a temporary agency. If the individual did not work out, they would be sent back to the agency. The individual is hired by the agency; the individual is paid by the agency; to the extent the individual has any kind of benefits, they were provided by the agency. In some cases the individual working at the Santa Barbara News-Press was referred to the Company by the agency without an interview.

4. **Whether the employee responded to any communication from Top Echelon or Office Team (with respect to Mr. Melendez) to begin or continue the hiring process?;**

Yes to both.

5. **The names of all people with whom the employees spoke and/or were interviewed in connection with the hiring process?;**

Scott Steepleton, Dale Rim, Barry Punzal and/or Yolanda Apodaca, Top Echelon and Office Team.

6. **The names of all people who participated in the decision to hire the employee to perform work in the service of SBNP?; and**

See answer to question 5.

7. **Identify all people who supervise the employee, including having the responsibility to discipline, discharge (or remove from working in the service of the SBNP), effectively recommend discipline or discharge, and/or provide the employee with assignments and/or instruction (including editing) for workplace performance?**

Scott Steepleton and/or Dale Rim and/or Barry Punzal supervise the individuals with respect to their assignments for writing for Santa Barbara News-Press. If there is a disciplinary and/or performance problem, the individual is referred back to the agency.

On December 3, 2007, the Union through Counsel Gottlieb sent a letter to Counsel Zinser by facsimile, email, and US mail with the caption: Re: Unlawful hiring of "temporary" employees to perform bargaining unit work." The letter states in part:

In addition to the requests for information that are now outstanding on this issue, please provide the following, all no later than December 21, 2007:

3. Has [the Respondent] ever used employees it labeled "temporary" employees—either direct hires or through an agency—to perform work that is now included in the certified bargaining unit?

4. If so, state the following for each instance of such use of temporary work:

f. The date(s) on which the "temporary" employee performed bargaining Unit work;
g. The name(s) of all such temporary employees;
h. The name(s) of any temporary agency which you claim employed the temporary employees;
i. The specific project or task(s) performed by the temporary employee(s);
j. The pay rates for the temporary employee(s).

The enumerated information requested in this letter is alleged in complaint subparagraph 7(b).

By letter dated January 30, 2008, sent by facsimile transmission and commercial carrier, Counsel Zinser wrote Counsel Gottlieb. The letter stated in part:

In regard to your additional information requests contained in your December 3, 2007 letter that are the subject

> of Charge No. 31–CA–28589, please note that I provided that information to you at our November 14, 2007 bargaining session. If you remember, at that bargaining session I handed you and Nicholas Caruso a list of temporary employees performing work in the newsroom, which included their name, agency, job title, dates performing Unit work and pay rates.
>
> I have enclosed that list for your convenience, I have also enclosed updated information to reflect the present list of temporary employees in the newsroom. I hope this resolves the matter and I look forward to continued bargaining.

The letter included two attached lists. The first is the list identified in the letter as that provided by the Respondent to the Union along with other materials at the bargaining session of November 14, 2007. That list contains the names of eight Top Echelon employees working in the newsroom with their starting dates, the earliest of which is July 9, 2007, and one Office Team employee working in the newsroom, again with a July 2007 starting date. The second or revised list addresses the subsequent changes in the status of these newsroom employees: the list deletes two of the earlier-listed Top Echelon employees who departed and adds four additional "temps" who started variously in the period October 2007 through January 2008.

2. The complaint allegations regarding the temporary agency employee information requests

As discussed supra, the complaint alleges in paragraph 7(a) that on November 16, 2007, the Union sought the noted information and, as alleged in complaint subparagraph 7(g), the Respondent did not provide it until about January 23, 2008. Subparagraph 7(f) alleges the information was relevant and necessary to the Union's performance of its duties as the employees' representative. Similarly, the complaint alleges in paragraph 7(b) that on December 3, 2007, the Union, sought the noted information and, as alleged in complaint subparagraph 7(h) did not provide it until about January 30, 2008.[17]

The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act. The heart of the parties dispute in these regards is whether or not the Respondent was reasonable to take from November 16, 2007, to January 23, 2008, a period of 69 days, in providing the requested information in the first instance and from December 3, 2007, to January 30, 2008, a period of 59 days, to provide the requested information in the second instance.

3. Analysis and conclusions regarding delay

a. The preliminary matters

Several aspects of these events are not relevant to resolving the noted complaint issues. First, the fact that a charge was filed concerning these employees neither enhanced the Union's right to the information requested nor in some way obligated the Respondent to speedier production of the information. Similarly, the charge neither enhanced nor diminished the Respondent's obligations under the Act to provide the information timely to the Union. The charge and the parties' responses to the Board and to one another regarding it are independent of their rights and obligations respecting information requests in the bargaining process.

There is one collateral matter that was not focused on by the parties but merits mention herein: Whether or not the Respondent was obligated to provide information at all concerning employees not in the unit and who are not the Respondent's employees?

Information requested by a labor organization representing a unit of an employer's employees enjoys a presumption that information concerning those employees is relevant and should be provided. *Chrysler, LLC*, 354 NLRB 1032 (2010). There is no such presumption concerning information concerning non-unit employees or the employees of other employers. *Disneyland Park*, 350 NLRB 1256 (2007). As to such information, the labor organization bears the burden of establishing the relevance of the information sought to the bargaining. The General Counsel can establish relevance by presenting evidence that either (1) the union demonstrated the relevance of the information, or (2) the relevance of the information should have been apparent to the employer under the circumstances. Ibid. The Board notes this burden is "not exceptionally heavy" and is met by "some initial but not overwhelming demonstration." *St. George Warehouse, Inc*., 341 NLRB 904, 925 (2004). The Board has commented further that the burden is not "an exceptionally heavy one, requiring only a showing be made of a 'probability that the requested information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998), quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

In the instant case, the parties did not argue either at the time of the Union's request nor in the instant proceeding concerning whether the Union was entitled to the information under challenge in the information request portions of the complaint. In fact, the information has been supplied to the Union only the timing of the provision is in issue. Presumably, the relevance of the information sought was "apparent to the employer under the circumstances." I explicitly find, however, respecting these elements of the complaint that the Union met its burden of showing relevance for the requested information through its demonstration that it had legitimate questions concerning whether the individuals inquired about were or were not unit employees. And, further, given the unit work that was admittedly done by the individuals under inquiry, the Union had a legitimate basis to inquire concerning the timing of the Respondent's decision to utilize such individuals to do unit work and the implications of that decision.

This is so, not simply because of the work of these individuals having a potential impact on bargaining unit employees'

[17] The General Counsel's trial motion to change this date to May 26, 2009, was denied. See fn. 13, supra.

terms and conditions of employment,[18] but also because the information was pertinent to the Union's decision to file or process grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Bell Telephone Laboratories*, 317 NLRB 802, 803 (1995), enfd. mem. 107 F.3d 862 (3d Cir. 1997). Based on all the above, I find the information sought was relevant to the Union's role as representative of unit employees and the Respondent was obligated under the Act to provide the information sought by the Union.

There was no dispute the information was requested by the Union as alleged. I have found the Respondent was obligated to provide the information sought. The complaint concedes the information was provided. The final element of the complaint allegations concerning these information requests is whether or not the response to each of the two requests was sufficiently timely. That is the heart of the matter and will be addressed immediately below.

b. The issue of delay

If the Act requires employer disclosure to a union of requested information relevant to bargaining, it should be compiled in a reasonable period and disclosed in a reasonable time. The Board has long held that unreasonable delay in providing such information is a violation of the Act as much as not providing the information at all. *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126 (2007). The employer must act in good faith to provide the information as promptly as circumstances allow. *Postal Service*, 352 NLRB 923 (2008). The test of the reasonableness of any particular delay is based on the totality of the circumstances rather than the simple passage of any specific amount of time. Those circumstances include the larger pattern of conduct regarding the relations of the parties. *Albertson's, Inc*., 351 NLRB 254 (2007). In *Cresfield Convalescent Center*, 287 NLRB 328 (1987), the Board adopted a judge's analysis that a temporary misjudgment causing a brief and noninjurious nondisclosure in the midst of complying with other requests did not warrant a finding of unlawful conduct. The time required to acquire the information requested is yet another factor in evaluating the reasonableness of the period of nondisclosure. *E. I. du Pont & Co*., 346 NLRB 553, 581 (2006).

The context of the information requests at issue here has been set forth and discussed in some detail supra. Counsel for the Respondent notes on brief at 18–19 that the information requests occurred immediately after the parties' initial bargaining session at which time the Respondent had provided very substantial amounts of earlier union requested information. Further the Respondent argues that the period after the request involved both the general seasonal press of business and the industry specific rush of the Thanksgiving–New Years Day holiday period in the newspaper industry as well as the unusual circumstance that the very substantial posthearing brief was in preparation in the earlier unfair labor practice hearing before Judge Kocol. And, the Respondent argues, the primary, indeed essentially single, gatherer of the requested information at the Respondent's facilities was the head of the small human resources department, Apodaca, who was further burdened with a multitude of tasks during this busy end of year period.

The General Counsel argues that the delays of the Respondent in providing information in response to the two information requests: 69 days–approximately 10 weeks in the initial case, and 59 days–approximately 9 weeks in the second case, constitute periods of information provision delay frequently found by the Board to be unreasonable and a violation of Section 8(a)(5) and (1) of the Act citing multiple cases.[19] And the General Counsel argues that beyond the season involved, the testimony regarding the business and good intentions of Apodaca, and the briefing burdens of the four counsel of record from the two firms litigating the Respondent's side in the Kocol case, there was no evidence offered by the Respondent regarding any special unavailability of the information requested or its volume or complexity. Thus, the General Counsel argues there is simply no reason to grant the Respondent additional time beyond simple test of reason in complying with these two requests.

The Charging Party and the General Counsel also argue that the evaluation of the information elements of the complaint must take place in what they characterize as the pattern of unfair labor practices of the Respondent. And in that larger context, there is the finer point that the information requests deal with the use of outside agencies which use by the Respondent constitutes violations of Section 8(a)(5) and (1) of the Act and, further, violations of Section 8(a)(3) and (1) of the Act. Thus, they argue, there is no innocent context as to these information requests.

I have carefully considered the arguments of the parties, the record as a whole and the entire context of events and circumstances respecting the relationship between the parties. The General Counsel and the Charging Party are correct that the bare number of days taken by the Respondent to provide the requested information devoid of context is regularly found to be unreasonably long and in violation of the Act. But all delays have a context, a setting and circumstances that allow the test of reasonableness to be applied to the particular situation. The cases cited above and numerous others command attention to and evaluation of such context in reaching any conclusion as to the reasonableness of the delay.

The circumstances respecting the November 16, 2007 request cut both ways. The importance of the information, the fact that it had been earlier discussed in negotiations and the fact that the request for the information was delayed in that the Respondent asked for the request to be put in writing—all these factors—support a finding that it was necessary to provide the information forthwith. The season and press of business justify some delay in provision of the information, but not a delay extending to January 23, 2008. I do not find that the informa-

[18] See *Disneyland Park*, 350 NLRB 1256 (2007); *Richmond Health Care*, 332 NLRB 1304, 1307 fn. 1 (2000); *Associated Ready Mixed Concrete, Inc.,* 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

[19] *Postal Service*, 354 NLRB 412 (2009); *Woodland Clinic*, 331 NLRB 735 (2000); *Capitol Steel & Iron Co.*, 317 NLRB 809 (1995), and many others in the General Counsel's brief at 22.

tion requested was so burdensome to gather, compile, and report, that the time taken to provide it was necessary or reasonable. I also find of significance the fact that the information at issue concerned the temporary agency contractors, the Respondent's use of whom has been found supra to violate Section 8(a)(1), (3), and (5) of the Act. All of the above, in the context of the record as a whole, convince me that the Respondent's delay in providing the November 16, 2007 requested information until January 23, 2008, was unreasonable and violated Section 8(a)(1) and (5) of the Act. This allegation of the complaint is sustained.

Turning to the information request of December 3, 2007, respecting which the Respondent provided the requested information on January 30, 2008, my analysis and findings and conclusions are the same. The factors involved are factually equivalent. The context, subject matter, press of business arguments, etc., are equivalent. The distinctions are without legal difference. All of the above, in the context of the record as a whole, convince me that the Respondent's delay in providing the December 3, 2007 information until January 30, 2008, was unreasonable and violated Section 8(a)(1) and (5) of the Act. This allegation of the complaint is sustained.

F. Allegations Respecting Employee Richard Mineards

1. Complaint allegations respecting Mineards

Complaint paragraph 14(b) alleges the Respondent laid off its employee Richard Mineards. Complaint paragraph 18 alleges that the Respondent undertook the layoff without prior notice to nor affording the Union an opportunity to bargain with the Respondent with respect to the decision to lay off Mineards or to bargain respecting the effects of the layoff. Complaint paragraph 19 alleges that the Respondent through its agent, Don Katich, bypassed the Union and dealt directly with its employees in the unit by offering an employee nonunit terms and condition of employment. The complaint further alleges at paragraph 23 that the layoff was undertaken by the Respondent because the employees formed, joined, or assisted the Union and engaged in protected concerted activities and in order to discourage the employees from engaging in these activities. Paragraph 24 of the complaint alleges this conduct violates Section 8(a)(1) and (3) of the Act. Paragraph 25 of the complaint alleges this conduct violates Section 8(a)(1) and (5) of the Act.

The complaint further alleges in subparagraph 7(e) that on or about January 14 and 15, 2009, orally, and January 26, 2009, in writing, the Union requested the Respondent furnish it with information related to the employment status of employee Mineards and, in paragraph 7(f) that the information requested was relevant to the Union's performance of its duties as representative of employees in the bargaining unit. The complaint subparagraph 7(k) alleges that the Respondent failed and refused to provide the Union with the requested information until about February 9, 2009, and in subparagraph 7(l) alleges this delay as unreasonable. Paragraph 25 of the complaint alleges this conduct violates Section 8(a)(1) and (5) of the Act.

2. Facts respecting Mineards

Richard Mineards began working for the Respondent as a columnist and radio broadcaster in April 2007, and worked through 2008, for the Respondent in the bargaining unit[20] as a salaried employee. On or about the morning of January 7, 2009, the Respondent's director of news operations, Don Katich, met with Mineards in Mineards office and, in Mineards credible and unchallenged testimony, told him: "[W]e are eliminating your column forthwith because of cost cutting." Mineards testified:

> [Katich] basically said it was because of cost cutting and then went on to explain that it was in general but obviously the economy had impacted enormously with newspapers and magazines across the country, and that it was nothing to do with the column but merely a cost-cutting measure.

Arrangements were made for final payments and vacation of the premises and the conversation ended amicably. After perhaps a week, Katich was in contact with Mineards proposing he resume his column for the Respondent on a freelance basis. The two met over lunch on January 15, 2009, to discuss the matter and reached a tentative agreement on a weekly payment for the column which Katich agreed to present to higher management. Management's responding offer accepted the freelance payment amount but sought considerable additional writing of "personality profiles" each week which Mineards indicated involved an unsatisfactory amount of time and effort for the money involved. The parties shared views for a time, but no agreement was reached and within a few days Mineards accepted other employment.

The Respondent did not notify the Union nor offer to bargain with it respecting these Mineards events. Caruso who testified he had learned of Mineards' layoff from a blog, asked Zinser about Mineards status the morning of the January 14, 2009 bargaining session. Zinser responded he did not know of the individual, took his name down and indicated he would look into it. During that day's negotiations and the following day's negotiations, Caruso asked again regarding the matter with Zinser responding he would have to get back to Caruso. Travis Armstrong, the Respondent's editorial page editor, who was present in bargaining, did not confirm Mineards' layoff. Caruso followed up on the request for information with a letter to Zinser dated January 26, 2009. The letter demanded an immediate explanation of the circumstances of Mineards layoff and an explanation of why the Respondent had failed to bargain over the Mineards matter. The letter asserted the Union would take legal action should the Respondent not respond to the request by close of business on January 27, 2009. In late January, the Union did in fact file a charge.

The Union received its first response to the information request in the form of a February 9, 2009 letter from Counsel Zinser to Caruso. The letter informed the Union that the Re-

[20] While not employed at the time of the election, there was no dispute that as a columnist Mineards was in the bargaining unit, i.e., he was within the unit inclusion language quoted supra which includes the list of included categories: "writers, reporters, copy editors, photographers, and graphic artists."

spondent had made a business decision to lay off Mineards effective January 7, 2009. The letter recited his salary, workload at the time of his layoff, and added the Respondent felt the combination "to be an inefficient use of resources, especially in these turbulent economic times." The letter indicated the Respondent was available to meet and discuss the issue should the Union so desire. Zinser protested that Caruso was repeatedly setting deadlines for the production of requested information but that the requirement was only that the employer respond in a reasonable period of time. The letter stated: "Less than three weeks have passed since you made your written inquiry regarding Mineards; I believe this response constitutes an answer within a reasonable amount of time." On that same day the Union in a letter to the Respondent indicated it wished to bargain over the decision to lay off Mineards and the effects of that decision.

On February 26, 2009, Caruso and former employee Melinda Burns met with Zinser and Armstrong to discuss the Mineards layoff. The Union proposed Mineards be recalled at a 20-percent reduction-in-pay. The Union solicited the Respondent's agreement to its proposal, a counterproposal or discussions respecting severance. The Respondent took the position that the proposed salary was not satisfactory because Mineards was not willing to undertake substantial additional work beyond his column for that salary. The Respondent also took the request for severance negotiations "under advisement" noting that in the past the Respondent had not paid severance in layoff situations.

3. Analysis and conclusions respecting the Mineards' allegations

a. Did the Respondent's alleged failure to timely notify and offer to bargain with the Union regarding the Mineards' layoff and/or its direct dealing with Mineards violate Section 8(a)(5) and (1) of the Act?

The facts as set forth supra and briefly recited here concerning Mineards are not in essential dispute. Thus, there is no doubt that at relevant times Mineards was in the bargaining unit and that the Union represented the unit. The Respondent does not contend that it notified the Union regarding the Mineards' layoff before the Union discovered the layoff had occurred on it own on or about January 14, 2009, and the Respondent concedes it did not provide the Union any of the details concerning the layoff requested by the Union until its letter to the Union of February 9, 2009. Further the Respondent does not deny that its agent Katich directly dealt with Mineards during the period before it notified the Union of its actions proposing he become a freelancer, i.e., a nonunit worker, continuing to write his column and undertaking additional assignments for a substantial reduction in compensation.

The black letter law in this area is longstanding and recent consistent Board holdings are cited by the General Counsel on brief at 97. The Board in *Eugene Iovine, Inc*., 353 NLRB 400, 404 (2008), enfd. No. 09-0217ag (2d Cir. 2010), adopted the analysis of Administrative Law Judge David I. Goldman who wrote at 353 NLRB No. 36, slip op. at 5:

> The decision to lay off employees for economic reasons is a mandatory subject of bargaining, and therefore subject to the requirement of timely advance notice required by the Act for good-faith bargaining to impasse. *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004) ("Decisions to conduct economically motivated layoffs are mandatory subjects of bargaining"); *Toma Metals, Inc.,* [342 NLRB 787, 787 fn. 1 (2004)]; *Tri-Tech Services,* 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain"); *Ebenezer Rail Car Services*, 333 NLRB 167 (2001).

Judge Goldman again at *Iovine, Inc*., id., addressed the question of when such notification and offer to bargain must take place:

> Even when negotiations for a new collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises,* supra; *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013, 1017 (1982) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli"), enfd. 722 F.2d 1120 (3d Cir. 1983). In sum, "an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co*., 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals, Inc.,* 342 NLRB 787, 787 fn. 1 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682, (1981), where the Court held that bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time.

The General Counsel also argues, citing cases such as *SPE Utility Contractors, LLC*, 352 NLRB 787, 791 (2008), that an employers direct negotiation with unit employees concerning their terms and conditions of employment bypassing the union representative inevitably erodes the labor organization's exclusive representative status. More specifically, the Government argues that laying off a unit employee without giving that employee's representative an opportunity to bargain and then approaching the employee directly and offering to employ the individual to do the same work outside the unit violates Section 8(a)(1) and (5) of the Act citing *Modern Merchandising*, 284 NLRB 1377 (1987).

The Respondent makes several arguments seeking to avoid the conclusion under the cases cited that its actions violated Section 8(a)(1) and (5) of the Act. Initially it argues on brief at 220:

> As for the allegation that the News-Press dealt with Mr. Mineards, the News-Press does not deny that Mr. Katich contacted Mr. Mineards about becoming a freelancer. The evidence indicated, however, that Mr. Katich was a new supervisor that was unfamiliar with his obligations with respect to represented employees. The contact with Mr. Mineards was limited and unsuccessful. To the extent that the New-Press violated the Act, the violation was de minimus.

Second, the Respondent argues that it was not required to bargain over its decision to lay off Mineards because its decision was in fact an entrepreneurial decision involving a change in the scope and direction of the enterprise and therefore outside the ambit of mandatory subjects of bargaining. *Tel Plus Long Island*, 313 NLRB No. 47, slip op. at 9 (1993) (not reported in Board volumes), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Further, the Respondent emphasizes that it did in fact negotiate with the Union over Mineards' layoff, considering the Union's proposals and offering its own. Thus, the Respondent argues on brief at 223: "No accord was reached, **but the parties engaged in bargaining** [bolding in original]." And thus, the allegation should be dismissed.

I have considered the record as a whole including the briefs of the parties and the testimony of the witnesses on the questions posed and arguments presented. I find and conclude as follows.

First, I reject the argument of the Respondent that the layoff of Mineards was not a decision subject to bargaining or that the effect of that decision was outside the Respondent's bargaining obligation. I do so based on the record which clearly supports a factual finding, which I explicitly make, that the underlying issue respecting Mineards layoff was economic and not any type of *First National Maintenance Corp.* decision concerning the scope and direction of the enterprise. The record is sufficiently clear that it is unnecessary to belabor the point. As noted supra, the negotiations between the Respondent and the Union and between the Respondent and Mineards were pure and simply economic. The Respondent was prepared to continue Mineards' column duties at a reduced compensation and with additional duties added on. As Zinser stated in his February 9, 2009 letter to the Union, the Respondent was concerned with avoiding the inefficient use of resources. The cases cited supra make it crystal clear such a layoff is not sheltered from traditional notification and bargaining obligations.

Second, I reject the argument of the Respondent that since bargaining finally did occur, nothing else is required and the matter should be dismissed. The cases cited supra make it plain that disclosure and bargaining must occur sufficiently in advance of the proposed action to allow a reasonable opportunity to bargain. If the notice is too short, the decision at issue is simply a fait accompli and no sufficient bargaining can take place. Similarly bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time. Neither occurred here.

This being so, I find and conclude that the Respondent in failing to timely notify the Union of the layoff of Mineards and to provide sufficient time to allow bargaining over both the decision and its effects, violated Section 8(a)(1) and (5) of the Act.

Regarding the Respondent's argument that the direct dealing by its agent Katich as described supra was an innocent, isolated de minimus act of a new supervisor ignorant of the complications of dealing with union-represented employees, I reject the argument. This action was not isolated in any fashion. The Respondent has been found herein to have improperly attempted to have unit work done by nonunit or former unit employees. Actions were taken by the Respondent that violated both Section 8(a)(3) and (5) of the Act in these circumstances. The Respondent's responses to the Union's related information requests were also unreasonably delayed in violation of the Act. There was simply no isolation or de minimus aspect to the conduct at issue. I further find then, consistent with the cases cited above, that the direct dealing involved herein between Katich and Mineards violated Section 8(a)(1) and (5) of the Act.

b. Did the Respondent's layoff of Mineards violate Section 8(a)(1) and (3) of the Act?

Why was Mineards laid off? The Government complaint alleges he was laid off because the employees engaged in union activities. The Respondent's communications at the time of his layoff and in negotiations with the Union subsequently suggest the cause of the initial layoff and the decision not to rehire him was economic. The General Counsel's theory of an antiunion layoff of Mineards in violation of Section 8(a)(3) is not based on a theory of Respondent's hostility to Mineards as an individual. Nor would such an argument withstand the fact that Mineards seemingly was on excellent terms with higher management or the paucity of evidence that the Respondent's agents believed Mineards was sympathetic to or supportive of the Union. Rather, the General Counsel argues that the Respondent, in seeking to convert Mineards from a unit employee doing unit work to a freelancer doing unit work, was continuing an illegal pattern and practice of seeking to undermine the Union generally by reducing the size of the bargaining unit and establishing a significant nonunit member population of individuals who were doing unit work.

In addition to the argument that the Respondent was implementing an illegal and overarching plan and practice of the transfer of unit work to or the transmutation of unit members doing unit work to nonunit members, the Government argues that Mineards' layoff was also in violation of the Act as involving direct dealing and a failure to notify and bargain with the Union. Further, the General Counsel argues that the Respondent's response to the Union's information request regarding Mineards was itself unreasonably delayed and in violation of Section 8(a)(1) and (5) of the Act. Considering the number, frequency, and type of unfair labor practices committed by the Respondent in the instant case, the General Counsel seems to be arguing, antiunion animus must adhere to the Mineards layoff as a man must get wet when standing in a heavy rain.

It is appropriate to repeat here the Board's analytical framework for resolving this type of issue. The analysis was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d

899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Again, as set forth supra in considering an earlier Section 8(a)(3) of the Act allegation, under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Assuming, without deciding, that the General Counsel has met his burden as to this allegation, I turn to the Respondent's defense in the *Wright Line* posture. Has the Respondent met its burden of demonstrating that it would have laid off Mineards, even in the absence of the employees' union and or other protected activities—here, the employee selection of union representation? I find that the Respondent has. I reach this conclusion because the Respondent, both in its direct dealings with Mineards before the Union was involved and in the subsequent negotiations with the Union, ultimately decided not to reemploy Mineards and its' decision in the event turned on economics rather than Mineards' status as a unit employee or nonunit freelancer.

In its direct dealings with Mineards, the Respondent received an employment counteroffer from Mineards the substance of which restored Mineards to writing his column, but as a freelancer. Under the General Counsel's theory, this was the antiunion desire of the Respondent, to pull unit work out of the unit by recasting unit employees as nonunit workers. Yet, in the event, the Respondent did not accept the offer but rather counter offered and, when no agreement was reached, simply let the layoff stand rather than bring Mineards back on the terms he had offered. These actions by the Respondent convince me and I find, that the Responded would have laid off Mineards when it did for economic reasons even if the employees had not engaged in protected activities and selected a labor organization to represent them.

Based upon all of the above, I find the General Counsel, under the *Wright Line* analysis of this 8(a)(3) allegation, has not met its ultimate burden of proving discrimination in the layoff of Mineards as alleged in the complaint. Therefore, I shall dismiss this aspect of the complaint.

c. Was the delay in the response of the Respondent to the Union's information request concerning Mineards a violation of Section 8(a)(5) of the Act?

Again the facts concerning this allegation are essentially undisputed and have been set forth in brief fashion above. The Respondent laid off Mineards on January 7, 2009, and negotiations between the Respondent and Mineards—without the Unions awareness of the layoff or subsequent dealing—continued through a lunch on January 14, 2009, and additional communications in the following few days. The Union learned Mineards had been laid off from an outside source and Caruso asked Zinser about Mineards status on the morning of January 14, 2009, during bargaining. Zinser indicated ignorance concerning Mineards and his status. No other agent of the Respondent at the bargaining spoke up. Caruso renewed his inquiry the following day at bargaining and Zinser simply indicated he would have to get back to Caruso.

Caruso, having not received a response to the Mineards' information requests, wrote Zinser on January 26, 2009, demanding an immediate explanation of the circumstances of Mineards' layoff and an explanation of why the Respondent had failed to bargain over the Mineards' matter. Zinser responded by letter dated February 9, 2009. The complaint alleges the Respondent's delay to February 9, 2009, in providing the requested information was unreasonable and a violation of Section 8(a)(5) and (1) of the Act.

The Board case law on the test of reason respecting timeliness of employer responses to union information requests has been set forth supra in considering the outside agency employees information request allegations. The analysis here is guided by the same Board teachings. As to the instant information request, the General Counsel cites *Postal Service*, 308 NLRB 547 (1992), for the proposition that a delay of about 4 weeks in supplying relatively uncomplicated and easily acquired information was unreasonable. The Respondent emphasizes that the totality of the circumstances should be examined citing *West Penn Power, Co.*, 339 NLRB 585, 587 (2003).

At the threshold it is important to identify the amount of time involved in the delay at issue. Between the initial request and the production of the information, some 26 days passed. The General Counsel prefers to characterize this, albeit correctly, as about 4 weeks. The Respondent on brief argues at 38: "A scant 14 days passed between the [Union's] formal written information request and the [Respondent's] response." This latter focus on the written information request parallels Zinser's response to Caruso which states in part: "Less than three weeks have passed since you made your written inquiry regarding Mr. Mineards; I believe this response constitutes an answer within a reasonable amount of time."

The Respondent early in the bargaining process expressed a preference for receiving information requests by letter and often requested that oral requests for information across the bargaining table be followed up by a written request. As may be seen in the factual recitations in this decision, the Union at least on several occasions followed the requested procedure. And, when an oral request of the Respondent was not responded to, the Union on some occasions on its own motion made a written request for the information earlier requested orally.

I made an explicit finding here that an oral request for information is sufficient under Board standards to start the clock running on the duty of the Respondent to respond. The Union's subsequent repeat or parallel requests in writing do not provide additional time or excuse for delay. Thus, the Respondent's quoted argument on brief and in the letter to Caruso recite and seemingly rely on improperly foreshortened periods of delay

which are simply legally irrelevant to resolving the actual delay issues in dispute.

The system the Respondent apparently instituted of, in effect, awaiting for the receipt of a written union request for earlier orally requested information is not per se violative of the Act. Rather it simply does not extend the period of time the Board will consider reasonable in replying to information requests. The test of reason here is twofold: (1) the time allowed is a reasonable one and, (2) the system by which that time is tested is a reasonable system of information gathering. Thus, when the Respondent in the instant case awaited a written request rather than taking immediate action to privately acquire the information requested or at the table immediately query the Respondent's managers for the information requested, it selected an unreasonably slow means of obtaining the information.

Further, there is a significant basis for belief in this matter that the Respondent was deliberately delaying giving the Union information which might disrupt the Respondents then ongoing illegal direct dealing with Mineards. Thus, at the same time as the January 14 and 15, 2009 negotiations were being conducted and oral inquiries about Mineards being put off at the bargaining table, management was meeting with Mineards without the Union's knowledge and in violation of its duty to bargain in good faith with the Union concerning Mineards. As the Respondent has argued on brief, Katich, the Respondent's new director of new operations was the agent of the Respondent meeting with Mineards, was new to his job and was not experienced or sophisticated in dealing with a represented employees. It is likely that other agents of the Respondent would have been aware of Kasich's plans and intentions regarding Mineards even if they had not given Katich his marching orders in his dealings with Mineards. It seems quite unlikely that Travis Armstrong, the Respondent's editorial page editor, who was at the bargaining table when the oral request for information was made and who did not respond, was ignorant of the Respondent's ongoing direct dealing with Mineards—indeed dealings that continued through the negotiation sessions involved.

In sum, and based on the record as a whole and the arguments of the parties and the testimony of the witnesses, I find that the 26-day delay of the Respondent in providing the Union its requested information was clearly unreasonable and violated Section 8(a)(1) and (5) of the Act. I therefore sustain these elements of the complaint.

G. Allegations Respecting Employee Robert Eringer

1. Complaint allegations respecting Eringer

Paragraph 11 of the complaint alleges that since on or about May 16, 2008, the Respondent transferred unit work to nonunit individual Robert Eringer. Paragraph 17 of the complaint alleges that this conduct concerned a mandatory subject of bargaining. Paragraph 18 of the complaint alleges that the conduct engaged in by the Respondent alleged in complaint paragraph 11 occurred without the Respondent notifying or affording the Union an opportunity to bargain with respect to the conduct. Complaint paragraph 20(c) alleges this conduct constitutes a failure and refusal to bargain in good faith with the Union as the exclusive bargaining representative of unit employees: Paragraph 21 alleges this conduct constitutes a violation of Section 8(a)(1) and (5) of the Act. Paragraph 23 of the complaint alleges that the Respondent engaged in the action described in paragraph 11 because the employees engaged in protected activities and to discourage employees from engaging in those activities. Complaint paragraph 24 alleges that in engaging in the conduct alleged in paragraph 11 engaged in for the reasons alleged in paragraph 23, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

2. Facts, positions of the parties, and basic issues respecting the Eringer allegations

The Respondent contracted with Robert Eringer, an individual not employed by the Respondent, to provide copy for publication in the Paper of an investigatory reporter column on page 2 beginning in middle May 2008. Eringer became and performed as a freelancer for the Respondent at material times and there is no dispute he was not an employee of the Respondent nor was he at any time a member of the bargaining unit. There is also no dispute that the Respondent did not notify or offer to bargain with the Union prior to engaging or utilizing Eringer as a freelancer in May 2008. There is a fundamental dispute as to whether the Respondent was obligated under the Act to do so.

The General Counsel and the Charging Party argue that the Respondent was obligated to notify and bargain with the Union before it, in effect, subcontracted unit work to a nonemployee. The Respondent argues that in engaging Eringer as yet another freelancer paid for preparing material for publication, it was simply continuing a longstanding, frequently used, business technique respecting which it had no obligation to notify or bargain with the Union simply because there was no change to the prebargaining status quo, the continuing pattern and practice of Respondent's newsroom operations.

The General Counsel and the Charging Party argue that the Respondent's contemplation of and final action of hiring Eringer as an outside contractor was not simply the hiring of a generic freelance writer who was tasked with the preparation of an article and therefore cannot be justified by arguing the Respondent had long and regularly utilized freelance writers. Rather, they assert that Eringer was hired as an "investigative reporter" a category that had always been filled by unit employees and had never previously been done other than in-house and had never been subcontracted to a freelance writer. Thus, they argue that Eringer's hire was the first time subcontracting of investigative writing had been done and it was not simply the repetition of the admitted practice of assigning generic news writing to freelancers.

There is no dispute that the Respondent has historically utilized freelance writers and photographers who provide publishable material for the Paper essentially since it acquired the News-Press. And there is also no dispute that it has done so regularly and to no small extent. There is no contention that

freelancers are or should be in the bargaining unit even if they are doing bargaining unit work. The dispute here is whether there existed a sufficiently discrete category of bargaining unit work at the Paper for which there was no history of use of freelance writers, i.e., investigative journalist or investigative reporter and whether Eringer's use by the Respondent was a break in or exception to the contended history of nonuse of freelance contractors for such work. It is necessary then to consider in a sense the taxonomy of the phylum "reporters" or "journalists" as well as the specific terms and content of the work of the individuals involved.

The General Counsel advances the circumstances of reporter Scott Hadley as supporting his argument here. Hadley was initially employed by the Paper as a reporter who was to undertake investigative stores and to assist in training other reporters in the skills and techniques of investigative reporting. On June 9, 2001, the Respondent published an article in the Paper announcing: ". . . we are promoting staff writer and county government reporter Scott Hadley to the new position of investigative reporter." Hadley continued working for the Respondent until he resigned on July 14, 2006. During his employ in the period following his announced promotion to investigative reporter, he wrote both regular and investigative stories.[21] During his employment for the Paper he also won various awards titling him an investigative reporter and was held out by the Paper in articles addressing these awards as an investigative journalist.

While associate editor, Scott Steepleton, testified the term investigative reporter did not exist at the Paper, he prepared a personnel requisition form dated March 6, 2007, seeking the hire of a full-time individual for the position he identified in the "position" box of the form as: "investigative reporter" and which hire he further noted on the form was to replace employee Barney McManigal who was "no longer employed."[22] The fact that the Respondent was seeking to hire an investigative reporter and that the associate editor used that specific term on the hiring form convinces me, and the fact that the Respondent held out bargaining unit members to the public as having that title further convinces me that the name or title is not without significance for unit members, for the Respondent's newsroom management and for the Paper's readership.

The Respondent argues:[23]

> Robert Eringer was a well-known author and investigative report[er] in the Santa Barbara region known to his fans as "The Investigator." He approached the News-Press about writing an investigative column in their paper and it was very hard for management to refuse an opportunity to work with such a well-known local author.
>
> Mr. Eringer wrote stories that consistently appeared on page two of the News Section in a column-style format. He wrote investigative pieces that he pitched to the News-Press. Robert Eringer did not replace anyone from the bargaining Unit nor did he perform work that was previously assigned to bargaining unit employees. Mr. Eringer is just another in a long line of freelancers.

3. Analysis and conclusions respecting the Eringer allegations

a. The 8(a)(1) and (5) allegations

At the threshold there is no real dispute and I find that the work done by Eringer for the Respondent was bargaining unit work. It is unnecessary to resolve the arguments of the parties regarding investigative reporters to find that Eringer, either as a columnist or investigative reporter did unit work. There is no doubt that he was paid as a freelancer and was not an employee of the Respondent or considered as a member of the bargaining unit. There is no doubt that the Respondent did not notify or offer to bargain respecting its decision to retain Eringer as a freelance contributor. There is also no dispute that the Respondent at all relevant times has utilized freelance writers and photographers to write copy or take publishable photographs and has published such articles and photographs.

The legal issue remaining is narrowly focused on the issue of past practice as a defense to the failure to bargain allegation. This is so because the use of a nonemployee to perform unit work is analytically similar to the act of subcontracting out unit work. *St. George Warehouse, Inc.*, 341 NLRB 904 (2004). The relevant case law respecting past practices as a defense to such allegations was earlier discussed respecting the Respondent's use of outside agencies to provide nonunit individuals to do unit work. That case law is noted and fully applies here, but the complete argument set forth earlier will not be repeated in full.

Where the employer raises a defense of past practice to a unilateral change allegation of the type at issue here, the General Counsel bears the burden of showing, by a preponderance of the evidence, that the allegedly unlawful subcontracting constituted a material and substantial change in the Respondents' practices. *Great Western Produce*, 299 NLRB 1004, 1009 fn. 2 (1990); *Clements Wire,* 257 NLRB 1058, 1059 (1981).

The Board in *Eugene Iovine, Inc*., 353 NLRB 400, 400 (2008), noted the evidentiary standard for determining the sufficiency of the pattern or frequency of occurrence the past practice:

> The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007);

[21] The traditional dictionary definition of the term investigative journalist or an investigative story or series describes the underlying task as one that involves intense inquiry often directed to expose improper behavior or injustice. The testimony of witnesses at the hearing was varied with far broader meaning assigned by the Respondent's witnesses. I view the differences in the testimony by these news reporters and editors on this issue as approaching the theological and decline to credit one version over another.

[22] Barney McManigal was one of the employees held by Judge Kocol to have been terminated in violation of the Act and ordered reinstated. He was discharged in February 2007, and has not been reinstated.

[23] On posthearing Br. at 89, et seq.

Philadelphia Coca-Cola Bottling Co., 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004).

The Board approved the analysis of Administrative Law Judge Aleman in *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353 (2003), who set forth the following:

> A past practice is defined as an activity that has been "satisfactorily established" by practice or custom; an "established practice"; an "established condition of employment;" a "longstanding practice" [citations omitted]. *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988); See, also, *Golden State Warriors,* 334 NLRB 651 (2001); *Dow Jones & Co.,* 318 NLRB 574, 578 (1995). Thus, an activity, such as the Respondent's distribution of bonuses, becomes an established past practice, and hence, a term and condition of employment, if it occurs with such regularity and frequency, e.g., over an extended period of time, that employees could reasonably view the bonuses as part of their wage structure and that they would reasonably be expected to continue. *Sykel Enterprises,* 324 NLRB 1123 (1997); *Blue Circle Cement Co.,* 319 NLRB 661 (1995); *Lamonts Apparel, Inc.,* 317 NLRB 286, 287 (1995); *Central Maine Morning Sentinel,* 295 NLRB 376, 378 (1989); *General Telephone Co. of Florida,* 144 NLRB 311 (1963); *American Lubricants Co.,* 136 NLRB 946 (1962).

I find the use of Eringer to write, in the Respondent's term on brief, "an investigative column" or columns, which investigative pieces, the Respondent again on brief notes, had never previously been assigned to freelancers or to bargaining unit employees, was clearly a new arrangement for which there was no previous history. Thus the defense of an established past practice or established condition of employment simply does not apply. The Respondent's determination in retaining Eringer because he was a well known local author and reporter in the area who had his own fan base and his unique personal style, as Steepleton testified: "We had never had a page 2 columnist like this before," convinces me and I find, that the Respondent's past practice of freelance use for general articles does not extend to or include the circumstances here presented.

An argument of the Respondent offered in defense to this allegation in its posthearing brief section headed VI,B,2 at 87, is that, in "protesting the contracting of Robert Eringer [the Union] is unlawfully trying to gain editorial control of the News-Press." The Respondent's general argument is considered elsewhere in this decision, but its attempted application here that the Union is overreaching is specious, indeed even frivolous. The Union's charge and the General Counsel's complaint addresses the Respondent's argued bargaining obligations concerning using a freelance contractor to do certain work. It simply does not address the content of the work. Were the Respondent's argument to apply here, Respondent's freedom to subcontract unit work in new and untried ways without notification or bargaining with the Union would be unencumbered by the Act. I reject the asserted defense as simply inapplicable to the instant allegation. And, further, I find it misconstrues the obligations of Section 8(a)(5) of the Act applicable here.

The Respondent is not foreclosed by the Act from hiring columnists or others who are not in the bargaining unit to do unit work. Rather and importantly, the Respondent is simply obligated to notify and bargain with the Union regarding the unit work at issue. As the Supreme Court taught in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), giving the Union an opportunity to address the employer's desires and concerns simply allows, through bargaining, the employer to consider the positions and offers of the representative of the employees who do unit work. If the matter is not resolved and an impasse occurs in bargaining, the employer's bargaining obligations are satisfied and the employer is not prevented from taking the action it feels necessary.

Given all of the above, and based on the record as a whole, including the testimony of witnesses and the arguments of the parties, I find that the Respondent was obligated to notify and offer to bargain with the Union regarding its decision to assign bargaining unit work, i.e., the writing of an investigative column on page two of the paper, to a freelance, nonemployee, nonbargaining unit member in May 2008. I specifically find that the history of the Respondent's use of freelance writers to that time was different and distinct from the use of a freelancer for the investigatory column and provided the Respondent no shelter from its notification and bargaining obligations. I further find that since the Respondent did not in the event notify or offer to bargain with the Union regarding its use of Eringer in the manner described, it violated Section 8(a)(1) and (5) of the Act. I therefore sustain the relevant paragraphs of the complaint described above.

b. The 8(a)(1) and (3) allegations

The essence of this allegation is not that the Respondent undertook to have an investigatory column written by Eringer but that the Respondent hired Eringer as a nonbargaining unit freelancer to do the writing rather than hiring him as a bargaining unit member employee of the Paper. Thus the theory of a violation—again as earlier based on a *Wright Line* analysis, focuses on the unit/nonunit status of the hired individual.

The General Counsel argues that the argument and analysis advanced to establish that the Respondent violated Section 8(a)(1) and (3) of the Act in using outside agencies to obtain nonemployees to do bargaining unit work apply fully to the Eringer situation. Counsel notes that the timing is also highly supportive of a finding of a violation in that the Eringer freelance hire and use of his work started in the same month, May 2008, that the use of outside agency referred contractors were used. The General Counsel argues that all this evidence should be at least sufficient to meet the governments prima facia showing under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and counsel notes further that the Respondent supplied no evidence that it would have hired Eringer as a freelance writer to do the work that he did in the absence of its employees electing union representation.

This is the third *Wright Line* 8(a)(3) analysis of the Respondent's actions in dealing with nonunit individuals—both freelance and outside agency referred individuals—doing unit

work. None the less it is necessary to once again set forth the two part process of a *Wright Line* analysis.

Under *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the subtracting decision. If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co*., 316 NLRB 771, 771 (1995). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

Antiunion motivation may be established through direct or circumstantial evidence. An example of such circumstantial evidence includes the timing of the decision. "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Gaetano & Associates*, 344 NLRB 531 (2005), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). Thus, the Board stated in *Allstate Power Vac., Inc*., 354 NLRB 980, 983 fn. 12 (2009):

> [12] In analyzing these allegations under *Wright Line*, the judge should, where necessary, address the General Counsel's arguments that the Respondent deviated from past practice in taking the above alleged unlawful actions and/or treated the affected employees differently than it had treated other similarly situated employees in the past.

I agree with the General Counsel that the timing of the freelance hire, i.e., at the same time as the commencement of the use of outside agencies to provide nonemployees to do unit work, as well at the blatantly violative[24] failure to notify or offer to bargain with the Union regarding the decisions of the Respondent to use both the agencies and Eringer supports its prima facia case. Having reviewed all the evidence and my earlier conclusions and analysis in these regards, in conjunction with a full consideration of the instant issue, I further find and conclude that the evidence carries the General Counsel's case that the Respondent undertook to employ Eringer as a freelancer rather than as a unit member because it wished to undermine the Union by reducing the number of bargaining unit employees and increasing the number of nonunit individuals who were doing unit work.

Given that finding, under *Wright Line* as noted, it falls to the Respondent, in the nature of an affirmative defense, to demonstrate that Eringer would have been hired as a freelancer and not as an employee and bargaining unit member even if the Union had not come to represent the employers and or the employees had not engaged in union activities. In meeting this burden, the Respondent cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity.

The Respondent on brief argues that the Government's allegation is frivolous and that the Respondent regularly used freelance writers. The record establishes, however, that the investigative column undertaken by Eringer was unique in the Respondent's history and had never been undertaken by anyone else—bargaining unit member or nonbargaining member, freelancer or other nonemployee. I do not find the Respondent's arguments nor the record evidence addresses why—in this specific instance—Eringer was taken on as a freelancer as opposed to a unit employee. It is therefore clear to me and I find that the Respondent has not demonstrated by a preponderance of the evidence that it would have taken on Eringer for the column he came to write as a freelancer as opposed to as a unit member. This being so, I find the General Counsel has sustained his ultimate burden as to this allegation.

I therefore find that the Respondent hired Eringer as a freelancer rather than as a unit employee in order to weaken and undermine the Union in its representative capacity and to discourage employees' union activities. I further find that in so doing the Respondent violated Section 8(a)(1) and (3) of the Act as alleged. I shall therefore sustain the relevant allegation of the complaint.

H. The Respondent's August 22, 2008 Letter to Employees

1. Allegations and facts concerning the August 22, 2008 communication

Complaint paragraph 21 alleges that on or about August 22, 2008, the Respondent by Wendy McCaw distributed a letter to employees in which it offered to provide its own attorney to represent employees during the Board's ongoing investigation and which discouraged employees from cooperating with the Board's ongoing investigation of pending unfair labor practices. Complaint paragraph 26 alleges this conduct violates Section 8(a)(1) of the Act.

On August 9, 2008, Top Echelon informed the Respondent, i.e., Apodaca, that certain of its records had been subpoenaed by the NLRB and that it had given the NLRB contact information respecting Top Echelon's temporary employees utilized by the Respondent. In August 2008, Amie Marie Fowler was a nonunit employee of the Respondent working in the press department. Fowler had been a Top Echelon referred contractor working on behalf of the Respondent from August 2007 to February 2008. As such her contact information would have been part of the material obtained from Top Echelon by the NLRB. Apodaca in August 2008, knew of Fowler's work history, including her Top Echelon relationship and therefore within 2 weeks of the events described, knew or should have

[24] The Respondent had the services of highly skilled local and bargaining counsel. Both firms were involved in the earlier litigation at relevant times. The parties and individuals involved are smart individuals who would have taken advice from counsel and followed advice. On this record I simply do not accept the principle of honest mistake, accident, or confusion respecting major courses of conduct taken by the Respondent.

known[25] the NLRB had gotten Fowler's contact information earlier that month from Top Echelon.

In August 2008, Fowler used a personal mobile or cell telephone as her sole telephone, i.e., she did not have a "land-line" or hard-wired telephone at her residence. Her mobile phone was the only phone on which she could be contacted. As a mobile phone, her phone number was not published in "hard line" telephone directories.

Fowler testified credibly that in or around mid-August 2008, she received a voice message from a caller. The caller, a female,[26] identified herself as being from the NLRB and said she wanted to speak to Fowler about her temporary employment at the *News-Press*. The caller asked that Fowler return her call but made no suggestion such an action was mandatory. Fowler testified she was angry because she did not perceive her connection to the disputes concerning the newsroom employees. She was further concerned respecting how her telephone number had gotten to the caller.[27]

Fowler went to her superiors and reported the message she had received and the fact that she was "concerned how they had received my phone number, that possibly the *News-Press* had given it to them." She testified that she was told in reply:

> They told me that it was my decision whether I'd like to contact the NLRB or not and that they would address the issue to Human Resources to find out if, you know, maybe the *News-Press* had given my number out or not.

Fowler testified her response from management was the August 22, 2008 memo to employees that everyone received on their desks from Wendy McCaw a couple of days later.

Apodaca testified that Fowler's call and report to her supervisors was reported to her by Fowler's supervisors. In Apodaca's recollection she was told Fowler had received a call on her private cell phone from a female seeking a return call and that Fowler was concerned how her phone number was obtained. Apodaca testified that she either met with or telephoned McCaw. She testified:

> I said that our employee Amie [Fowler] had received a call and we weren't sure who it was from, and somehow her personal cell phone number was out there, and I wanted to let her know, I assured her the company had nothing to do with it and she thanked me and that was it.
>
> . . . .
>
> I believe I may have suggested that this may be occurring more and we should probably let employees know that *The News-Press* has nothing to do with it.

When asked by the General Counsel during cross-examination what was the basis for her remark "occurring more," Apodaca could not recall.

A few days later, Apodaca was in communication with McCaw and was told that McCaw had learned that the NLRB had been in touch with the employee and that McCaw was preparing an employee memo. She asked Apodaca to arrange for its distribution which Apodaca did. Supervisors received and distributed the memo to employees throughout the Paper. McCaw did not appear or testify at the hearing.

The August 22, 2008 communication is a single-letter-size sheet of paper that has no letterhead. Rather it has a single, bold, large font, all capital letter, centered heading: **CONFIDENTIAL.** This was followed in letter format with the August 22, 2008 date and a "Dear News-Press Employees" greeting and a "Sincerely, Wendy McCaw" close. The body of the communication stated:

> Some disturbing news has recently come to my attention. I was just informed that an agent of the National Labor Relations Board (NLRB) has contacted News-Press employees directly, including on their personal cellular telephones.
>
> We have previously addressed the NLRB's unfair treatment of the News-Press in a letter to the NLRB General Counsel Meisburg in Washington D.C. outlining the biased treatment that the News-Press has received.
>
> Rest assured that neither I nor any of senior management has divulged any personal or other contact information about any non-newsroom employees to the NLRB. As I previously informed the newsroom employees we are required by law to give confidential information (salary, address, and other personal information) for the newsroom employees to the NLRB and the Teamsters union (which represents only the newsroom employees). Unfortunately, I do not know what the Teamsters and/or the NLRB has done with that newsroom employee information. However, I am committed to protecting the privacy of every employee here at the News-Press.
>
> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.
>
> If you do not feel comfortable with speaking to the NLRB agents, you may feel free to tell them that you do not wish to talk with them. These are only some of the options available to you.
>
> I ask you not to be afraid or intimidated by the NLRB's "investigation" tactics. As it has been the Union's position, so it seems that the NLRB would see us give up our First Amendment rights by prosecuting meritless charges, if only to try and make up for Judge Wilson's rebuke of those same tactics. We will not give up our First Amendment rights, to the NLRB, Teamsters or anyone

[25] Apodaca conceded during cross-examination that the information was fresh in her mind during August 2008.

[26] Apodaca testified that she was informed that the person who left the voice message for Fowler was female.

[27] Fowler had had unfortunate experiences before moving to Santa Barbara which caused her to wish to limit the availably of her "contact information."

else, nor will we submit to any intimidation against our employees from anyone.

I will not belabor the point any further than to say I am very disappointed that employees that are not represented by the Teamsters have been contacted directly. Should any of you have any questions or concerns to share, please contact Mrs. Apodaca in our Human Resources Department so that we can alleviate any fears or concerns you may have.

Apodaca testified that this memo had been preceded by an earlier general memorandum to all employees issued at a different time which directed employees to see Apodaca if they needed assistance with the "union situation." That earlier memo mentioned that employees could obtain legal representation from the Respondent's counsel who would seek to assist them if possible.

2. Analysis and conclusions respecting the August 22, 2008 memo allegations

While the facts and circumstances of the memorandum's authorship and distribution are not disputed, the parties disagreed regarding the events that generated the communication. Thus, the Respondent argues that upon learning that an employee with sensitivity to unauthorized communications to her on her personal mobile phone was concerned that the Respondent had released her number to the government and did not understand her relationship to the Union/NLRB concerns respecting the newsroom of which she was not a part, the Respondent as part of its zero tolerance of harassment issued the memorandum.

The General Counsel rather describes the actions of the Respondent's agents, predicate to the issuance of the memorandum, as a malign course of conduct involving distortions, withheld information and antiunion and antigovernment motivations. Thus, the Government argues, Apodaca well knew—the information was "fresh in her mind"—that Top Echelon had under subpoena released contact information to the NLRB for those Top Echelon employees who had worked for the Respondent. And, Apodaca equally knew that Fowler was such an employee. Finally she also knew that this category of individual was connected to the outside agency issue under investigation and that the NLRB had gotten the contact information to contact these individuals regarding that issue.

Thus, argues the General Counsel from these assertions, when Apodaca learned that the NLRB had left a message on Fowler's phone asking that Fowler call the NLRB, Apodaca knew: (1) why the NLRB was calling Fowler; (2) how the NLRB had gotten Fowler's contact information; and (3) that the inquiry of Fowlers as a former Top Echelon employee was of direct relevance to a charge and ongoing investigation by the Regional Office of the NLRB. The General Counsel argues further that despite Apodaca's dodging and inconsistent version of her initial communication with McCaw and Apodaca's abbreviated and reluctant description of her later communication with McCaw, Apodaca clearly gave the facts to McCaw who, alone or with others, determined to attempt to take advantage of the situation. The contrary and overtly false assertions contained in the memo to employees, when compared to the facts recited above, the government argues, makes it clear that the Respondent was not constrained by the truth in preparing the memo, but was rather engaging in malicious deceit and falsified self righteousness.

The General Counsel also emphasizes the self-serving, and self-evidently absurd, characterization of the NLRB call to Fowler as presenting a harassment issue. The only evidence on the content of the single call—which seems to be both the complete and entire experience of Fowler with the NLRB—is that Fowler's phone was called and, as is available with mobile phones when no answer occurs, a voice mail message was left. That voice message was a female voice identifying the caller as an NLRB agent and asking Fowler to call her, presumably at some phone number also recorded.

Having considered the events that preceded the issuance of the August 22, 2008 memorandum to all employees as described above, I agree with the General Counsel that there is no reasonable or rational basis for perceiving the fact that a female Board agent called a female nonbargaining unit employee of the Respondent and left a voice message identifying the caller as an NLRB agent and requesting the employee return the NLRB agents call as presenting a "harassment" issue. Further, I agree with the General Counsel that the evidence set forth above establishes that the Respondent either knew or should have known this was true, that the contact information case from Top Echelon and, finally, that the matter under inquiry by the NLRB dealt with the Top Echelon/employee issue presented in the earlier portions of this decision.

The General Counsel makes two, separate arguments that the memorandum violates Section 8(a)(1) of the Act: (1) that it improperly suggested to its employees that they be represented by the employer's attorney in the investigation of a charge against the employer and, (2) that it improperly interfered with the Board's investigative processes by discouraging employees from cooperating with the Board's ongoing investigation. These arguments must be separately considered.

a. Does the Respondent's August 22, 2008 memo improperly suggest to its employees that they be represented by the employer's attorney in the investigation of an NLRB charge against the employer?

The Government cites the Board's decisions in *KFMB Stations*, 349 NLRB 373, 387 (2007), and *S. E. Nichols, Inc*., 284 NLRB 556, 559 fn. 9, 580–581 (1987). In *KFMB Stations*, the Board adopted the conclusion of the judge that the employer violated Section 8(a)(1) of the Act by offering employees, who had been subpoenaed by the General Counsel, the services of its attorney. It relied on *S. E. Nichols,* 284 NLRB 556 (1987), enfd. on this issue 862 F.2d 952 (2d Cir. 1988).

In *S. E. Nichols,* supra, the judge found the employer's agent informed employees that Board agents would be visiting the employer's facility and might want to interview employees. He told the employees: "[I]f [they] needed any protection he would get his lawyer to sit in on the meeting." On his own initiative, the employer's agent also told the employees they could see Respondent's attorney if they needed help in connection with anticipated requests by Board agents for employee statements. Sustaining the General Counsel's complaint allegation, the judge found the employer's statements violated Section 8(a)(1)

of the Act citing *Florida Steel Corp.,* 233 NLRB 491, 494 (1977), enf. denied 587 F.2d 735 (5th Cir. 1979); *Garry Mfg. Co.,* 242 NLRB 539 (1979), enf. denied 630 F.2d 934 (3d Cir. 1980). The judge discussed the evolution of the doctrine and distinguished the Federal Circuit Court disapprovals of the two cited cases at some length.

In approving the judge's analysis on the question the Board held:

> Concerning the offer of counsel, we agree with the Judge's clear exposition of the reasons the Respondent's offer is distinguishable from the statements found not coercive by the courts in *Garry Mfg. Co.,* 630 F.2d 934 (3d Cir. 1980), and *Florida Steel Corp.,* 587 F.2d 735 (5th Cir. 1979). Essentially, telling employees that *they* might need protection in an action against the Respondent would tend to dissuade them from cooperating with the Board. Secondly, here the Respondent did not recommend obtaining independent counsel but offered only its *own* attorney, thus, in the judge's words, "temptingly proposing a serious conflict of interests." [284 NLRB 556, portion of fn. 9 at 559.]

Chief Judge Feinberg of the Second Circuit addressing the allegation on review of *S.E. Nichols, Inc.,* held in part:

> Finally, the company objects to a finding that it violated the Act by telling employees that they could receive the advice of the company's attorney in connection with interviews by Board investigators. Nichols claims that it was simply advising its workers of their right to counsel. The ALJ discounted this explanation because the advice seems to imply the need for protection and would have the effect of dissuading employees from cooperating with the Board's investigation since the "most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being 'advised' by the employer's counsel." The Board agreed, and so do we. [862 F.2d 952 (2d Cir. 1988), at 959.]

The Respondent notes that the Fifth Circuit Court of Appeals in *Florida Steel Corp*., 587 F.2d 735 (5th Cir. 1979), has rejected the Board's theory of a violation. The Respondent, on brief at 213–215, passim, cites a variety of cases in which circuit courts have denied enforcement to cases dealing with written communications of employers to employees of a generally similar nature. Counsel summarizes, on posthearing brief at 214: "Courts have systematically concluded that letters like Santa Barbara News-Press's do not violate the Act."

The Board has specifically stood by its counsel provision theory of a violation of the Act in the cases noted. I am bound by Board cases not abandoned by the Board or reversed by the Supreme Court. And as noted, the Second Circuit Court of Appeals enforced the Board's decision in *S. E. Nichols, Inc.* I therefore follow the cited cases here and find that the Respondent in offering to employees that its attorneys would represent them during the Board's ongoing investigation violated Section 8(a)(1) of the Act. I note further that the cases, including the cases in which the circuit courts have disapproved of the Board's findings a violation of the Act turn on their specific facts. Here, the employer went out of its way in its communication to employees to hold back facts it knew, expressed hostility to the Government and its agents and associated them with partisan misconduct in investigations. In that context—one of clear and admitted hostility and disapproval, the Respondent offered its employees access to lawyers it had retained. Thus, the letter placed on each employee's desk by his or her supervisor which letter bore the name of the owner and publisher, Wendy McCaw, said in part:

> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers.

I find that this factual context of hostility and disdain respecting the NLRB investigation and investigators especially given the actual circumstances underlying the triggering events distinguishes the facts pertaining in the situations producing the contrary decisions of the courts. But in all events I am bound to and therefore follow the Board-cited cases here. Having considered the record as a whole, the testimony of the witnesses and the arguments of the parties and the cases cited, I find and conclude that the Respondent in offering to employees in the manner and context noted that its attorneys would represent them during the Board's ongoing investigation the Respondent's August 22, 2008 memo improperly suggested to its employees that they be represented by the employer's attorney in the investigation of an NLRB charge against the employer and thereby violated Section 8(a)(1) of the Act.

b. Does the Respondent's August 22, 2008 memo improperly interfere with the Board's investigative processes by discouraging employees from cooperating with the Board's ongoing investigation?

The General Counsel's argument respecting the Respondent's intentions in circulating the memo to employees and the general distorted and knowingly false presentation in the memo regarding its professed ignorance of how and why the Board was contacting nonunit employees was noted earlier. So, too, the General Counsel and the Charging Party's arguments that individual instances of violations of the Act were simply part of a whole course of conduct designed to undermine the Union and discourage employee support for the Union has been discussed earlier in considering other allegations.

The authority the Government offers for its theory of a violation here is *Certain-Teed Products Corp*., 147 NLRB 1517, 1519–1521 (1964). In that case, the employer's agent informed about 90 percent of the employer's employees that unfair labor practice charges had been filed against the employer and that the employees were not obligated to make any statements to a Board agent unless and until they were subpoenaed to appear at a hearing. He also advised employees that they could tell the Board agent to "go to the devil, or go to hell." The judge found

such conduct did not violate the Act. The Board reversed holding:

> The Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals. It is for this reason that the Board has carefully sought to protect the integrity of its processes by preventing any obstruction of Board agents in their investigation of charges. [Footnote omitted.] Here, as noted, Respondent told 90 percent of its employees that they need not cooperate with Board agents in their investigation. While it may be technically true that an individual may not be forced to give statements to a Board agent unless subpoenaed, it is clear, and we find, that under the circumstances in the present case, Respondent's advice was designed to and would in fact tend to discourage employees from supplying information to a Board agent and thus to hinder him in investigating the charges filed in this case against the Respondent. [Footnote omitted.] In reaching this conclusion, we rely on the facts that Respondent advised virtually all of its approximately 100 employees that they need not cooperate in the Board investigation; that it told several of these employees that their cooperation would result in their being subpoenaed and forced to testify at a hearing, thus indicating that their cooperation would involve them more deeply in the litigation; [footnote omitted] that Respondent's opinion regarding the investigation was not solicited by employees, and the language it utilized was in many instances intemperate; and that Respondent made other coercive statements to employees which we have previously found violated Section 8(a)(1), including statements expressing disbelief and annoyance at employees who testified at the first hearing.We find, therefore, that the above-described conduct by Respondent interfered with the rights of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act. [Footnote omitted.] [147 NLRB 1517, 1520–1521.]

The Board also made clear in *Certain-Teed* that, as is true generally respecting 8(a)(1) allegations, it is the tendency of the conduct, i.e., its objective possibility, alleged to chill the section rights of employees rather than its actual effect on specific employees that is to be considered.

The Respondent argues the *Certain-Teed* decision is "readily distinguishable and not dispositive of the instant issue." (The Respondent's posthearing brief at 212.) Counsel notes that employees in *Certain-Teed* had not been seeking advice from the employer and the language used was intemperate.

The Respondent emphasizes the advisory and informative nature of its memo. Counsel for the Respondent argues the General Counsel's characterizations of the memo are strained and incorrect. It was rather informative and contained no compulsory instruction for employees. It specifically noted there were options for employees who were contacted by the NLRB. Indeed counsel for the Respondent emphasizes the memo specifically indicated to employees that the Respondent could not advise them: "I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you."

From this argument the Respondent advances the proposition that the statements in the communication are protected by Section 8(c) of the Act which states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Respondent cites the Seventh Circuit's rejection of the Board's decision in *NLRB v. J. W. Mortell Co.*, 440 F.2d 455 (7th Cir. 1971), enf. denied 168 NLRB 435 (1967), in which the circuit court found Section 8(c) protected certain employer statements regarding an employees right not to meet with the NLRB agent preparing for an unfair labor practice trial. I note however, that I am bound to follow the Board precedent absent reversal by the Supreme Court. Further, the Respondent cites certain advisory memoranda issued by the General Counsel's Division of Advice, so called Advice memoranda. While the case citations contained therein are obviously instructive insofar as they direct a reader to legal authority, Advice memoranda are not binding precedent and of themselves neither support nor limit the argument of any party on a legal issue. I therefore do not rely on them as authority.

The Respondent also cites the Board's holding in *Baptist Medical Center,* 338 NLRB 346, 347 (2002), which declined to apply the *Certain-Teed* doctrine to memoranda addressed to employees dealing with investigations by institutions other than the NLRB. The General Counsel argues and I agree that this circumstance renders the case distinguishable from the issues at hand.

I have considered this issue in light of the memorandum itself, the underlying circumstances and the record evidence of what was known by the Respondent's agents at the time of issuance of the memo. I have considered this in light of the record as a whole, the testimony of the witnesses and the entire course of conduct of the Respondent at all relevant times. Based on all the above, the argument of the parties and the applicable precedent, I find and conclude as follows.

It is important to have the language and context of the memorandum clearly in mind in considering its likely impact on the employees—the test of the argued violation at issue. The owner and active manager of the Respondent: McCaw, causes a nonletterhead communication bearing her name and marked confidential to be delivered to all employees through delivery by supervision to the desks or other workplaces of all employees.

The communication leads with the correct assertion that she has learned "that an agent of the National Labor Relations Board (NLRB) has contacted News-Press employees directly, including on their personal cellular telephones." The communication however labels this information as "disturbing" in her first paragraph and labels the Board's conduct improper in the second:

> We have previously addressed the NLRB's unfair treatment of the News-Press in a letter to the NLRB General Counsel

> Meisburg in Washington D.C. outlining the biased treatment that the News-Press has received.

The memo is replete with additional warnings and admonitions respecting the conduct of the NLRB: "I ask you not to be afraid or intimidated by the NLRB's "investigation" tactics." "[I]t seems that the NLRB would see us give up our First Amendment rights by prosecuting meritless charges." "We will not give up our First Amendment rights, to the NLRB, Teamsters or anyone else, nor will we submit to any intimidation against our employees from anyone."

Based on the record as discussed earlier, I specifically find that Respondent's agent, Apodaca, knew at the time she reported on the inquiry of former Top Echelon employee Fowler to McCaw, that Top Echelon referents—unit and nonunit members alike—had had their contact information given to the NLRB and I, on the same basis, further find that Apodaca also knew that the then ongoing NLRB investigation of the charges against the Respondent involved the status of such Top Echelon referral individuals—a circumstance that obviously meant that at least some of these individuals would be contacted by government investigators. Since McCaw did not testify, I draw the obvious inference that she knew these facts as well at the time she wrote the memo. Yet given this knowledge, the memo states: "I will not belabor the point any further than to say I am very disappointed that employees that are not represented by the Teamsters have been contacted directly."

All of the above convinces me that the memo was not truthful and was calculated to produce a hostile view of the NLRB by creating the false impression the NLRB was harassing the Respondent's employees. I find this was intended and the Respondent's creation and presentation of the memo in the circumstances described was designed so that the employees would pay attention to the memo's advisory statements:

> I cannot directly ask you not to speak with the NLRB's agents should they, in some way, contact you. However, please note that the News-Press has retained lawyers for these matters. As News-Press employees, you may state to the NLRB agent or any Teamster operative that attempts to contact you that you are represented by counsel and to direct them to contact our lawyers
>
> If you do not feel comfortable with speaking to the NLRB agents, you may feel free to tell them that you do not wish to talk with them. These are only some of the options available to you.

The memo is clearly not, and I specifically find it is not, a benign, nonmalicious statement of the opinion by the Respondent.

It is in this factual context, as well as the larger context of the course of unfair labor practices committed by the Respondent throughout the period that I consider the legal arguments respecting the memo. Doing so I rely on the teachings of *Certain-Teed Products Corp*., 147 NLRB 1517, 1519–1521 (1964). I find the cases cited by the Respondent both distinguishable on their facts and, in the case of the United States Circuit Court of Appeals' cases reversing Board decisions cited to me, I also find the decisions are not binding precedent on an NLRB administrative law judge. Accordingly, I further find that in distributing the August 22, 2008 memo to all employees, the Respondent improperly discouraged its employees from cooperating with the Board's ongoing investigation and in so doing violated Section 8(a)(1) of the Act. I therefore sustain the relevant paragraphs of the complaint.

3. The remaining allegations respecting requests for information

a. The allegations, facts, and argument

(1) The August 6, 2008 information request

Complaint subparagraph 7(c) alleges that since on or about August 6, 2008, the Union through Caruso, requested, in writing, that the Respondent furnish the Union with the following information:

> Notification of when a new employee is hired into the unit, when an employee terminates (including resignation), or when an employee working in the newsroom has a change in employment status (including changes in title, duties, or other terms and conditions of employment) including date of hire, classification and rate of pay.

The request was headed in the letter by the specification: "I would like to make a standing information request." The request also contained the paragraph:

> Since we are disputing the employer's use of only *Temporary* employees and *Independent Contractors* [capitalization and italicization in the original] to dilute the bargaining unit, this request included the above requested information for all individuals hired to perform work performed by the bargaining unit.

Subparagraph 7(f) alleges the requested information was relevant and necessary to the Union's performance of its duties as the employees' representative. Complaint subparagraph 7(i) alleges that until October 22, 2008, the Respondent failed and refused to furnish the Union the requested information. The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act.

(2) The September 9, 2008 information request

Complaint subparagraph 7(d) alleges that since on or about September 9, 2008, the Union through Caruso, requested, in writing, that the Respondent furnish the Union with the following information:

> Notification of status changes for workers performing bargaining Unit work:
>
> The status, classifications, wages and benefits of Alex Pavlovic, Dave Mason, Chauncy Kim, Alan Hunt, Bill McMorris and John Creely, and whether the New-Press considers them to be in the bargaining Unit or not, and if not, what is their status in the New-Press' view.

> Please provide the same information for any other people performing bargaining Unit work with respect to whom you have not yet provided this information.

Complaint subparagraph 7(j) alleges that until October 24, 2008, the Respondent failed and refused to furnish the Union the requested information. The complaint at subparagraph 7(l) alleges the delay in the Respondent's furnishing the Union's requested information in both of these instances was unreasonable and complaint paragraph 25 alleges the unreasonable delays violated Section 8(a)(5) and (1) of the Act.

(3) Facts concerning the information requests and Respondent's responses

There is no dispute that the August 6, 2008 Union's information request was made as alleged and that the Respondent supplied the information at the October 22, 2008 bargaining session, i.e., after 77 days or 11 weeks had passed. There is no dispute that the September 9, 2008 Union's information request was made as alleged and that the Respondent supplied the information by letter dated October 24, 2008 bargaining session, i.e., after 45 days had passed.

The Respondent argues that the information request cannot be viewed in a vacuum and emphasized that from October 22, 2007, the Union had made numerous, substantial, and lengthy information requests to which the Respondent timely answered with voluminous information. The Respondent notes that on September 3, 2008, it provided a roster of bargaining unit employees which included the employee's name, hire date, status, regular hours worked in 2007, overtime hours worked, and gross wages. It notes further that Caruso in a September 9, 2008 letter to Zinser, voiced appreciation that the Respondent had provided that wage and hour information. The Respondent further notes that the complaint does not allege a failure to supply any information, rather only a delay in responding to a very few requests.

The General Counsel argues that the requested information regarding unit employees is presumptively relevant citing *Pennsylvania Power & Light Co*., 301 NLRB 1104 (1991), citing *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). To the extent that the information concerning individuals who are doing unit work but who are not unit members or who were in potential or actual dispute as unit members, the General Counsel argues "the information was relevant as it was part of the Union's ongoing investigation into 'the nature and extent of the use of workers outside of the Unit who are being used to supplant the unit work force.'" *St. George Warehouse*, 341 NLRB 904, 925 (2004). (The GC posthearing brief at 29.) The General Counsel further adds that the delay coupled with an absence of any justification or explanation, which belies any claim of difficulty in obtaining the information, clearly violates the Act citing *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1991).

The Respondent argues the Union never established the relevancy of the requested information respecting nonbargaining unit employees of the Respondent or the agency supplied nonemployees of the Respondent citing *Disneyland Park*, 350 NLRB 1256 (2007).

b. Analysis and conclusions regarding the information request response allegations

It is worthwhile to return to the basic law on the elements of an employer's obligations to respond to information requests. As discussed supra, the information sought must be relevant to the Union's role as unit employees' representative. The Board holds that information about subcontracting is not presumptively relevant to such a union. Therefore, a union seeking such information must demonstrate its relevance to the employer. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). In determining whether such relevance has been shown the Board uses a broad, discovery-type standard. A union demonstration of potential or probable relevance is sufficient to give rise to an employer's obligation to provide the information. To demonstrate that relevance at an unfair labor practice hearing, the General Counsel must present evidence either: (1) that the union demonstrated the relevance of the nonunit information, or (2) that the relevance of the information sought by the Union should have been apparent to the Respondent under the circumstances. See *Allison Co.,* 330 NLRB 1363, 1367 fn. 23 (2000); *Brazos Electric Power Cooperative, Inc.,* 241 NLRB 1016, 1018–1019 (1979), enfd. in relevant part 6l5 F.2d 1100 (8th Cir. 1980). Absent a showing of relevance, the employer is not obligated to provide the requested information.

The parties were clearly in dispute regarding the unit status of various of the Respondent's employees and were in specific dispute regarding the unit work undertaken by and the unit placement of outside agency referents. Important elements of that matter were discussed supra, and I have found that the Respondent's use of those individuals for unit work violated Section 8(a)(1), (3), and (5) of the Act. As discussed earlier, the Unions view on this issue was communicated early and often to the Respondent. Based on the record as a whole, I find the relevance of the information requested was known to the Respondent or at the very least should have been apparent to the Respondent under all the circumstances. I therefore find the information requested at issue herein was relevant at the time the Respondent received the Union's information requests. I reach this result based on the cited cases and the Board's decision in *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 717 (1992), enfd. 991 F.2d 786 (1st Cir. 1993).

The Respondent, on posthearing brief at 29, notes the information requests at issue are "ongoing" or "standing" requests, and argues:

> There is no precedent for a "standing information request." The notion of a continuing information request or "standing information request" is an anathema to the Act. . . . Providing [the Union] with information on a regular basis or when employees enter or leave the company is a contract term that can be negotiated, but is not an obligation with which the [Respondent] must comply at the beck and call of the [Union].

I do not find the argument of the Respondent here convincing. First, parties often negotiate contracts which expand or limit one or both parties' statutory rights. Until a contract so limiting a right has been concluded, and no such contention has been made here, negotiating about statutory rights does not limit them. Second, I perceive nothing about a standing request for

information which is disabled or reduced in efficacy under the Act by reason of its continuing nature.[28] Nor has the Respondent cited authority for its asserted proposition. Finally, even were a continuing request otherwise relevant information for some reason impaired by the fact of its continuing nature, it would remain effective as an initial or noncontinuing request for the information and is therefore not for reason of its standing status void ab initio. I explicitly find that the Union's requests for information here were not limited by virtue of being "ongoing," nor for that reason was the Respondent's obligation to respond timely to the requests diminished. This defense is rejected.

Given all the above and the record as a whole including the arguments of the parties and the testimony of the witnesses, I find and conclude as follows. The Union's information requests were received by the Respondent. The information sought was relevant under the Board's decisional law and the teaching of the courts. The Respondent responded to each information request in a sufficient manner as to the content of the response. As to the timeliness of response, I find the responses to each request, in the light of the entire history of the relationship, the bargaining and the other information requests and the Respondent's responses to them, was unreasonably delayed. The information could and should have been conveyed to the Union well before the actual times of delivery as discussed and described supra. I further find that this unreasonable delay in each instance violated the Respondent's obligation to bargain in good faith with the union and therefore violated Section 8(a)(1) and (5) of the Act. I therefore sustain the noted allegations of the complaint.

I. The December 3, 2008 Katich Meeting with Employees: Confidentiality Issue, the Dispute Concerning the One Story a Day Announcement and Change in Work Practices

1. The allegations

The two complaint allegations set forth below are essentially legally independent but share common events that make it more efficient and understandable to address them together.

The General Counsel's complaint paragraph 22 alleges that on or about December 3, 2008, the Respondent by Don Katich, in a conference room at the Respondent's facility, instructed employees not to discuss their terms and conditions of employment. Complaint paragraph 26 alleges this conduct interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act. This is the confidentiality issue.

The General Counsel's complaint paragraph 16 alleges that on or about December 3, 2008, the Respondent announced and established a requirement that unit employees produce at least one story per day. Paragraph 18 alleges that the actions alleged in paragraph 16 were undertaken without prior notice to the Union or affording it an opportunity to bargain with respect to the conduct or the effects of the conduct. Paragraph 20(c) of the complaint alleges this conduct constitutes a failure and refusal by the Respondent to bargain in good faith with the Union and, in paragraph 25, is further alleged to violate Section 8(a)(1) and (5) of the Act. This is the change in work practices issue.

2. Relevant events

a. Testimony

Don Katich was hired by the Respondent on September 15, 2008, as the Respondent's director of news operations. That position reported to the copublishers and chief financial officer. The director of news operations is in charge of newsroom operations and the employees there including the bargaining unit employees. Reporting to Katich was the associate editor, Scott Steepleton, who at the time of Katich's hire was an experienced member of the Respondent's newsroom management.

Early in his employ with the Respondent without recalling a specific date, Katich testified he had a lunch meeting with Steepleton to become acquainted and learn more of the practical side of day-to-day operations of the newsroom. Part of that conversation included a general description by Steepleton of the workload, type of work, and general productivity of newsroom employees including bargaining unit members.

In late November 2008, Katich came to know that some 17 nonnewsroom employees were to be laid off by the Respondent. The layoffs were to be effective and made public on December 3, 2008, a Wednesday. Katich testified he "wanted to provide some assurance to the people in the newsroom that those layoffs would not affect them in any way" and so he issued a staff memo a few days before December 3 announcing a meeting for that day for the entire newsroom staff. He testified:

> [I]t was my motive, my objective to give some hope, some guidance to both managers and bargaining unit employees within the newsroom that there was—that these layoffs would not affect them and that there was some plan, some hope, some direction of how we would work together to ensure that we stay viable as a news organization.

That day, with three pages of word processor prepared and printed notes in hand, which notes included within them the text of the just released press release issued by the Respondent announcing the layoffs, Katich met in the afternoon with the newsroom staff comprising 15 to 25 reporters, page designers, copy editors and photographers as well as then Associate Editor Steepleton, Assistant Life Editor Boelchler, photo editor Maldonado, and scene editor Bradford. Several witnesses testified regarding the specifics of the meeting.

Katich testified concerning the meeting. When asked if he read his notes verbatim at that meeting by his counsel, he responded: "Not in its entirety." He added:

> The only portion of my notes that I read verbatim was a press release that you have identified in the larger font. The remainder of the notes were used more to keep me on track and to make sure that there were certain things I did not forget.

[28] That is not to say that issue of the reasonableness of the frequency of an employer's response to such requests may not arise. But here, the initial response of the Respondent is under contention not some later, repeat response.

Katich testified, and his notes track the assertion, that following his opening greetings, announcement of the layoffs and his assurances that the layoffs would not affect the newsroom, he announced: "The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." He testified:

> And the purpose of that was to hopefully ensure that the words that I spoke, the direction that I communicated to the newsroom would not appear in the blog-sphere or in our competition as—and did so report about the 17 layoffs.

Having announced that caution, Katich discussed the general difficulties in the newspaper industry and specific problems with other papers. He then turned to the News-Press and in an exhortation asked for a renewed effort by all to invigorate the Paper.

He testified he then told the employees that "starting immediately" as part of the necessary effort to build up the paper" a series of things would take place. In testifying about the specifics of what he said regarding the listed matters, Katich indicated: "What I stated in the meeting is virtually identical to what my notes have indicated." The notes state:

> Starting immediately, all of our efforts, every day go towards building up this paper.
>
> We will be hiring an AM Assignment Desk Editor who will be working 6 am–3 pm, preparing the days events and assignments in preparation for our 9 am Meeting with the Associate Editor, Business Editor, photo in an effort to plan out the days events in a coordinated and proportional structure.
>
> We will have a posted work schedule and every reporter/writer wall be responsible for a minimum of one story per day and one story for the weekend.
>
> We will assign/schedule Feature stories 60 days in advance.
>
> We will dominate our Lead story, at times assigning two resources to cover the story.
>
> We will make better use of our graphics design capabilities.
>
> We have the the [sic] best photojournalists in the market; we will use them more effectively.
>
> We will migrate to [a new type of technology] aggressively providing greater efficiency in how we operate.
>
> We will remove any artificial barrier that hinders our ability to proceed.
>
> We will provide LIVE streaming over Newspress.com and Dale Earnerst will be present at our 9 am meetings.

Steepleton testified in response to questions from Respondent's counsel as follows regarding what was said in the meeting:

> Q. Now, did Mr. Katich explain anything or state anything about the expectations of reporters as far as the amount of work that the company expected them to produce?
>
> A. Yes.
>
> Q. Okay. What did Mr. Katich say?
>
> A. A story a day.
>
> JUDGE ANDERSON: Do you remember how it came up? The words before it and the words after, if you will.
>
> THE WITNESS: He went through the closures, he went through having to reposition people, and kind of as a result, I may not be quoting him accurately, but as a result people are going to have do a story a day. That's what we want out of people.

There is no dispute that the remarks of Katich regarding the "story a day" were not expanded upon, explained, or even commented upon thereafter by Katich or any of the Respondent's managers or supervisors attending the meeting at the meeting itself.

Following his remarks, Katich solicited questions from employees. Some were proffered and responded to. They did not touch upon the "story a day" matter. In time the meeting concluded and the assembled group began to disperse. Again no discussions occurred regarding the "story a day" matter.

Karna Ming E. Hughes, is a reporter in the bargaining unit who at relevant times was a writer of feature stories for the Paper's lifestyle section who also wrote shorter stories for the news and the lifestyle sections. She is also a member of the Union's bargaining committee. She testified that she attended the December 3, 2008 meeting. She testified further that the "one story a day requirement announced by Katich was new to her and she wondered how it would apply to her circumstances as a lifestyle section writer. She did not raise the matter at the meeting. She described her later actions concerning the matter:

> Well, immediately following the meeting as I was walking back to my area, my desk in the newsroom, I asked the Assistant Life Editor, Charlotte Boechler, if the story a day requirement applied to us in the life section.
>
> Q. Did she respond?
>
> A. Yes. She said not to worry about it and that they'd talk to us about it later.
>
> Q. Did you respond to that?
>
> A. I asked when we would talk about it. I asked will that be next week?
>
> Q. And did Ms. Boechler respond?
>
> A. She said not to worry about it, that she'd let us know.

Dave Mason, a reporter for the life section attended the December 3, 2008 meeting and also had questions about the "story a day" matter and asked Boechler about it.

In due course, Boechler, in Steepleton's memory, told Steepleton that Hughes and Mason had questions about Katich's December 3 statements respecting work amounts. Steepleton contacted the two and conducted a meeting with the two and Boechler, his spouse, on December 9, 2008. Steepleton testified that following opening greetings and his thanking the employees for their efforts, the subject turned to Katich's "story a day" comment. Steepleton testified that he told the employees that the "story a day" was "a goal to shoot for" and that not every story was the same size, ". . . [s]ome stories are going to take longer and some stories aren't. . . ." The conversation continued with the employees seeking specifics as to length and deadline for submission requirements Steepleton assured them that flexibility would apply.

Hughes testified:

> Scott Steepleton started the meeting by saying that he was thankful for what we had done in terms of contributing additional articles around the tea fire incident, and then he said that with the—that times had changed in general for the Company, that the layoffs, that we were aware of the layoffs and times had changed, and that the story a day requirement would apply to us. . . . He said that he wanted us—he said that in general we seemed to be averaging about two features a week, so he wanted us to continue writing two features but then also do three additional stories and the three stories would be what he called write-throughs of about 10 to 12 inches in length.

Hughes added that Boechler then stated she thought that as to those shorter stories, "we should just take about 10 minutes to interview one person for the story and then that it would take about an hour to write the stories."

Mason recalled Steepleton's remarks at the meeting regarding additional stories:

> Scott [Steepleton] was saying—was talking about they were looking at how the features department would satisfy the goal of one story per day. Because as I said earlier, feature stories do involve more time. They involve more research, more writing time.
>
> As Scott said that they thought we could—Scott said that they were having us write two additional stories, which would be short stories, per week. So we would have our three—he said that we all were doing the three cover stories a week, the life section covers, and that there would be two additional shorter stories. And that would bring us up to five stories a week. . . . I also remember that at the time Karna Hughes had—was concerned about the workload. And she expressed her concern about how we'd manage to do all this. And to the best of my memory, I believe Scott and Charlotte said that they were—you know, discuss those things with her.

Hughes, Mason, and Marilyn McMahon, union bargaining committee member, unit member, and staff writer in the life section under Charlotte Boechler, each testified to feeling under greater pressure to write more stories. Mason and Hughes testified that they were making extra efforts to complete the added shorter stories now required of them weekly. McMahon testified: "There's a been a great deal more pressure to write more stories. Not only for the feature section, but also for the city desk." Katich and Steepleton testified that no increase in workload of unit employees was initiated following the December 3, 2008 meeting.

There is no dispute that the Respondent did not communicate with the Union before the December 3, 2008 meeting respecting any change in the number of stories required of unit employees. On December 4, 2008, Caruso by letter to Zinser raised two matters which Caruso stated he learned had been raised by Director of News Operations Katich at a December 3, 2008 newsroom employee meeting. The letter described one matter as the "apparent announcement of a new requirement" that reporters would be required to write a minimum of one article per day. The letter at this point stated:

> This, is therefore to request that the News-Press disavow and rescind any such policy as it affects the newsroom. If the News-Press declines to do so this is to request that the News-Press immediately explain in full on reporter "production" is, what, if any consequences including disciplinary and/or positive consequences may flow from that policy. . . .

The letter raised as the second item the fact that Katich instructed the employees that everything said at the employee meeting was "proprietary" and had to stay in the room and not be shared by anyone outside the room. The letter noted:

> As you know, Michael, we have been down this road before "at least with a 'gag order'" that the News-Press significantly modified on the eve of the filing of an ULP charge in July, 2006, and with the December 15, 2006 memo, which would have been protected if disclosed to the media by any newsroom employee. Again this is to request that the News-Press rescind or clarify to its employees its position on what employees may disclose to non-News-Press employees without negative consequences to them.

Caruso wrote a second letter to Zinser on the matters covered in the first letter dated December 11, 2008, again seeking a reply. Zinser responded by letter dated December 12, 2008, stating the Respondent needed more time to respond. On December 19, 2008, Zinser wrote to Caruso covering various matters. As to the "trade secrets" issue the letter stated:

> In the meeting you referenced, Dan Katich informed reporters that the information pertaining to the business strategy of *Santa Barbara News-Press* was proprietary and confidential. Employees were informed of how management had decided to reorganize the content of the newspaper, as well as how management has decided to dedicate resources. The information was considered a trade secret that is confidential and propriety information that *Santa Barbara News-Press* expected employees to not share with any competing news outlets.
>
> *Santa Barbara News-Press* is well aware of employees' rights to discuss terms and conditions of employment with [the Union], and in no way were employees directed to withhold any information pertaining to terms and conditions of employment from [the Union]. You are replowing tilled soil here. We have been down this road before. To the extent an employee interpreted anything to reflect such a prohibition, that employee's interpretation is unreasonable and unsupported. Of course employees can discuss terms and conditions with the union and among themselves.

Zinser's letter also addressed the "one story" policy issue:

> Finally, with respect to "a new policy that reporters will be required to write a minimum of one article per day," such a goal was announced to employees. This is no new "policy." Your letter appears to recognize this by referring to the "pre-existing practice and policy . . . ." *Santa Barbara News-*

Press does not intend to discipline any employees for failing to meet goals that are greater than historic productivity standards.

b. Credibility resolutions

The bulk of the evidence respecting these allegations is undisputed. To the extent there is dispute regarding some elements of the events, I here resolve credibility issues needed to determine what actually occurred. Based on the demeanor of the witnesses, consideration of their positions and sympathies, and importantly in this case, the fact that the witnesses involved are purveyors of words and evinced experience and skill in their use, I make the following findings.

I find that Katich opened his remarks at the December 3, 2008 meeting with the assertion, which is consistent with his notes: "The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." Again consistent with the great bulk of the witnesses, I find Katich did not make any statement to the employees respecting the Respondent's employee handbook. Further, I find he did not make the remarks attributed to him in Zinser's letter to Caruso dated December 19, 2008.

Regarding the statements of Katich respecting the "story per day" subject matter, I find, consistent with his notes, that he made a statement which contained a series of things which he indicated he was announcing were to "start immediately" and which were part of the necessary steps necessary to build up the paper. One of the series of things that he announced would immediately take place was the statement: "We will have a posted work schedule and every reporter/writer will be responsible for a minimum of one story per day and one story for the weekend."

3. Analysis and conclusions

a. Matter of subjectivity, intention, ignorance, lack of enforcement, and inexperience

The Respondent argued at some length that I consider the perspective of Katich in evaluating the allegations of violations of Section 8(a)(1) and (5) arising out of the December 3, 2008 meeting. Thus, counsel for the Respondent argues it is important to note that Katich at the time of these events was inexperienced in managing a newspaper newsroom and equally inexperienced in managing employees in a union-represented bargaining unit. Finally, the Respondent notes that Katich's conduct must be viewed through the lens of what he knew or understood to be true concerning employees working conditions at the time the remarks were made. He further notes no employees had been disciplined for violation of the supposed new rules in the context of the instant dispute. Finally the counsel for the Respondent urges Katich's intentions and desires be taken into account both as to the consideration of a violation and, if necessary, in crafting a remedy.

The Board has traditionally applied an objective standard to evaluating whether or not employer conduct constitutes interference, restraint, or coercion of employees in the exercise of their right to self-organization and therefore violates Section 8(a)(1) of the Act and does not look to the subjective views of the employer or the employees involved. It has relied on the decision of the Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969):

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established, and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.
>
> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. [395 U.S. at 617–618.]

The Board has maintained that position in *Lafayette Park Hotel*, 326 NLRB 824 (1998), a case which dealt with an employer's unacceptable conduct rules for employees including "divulging Hotel-private information" to unauthorized individuals. The Board in a split decision on the merits held "we all agree" that the employer's conduct is to be tested by a determination whether or not it would reasonably tend to chill the exercise of Section 7 rights (326 NLRB at 824). The Board noted further:

> Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB* v. *Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation* [*v. NLRB*, 324 U.S. 793, 797–798 (1945)], 324 U.S. at 803 fn. 10. [326 NLRB at 825.]

Based on all the above, the arguments of the parties, the record as a whole and the testimony of the witnesses, I find as follows respecting these defenses. First, I find the standard to be applied to the statements in contest is an objective one of determining what reasonable employees would have perceived in the context of the employer's labor relations setting. Applying that standard it is permissible to consider the perceptions of a reasonable employee perceiving the meeting's participants statements but the subjective state of Katich to the extent it was not part of the perceptions of a reasonable employee is immaterial. The noted standard will be applied in reaching a resolution of the allegations immediately below.

b. The December 3, 2008 meeting confidentiality allegation

I have found, supra, that Katich essentially opened the December 3, 2008 meeting with the statement: "The contents of this meeting are considered to be a trade secret and as such what is discussed in this meeting shall not leave the confines of this building." I further found that Katich made no reference to the Respondent's personnel manual in his remarks.

A "trade secret" is a common term for a secret device or technique which is held closely or confidentially and is used by a company in manufacturing its products. The most common example within our culture is the secret formula or recipe for the Coca-Cola® beverage. Proprietary information is simply a broader class of information properly closely held by a company. An employee would be imprudent to lightly disseminate a trade secret or other proprietary information of his or her employer. There is no doubt that Katich, the highest official of the Respondent in the newsroom, was giving an instruction of importance to the meeting participants in opening with his cautionary advisory: "what is discussed in this meeting shall not leave the confines of this building."

In *Crowne Plaza Hotel*, 352 NLRB 382 (2008), the Board considered whether a rule prohibiting employees from talking to the press was unlawfully broad and, thus, violative of the Act. Citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), the Board affirmed that Section 7 of the Act protects "employee communications to the public that are part of and related to an ongoing labor dispute." Id. at 386 fn. 21. In *Crowne Plaza*, the Board found that the employer's rule in that case could reasonably be construed as "prohibiting all employee communications with the media regarding a labor dispute." At the very least, the rule could be viewed as "ambiguous." The Board concluded that the rule was facially overbroad and thus the maintenance of the rule was violative of Section 8(a)(1) of the Act. Id. at 386. See also *Trump Marina Casino Resort,* 354 NLRB 1027 (2009), and *Brunswick Corp.*, 282 NLRB 794, 795 (1987). With respect to interfering with the protected right to talk to the media about labor disputes, see *St. Luke's Episcopal-Presbyterian Hospitals*, 331 NLRB 761, 762 (2000); and *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

At all relevant times, the Union was engaged in a labor dispute with the Respondent presumably in an attempt to put pressure on the Respondent to make concessions at the bargaining table. The Union requested that businesses cease advertising in the Paper and called for a boycott of those businesses that did not agree to cease advertising in the Paper. The Respondent filed several charges against the Union contenting that aspects of the campaign against the Paper violated the Act. In December 2008, those charges were outstanding and had not as yet been ruled on by the Board.

It is important to note the specific statutory rights involved respecting this issue as well as the Respondent's and the Union's positions on the matter as communicated to one another. At issue are the right of employees to talk to one another and to their bargaining representative about certain matters, but also, and importantly, the incident touches on the right of employees to have communication with the media regarding a labor dispute. Caruso's letter to Zinser dated December 4, 2008, clearly notes that the Union is again dealing with a perceived infringement of employees' rights to communicate to the media, i.e., his reference to earlier Respondent limitations and restrictions on information that would have been "protected if disclosed to the media by any newsroom employee." Yet, in Zinser's reply, which I have found supra to incorrectly deny the occurrence of the broad restrictions Katich announced at the beginning[29] of the meeting at issue does not address the access to media rights of employees or the Union's complaint in that regard. In my view the Respondent's overly restrictive view of employee rights to discuss with their Union and among themselves certain information, as well as communicate with the media respecting the ongoing labor dispute was defiantly reiterated by Zinser in the face of the Union's complaint and Katich's initial remarks may hardly be labeled as a de minimus or inadvertent error in the full context of events.

Given all the above and based on the record as a whole, the argument of the parties and the testimony of the witnesses, I find the broad and essentially total blackout or "keep secret" admonition of Katich to employees regarding the meeting's content, during this period of the Union's ongoing labor dispute "at the very least, . . . could be viewed as 'ambiguous'" by the employees. Accordingly I find Katich's restriction was overbroad and, thus, was violative of Section 8(a)(1) of the Act. I therefore sustain the relevant paragraph of the complaint.

In reaching this conclusion I have considered the fact that the employees surely knew that Katich was new to his job. I find that it makes no difference here because the remarks made by Katich were made in the presence of the other Respondent managers and supervisors in the newsroom and were not corrected by them. The employees reasonably took Katich's caution as authoritative when it was allowed to stand uncorrected by their more immediate supervisors who were in the meeting with them. The Respondent's agents had their chance to catch any error in their new manager's remarks. When they did not make corrections, the employees could hold no reasonable belief he was not speaking with the authority of his office. And as noted supra, the Respondent was informed of his conduct by the Union and responded with a denial of the actual details of the event and a reassertion of the Respondent's rights to impose such total blackout restrictions at the beginnings of meetings under the banner of trade secrets and proprietary information.

I have also considered the fact that the Respondent's handbook has an addendum which asserts that the Respondent's handbook's prohibitions in its "Confidentiality" portion does not apply to communications protected by the National Labor

[29] It is of course revealing that the meeting commenced with the announcement of a broad no-disclosure edict by the Respondent. At that point when the meeting was just beginning there was no way of the employees knowing what broader subjects the meeting might visit. Only at the end of a meeting, when it is clear what has been said, could an employer safely put out a blanket restriction under a claim that only company plans and strategies were being protected.

Relations Act and states its policy should not be construed as preventing employees from discussing with each other their wages, hours, and other conditions of employment for their mutual aid and protection. I find that an employer's written assurances in its employee handbook, of the type and nature involved herein, are simply not an effective defense to the chill the employees rights suffer when they are told in a closed meeting by the newsroom editor, with all their other supervisors and newsroom editors present, that like a trade secret what was said in the meeting was to be held closely: "what is discussed in this meeting shall not leave the confines of this building." The employee handbook, including its cautionary language, was not before employees summoned to a meeting attended by their managers and supervisors. What they are told at the meeting, that all information is restricted as described, is not saved from violating the Act because of the language of the employee manuals read long before and doubtless stuck by those employees in the back of the employees' desk drawers.

c. The allegation concerning the December 3, 2008 one story a day announcement and subsequent change in work practices

The case law applicable to unilateral changes is not in dispute and has been presented supra. The issue here rather is factual: Did the Respondent through Katich on December 3, 2008, announce and establish a new standard for unit employees respecting the quantum of daily article production?

The Respondent argues that there was no discrete, established minimum standard for the number of stories or articles written in the newsroom. Further, counsel for the Respondent argues there was no written or disseminated standard addressing the quantum of stories required to be produced. While there was no such specific standard, the Respondent did expect employees to be productive and employees who were not sufficiently productive were regularly admonished in their performance reviews to do better. Thus, for example—a warning to an employee failing to produce at least one story a shift. On many occasions, particular employees had their individual productivity described in such reviews in terms of their story output. Examples include: "usually writes a story a day during weekdays and a story (or two) and briefs on Saturday," "is extremely productive and regularly writes a story or two a day," "is called upon to write or contribute two stories on a daily basis." It is also true that the nature, length, and difficulty of writing particular stories in particular portions of the paper vary so widely that the terms "article" or "story" as a measure of unit employees productivity was so variant as to be almost meaningless as a form of measurement.

The Respondent notes that at the meeting at issue Katich sought to inspire employees and wanted employees to be productive and to contribute daily to the paper. His remarks at the meeting were simply that employees were responsible for one contribution per day and that this was historically nothing new. Further, the Respondent argues it did not discipline or threaten to discipline any employee for failing to achieve such a standard after December 3, and made it clear to the Union in writing that they would not be disciplining employees.

The Respondent further argues the matter at best is a de minimus violation of the Act and notes, on brief at 196:

> Assuming, arguendo, that Mr. Katich announced a "change" at the December 3, 2008 meeting, the goals announced by Mr. Katich were actually less of a "change" than those instituted in *Service Spring Co*., 263 NLRB 812, 812 (1982), where a new president instituted stricter attendance standards and "tightened discipline" to improve production efficiency.

The General Counsel argues that it is clear that until the December 3, 2008 meeting, no quantified rule or standard existed respecting a particular number of stories per unit of time, such as one story per day. The fact that historically individual employees in private evaluations conducted after a calendar year had passed were praised for achieving or criticized for not producing an output of a story or stories a day is not evidence of a rule. New employees who need to learn of the employer's performance rules or standards at the soonest opportunity would not know such praise or criticism awaits them at year's end. The General Counsel in these regards advances the Board's adopted explanation of Administrative Law Judge Richard A. Scully in *Alwin Mfg. Co*., *Inc.,* 314 NLRB 564, 568 (1994), wherein the judge explained:

> There is a substantial difference between attempting to discipline an employee for low production based on the production of other similarly situated employees or his own previous production and imposing precise minimum hourly production rates which have been unilaterally determined by the employer and which all employees must meet or be subject to disciplinary action.

See also *Tenneco Chemicals, Inc.,* 249 NLRB 1176 (1980). And the General Counsel emphasizes that the mere announcement of a change is a violation of Section 8(a)(5) of the Act, irrespective of whether any attempt at enforcement or discipline or threat of discipline or other steps had been undertaken. *ABC Automotive Products Corp*., 307 NLRB 248 (1992).

Based upon all the above, the record as a whole, the arguments of the parties and the testimony of the witnesses, I find and conclude as follows.

First, I find that there was in fact no specific numeric written minimum quantity requirement attached to story production in the bargaining unit as of the time of the December 3, 2008 meeting. I further find that Katich—when he announced of the various employee actions and achievements that followed his exhortatory declamation, as his notes reflect: "Starting immediately, all of our efforts, every day go towards building up this paper," was listing new actions the Paper would be taking. Put another way Katich was announcing the new "We will" actions as changes in old ways of doing business which would aid the paper in overcoming economic adversity. The only fair meaning to be taken from Katich's remarks—recall both he and his audience are professional wordsmiths living in a world of language—in the context presented, was that all was to be new, that changes were to occur as listed by him in his remarks. Thus, I reject the argument that he was not seeking change. I reject the argument that the employees would not realize he was setting forth new standards of employee conduct "starting

immediately." The contrary argument that the employees would believe he was stirring the troops with an announcement that the status quo would simply be maintained "starting immediately" is unsound and unpersuasive.

Second, based on the cases cited above, I find the unilateral announcement of a change in the story output policy for unit members violated Section 8(a)(1) and (5) of the Act from that point forward even in the absence of enforcement or threat of enforcement. And I do not find the matter simply de minimus or a new manager's innocent naiveté as the Respondent has argued.[30] Rather, I find there are significant additional factors that further support the violation and diminish the Respondent's arguments that the entire matter was miscommunication and confusion.

The correspondence quoted in part above, make it clear that the Union put the Respondent on notice early on of its concerns regarding a December 3 announced new standard. The Respondent delayed any substantive response by initially asking for more time to prepare a response and then in that response simply reasserted its version of facts, rejected by me as incorrect supra, and refused to admit of any need to take the Union's requested action to either retract the announcement or to assure employees that no new standard was in place or would be enforced. Further, again as discussed supra, the Respondent's agents Boechler and Steepleton, as late as December 9, 2008, met with employees who had expressed worries about the specific new story quantum requirements personal to them that were in place as a consequence of Katich's December 3 "one story" announcement. Those agents of the Respondent did not give any assurances to the worried employees that no change had occurred in story requirements. Rather, they gave the employees specific instruction in how they should apply the new rules to their work output. Employees would reasonably believe in such a context that their performance requirements had been raised. I sustain the relevant complaint allegations.

J. The Respondent's Employee Performance Evaluation Modification Allegations

1. The allegations

The complaint at subparagraph 13(a) alleges that in or around November 2007 through January 2008, the Respondent made a general modification to its performance evaluation system in connection with the 2007 performance of unit employees. In subparagraph 13(b) the complaint alleges the Respondent in or around November 2008 through January 2009, "failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice."

Complaint paragraph 17 alleges the performance appraisal system is a mandatory subject of bargaining and paragraph 18 contends the Respondent took the actions alleged in paragraph 13 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct or the effects of this conduct. Complaint paragraphs 20(c) and 25 alleges that the Respondent in engaging in the conduct set forth in paragraph 13 has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Complaint paragraph 23 alleges the Respondent took the actions alleged in paragraph 13 because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities. Complaint paragraph 24 alleges that the Respondent in engaging in the conduct set forth in paragraph 13 taken for the reasons set forth in paragraph 24 has discriminated in regard to the hire or tenure or conditions of employment of employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

2. Relevant events

At relevant times the Respondent has utilized a performance evaluation system to evaluate the performance of its employees. The process utilizes a multipage form, which on its face describes the process. It states in part:

> After you and your supervisor discuss your performance, the evaluation form will be returned to you for your signature to confirm that discussion took place. You may, if you wish, enter additional comments of your own. A copy of the complete form with your comments (if any), will be given to you and the original will be on file in the Human Resources Department.

Apodaca testified that the forms traditionally are prepared by the supervisor for each employee and the completed forms are submitted to the human resources department for approval. The approved forms are then returned to the supervisor who then meets with the employee to discuss the completed form and the employee's performance. Thereafter, the form, along with any comments the employee chooses to submit in response, are returned to human resources for inclusion in the employee's personnel file. Up to and including the 2006 performance appraisal process at the end of 2006, some employees were given employer-prepared self-assessment forms by their supervisors which were filled out and returned to supervisors as part of the evaluation process. Both unit and nonunit employees did so but not all employees in all departments did. Some employees took the language of the forms and submitted answers in other ways such as by email. After the 2006 evaluation process, the Respondent-prepared self-assessment forms were no longer supplied to employees although some employees submitted self-prepared self-assessment submissions thereafter. Apodaca testified she believed fewer than half of employees used the employer-prepared self-assessment forms during the period of their use. Most of the Union's supporting employees who testified regarding the matter used them. Apodaca testified the self-assessment process was always voluntary and simply an aid to supervisors in evaluating employees.

[30] The Respondent's cited case, *Service Spring Co.*, 263 NLRB 812 (1982), is inapposite in that it is a case addressing an alleged violation of Sec. 8(a)(3) of the Act, not a violation of Sec. 8(a)(5) of the Act and hence does not address statutory bargaining rights and issues.

The evaluation process ascribes numeric scores to various elements of employee performance. The arithmetic total of these scores, depending on their totals, makes the employee eligible or ineligible for any annual bonus awarded that year by the Respondent to employees. In January 2006, the then-publisher, Joseph Cole, wrote a memo to employees explaining that the performance reviews give the employee "the formal opportunity at least once a year to discuss your job performance with your immediate supervisor. Success can be reviewed and areas for improvement explored."

Melinda Burns, a former employee, testified that as a newsroom reporter participant in the evaluation processes at the end of the years 2001, 2002, and 2004, she had occasion to discuss her supervisors evaluation of her and that she had protested that her supervisor's scoring of her performance were unreasonably low. On these occasions, she was able to obtain increases in her scores that allowed her to receive annual bonuses that she would not have received had the scores not been raised.

The evaluation process for employee performance in calendar year 2007 took place after the Union became the representative of unit employees. Witnesses Marilyn McMahon, Dennis Moran, and Karna Hughes testified that they did not have the opportunity to see their supervisor-prepared 2007 performance evaluations or meet with their supervisors concerning them. Hughes testified that she had submitted a self-evaluation form to her supervisor, then-editor of the life department, Mindy Spar, in November 2007. After a period of months passed Hughes asked Spar if they were going to have a performance review and Spar answered she did not know. Spar left the paper on or about May 1, 2008.

These employees testified they learned of the existence of supervisor-prepared evaluation forms for them only some months later when instructed to come to the human resources' department to sign their evaluations. Ultimately, the human resources department had occasion on May 6, 2008, to send to five employees email apologies for the fact "that your 2007 performance review was not reviewed by you" and a similar email to a sixth employee was sent on May 8, 2008.

Many of the employees involved in this circumstance had had supervisors leave the employ of the Respondent during the period these circumstances occurred. Other employees, including bargaining unit employees, received performance evaluation forms, discussed them with their supervisors and signed them in the normal course. Supervisors involved in the performance evaluation process received a memo from the human resources department to undertake and complete the 2007 evaluation in the normal course similar to the memos distributed to them in earlier years.

Respecting the employee performance evaluation process for the performance year 2008, Apodaca testified that the Respondent changed the evaluation forms for nonunit employees of the Respondent and determined their meetings with supervision as part of the evaluation process for 2008 would take place in late May 2009. She testified regarding the unit employees:

> Why, Ms. Apodaca, did the company not just simply meet with the 20 employees in the bargaining Unit in November or December or January or February to discuss their performance evaluations rather than waiting for this new change in the form for the other 130 employees?
>
> A. It was my belief that we should be consistent and administer all of the performance reviews at the same time.
>
> Q. So, if I may, in other words, you wanted to treat the 150 employees the same rather than have 20 Unit members receive their performance evaluations prior to the other ones?
>
> A. Yes.

There is no dispute that the Respondent never notified the Union that it was making changes to its performance evaluation process for unit employees.

3. Analysis and conclusions

a. Modification of performance evaluation of employee's 2007 performance

The General Counsel has alleged that the denial of the bargaining unit's opportunity to meet with supervision concerning their 2007 performance-evaluation forms was significant to unit employees because such meetings provided an opportunity for the individual unit employee to disagree, argue, and obtain increases in the supervisor's numeric scoring which could make an employee eligible for a bonus for the first time. The General Counsel has further alleged that the Respondent's denial of this unit practice for the performance year 2007, without notifying the Union or providing it with a chance to meet and bargain is a violation of Section 8(a)(5) of the Act. The Government further alleges the denial was undertaken to discriminate against unit employees for their union activities in violation of Section 8(a)(3) of the Act.

The Respondent addresses all aspects of the Governments claims, but argues most forcefully that the contretemps concerning the missing of some of the 2007 performance year employee meetings with their supervisors was not a policy established by the Respondent, but was rather a mistake of individual supervisors arising from the uncontested fact that some supervisors and managers left the Respondent's employ during the relevant period and the entire newsroom managerial and supervisorial staff was in some confusion during the period at issue. And, the Respondent emphasizes, there is no evidence that the mistake was more widespread that the specific half dozen or effected employees to whom the Respondent specifically apologized when the error was discovered in May 2008.

Thus, the Respondent argues, there was no change in policy—the human resources department was unaware of the events and apologized to employees for the error when it was discovered. Further, there was no animus driven action that could possibly be in violation of Section 8(a)(3), simply because there was no action taken by the Respondent beyond the personal negligence of a few supervisors who were soon to leave their employment.

Turning initially to the 8(a)(3) allegation, the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical framework for addressing the issue. The cases cited supra will not be repeated here in total, but it is important

to recall that in the two-step process, it is the General Counsel has the initial burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the challenged action taken. Here, I find the General Counsel bears the burden of establishing that there was a decision taken by an agent or agents of the Respondent or attributable to them to withhold or deny the unit employees or some of them the right to discuss their performance evaluations with their supervisors. It is to that threshold matter I turn.

The record reflects a half dozen employees did not have timely postevaluation meetings with supervision for performance year 2007. At least the bulk were union supporters. The record also shows that when the human resources' department learned of this fact they issued apologies. Further, there is evidence that the supervision of the newsroom had been in turmoil at relevant times and that many of the supervisors left the Respondent's employ. Finally it is clear that the Respondent distributed the "normal" instructional memo to supervision for performance year 2007 evaluations and that at least one supervisor testified that he was instructed in the normal course and personally provided employees with an opportunity to meet and discuss their evaluations as in prior years. It was also shown that at least one supervisor when asked whether or not employees would be meeting with their supervisors to discuss the evaluations indicated she did not know. Lastly, the entire issue must be judged on the entire record including the substantial pattern of antiunion conduct undertaken by the Respondent.

Given all the above, the record as a whole, including the argument of the parties, and the testimony of the witnesses, I find and conclude the General Counsel has not met his initial burden of showing an intentional action by the Respondent. There is simply insufficient evidence of a directed course of conduct. Rather I find a series of mistakes at a time of some confusion and turmoil: Nothing more. That being so, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged in the complaint concerning the 2007 evaluation year. I shall therefore dismiss these allegations of the complaint.

This factual finding is likewise fatal to the General Counsel's 8(a)(5) allegation concerning the 2007 evaluation year performance process. I have found no intentional change in practices. Rather I have found that the errors in process were acknowledged by the Respondent and apologized for. There was insufficient evidence to find that a practice had been knowingly changed or that the irregularities that occurred were regularized or made into new practices. That being so, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint concerning the 2007 evaluation year. I shall therefore dismiss these allegations of the complaint. I include in this dismissal any contention that the discontinuation of the Respondent-prepared self-assessment form in performance year 2007 was a unilateral change violative of Section 8(a)(5) of the Act or an animus based action against unit employees. The process of self appraisal was clearly voluntary. The language on the forms was sometime copied by employees in other forms of self evaluation. I find the significance of the form as opposed to the process, was of insufficient significance to the performance evaluation process to trigger a bargaining obligation standing alone.[31] And I do not find sufficient evidence offered that the discontinuance was retaliatory to meet the General Counsel's initial burden under *Wright Line*.

b. Failure to conduct evaluation of employee's 2008 performance in accordance with past practice

The facts relevant to this allegation are undisputed and may be taken from Apodaca's testimony quoted, supra. The Respondent changed the forms used for nonunit employees for the calendar year 2008 performance period evaluation process and determined the nonunit employees' meetings with their supervision as part of the evaluation process for 2008 would take place in late May 2009. The Respondent retained the earlier forms and process used for the unit employees. But rather than have the fewer unit members receive their performance evaluations prior to the more numerous nonunit employees, the unit members' process was conformed to the new nonunit schedule. Thus, unit employees' schedule of meeting with their supervisors was changed by the Respondent from the late fall, early winter time of previous years to the late spring period for 2009. The Union was not informed of nor offered an opportunity to bargain over the scheduling change.

The Respondent's counsel argues that the complaint alleges that the Respondent failed to conduct employee performance evaluations of 2008 performance and the record established that it in fact did so, therefore there can be no violation found. I find this is an overly narrow reading of the complaint. The precise language of complaint paragraph 13(b) alleges that the Respondent: "failed to conduct employee performance evaluations of 2008 performance for its unit employees in accordance with the Respondent's past practice." Parsing the allegation, it is clear and I find the heart of the allegation and its fair meaning is that the Respondent changed its practice rather than discontinued it. This being so I find the complaint encompasses the uncontested delay that took place at the Respondent's hands.[32]

The Board holds that a unilateral change is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co.,* 281 NLRB 737, 738 (1986). Employee performance evaluations, especially those that have the potential to affect the amount of bonus an employee might receive, are important and mandatory subjects of bargaining. The time or season in which the employee has an opportunity to meet with his or her supervisor to discuss the supervisors evaluation is not, in my view automatically critical. Rather, I find it may in some cases turn on events and context. Here, the change in the schedule for meeting with supervisors is now a period of some months after

[31] Further, it is not clear that the General Counsel's complaint allegations read in conjunction with the General Counsels statements regarding the complaints application to the self-appraisal form discontinuance at the trial would support a violation.

[32] It should be clear and I find that the perceived employer need to change represented employees terms and conditions of employment to better coordinate with the terms of unrepresented employees is not a business necessity justifying conduct otherwise violative of Sec. 8(a)(5) of the Act.

the supervisor has prepared his or her evaluation. This is so because the process for unit employees was otherwise retained and only the date of the supervisor-employee review was changed.

I find the schedule change is significant on this record for two reasons. First, as witnesses testified, the meetings provide an opportunity to change supervisors' minds about numeric scoring that may directly affect the employees' eligibility for employeewide annual bonuses. The delay caused by the change between the supervisor's evaluation and his or her discussion of it with the employee may easily cause the supervisor to become less likely to change the ratings and scores in a later employee meeting. Certainly, that would be a reasonable worry for employees. The employee performance at issue in the meeting held approximately half a year after the performance year being evaluated is increasingly distant for both meeting participants, a fact that bodes ill for possible informed discussion and reconsideration.

All this being so, I find the change in timing was material, substantial, and significant. I further find the change was therefore an improper unilateral change encompassed within the allegations of paragraph 13(b) of the complaint. I therefore find the Respondent by making the change without notifying the Union or offering to bargain, violated Section 8(a)(5) of the Act.

The General Counsel also alleges that this conduct violates Section 8(a)(3) of the Act. Turning again to the *Wright Line* analysis, I find the Government has not provided sufficient evidence of discriminatory, animus-based intention to sustain its initial burden. The General Counsel's barebones reliance on the general course of the Respondent's conduct is insufficient as to this allegation. I shall therefore dismiss the 8(a)(3) theory of a violation alleged in the complaint regarding this conduct.

K. The Respondent's Failure to Grant Merit Increases to Employees for Years 2006–2008

1. The allegations

The General Counsel's complaint at paragraph 12(a) alleges that the Respondent failed to grant its employees a merit wage increase in recognition of work performance during 2006. Paragraph 12(b) makes the same allegation for year 2007 and paragraph 12(c) makes the same allegation for 2008. Complaint paragraphs 23, 24, and 25 allege that the conduct alleged in the subparagraphs of paragraph 12 was undertaken without notifying or offering to bargain with the Union and was further undertaken because of the employees' union activities and, in consequence, the complaint alleges, the acts are violations of Section 8(a)(1), (3), and (5) of the Act.

2. Relevant events[33]

At the time of the acquisition of the paper by the Respondent in 2000, the then-publisher, Joe Cole, addressed newsroom employees and announced that pay raises and bonuses based on merit would be paid. They were for years 2000, 2001, and 2002. In the end of the year meeting in 2003, then-editor, Jerry Roberts, spoke to newsroom employees and told them that their wage increases and bonuses would be tied to the scores on their annual evaluations.

The Respondent's employee handbook, unchanged in relevant part from its 2000 initial issuance, addresses the Respondent's performance management system. It states in part:

> Performance reviews are only one of a number of factors that are considered in determining compensation. Other factors may include but are not limited to merit, position, and general business and economic conditions. Any and all compensation increases are at the sole discretion of the News-Press.

On December 16, 2003, Apodaca transmitted an email to the Respondent's entire staff entitled: Message from Jerry [Roberts]. The memo stated in part:

> Today I am announcing this years' program for performance-based bonuses and merit raises for a number of employees.
>
> . . . .
>
> After the rest of the budget was approved by Ampersand management, a pool of money was set aside and earmarked for performance bonuses and raises. The bulk of that money is in the form of bonuses; the balance consists of raises that range from 0 to 2 percent annually.
>
> I'm please to say that, for the first time in several years, we have put in place a structured system for making decisions on pay issues. The system, rafted by senior News-Press managers over the last month and approved by Wendy [McCaw] and Joe [Cole] last week, was designed to meet three key criteria:
>
> —It is **performance-based** [bolding in original]. Bonuses and raises are being awarded, within categories of responsibility, on the basis for performance review scores given by supervisors and managers.
>
> —It is **objective and rational** [bolding in original]. There are two factors that determine extra compensation: performance review and level of responsibility within the company. By doing this we sought to remove most of the subjectivity that previously marked some compensation decisions.

[33] In describing the history and circumstances of employee merit raises it is important to keep in mind several distinctions to avoid confusion. The merit wage allegations are directed to increases given at the years end for merit during the ending year. Thus, for example the complaint alleges a failure to grant a merit increase for work performance during 2006. That increase, like increases in preceding years, would have been granted and been effective at the end or 2006 or the beginning of 2007. Increase denial allegations may relate to particular employees, classes of employees such as unit members, or all an employer's employees.

> —It is **clear and consistent** [bolding in original]. Each staffer in a job classification gets EXACTLY [capitalization in original] the same as anyone and everyone else in that classification with the same performance score.
>
> . . . .
>
> Building on the framework we have put in place this year, we will also be undertaking a complete review of our salary and compensation system in 2004.

At the end of 2004, then-assistant city editor, Michael Todd, spoke to his supervisees including then-senior writer, Melinda Burns. Burns recalled Todd announced that anyone who received less than a numeric score of three on his or her performance evaluation would not receive either a wage increase or a bonus. Those receiving a numeric score of three or more would and in the event did receive merit payments.

On November 30, 2005, Jerry Roberts sent an email to newsroom employees respecting performance reviews. The email set forth the numerical measures for performance used on the performance reviews:

> 5—Always excels or exceeds standards.
> 4—Consistently meets standards.
> 3—Generally meets standards. Improvement possible.
> 2—Meets standards sometimes. Improvement needed.
> 1—Does not meet standards. Improvement required.

The memo concluded noting that the matter of yearend compensation was being dealt with by the publisher with the goal to have those issues resolved by the end of the year.

On January 27, 2006, Publisher Cole sent an email to all the Respondent's employees captioned "timing of performance reviews and bonuses." The memo announced the 2005 written performance evaluations and bonuses were ready for distribution. It noted: "Potential pay increases for 2006 are still under consideration as we wrestle with the 2006 spending plan in light of the business environment." Under a concluding section headed "Innovation and Change," the email stated in part:

> Our practice of potentially rewarding everyone in the organization with annual cash bonuses—in every depart-ment—from top to bottom—may be innovative within the newspaper industry, but it is the norm within a wide range of other industries that face more competition than the News-Press has had in the past.

In and after calendar year 2006, the newspaper industry entered rocky times. The Respondent was not immune from the general and industry specific troubles nor like difficulties specific to its market area. As the Respondent argues on posthearing brief at 101:

> It was from this market backdrop that the News-Press did not grant wage increases to any employees—not just bargaining unit employees—for work performed in 2006, work performed in 2007, and work performed in 2008.

As noted supra, employees were not eligible for merit payments if they had received a low numeric score on their annual performance evaluation. Employees were also ineligible for merit-wage increases if their wage was sufficiently high to have been capped under the Respondent's salary cap system which had been put in place in 2000. It is not clear that employees were generally notified of the fact that no merit-wage increases would be paid for performance years 2006, 2007, and 2008. Employees Hughes and McMahon testified that they were not notified by managers or supervisors that the Respondent was not giving out merit increases in any given year at issue.

Steepleton testified that he participated in the performance review of 2006 which took place in February 2007, and testified he told at least five employees, Eliason, Hobbs, Hughes, McManigal, and Davison, there was not going to be an increase for work performed in 2006. He testified he did this because he had been told by Apodaca a few weeks earlier that there would be no increases.

Steepleton also initially testified that he spoke to employee Melinda Burns along with the other employees concerning her evaluation and specifically recalled he told her something about the fact there would be no wage increases. He noted he had been told to share the fact of no increases as based on market conditions and the bad economy. In fact, Burns left the Respondent in October 2006, well before any evaluation conversations occurred. Braced with this fact, Steepleton recanted his earlier testimony about Burns.

Apodaca testified that no written communications to employees or the Union were prepared informing them that there would be no merit wage increases in 2007 based on 2006 performance evaluations. Apodaca did however issue a memorandum to supervisors concerning the evaluation forms, but there was no reference to an omitted merit wage increase. She recalled however she told the supervisors to inform employees that there would be no merit wage increases in 2007 based on 2006 performance evaluations when discussing the performance evaluations of employees with them.

In 2008, Apodaca issued a similar memorandum concerning 2007 performance based increases to that noted immediately above. Again, this memorandum instructed supervision respecting evaluations without any mention of the omission of merit wage increases for that period. Zinser by letter dated January 2008 asserted to the Union in part:

> At the present time no decision has been made with respect to awarding merit increases in 2008 based upon performance in 2007. Additionally should a decision be made to award merit increases, we will be making a specific proposal with respect to the subject as it relates to bargaining unit employees.

3. Analysis and conclusions

a. The defense that the merit wage increase allegations are barred by Section 10(b) of the Act

The Respondent at trial by motion to dismiss and on posthearing brief argues that the allegations of paragraph 12 of the complaint are time barred by operation of Section 10(b) of the Act. Section 10(b) of the Act states in part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the

Board." Such issues are properly addressed before considering the merits of the allegations.

If the Respondent's omission to pay merit wage increases for each of the calendar years 2006–2008, occurred more than 6 months before the relevant charge filed addressing that year's failure, time bar is an issue. Assuming for purposes of the initial analysis, that the act of omission—the nonpayment of merit wage increases—is taken to have occurred on the last day of the performance year involved, the 6-month period for each year is the June 30 date—i.e., 6 months later—in the following year.

The Union filed Charge 31–CA–28661 on February 20, 2008, and it was served on the Respondent on February 22, 2008. The charge alleged the Respondent "unilaterally changed its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2006 performance year merit-wage increase nonpayment. The Union filed Charge 31–CA–28700 on April 15, 2008, and it was served on the Respondent on April 17, 2008. The charge alleged the Respondent "unilaterally and in connection with calendar year 2007, perpetuated its change of its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2007 performance year merit-wage increase nonpayment. The Union filed Charge 31–CA–29099 on February 18, 2009, and it was served on the Respondent on February 23, 2009. The charge alleged the Respondent "unilaterally changed and in connection with calendar year 2008, perpetuated its unlawful change of its policy of offering annual raises to bargaining unit employees" in violation of Section 8(a)(1), (3), and (5) of the Act. This is the charge related to the 2008 performance year merit-wage increase nonpayment.

Since the service date of Charge 31–CA–28661, February 22, 2008, is past June 30, 2007, Section 10(b) of the Act seems to potentially apply to the allegation concerning the omission of merit increases awarded based on employees' 2006 performance year.

Since the service date of Charge 31–CA–28700, April 17, 2008, is not past June 30, 2008, Section 10(b) of the Act does not seem to apply to the allegation concerning the omission of merit increases awarded based on employees' 2007 performance year.

Since the service date of Charge 31–CA–29099, February 23, 2009, is not past June 30, 2009, Section 10(b) of the Act does not seem to apply to the allegation concerning the omission of merit increases awarded based on employees' 2008 performance year.

The second aspect of a 10(b) tolling analysis is the question of whether or not the Charging Party knew of the event or events underlying the relevant unfair labor practice charge and complaint allegation. This is so because there is a body of decisional law addressing various questions regarding special circumstances in which the commencement of Section 10(b) the 6-month limitation is held not to have occurred. The typical fact situation arising in this context is the ignorance of the charging party of the facts underlying the conclusion that an unfair labor practice committed by the respondent in the case had occurred. This argument is raised by both the Charging Party and the General Counsel here and the underlying law was argued by all parties.

The Respondent in its motion for summary judgment notes the Board in *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992), reiterated longstanding law that the Board will find constructive knowledge sufficient to invoke Section 10(b) of the Act's limitations where the party involved did not act with reasonable diligence to discover unfair labor practices which could have been discovered by such diligence. The Board also holds the corresponding notion that Section 10(b) does not bar an allegation "that was not within the knowledge of or which could not have been discovered by the charging part[y] with reasonable diligence." *Oregon Steel Mills*, 291 NLRB 185, 192 (1988), enfd. 1989 WL 435373 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990).

It is therefore appropriate to consider what the Union knew or should have known during the critical period. The critical period here is the period of time, the extent of which is critical to a 10(b) 6-month analysis of the allegations concerning the calendar year 2006 performance-merit increase nonpayment between knowledge or constructive knowledge and the filing of the charge. Put another way, how much time is in issue, if the 6-month limit is to be applied? Returning to the dates in question, if the theoretical toll date is June 30, 2007, how much time after that passed before the filing of the charge? Since the charge in Case 31–CA–28661 was served on February 22, 2008, 7 months and 22 days passed after the theoretical tolling date of June 30, 2007. Thus, the Union's service of the relevant charge was 7 months and 22 days late. The Charging Party and the General Counsel therefore need to establish through operation of Board rules and decisional law, that the start of any 10(b) period was delayed by at least 7 months and 23 days. Applying that number of days to the event date established supra of December 30, 2006, the Charging Party and the General Counsel therefore need to establish that the 10(b) period was tolled until at least July 23, 2007.

Turning to the period in question, the Union organized employees in 2006, petitioned for representation, and prevailed in the election of September 27, 2006. Thereafter postelection matters were litigated and on March 8, 2007, the Board certified the Union as the unit employees' representative. In initial bargaining in mid-November 2007 the Union asked the Respondent about its past practice respecting merit-wage increases and Zinser in initial bargaining in mid-November 2007 told the Union in Caruso's memory:

> [W]ell, all I can tell you is that some years—with regard to merit increases, some years we do it and some years we don't. We didn't do it this year. . . . [I]t's at management's discretion as to whether we do it or not.

Zinser sent Caruso a letter dated January 23, 2008, captioned: "Santa Barbara News Press Merit Increases." The letter noted in part:

> As previously communicated to you, whether or not individuals are awarded merit increases has been totally discretionary. In some years none are awarded at all. The attached listing of newsroom employees and their increase history makes very clear that from 2000 to the present,

there have been several years in which no increases were awarded.

The reason for the fact that merit increases were not awarded in certain years is strictly a matter of management discretion. Management decided that it did not wish to award increases in the particular calendar years.

Apodaca testified that the assertion in the letter was incorrect and that merit-wage increases had been awarded to employees who were not wage capped and who a sufficient numeric performance score in all years up to the Respondent's decision not to pay performance year 2006 merit increases.

I have considered the arguments of the parties on the relevant motion for summary judgment and the general assertion of the 10(b) time-bar defense. As noted supra, I find the defense is temporally valid only for the 2006 performance year. The other two allegations for performance periods 2007 and 2008 are proper in that their underlying charge were filed within 6 months of the events at issue.

Turning to the facially time-barred charge of Case 31–CA–28661 and the related complaint allegation in paragraph 12(a) which alleges that the Respondent failed to grant its employees a merit-wage increase in recognition of work performance during 2006, the issue is: May the Union on this record be found to have known or be charged with knowing the Respondent had omitted merit raises for the 2006 performance year at relevant times?

During the time relevant here, the Respondent had not recognized the Union as the unit employees representative and the Union did not have designated agents or any official institutional presence in the workplace, such as union stewards, aiding in the representation process. And to the extent the Respondent did in time officially describe its practices regarding merit-based wage increases to the Union, it incorrectly described those past practices of the Respondent. I find therefore there was no official, institutional notice to the Union or one which could rise to the level of institutional constructive knowledge by the Union of the facts underlying the complaint allegation of paragraph 12(a).

The Respondent suggests that the prounion employees in the newsroom identified by Steepleton as having met with him concerning their 2006 evaluations were specifically told by him that there would be no raises based on those increases. Therefore, argues the Respondent, through those individuals, the Union knew or should have known of the Respondent's omission of 2006 based increases at least by the time of these conversations identified by Steepleton as in mid-February 2007. If the Union is held to have known at that time or soon thereafter that there were to be no merit increases for performance year 2006, its charge in Case 31–CA–28661 is out of time.

I reject the Respondent's argument on several grounds. First, I do not find individual bargaining unit employees at that prerepresentational time rose to the level of agents of the Union. What they knew could not be attributed to the Union absent direct evidence not present here. Further, there is an important credibility issue with the testimony of Steepleton on this issue. His claim to have told employees there would be no merit increase was denied by employees and, importantly, he initially testified he clearly recalled telling the same thing to employee Burns only to be forced to recant when Burns was established not to have been an employee at the relevant time. I find that impeaching event—and Steepleton's very unpersuasive demeanor during the his entire testimony in these regards—renders his testimony that he told employees there was to be no bonus fatally unreliable. I reject it and find that he did not in fact make the important assertions he claimed. To the contrary, the employees who testified that they were not told by Steepleton that there were to be no merit increases at all, despite being associated with the Union, presented believable testimony and a convincing demeanor during its delivery.

Based on this important credibility resolution and finding, I come to the same conclusion the Board did in a very recent case, *ABB, Inc*., 355 NLRB 13 (2010), affirming the judge who found: "There is simply no credible showing the Union had clear and unequivocal notice of the changes prior to that time. Thus, the charge was timely filed and is not barred by the 10(b) statute of limitations." (Id. at 21.) On the record as a whole, including the testimony of the witnesses and in light of their demeanor, I reach the same conclusion. There is no factual basis to find actual or constructive knowledge by the Union of facts sufficient to bar the charge or the complaint allegation at issue under Section 10(b) of the Act. *Mission Foods*, 350 NLRB 336 (2007).

b. The merit increase allegations on their merits

(1) The 8(a)(5) merit increase allegations

The record establishes that the Respondent gave annual merit-pay increases from the onset of its operations in 2000, through the merit increases granted for the 2005 performance year. For the 2006 performance year and thereafter it has not given merit raises. The merit raises involved for performance years 2000–2005 were based in significant part on performance review numerical scores. The increases and the underlying performance evaluations were in the period 2000–2005 awarded generally in the late part of the performance year or very early in the following year. The record reflects instances where delays had occurred in the process for individual employees and later merit increases were made retroactive. Employees scoring at or above a certain numeric score received an increase which was a fixed percent of the employees' salaries. Those not scoring at or above the minimum received no merit increase. Exceptions in the latter years were for those who had achieved a salary level that the Respondent had "capped" thereby prohibiting increases above the cap level.

In *Dynatron/Bondo Corp.*, 323 NLRB 1263 (1997), the Board found that the employer had a past practice of granting merit-based wage increases, and that the employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain over the discontinuance of the program. In determining that the raises at issue were an established past practice, the Board found the following factors relevant: (1) the sole, fixed criterion for granting a raise was merit; (2) the timing of the increase was fixed; (3) the amount of the raise, although discretionary,

fell within a narrow range; (4) the majority of employees received the increase; and (5) the increases had been consistently granted over a significant period of time. Id. at 1264. The General Counsel also cites *Rural/Metro Medical Services*, 327 NLRB 49 (1998), and *United Rentals*, 349 NLRB 853 (2007), for the proposition that regular merit increases become a past practice which must be bargained about and may not simply be unilaterally discontinued.

The unilateral change cases cited supra need not be repeated here. The Acts requirement in this setting is not a prohibition against discontinuance of merit increases of represented employees for a year or even permanently. It is rather the obligation to notify and bargain with the Union respecting the proposed change. It is clear the Respondent did not do so with respect to any of the three changes at issue herein: the discontinuance of the merit increases for performance years 2006, 2007, and 2008.

The Board has from early days noted a business necessity or economic exigency exception to the normal obligation to bargain to impasse or an agreement before implementing a unilateral change as to a particular matter. See, e.g., *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979), citing *NLRB v. Katz,* 369 U.S. 736, 748 (1962). This doctrine has been clarified by the Board over time. Thus, the Board adopted the judge's distinction between business necessity and compelling considerations in *Farina Corp.*, 310 NLRB 318, 321 (1993):

> However, business necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially.

The distinction was cited with approval by the Board in *Hankins Lumber Co*., 316 NLRB 837, 838 fn. 9 (1995). And *Hankins* held further, id. at 838:

> Accordingly, the Board recognizes as ''compelling economic considerations'' only those extraordinary events which are ''an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'' *Angelica Healthcare Services [Group]*, 284 NLRB 844, 852–853 (1987).

In establishing such a defense, the party attempting to prove economic exigency carries a heavy burden. *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992). Further, the exigency must be shown to have not been reasonably foreseeable. *RBE Electronics of S. D., Inc.*, 320 NLRB 80 (1995), and to have a major economic effect that causes the employer to take immediate action. *Hankins,* above. The Respondent never made such assertions of ''compelling economic considerations'' to the Union at relevant times, but rather on several occasions noted that decisions respecting the granting of merit pay increases due in the coming months remained under consideration by the Respondent.

Given all the above, the arguments of the parties, and the record as a whole, including the testimony of the witnesses and the demeanor-based credibility resolutions made supra, I find that the Respondent had a uniform practice of granting merit raises to employees based on evaluations of the preceding calendar year having done so without exception from its commencement of operations in 2000, through the 2005 performance year. I further find that at the end of the 2006 performance year, a time when the Union represented unit employees, the Respondent unilaterally determined not to grant merit raises. I further find it continued to breech its previous practice for performance years 2007 and 2008. The Respondent did not notify or offer to bargain with the Union with respect to any of these cessations.

Based on these findings, I find that the Respondent, with respect to each year alleged in the complaint, failed and refused to bargain with the Union concerning its cessation of its practice of granting merit wages to unit employees in violation of Section 8(a)(5) and (1) of the Act. I shall therefore sustain the relevant allegations of the complaint.

(2) The 8(a)(3) merit increase allegations

The General Counsel has alleged and argues in support on brief that the merit wage discontinuance discussed supra was motivated by animus against the represented employees for having selected the Union and in order to discourage employee union activities generally. The evidence and argument offered is in essence: (1) the general animus alleged in the instant case much of which occurred contemporaneously with the cessation of the merit increases and (2) the lack of any explanation offered by the Respondent for the cessation coupled with the deceit of the Respondent in asserting falsely, in writing to the Union, that there was no consistent historical pattern of granting merit wage increases when in fact there was.

The Respondent emphasizes the uncontested fact that all employees of the Respondent were equally affected by the Respondent's business decisions to not grant merit wage increases for performance years 2006–2008, and that the nonunit employees represent by far the larger fraction of individuals involved. Counsel for the Respondent argues further that economic conditions were deteriorating and additional cuts occurred in later periods.

The General Counsel's 8(a)(3) theory of violation again invokes a *Wright Line* analysis. Addressing the General Counsel's threshold burden, I find the Government has not provided sufficient evidence of discriminatory, animus based intention to sustain that initial burden. The General Counsel's barebones reliance on the general course of the Respondent's conduct is insufficient as to this allegation. While I grant both the widespread course of the Respondent's violations which include multiple examples of animus-based 8(a)(3) violations, some closely linked in time to the merit increase cessations, I do not find that general evidence and history sufficient to sustain the Government's burden here. This is especially true where, as the Respondent correctly argues, the actions under scrutiny applied to all employees, the great bulk of whom were not represented by a union and have not been shown to be engaged in union activities on this record.

I shall therefore dismiss the 8(a)(3) theory of a violation alleged in the complaint regarding this conduct.

L. The Suspension and Discharge of Respondent's Employee Dennis Moran

1. The allegations

Complaint paragraph 15(a) alleges that the Respondent suspended its employee Dennis Moran on or about August 23, 2008. Complaint paragraph 15(b) alleges that the Respondent terminated Moran on or about August 30, 2008.

Complaint paragraphs 17 and 18 alleges the actions alleged in paragraph 15 are mandatory subjects of bargaining and the Respondent failed to notify the Union over its decision to discharge Moran and failed to bargain with the Union regarding the suspension and discharge of Moran.[34] Complaint paragraphs 20(c) and 25 allege the Respondent's conduct in these regards constitutes a failure to bargain with the Union in good faith and violates Section 8(a)(5) and (1) of the Act.

Complaint paragraphs 23 and 25 allege that the Respondent's conduct alleged in paragraph 15 was undertaken because the employees formed, joined, or assisted the Union and engaged in protected activities and to discourage employees from engaging in these activities and in so doing violated Section 8(a)(3) and (1) of the Act.

2. Relevant events

Dennis Moran began his employment with the Respondent as a copy editor on the news desk in September 2005 and worked there for approximately 1 year when he transferred into the sports department as a copy editor and sports writer. He worked in that capacity until his termination on August 30, 2008. He described his duties in the sports department:

> As a copy editor, your duties would include reading stories, copy editing them, writing headlines, laying out pages for the computer program, taking phone calls from coaches who were calling to report in the results of sports events. As a sportswriter, I would cover sports events as directed by the sports editor and write feature stories.

During the period November 2007 until his discharge, Moran was a member of the Union's bargaining committee and, he testified, he was the only member of the bargaining team still employed by the Respondent who regularly attended bargaining sessions. The Respondent's knowledge of Moran's union activities at relevant times was not in dispute.[35]

In the period from Moran's transfer to the sports department to April 2008, the sports department was supervised by the sports editor, Barry Punzal. At the time of Moran's transfer, Punzal supervised seven full-time reporters/copy editors. Punzal was laid off on May 1, 2008. Sports reporters, Blake Dorfman and John Dvorak, were assigned Penzal's duties by Associate Editor Steepleton. Dorfman thereafter assigned the great majority of stories in the sports department. Attrition in the sports department continued in the summer of 2008, until by August 2008, there were four employees in the sports department: Moran, Dennis Bateman, Dorfman, and Mark Patton.

In late July 2008, Copublisher McCaw received an email from a longtime local reader expressing unhappiness with the paper's perceived inadequate coverage of local sports. In particular the reader complained of the absence of coverage of a local golf tournament, "by the way what happened to your sports reporters?," and expressed disapproval generally at some length concerning the sports section of the paper which had "dwindled to a 4 page joke." McCaw forwarded the email to Steepleton on July 29, 2008, with the note: "Fan mail . . . You might want to respond."[36]

Blake Dorfman testified that, at Dorfman's request, Steepleton met with the then-four employees who constituted the sports department staff two days later on July 31, 2008, to address Dorfman's concerns over the lack of staffing in the sports department and the difficulties that would arise when he left to attend the China Summer Olympics that year leaving only three staff members in the sports department for that period. Dorfman testified he told Steepleton at the meeting:

> Scott, we are understaffed and we need more bodies in the Sports Department and they need to be trained up by the time football season starts, and training takes a long time, so we need to get them in as quickly as possible. Also, we need to go over scheduling. We need to go over scheduling issues with a four-person Department because that's a tricky puzzle to put together.

Dorfman recalled that the August sports department schedule was prepared at this meeting:

> There would be three people left in the Department and if each person is to get two days off or even a day off there needs to be at least two people putting out the Section every day. So, we tried to go over how those three people would be spread scheduling wise.

Because of the short staffing, the August schedule did not include assigning individual events to particular staff members. Dorfman testified he had not assigned anyone to the upcoming 2008 Santa Barbara Classic Golf Tournament any time prior to this meeting and it was not discussed nor assigned at the meeting itself. As Dorfman wrote to Steepleton in an email reviewing the meeting, he considered the sports department as then staffed to be in a "desperate situation."

In the summer of 2008, Richard Chavez was the director of the Santa Barbara Golf Club. That institution hosts the Santa Barbara Classic, a longstanding annual event of some impor-

[34] The Regional Director for Region 31 notified the Respondent, by letter dated October 28, 2008, that the Union in Case 31–CA–28890 had withdrawn with the Regional Director's approval, the portion of the charge alleging that the Respondent had violated Sec. 8(a)(1) and (5) of the Act by failing to notify the Union prior to suspending employee Moran.

[35] In a January 2008 letter distributed to employees, Moran was identified by the Respondent's director of human resources to employees as one of two employee "newsroom union reps." Copies of the letter were sent to the copublishers and to associate editor, Scott Steepleton.

[36] Steepleton testified he could not recall if he had investigated the particulars of the paper's coverage of the golf tournament mentioned in the email.

tance to the local sports and golf community. The 2-day event is regularly held the first weekend of August, which for 2008 was Saturday, August 2, and Sunday, August 3. Chavez testified that in connection with the then-upcoming tournament, in mid-July, he "called Kevin Merfeld who was the sports writer for the News-Press and left a message on his recording." He testified he called Merfeld:

> Because [Merfeld] had been writing most of the articles for the tournaments. We have four major tournaments a year. I like to make sure the News-Press covers those tournaments, so I call him in advance.

In Chavez' testimony, Merfeld, who had resigned or was in the process of resigning in July, never returned Chavez' call. On or about July 29, 2008, Chavez called the Paper again. He testified he reached an individual in the sports department with the first name of Dennis. He did not learn Dennis' last name. Chavez testified:

> Well, if I remember correctly, I believe that I called and told him that I had called Kevin [Merfeld] and he had not responded. He told me that Kevin was no longer employed. I told him that the reason for the call was that we were having a large tournament on that weekend and I wanted the News-Press to cover the tournament. . . . He said that they were short handed and that they would not be able to cover the tournament with a sports writer coming out to the golf course, which is what they usually do. So I told him, no problem, could I send you the results and we can get it in the paper, and he said yes, he would.
>
> Q. Okay. And was that the end of your conversation?
>
> A. I believe he told me to fax the information to him and that was it.

The two then-sports department employees working on July 29, 2008, Dennis Moran and Dennis Bateman, each testified he had no recollection of speaking with Chavez or speaking about the Santa Barbara Gold Classic Tournament with anyone at that time.

On Saturday, August 2, 2008, the first day of the tournament went forward and Chavez testified he sent the results of the day to the Paper by facsimile transmission. The following day, August 3, the second day of the tournament went forward. Chavez heard from tournament participants that there had been no coverage in the days News-Press. Chavez at the end of the tournament that day again sent the results into the News-Press by facsimile transmission. On the following day, August 4, 2008, Chavez discovered that the News-Press had not covered the tournament in that day's paper either. Chavez testified he was displeased by the absence of coverage and "instantly" called Copublisher McCaw. He was unable to reach her but was able to leave a message on her answering machine. He described the message:

> I explained to her that I had done the radio show for her and that I felt that the least the newspaper could do was to cover my tournaments, and so I was very upset that it hadn't happened. They told me it was going to happen and it didn't happen. And I was irritated.

McCaw had received an earlier email on Sunday, August 3, 2008, from a subscriber to the Paper complaining of the Paper's omission to cover and report in that day's Paper the results of the Classic Tournament. She forwarded the email to Steepleton at 8:07 a.m. the following day, Monday, August 4, 2008, under an "FYI" reference. Steepleton responded by email to McCaw at 6 p.m. later that day, August 4, 2008, which email stated in its entirety:

> Wanted to let you know that Brad Cheng pulled me aside today to inform me that word on the street is Blake [Dorfman] is not returning to the News-Press after China. (This would go against what Blake had said and what Lee says.) Also, Brad Cheng says he hears the "plan" among sports reporters is to stage a walkout and launch a sports Web site in Santa Barbara.
>
> Patton says he is happy here. We have Trenchard that we can pull off Scene; we have Tony Peck; we have Bateman. And I have at least two people in the works in the writing/designing ranks. We also have the stringer ad that should break any day.

McCaw responded to this communication by email at 12:15 p.m. on August 5, 2008. The email stated:

> Have you discussed this with Blake [Dorfman]? I think you must ask him if the rumor you heard is true. Please let me know what he says.
>
> Also, there was no local sports coverage at all in Sunday's and Monday's papers. On Saturday there was a staff report that didn't appear online and Patton's column.
>
> There were no results of the Formula One race in the Monday paper. I believe the paper is being sabotaged. We need to discuss this tomorrow when you are back at the paper.

Steepleton testified he then met, still on August 5, with Dorfman at the Respondent's facility and in essence confronted him with the rumors he had reported to McCaw. Dorfman in his memory denied all and professed loyalty and affection for the Respondent. Dorfman in testifying in the instant proceeding admitted that his statements to Steepleton in this conversation were mendacious. Steepleton then responded to the quoted McCaw email with an email reporting on his conversation with Blake Dorfman earlier that day in which Dorfman denied all aspects of the matters attributed to him, professed loyalty to the Paper and stated his intention to remain with it. McCaw did not testify.

Chavez testified he received a return telephone call that same day he called McCaw, August 4, 2008, from Copublisher Authur von Wiesenberger. Chavez told the copublisher of his earlier conversation with the un-last-named "Dennis," his transmission of the tournament results to the Paper and the subsequent failure of tournament coverage in the Paper. Chavez was emphatic in his testimony that he did not know and certainly did not identify to von Wiesenberger in this telephone call the last name of the Paper based caller he identified as Dennis. Chavez further recalled that in this telephone call he also expressed his hope and desire that the two upcoming Women's and Junior Tournaments would receive proper press

coverage in the News-Press. In Chavez' memory, von Wiesenberger was apologetic on behalf of the Paper and assured Chavez that the upcoming two tournaments of concern to Chavez would be covered by the Paper.[37]

Steepleton testified that on August 4, 2008, he got a telephone call from von Wiesenberger relating the complaints of Chavez which Steepleton recalled as:

> Dennis had apparently told Mr. Chavez that we would cover it, and [von Wiesenberger] was upset that we didn't follow through with what Dennis had told Mr. Chavez apparently that we would do.

Steepleton replied that he "would figure out why we didn't cover it and that if there is anything we could do to get something in, we'll get something in." Von Wiesenberger also sent an email to Steepleton on August 5, 2008, at 1:21 p.m., with the following opening paragraph:

> I spoke with Richard Chavez at the Santa Barbara Golf Club. He was one (of many) who was upset with the lack of coverage of the Gold Tournament even though he had faxed information over to the paper. He was also the one who spoke to Dennis Moran.

The email also made suggestions to Steepleton on how to insure proper coverage of the then-upcoming Women's Classic Golf Tournament. Steepleton responded at 4:12 p.m. the same day that he would take the copublisher's recommended actions to cover the event and he noted he would contact Chavez. Authur von Wiesenberger did not testify.

Steepleton testified that after sending the above quoted email he almost immediately telephone Chavez and offered apologies for the Paper's coverage failure. He indicated to Chavez that von Wiesenberger had told him of the problem and Chavez confirmed he had spoken to von Wiesenberger. Steepleton also recalled he asked Chavez for the details of the mix-up. Chavez told him that he had spoken on the telephone with the Paper's employee, Dennis, about coverage of the Classic and had been told to send in the results to the Paper's facsimile phone line. Steepleton could not recall whether Chavez initiated providing Dennis' last name or if Steepleton asked him what it was but, in either event, Chavez, in Steepleton's testimony, told him the individuals full name, he thought, was Dennis Moran. The conversation turned to the upcoming Santa Barbara Women's Open and the Santa Barbara Junior Tournaments. Chavez asked for coverage of those events and Steepleton assured Chavez the Paper would cover them. Chavez generally recalled having a discussion with an employee of the Respondent as Steepleton had described, although Chavez' memory on the specifics of the call was vague. Chavez was, however, quite clear, even emphatic, that in all the communications concerning these events, he did not ever provide Dennis' last name to anyone because he had never learned it.

After the call, Steepleton arranged to have the Women's Classic Tournament covered. Chavez testified that the Paper had a reporter present at the Women's Classic Tournament and the event was covered in the Paper "very well." Without being able to recall the specifics, he testified that he learned the Paper would not be able to have a reporter in attendance during the Junior Tournament and that he should fax the Junior Tournament results to the Paper's facsimile telephone each day. Chavez did as instructed, but the Junior Tournament which was held on August 14 and 15, 2008, received no coverage in the Paper in the following days.

Soon thereafter, Chavez testified he called Steepleton at the Paper for an explanation. Steepleton told him that the facsimiles Chavez had submitted to the Paper respecting the Junior Tournament were unintelligible. Chavez thereafter personally delivered the Junior Tournament results to the Paper and the Junior Tournament was covered in the Paper the following day.

Steepleton testified that in mid-August he spoke to Dennis Bateman at the Paper. He recalled asking Bateman if he had spoken to anyone about the Santa Barbara Gold Classic. Bateman answered no. Steepleton then asked him if the name Richard Chavez rang a bell with him and again Bateman answered it did not. Bateman testified he had no memory of this conversation with Steepleton, but that since he would have regarded it as of no particular significance, he could not be positive it had never occurred. He did recall he told Steepleton that he in fact had never knowingly talked with an individual named Richard Chavez or even recognized the name Richard Chavez. Further, he was sure he had talked to no one at all about a golf tournament.

A few days later, Steepleton testified he spoke to Dennis Moran at the facility. Steepleton recalled that he told Moran:

> That we missed a big golf tournament, that I understand that he may have talked to somebody about it, and I wanted to figure out—this is important to us and I want to figure out why we didn't cover it. . . . He told me that he talked to Richard Chavez about the tournament and that he had also talked to Mr. Chavez about Mr. Chavez sending in the scores by fax. He said at one point that he talked to Mr. Chavez about perhaps us not being able to cover it because a guy that had been covering golf, Kevin Merfeld, was no longer with the newspaper and that he didn't know if we would be able to get somebody out there on site to cover it, or at the golf course to cover it. . . . He apologized. He said something about it could have slipped through the cracks. I asked him if he had done any follow up to try to get the fax scores or since he didn't get the fax scores if he had followed up with Mr. Chavez at all to try to get the fax scores, or the scores faxed in, I'm sorry, and he said he hadn't.

Moran also testified to a conversation with Steepleton on or about August 16, 2008, at the facility. He characterized the conversation far differently from that described by Steepleton above. Moran denied that he was asked by Steepleton about the Santa Barbara Golf Classic Tournament or about knowing Richard Chavez. Moran testified he had had no dealings with Richard Chavez since covering a single golf tournament in May

[37] The Women's Classic was to occur on the following Wednesday and Thursday, August 6 and 7, 2008, and the Junior Tournament was to occur on Thursday and Friday of the next week, August 14 and 15, 2008.

of 2007, and that he had never covered the Classic at anytime and had not had any contact with anyone in 2008 regarding the Classic nor had he been assigned to cover the tournament for the Paper. Rather, Moran recalled, the conversation with Steepleton concerned only the circumstances of how faxed Junior Tournament results could have been received by the Paper and yet the event had not been covered in the Paper. Moran recalled he related that some fax results had been received but that they were illegible and could not be used as the basis for coverage.

By email to editor Travis Armstrong and Yolanda Apodaca dated Friday, August 15, 2008, at 12:12 p.m., Blake Dorfman announced his resignation effective at the end of his Beijing-based coverage of the Olympic Games. The email was forwarded under a "FYI" reference by Apodaca to each of the copublishers and to Steepleton.

On August 23, 2008, a formal meeting to review the circumstances surrounding the Classic Golf Tournament coverage was conducted by Steepleton. Also in attendance were Norman Colavincenzo, the Respondent's chief financial officer, Yolanda Apodaca, and Moran. Steepleton testified:

> I said, "Dennis, I need to follow up on some things regarding the Golf Classic, and what we had talked about in the earlier meeting. I just want to double check that you did talk to Richard Chavez about this and said that we would cover this." He, Dennis, said that, "Maybe it was Mark Patton who talked to him." I said, "Mark Patton?" Dennis then—I said to him, "That's different than what you told me in my office. You didn't talk to him?" And then he said, "Well, you know what, maybe I did. Maybe it was me who talked to him." I said, "Did you tell Mr. Chavez that we could not cover it, and that Kevin Merfeld was no longer with the newspaper and that he would have been covering golf?" He said that he had. I said, "Do you understand that I'm the one that decides who we send to cover things, what we cover, how we cover things, when we cover things?" He said, "Yes, I do." I said, "It's clear to you that—"I think I said, "that I'm the one that makes the decisions?" He said, "Yes." And that would be my recollection.

Steepleton recalled that at the end of the meeting he told Moran that he was going to be placed on indefinite suspension. Steepleton further testified that at the conclusion of the meeting, he had no current intention to terminate Moran. He testified: "I had no plan at that point. . . . It could be a suspension. It could be a written reprimand, I was taking into account a lot of different things."

Steepleton also testified that his fellow managers, Colavincenzo and Apodaca, took notes of the meeting and that immediately after the meeting the three reviewed the notes and created a single document that was "the most accurate representation of the verbal exchange at that meeting." The notes, in evidence as Respondent's Exhibit 805, simply do not track the testimony of Steepleton regarding the statements of Moran quoted above. Importantly in the notes, Moran throughout the meeting denies that he had any knowledge of or dealings regarding the golf tournament and denied having talked to Chavez before the tournament and denied ever telling Chavez at any time that Kevin Merfeld was no longer an employee of the Respondent.

Moran described the meeting at trial:

> Well, Mr. Steepleton brought up again the golf tournament and asked me if I had told Richard Chavez before the golf tournament that we would not be able to cover the golf tournament this year because our staff was reduced and Kevin Merfeld had left the paper and he was our golf writer. . . . I said I had no recollection of talking to Richard Chavez and that I'm certain I didn't tell anyone that Kevin Merfeld had left and that we wouldn't be able to cover this event. . . . [A]t some point in the meeting he told me that decisions on what to cover should have gone through him. . . . I remember telling him that because our staff was reduced there were a number of things we weren't covering that we normally would have because we went from eight people to three people in a fairly short period of time. . . . [Steepleton] told me at the end of the meeting that I was being suspended while he investigated this. And then Yolanda Apodaca said she would escort me out. . . . [S]he escorted me out and at the door I told her that I would tell her if I remembered anything else, but that the golf tournament I remembered was the Santa Barbara City Championships in May, and I didn't have prior knowledge of the Santa Barbara Classic.

Norman Colavincenzo did not testify. Apodaca did not testify regarding this meeting.

There is no dispute that the Respondent did not notify nor offer to bargain with the Union regarding the Moran suspension before its decision and implementation of the decision to suspend Moran. On August 23, 2008, Caruso sent a letter to Zinser regarding the Moran suspension. The letter sought immediate rescission of the suspension, restoration of any lost pay and that the Respondent "agree to negotiate over this action before implementation if the News-Press wishes to persist with it."

Zinser responded with a letter dated September 2, 2008, a time after the suspension of Moran had been converted to a discharge. The letter acknowledged the Union's August 23, 2008 letter and advised that the Respondent had no obligation to bargain over any discipline relating to Moran or the Respondent's maintenance of discipline consistent with the status quo. The Respondent, the letter asserted, was "maintaining the dynamic status quo that has always existed." The letter also noted the discipline and discharge of Moran were for cause and rejected the Union's proposal to rescind the discipline of Moran.

Blake Dorfman testified that by early July 2008, he had determined he was going to resign his employment with the Respondent but concealed that fact from the Respondent in fear of jeopardizing his newspaper credentials for the China Olympics starting in August. Dorfman after considering the matter and changing his initial testimony concluded he had left for China on August 5 or 6, 2008.

Dorfman's Board prepared pretrial affidavit asserted he had:

> received a call about August 7th from a gentleman who was irate, who said he was the founder of the tournament—this is the Santa Barbara Golf Classic—30 or so years ago and he was very upset that the *News Press* was not covering the

> event because it always had somebody there. . . . I don't know the name of the caller. I know it was not Richard Chavez. . . . I told the caller I was sorry and I referred the caller to Scott Steepleton.

Under cross-examination, Dorfman testified the call took place before he left for China and therefore must have occurred at an earlier date than the affidavit asserted.

Dorman testified that just before he left for the Olympics, knowing he would not be returning to the Respondent's employ when he came back from China, he:

> stayed late that night after we put the Paper to bed and filled a couple of boxes with personal knickknacks from my desk and pulled my Jeep—or pulled my car up to the loading dock there so I didn't have to carry it too much and loaded up the car.

As noted, supra, Dorfman resigned his employment with the Respondent by email from China on August 15, 2008.

Dorfman returned from China on or about August 25 and telephoned Apodaca some few days late in late August 2008. He recalled:

> She said I have—there's something you need to sign as far as—I think it was about my last paycheck, something I needed to sign along those lines and then also she asked if I needed any personal items from my desk. I said, no, I already asked Dennis Moran to grab some stuff from my desk and don't worry about it.

Dorfman added: "I said that he had grabbed some stuff from my desk for me." Apodaca recalled that Dorfman told her that he did not need to collect his personal things because "Dennis Moran had already cleaned out his desk."

Apodaca reported to Steepleton, Dorfman's statements and asked him to check on the contents of Dorfman's desk. Steepleton did so. He testified that at the earlier time he had discussed the rumors of Dorfman leaving the employ of the Respondent just before he went to China, as discussed supra, he had inspected Dorfman's desk and it was full of the normal accruements of journalism, but when he inspected the desk a second time at Apodaca's behest, the desk no longer had any personal contents and was missing all the previously present notebooks.[38]

Steepleton testified that he believed Dorfman's statement to Apodaca as reported by her to him, i.e., that Moran had cleaned out Dorman's desk. When he saw that Dorfman's notebooks, which Steepleton regarded as proprietary material, had been taken, he assumed Moran had taken them. In consequence, Steepleton determined to terminate Moran. Dorfman, who was on suspension and not allowed on premises, was never contacted by the Respondent respecting the Dorfman desk events. As noted, supra, Dorfman has emptied his desk on his own, before travelling to China and there is no doubt on this record that Moran had no participation or even knowledge of the "desk clearing" events that actually occurred, the story Dorfman had told Apodaca or the Respondent's belief that he was complicit in those events.

A letter was prepared over Steepleton's signature dated August 30, 2008, terminating Moran. Moran—on indefinite suspension and away from the facility—was telephoned by Steepleton that day. Moran testified:

> [Steepleton] told me that his investigation was complete and that unfortunately they were letting me go. . . . I asked him why, and he said that would be explained in a letter and that I could come by and get it. He told me to come to the rear employee entrances of the News-Press that afternoon and ask the security guard for Yolanda who would come and give me the letter.
>
> Q. Did you go to the News-Press that day?
> A. I did.
> Q. What happened when you arrived at the News-Press?
> A. Well, Scott himself came to the back door and he smiled and shook my hand and gave me the letter. He asked me if there were any personal items at my desk that I wished to have, and I said I couldn't think of anything of any importance, and that was it.

The letter asserted, inter alia, that Moran was discharged because of his dishonesty, his failures concerning the Classic Golf Tournament coverage, his improper disclosure to Chavez that former employee Merfield was no longer employed by the Respondent, his improper disclosure to Chavez that the Respondent did not have the sport staff to cover the Classic Tournament, failures of instruction and follow through respecting the faxing of scores, and other assertions of misconduct. As to the Dorfman desk matter the letter noted:

> You have never been given authority by anyone in management to assist Mr. Dorfman in the removal of proprietary information or any material from Mr. Dorfman's prior desk belonging to the News-Press. You know that Mr. Dorfman is planning on setting up a competing business in reporting local sports. Your removal of this material in secret and failing to even ask Human Resources or any member of management of this activity speaks more to your dishonesty.

Moran's employment was terminated effective September 16, 2008. There is no evidence Moran ever knew anything about the desk episode, or was ever asked by Respondent about his role in the desk emptying episode, or that the Respondent ever attempted to obtain from him any of the desk's missing contents or sought to learn if he had or could locate such materials.

Both Steepleton and Apodaca testified that had the Respondent known that Dorfman lied about Moran cleaning out Dorfman's desk, Moran would still be employed by the Respondent. Counsel for the Respondent contends on posthearing brief at 150 that the Respondent only learned that Dorfman had

[38] Steepleton described a reporter's notebooks as containing:

> Story notes, Story ideas. Telephone numbers of sources, names of sources. Maybe planning notes for stories down the road, I mean all sorts of information that [a] reporter needs to write stories for us.

lied to Apodaca regarding that matter on June 1, 2009, at the hearing in the instant case. As of August 21, 2009, the final day of hearings in this matter, Moran had not been offered reinstatement by the Respondent and his discharge remains in issue.

3. Analysis and conclusions

a. Threshold resolution of factual conflicts and credibility issues

The record respecting the Moran allegations present several significant factual conflicts, some of which are a consequence of different testimony regarding specific events. My resolutions here as elsewhere in this decision, turn on consideration of the record as a whole, the arguments of the parties and, my consideration of the witnesses' demeanor during their testimony.

Of the greatest significance to the resolution of the factual dispute is the issue of what Chavez reported regarding the last name of the individual "Dennis" with whom Chavez had the conversation which essentially initiated the relevant events. That conflict involves the testimony of Chavez, the speaker, and Steepleton, the listener, regarding whether or not Chavez identified Moran as the "Dennis" involved. Also of importance is the divergence of versions of conversations had between Steepleton and Moran regarding the events. I shall deal with the credibility of each of the three witnesses first.

Richard Chavez testified to the various conversations he had as discussed supra. The critical element for the instant dispute was whether he had ever provided the last name of the individual "Dennis," with whom he had had an earlier conversation, to agents of the Respondent, McCaw, von Wiesenberger, or Steepleton. Chavez testified with some conviction that in his conversation with Dennis he did not learn his last name, he never learned his last name and he, in consequence of this ignorance, did not provide his last name to anyone. Pressed on the matter of whether or not he had discussed "Dennis" in various conversations, Chavez came to admit or concede the likelihood that he had done so with McCaw, von Wiesenberger, and Steepleton. He resisted, however, any suggestion that he had given Dennis' last name to anyone or in some other way identified him as a specific individual.

Chavez, at the time of his testimony a recently retired head of the Santa Barbara Golf Club, was on this record an unbiased neutral without a stake in the outcome of the litigation and without any apparent hostility to any party or to the "Dennis" involved in the events. I was impressed with his serious attention to the questions presented to him and to his answers. He was willing to admit his memory as to certain matters was not complete and to have that memory refreshed. He did not however simply adopt attributions contained in leading questions by counsel attempting to go beyond his refreshed recollection. I found him to be a believable and an impressive witness, highly credible.

Suspecting the importance of the matter to the case, I was particularly attentive to the portion of Chavez' testimony respecting his communication or noncommunication of Dennis' last name to anyone. A subject that was revisited by counsel throughout his testimony. I found Chavez' testimony to be consistent and believable without being defiant or stubborn. Based on his testimony and demeanor, I came to believe that Chavez was both telling the truth as he saw it and that the way he saw it was based on a strong memory of that aspect of the events. Witnesses' memories of events which allow the rememberer to state that a thing did not occur or that a statement was not made must be cautiously evaluated. I have done so here and remain convinced Chavez was that rare witness who was able to persuasively make such a claim as to Dennis' last name here. I credit him in full and specifically find he did not at anytime know and therefore did not and, indeed, could not have repeated Dennis' last name to anyone during the events and conversations at issue.

Credibility resolutions do not take place in a vacuum. Any opposing evidence including opposing testimony is properly considered in resolving credibility. I have done so in this case in making the resolution immediately above. For purposes of organizational clarity, I address those conflicting areas.

Scott Steepleton testified that Chavez identified the Dennis of these events as Dennis Moran in his conversations with him. As noted, Chavez denied this was so. I found Steepleton's testimony concerning his memory of events and conversations during this proceeding to be simply unreliable. Concerning another element of the complaint, he testified to having had a performance evaluation meeting with an employee in 2007, only to recant when braced by the fact that the employee in question had left the Respondent's employ in 2006. Steepleton attributed statements to Dennis Moran in a meeting with management on August 23, 2008, that were importantly inconsistent with Moran's testimony and more importantly with the notes of the meeting prepared by Steepleton's fellow management meeting attendees and reviewed by him immediately following the meeting. Steepleton's memory did not serve him well, missing the mark in important ways.

In observing Steepleton's demeanor during his testimony, I found he appeared quite anxious when asked to give testimony of events and conversations relevant to the issues in dispute herein. His seeming doubts in my view reflected a lack of confidence on his part regarding the accuracy of his testimony in these regards and very much undermined my confidence in his credibility as well. I had no doubt and here specifically find that Steepleton's credibility was very significantly less than that of Chavez and I credit Chavez over Steepleton wherever the two witness' versions of events differed.

The noted McCaw and von Wiesenberger email to Steepleton merits consideration and analysis. Chavez' very first report of his experiences with Dennis were his phone message left for Publisher McCaw. While Chavez' message likely reported his dealing with the no last name Dennis, there was no evidence of Chavez' use of Dennis' last name in this communication left for Copublisher McCaw. McCaw did not testify.

Other matters, not fully fleshed out on this record, were being discussed between McCaw and Steepleton. As set forth more completely supra, Steepleton had reported to McCaw that there were rumors of a "plan" among sports reporters is to stage a "walkout." At that time, with Dorfman days away from leaving for the China Olympics, there were only three sports writers: Dennis Moran, Dennis Bateman, and Mark Patton. Stee-

pleton's email to McCaw further asserts that in evaluating who would be "with" the Respondent in such a walkout: "Patton says he is happy here. . . . [W]e have Bateman." Moran's name is omitted. McCaw responds with an email to Steepleton sent at 12:15 p.m. on August 5, 2008, noting recent problems in sports coverage and concluding: "I believe the paper is being sabotaged. We need to discuss this tomorrow when you are back at the paper."

It is clear and was surely clear to McCaw at that time, who as copublisher was involved in newsroom matters and also in the employer/union disputes at the Paper, that (1) if there was a chance of a walkout of sports department employees and/or sabotage of sports coverage, and, (2) if, of the three sports department employees who would be working, two were regarded as allies by Steepleton, then the third sports employee, Dennis Moran, was the potential walkout and the saboteur. Further, management would have well known that Moran was also a union representative in the newsroom. Put another way, there were two Dennis' in the sports department, Bateman and Moran. Bateman was an ally, Moran was the union representative. Clearly, in management's view Moran was the Dennis who had spoken to Chavez and was responsible for the sabotage. Since these is no credible evidence tying him to these events, his union activities are the only factor on this record the Respondent's agents would be considering.

The two copublishers were actively involved in dealing with the Chavez matter in this period. The record shows at relevant times they were also affianced. I do not find it unreasonable to assume the two were in communication regarding these goings-on on that Tuesday, August 5, 2008.

At 1:21 p.m. on August 5, 2008, 66 minutes after McCaw's email to Steepleton quoted immediately above, von Wiesenberger's email to Steepleton identified Dennis Moran as the Dennis who had talked to Chavez. There was no other record evidence beyond that email that Chavez used Dennis' last name to Copublisher von Wiesenberger. And, importantly, von Wiesenberger did not testify.

Considering all the above, I find that the unexplained email assertion in Copublisher von Wiesenberger's email that Dennis Moran was the person who had spoken to Chavez is not supported by credible evidence and is not in and of itself persuasive evidence of the fact asserted therein.

Turning to the conflict between Steepleton and Moran respecting their conversations concerning Moran's role in the golf events described above, I have discredited Steepleton's testimony above. I did so for the reasons asserted supra and because I found Moran to be a persuasive witness regarding these events with a sound demeanor. As is set forth in detail above, Steepleton attributed to Moran various essentially confessional statements regarding his role in calling and talking to Chavez which attributions Moran credibly denied. The record contains important corroboration of Moran's denials of such attributions in the August 23, 2008 meeting of Moran with Steepleton and his fellow managers, Colavincenzo and Apodaca. The management notes of the meeting track Moran's version of the meeting in these important aspects. Colavincenzo did not testify and Apodaca did not address what was said at this meeting in these regards or the contents of the notes of the meeting.

b. Positions and arguments of the parties

The General Counsel argues that the suspension and discharge of Dennis Moran were motivated by union activities and invokes the analytical framework established in *Wright Line*, 251 NLRB 1083 1089 (1980), as developed and applied in considering various 8(a)(3) allegations, supra. The General Counsel develops the *Wright Line* procedures in some detail. Counsel for the General Counsel on posthearing brief cites the Board's decision in *Pacific Design Center*, 339 NLRB 415 (2003), in which the Board approved the holding of Judge Lana Parke respecting the General Counsel's prima facie case in a *Wright Line* analysis (339 NLRB at 418):

> The prima facie case may be established by proving the following four elements: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee; and, (4) there is a link or nexus between the protected activity and the adverse employment action. *Hays Corp.,* 334 NLRB 48 (2001).

The Government asserts that the first three of the quoted elements of the General Counsel's prima facie case are not in dispute and focuses on the fourth element, establishing a link or nexus between the protected activities and the adverse actions taken.

The General Counsel then cites various factors which counsel argues gives rise to an inference that an employer acted with antiunion motivation with citation of Board authority for each factor asserted. Those factors, as set forth in the General Counsel's posthearing brief at 163–164, include:

- Expressed hostility toward the protected activity
- Abruptness of the adverse employment action
- Suspicious timing
- Pretextual reasons given for the adverse employment action
- Disparate treatment
- Departure from past practice
- Shifting defenses

Finally, the General Counsel notes, as has been discussed supra in several *Wright Line* analyses, if the Government establishes its prima facia case, the burden shifts to the employer to demonstrate that the adverse action taken would have been taken even absent protected activity. The Government emphasizes however that the employer must demonstrate that the same action would have, not just could have, been taken in the absence of the protected conduct citing *Hicks Oil & Hickgas, Inc.,* 293 NLRB 84, 85 (1989).

The Respondent agrees the correct analytical framework for resolving the suspension and discharge disputes is the *Wright Line* formulary. The Respondent argues correctly however, with numerous Board and court citations supporting the proposition, that employers are free to make and enforce employee

rules, to investigate misconduct and to discipline and discharge employees, indeed to do so for any or no reason save for protected reasons. Further protected activity is not a grant of immunity sheltering an employee or employees from having misconduct addressed to and including discipline and discharge. Counsel for the Respondent argues in effect that the citations of the Government's cases asserting general principles do not necessarily apply to the instant case, but rather are distinguishable on the facts involved herein.

The heart of the parties' arguments regarding the suspension and discharge of Moran are factual. The parties on brief and at the hearing acknowledged the analytical principles involved under *Wright Line* and related cases and have marshaled and cited the lead cases regarding them. They each correctly assert however that the application of those principles to the complex facts involved in the relevant events is where the instant dispute must be resolved. It is to the party's factual arguments that I now turn.

The General Counsel argues that there is a clear link between Moran's union activity and the suspension and discharge he received. Thus counsel argues Moran was the Union's newsroom representative at relevant times and one of the few employees—as opposed to former employees—active on the union side in bargaining. The Government directs attention to the very substantial and ongoing hostility of the Respondent to the Union and to employees supporting the Union and the long string of unfair labor practices committed by the Respondent against the Union and union supporting employees as adjudicated in the instant case.

The Respondent notes that these arguments, which it also contests respecting the assumption of improper respondent conduct as to other employees, rely on generalities that are of no logical force. Thus, the Respondent argues the status of Moran as a bargaining unit committee member is not related to his suspension or discharge and there was simply no nexus between any union activities and the discharge. The Respondent argues on posthearing brief at 161:

> Moran was not engaged in union activities when he spoke to Mr. Chavez, when he failed to bring the Santa Barbara Gold Classic Story to the attention of management, when he unilaterally decided that the News-Press was understaffed and could not cover the tournament, and when he failed to bring to anyone's attention that Mr. Chavez would fax in the scores.

The Respondent emphasizes that the occurrences that underlie the Respondent's unhappiness with events and its subsequent suspension and discharge of Moran were developments concerning which it did not initiate but rather reacted to. And, the Respondent asserts, the conduct at issue—both the circumstances involving Chavez and the golf coverage and the unauthorized removal of the Respondent's proprietary materials from Dorman's desk—was objectively as well as subjectively from the Respondent's perspective worthy of discipline including discharge.

The General Counsel focuses on the Respondent's handling of Chavez' and Dorfman's desk content removal matters arguing that no proper or balanced investigation of the events took place and that the Respondent's actions contained many of the traditional indicia of contrivance and deceit. Thus, the General Counsel argues the Respondent never established that it had any basis for finding Moran, to be the un-last-named Dennis who called Chavez. Thus it did not treat the two sports department Dennis' who were equally possible Chavez conversants, equally. It essentially never investigated the Dorfman accusation that Moran had taken the material from his desk, never asking Moran about the desk emptying assertion nor asked Dorman to speak again to the desk emptying matter after informing him of the importance of his previously lightly given statement that Moran did it. Finally, the General Counsel argues the Respondent misattributed statements and actions to Moran that he had essentially confessed his guilt in order to justify its erroneous discipline of him, which accusations were simply false and pernicious. Thus, the General Counsel notes that Steepleton consistently asserted that Moran had in effect admitted his guilt in the Chavez events, which assertions were false and should be discredited. The Government notes the Respondent's counsel, Cappello, falsely argued in his opening statement in the instant case that Moran "was also involved in clearing out the desk of another employee who had resigned and then he denied it when he was confronted" when there was never any evidence offered that Moran was ever provided an opportunity to deny the accusation. And, the Government notes, the record clearly established that Moran had neither a role in nor even knowledge concerning the Dorfman desk clearing incident.

c. Analysis and conclusions

The parties have correctly identified the Board's *Wright Line* approach as the correct manner of addressing these allegations. They have largely marshaled the applicable cases, many of which have been cited in earlier *Wright Line* inquiries, supra, and immediately above. It seems most appropriate to address the two separate allegations, the suspension of Moran and the later discharge of Moran seriatim using the *Wright Line* framework. I shall consider the challenged suspension first.

(1) The suspension of Moran under Section 8(a)(1) and (3) of the Act

As noted the Government has alleged that Moran's suspension was in violation of Section 8(a)(3) of the Act, the Respondent strongly denies the allegation, and the parties addressed the issue under *Wright Line*. Turning to the Government's case, I agree with the Government that the initial elements of the General Counsel's prima facia case set forth in the quoted portion of *Pacific Design Center*, 339 NLRB 415 (2003), above, are met. Thus: (1) the alleged discriminatee engaged in union or protected concerted activities; (2) Respondent knew about such activity; (3) Respondent took adverse employment action against the alleged discriminatee. The remaining and disputed element then is the fourth element from the quoted portion of that decision: whether or not there has been a sufficient showing by the General Counsel on this record of a link or nexus between the protected activity and the adverse employment action, here Moran's suspension on August 23, 2008.

In order to determine the existence of a causal relationship, the specific union activity involved must be identified. As the Respondent argues persuasively on brief causation is an impor-

tant issue. Thus, the Respondent notes: Moran's general union activities were and had been ongoing for some time and had also long been known by the Respondent. Counsel argues those general union activities were not directly or even indirectly related to the Chavez/golf matters underlying the suspension and, in essence, were so attenuated so as not to provide a persuasive nexus connecting Moran's union activity with the suspension.

It is necessary, however, in this analysis to focus on the particular circumstances which lead to the suspension with attention to the events which underlay the Respondent's determination that Dennis Moran was the "Dennis" of the Chavez phone conversation. Clearly when Chavez reported he had talked to a "Dennis" at the Paper, two choices reasonably presented themselves, the two Dennis' in the sports department: Dennis Moran and Dennis Bateman. How did it come to pass that Respondent suspected Dennis Moran and not Dennis Bateman or even Dorfman?

Steepleton testified that he came to that conclusion after talking to the two and to Chavez. I have specifically found supra, based on the credibility analysis set forth supra, that this was not so and that Steepleton came to the belief that Moran and not Bateman was the Dennis/Chavez conversant because he was specifically so informed by Copublisher von Wiesenberger by email on August 4, 2008—the day before Steepleton first talked to Moran. But, on this record, how did Copublisher von Wiesenberger come to that opinion as of that date? He had spoken to Chavez, but Chavez testified credibly that he had never known the last name of "Dennis" and had not identified Moran as the "Dennis" involved to von Wiesenberger. Von Wiesenberger did not testify.

Copublisher McCaw, present in the office with Copublisher von Wiesenberger that day, was also involved in the events and, it might be inferred, informed her colleague. But again Chavez' credible denials encompassed his conversations with McCaw and she did not testify. So while it is logical that she would have told Copublisher von Wiesenberger what she knew, I cannot find she learned that the "Dennis" who was the wrongdoing employee of the Paper was in fact Moran from Chavez.

A separate email exchange between McCaw and Steepleton on August 4, quoted in part above is relevant. Copublisher McCaw had earlier learned of the problems in golf coverage and let Steepleton know in an email. Steepleton by email in response informed McCaw that he had learned of a possible sports reporter "plan" to "stage a walkout." Steepleton identified various employees who would be allies of the Paper in such an event including his statement: "we have [Dennis] Bateman." He also noted: "Patton says he is happy here." McCaw's response to Steepleton's email clearly indicates she took the events and rumors to be animated by hostility to the Paper: "I believe the paper is being sabotaged."

It is not a far leap to conclude that McCaw Associated Dennis Moran with the sabotage against the paper. There were only three sports employees present at the Paper (Dorfman being in China), Moran, Bateman, and Mark Patton. By process of elimination from the perspective of McCaw, the Dennis who was sabotaging golf coverage and agitating Chavez had to have been Dennis Moran, the Union's representative. The copublishers' actions that August 5 is the only basis for explaining the statement in von Wiesenberger's email to Steepleton that Moran was the "Dennis" of Chavez' complaints. The logical force of this conclusion that Moran was the villainous "Dennis," based on his union activities, is sustained primarily by the lack of record alternatives. Importantly, neither McCaw nor von Wiesenberger testified. And Chavez' testimony was both credited and clear that he did not provide the last name of his telephone conversant who identified himself only as Dennis to anyone since he never knew the individual's last name.

Given the above analysis, it is clear that the union activities of Moran, despite their general nature, had a contextually direct relationship to the fact that Moran was identified as the employee, indeed in McCaw's judgment, saboteur, named Dennis whose conduct involving Chavez and golf had damaged the Paper. That identification, I find based on all the above, leads directly to Moran's suspension.

The Respondent notes that it was clearly entitled to ascertain who had spoken with Chavez and caused the difficulties set forth at length earlier. Thus, Respondent argues the investigatory suspension of Moran was reasonable and nondiscriminatory. The problem with this argument, as the General Counsel notes on brief, is that only Dennis Moran and not Dennis Bateman was suspended during the investigation. That asymmetry or disparate treatment is justified only if the identification of Moran as the villainous Dennis is itself benign and free from union animus. I specifically find that this record simply does not support any finding that the identification of Moran as the Dennis/Chavez conversant was made based on other than Moran's association with, and advocacy on behalf of, the Union as noted above.

Based on all the above, including the argument of the parties, the testimony of the witnesses including an evaluation of their demeanor and, importantly, the fact that neither McCaw nor von Wiesenberger, testified, I find the General Counsel has sustained his prima facie case under *Wright Line* that the Respondent suspended Dennis Dorfman because of his union activities and sympathizes.

Given this finding, the burden under *Wright Line* then shifts to the Respondent to prove that it would have suspended Moran in the absence of his union or protected activity. Here, the Respondent's factual arguments founder on the rock of my finding that there is no credible basis on this record for finding that the Respondent has any reason—other than Moran's union activities and sympathies—for assuming that Dennis Moran rather than Dennis Bateman or another employee was the self-identified Dennis who spoke to Chavez by telephone regarding the golf tournament.

I am aware of the line of cases under *Wright Line* that hold that an employer may meet its burden of showing that an employee would have been disciplined even if no protected or union activities had occurred based on a reasonable belief that the employee committed an offense. In *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002), the Board noted:

In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. See *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012–1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself).

That line of cases does not apply here however because I have explicitly found that the Respondent's belief that Moran was the otherwise unidentified Dennis who had engaged in misconduct resulted from the Respondent's suspicion of Moran generally based on Moran's union activities. The belief is therefore neither reasonable nor exculpatory. The Supreme Court made it clear many years ago in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), that regardless of motive, discharging employees who did not engage in misconduct and were engaged in protected activities tends to discourage Section 7 activity and violates Section 8(a)(1) of the Act. As set forth supra, I have found and here reiterate that there is no persuasive evidence that Moran in fact was the Dennis at issue. And the Respondent bears the burden of proof at this stage of the *Wright Line* analysis.

Having found that the General Counsel has sustained his prima facie case under *Wright Line* that the Respondent suspended Moran because of his union activities and that the Respondent has not established that the Respondent would not have suspended Moran had he not engaged in such activities, I find the General Counsel has prevailed respecting the suspension allegation. I sustain this paragraph of the complaint.

(2) The discharge of Moran under Section 8(a)(1) and (3) of the Act

As discussed supra, Moran was under indefinite suspension effective August 23, 2008. A few days later in conversations with Dorfman, Apodaca was told by Dorfman that had no need to clear out his desk because "Dennis Moran had already cleaned out his desk." The Respondent discovered that the desk was in fact "cleaned out" and that materials the Respondent regarded as proprietary were missing. The Respondent without speaking to Dorfman further or to Moran at all regarding the matter, determined to discharge Moran and did so on August 30, 2008. The discharge is alleged in the complaint to be in violation of Section 8(a)(3) of the Act. The Respondent denies the allegation. All parties agree that the *Wright Line* analysis is appropriate in resolving this dispute. The General Counsel and the Respondent to a large degree treat the suspension and discharge of Moran in a common manner or as a unity and the arguments noted above in my consideration of the suspension were applied by each party to the facts of the postsuspension events.

The General Counsel argues additionally however that the complete absence of any investigation by the Respondent into the truth of Dorfman's claim that Moran had cleared his desk reveals the desk clearing matter to be a pretext for discharge. Thus, the Government argues that the contention that the Respondent's agents believed and accepted Dorfman's casual remark that Moran had cleared his desk, an unexamined statement from an ex-employee who the Respondent knew had lied to them only days before in asserting that he did not intend to resign his employment, is palpably incredible. The General Counsel further contends that for the Respondent to believe Dorfman's casual statement to such an extent that the Respondent would fire Moran without revisiting the matter with Dorfman or even asking Moran about the matter is beyond blatantly incredible and reveals duplicity by the Respondent's agents.

The Respondent emphasizes that its agents Steepleton and Apodaca made clear that Moran would not have been discharged, but for their belief he had engaged in the desk clearing conduct described by Dorfman and that, while during the course of the trial the Respondent learned of Dorfman's false statement and Moran's nonparticipation in the desk cleaning, no agent of the Respondent was aware of the falsity of Dorfman's attributions regarding Moran at any earlier time.

Based on the record as a whole, the testimony of the witnesses in light of their demeanor and the arguments of the parties, I find and conclude as follows. Essentially for the reasons given in finding the Government has established its prima facie case as to the suspension, I make the same finding here respecting the discharge. Moran was suspect in the eyes of the Respondent for his union activities and sympathies in light of the Respondent's high officials' determination that the sports department was under threat of a walkout and that, by the process of elimination discussed supra, Moran was the disloyal employee.

I find it simply unbelievable, indeed more like something from the works of Franz Kafka, the post-Moran suspension events and actions of the Respondent's agents ending in Moran's discharge. Relying on a casual reference by Dorfman, a now former employee who Respondent well knew had recently lied to it regarding his intentions to continue his employment with the Respondent, Apodaca and Steepleton determined to terminate Moran. The Respondent never asked Moran about the matter and seemingly went far out of its way to avoid informing Moran he was viewed as having done a dischargeable act. Thus Steepleton called Moran and told him he was to be discharged. When Moran asked him why, Steepleton told him he would get a letter and to come to the exit of the facility. When Moran did so, again Steepleton omitted to disclose the Dorfman accusation, but rather simply gave Moran

a lengthy letter containing a litany of advanced sins and omissions asserted as a basis for discharge and sent him on his way before he could address the assertions. To argue that Moran never denied the Dorfman claim is again the Kafkaesque sin of the accused that, never learning of the allegations against him, is incapable of making a denial or offering explanation.

Given my finding that the *Wright Line* prima facia case of the Government has been sustained, the burden then shifts to the Respondent to prove that it would have discharged Moran in the absence of his union or protected activity. As in my rejection of this contention respecting Moran's suspension, I reject it here because I am simply unable to accept that had Moran not been the object of suspicion and disloyalty for his union activities, as discussed supra, the Respondent would never have simply blindly believed Dorfman's remark about Moran clearing out his desk without even asking Moran about his actions if any in actually clearing out Dorfman's desk. And, if such a fundamentally fair and reasonable undertaking had occurred,[39] I am satisfied that Dorfman's glib falsehoods would have been quickly discerned, if not immediately corrected by Dorfman himself or by Moran.

Given all the above, I find that the General Counsel has sustained the complaint allegations that the discharge of Moran violated Section 8(a)(1) and (3) of the Act.

(3) The bargaining allegations respecting Moran's suspension and discharge

The General Counsel in his complaint alleges the Respondent's postsuspension failure to notify and bargain with the Union over the suspension and termination of employee Dennis Moran violated Section 8(a)(1) and (5) of the Act. As set forth in greater detail supra, the Respondent did not notify nor offer to bargain with the Union regarding the Moran suspension before its decision and implementation of the decision to suspend Moran. Rather, when the Union learned of Moran's suspension on the day of its occurrence, Union Chief Negotiator Caruso by letter sought of the Respondent's chief negotiator, Zinser, the immediate rescinding of Moran's suspension, restoration of any lost pay and that the Respondent "agree to negotiate over this action before implementation if the News-Press wishes to persist with it." By letter dated September 2, 2008—after Moran's discharge, Zinser replied to Caruso again by letter that the Respondent had no obligation to bargain over any discipline relating to Moran or the Respondent's maintenance of discipline consistent with the status quo. The Respondent, the letter asserted, was "maintaining the dynamic status quo that has always existed." The letter also noted the discipline and discharge of Moran were for cause and rejected the Union's proposal to rescind the discipline of Moran.

It is important in addressing the allegations here to distinguish between an employer's obligation to bargain over its system of discipline, i.e., disciplinary rules and practices, and its application of those rules and practices to a particular individual or situation. An employer must upon demand bargain with its employees' representative concerning its terms and conditions of employment applicable to the represented employees. An employer's disciplinary rules and practices are a part of those employees' terms and conditions of employment. Changes in the rules are mandatory subjects of bargaining and require notification and provision of an opportunity to bargain to the Union prior to changes in rules in their manner of implementation.

The complaint allegations framing the instant dispute here, complaint paragraphs 15(a) and 15(b), specifically name the conduct at issue as the Respondent's postsuspension failure and refusal to bargain as the specific acts of suspending and discharging Moran. Thus, the complaint allegations do not allege and the General Counsel does not argue the Respondent failed to bargain about the Respondent's general system of disciplinary rules and practices. Rather the complaint and the Government asserts a narrower statutory bargaining obligation respecting the application of the Respondent's discipline in regards to the Respondent's specific acts of suspending and discharging Moran. It is also important to note the bargaining obligation asserted by the complaint and argued by the General Counsel arises by virtue of the Union's request for bargaining. This is consistent with the Union's actions offered by the Government in support of the allegation, i.e., the Union's letter sent upon its learning Moran had been suspended in which the Union seeks negotiations with the Respondent over the suspension of Moran and any subsequent Respondent "implementation" of its discipline, i.e., discharge, of Moran.

An employer's obligation to bargain respecting individual application of its rules to employees in any given situation differs depending on the circumstances of the application of the rules. Some rules require very little if any discretion on the part of the employer in their application, for example a rule providing employees receive a fixed percentage wage increase on the anniversaries of their employment. If the rules are longstanding, i.e., meet the Board's test as a past practice and do not involve the exercise of substantial discretion, the employer is not obligated to provide notice to a Union that had not sought such prerule application bargaining. *Washoe Medical Center, Inc.,* 337 NLRB 202, 202 fn. 1 (2001).[40]

Other employer rules, including disciplinary rules, require the exercise of a substantial degree of employer discretion and a bargaining obligation exists concerning their application. The Board in *Eugene Iovine, Inc.,* 328 NLRB 294, 294 (1999), addressed such discretionary rules:

> The Board and the courts have consistently held that such discretionary acts are, as stated by the judge, "precisely the type

[39] An employer, the Respondent here, is not required to be fair, reasonable, or even to avoid Kafkaesque human resource decisions. In determining if certain conduct would have occurred absent protected conduct, however, the motivations, habits, and practices of the employer must be considered.

[40] See also *Virginia Mason Medical Center*, 350 NLRB 923, 931–932 (2007). In the instant case, the General Counsel is not contending the Respondent failed to bargain about the Moran suspension and discharge at any time before the Union requested such bargaining on August 23, 2008, after Moran's suspension.

of action over which an employer must bargain with a newly-certified Union." See *NLRB v. Katz*, 369 U.S. 736, 746 (1962) (employer must bargain with union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion"); *Garment Workers Local 512 v. NLRB (Felbro, Inc.)*, 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain with the union over economic layoff, which is "inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work"); *NLRB v. Allis-Chalmers Corp.,* 601 F.2d 870, 875–876 (5th Cir. 1979) (employer must bargain over wage increase which did not result from "purely automatic" policy and was not pursuant to "definite guide-lines"); *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990) (despite past practice of instituting economic lay-offs, employer, because of newly certified union, could no longer continue unilaterally to exercise its discretion with respect to layoffs).

The initial step here then, as to both the suspension and the discharge of Moran, is to determine: (1) if the Respondent's disciplinary acts applied longstanding rules (i.e., were past practices) as opposed to new rules (unilateral changes), and (2) if the rules applied were discretionary or sufficiently nondiscretionary to avoid the obligations set forth in *Eugene Iovine, Inc.,* supra. The Board in *Eugene Iovine, Inc*. makes it clear that the burden is on the employer to establish in this context that a past practice existed and that the disciplinary actions taken were consistent with that practice.

Turning to the Moran suspension, the Respondent asserted to Moran and at trial in its defense that Moran was suspended indefinitely pending completion of the investigation of his role in various Chavez and golf tournament events as discussed above. The rules advanced by the Respondent as applicable to Moran's argued actions in this sequence of events are multifold. They include rules against disclosure of proprietary information, rules regarding honesty, consulting with supervision, proper work scheduling and follow through and others. The General Counsel vigorously contested the existence, consistency of application and applicability of many of the challenged rules to Moran's situation. Indeed Steepleton, the supervisor tasked with the disciplinary decision regarding Moran indicated at the time he needed to consider the matter.

All of the above makes it clear and I find that the application of the rules to Moran at the time of his suspension involved highly discretionary decisions by the Respondent's agents as to what to do with Moran and/or others involved in the complex events which have been discussed in some detail, supra. Thus, I find, under the *Eugene Iovine, Inc.,* above, decision, that the Respondent was required to bargain with the Union concerning the suspension process and the discipline that could potentially result from the completion of the consideration. As the Board noted in *Oneita Knitting Mills, Inc*., 205 NLRB 500, 500 fn. 1 (1973):

> What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

Given all the above, I find the Respondent had an obligation to bargain with the Union concerning the suspension and subsequent discipline of Moran, at least from the time of the Union's August 23, 2008 request to bargain about Moran's suspension and any subsequent discipline, which is as far back in time as the Union and the General Counsel have chosen to litigate. The Respondent's explicit refusal to so bargain, therefore violates Section 8(a)(1) and (5) of the Act and I so find.[41]

Turning to the subsequent discharge of Moran by the Respondent, the same decisional law applied to Moran's suspension applies to Moran's discharge save that here the Union had requested bargaining and the Respondent's obligation to bargain preceded its discharge decision. Thus, the Union's August 23, 2008 request to bargain concerning the postsuspension handling of Moran clearly proceeds and encompasses Moran's discharge.[42] That being so, the Respondent was obligated to meet and bargain with the Union concerning the discharge, this includes both bargaining regarding the decision itself before the decision was taken as well as bargaining concerning the effects of the discharge.[43] This being so, the Respondent's explicit refusal to engage in such bargaining violated Section 8(a)(5) and (1) of the Act and I so find. I therefore sustain the relevant paragraph of the complaint.

M. The Table Bargaining Allegations

1. The complaint allegations

The complaint at paragraph 20 alleges an improper course of bargaining by the Respondent during the November 2007–March 2009 period. Thus, the complaint alleges the parties met for the purposes of collective bargaining concerning unit employee's terms and conditions of employment during the period. Complaint subparagraphs 20(b)(i) and (ii) allege that during this period during bargaining:

> (i) The Respondent has insisted on proposals that are predictably unacceptable to the Union, which proposals include, but are not limited to, the Respondent's proposals on management right, grievance and arbitration, union bulletin board, discipline and discharge.
>
> (ii) The Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management rights clause that would grant the Respondent unilat-

[41] Given these findings I find it is unnecessary to address the various contentions of the government that the various rules the Respondent identified as applicable to Moran's potential discipline were not legitimate or were not applied consistent with the Respondent's past practice.

[42] Steepleton and Apodaca testified that at the time of Moran's suspension, which was also the time of the Union's bargaining request, the Respondent had not decided to terminate Moran.

[43] Various subjects such as severance terms, references, unemployment processing, and other matters arise after a termination and may be the subject of effects bargaining.

eral control over many terms and conditions of employment.

The complaint at paragraph 20(c) alleges:

> By its overall conduct including but not limited to the conduct alleged in paragraphs 7 through and including 16 and paragraphs 18, 19, and 20(b), the Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of the Unit.

Complaint paragraph 25 further alleges the quoted conduct of the Respondent constitutes a failure and refusal to bargain collectively in good faith and a violation of Section 8(a)(5) and (1) of the Act. The Respondent in its answer denies both the specific bargaining allegations and the conclusionary allegation that it violated Section 8(a)(5) and (1) of the Act.

2. The bargaining conduct of the parties[44]

The Respondent and the Union have met in bargaining since November 13, 2007, usually in 2-day stints. Since May 9, 2008, the parties have utilized the services of a commissioner of the Federal Mediation and Conciliation Service. The Union at all material times has been led in bargaining by Nicholas Caruso, an international staff representative of the Charging Party, with many years of negotiating experience in the publishing industry. The Respondent has at all times been represented by Michael Zinser of the Zinser law firm who has many years of negotiating experience in the publishing industry. These individuals have been assisted: in the Union's case by its counsel, Ira Gottlieb, of the law firm of Bush, Gottlieb, Singer, Lopez, Kohanski, Adelstein, and Dickinson, as well as an employee committee and, in the Respondent's case, by managerial agents of the Respondent and other members of the Zinser law firm.

In negotiating and agreeing to procedural arrangements prior to the start of face-to-face bargaining, the Respondent made it clear that it was interested in confining bargaining to mandatory subjects of bargaining and was not interested in consuming "valuable bargaining time with permissive, nonmandatory subjects of bargaining." The Respondent's initial position respecting bargaining proposals was that it would stand on the status quo and wait and see what changes the Union might propose.

The Union submitted to the Respondent its opening proposal on November 1, 2007, in anticipation of the opening meeting on November 13. The proposal included, inter alia, a discipline and discharge clause limiting the Respondent's rights to discipline, suspend, or discharge unit members without just cause. The proposal also included a progressive discipline, grievance, and arbitration clause applicable to any disciplinary action, controversy, or dispute concerning the application or interpretation to the contract. The final step of the proposed procedure was final and binding arbitration with the arbitrator able to sustain, reverse, or modify any unjust discipline of unit employees the arbitrator determined not to be for just cause. The decision of the arbitrator was to be final and binding. The Union's November 1, 2007 proposal contained a no-strike, no-lockout clause. The proposal also contained a work assignments clause which included, inter alia, the following separate paragraphs:

> 1. An employee shall not be required to perform, over the employee's protest, any practice which compromises the employee's integrity.
>
> . . . .
>
> 3. Substantive changes in material submitted shall be brought to the employee's attention before publication. An employee's byline or credit line shall not be used over the employee's protest.
>
> 4. An employee shall not be required to gather, write, edit, photograph or process anything for publication that is malicious, distorts the facts or creates an impression[45] which the employees knows to be false. If a question arises as to the accuracy of printed material or photographs, no correction or retraction of that material or photograph shall be printed without prior consultation with the employee involved.
>
> 5. An employee may not be disciplined for refusing to cover a story or perform a task that is unethical, immoral or unsafe. An employee may request and shall receive a written explanation from management in instances when an employee is given an assignment that violates this section.
>
> 6. An Employee may request and shall receive a written explanation from Management in instances when significant changes are made to a story, photo or graphic or the story, photo or graphic is not published. An employee may also request and shall receive a written explanation from Management in instances when the employee has submitted a written story, photo or graphic and that proposal is denied.
>
> . . . .
>
> 9. Each employee shall furnish the Employer with conscientious service for the entire period of time he/she is employed each day, and no employee shall be required to perform an excessive amount of service, constituting, in fact, an unreasonable workload.

In the initial 2-day bargaining session, November 13–14, 2007, various discussions and information requests respecting temporary employees and merit wages increases were undertaken and followed up with later correspondence as has been discussed supra. On November 14, 2007, the Respondent submitted written proposals to the Union including articles on

[44] Certain complaint allegations sounding in Sec. 8(a)(5) of the Act have been discussed earlier in association with factually related violations. Those discussions and conclusions while also appropriately set forth in this factual recitation and consideration, for reasons of avoiding making a long decision even longer, will not be duplicated save in a partial abbreviated fashion. They formed part of the relevant circumstances in my consideration of the issues herein.

[45] [Judge Anderson agreed to leave this footnote blank.]

management rights, discipline, and discharge, and a no-strikes article which included no-lockout language.

The management-rights proposal (which included "bargaining notes" entries at its end.) stated in part:

> Section 1. Except as expressly modified or restricted by a specific provision of this Agreement the Employer reserves and retains, solely and exclusively, all of its normal, statutory inherent, and common law rights prerogatives and functions to manage the business, whether exercised or not, as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer.
>
> Section 2. The sole and exclusive rights of management which are not abridged by this Agreement shall include, but are not limited, to the following rights:
>
> (a) To determine the content of Santa Barbara News-Press, including, but not limited to, editing, presentation and placement of all stories, columns and photos.
> (b) To establish or continue policies, practices and procedures for the conduct of the business and, from time to time, to change or abolish such policies, practices or procedures.
> (c) To determine and, from time to time, to redetermine the methods, processes and materials to be employed.
> (d) To discontinue processes or operations of the Employer.
> (e) To establish work, quality and productivity standards.
> (f) To determine the number of hours per day or week that operations shall be carried on.
> (g) To determine and to select the equipment to be used in the Employer's operations and, from time to time, to change or to discontinue the use of any equipment and to select new equipment for its operations, including equipment for new operations.
> (h) To establish employee work schedules, to set the hours of work and the number of employees, and from time to time to change the hours and employees'' work schedules.
> (i) To select and hire employees, determine their qualifications and assign and direct their work.
> (j) To determine the number and type of employees required.
> (k) To assign work to such employees in accordance with requirements as determined by management.
> (l) To lay off employees due to lack of work or for reasons of efficiency.
> (m) To determine the fact of lack of work.
> (n) To make and enforce safety rules and rules governing the conduct of employees within the News Department and for the maintenance of discipline, to the fullest extent permitted by the National labor Relations Act, to establish and enforce a Code of Ethics for all News Department employees.
> (o) To suspend, discharge or otherwise discipline employees.
> (p) To issue, amend and revise policies, rules, regulations, and practices.
> (q) To determine the content of all jobs and descriptions thereof, and to determine the essential functions of all jobs.
> (r) To determine when training will be provided to employees and those employees to receive training.
>
> Section 3. The Employer shall have the right to utilize independent contractor free-lance writers and photographers to the extent deemed necessary by News Department management.
>
> Section 4. The Employer's failure to exercise any right, prerogative, or function hereby reserved to it, or the Employer's exercise of any such right, prerogative, or function in a particular way, shall not be considered a waiver of the Employer'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 functions of the Agreement.
>
> Section 5. Managers/Supervisors shall have the right to write and/or take pictures for publication in Santa Barbara News-Press.
>
> Section 6. The rights and prerogatives of Management, whether established by express provisions (including this Article) or by practice, shall be deemed to be part of the status quo that remains in effect after the expiration of this Agreement on _____ and until a different agreement is reached or other lawful change is permitted.
>
> **Bargaining Notes** [Bolding in original.]
>
> 1. This proposal represents the status quo for Santa Barbara News-Press.
>
> . . . .
>
> 3. The Union's proposal on "Work Assignments" in effect transfers control of content from Management (where it resides now) to the individual employee's subjective notions of "integrity," "malicious," unethical," "immoral," "unsafe, and "unreasonable work load." Santa Barbara News-Press is not willing to so transfer control. That should remain with the Publisher.

The Respondent's discipline and discharge proposal stated in part:

> Section 1. The Employer shall have the right to discharge or discipline employees. The disciplinary action which the Employer may take in punishing or penalizing employees shall

include, but not be limited to: (a) warning; (b) suspension from work without pay; (c) discharge.

Section 2. In the case of any offense for which an employee may be discharged, the Employer may at its sole discretion, impose a lesser penalty.

Section 3. While the policy of the Employer is at-will employment, the Employer wishes to communicate that it will impose discipline or discharge for the following types of misconduct:

(a) Biased reporting.
(b) Violation of the Employer's policies on Business Conduct, Conflicts of Interest, Confidentiality and Code of Ethics.

. . . .

(h) Disloyalty
(i) Insubordination
(j) Dishonesty

. . . .

(l) Neglect of Duty

. . . .

(r) Failure to meet the productivity standards of the Employer

Section 4. Employees should have no expectation of privacy when on Employer property or while on duty, whether on or off Employer property, insofar as it involves the Employer's right to search desks, vehicles, brief cases, purses, computers, Email to investigate possible violations of Employer rules and policies. A refusal of an employee to cooperate in any such investigation shall be deemed to be insubordination and therefore, cause for discipline and/or discharge.

The Respondent's no-strike proposal included the following language:

Section 1. There shall be no strikes (including sympathy, unfair labor practice, or wildcat strikes), sit-downs, work stoppages, boycotts, picketing, any acts honoring a picket line or any other acts that interfere with the Employer's business, including but not limited to the Employer's operations, the production or sale of its products or services or any Employer sponsored events or meetings, during the term of this Agreement by the union, its officers, agents and members, or by the employees.

. . . .

Section 4. Any or all employees participating in any activity proscribed herein shall be subject to disciplinary action, including discharge.

. . . .

Section 6. The Employer agrees that during the term of this Agreement, it will not lock-out the employees covered by this Agreement.

Following this 2-day bargaining session, as discussed in earlier portions of this decision, information requests were made by the Union. The parties also agreed by letter to meet for 3 days of bargaining in mid-January 2008. That session was canceled by Zinser based on the unavailability because of illness of Scott Steepleton. Bargaining sessions were agreed to be held on February 12, 13, 14, 15, 25, 26, and 27, 2008.

The bargaining sessions in the week of February 12, 2008, included discussions of the merit-pay history and discussion of information submitted to the Union as well as the Union's desire and request for information as has been discussed in other portions of the decision.

The Respondent on February 13, submitted a written grievance proposal. The proposal provided for a 4-step process for grievance handling. In essence, step 1 provided for an employee, individually or with a union steward, a period of time following the ripening of the dispute to discuss the claim with the employee's immediate supervisor who would provide a verbal response within 3 days.

Absent resolution, step 2 allowed for taking the matter in a more formal way to the associate editor who would respond in writing within 4 days. Absent resolution, step 3 provided for review by a group of two union representatives, the associate editor, and the director of human resources with the director of human resources communicating the Company's decision in writing within 4 days.

Finally, if no resolution has taken place, step 4 provided for a written appeal to the copublishers and a meeting of the copublishers, the associate editor, the director of human resources, and two union representatives. The copublishers within 4 working days "would provide to the Union in writing the final decision of the Company on the grievance."

During this week in bargaining, the Union addressed the Respondent's earlier submitted discipline and discharge, and management-rights proposals and the newly submitted grievance proposal. Caruso identified these subjects as the heart of the negotiations which if settled would make reaching an agreement easier. The Union noted with alarm, however, the Respondent's proposed contract clauses were punishing and harsh for employees and there was no limit or control on the Respondent's rights: no standards of just cause or reasonableness and no third party dispute resolution such as arbitration.

Zinser emphasized that the Respondent's proposals provided for employee grievances with union representation, with multistep processing that provides for dialogue of the interested parties and discussion of the matters in dispute. These proposals created new rights for the Union that had not existed heretofore. He noted, however, that the "publishers want to retain final say on these decisions. They do not want to relinquish that decision-making power to the third party."

The negotiators also discussed the Respondent's bulletin board proposal of February 14, 2007. The Union complained that the provision requiring the Respondent's approval of mate-

rial prior to its posting was demeaning and condescending. The Respondent responded that there was no union statutory right to bulletin board access and that such rights were created by a contract. The Union rejoined that the Respondent's proposals seemed to have a theme that management needed "total control." The Union modified its bulletin board proposal on February 15, 2008, but it became clear that the language was not complete in Caruso's view and that it would have to be fixed by giving both sides keys to the board.

Following intersession information correspondence discussed in other sections of this decision, the parties met in bargaining on February 25 through 27, 2008. At that session the Union provided its written discipline and discharge language. It provided for "just cause" as a basis for discharge or discipline of employees as well as a progressive or multistep discipline system: verbal warning (documented), written warning, suspension from work without pay, discharge. The Union made it clear that the fundamental difference between the parties in these areas was not the language so much as the existence of an impartial third party to decide differences.

The Union amended its bulletin board proposal to specify that the union shop steward and the newsroom manager would each have a key to the board for the purpose of posting and removing material. Caruso took pains to explain that despite the fact that Respondent had a key under the proposal, the bulletin board was the Union's and the Union though its steward would determine what was appropriate to be posted.

The grievance and arbitration proposals were discussed. The Respondent indicated it had no new proposal and the Union lamented that it was "unheard of" for the employer to retain "total control" over disputes. Caruso, as the Union's negotiation notes indicate, complained:

> Every step of the way . . . the Company wants everything to be the same and to have ultimate control. . . . Quite frankly, I am very frustrated with the proposals being essentially nothing more than what the employees already have and that the company wants absolute say over disputes.

The Union also submitted a written proposed letter of understanding on Journalism Ethics which was a proposed addendum to the agreement. The language of the proposal adopted the code of ethics of the Society of Professional Journalists. The proposal further asserted:

> Additionally, the parties recognize that it may be impossible to eliminate all forms of bias from the news. In the spirit of continual improvement, however, reporters pledge to be fair and objective. When Management views a news story to be unbalanced or distorted, a discussion will be held between the applicable parties to make appropriate changes. It is agreed further that the Management will not attempt to interject opinion into a news story. If agreement cannot be reached on appropriate changes, the reported may withhold his/her byline.

The parties met again in bargaining on April 2 and 3, 2008. The Respondent submitted a new grievance procedure proposal with timing language changes and a new step 4 which provided a grievance mediation process before a Federal Mediation and Conciliation Commissioner. The former step 4, now became step 5 and as before reserved the final decision in disputes to the Publishers. The Union argued that its core issues were grievance language, management rights, and discipline and discharge. While appreciative of the value of mediation the Union insisted it was not a substitute to final and binding arbitration by an impartial arbitrator.

The Respondent supplied an updated written grievance proposal which deleted the earlier specifically named FMCS representative. The proposal contained the following bargaining note:

> Santa Barbara News-Press rejects the notion that a grievance procedure without "just cause" and "binding arbitration" by a neutral is illegitimate. Thousands and thousands of employers have written procedures for resolving workplace disputes, without the concept of just cause and arbitration. The Union seems to be saying that these employment relationships are not legitimate. Santa Barbara-Press strongly disagrees with this premise.

The Respondent in writing withdrew its November 14, 2007 no-strike article. Zinser represented that since the Respondent was not going to agree to a binding arbitration clause, it was withdrawing its no-strike language and the employees can go on strike in furtherance of their view of a labor dispute.

Caruso responded thereafter that the focus should be on union contracts since the employees elected the Union to represent them. "[W]e have to start negotiating things that are found in Union Contracts, not things that may be out there in the non-union environment." Caruso suggested the Union might remove the "just cause" language in the grievance clause if the parties could reach agreement on a grievance procedure with third-party resolution.

In this session, the Respondent submitted modified proposals on discipline and discharge and on bulletin boards. The Respondent's proposal on discipline and discharge modified its earlier Section 4, quoted above, by striking the items "brief cases, purses" from the search language and adding a new sentence:

> The Employer shall have the right to search personal vehicles, brief cases, or purses if the Employer has a reasonable suspicion that the contents thereof involve possible violation of the Employer['s] rules and policies.

The Respondent's bulletin-board proposal carried unchanged the proposition that items to be posted must be submitted to the Publisher and approved prior to posting. Caruso again took umbrage with the proposition that the Union had to get approval for its postings and asserted that the Union would be responsible for posting and taking down materials.

The Respondent responded to the Union's earlier proposal on Journalism Ethics by noting it remained of the view that the subject matter was a permissive nonmandatory subject of bargaining that it did not wish to bargain about. It specifically requested the Union withdraw the proposal.

Between sessions, Caruso in a letter dated April 23, 2008, complained to the Respondent that the Respondent's insistence in its proposals with no just cause requirements in disciplinary action matters and its rejection of binding arbitration concern-

ing grievances were "predictably unacceptable as we have repeatedly informed you." Caruso challenged Zinser in his letter:

> This position in the context of collective bargaining is in bad faith, both because it is illustrative of the News-Press' overarching and virtually uniform refusal to deviate from the status quo on any significant matter, and because of a fundamental difference between pre-union and post-election set of circumstances. . . . Since you continue to assert . . . that the Santa Barbara News-Press can persist—as do non-union employers—with its pre-existing, one-sided non-binding "procedures" leading to a unilateral resolution to a contractual dispute it strongly suggests that you have no interest in reaching an agreement with the Union.

Zinser replied by letter of May 9, 2008, which letter dealt with other matters but also addressed the language quoted immediately above:

> With respect to your proposals for just cause and arbitration, it is certainly the union's right to propose those concepts for a new Collective Bargaining Agreement. However, as you acknowledged at the table, grievance and arbitration is a mandatory subject of bargaining, and the Santa Barbara News-Press has the right to propose a procedure that does not contain concepts of "just cause" or binding arbitration. Even you acknowledged awareness of Collective Bargaining Agreements without arbitration in them. Your statements reflect a belief and/or position that by virtue of the union being certified, that translates into a requirement that an employer agree to what you want. This is not the law. From the point of view of the Santa Barbara News-Press, the existing wages, hours, and working conditions are very generous. Therefore proposing the status quo on such items is certainly consistent with good faith. "Predictably unacceptable" is not a standard under the National labor Relations Act. If that were the case, either party could unilaterally adopt fixed positions and them announce that any proposals from the other side that do not adopt those positions are predictably unacceptable. . . .

The parties met in bargaining again at a May 14 and 15, 2008 session. The Union withdrew at the Respondent's request, its November 2007 proposals on work assignments quoted in part supra, and its earlier proposed letter of understanding on journalism ethics. It also submitted a new proposal on discipline and discharge. The proposal retained the "discipline for just clause" language as well as "reasonable and uniformly applied" limitation language on implementation of discipline.

At this session management's rights were discussed with the Respondent asking for the Union's position on management rights. The Union responded that the Respondent's proposed management-rights language became more acceptable if other parts of the Union's proposed contract, such as just cause and grievance and arbitration, were in place and applied to the clause. The Union agreed to provide a written position on management rights.

Intersession exchange of correspondence, in part discussed in other sections of this decision, took place and the parties met again in bargaining at the June 3 and 4, 2008 session. FMCS Commissioner Rucks participated. The Union provided the Respondent with its written response on management rights. The Union's response took the form of copying the entirety of the Respondent's management-rights proposal, quoted supra, and appending 24 footnotes to various of its sections and subsections with the Union's position and commentary contained in those footnotes. A significant number of the Union's proposal's footnotes appended to various of the listed rights of management contained the statement: "[T]he Union is not willing to waive its right to bargain over changes in wages, hours and working conditions if applicable," or similar language. The Union also made clear that management-rights language must not be read in isolation. Thus a footnote: "The Union has no concerns provided such action is with Just Cause which may be processed through a legitimate grievance procedure."

The Respondent in turn at the session provided the Union with a written response to the Union's footnote formatted document addressing the Respondent's earlier management-rights proposal. The Respondent's document begins:

> Santa Barbara News-Press appreciates the Union providing us its position with respect to our Management Rights proposal. We want to make sure the Union understands the proposal. The proposal is intended to set out subject matters on which Management has the right to act unilaterally, without bargaining, during the term of the Collective Bargaining Agreement. As a general observation, your comments largely communicate a desire to have the ability to require the Santa Barbara News-Press to bargain over virtually every decision it would need to make to run the News Department.

The document then addresses various union footnotes and questions raised by the Union. It concludes:

> Inasmuch as the Union did not actually make any counter proposal on Management Rights, you have presented us with no new language to consider. That being the case, subject to discussion of future counter proposals o[f] the Union, the proposal of Santa Barbara News-Press regarding Management Rights remains as stated.

In response to the Respondent's document, the Union on June 4, 2008, provided a complete written management-rights proposal. While the proposal tracked the format of the Respondent's proposal, it interjected the limiting term "reasonable" in the matters the Respondent would have license to modify. Further it provided in its Section 6:

> Rights as provided in this [Management-Rights] Article shall not supersede Managements legal obligation to bargain over changes that substantially affect the wages, hours and working conditions of Bargaining Unit Employees.

Zinser on behalf of the Respondent read the Union's proposal and lamented that the Union was proposing that the Respondent would have to bargain over every change. Caruso demurred saying the Union's over-arching problem with the Respondent's management-rights proposal was that it represented the

status quo which means there is no purpose to having a collective-bargaining agreement.

The parties again undertook intersession communications discussed in other sections of this decision. The parties held their next bargaining session on July 10 and 11, 2008. They exchanged proposals on collateral matters such as electronic communications, mileage reimbursement, access to premises, and severance pay. On July 10, 2008, the Union submitted a new proposal on employee integrity setting forth in the proposal's "bargaining notes" that the Union had withdrawn its earlier work assignments proposal at the Respondent's behest and now offered the employee-integrity language as a modified proposal. The proposal contained certain paragraphs which recited that that the employer "shall continue" certain existing practices and also contained the following:

> 3. An employee may withhold his byline from an article which he/she reasonably believes is malicious, distorts the facts or creates an impression which the employee knows to be false.
>
> 4. An employee may not be disciplined for refusing to perform a task that the employee reasonably believes is unsafe.
>
> 5. [Omitted.]
>
> Nothing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, consistent with applicable law and with the employee's right to withhold his/her byline as described above.

The parties discussed the proposal that day and the next with the Respondent taking the position that it was a repackaging of the Union's earlier nonmandatory proposals on ethics.

The Respondent responded to this proposal in writing on July 11, 2009, indicating it would consider the Union's argument that the proposal was a mandatory proposal and asked several questions respecting the Union's intentions regarding the employees control over bylines.

On July 16, 2008, Zinser notified Caruso he could not meet in August but offered dates in September which Caruso agreed to. The parties held their next session on September 3 and 4, 2008. Each side met separately with the FMCS Commissioner who shuttled between the parties. In this manner they exchanged proposals on vacations and holidays. On September 4, 2008, the Respondent requested the Union withdraw its employee integrity proposal.

Intersession communication took place regarding information and other matters including matters discussed in other sections of this decision. By letter of September 9, 2008, Caruso wrote Zinser dealing with several matters. Respecting the Employee Integrity proposal the letter stated:

> With regard to your bargaining request of 9/4/08 to withdraw our proposal on Employee integrity; it is my understanding that the Employer wanted to study the case law on this matter provided by our legal counsel and respond. Evidently, you do not feel any obligation to explain your position. We will withdraw the proposal per your request, take your request to mean you are refusing to bargain over the Union's proposal and file a charge for refusal to bargain on a mandatory subject of bargaining. The Union reserves all rights pertaining to this subject.

The next bargaining session was held on October 22 and 23, 2008, with the FMCS Commissioner assisting. The parties discussed language addressing vacation, duration of contract, wages, retirement, overtime, electronic communications, and reductions-in-force.

Again, intersession communication took place regarding information and other matters including matters discussed in other sections of this decision. The parties met again in bargaining on January 14 and 15, 2009. The Mineards matter was discussed as was presented in a separate section of this decision. Several contract subjects were discussed including hours of work, overtime, full-time status, sick leave, contract integrity, access to the premises, vacation, and holidays. Later in the session, wages, mileage, retirement, health insurance, holidays, and issues of concerning the assistant life and scene editors were discussed. The Respondent noted the parallel language between its management-rights proposal and the Union's language and sought tentative agreement on any portions of the proposals. The Union took the position that no agreement on any part of the management-rights proposals could be even tentatively approved until the entire proposal was agreed upon.

Intersession communication concerning Mineards and other information issues continued as discussed in other sections of this decision. The parties met for their next bargaining session on February 25 and 26, 2009. In the session matters discussed in other sections of this decision took place. The Respondent provided the Union a document entitled: Proposed Agreement Between Santa Barbara News-Press and GCC/IBT as of February 25, 2009,[46] which Zinser identified as the Company's position. He reviewed the document with the parties noting the articles on which the parties had indicated tentative agreement. The Respondent also submitted a February 26, 2009 bargaining agenda items recitation which summarized the state of management-rights clause discussions and asked if the Union's position on the matter had changed. Caruso told Zinser he would provide a written response on its position later in the week.

By letter to Zinser dated March 10, 2009, Caruso reviewed the bargaining history of the managements-rights proposal and informed Zinser that after the Union's subsequent review of the Respondent's last management-rights proposal with counsel, the Union "concluded the clause as the News-Press proposed it, in conjunction with its other outstanding proposals, was potentially more harmful than had been communicated to the union committee at the table." Caruso explained that the Union's last position, in which it had omitted the Respondent's Section 6 postcontract expiration language, was based on it's determination of the section's "ramifications were potentially harmful."

The parties thereafter addressed matters discussed in other sections of this decision and did not meet in bargaining again until the timeframe of the allegations of the complaint, ending

[46] The 39-page document comprised some 32 articles and each article had following notations indicating the dates of the Respondent's proposals and if tentatively agreed upon.

on March 24, 2009, had passed. All parties agree that at no time during the relevant period of bargaining had an impasse been declared and at no time had an impasse in bargaining existed. Bargaining has continued, at least to the end of the hearing in the instant case, without agreement having been reached.

3. Analysis and conclusions

Consideration of allegations of bad-faith bargaining under the Act, includes consideration of the parties conduct in bargaining but also require examination of all other conduct at relevant times. For purposes of clarity of analysis, the two individual complaint bargaining conduct allegations, complaint subparagraphs 20(b)(i) and (ii), are addressed separately and thereafter the "over all conduct" bad-faith bargaining allegation, complaint subparagraph 20(c), will be addressed which covers essentially the Respondent's total bargaining conduct.

a. The allegation that the Respondent has insisted on bargaining proposals that are predictably unacceptable to the Union, including but not limited to the Respondent's proposals on managements rights, grievance and arbitration, union bulletin board rights, and discipline and discharge. Complaint subparagraph 20(b)(i)

The Board has long held that an employer's rigid adherence to collective-bargaining proposals that are predictably unacceptable to the union may indicate a predetermination not to reach agreement in order to frustrate bargaining and undermine the statutory representative. *Lake Holiday Manor*, 325 NLRB 469,470 (1998); *Mar-Len Cabinets,* 243 NLRB 523 (1979); enfd. 695 F.2d 995 (9th Cir. 1981); *Tomco Communications, Inc.*, 220 NLRB 636 (1975); *Stuart Radiator Core Mfg. Co.,* 173 NLRB 125 (1968); *Procter & Gamble Mfg. Co.,* 160 NLRB 334, 336 (1966); *Fitzgerald Mills Corp.,* 133 NLRB 877, 882 (1961), enfg. 313 F.2d 260 (2d Cir. 1962), cert. denied 375 U.S. 834 (1964); *NLRB v. Herman Sausage Co.,* 275 F.2d 229 (5th Cir. 1960), enfg. 122 NLRB 168 (1958), rehearing denied 277 F.2d 793 (5th Cir. 1960).

It is clearly not simply the unacceptability of the respondents contract proposals to the other side that renders the conduct described in the cases improper but the purpose behind the proposals and the defense of the proposals. Thus, a genuine and sincerely held view may be put forward and defended without violating the Act, *Pease Co. v NLRB*, 666 F.2d 1044 (9th Cir. 1981), but the rigid offering and defense of a range of proposals not for their own sake, but rather because the party is aware the proposals are anathema to the other side, is bad-faith bargaining because there is no true intention by the offering party to reach agreement.

Since motive is the underlying issue, these cases more commonly arise in the context of an employer's insistence, as here, on a broad management-rights clause as well as other proposals which are predictably unacceptable to the labor organization representing the unit employees. In applying the predictably unacceptable test, the Board emphasizes that it understands and adopts the teachings of *NLRB v. American National Insurance Co.,* 343 US 395 (1952), in which the Supreme Court held that an employer's bargaining for a broad management-functions clause was not an unfair labor practice. The Board has made it clear, and the Respondent on brief emphasizes as well,[47] that the entire bargaining circumstances must always be kept in mind. Thus, the Board noted in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), at 334 NLRB 488:

Finally, it is axiomatic that under the NLRA neither the Board nor the courts may compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 403–404 (1952). However, "[e]nforcement of the obligation to bargain collectively is crucial to the [NLRA] statutory scheme." Id. at 402. Our examination of the Respondent's proposals in this proceeding is thus not to determine their merits, but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement. *Coastal Electric Cooperative*, 311 NLRB 1126, 1127 (1993).

The instant allegation focuses on the Respondent's proposals concerning management rights, grievance and arbitration, union bulletin board rights, and discipline and discharge. The proposals are attacked by the General Counsel and the Charging Party for their broad and total failure to do more than reflect the substantive terms and conditions of employment that were in place before the Union became the employees' representative and the tenacity and rigidity with which the Respondent's negotiators maintained these substantive proposals throughout the negotiation.

The Respondent during negotiations readily conceded, if not affirmatively declaimed, that its proposals and its bargaining intentions generally were designed to preserve the terms and conditions of unit employees, the status quo, without making substantive concessions to the Union. The items tentatively agreed upon during the course of the negotiations were essentially proposals either on procedural or process changes to the Respondent's then existing practices or, on covered minor or less significant matters. The management-rights language in important ways sought to return the Respondent's rights not just to the status quo of the state of affairs when the Union was representing employees without a contract but seemingly to the earlier "pre-representation" time when there was not employee representative and the Respondent could take actions and make decisions without the duty or obligation to bargain with the unit employees' representative about such matters.

In turn the Union at all relevant times indicated that the heart of the noneconomic aspects of the contract from its perspective required an objectification of standards, i.e., specification of production or other standards against which employees were to be measured, or the identification of the standard to be applied as "reasonable." Coupled with such identification the Union sought the resolution of disputes by a third party, i.e., an arbi-

[47] Counsel for the Respondent, on Br. at 240, cites the Board's decision in *KFMB Stations, Inc.*, 349 NLRB 373 (2007), in which the Board adopted the judge's assertion, at 383: "Cases are legion holding that the Board will not analyze an employer's particular contract proposal to determine whether it would be 'acceptable' to the union."

trator in binding arbitration. In essence, the Union made it clear that the contract must constitute a transformation of the Respondent's operation from an imperium where the employer's decisions were its own to make without final review without limiting standards and were unchallengeable to a reasonable world to a new setting and circumstance under a contract where the application of reasonable rules could be challenged and adjudicated before an outside arbitrator who had final authority. This latter world, the Union's negotiators insisted, was the world of represented employees and collective-bargaining contracts, and it was the world the Respondent entered when the employees selected the Union to represent them.

The position of the parties on these fundamental approaches did not shift during the negotiations. While procedural changes were made in proposals, such as additional prearbitral steps in the Respondent's grievance process proposal, the parties positions remained essentially as they began on the fundamental issues of the Respondent's relinquishment of final control and decision making respecting matters of disputes and discipline. The Respondent's demurral, or even rejection, of the Union's view was matched by the Union's negotiators rejection of the Respondent's proposals or the Union took the view that certain of the Respondent's proposals might be acceptable were the Union's core principals incorporated.

The negotiations respecting the union bulletin board was somewhat different. The Respondent was willing to provide contract language which would allow the Union to post union materials in an identifiable location with restrictions on the type of materials posted. The negotiations foundered on the Respondent's insistence that it retain the right to preapprove any and all materials the Union sought be posted. The Union balked at any preapproval process. Procedural changes in the parties' proposals were unable to span that critical difference.

The Union's declamations that the Respondent's proposals, to the extent they did not accept the core principles of the Union, were predictably unacceptable, were met by the Respondents answer that various collective-bargaining agreements known to it contained provisions similar or even identical to those proposed by the Respondent and hence its proposals were by virtue of that fact absolutely not predictably unacceptable. Further, as the Respondent argued during the negotiations, the term "predictably unacceptable" was not a statutory phrase in the language of the Act.

The bargaining herein must consider the larger context as will be undertaken below. Initially, however, elements of both sides' arguments here are correct. The Respondent is correct that individual proposals of the type at issue here are not to be judged individually as per se proper or improper. Further, the parties generally are entitled to seek to preserve their bargaining positions and resist making concessions. The parties in the course of negotiations and the interplay of economic forces are expected to reach their own agreement. It is not intended by the statute that it substitute statutory terms for parties negotiated terms. Further, it is not impermissible for there to be winners and losers in contract negotiations in the sense that one party's proposals may prevail to a greater or lesser degree over the other sides proposals.

The General Counsel and the Charging Party however are correct that the Respondent's consistent failure and refusal to accept binding arbitration and any limitation of the Respondent's unfettered power to decide at the final step all unit employee discipline matters, including matters of measuring and judging employee performance, are predictably unacceptable to labor organizations representing employees under the Act.

The Respondent made essentially two separate, albeit related, arguments on this issue. First, the Respondent notes the fact that at the time it made these proposals it knew of, and in some cases provided, contracts to the Union which contained the Respondent's proposed language and or which omitted the provisions the Union sought. It raised the existence of these contracts with the Union to establish that such language could not be predictably unacceptable since they existed in other settings. It made the same argument before me. I reject the notion advanced or its logical force that the simple fact that a contract exists or existed somewhere in another place and/or another time which contains certain language somehow anoints the selected language of that contract as acceptable or not predictably unacceptable to the Union in the context of the instant negotiations.

Second, in colloquy in negotiations, the Union argued that collective-bargaining contracts containing grievance- and binding-arbitration language were commonplace in America. The Respondent argued that there were a far greater number of nonunion employee relationships with their employers which were not covered by contracts at all let alone binding arbitration, implicitly arguing that that those unorganized employees relationships with their employers must influence, if not control in their numerical superiority, the question of inherent unreasonableness of given proposals. I reject the Respondent's "nonunion" relationships argument here. What is or is not predictably unacceptable to a labor organization in contract negotiations with employers concerning their employees is not determined by the state of the unrepresented world.

If the proposals under discussion were in fact predictably unacceptable at the time of their offer, the remaining issue must be considered. What was the motive for their offer and defense by the Respondent? In this connection, the Respondent argued and the record as a whole sustains the proposition that the Respondent, through the consistent views of its owner, was sincerely and very strongly intent upon, even determined, to preserve and retain for the publisher all possible control over the Paper's employment relationship with represented employees, in essentially all possible permutations.

That fact of a strong need to retain essentially total control over the employee relationships may be argued to show the Respondent's motives were not to avoid or prevent agreement in bargaining with the Union, but rather were not inconsistent with the Respondent's effort to reach an agreement which would maintain the Respondent's control of the employees. Or, it may be argued that the Respondent's actions were designed to frustrate agreement and in time thwart the Union and render it so obviously powerless and ineffective that the employees would eventually reject the Union and allow the Respondent to return to the truly unfettered control that only a nonrepresented employee complement would allow–the removal of any obliga-

tion to bargain with an employee representative. The former motive is not inconsistent with an intention to reach agreement with the Union. The latter motive is specifically focused on not reaching an agreement, on thwarting the Union, and ending union representation.

Resolution of this critical factual issue, in this case, depends on evaluating the entire record of the relations between the parties. Without that broader consideration, no determination on the failure to bargain allegations may be confidentially reached. The predictably unacceptable approach which focuses only on bargaining proposals and bargaining conduct, on this record respecting the instant bargaining relationship, I conclude, does not complete the necessary analysis of the bargaining issues before me. I therefore decline to make conclusions based on this overly narrow view of the bargaining. The Act and the cases simply require a broader analysis and consideration on the facts of this case.

All of the above, therefore, is but preamble to the consideration of the Respondent's bargaining in the context of the entire relationship over all relevant times. The cases make clear that the larger view is essential to determine what is or is not predictably unreasonable. And further, the larger picture is necessary to determine if predictable unreasonableness of proposals, in the context of both the totality of bargaining and other events, rises to the level of surface bargaining. The larger picture must be considered to reach a final result. That analysis will await the consideration of complaint paragraph 20(c) below.

b. The allegation that the Respondent has insisted as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract including, but not limited to, language pertaining to a management-rights clause, that would grant the Respondent unilateral control over many terms and conditions of employment. Complaint paragraph 20(b)(ii)

The theory of surface bargaining the General Counsel invokes in the quoted pleading is that set forth by the Board in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487, 488–489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003):

> Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract.[4] In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith. See *A-1 King Size Sandwiches,* [265 NLRB 850 (1982], at 859 fn. 4.

[4] *A-1 King Size Sandwiches,* 265 NLRB 850, 859–861 (1982), enfd. 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *NLRB v. Johnson Mfg. Co. of Lubbock,* 458 F.2d 453, 455 (5th Cir. 1972); *Eastern Maine Medical Center*, 658 F.2d 1, 12 (1st Cir. 1981), enfg. 253 NLRB 224, 246 (1980); *South Carolina Baptist Ministries*, 310 NLRB 156, 157 (1993). See *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990).

In order to test the theory of the violation asserted, it is necessary to first identify the Respondent's proposals relevant to the claim and consider their impact as a whole on employee rights.[48]

The General Counsel's pleading by its terms identifies the Respondent's management-rights proposal as one of the contract proposals that would grant the Respondent unilateral control over many terms and conditions of employment. The Respondent's management-rights article was proposed by the Respondent at the November 2007 bargaining session, the very first bargaining between the parties, and is quoted in full supra. Its first section states:

> Section 1. Except as expressly modified or restricted by a specific provision of this Agreement the Employer reserves and retains, solely and exclusively, all of its normal, statutory inherent, and common law rights prerogatives and functions to manage the business, whether exercised or not, as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer.

The Respondent's bargaining note attached to the management-rights proposal makes its purpose clear: "This proposal represents the status quo for Santa Barbara News-Press." The discussion between the parties made it clear that the clause is an attempt by the Respondent to retain control over many, indeed most, aspects of employees' activities.

It is important to understand the reference point contained in the quoted management-rights proposal section 1. When the clause refers to the Respondent's sole and exclusive retention of all "rights prerogatives and functions to manage the business" "as such rights existed prior to the time any Union became the statutory bargaining representative of the News Department employees of the Employer," the clause refers to a time before the Respondent had any obligation to bargain with the Union under the Act. Thus, the clause unambiguously asserts that "[e]xcept as expressly modified or restricted by a specific provision of this Agreement" the Respondent will have no obligation to bargain with the Union or otherwise be obligated under Section 8(a)(5) of the Act to deal with the Union during the contract's life.

Section 2 of the Respondent's management-rights proposal, quoted supra, contains an exhaustive list of 18 specific catego-

[48] This analysis is threshold to the final consideration of the bargaining in light of the entire course of conduct of the parties both at and away from the bargaining table.

ries of decisions effecting unit employees that are expressly reserved exclusively to the Respondent with the Union having no bargaining rights respecting them. Section 3 provides the Respondent unlimited license to utilize independent contractor news writers and photographers. Section 5 provides a similar license to use managers and supervisors to write or take pictures.

And, even beyond the life of the contract, the Respondent's management-rights proposal if adopted would restrict the Union's bargaining rights beyond the contract. The Respondent's proposal's section 6 states:

> Section 6. The rights and prerogatives of Management, whether established by express provisions (including this Article) or by practice, shall be deemed to be part of the status quo that remains in effect after the expiration of this Agreement on _____ and until a different agreement is reached or other lawful change is permitted.

Thus, section 6 of the proposal would continue the life of the management-rights language proposed and all its preemption or elimination of the Union's collective-bargaining rights as discussed until a new contract was reached. If the Respondent was prepared to stand firm on insisting that the language be carried forward into new contracts, the Union's representational role as envisioned by the statute and Section 8(a)(5) of the Act would be eviscerated in perpetuity.

Since the Respondent's management-rights proposal recognizes that the Respondent's freedoms under section 1 are susceptible to being "expressly modified or restricted by a specific provision of this Agreement," it is also necessary to consider other of Respondent's proposal's terms effect on the management-rights language. In other words, is the management's rights proposal limited in any significant way by the remainder of the contract as proposed by the Respondent? To a significant degree, the contract as proposed by the Respondent does not establish standards or specific conditions that might limit the reach and power of section 1 of the management-rights proposal.

The Respondent's discipline proposals have been quoted above. The Respondent's proposals very clearly reserves final decisions respecting the discipline and discharge of unit employees to the Respondent's unfettered discretion. Indeed, the Respondent's proposals unambiguously recite the Respondent's goal and the effect of the language is to preserve the rights and responsibilities the Respondent had during prerepresentation days when the Union had no bargaining rights, i.e., when all right and discretion to act was with the Respondent exclusively and the Union had no rights whatsoever. That this fact was intentional is not in dispute and is exemplified by the statements of the Respondent's negotiators at the table and in bargaining notes set forth in the Respondent's written proposals that the proposals were deliberately intended to reserve to the Respondent the establishment, modification and application of all standards of employee discipline and conduct generally. This includes any determination of whether employees have violated those standards of conduct, and includes the determination and enforcement of any and all discipline, up to and including discharge, of unit employees in respect to such matters. No standards of "just cause" or the limiting word "reasonable" are included in the proposals, no mechanism of third-party adjudication of disputes such as an arbitration clause is included in the Respondent's proposals.[49]

The General Counsel and the Charging Party argue that the proposals of the Respondent reflect in effect a proposed waiver by the Union of its bargaining rights so that the Respondent could resume its preunion representation complete and unfettered control of the Respondent's operations in so far as unit employees are involved. They note that, were the Union to accept the Respondent's rigidly advanced and defended proposals to preserve the prebargaining status quo, for the very limited rights specifically provided by the remainder of the Respondent's proposals, the Union and the unit employees they represent would be very much worse off than if they simply settled for never having entered into an agreement at all. Indeed, they argue, the postcontract effects of the Respondent's proposals were such that, accepting the Respondent's proposals would not simply condemn the Union and unit employees to severely diminished rights during the life of the contract, they would also be waiving their representational and bargaining rights after the contract expired and potentially in perpetuity.

The Respondent emphasizes that there is no dispute that the parties were never at impasse. The Respondent argues that it never insisted on or took a final position on its management-rights proposal. It notes that it expressed implicit flexibility in the management-rights clause when asking the Union if there were portions of it that the Union could agree to and that the Union expressed tentative or potential acceptance of certain of the enumerated reservations in the proposal. Rather, the Respondent argues it was the Union that inflexibility sought to restrict the Respondent by means of a grievance and arbitration clause and limited management-rights clause and, in so doing "undermine and control the content of the newspaper." (The R. Posthearing Br. at 271.)

I do not accept the Respondent's claims of flexibility respecting the management-rights clause. The enumerations of various rights in section 2 of the Respondent's management-rights proposal were discussed. That section opened with the caveat: "The sole and exclusive rights of management which are not abridged by this Agreement shall include, but are not limited, to the following rights." Thus, the inclusion or exclusion of a particular item in later portions of the contract, without other changes, did not effect the substance or reach of the earlier quoted language. And there was no demonstrated flexibility respecting the critical section 1 which in the broadest possible language waived the Union's bargaining rights in their entirety save for specific contractually provided rights. And as is noted, there was a paucity of substantive rights set forth in the remainder of the contract proposals of the Respondent.

[49] While procedural steps providing the Union rights to participate and argue during the discipline or dispute process, including participation in third-party mediation processes, are in the Respondent's proposals, they are all preamble to the absolute power of the Publishers to take unreviewable final decisions in all aspects of discipline. The Respondent's bulletin board proposal does contain language that limits the Respondent to "reasonable" restrictions on union postings.

It is clear and I find that the proposals of the Respondent for a collective-bargaining agreement, if accepted by and entered into by the Union, would without doubt have rendered the Union and the unit employees worse off in terms of the statutory bargaining rights the Act provides than if they had not agreed to a contract at all.

The Respondent is correct that the parties had not bargained to an impasse, as of the final date of the complaint allegation in these regards and that the Respondent did not characterize its proposals as last and final or in some other fashion as final. The absence of such specific language or the state of impasse being reached does not however automatically render the Respondent's bargaining in these regards flexible. Rather the record is clear and I find that the Respondent made it clear that critically as to the management-rights proposal but also as to its proposals dealing with discipline and discharge, and grievance and arbitration, that the Respondent was wedded to regaining control over decision making by obtaining the Union's waiver through the quoted contract language of its representation rights for the life of the contract and beyond. Further, the Respondent explicitly in statements by its agents across the table and in notes on proposals and in comments respecting proposals, made it clear that the Respondent was happy with and saw no reason to depart from the preunion, prebargaining obligation, substantive status quo package of rights and powers that gave it unfettered final decisionmaking authority over its unit personnel and its operations. And, during the 2007–2009 period at issue it held to that position.[50]

I find that the Respondent's proposals as described and insisted on as described, simply overreached.

When the employer's proposals, considered as a whole, vest nearly total discretion in the employer while offering little in return, this does not look like the conduct of an employer sincerely attempting to reach agreement, but rather is evidence that it is not seeking to bargain in good faith. *Hydrotherm, Inc.,* 302 NLRB 990, 995 (1991).

c. The allegation that the Respondent, by its overall conduct has failed and refused to bargain in good faith. Complaint subparagraph 20(c)

The Board has long made it clear that table bargaining allegations must be resolved by considering all aspects of the parties' relationship at and away from the bargaining table. It recently restated this doctrine in *Public Service Co. of Oklahoma (PSO),* 334 NLRB 487, 488 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003):

> In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. See, e.g., *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). From the context of an employer's total conduct, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. Id. Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

The relevant complaint paragraph at issue explicitly recognizes and incorporates the "totality of the party's conduct, both at and away from the bargaining table" standard. All parties recognized the Board's quoted analytical approach. It will be applied here.

The specific proposals and conduct occurring at the table respecting negotiations have been discussed in the two immediately preceding sections. I have found as the Respondent argued that there is no duty on the Respondent's part to make concessions simply because the employees have selected a labor organization to represent them. I have further found, again as the Respondent has argued, that viewing itself as having essentially resisted the Union's economic pressure campaign, it was generally entitled to seek to impose its economic proposals on the Union. I further noted however that the Respondent's substantive proposals sought, essentially uniformly, to entrench and encapsulate in its proposed contract the prebargaining terms and conditions of unit employees' employment.

Importantly, I further found that the Respondent's proposals to an extraordinary degree sought to remove by union contractual waiver the Union's rights to bargain with the Respondent regarding matters not explicitly controlled by the contract. This fact coupled with the general revanchist nature of the entirety of the Respondents proposed contract clearly rendered the Union better off refusing to enter into the Respondent's proposed contract and accepting a relationship which while without a contract's limitations on Respondent's actions also did not including any waivers of the Union's bargaining rights.

In these regards, however, I further noted that the Respondent had explicitly withdrawn its no-strike proposal leaving the Union and unit employees free to engage in strikes in furtherance of contract disputes under the Respondent's proposed contract. I also noted that although the parties had been in negotiations for some time and that the Respondent's proposals in relevant part as to the substantive matters noted here had re-

[50] As discussed, both supra and infra, the Respondent did withdraw its broad no-strike proposal in February 2008.

mained firmly held, the parties were at no time at impasse. And no party had declared that impasse was at hand.

Turning to the procedural aspects of bargaining, I have found and concluded that the parties did not engage in improper bargaining in matters not discussed herein. Although each party viewed the others actions and conduct regarding certain procedural matters with alarm, I found that the conduct at the table was not wrongfully abusive or noncooperative, that the parties agreement and occasional disagreement on dates, times, and places for bargaining was not improper, and that the procedural aspects of bargaining were not improper.

I have in earlier sections of this decision considered a host of other allegations including alleged violations of Section 8(a)(5), (1), and (3) of the Act, and various allegations of Union and General Counsel misconduct as alleged by the Respondent. As set forth supra, I have not sustained the Respondent's contentions of misconduct. I have however, as set forth supra, found a wide range of unfair labor practices committed by the Respondent.

These unfair labor practices as set forth in full above include violations of Section 8(a)(5) of the Act respecting unilateral changes involving nonunit employees, direct dealing with employees bypassing the Union, unreasonable delays in providing information to the Union, and factual misstatements made during bargaining in response to information requests.

The violations of Section 8(a)(1) and (3) of the Act, which comprise a host of violations which are again set forth in detail supra and will not be duplicated here, include employee discharges, denials of annual bonuses, improper use of other employer's employees to do unit work, and improper communications to employees both orally and by memorandum. These events occurred conterminously with the negotiations at issue here.

Considering all the above, on the record as a whole, including the arguments of the parties and the credibility of the witnesses, viewing the entire relationship for purposes of evaluating the bargaining allegations, I find without difficulty that the Respondent engaged in a course of bad-faith bargaining in these negotiations for a first contract.[51] As discussed, the Respondent's proposals in their totality and, despite the fact that no impasse had occurred in bargaining and that the Respondent's no-strike proposal was withdrawn, throughout the bargaining, required the Union to in essence abandon its bargaining rights in order to obtain a contract, which contract, as a recitation of the Respondent's proposals, would essentially and without other than procedural exception, return the substantive relationship between the parties to that obtaining before the Union obtained bargaining rights for the Respondent's unit employees, i.e., the Union would have its role diminished to a point approaching elimination. Thus, the Respondent at all times and without material modification of the total package of substantive proposals in these regards, offered no outcome but abandonment of the Union's bargaining rights not only for the life of the contract but until and unless the Respondent agreed to remove the waiver by agreeing to a contract that did not contain such a limitation.

Without more this conduct would sustain a finding of 8(a)(5) bad-faith bargaining. But coupled with that conduct, the Respondent herein was simultaneously conducting an ongoing broad and pernicious pattern of unfair labor practices designed to delay bargaining and undermine the Union's strength and support among unit employees. Employees of outside employment referral agencies were improperly used to do unit work. Unit employees were wrongfully denied annual bonuses. Employees were wrongfully coerced by statements of management and by memo from the Publisher. Employers were dealt with directly; bypassing the Union. Repetitive failures to notify and bargain concerning changes in working conditions took place. Employees were discharged because of their union activities. This is serious stuff and well supports the finding that the Respondent was fundamentally opposed to union representation of its employees had no intention to enter into a collective-bargaining agreement with the Union, save one which would geld it, leaving the unit employees essentially unrepresented by contractual waiver.

Given these findings, I further find that the Respondent by engaging in the conduct noted, failed and refused to bargain with the Union in good faith and in so doing, violated Section 8(a)(1) and (5) of the Act as alleged. I therefore also sustain the General Counsel's complaint paragraph 20(c).

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since September 27, 2006, based on Section 9(a) of the Act, the Union has been the exclusive representative of the following unit of the Respondent's employees for purposes of collective bargaining:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

[51] "[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith. Thus, the fact that the bargaining is for a first contract, especially after a contentious election campaign, would be one of the circumstances to consider in evaluating the bona fides of the bargaining." *APT Medical Transportation,* 333 NLRB 760, 760 fn. 4 (2001).

(a) Issuing a letter to employees from the owner and Publisher discouraging employees from cooperating with the Board's ongoing investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

(b) Instructing employees that anything that might be said at an employee meeting, including statements concerning employees terms and conditions of employment or other statements about their working conditions were confidential, proprietary, and could not be discussed by employees outside the meeting.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following acts and conduct because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities:

(a) Transferring work from the bargaining unit to agency employees who were not employees of the Respondent.

(b) Transferring unit work to nonemployee Robert Eringer.

(c) On or about August 23, 2008, suspending employee Dennis Moran.

(d) On or about August 30, 2008, discharging its employee Dennis Moran.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct:

(a) Failing and refusing as set forth in the body of this Decision to furnish the Union with information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees in a reasonable time under all the circumstances but rather delayed unreasonably in providing the requested information.

(b) Transferring unit work from unit employees to outside agency employees and failing and refusing to notify and provide the Union an opportunity to bargaining concerning the Respondent's decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

(c) Failing to grant its unit employees a merit increase in December 2006 or January 2007, in recognition of work performance during 2006.

(d) Failing to grant its unit employees a merit increase in December 2007 or January 2008, in recognition of work performance during 2007.

(e) Failing to grant its unit employees a merit increase in December 2008 or January 2009, in recognition of work performance during 2008.

(f) Failing to notify and offer to bargain with the Union concerning its determination to delay performance evaluations of unit employees as part of the Respondent's performance evaluation system in or around November 2007, and implementing the delay unilaterally.

(g) On or about January 7, 2009, laying off its employee Richard Mineards without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(h) On or about August 23, 2008, suspending employee Dennis Moran without notifying or offering to bargain with the Union concerning his suspension.

(i) On or about August 30, 2008, discharging its employee Dennis Moran without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(j) On or about December 3, 2008, announcing a requirement that unit employees produce at least one story per day without notifying or offering to bargain with the Union respecting the new policy.

(k) On or about January 14, 2009, and continuing to about January 16, 2009, bypassing the Union and dealing directly with its employees in the unit by offering a unit employee non-unit terms and conditions of employment.

(l) Bargaining in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the Respondent unilateral control over many terms and conditions of employment and leave the Union and the bargaining unit employees worse off than if they went without an agreement.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not violate the Act as alleged in the complaint save as specifically found in this decision and the complaint allegations not sustained above shall be dismissed.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found. The language on the Board notices will conform to the Board's decision in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), that reiterates the logic of the proposition that remedial notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

The Respondent having wrongfully suspended or discharged certain of its employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, with interest which shall be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as described below.

Respecting the remedy for the wrongful unilateral layoff of employee Richard Mineards, the Board's decision in *Eugene Iovine, Inc*., 353 NLRB 400 (2008), provides that reinstatement and a standard make-whole remedy including backpay, with interest, is appropriate where economic layoffs have not been properly bargained as found herein. That remedy shall be directed herein.

Unit employees who suffered injury in the form of loss of work as a result of the Respondent's improper assignment of unit work to outsiders, shall be made whole for any loss of earnings and other benefits, plus interest as set forth below.

The General Counsel seeks compound interest on the sums due herein. The Board in its recent case, *ADF, Inc.,* 355 NLRB 81, 81 fn. 4 (2010):

> Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Cardi Corp.*, 353 NLRB 966. 2 (2009); *Rogers Corp.*, 344 NLRB 504, 504 (2005).

I therefore decline the General Counsel's request and shall direct interest be calculated and paid consistent with the Board's current view. See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent is obligated to remedy its improper unilateral changes as found herein. At the Union's request, the Respondent shall restore the unit employees' terms and conditions of employment as they existed before the Respondent's improper unilateral changes and maintain those conditions, unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposal following a valid impasse in bargaining. Further, the Respondent shall make unit employees whole, with interest, for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment as found herein and as more specifically provided above.

The General Counsel seeks a broad cease-and-desist order noting that an important factor in such a determination is whether the employer displays "an attitude of opposition to the purposes of the Act to protect the rights of employees generally." *May Dept. Stores Co. v. NLRB*, 326 US 376, 392 (1945). The typical requirement justifying the "in any other manner" limitation is the proclivity to violate the Act and general disregard for employees' fundamental rights. *Hickmott Foods*, 242 NLRB 1357 (1979). The Board has continued to direct the broad remedy in appropriate cases: *Pan American Grain Co.*, 346 NLRB 193, 193 fn. 2 (2005). The General Counsel notes that the Respondent was issued a broad remedial order by Judge Kocol in his decision, *Santa Barbara News-Press*, Case 31–CA–27950, JD(SF)-37-07, slip op. at 72 (2007). I agree the instant case falls well within the parameters of the cited cases. I shall therefore direct a broad cease-and-desist order apply herein.

The General Counsel also urges that the Respondent be required to have a high-ranking official read the notice aloud to employees or be present at its reading to employees by a Board agent. Counsel points out the broad sweep of the unfair labor practices committed by the Respondent herein and notes "the public reading of the notice is an effective but moderate way to let in a warning wind of information and more important, reassurance." *McAllister Towing & Transportation Co.,* 341 NLRB 400 (2004) (internal quotations omitted). *Three Sisters Sportswear*, 312 NLRB 853 (1993).

Judge Kocol was asked for the same remedy in his earlier case and held:

> Citing *McAllister Towing & Transportation Co.,* 341 NLRB 394, 400 (2004), the General Counsel also seeks an order requiring Steepleton to read to the employees, or at the option of the News-Press, to have a Board agent read, the Notice to Employees in this case. While the issue is close, I conclude the broad cease and desist order should be adequate to prevent further violations and assure employees of their rights under the Act. Of course, if the News-Press continues to violate the Act additional remedial measures might be necessary. [*Santa Barbara News-Press*, Case 31–CA–27950, JD(SF)-37-07, slip op. at 72 (2007).]

Given the fact that the Respondent has continued to violate the Act and the fact that it has continued to do so in a wide ranging and significant manner involving numerous of Respondent's agents, including its highest officials, as noted supra, it is appropriate that this special remedy be directed. I shall therefore require the Respondent to permit a Board agent at a location at the Respondent's Santa Barbara facilities, of sufficient size and otherwise appropriate for such an address, to real aloud the notice set forth herein to all unit employees and newsroom supervisors and management in the presence of a high-management official of the Respondent. The Respondent may, at its option, elect that the notice be read aloud at the same location to the audience indicated by the high-management official rather than a Board agent.

The General Counsel also requests that the certification year in the representation case in which the Union was certified, Case 31–RC–8602, be extended "to insure that the employees are accorded the service of their selected bargaining agent for the period provided by law. *Mercedes-Benz of Orlando*, 354 NLRB No. 72, slip op. at 2 (2009) (not reported in Board volumes). Since the Respondent's unfair labor practices as found by Judge Kocol in JD(SF)–06–07 (2007) remain unremedied along with the unfair labor practices found herein and, most importantly, because the Respondent engaged in its bad-faith bargaining from the very onset of face to face negotiations with the Union and continued its bad-faith bargaining thereafter throughout the period litigated, the Union has been deprived of all opportunities to engage in good-faith bargaining. Thus, the good-faith bargaining which was intended to occur in the certification year has not yet begun.

Given this critical fact, I find it appropriate to order as part of the remedy herein that the Respondent as part of it obligation to commence bargaining in good faith with the Union, do so and continue to do so, as if the certification year in Case 31–RC–8602 begins at the moment of commencement of the first face-to-face bargaining in good faith after the unfair labor practices found herein have been fully remedied.

The unfair labor practices found herein, but not specifically discussed in the portion of this decision entitled "Remedy" shall be remedied in accordance with current Board decisional law. Omission to include discussion of such traditional unfair labor practice remedies in the remedy discussion herein respecting each and every sustained allegation, is not to suggest standard remedies for the violations found are not required.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended[52]

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing letters or other communications to employees from the owner and copublisher discouraging employees from cooperating with the Board's ongoing investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

(b) Instructing employees that anything that might be said at an employee meeting, including statements concerning employees terms and conditions of employment or other statements about their working conditions were confidential, proprietary, and could not be discussed by employees outside the meeting.

(c) Transferring work from the bargaining unit to outside agency employees who were not unit employees of the Respondent because the unit employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(d) Transferring unit work to nonemployee Robert Eringer because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities

(e) Suspending employee Dennis Moran because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(f) Discharging employee Dennis Moran because the employees of the Respondent formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(g) Failing and refusing to furnish the Union with the information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees in a reasonable time under all the circumstances but rather delaying unreasonably in providing the requested information.

(h) Transferring unit work from unit employees to outside agency employees and failing and refusing to notify and provide the Union an opportunity to bargain concerning the Respondent's decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

(i) Failing to grant its unit employees a merit increase in December 2006 or January 2007, in recognition of work performance during 2006, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(j) Failing to grant its unit employees a merit increase in December 2007 or January 2008, in recognition of work performance during 2007, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(k) Failing to grant its unit employees a merit increase in December 2008 or January 2009, in recognition of work performance during 2008, without notifying the Union and offering it an opportunity to bargain respecting the decision to not grant merit increases in this period.

(l) Failing to notify and offer to bargain with the Union concerning delay in the timing of performance evaluations of unit employees as part of the Respondent's performance evaluation system in or around November 2007, and implementing the delay unilaterally.

(m) Laying off its employee Richard Mineards without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(n) Suspending employee Dennis Moran without notifying or offering to bargain with the Union concerning his suspension.

(o) Discharging employee Dennis Moran without notifying or offering to bargain with the Union concerning his discharge or the effects of this discharge.

(p) Announcing a requirement that unit employees produce at least one story per day without notifying or offering to bargain with the Union respecting the new policy.

(q) Bypassing the Union and dealing directly with its employees in the unit by offering an employee nonunit terms and conditions of employment.

(r) Bargaining in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the Respondent unilateral control over many terms and conditions of employment and leave the Union and the bargaining unit employees worse off than if they simply did not enter into a collective-bargaining agreement.

(s) Assigning freelance employee, Robert Eringer, unit work in order to weaken the Union as the representative of unit employees.

(t) In any like or related manner 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) Offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, in the manner described in the remedy portion of this decision.

(b) Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner described in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and within 3 days notify each that this has been done and that the wrongful discrimination will not be used against him in any way.

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mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

(d) Make its unit employees whole for any losses they may have suffered by reason of the Respondent's discontinuance of its program of merit pay raises or the Respondent's delay in the timing of performance evaluations of unit employees, in each case with interest, in the manner set forth in the remedy section of this decision and, on request, bargain with the Union about the granting of merit raises and the timing of performance evaluations of unit employees in the future.

(e) Restore all unit work transferred to nonemployees of the Respondent referred by outside agencies and make its unit employees whole for any losses they may have suffered by reason of the Respondent's wrongful unilateral use of such nonemployees to do unit work, with interest as provided in the remedy section of this decision.

(f) Within 14 days after service by the Region, post copies of the attached notice at its Santa Barbara, California facilities set forth in the Appendix.[53] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed one or more of the California facilities 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 the closed facility at any time after March 24, 2009.

(g) 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.

(h) Within 14 days after service by the Region, permit a Board agent, at an appropriate location within the Respondent's Santa Barbara, California facility, to read aloud to all employees in the appropriate unit the notice marked "Appendix" in the presence of a responsible management official. The Respondent may elect to have the notice read by a high-management official rather than by a Board agent in the same setting and circumstances.

The allegations of the complaint not sustained herein shall be, and they are, dismissed.

Dated, Washington, D.C., May 28, 2010.

[53] 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

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.

After a trial at which we appeared, argued, and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees, have it read aloud to employees, and to abide by its terms.

Accordingly, we give our employees the following assurances.

WE WILL NOT issue letters or other communications to employees from the owner and copublisher discouraging employees from cooperating with the Board's ongoing investigation of pending unfair labor practices and offering to provide its own attorney to represent employees who are contacted by the Board.

WE WILL NOT instruct employees that anything that might be said at an employee meeting, including statements concerning employees' terms and conditions of employment or other statements about their working conditions were confidential, proprietary and could not be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to outside agency employees who were not employees of the Respondent.

WE WILL NOT transfer unit work to nonemployee Robert Eringer.

WE WILL NOT suspend and/or discharge employee Dennis Moran or any other employee because of his union or other protected concerted activities or to discourage other employees from supporting the Union.

At all times since September 27, 2006, based on Section 9 of the Act, the Union, the Graphic Communication Conference, International Brotherhood of Teamsters, has been the exclusive representative of the following unit of the our employees for purposes of collective bargaining:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

We are obligated by Federal labor law under the National Labor Relations Act to bargain with the Union as the exclusive representative of unit employees concerning their terms and conditions of employment. In conjunction with that obligation, we give you these further assurances:

WE WILL NOT unreasonably delay in furnishing the Union with information requested by it which was necessary for and relevant to the Union's performance of its duties as the exclusive representative of bargaining unit employees.

WE WILL NOT fail to notify and offer to bargain with the Union respecting the economic layoff, disciplinary suspension, or disciplinary discharge of unit employees.

WE WILL NOT transfer unit work from unit employees to outside agency employees and fail and refuse to notify and provide the Union an opportunity to bargaining concerning the Respondent's contemplated decision to utilize outside agency employees to do unit work and the effects of such a decision on unit employees.

WE WILL NOT fail to grant our unit employees merit increases without first notifying the Union and providing an opportunity to bargain respecting such a decision to depart from past practice for the period December 2006 through January 2009.

WE WILL NOT lay off, suspend, or discharge employees without first notifying the Union these actions are under consideration and providing an opportunity to bargain respect-ing such a decision and its effects.

WE WILL NOT discharge or hire individuals as nonunit employees rather than unit employees in order to weaken the Union as the unit employees' representative.

WE WILL NOT announce new requirements that unit employees produce at least one story per day without first notifying and offering to bargain with the Union respecting the proposed new policy.

WE WILL NOT bypass the Union and deal directly with our employees in the unit by offering unit employees' nonunit terms and conditions of employment to do unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that the Union agree to language in the contract that would grant the News-Press unilateral control over many terms and conditions of employment and in consequence leave the Union and the bargaining unit employees worse off than if they declined to enter into such an agreement and simply did without a contract.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Dennis Moran and Richards Mineards full reinstatement to their former unit positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards and, within 3 days WE WILL notify each that this has been done and that those wrongful actions will not be used against either in any way.

WE WILL make our unit employees whole for any losses they may have suffered by reason of the Respondent's transfer of unit work to employees of outside agencies and by reason of our discontinuance of our program of merit pay raises for performance years 2006–2008 or as the result our delay in the timing of performance evaluations of unit employees for performance year 2007, in each case with interest, and, on request, WE WILL bargain with the Union about the transfer of work outside the unit and the granting of merit raises and the timing of performance evaluations of unit employees in the future before we deviate from past practice.

WE WILL restore all unit work transferred to nonemployees of the Respondent referred by out agencies and make its unit employees whole for any losses they may have suffered by reason of our wrongful unilateral use of such nonemployees to do unit work.

WE WILL convert Robert Eringer to unit employee, if we utilize his services, and will not hire him as a freelance employee doing unit work in order to weaken the Union as the representative of unit employees.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMPERSAND PUBLISHING, LLC	)	**CASE NOS.**	**31-CA-28589**
D/B/A *SANTA BARBARA NEWS-PRESS*	)		**31-CA-28661**
	)		**31-CA-28667**
EMPLOYER,	)		**31-CA-28700**
	)		**31-CA-28733**
	)		**31-CA-28734**
AND	)		**31-CA-28738**
	)		**31-CA-28799**
	)		**31-CA-28889**
	)		**31-CA-28890**
GRAPHIC COMMUNICATIONS	)		**31-CA-28944**
CONFERENCE/INTERNATIONAL	)		**31-CA-29032**
BROTHERHOOD OF TEAMSTERS	)		**31-CA-29076**
	)		**31-CA-29099**
UNION.	)		**31-CA-29124**
	)		

MOTION FOR RECONSIDERATION

COMES NOW, the Respondent, Ampersand Publishing, LLC, d/b/a *Santa Barbara News-Press* ("*SBNP*"), pursuant to Sections 102.48(d)(1)&(2) of the National Labor Relations Board's ("the Board" or "the NLRB") Rules and Regulations, Series 8, as amended with this Motion for Reconsideration in the above-named and numbered cases. *SBNP* respectfully moves the Board to reconsider its September 27, 2012 Decision and Order[1] on four grounds:

1. There did not exist a quorum of Board Members when the Decision and Order issued; the "recess" appointments of NLRB Members Griffin and Block are invalid and unconstitutional. In addition, the vacancies the President attempted to fill did not "happen" when the Senate was in recess. There were no vacancies for

[1] Attached as Exhibit 1, is a copy of the Decision and Order of the NLRB in Case No. 31-CA-28589 et al.

which recess appointments could be made, and the "recess" appointments of Members Block and Member Griffin are invalid and unconstitutional;

2. The bargaining expenses reimbursement remedy is improper, punitive, and was specifically waived;
3. The September 27, 2012 Decision and Order contains material factual errors;
4. The September 27, 2012 Decision and Order contains material legal errors.

I. THE PRESIDENT'S "RECESS" APPOINTMENTS ARE INVALID AND UNCONSTITUTIONAL

A. THERE EXISTED NO QUORUM TO ISSUE THE DECISION AND ORDER AS THE "RECESS" APPOINTMENTS OF MEMBERS[2] GRIFFIN AND BLOCK WERE INVALID AND UNCONSTITUTIONAL.

On January 4, 2012, the President announced two appointments to the NLRB while the Senate was not in a period of recess. The President appointed, under the auspices of a recessed Senate, Members Griffin and Block to the NLRB. These "recess" appointments occurred without the Senate's consent and constituted an abuse of Executive branch power. The President failed to honor the Recess Appointments Clause. *See* U.S. Const. Art a. II, § 2 cl.3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall Expire at the end of their next Session,…").

Under *New Process Steel, LP v. NLRB*, 130 S.Ct 2635 (2010) and 29 U.S. C. § 153 (b) (Section 3(b) of the Act), "The NLRB cannot issue orders or decisions without a quorum of three

[2] This term is used as an honorary title and should not be construed as an admission.

members. Since January 3, 2012, the NLRB has not had a valid quorum – since the expiration of former Members Becker's term.[3]

Although the President nominated Sharon Block and Richard Griffin, on December 15, 2011, the Senate has never confirmed these nominations.

On December 17, 2011, the Senate agreed, by unanimous consent, to remain in session for the period of December 20, 2011, through January 23, 2012. 157 Cong. Rec. S8783-8784 (Dec. 2011) (Sen. Wyden). In addition, the Senate agreed to conclude the first session of the 112th Congress on December 30, 2011, and commence the second session of the 112th Congress on January 3, 2012, in accord with Section 2, Amendment 20 of the U.S. Constitution. *Id.*

In order for the Senate to recess, the Senate needs to adjourn for more than three days[4] under the Adjournment Clause. U.S. Const. Art I § 5, Cl. 4 (This Clause forbids the Senate from "adjourn[ing] for more than three days" unless the Senate obtains consent from the House of Representatives. The Senate never adjourned for more than three days when the President made the "recess" appointments of Members Block and Griffin. *See* 158 Cong. Rec. S 24 (Daily Ed. Gen. 23, 2012 (Sen Grassley), "No concurrent resolution authorizing an adjournment was passed by both chambers."). The Senate met in pro forma sessions every three or four days between January 3, 2012, and January 23, 2012. Pro forma sessions of Congress are historically and

[3] The other two NLRB seats were vacated in August 2010, upon the expiration of member Schaumber term and in August 2011, when Chairman Liebman left the Board.

[4] A Sunday does not factor into the calculation of days for purposes of the Recess Appointments Clause; a four-day break that includes a Sunday is equal to a three-day break excluding a Sunday. Sundays are a *dies non*, per Congressional practice. 5 *Hind's Precedents of the House of Representatives* 846 (1907); *See also*, e.g. Jefferson's Manual and Rules of the House of Representatives (Washington: GPO, 2007), §83 ("Sunday is not taken into account in making this computation."). Thus, each break of the Senate between January 3, 2012, and January 23, 2012, was three days long.

commonly used to satisfy the Adjournment Clause. 158 Cong. Rec. S. 114 (Daily Ed. Gen. 26, 2012 (Sen Lee).

As the Senate did not adjourn for more than three days under the Adjournment Clause, the Senate did not go into recess pursuant to the Recess Appointment's Clause. As a result, the "recess" appointments of Members Block and Griffin to the NLRB are invalid.[5] As a result of the invalid and unconstitutional "recess" appointments, the NLRB lacked a quorum when it issued its Decision and Order against *SBNP*. *See New Process Steel*, 130 S.Ct. at 2644-45.

B. THE PRESIDENT ATTEMPTED TO FILL VACANCIES THAT DID NOT "HAPPEN" WHEN THE SENATE WAS IN RECESS.

Article II, Section 2, Clause 3 of the U.S. Constitution states: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall Expire at the end of their next Session." The President named Member Block to an NLRB seat that was vacated by a confirmed Board Member on December 16, 2004. The President named Flynn to a Board seat vacated by a confirmed Board Member on August 27, 2010. The President named Member Griffin to a Board seat that was vacated by a confirmed Board Member on August 27, 2011. The vacancies created on December 16, 2004, August 27, 2010, and August 27, 2011 did not "happen during the recess of the Senate."

The Recess Appointments Clause explains that the President's limited recess appointment authority arises when the vacancy actually "happens" or occurs during a Senate recess, not whenever a vacancy "happens to exist" during a Senate recess. The NLRB vacancies the President attempted to fill pursuant to the Recess Appointments Clause arose

[5] The "recess" appointment of Member Flynn, is similarly invalid; however Member Flynn did not participate in the Decision in the instant case.

well before the alleged "recess" during which the President unlawfully acted between January 3, 2012, and January 23, 2012. The President utilized the Recess Appointments Clause as a tool to perform an "end run" around the Senate confirmation process. It was never the intent of the Framers to utilize the Recess Appointments Clause to bypass the Senate confirmation process. The President's actions ran afoul of the system of checks and balances and is counter to the clear language of the Recess Appointments Clause. The "recess" appointments were an unconstitutional abuse of Executive authority.

II. THE AMENDED REMEDY ORDERING THE REIMBURSEMENT OF THE UNION'S BARGAINING EXPENSES IS IMPROPER, PUNITIVE AND WAS SPECIFICALLY WAIVED.

A. THE WAIVER OF EXTRAORDINARY REMEDIES

The NLRB's Decision and Order amended the ALJ Remedy to include reimbursement of the Union's bargaining expenses. (Dec at 3-4). At the hearing during his opening statement, Counsel for the General Counsel and the ALJ stated the following:

> MR. WYLLIE: … as will be shown through the evidence here, Your Honor, the *News Press* has repeatedly and flagrantly violated the rights of its employees. Respondent's actions have taken a severe toll on employees in their section activity and has violated Section 8(a)(1) and (3) and (5) of the Act.
>
> JUDGE ANDERSON: What do you want by way of remedy, Counselor?
>
> MR. WYLLIE: By way of remedy, Your Honor, we want restoration of the status quo with respect to the temporaries who want the work returned to the unit. We also – because it's alleged as (a)(3), we believe that there's the issue of back pay for the benefits to determine the differences in the benefits that were not paid to these people during the time that they were temporary employees. We want the restoration of the status quo ante, the return of work to the unit that was unit work.
>
> With respect to the bargaining, we have some remedies that are specifically set out in the complaint that we're – I believe we're seeking a – an extension of decertification hearing.
>
> JUDGE ANDERSON: How long?

MR. WYLLIE: For one year. We're seeking that they restore the merit wage increase policy as it existed, as well as the performance evaluation. So, returning to the status quo on the unilateral changes.

JUDGE ANDERSON: Are any of these, from your perspective, advocating something new? A change in the law? Or are you suggesting these are –

MR. WYLLIE: That the remedies –

JUDGE ANDERSON: -- these are existing?

MR. WYLLIE: These are existing remedies, Your Honor. In addition, we're seeking the reinstatement and make whole for Dennis Moran, and also for the unlawfully laid off employees.

JUDGE ANDERSON: What about compound interest? Is that new, granted by Board?

MR. WYLLIE: I believe that – I don't know what it is, Your Honor. I believe that's an issue that the GC wants to take up with the Board.

JUDGE ANDERSON: So in that sense –

MR. WYLLIE: That's my understanding.

JUDGE ANDERSON: -- that may be a new one?

MR. WYLLIE: That – yes.

JUDGE ANDERSON: All right. Thank you, Counselor. Did I cut you off?

MR. WYLLIE: No, you did not, Your Honor.

JUDGE ANDERSON: Thank you. (Tr. at 42-43).

Immediately thereafter, Counsel to GCC/IBT in his opening statement, in a colloquy with the ALJ, stated:

MR. GOTTLIEB: Thank you. I could go on with the other unfair labor practices. I think Mr. Wyllie adequately described them. So I'm happy to discuss our position further with Your Honor, if you'd like. That's –

JUDGE ANDERSON: Well, if the Charging Party is, in fact often with tears in its eyes, forced to concede that it's the General Counsel's complaint and you can't expand it. It's the government's right and only the government's right to issue a

> complaint. But the Board has said that the complaint may be the General Counsel's, but the remedy is the Board's. And that – it's for the Charging Parties to express whatever it is they want to express, followed then by argument and convincing proof.
>
> What if anything, have you to say about the remedy, Counsel?
>
> MR. GOTTLIEB: Well, we are satisfied with the remedy as far as what the General Counsel is seeking. We think the most forceful remedies available must be applied because we're looking at a recidivist employer here.
>
> So I don't know that – unless we're talking about some new and creative areas, I think – or new legislation, I think we're – we have to go on with what the General Counsel has advocated here.
>
> JUDGE ANDERSON: Very well. (Tr. 45-46).

GCC/IBT admitted, on the Record, that it was "satisfied with the remedy" sought by the General Counsel. The first notion of a reimbursement for bargaining expenses remedy was on September 23, 2011, (over one year after the ALJ Decision and over two years after the Record's closure) in GCC/IBT's Exceptions where it excepted to "the omission from the ALJ's Decision of an award of bargaining expenses to the Union." (GCC/IBT Excep. 6). In its Brief in Support of Exceptions, GCC/IBT admitted that neither GCC/IBT nor General Counsel requested bargaining expenses as a remedy. (GCC/IBT Excep. Br. at 14). *SBNP* opposed, in its Answering Brief, GCC/IBT's plea for the extraordinary remedy of reimbursed bargaining expenses. (*SBNP* Answ. Br. to GCC/IBT Excep. at 15-18).

GCC/IBT threw a "Hail Mary" in the hope that the NLRB would catch it. Through this Motion, the NLRB has the ability to correct the call through the equivalent of instant replay review. Denying a request for bargaining expenses reimbursement is not unprecedented. *See The Leavenworth Times*, 234 NLRB 649 fn2 (1978) (Overturning ALJ's award of bargaining expenses to Charging Party.).

B. PRECEDENT SHOULD BE FOLLOWED

The NLRB should explain how and why it deviated from precedent in issuing its *sua sponte* remedy that was never requested or even endorsed by the General Counsel. In rendering its Decision, the NLRB has overruled, *sub silento*, *The Bakersfield Californian*, 337 NLRB 296 (2001). In *The Bakersfield Californian*, the General Counsel alleged that the company unlawfully "implemented" a merit pay proposal when it posted working conditions. The complaint did ***not*** allege that it was an unfair labor practice to actually ***grant*** the merit-wage increases. 337 NLRB at 296. At the commencement of the hearing, the Respondent's attorney "took great care to clarify exactly what the factual allegations were, … "voiced [his] concerns," and stated his position that the "complaint and stipulations at hearing concern the posting of conditions … only." The General Counsel, in response "remained silent." *Id.* at 297. The ALJ assured the Respondent that if the posting of the Merit Wage Proposal was not a violation, he would not find a violation based upon conduct that occurred thereafter, i.e. actually granting the merit wage increases. *Id.* The General Counsel did not object and remained silent, which the ALJ viewed as agreement with the Company's position. *Id.*

In addition, *The Bakersfield Californian* ALJ explained:

> Respondent was attempting to clarify the allegations in the complaint. The General Counsel could have entered into the colloquy between myself and Respondent to offer comment, to interpret the complaint, or to amend the complaint, which is his right. The General Counsel, instead, remained silent. This left the complaint unamended. Based on this colloquy, and Counsel for the General Counsel 's seeming agreement with the statements made therein, Respondent was therefore assured by me that if there was not a violation to be found in the posting of the discretionary language in the last, best, and final offer, no violation would be found. There was no objection. With this assurance, any factual information or legal arguments that the parties may have had regarding Respondent 's granting of merit wages and bonuses was not heard.
>
> A (judge)is allowed to pass on an issue not alleged in the complaint if it is closely related to a subject matter in the complaint and is fully litigated. *Monroe Feed*

> *Store* ,112 NLRB 1336,1337 (1955);see also *Hi-Tech Cable Corp.*,318 NLRB 280 (1995); *Meisner Electronic*, 316 NLRB 597 (1995); *Pergament United Sales* ,296 NLRB 333 (1989). Fairness, however, must be considered in the circumstances of the case. *Facet Enterprises v. NLRB*, 907 F.2d 963,972 (10th Cir.1990); *Maintenance Service Corp.*, 275 NLRB 1422,1425-1426 (1985).
>
> Here, Respondent took great care to clarify exactly what the factual allegations were. Notably, the Respondent voiced its concerns about the complaint during the preliminary matters portion of the hearing. That is, prior to putting on its case. [sic] The General Counsel had full and fair opportunity to correct the Respondent's understanding of the complaint prior to my hearing any evidence at the hearing but did not. Therefore the issue regarding Respondent 's actual granting of merit wages and bonuses was not fully litigated. Accordingly, the question is whether or not Respondent violated the Act by posting the last, best, and final offer which included a wholly discretionary merit and bonus wage increase.

Id. at 301.

In the instant case, in contrast with *Bakersfield Californian*, the General Counsel did not just "remain silent;" the General Counsel detailed what he sought, "by way of remedy." The ALJ even asked the General Counsel if the ALJ cut him off to which the General Counsel replied "no." *SBNP* also went to "great pains" to understand the remedies sought in the case. The General Counsel had the opportunity to expand the Second Amended Complaint – the ALJ even solicited him – but the General Counsel[6] did not do so.

In addition, during its opening statement, GCC/IBT specifically endorsed the remedy sought by the General Counsel. Counsel to GCC/IBT concluded his colloquy with the ALJ that GCC/IBT "was satisfied with the remedy … (and) we have to go on with what the General Counsel has advocated here." (Tr. 45-46). GCC/IBT did not mention the reimbursement of bargaining expenses as a sought remedy at the hearing, either.

[6] It is worth noting that Region 31 was the prosecuting Region in *The Bakersfield Californian*, as well.

Both the General Counsel and GCC/IBT failed to seek reimbursement of bargaining expenses as a remedy, although both could have petitioned (or attempted to petition, in the case of GCC/IBT) the ALJ for the remedy. Significantly, at no time has the General Counsel ever sought or endorsed the reimbursement of bargaining expenses as a remedy.

As explained in *The Bakersfield Californian*, "fairness, however, must be considered in the circumstances of this case." GCC/IBT stated that it thought, "The most forceful remedies available must be applied because we're looking at a recidivist employer here," but never suggested the reimbursement of bargaining expenses as an appropriate remedy. GCC/IBT is no stranger to extraordinary remedies; it has consistently sought injunctive relief pursuant to Section 10(j) of the Act for the cases involved in this and other hearings involving *SBNP*. In a 10(j) proceeding involving NLRB Case No. 31-CA-27950 et al., 357 NLRB No. 51 (2011), both the U.S. Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit denied extraordinary relief, however. *See McDermott v. Ampersand Publ'g LLC*, 2008 WL 8628728 (C.D. Cal. 2008) (unreported in F.Supp.2d), aff'd 593 F.3d 950 (9th Cir. 2010).

The NLRB's Decision in the instant case also calls into question the teachings in *California Saw & Knife Works*, 320 NLRB 224, 275 (1995), that explains that the Second Amended Consolidated Complaint in the instant case:

> … only encompasses what the General Counsel states that it encompasses, no more. Where the General Counsel has opposed the Charging Parties or where the Charging Parties' arguments go clearly beyond the reach of the complaint as issued and prosecuted by the General Counsel, the Charging Parties' arguments fail, not on their subjective merits which I have not considered, but on the grounds that only the General Counsel may adopt and include such arguments in a complaint under the Act. … The Charging Parties [sic] theories and allegations, where inconsistent with the position or, or opposed by the General Counsel, will not be further addressed.

See also, *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588, 590-91 (D.C. Cir. 1994) (Once a charge is filed, the General Counsel has the responsibility of framing the issues, not the Charging Party, and the General Counsel is not free to expanding the charge post-complaint (citing *NLRB v. Fant Milling Co.,* 360 U.S. 301, 307, 79 S.Ct. 1179, 1183, 3 L.Ed.2d (1959))).

The remedy contained in GCC/IBT's Exceptions (as opposed to a Motion) went, "clearly beyond the reach of the complaint and prosecuted by the General Counsel" and should fail. There was no evidence about hardship; monetary loss; outrageous, patently offensive conduct during negotiations; lack of engagement, questions, or counter proposals, etc. There was also no need for *SBNP* to marshal a defense to this potential remedy as both the General Counsel and GCC/IBT had specified – on the Record – the extent of the remedies sought. Implementing an un-plead extraordinary remedy conflicts with precedent. The NLRB's Decision contains no explanation of why it broke from precedent. An unreasoned break from precedent is arbitrary and capricious agency action.

The instant Decision created a construct where the Charging Party – rather than the General Counsel – is free to expand the complaint, as the remedies are specified in the complaint. It bears repeating: at no time has the ***General Counsel*** sought or endorsed the reimbursement of bargaining expenses as a remedy. If *SBNP*'s bargaining conduct was so egregious, it stands to reason that the General Counsel would have plead, or at least filed a motion seeking this extraordinary remedy.

The instant Decision offers no explanation of how and why the NLRB inexplicably deviated from precedent and established a new standard where both the General Counsel and Charging Party agree that the only remedies sought are those encompassed in the complaint (which implicated *The Bakersfield Californian*), and then the Charging Party can seek remedies

beyond those sought by the General Counsel – that the General Counsel never endorsed – and which were only sought in exceptions filed by the Charging Party (which implicated *California Saw & Knife*). *SBNP* has been "sandbagged." Not until over two years after the hearing ended, not until over a year after the ALJ issued his Decision, and not until after *SBNP* filed its own Exceptions, did GCC/IBT mention the extraordinary remedy of reimbursing bargaining expenses.

SBNP was not fairly apprised of this potential extraordinary remedy until well after the close of the hearing. Given that it is an extraordinary remedy, it is a due process violation to award an extraordinary remedy on a matter that was not explicitly litigated, and over which *SBNP* had no notice or reasonable expectation of having to defend against in the presentation of is defenses.

It was not alleged nor did the Board conclude that any proposal of *SBNP* was unlawful. The General Counsel argued a "predictably unacceptable" theory upon which both the ALJ and NLRB passed. The NLRB's Decision, in the instant case, fails to address how the NLRB did not sit in judgment of substantive proposals and how the NLRB did not merely act as a referee of the bargaining process. The NLRB Decision further failed to explain how Section 8(d) of the Act did not constitute a defense to *SBNP*'s bargaining. Through its Decision and Order, the NLRB has effectively eviscerated Section 8(d) by compelling *SBNP* to make concessions as part of the remedy.

C. THE NLRB DECISION IS PUNITIVE

SBNP recognizes that the Board has the authority to fashion a remedy consistent with the Act. *See Kaumagraph Corp*., 313 NLRB 624 (1994) ("Once a complaint has issued, however, responsibility for fashioning an appropriate remedy for the unfair labor practices rests with the

Board.") (citing *Schnadig Corp*., 265 NLRB 147 (1982)). However, in the case of an extraordinary remedy, due process dictates that the respondent must be apprised of the extraordinary remedy.

In *Frontier Hotel & Casino*, 318 NLRB 857 (1995), the General Counsel filed a Motion for a reimbursement remedy; the Charging Party filed a Motion for Attorney's Fees and Litigation Expenses. On review, the court denied the Board's Order awarding attorney's fees but granted the reimbursement remedy. *See Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805-06 (1997).

As is significant to the instant case, the bargaining conduct in *Frontier Casino* was explicitly detailed and contained a plethora of factors that do not exist in the instant case. The bargaining conduct and proposals in *Frontier Hotel & Casino* were significantly more egregious than that of *SBNP*. In *Frontier Hotel & Casino*, the conduct of the attorney and the proposals included:

- Cutting the wages of one group of represented employees by 5%;
- Requiring unit employees to work 2,000 hours annually to be eligible for holiday and vacation pay;
- Eliminating the pension plans;
- Replacing the Union health plan with two private plans;
- Stating that the Company would be "pleased to get rid of all the collective bargaining agreements and that was [the attorney's] purpose in getting such a – this kind of proposal;
- Eliminating the hiring hall;
- Eliminating the daily and weekly guarantees;
- Eliminating business agents visiting privileges;
- Eliminating the Steward's privileges;

- Eliminating another union's pension plan;
- Reducing laborers wages from $11.92 per hour to $6.50 per hour;
- In response to a protest over the proposed Holiday and Vacation Rule responding "Tom don't care. Tom would like to have a strike anyway," a refrain that was repeated;
- Refusing to engage in any meaningful discussion of the Union's proposals;
- Declaring that the parties were at impasse.

(318 NLRB at 857-58). In addition, at the NLRB hearing, the Company's attorney responded to questions with "unresponsive, aggressive, and flagrantly disrespectful remarks" that convinced the ALJ that the attorney "has rejected the concept that his conduct is subject to review under the Act," thus the attorney "has no credibility whatsoever. Even when he is testifying to matters not in serious dispute, one must mistrust him." 318 NLRB at 860. In *Frontier Hotel and Casino*, the Board explained, "The defense here rests on the transparently untruthful testimony of an attorney whose words and demeanor demonstrated unmistakably that he was not to be believed. … [the attorney] was in the unusual position of being able to determine from personal knowledge that the respondent's defense lacked credibility and merit." *Id.* at 861.

In the instant case, the ALJ made no such findings. Significantly, *SBNP* did not propose a "no strike" clause. *SBNP* never insisted that GCC/IBT waive its right to strike during the term of the contract. The NLRB failed to explain how the Board's teachings in *Coastal Elec. Cooperative, Inc*., 311 NLRB 1126, 1127 (1993) did not apply. The vague conclusion that *SBNP*'s proposal somehow created a situation where bargaining unit employees had, "fewer rights and less protection than provided by law without a contract" was simply unsupported.

Unlike any case alleging bad faith bargaining, *SBNP* did not declare impasse or insist on a proposal to impasse. In fact, GCC/IBT admitted that the parties were not at impasse. (Dec. at

22, 83, 86-88). At the time of the hearing, *SBNP* and GCC/IBT had met 27 times[7]. At the time of the hearing, during the course of bargaining, *SBNP* had submitted 48 written counter-proposals with bargaining notes explaining, in writing, the particular reasons *SBNP* rejected GCC/IBT's proposal and/or particular language. In addition, *SBNP* and GCC/IBT had reached tentative agreements on 16 issues, as of the time of the hearing. These facts, and other facts explained in the Record, distance the instance case from the facts in *Frontier Hotel & Casino*.

The instant case is not an example of bad faith bargaining where the extraordinary remedy of reimbursed bargaining expenses is appropriate. The instant case is an example of a union lacking the strength to impose its will through negotiations. The NLRB's Decision and Order improperly takes a side in negotiations in contravention with its statutory mandate. The NLRB endorsed the ALJ's faulty logic that *SBNP*'s bargaining violated the Act not because of a particular proposal, but rather because the proposals failed to make a concession. (Dec. at 87) ("…Respondent explicitly in statements by its agents across the table and in notes on proposals and in comments respecting proposals, made it clear that the Respondent was happy with and saw no reason to depart from the pre-union, pre-bargaining obligation, substantive status quo package of rights and powers that gave it unfettered final decision making authority over its unit personnel and its operations.") Maintaining the status quo cannot comport with the idea that employees would be "worse off" by GCC/IBT agreeing to *SBNP*'s proposals.

Additionally, the NLRB's finding that *SBNP* engaged in bad faith bargaining by proposing a management rights clause that extends beyond the expiration of the contract constituted bad faith bargaining creates an impossible paradigm. The NLRB has already explained that a management rights clause does not survive the expiration of a contract, absent

[7] Since the hearing, *SBNP* and GCC/IBT have continued to meet.

evidence that the parties intended it to survive. *See Register-Guard*, 339 NLRB 353, 355 (2003). *See also Ironton Publications, Inc.* 321 NLRB 1048 (1996); *Blue Circle Cement Co, Inc.*, 319 NLRB 954 (1995); *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005). Thus the NLRB explains that in order for a management rights clause to extend beyond the expiration of a contract, the parties must manifest an intent to do so, i.e. memorialize it in a collective bargaining agreement, although proposing it, as found by the NLRB in the instant case, constitutes bad faith bargaining. The NLRB has created the classic "damned if you do, damned if you don't" scenario. Equity dictates that this construct cannot be. By proposing that a management rights clause extends beyond the expiration of a contract, *SBNP* did not violate the Act and bargained in good faith in order to comport with established NLRB precedent.

Finally, the *sua sponte* nature of the extraordinary remedy in this case is, to the knowledge of *SBNP*, unprecedented. In each case involving the extraordinary remedy of reimbursed bargaining expenses, the extraordinary relief has been specifically sought in a complaint or specifically sought through a motion[8]. The NLRB should explain this dramatic break from precedent. The unprecedented nature of this *sua sponte* remedy is punitive.

[8] An exception is not a motion. The NLRB's rules and regulations have separate provisions for motions and exceptions, including post-hearing motions. *Compare* Section 102.46 and Section 102.47 of the NLRB's Rules and Regulations, Series 8, as amended.

CONCLUSION

WHEREFORE, for any and all of the reasons explained in this MOTION FOR RECONSIDERATION, and for any additional reasons deemed just and proper by the Board, *SBNP* requests that the this Motion for Reconsideration in NLRB Case No. 31-CA-28589 et al. be granted, that the Decision and Order be vacated, and that the Second Amended Consolidated Complaint be dismissed.

DATED: October 25, 2012
Nashville, Tennessee

Respectfully submitted,

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Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphic Communications Conference/International Brotherhood of Teamsters. Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028738, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124

May 31, 2013

ORDER DENYING MOTION FOR RECONSIDERATION AND MODIFYING REMEDY

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On September 27, 2012, the National Labor Relations Board, by a three-member panel, issued a Decision and Order in this proceeding adopting the judge's findings that the Respondent violated Section 8(a)(1), (3), and (5) in multiple respects.[1] Among the 8(a)(5) violations affirmed by the Board was that the Respondent engaged in bad-faith bargaining by adhering to an overly broad management-rights proposal while simultaneously committing numerous unfair labor practices away from the bargaining table. To remedy the bad-faith bargaining violation, the Board ordered, among other remedies, that the Respondent reimburse the Union for its negotiation expenses.[2]

1. On October 25, 2012, the Respondent filed a Motion for Reconsideration. On November 8, 2012, the Acting General Counsel filed an opposition.

Under Section 102.48(d)(1) of the Board's Rules and Regulations, a motion for reconsideration must be justified by "extraordinary circumstances." We find that none of the arguments the Respondent raises in its motion satisfy this requirement.[3]

The Respondent argues that the Board improperly "deviated from precedent" by ordering it to reimburse the Union for its bargaining expenses. The Respondent asserts that "[i]n each case involving the extraordinary remedy of reimbursed bargaining expenses, the extraordinary remedy has been specifically sought in a complaint or . . . through a motion." In the Respondent's view, the Board erred in ordering this remedy here because the remedy was waived as neither the Acting General Counsel nor the Union requested this remedy from the judge at the hearing, the judge did not provide for the remedy, and the Union's exception to the judge's failure to provide it does not qualify as a motion.

We find no merit in these arguments. Our authority to order the reimbursement of the Union's bargaining expenses in the absence of such a request to the judge is well supported by precedent.[4] In *Regency Service Carts*, 345 NLRB 671 (2005), cited in fn. 8 of our decision, neither the General Counsel nor the Union requested a bargaining expense remedy from the judge. Id. at 676. Rather, like the Union here, they requested this remedy in cross-exceptions to the Board. The Board granted the request, relying on its "broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct." Id. at 677 (quoting *Teamsters Local 112*, 334 NLRB 1190, 1195 (2001), and *WestPac Electric*, 321 NLRB 1322, 1322 (1996)). Indeed, even in the absence of exceptions to a judge's failure to award the reimbursement of bargaining expenses, the Board may grant this remedy sua sponte. *Teamsters Local 112*, 334 NLRB at 1195.

In addition, the Respondent argues that its bargaining conduct was not sufficiently egregious to warrant the Board's order to reimburse the Union for its bargaining expenses. This argument does not merit reconsideration, as it fails to raise any issue not previously considered by the Board.

2. On December 18, 2012, while the Respondent's motion was pending before us, the United States Court of Appeals for the District of Columbia Circuit granted the Respondent's petition for review in a related case, *Santa Barbara News-Press*, 357 NLRB No. 51 (2011) (*Santa Barbara I*), vacated that Decision and Order and denied the Board's cross-application for enforcement. *Santa Barbara News-Press v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012).[5] The events in *Santa Barbara I* involved an orga-

[1] 358 NLRB No. 141 (*Santa Barbara II*).

[2] 358 NLRB No. 141, slip op. at 3–4.

[3] The Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

[4] It is worth noting that in Board proceedings, remedies are not usually pleaded. See NLRB Casehandling Manual, Part One, Sec. 10380.

[5] As discussed below, the court's decision raises issues with respect to our finding that the Respondent bargained in bad faith in violation of

nizing campaign by the newsroom employees that commenced shortly after the Respondent's owner, Wendy McCaw, implemented several new publishing guidelines to eliminate what she perceived was bias in the employees' reporting. The employees, however, perceived McCaw's guidelines as an attack on their journalistic integrity and submitted a written demand that the Respondent "[r]estore journalism ethics" to the newspaper, recognize the Union, and negotiate a collective-bargaining agreement with the newsroom employees. 357 NLRB No. 51, slip op. at 2. The Board found that during the course of the dispute, which included union requests that readers cancel their subscriptions if employees' demands were not met, the Respondent committed numerous 8(a)(1) and (3) violations, including the discharges of two employees for alleged biased reporting and of six others who protested the initial two terminations. The Board rejected the Respondent's arguments that the employees' demands for journalistic integrity, which it claimed was the principal objective of their organizing and protest activities, was unprotected and that any violations found by the Board would constitute impermissible interference with its First Amendment right to control the content of its newspaper.

When the Respondent reasserted these arguments on appeal, the court agreed and vacated the Board's Decision and Order. The court observed that the "First Amendment affords a *publisher*—not a reporter—absolute authority to shape a newspaper's content," and that "a publisher's editorial policies do not constitute a 'term and condition' of employment" under Section 7. 702 F.3d at 56, 57. Determining, contrary to the Board, that the newsroom employees' actions were primarily directed against the paper's new editorial guidelines, the court found the conduct unprotected. Id. at 57. The court further rejected the Board's argument that its decision was enforceable even if the employees pursued an unprotected goal of gaining editorial control, because they also engaged in protected conduct that sought the Respondent's negotiation of a contract governing wages and working conditions. Id. at 58.

Here, the Respondent insists that the Union's bargaining proposals and the 8(a)(5) allegations continued the employees' unprotected quest for editorial control of the newspaper. The record evidence, however, simply does not bear out the Respondent's assertions.

In support of its position, the Respondent asserts that the Union rejected section 2(a) of the Respondent's management rights proposal, which sought "sole and exclusive rights . . . to determine the content" of its newspaper. 358 NLRB No. 141, slip op. at 78. In fact, the Union did not reject the proposal. The Respondent's own bargaining notes state that the "Union does not disagree that Management has a right to determine the content of the paper." Nor did the Union withdraw this concession by subsequently proposing that the Respondent's right to control the content of its newspaper "does not extend to the use of the employee's byline." The Board has long held that byline protection clauses are mandatory subjects of bargaining, rather than an impingement on a newspaper publisher's right to control the content of its product. *Westinghouse Broadcasting*, 285 NLRB 205, 215 (1987).[6]

We similarly reject the Respondent's contention that the Union sought content control of the newspaper by opposing the Respondent's right to discipline or discharge an employee for "biased reporting." 358 NLRB No. 141, slip op. at 79. The Union in fact *agreed* that biased reporting constituted just cause for discipline and proposed only that the Respondent provide some definitional guidelines so that employees would understand how this disciplinary rule would be applied. The events of *Santa Barbara I*, in which two employees were discharged for biased reporting, notwithstanding that their articles had been approved for publication by management officials who "initially saw no bias," illustrate the reasonableness of the Union's request. *Santa Barbara I*, supra, 357 NLRB No. 51, slip op. at 26, 33, 35–36, 42.

Finally, whatever doubts the Respondent may have had about the Union's intentions regarding content control should have been dispelled by the Union's "Employee Integrity" proposal, which reiterated the byline protection language and made clear that:

> [n]othing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, con-

Sec. 8(a)(5) and (1), and with the special remedies that we ordered for this and the other violations committed by the Respondent. Before discussing these issues, however, we note that the Respondent did not seek to amend its motion to argue that the court's decision warrants reconsideration of any violation found or remedy ordered in our decision. See, e.g., *Ideal Market*, 211 NLRB 344 (1974). By failing to do so, under Sec. 10(e) of the Act, 29 U.S.C. § 160(e), the Respondent has waived reliance on the court's decision as support for any argument that it may ultimately make on appeal with respect to issues reviewable by an appellate court. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1254–1255 (D.C. Cir. 2012); *W & M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1345–1346 (D.C. Cir. 2008).

[6] See also *Capital Times Co.*, 223 NLRB 651, 682 fn. 81 (1976), overruled on other grounds, *Peerless Publications Inc.*, 283 NLRB 334 (1987) (an "employee's professional reputation is among the interests protected by restrictions on management's use of a reporter's byline, which restrictions are included in the instant bargaining agreement and have been held mandatory subjects of collective bargaining").

> sistent with applicable law and with the employee's right to withhold his/her byline as described above.

Santa Barbara II, supra, 358 NLRB No. 141, slip op. at 82. Rather than embrace this offer for what it plainly was—complete acceptance of the Respondent's authority to determine the content of its newspaper—the Respondent rejected the proposal, asserting that it involved a permissive subject of bargaining and would "hamper[] the bargaining process and stifle[] progress towards an overall agreement." Simply put, the Respondent refused to take "yes" for an answer on a matter it asserts was of vital concern to it throughout negotiations.[7]

Whatever may have motivated the Union's organizing efforts, at the bargaining table—as the record demonstrates—the Union was willing to concede the Respondent's right to editorial control. Therefore, we reject the Respondent's content control defense to the 8(a)(5) bargaining violations found by the judge.

3. To the extent that we relied on them in our initial decision, we no longer rely on the violations found by the Board in *Santa Barbara I* as support for the remedies ordered in this case. Nevertheless, having carefully considered the issue, we find that these remedies remain appropriate.

With respect to the broad cease-and-desist order that we provided under *Hickmott Foods*, 242 NLRB 1357 (1979), we adhere to our previous finding that the Respondent's violations in this case alone are sufficient to justify a broad order under the "egregious and widespread misconduct" standard of *Hickmott* without reliance on the alternative standard of proclivity to violate the Act. See 358 NLRB No. 141, slip op. at 3. In assessing the appropriateness of a broad order under either aspect of *Hickmott*:

> the Board reviews the totality of circumstances to ascertain whether the respondent's specific unlawful conduct manifests an attitude of opposition to the purposes of the Act to protect the rights of employees generally, which would provide an objective basis for enjoining a reasonably anticipated future threat to any of those Section 7 rights.

Five Star Mfg., 348 NLRB 1301, 1302 (2006) (internal quotation and citation omitted). The Respondent's conduct here shows an unmistakable campaign to undermine the Section 7 rights of unit employees. Despite the employees' election of a bargaining representative, the Respondent sought to maintain unilateral control of their terms and conditions of employment. In a pattern of unlawful conduct, it disregarded the fundamental rights of its employees by, among other violations: (1) transferring unit work to nonunit freelance reporters; (2) prohibiting employees from discussing matters involving their terms and conditions of employment outside its employee meeting; (3) bargaining in egregiously bad faith by insisting on proposals that the employees' status remained at-will employment and that granted the Respondent virtually unlimited control over their working conditions; (4) dealing directly with unit employees with regard to their terms and conditions of employment; and (5) implementing unilateral changes concerning mandatory subjects of bargaining. These violations, as well as the other unlawful conduct found in this proceeding, directly affected the entire bargaining unit and sent a clear message that the employees' decision to be represented by the Union would only be to their detriment.

In view of its broad scope and severity, the Respondent's misconduct here alone provides more than a sufficient "objective basis for enjoining a reasonably anticipated future threat to [employees'] Section 7 rights" in accordance with *Five Star Mfg.*, supra. We note that such an expectation is supported by the Respondent's further unlawful conduct following the events involved here. In *Santa Barbara News-Press*, 358 NLRB No. 155 (2012) (*Santa Barbara III*), issuing the same day as the decision in this proceeding, the Board found that the Respondent's service of subpoenas on employees prior to the hearing in the instant case, demanding copies of their confidential affidavits to the Board during the investigation of this case, "had a chilling effect on the employees' rights to participate in Board investigations and coerced the employees in violation of Section 8(a)(1)." Id. slip op. at 2. The Board there found that the Respondent was well aware that it was not entitled to such affidavits before the employees testified at the hearing, having been so informed by the judge in *Santa Barbara I* in a ruling undisturbed by the court's decision in that case. Id., slip op. at 3. Therefore, without relying on the vacated *Santa Barbara I* violations or on the "proclivity" aspect of the *Hickmott* standard, we reaffirm our determination that a broad cease-and-desist order is warranted in this proceeding.

We also find that the notice-reading remedy remains appropriate based on the serious and unit-wide impact of the violations here, all of which were committed by high-

[7] Later in negotiations, the Union resubmitted a revised Employee Integrity proposal that contained stronger language in favor of the Respondent's content control right, but the Respondent again rejected it. The revised proposal read:

> Nothing in this provision shall be interpreted or applied to compromise or affect the employer's right to control the substantive content of the newspaper, or interfere with the employer's entrepreneurial control of its operations, consistent with applicable law and with the employee's right to withhold his/her byline as described above.

ranking officials of the Respondent. See *OS Transport LLC*, 358 NLRB No. 117, slip op. at 2 (2012); *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46, slip op. at 1–2 (2012). The violations found in *Santa Barbara III* render this remedy all the more warranted.

The 12-month extension of the Union's certification year ordered by the Board is the traditional remedy for the kind of bad-faith bargaining in which the Respondent engaged in this case.[8] The court's decision concerning the violations found by the Board in *Santa Barbara I* does not affect the continued appropriateness of this remedy.

With respect to our order that the Respondent reimburse the Union for its negotiation expenses, we noted in our decision, among other things, that the Respondent's proposal concerning discipline and discharge stated that the relationship with employees under the contract would remain at-will employment and provided a grievance procedure that would end in an unreviewable decision by the copublishers, who committed most of the violations found by the Board in *Santa Barbara I.* Our discussion relied on the Respondent's bad-faith bargaining conduct in adhering to these proposals and not on the violations found in the vacated decision. Therefore, this remedy also remains appropriate.[9]

Accordingly, having duly considered the matter, we find that the Respondent has not raised any extraordinary circumstances warranting reconsideration of the Board's decision under Section 102.48(d),(1) of the Board's Rules and Regulations.

IT IS ORDERED, therefore, that the Respondent's motion for reconsideration is denied.

IT IS FURTHER ORDERED that the Order and notice be modified to include the following provision regarding the tax and social security reporting remedies:

1. Insert the following as paragraph 2(h) and reletter the subsequent paragraphs.

"(h) Compensate Dennis Moran, Richard Mineards, and unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."

Dated, Washington, D.C. May 31, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue letters or other communications to you from the owner and copublisher offering to provide our attorney to represent you if you are contacted by Board agents investigating unfair labor practice allegations.

WE WILL NOT instruct you that anything said at an employee meeting concerning employees' terms and condi-

[8] See 358 NLRB No. 141, slip op. at 3, and the cases cited therein.

[9] In *Latino Express*, 359 NLRB No. 44 (2012), which issued after the decision in this case, the Board modified its backpay remedy by adding two new requirements: the reimbursement to employees of any additional income taxes they owe as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year; and the submission of appropriate documentation to the Social Security Administration (SSA) —allocating backpay, when it is paid, to the appropriate calendar quarters. The Board decided to apply both remedial policies retroactively to all pending cases in whatever stage. Id., slip op. at 1. In accordance with *Latino Express*, we order the Respondent to reimburse Dennis Moran, Richard Mineards, and unit employees adversely affected by the Respondent's unilateral changes an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no unlawful action taken against them. Further, we order the Respondent to submit the appropriate documentation to the SSA so that when backpay is paid to Moran, Mineards, and unit employees adversely affected by the unilateral changes, it will be allocated to the appropriate periods. We shall modify the Order and include a new notice to conform with these revisions.

tions of employment is confidential and proprietary and cannot be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to nonunit employees of contract agencies because you form, join, or assist Graphic Communications Conference, International Brotherhood of Teamsters (the Union), or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT transfer unit work to freelance nonemployees because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT suspend or otherwise discriminate against you because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT discharge you because you form, join, or assist the Union, or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT unreasonably delay in furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as your collective-bargaining representative.

WE WILL NOT transfer unit work from unit employees to nonunit employees of contract agencies and fail and refuse to provide the Union with notice and an opportunity to bargain concerning the decision to utilize the nonunit employees and the effects of the decision on unit employees.

WE WILL NOT fail to grant you merit increases for the period December 2006 through January 2009 without providing the Union notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT unilaterally change the timing of employee meetings with their supervisors as part of the performance evaluation system without providing the Union notice and an opportunity to bargain about the change and its effects.

WE WILL NOT lay off, suspend, or discharge you without providing the Union notice and an opportunity to bargain about these decisions and their effects.

WE WILL NOT assign bargaining unit work to nonunit freelance employees without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

WE WILL NOT unilaterally announce a requirement that you produce at least one story per day without providing the Union notice and an opportunity to bargain about the proposed new policy.

WE WILL NOT bypass the Union and deal directly with you by offering you nonunit terms and conditions of employment for unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that we retain unilateral control over many terms and conditions of employment, thereby leaving you and the Union with substantially fewer rights and protections than you would have without any contract.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed by us at our Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year will extend 1 year from the date that good-faith bargaining begins.

WE WILL reimburse the Union for its costs and expenses incurred in collective-bargaining negotiations from November 13, 2007, until the date on which the last negotiation session occurred.

WE WILL make our unit employees whole for any loss of earnings and other benefits resulting from our discontinuation of our program of merit pay raises for performance years 2006–2008 or our change in the timing of employee meetings with their supervisors regarding their 2008 performance evaluations, plus interest.

WE WILL make unit employees whole for any loss of earnings or other benefits resulting from our wrongful unilateral use of nonunit employees to do unit work, plus interest.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment that we unlawfully made and restore the status quo ante.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no

longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits resulting from our unlawful employment actions against them, less any net interim earnings, plus interest.

WE WILL compensate Dennis Moran, Richard Mineards, and unit employees adversely affected by our unilateral changes for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and WE WILL, within 3 days thereafter, notify each of them that this has been done and that those wrongful actions will not be used against them in any way.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS

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March 17, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 27, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 141. The Respondent filed a timely motion for reconsideration. On May 31, 2013, the Board issued an Order Denying Motion for Reconsideration and Modifying Remedy, which is reported at 359 NLRB No. 127. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, and the Order Denying Motion for Reconsideration and Modifying Remedy, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order and the Order Denying Motion for Reconsideration and Modifying Remedy, and retained this case on its docket for further action as appropriate.

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 141, which is incorporated herein by reference.[1]

We have also considered the vacated Order Denying Motion for Reconsideration and Modifying Remedy reported at 359 NLRB No. 127, which we incorporate by reference. We agree with and adopt the findings and rationale set forth therein, and we have modified the Order herein accordingly.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing letters or other communications to employees from the owner and copublisher offering to provide its attorney to represent employees who are contacted by

[1] We correct the second par. of fn. 2 of the vacated Decision and Order by deleting the reference to Sec. 8(a)(5), because the complaint alleged and we find that the August 22, 2008 memorandum to employees offering them the services of company attorneys violated Sec. 8(a)(1).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) when Director of News Operations Don Katich instructed employees to keep confidential the contents of his December 3, 2008 meeting with them, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2008), a case decided when the Board had only two sitting members. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by suspending and discharging Dennis Moran, we find it unnecessary to pass on the judge's additional finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to notify the Union of its suspension and discharge of Moran, failing to offer to bargain about the suspension, and failing to offer to bargain about the discharge decision and its effects.

The judge's recommended Order, as further modified herein, is set forth in full below.

[2] We affirm and incorporate the Amended Remedy as set forth in the prior Decision and Order, as modified and further explained in the Order Denying Motion for Reconsideration and Modifying Remedy. In affirming and incorporating the rationale of the latter Order, we rely on *Allied Medical Transport, Inc.*, 360 NLRB No. 142, slip op. at 6 fn. 9 (2014), and *Homer D. Bronson Co.,* 349 NLRB 512, 515 (2007), rather than *OS Transport LLC*, 358 NLRB No. 117 (2012), and *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46 (2012), as support for the notice-reading remedy. We further note that the Board's Order denying the motion for reconsideration relied on *Santa Barbara News-Press*, 358 NLRB No. 155 (2012) (*Santa Barbara III*), concerning the broad cease-and-desist order and notice-reading remedies. The Board subsequently considered that case de novo and adopted the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 155. See 361 NLRB No. 88 (2014).

In affirming the remedial provisions regarding adverse tax consequences and Social Security reporting requirements in the Order denying the motion for reconsideration, we rely on *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

Board agents investigating unfair labor practice allegations.

(b) Instructing employees that anything said at an employee meeting concerning employees' terms and conditions of employment is confidential and proprietary, and cannot be discussed by employees outside the meeting.

(c) Transferring work from the bargaining unit to nonunit employees of contract agencies because unit employees formed, joined, or assisted Graphic Communications Conference, International Brotherhood of Teamsters (the Union) or any other labor organization and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(d) Transferring unit work to freelance nonemployees because unit employees formed, joined, or assisted the Union or any other labor organization and engaged in protected concerted activities and to discourage employees from engaging in these activities.

(e) Suspending or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union or any other labor organization and engaged in protected concerted activities and to discourage them from engaging in these activities.

(f) Discharging or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage them from engaging in these activities.

(g) Unreasonably delaying furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as the collective-bargaining representative of unit employees.

(h) Transferring unit work from unit employees to nonunit employees of contract agencies and failing and refusing to provide the Union notice and an opportunity to bargain over the decision to utilize the nonunit employees and the effects of the decision on unit employees.

(i) Failing to grant unit employees a merit increase in December 2006 through January 2007, in recognition of work performance during 2006, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(j) Failing to grant unit employees a merit increase in December 2007 through January 2008, in recognition of work performance during 2007, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(k) Failing to grant unit employees a merit increase in December 2008 through January 2009, in recognition of work performance during 2008, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects.

(l) Unilaterally changing the timing of employee meetings with their supervisors as part of the performance evaluation system around November 2008 without providing the Union notice and an opportunity to bargain about the change and its effects.

(m) Laying off employees without providing the Union notice and an opportunity to bargain concerning the decision and its effects.

(n) Unilaterally announcing a requirement that unit employees produce at least one story per day without providing the Union notice and an opportunity to bargain about the new policy and its effects.

(o) Bypassing the Union and dealing directly with unit employees by offering employee Richard Mineards nonunit terms and conditions of employment.

(p) Bargaining in bad faith with the Union by insisting, as a condition of reaching agreement on a collective-bargaining contract, that the Respondent retain unilateral control over many terms and conditions of employment, thereby leaving employees and the Union with substantially fewer rights and protections than they would have without any contract.

(q) Assigning bargaining unit work to freelance nonemployee Robert Eringer without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year shall extend 1 year from the date that good-faith bargaining begins.

(b) Reimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, until the date on which the last negotiation session occurred.

(c) Make unit employees whole for any losses they may have suffered as a result of the discontinuation of the program of merit pay raises for the performance years 2006–2008 and the change in the timing of employee-supervisor performance evaluation meetings, with interest, in the manner set forth in the remedy section of the judge's decision, as amended.

(d) Make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral use of the nonunit employees of contract agencies or other nonemployees, with interest, in the manner set forth in the remedy section of the judge's decision, as amended.

(e) On request by the Union, and to the extent sought by the Union, rescind the one-story-per-day productivity standard and the unlawful unilateral transfer of unit work to nonunit freelance employees and nonunit employees of contract agencies.

(f) Within 14 days from the date of this order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the unlawful employment actions against them, with interest, in the manner set forth in the remedy section of the judge's decision, as amended.

(h) Compensate Dennis Moran, Richard Mineards, and other unit employees for the adverse tax consequences, if any, of receiving any lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards and, within 3 days thereafter, notify them in writing that this has been done and that the wrongful employment actions will not be used against them in any way.

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

(k) Within 14 days after service by the Region, post at its facility in Santa Barbara, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since July 9, 2007.

(l) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read by a high-ranking management official or, at the Respondent's option, by a Board agent in the presence of such an official.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations of the complaint not sustained herein shall be, and they hereby are, dismissed.

Dated, Washington, D.C. March 17, 2015

Mark Gaston Pearce, Chairman

[3] If this Order is enforced by a Judgment of the 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."

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue letters or other communications to you from the owner and copublisher offering to provide our attorney to represent you if you are contacted by Board agents investigating unfair labor practice allegations.

WE WILL NOT instruct you that anything said at an employee meeting concerning employees' terms and conditions of employment is confidential and proprietary and cannot be discussed by employees outside the meeting.

WE WILL NOT transfer work from the bargaining unit to nonunit employees of contract agencies because you form, join, or assist Graphic Communications Conference, International Brotherhood of Teamsters (the Union), or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT transfer unit work to freelance nonemployees because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT suspend or otherwise discriminate against you because you form, join, or assist the Union or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT discharge you because you form, join, or assist the Union, or any other labor organization or engage in protected concerted activities or to discourage you from engaging in these activities.

WE WILL NOT unreasonably delay in furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as your collective-bargaining representative.

WE WILL NOT transfer unit work from unit employees to nonunit employees of contract agencies and fail and refuse to provide the Union with notice and an opportunity to bargain concerning the decision to utilize the nonunit employees and the effects of the decision on unit employees.

WE WILL NOT fail to grant you merit increases for the period December 2006 through January 2009 without providing the Union notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT unilaterally change the timing of employee meetings with their supervisors as part of the performance evaluation system without providing the Union notice and an opportunity to bargain about the change and its effects.

WE WILL NOT lay you off without providing the Union notice and an opportunity to bargain about this decision and its effects.

WE WILL NOT assign bargaining unit work to nonunit freelance employees without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects.

WE WILL NOT unilaterally announce a requirement that you produce at least one story per day without providing the Union notice and an opportunity to bargain about the proposed new policy.

WE WILL NOT bypass the Union and deal directly with you by offering you nonunit terms and conditions of employment for unit work.

WE WILL NOT bargain in bad faith with the Union concerning unit employees' terms and conditions of employment by insisting as a condition of reaching any collective-bargaining agreement with the Union that we retain unilateral control over many terms and conditions of employment, thereby leaving you and the Union with substantially fewer rights and protections than you would have without any contract.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed by us at our Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year will extend 1 year from the date that good-faith bargaining begins.

WE WILL reimburse the Union for its costs and expenses incurred in collective-bargaining negotiations from November 13, 2007, until the date on which the last negotiation session occurred.

WE WILL make our unit employees whole for any loss of earnings and other benefits resulting from our discontinuation of our program of merit pay raises for performance years 2006–2008 or our change in the timing of employee meetings with their supervisors regarding their 2008 performance evaluations, plus interest.

WE WILL make unit employees whole for any loss of earnings or other benefits resulting from our wrongful unilateral use of nonunit employees to do unit work, plus interest.

WE WILL, on request by the Union, and to the extent sought by the Union, rescind the unilateral changes in terms and conditions of employment that we unlawfully made and restore the status quo ante.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Moran and Richards Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits resulting from our unlawful employment actions against them, less any net interim earnings, plus interest.

WE WILL compensate Dennis Moran, Richard Mineards, and unit employees adversely affected by our unilateral changes for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that those wrongful actions will not be used against them in any way.

AMPERSAND PUBLISHING, LLC D/B/A SANTA BARBARA NEWS-PRESS

The Board's decision can be found at www.nlrb.gov/case/31-CA-028589 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2016, an electronic PDF of Joint Deferred Appendix was uploaded to the Court's CM/ECF system, which will send notice of filing to counsel for all participants in the case who are registered CM/ECF users:

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Date: November 23, 2016

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
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