Knollwood Country Club *and* Unite Here Local 100. Cases 02–CA–150410, 02–CA–150571, 02–CA–151405, and 02–CA–162251

March 8, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On June 9, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited exceptions and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] as modified below, to modify the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[2]

The issues in this case arise from several labor cost-saving measures unilaterally undertaken by Respondent Knollwood Country Club in 2015, during the term of a multiemployer contract with Charging Party UNITE HERE Local 100 for a bargaining unit including seasonal food service workers at the Respondent's country club. For the reasons stated by the judge, we affirm his findings that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to make contributions to the Union's pension fund after December 2014 and to its health fund after June 2015, and that the Respondent violated Section 8(a)(1) of the Act by threatening to call, and then calling, the police on April 16, 2015, when laid-off employees visited the Respondent's facility to concertedly protest the Respondent's failure to recall them to work. As discussed below, we also agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting bargaining unit work without giving the Union prior notice and an opportunity to bargain, and by modifying the collective-bargaining agreement's seniority recall provision without the Union's consent. But as briefly discussed below, we reverse, on due process grounds, the judge's conclusions that the failure to recall employees by seniority was also unlawful on a separate unilateral change theory and that the Respondent unlawfully laid off employees out of seniority order.

The bargaining unit includes three classifications of food service employees working for the Respondent: "regular employees," who are entitled to contractual benefits including health and benefit fund contributions; "summer employees," who are hired to work between April 1 and October 31, are not required to become union members, and do not receive most contractual benefits; and "extra employees," hired on a temporary basis to substitute for regular employees or hired on an occasional event basis. The different classifications reflect the seasonal nature of the Respondent's food service operations. It normally offers no regular food service between January 2 and April 1. Prior to 2015, it would lay off all regular employees by January. For special club events held between January and April, the Respondent would offer these laid-off unit employees the opportunity to work on a per job basis. The Respondent would then recall the regular employee work force for the resumption of full food service operations in April. After this recall, it would hire summer employees for the busy season.

In 2015, however, the Respondent departed from past employment practices. It utilized temporary workers provided by Mack Staffing Services to perform unit work at special parties during February and March. It employed summer employees, rather than recalling any regular employees, to perform all unit work between April and August. Then, in August, it laid off these summer employees and arranged for them to be hired by Mack Staffing to continue to do the same work they had performed as unit employees. During and after August, the Respondent also recalled several laid-off regular employees to work side-by-side with former unit employees now employed by Mack Staffing.

The unilateral change subcontracting violation

It is uncontested that the Respondent did not give the Union notice and an opportunity to bargain prior to using Mack Staffing employees to perform unit work. Absent establishing that it was privileged to act unilaterally, the Respondent had a statutory obligation, and the Union a corresponding statutory right, to bargain about the decision to subcontract unit work. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210–212 (1964); *Mi*

[1] In the absence of exceptions, we adopt the judge's dismissal of the complaint's allegation that the Respondent unlawfully failed to grant union representatives access to its facility. Also in the absence of exceptions, we affirm the judge's conclusions that the Respondent unlawfully failed to deduct dues and remit them to the Union on behalf of eligible employees and that it unlawfully failed to fully and timely supply information requested by the Union on April 22 and 29 and July 24, 2015.

[2] We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein and with the Board's standard remedial language. We have substituted a new notice to conform to the Order as modified.

Pueblo Foods, 360 NLRB No. 116, slip op. at 1 (2014).[3] A waiver of statutory rights is not to be lightly inferred but instead must be "clear and unmistakable." See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708–709 (1983). The Respondent argues that the Union waived its right to bargain over the subcontracting by agreeing to a contractual management-rights clause reserving the Respondent's right to "discontinue, lease or relocate services or operations in whole or in part, or to discontinue performance of services or operations by employees of the Club." We reject this argument because the language in the management-rights clause referring to discontinuation of services or operations does not even remotely, much less clearly and unmistakably, authorize the unilateral conduct the Respondent engaged in here, which amounted to a combination of replacing some unit employees with staffing agency employees, arranging for laid-off unit employees to be rehired by the staffing agency to continue providing the same services they had previously provided, and belatedly recalling some "regular" unit employees to work side-by-side with staffing agency employees to perform unit work. While some individual unit employees were replaced at times by workers from Mack Staffing, no "services or operations by employees of the Club" were discontinued. Absent waiver by the Union of its right to bargain, the Respondent's subcontracting in these circumstances violated Section 8(a)(5) and (1) of the Act.[4]

The midterm contract modification violation

We also agree with the judge, as explained further below, that the Respondent's hiring of "summer employees" instead of recalling full-time regular employees from a seasonal layoff violated Section 8(a)(5) and (1) of the Act by modifying, without the Union's consent, article 8 of the parties' collective-bargaining agreement.

Article 8 provides, in relevant part: "in the event of layoffs . . . the most senior regular full-time employee . . . shall be the first reemployed." As previously stated, "summer employees" are unit employees, but unlike regular full-time employees they are not required to become members of the Union and are excepted from contractual wage rates and most benefits. Until 2015, they were only employed after the recall of the full complement of regular employees in the beginning of April.

Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1063–1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). When an employer defends against a midterm modification allegation by arguing that the contract did not prohibit its challenged conduct, the Board will not ordinarily find a violation if the employer's contractual

[3] The Respondent does not except to the judge's finding that its decision was a mandatory subject of bargaining.

[4] We reject the Respondent's argument, and any implication in the judge's decision, that the question of whether the Respondent unlawfully unilaterally changed terms and conditions of employment turns on whether or not the Respondent had a "sound arguable basis" for its position that the contract authorized it to displace unit employees with workers provided by Mack Staffing Services.

For the reasons set forth in *Provena St. Joseph Medical Center*, supra at 812–815, we also reject the Respondent's suggestion that the "contract coverage" standard applied by some United States courts of appeals should govern. See, e.g., *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836–837 (D.C. Cir. 1993) (where an employer acts "pursuant to a claim of right under the parties' agreement," the resolution of the charge requires interpreting the contract to determine whether it "covers" the employer's conduct, i.e., whether the parties have "negotiat[ed] contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment."); *Chicago Tribune Co. v. NLRB,* 974 F.2d 933 (7th Cir. 1992) (same).

Even under the "contract coverage" standard, however, we would not find that the management rights contract language relied on by the Respondent covers the conduct at issue. In *Regal Cinemas, Inc. v. NLRB*, the court rejected the respondent movie operator's argument that language giving it rights "to change or eliminate existing procedures or work" authorized it to "change or eliminate" unit projectionist work, without first bargaining, by transferring that work to nonunit managers and assistant managers. 317 F.3d 300, 312–314 (D.C. Cir. 2003). Further noting the absence of any affirmative evidence of specific discussions during the parties' negotiations tying the disputed transfer of unit work to the management rights language, the court stated that it was "loath to conclude that a union would knowingly agree to a clause that would effectively permit the employer to unilaterally extinguish the bargaining unit." Id. at 313. As in *Regal Cinemas*, the Respondent's interpretation of the contract here would permit it to unilaterally extinguish the bargaining unit by transferring unit work to nonunit workers. Also as in *Regal Cinemas*, the literal language of the management rights clause referring to a *discontinuation* of services or operations does not support this interpretation, and there is no affirmative evidence from multiemployer negotiations that the parties intended this language to apply to the actions taken by the Respondent. Thus, even under a contract coverage analysis, we would conclude that the Respondent's conduct here was not "covered by" the contract.

Acting Chairman Miscimarra believes that the management-rights clause clearly and unmistakably waives the Union's right to bargain over a subcontracting action that results from an actual discontinuance of performance of services or operations by its employees. However, he agrees with his colleagues that the Respondent did not, in fact, "discontinue performance of services or operations" by its employees: rather, it continued to employ some unit employees, either summer or regular, at the same time that it arranged to have nonunit subcontractor employees perform the same unit work. Because Acting Chairman Miscimarra agrees with his colleagues that the Respondent's unilateral changes were unlawful under either the "clear and unmistakable waiver" or the "contract coverage" standard, he does not reach or rely on his colleagues' rejection of the latter standard.

interpretation has a "sound arguable basis." *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); see also *American Electric Power*, 362 NLRB No. 92, slip op. at 1 (2015) (applying *Bath Iron Works*).[5] In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. See *Mining Specialists, Inc.*, 314 NLRB 268, 268 (1994).[6] To determine the parties' intent, the Board examines "both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself." Id. at 268–269; see also *Resco Products, Inc.*, 331 NLRB 1546, 1548 (2000).

The Respondent contends that the contract provision at issue has no bearing on its hiring of summer employees because hiring summer employees, who may not previously have worked for it, is not "reemploying" anyone. But, in context, the phrase "the first reemployed" reasonably refers only to the first employee to begin work after the seasonal shutdown, whether or not that individual previously worked for the Respondent. Article 8 is a fairly standard provision that provides some stability to regular unit employees who are subject to seasonal layoffs. We find no reasonable basis for the Respondent's view that the single word "reemployed," in isolation, allows it to circumvent the clear purpose of the provision and the protection it provides by simply replacing its regular bargaining unit employees with new hires instead of recalling them by seniority. There is no reasonable likelihood that the parties actually intended to permit any club, in any season, to eviscerate the basis of the bargaining relationship by ceasing to employ union members altogether while otherwise continuing operations unchanged. Moreover, seizing upon the word "reemployed" in isolation to nullify the basis and purpose of the contract runs against well-established principles of contract interpretation.[7] Thus, we find that "the contract language itself" requires the recall of laid-off regular employees by seniority prior to hiring summer employees. See *Mining Specialists*, 314 NLRB at 269.[8]

We accordingly affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d) by failing to recall regular full-time employees in accordance with contractual seniority provisions.[9]

AMENDED REMEDY

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

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) when it utilized workers provided by Mack Staffing Services to perform work that otherwise would have been performed by unit employees without first notifying the Union and giving it an opportunity to bargain, we shall order the Respondent to rescind this unilateral change and to notify, and on request, bargain with the union before implementing changes in unit employees' wages, hours, or other terms and conditions of employment. Having found that the Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d) by failing to abide by the contract provision requiring recall of laid-off employees by seniority, we

[5] Members Pearce and McFerran find it unnecessary to address the issue of whether *Bath Iron Works* was correctly decided in light of finding that the Respondent's failure to recall laid-off unit employees violated the Act for the reasons discussed below.

[6] "It is well settled that the Board has the authority to interpret collective-bargaining agreements in the course of deciding unfair labor practice cases." 314 NLRB at 268 fn. 5; accord: *Healthbridge Management, LLC v. NLRB*, 798 F.3d 1059, 1073 fn. 9 (D.C. Cir. 2015) (citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429–430 (1967)) ("the Supreme Court long ago held that the Board is empowered to interpret a collective bargaining agreement in the course of deciding an unfair labor practice charge")), enfg. 360 NLRB No. 118 (2014).

[7] See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956) ("Like other contracts, [a collective-bargaining agreement] must be read as a whole"); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d at 313; *Sawmill Restaurant*, 283 NLRB 537, 541 (1987) (rejecting contract interpretation that "would defeat the principal purpose for which the provision was included in the contract"); *Foreign Trade Export Packing Co.*, 112 NLRB 1246, 1258–1259 (1955); see also RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981).

[8] Moreover, uncontested testimony by Dennis Diaz—the Union's chief negotiator on multiple successive contracts with the 24-member multiemployer group, including the Respondent—establishes that the parties had discussed the question of whether clubs could hire summer employees prior to recalling laid-off regular employees, and that "all the 24 clubs, always recall the full-time employees first before they call summer help." Thus, extrinsic evidence of the parties' bargaining history and past practice is also inconsistent with the Respondent's interpretation of the contract. *Mining Specialists*, supra at 268–269.

[9] In addition to finding that the Respondent's failure to recall unit employees by seniority unlawfully modified the contract, the judge found that the same conduct independently violated Sec. 8(a)(5) and (1) as a unilateral change in employees' terms and conditions of employment. We reverse this finding on due process grounds because this independent theory of an 8(a)(5) violation was not alleged in the complaint, litigated at the hearing, or addressed in the General Counsel's posthearing brief. We also reverse on due process grounds the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by laying off employees without abiding by the contract's seniority provision and without regard to seniority. The General Counsel neither alleged nor litigated the illegality of this action.

shall order the Respondent to abide by the contract by recalling laid-off employees by seniority prior to hiring or recalling any other employees to perform unit work. We shall also order the Respondent to make all employees affected by either or both of these unlawful actions whole for any loss of earnings or benefits suffered as a result of this unlawful conduct.

Backpay for these violations shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. See *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[10]

Having found that the Respondent violated Section 8(a)(5) and (1) within the meaning of Section 8(d) by failing to deduct dues and remit them to the Union on behalf of eligible employees without the Union's consent, we shall order the Respondent to make the Union whole for any dues the Union would have received in 2015 absent the Respondent's unlawful conduct, including dues the Union would have received absent the Respondent's unlawful subcontracting and failure to recall unit employees, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra, and without recouping the money owed for past dues from employees.[11]

Having found that the Respondent violated Section 8(a)(5) and (1) by failing to remit contributions to the Union's pension fund after December 2014, and to its health fund after June 2015, we shall order the Respondent to make whole its unit employees by making all such delinquent fund contributions, including contributions it would have made but for its unlawful subcontracting and failure to recall unit employees, and including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[12]

Further, the Respondent shall be required to reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

Finally, having found that the Respondent violated Section 8(a)(1) by threatening to call and calling the police in response to employees' protected concerted activity, and that it violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, we

[10] For the reasons stated in his separate opinion in *King Soopers, Inc.*, supra, slip op. at 9–16 (2016), Acting Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

[11] See *Distler Construction Co.*, 363 NLRB No. 18, slip op. at 5 & fn. 2 (2015). The reimbursement requirement will be limited to employees who authorized dues deductions, and will be offset by the amount of any dues the Union collected over the compliance period from employees covered by the dues payment order. *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 1 fn. 1 (2015).

Acting Chairman Miscimarra would permit the Respondent to recoup from employees any dues amounts it pays to the Union. In his view, the majority's recoupment bar is punitive and therefore exceeds the Board's remedial powers under Sec. 10(c) of the Act. See *Alamo Rent-A-Car*, supra, slip op. at 7–8 and fn. 15 (Member Miscimarra, concurring in part and dissenting in part).

[12] The Respondent's failure to deduct and remit dues and to make contributions to the funds unlawfully modified its contract with the Union only during those periods in which the Respondent actually employed eligible employees. However, the Respondent shall be required to make the Union and affected employees whole by remitting dues and making contributions to the funds on its employees' behalf for all periods in 2015 during which it would have employed eligible employees absent its unlawful conduct.

Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, supra.

shall order the Respondent to cease and desist from this conduct.

ORDER

The National Labor Relations Board orders that the Respondent, Knollwood Country Club, Elmsford, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by utilizing workers provided by a temporary staffing agency to perform bargaining unit work without first notifying Unite Here Local 100 (the Union) and giving it an opportunity to bargain.

(b) Making midterm modifications to its collective-bargaining agreement with the Union without the Union's consent, including by failing to recall laid-off unit employees according to contractual seniority provisions, by failing to deduct dues and remit them to the Union on behalf of eligible employees, or by failing to make contractually-required contributions to the Union's health and pension funds.

(c) Threatening to call or calling the police in response to employees' protected concerted activities.

(d) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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

(a) Rescind the unilateral changes in the terms and conditions of employment of its unit employees.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the classifications listed in schedule A of the Agreement between the Union and the Federation of Country Clubs.

(c) Make whole those employees affected by its use of workers provided by a temporary staffing agency to perform unit work for any loss of earnings and other benefits suffered by them in the manner sent forth in the amended remedy section of this decision.

(d) Abide by the terms of the parties' collective-bargaining agreement by recalling laid-off employees by seniority prior to hiring or recalling any other employees, deducting and remitting dues to the Union on behalf of eligible employees, and contributing to the Union's health and pension funds as required by the collective-bargaining agreement.

(e) Make whole those employees affected by its failure to recall laid-off employees by seniority for any loss of earnings and other benefits suffered by them in the manner set forth in the amended remedy section of this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(g) Make the Union whole for any dues that the Respondent failed to deduct and remit under the parties' collective-bargaining agreement, in the manner set forth in the amended remedy section of this decision.

(h) Make all delinquent payments to the Union's pension and health funds and make the unit employees whole for any expenses ensuing from its failure to make such payments, including any additional amounts due to the funds on behalf of unit employees, with interest, in the manner set forth in the amended remedy section of this decision.

(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 in 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 Elmsford, New York facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 2, 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.

[13] 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."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2015.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 8, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, 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 change your terms and conditions of employment by using workers provided by a temporary staffing agency to perform bargaining-unit work without first notifying Unite Here Local 100 (the Union) and giving it an opportunity to bargain.

WE WILL NOT make midterm modifications to our collective-bargaining agreement with the Union without the Union's consent, including by failing to recall unit employees according to contractual seniority provisions, by failing to deduct dues and remit them to the Union on behalf of eligible employees, or by failing to make contractually-required contributions to the Union's health and pension funds.

WE WILL NOT threaten to call or call the police in response to your protected concerted activities.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as your collective-bargaining representative.

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

WE WILL rescind the changes in your terms and conditions of employment.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the classifications listed in schedule A of the Agreement between the Union and the Federation of Country Clubs.

WE WILL make you whole for any loss of earnings and other benefits resulting from our unlawful use of workers provided by a temporary staffing agency to perform unit work, less any net interim earnings, plus interest, and WE WILL also make you whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL abide by the terms of our collective-bargaining agreement with the Union by recalling laid-off employees by seniority before hiring or recalling any other employees, deducting and remitting dues to the Union on behalf of eligible employees, and contributing to the Union's health and pension funds as required by the collective-bargaining agreement.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to recall regular employees by seniority, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL make the Union whole for any dues we failed to deduct and remit under our collective-bargaining agreement with the Union.

WE WILL make all delinquent payments to the Union's pension and health funds and WE WILL make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

KNOLLWOOD COUNTRY CLUB

The Board's decision can be found at www.nlrb.gov/case/02–CA–150410 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Audrey Eveillard, Esq., for the General Counsel.
Craig Bonnist, Esq. and *Hugh Murray, Esq.,* for the Respondent.
Jane Lauer Baker, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on March 7 and 8, 2016. The charges and amended charges were filed on April 16 and 21, May 1, June 26, October 20, and December 14, 2015. The initial complaint was issued on September 30, 2015. A second consolidated complaint was issued on January 29, 2016. The complaint was again amended at and after the hearing. In substance, the allegations are as follows:

1. That since on or about 2005, the Union has been recognized by the Employer, in a multiemployer bargaining unit, as the representative of its cooks (second and third), pantry, kitchen helpers, pot washers, dishwashers, waiters/waitresses, bussers, bartenders, and golf course snack bar attendants but excluding all other classifications. It is further alleged that the most recent collective-bargaining agreement runs from February 1, 2014, to January 31, 2018.

2. That from about February 11, 2015, until about November 11, 2015, the Respondent, without giving notice to or an opportunity to bargain with the Union, subcontracted unit work to Mack Staffing Services.

3. That the collective-bargaining agreement contains provisions whereby the Respondent is obligated (a) to notify the Union at least one week prior to any contemplated layoff or cutback within the kitchen, bar, dining room or allied departments and (b) to apply seniority in the event of layoffs and/or recalls.

4. That on or about April 1, 2015, after a seasonal layoff, the Respondent failed to continue the contract provisions described above by failing to recall full-time bargaining unit employees to perform kitchen and dining room duties. It is further alleged that the Respondent failed to comply with the seniority provisions of the contract by laying off bargaining unit employees in or about September 2015. The General Counsel alleges that by failing to comply with the terms of the collective-bargaining agreement and in the absence of consent by the Union, the Respondent violated Section 8(a)(5) and Section 8(d) of the Act.

5. That notwithstanding article 3 of the collective-bargaining agreement requiring the Respondent to deduct periodic dues, assessments and initiation fees from employee wages and to remit them to the Union, the Respondent, in violation of Section 8(a)(5) and 8(d) has, since August 26, 2015, failed to do so.

6. That since on or about August 14, 2015, the Respondent has failed and refused to make contractually required contributions to the Unite Here Health Fund and the National Retirement Fund on behalf of the bargaining unit employees. The General Counsel alleges that inasmuch as these actions were undertaken in violation of the collective-bargaining agreement and in the absence of union consent, the Respondent violated Section 8(a)(5) and 8(d) of the Act.

7. That contrary to Article 20 of the collective-bargaining agreement the Respondent on or about April 16, 2015, in violation of Section 8(a)(5) and 8(d), refused to allow representatives of the Union access to its facility to perform functions relating to employee terms and conditions of employment. As to this incident, it is further alleged that the Respondent interfered with employee Section 7 rights by calling the police to have them removed from the facility.

8. That since on or about April 22, 2015, the Respondent has either refused to supply, or has failed to completely supply, or has untimely supplied, the following information that was requested by the Union.

(a) Events calendars for 2014 and 2015;
(b) Time cards for Local 100 bargaining unit employees for March and April 2015 and to the date of the Respondent's response;
(c) Audited financial statements for 2014;
(d) Monthly profit and loss statements for the current and the past 3 fiscal years;
(e) Disbursement Ledger for the current and the past 3 fiscal years;
(f) Any agreements for leases, including amendments thereto, relating to the operation or management of Respondent, the land upon which Respondent is located and/or the building in which Respondent is located in;
(g) Any agreements for construction, renovation or rehabilitation of any of the facilities, premises and grounds for the cur-

rent year and for the preceding 3 fiscal years;
(h) Respondent's reports, financial or operations, provided to members of Respondent in 2012, 2013, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The employer operates a country club and golf course located in Elmsford, New York. For a number of years it has recognized the Union as the collective-bargaining representative of its food service workers, (cooks, waiters, busboys, bar tenders, etc.). As a member of the Federation of Country Clubs, a multi-employer association created to bargain with the Union, the Respondent is a party to a collective-bargaining agreement running from February 1, 2014, to February 1, 2018.[1]

At the time of these events the Respondent's manager was Mauro Piccininni. Nelson Soracco was the Chairman of the Board of Directors.

The Club, although open all year round, provides food services for its members from around April 1 to January 2. (After New Year's Day). It typically employs a crew of regular kitchen, dining room and snack bar employees who are represented by the Union. As of 2014, this consisted of 17 full-time regular employees.

In addition to its normal day-to-day food service functions, the Respondent offers its facilities for parties such as weddings, birthdays, etc. When these are contracted for, the regular employees are typically given the opportunity to work. If a function is sufficiently large, the Respondent may hire additional temporary employees to supplement its regular work force.

The busiest time for the Respondent is from June to the end of August. Thereafter, bargaining unit work diminishes in around October through November. The exceptions are Thanksgiving, Christmas, and New Year, when parties are held. Typically, the summer help gets laid off first and then the regular full-time staff starts to get laid off, usually around November and December. After January 1 and until March, the golf course is closed, as is the pool. There are no member dining room services during this period of time, although the club is available for parties, such as birthdays, bar mitzvahs, weddings, etc. In the past, when events take place during this fallow season, the regular full-time employees have been offered the opportunity to work at these events.

The regular full-time employees are normally called back to work in March and before April 1. In the past, it has been the normal practice for the club to hire summer employees who typically start after April 1. As noted above, if there were functions such as weddings that took place between January 1 and April 1, the company offered these jobs to its regular full-time staff.

The regular employees are paid in accordance with the pay rates and terms of the collective-bargaining agreement. Thus, in addition to receiving the contractual hourly pay rates, contributions are made on their behalf to the Union's health and pension funds. The regular employees are covered by a standard union security and check off clause and the Union's records shows that such monies have been deducted and remitted to the Union for many years.

The contract permits the company to employ persons for summer employment between April 1 and October 31 in 2014, 2015 and 2017 and between March 20 and October 31 in 2016. These summer employees are not required to become dues-paying members of the Union; albeit they are required to pay an "agency fee." Summer employees, although paid at the contract wage rates, are not covered by the pension or health plans. Accordingly, the employer is not required to make contributions to those plans on behalf of the summer employees. Also, under the terms of Section 5.1 of the contract, summer employees are not entitled to vacation, holiday pay, sick pay or seniority.

In reviewing this collective-bargaining agreement, it is obvious to me that the intent of the parties was to allow the employer to hire persons for summer employment in order to supplement but not replace the regular employees who are covered by the agreement.

There are a number of other contract provisions that are relevant to this case.

At article 6, the contract provides that no regular employee who has completed his/her probationary period shall be discharged, laid off, suspended, dispossessed or evicted without just cause.

At article 8.2, the contract states; "The club may lay off employees by reason of business or seasonal requirements. Except in the case of fire, the Club shall notify the Union office at least one week prior to any contemplated regular or permanent layoff or cutback of personnel within the kitchen, bar, dining room and allied departments. The employees scheduled for layoffs . . . shall be likewise notified, and in the event of such layoffs, seniority shall prevail as follows: the most senior regular full-time employee in each category or classification shall be the last laid off and first re-employed after a layoff, except that the Shop Steward shall be the last laid off and first re-employed after a layoff . . . provided the persons remaining have the ability to do the work required. The Club shall notify the employees or the Union or pay one week's wages at the straight time rate in the event no notice has been given. Only written notice will be considered sufficient."

Article 17 deals with the subject of tips at special parties. Basically, article 17.1 provides that where there is a party of at least 20 persons, the Club agrees that the waiters, waitresses, busboys and bartenders will receive gratuities in the amount of 10 percent of the total party check. Article 17.2 provides that wait persons, bus persons and bartenders who are hired as ex-

[1] The attorney who assisted the Association in negotiating this agreement was Peter Pankin. The evidence shows that representatives of the Respondent attended and participated in these negotiations.

tras from an agency to work at special contracted parties are not entitled to any gratuities.

Article 20 provides that official representatives of the Union shall be admitted to the Club's premises at reasonable times to observe the working conditions in connection with the performance of the contract. It also provides that the Union is required to call at least 1 day before arrival.

Article 22 is a management rights clause. In pertinent part, it states:

> The rights of management which are not abridged by this Agreement, shall include, but are not limited to: the Club's right to determine the prices and terms of providing services, quality and types of meals, methods of operation, to drop or to add a particular service or operation; the right to determine and from time to time to re-determine the number, location and types of its services or operations and the methods, processes, materials, operations and services to be employed or furnished, to discontinue, lease or relocate services of operations in whole or in part, or to discontinue performance of services or operations by employees of the Club, to determine the number or [sic] hours per day or per week services or operations shall be carried on, to select and to determine the number of employees required, to determine the classification of and number of employees in each classification (if any), to assign work to such employees in accordance with the requirements determined by management, to establish and change work schedules, or to layoff, terminate or otherwise relieve employees from duty, to make and enforce rules for the maintenance of discipline and safety and to suspend, discharge, or otherwise discipline employees for any infraction of any rule of the Club or for any other just cause. . . .

Article 28 contains a multistep grievance/arbitration process. It provides that grievances must be filed and move to each next stage within certain time limitations. In the event that no resolution is made at the last step of the grievance process, either party has 30 days to submit a grievance to binding arbitration in accordance with the rules of the American Arbitration Association.

Article 29 contains what seems to be a somewhat unique provision. In substance, this provision permits an employer/signatory to present to impartial arbitrator evidence that the wage and hour scales "will work unusual hardship . . . and affect adversely the interest of the workers therein." It permits the arbitrator to allow an employer to modify the wage and hour scales of the agreement.

It should also be noted that the word "subcontracting" is not used in any part of the collective-bargaining agreement. That is, the contract neither contains any type of provision that would explicitly permit or restrict subcontracting. In order for the Respondent to justify a conclusion that the management rights clause waived the Union's right to bargain over subcontracting, we would have to construe other language as meaning that unrestricted subcontracting was allowed.

The parties stipulated that for the years from 2013 to 2015, the compilation of the regular full-time bargaining unit employees, numbering 17, was as follows:

Francisco Bendezu	Iariel Burgos
Gavino Contreras	Mauricio Diaz
Nicole Dixon	Patricia Henry
David Huanca	Michael Locastro
Ian Mapp	Walter Ortega
Gina Quintero	Marcelino Quintero
Christian Recio	Atdhe Tahiraj
Rosannis Perez Tejada	Segundo Tejada
Petula Williams	

The evidence suggests that in late 2014, the Club was experiencing some financial difficulties. Nevertheless, during negotiations for a renewed collective-bargaining agreement, no one representing the Respondent made any claims of financial distress. The collective-bargaining agreement was ratified on November 19, 2014.[2]

In or about December 2014, the Respondent obtained the services of attorney Matthew Persanis because it sought advice regarding what if any course of action it could take given its asserted business problems.

On December 9, 2014, Persanis sent a letter to the Union advising that the Respondent was requesting a meeting pursuant to the aforementioned article 29. He went on to state that the Club had suffered a downturn in membership. He further asserted that; "if we do not hear from you by December 15, 2014, we will assume you agree with our contention and we will reduce payments to employees."[3]

On December 9, union representatives had a telephone conversation wherein Persanis stated that the Club was seeking relief under article 29 because it was losing members and having financial difficulties. The Union, by Diaz, requested that it be provided with a list of the bargaining unit employees, a list of the club's membership, payroll records, and the schedule of upcoming events.

On December 29, 2014, the Respondent provided some of the requested information. It did not, however, provide its payroll records and schedules. Accordingly, Diaz sent an email to Persanis complaining about the inadequate submission of information.

On January 2, 2015, in accordance with past practice, the Respondent closed for the season. And by that time, all regular full-time employees had been laid off by the end of December. The employees were not notified that these layoffs were intended to be permanent or anything other than the normal seasonal layoffs.

The testimony of the Club's manager, Piccininni, was that in January 2015, he was instructed by Nelson Soracco to seek advice from Persanis as to how the club could save some money.

On January 14, 2015, Persanis sent an advice letter to the Respondent. This letter, which was not objected to, stated as follows:

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[2] Of course if the Respondent had claimed an inability to pay, during the negotiations, it would have been required to turn over financial information, if requested.

[3] Although the letter states that there was a previous letter dated November 24, 2014, the Union's representatives testified that they never received such a letter and the Respondent did not offer evidence of its existence.

> This memo is written as a response to your questions regarding your staffing.
>
> The first question was "Can you use outside vendors to staff an event?"
>
> The short answer is "yes." According to your collective bargaining agreement, page 14, Article 17, "special contracted parties" it talks about outside people from an agency. So it would seem to give you the authority to hire an outside agency to staff the party.
>
> In addition, the "Management Rights" clause on page 16 specifically states that unless a right is expressly and explicitly abridged by the agreement management retains that right. I would argue that since nowhere in the agreement does it prohibit the subcontracting of bargaining unit work you may do so.
>
> The next question had to do with layoffs; can you layoff the staff and just staff on a temporary or summer only basis. Again, I think the answer is "yes." We must look at Article 8 on page 8, "Seniority and Layoff." Section 8.2 gives you the right to lay off employees by "reason of business or seasonal requirements," the only prohibition is that the employees must be laid off by seniority. The article even talks about permanent layoff and goes on to describe the method for laying off. Section 8.5 states that the "Club's shall continue to have the right to establish and change employee schedules." Article 8.3 (d) states that an employee loses his, her seniority after being laid off for 6 months. Management Rights clause on page 16 allows you to "determine the prices and terms of providing services, methods of operations, drop or add a service. Therefore, laying off on a permanent basis is allowed.
>
> Having answered these questions the last question left is "can you staff with just summer employees?" the answer again is "yes." Summer employees are addressed in Article 5 on page 5. Summer employees may be hired between April 1 and October 31, for 2015. If an employee is a summer employee you do not need to pay welfare or pension contributions for that employee, you also do not need to pay the vacation holiday, sick or seniority.
>
> My advice in order to save money is to lay off your permanent employees, hold out until April 1, 2015 to hire anyone and let them go by October 31, 2015 so all you have is summer employees. You will save on all Fund payments, vacation, sick time, holiday pay.

Instead of seeking arbitration pursuant to article 29, whereby the Respondent could have presented evidence of financial hardship and asked for a reduction in wage rates, it chose instead to follow the advice of Persanis. In this regard, the Club, without notifying the Union, essentially went about substituting its regular full-time bargaining unit work force with either a subcontractor and/or the hiring of people it chose to describe as summer employees, for whom it would not make any health or pension contributions, nor make any union dues deductions.

In January 2015, Robert Mack of Mack Staffing Solutions became aware that Knollwood was interested in utilizing a temporary service company to staff its facility. He testified that he arranged for a meeting with Tara Fallon, the Respondent's controller and that he met with Knollwood's management in late January. As a result of this meeting, Mack agreed to provide the Respondent with temporary employees on an "as needed basis."

On January 29, 2015, Mack sent a contract to the Respondent. Despite the fact that the Respondent did not execute this agreement, Mack began to provide temporary workers to Knollwood starting on February 7, 2015. The evidence shows that Mack continued to provide temporary workers to perform tasks ordinarily performed by bargaining unit employees until October 14, 2015.[4] As a consequence, during the 2015 off season, Knollwood had a number of parties and instead of offering these jobs to its regular full-time staff as it had done in the past, it utilized Mack Staffing to provide people to do this work. In this regard, Patricia Henry testified that on an occasion after January 1, 2015, she had a conversation with Piccininni about her desire to work the parties scheduled in February and March 2015. She also testified that when she thereafter called Piccininni about working at one of the parties, he told her that she wasn't needed to work at these events and that the Respondent did not want to use any union staff.

As noted above, the normal past practice was that the regular full-time employees would be recalled to work from March and prior to April 1 of each year. Thereafter, and in conformity with the collective-bargaining agreement, the Respondent can and has hired summer employees to *supplement* the regular full-time staff. In my opinion, there can be no reasonable interpretation of the labor agreement that would entitle the Respondent to simply replace its regular full-time staff with summer employees only.

On March 15, 2015, Shop Steward Mapp phoned Michael Aguilar, the executive chef, and asked when he was supposed to return to work. Aguilar said he had no information as to when the full-time staff would be recalled. Thereafter, on March 27, 2015, Mapp made a visit to the club and when he spoke to Piccininni, he later said that the Board of Governors had not given him any information about when the regular crew would be coming back. Mapp was then given a letter stating that he had been indefinitely laid off.

It was stipulated that the 17 regular full-time employees previously listed, were not recalled from their seasonal layoffs when the Respondent reopened its normal food service operations in April 2015. Indeed, none of those employees were recalled to their former jobs before August 7, 2015.

The parties further stipulated that on or about April 1, 2015, and thereafter, the Respondent hired 34 other employees to perform bargaining unit work. With respect to this group, the evidence showed that some had worked for the club during previous summers, whereas some were newly hired employees. The evidence also showed that some of these people continued to be employed until January 2, 2016.

The evidence therefore establishes that with the exception of a relatively small number of the regular full-time employees

[4] GC Exhs. 7 and 8 comprise invoices from Mack Staffing Agency to the Respondent for providing employees.

who were recalled in August, September, and November, the majority of the people doing bargaining unit work during the 2015 season were either new hires, or people who had worked only as summer workers in past seasons.[5]

In this respect, the evidence shows that in failing to recall its full-time bargaining unit employees in March 2015, instead hiring other workers to do their jobs, the Respondent not only changed its past practice but breached the seniority provisions of the collective-bargaining agreement. (Article 8.2 states inter alia, that "the most senior regular full-time employee in each category or classification shall be the last laid off and first re-employed after a layoff.")

I addition to the above, It was stipulated that prior to 2015, the Respondent had, in accordance with the collective-bargaining agreement, deducted periodic dues, assessments and initiation fees from the wages of the 17 regular full-time bargaining unit employees and had remitted such monies to the Union. The parties stipulated that in 2015, the Respondent ceased deducting dues, assessments or initiation fees from the wages of bargaining unit employees. Finally, it was stipulated that in July 2015, the Respondent ceased making payments on behalf of any eligible employees for the contractually required contributions to the United Here Health fund or to the National Retirement Fund.

The evidence shows that all of these changes in past practice, which also breached express provisions of the collective-bargaining agreement, were taken without prior notification to the Union and without obtaining the Union's consent.

On April 6, 2015, the Union filed three grievances relating to employer's failure to recall the bargaining unit employees. And over the next week and a half, the Union tried, without success, to arrange a meeting with the Respondent or its attorney.

On April 16, 2015, union representatives met with some of the regular employees at a diner and after some discussion, the group decided to visit the club in order to talk about the Club's failure to recall them to work. When they arrived, Piccininni met them outside and when union representative Diaz asked when the workers could return to work, Piccininni said that they would not be returning and told the group that if they didn't leave, he would call the police. At this point, the two union representatives entered the premises and saw a group of workers whom they didn't recognize. When they went to speak to Piccininni in the latter's office, they said that they wanted to have a meeting about the grievances and were told that the meeting was being held now. They demurred and said that they wanted to set up a proper meeting. Piccininni responded that he had called the police.

After exiting the building, the group of employees stayed outside in the parking area and when the police showed up, the union representatives explained that there was a labor dispute. No one was arrested or forced to leave. Soon thereafter, the two union representatives again went inside to talk to Piccininni and Soracco where Diaz asked when the workers were going to return to work. Soracco stated that they were not returning and Piccininni said that summer employees were doing the work. This was the first time that the Union or the employees were advised that summer workers had been hired to replace them.

The collective-bargaining agreement at article 20, allows union representatives to be admitted to the Respondent's premises at reasonable time for a variety of purposes relating to working conditions. Apart from an emergency, the contract requires the Union to notify the company at least 1 day prior to arrival.

In the past, the 1-day notification provision has not always been followed. And in this case, I would tend to characterize the refusal of the company to recall *all* of its full-time employees as constituting an emergency.

On April 29, 2015, the Union requested information from the Respondent. In pertinent part, the request was for the following:

> (a) Events calendars for 2014 and 2015;
>
> (b) Time cards for Local 100 bargaining unit employees for March and April 2015 and to the date of the Respondent's response;
>
> (c) Audited financial statements for 2014;
>
> (d) Monthly profit and loss statements for the current and the past 3 fiscal years;
>
> (e) Disbursement Ledger for the current and the past 3 fiscal years;
>
> (f) Any agreements for leases, including amendments thereto, relating to the operation or management of Respondent, the land upon which Respondent is located and/or the building in which Respondent is located in;
>
> (g) Any agreements for construction, renovation or rehabilitation of any of the facilities, premises and grounds for the current year and for the preceding 3 fiscal years.
>
> (h) Respondent's reports, financial or operations, provided to members of Respondent in 2012, 2013, and 2014.

On July 24, 2015, the Union sent a follow-up letter in response to the company's communication dated June 16. This letter stated:

> 1. Events calendars for 2013, 2014 and 2015 with all events listed. The event calendars previously provided did not show all events, only some events;
>
> 2. Time cards, punch cards, or sign-in sheets showing the time that workers reported to or began work and the time that the workers ceased working for 2013, 2014 and 2015 to date. Thus far, only payroll records were provided. The employer is required to maintain accurate time records. If the employer does not maintain time records, please provide information as to the manner and method

[5] On August 7, the Respondent recalled full-time employee Michael Locastro who resumed his employment on August 14. On August 14, the Respondent recalled full time employee Ian Mapp and he returned to work on August 26. On or about August 26, the Respondent recalled full-time employees Patricia Henry, Gina Quintero, and Christian Recio. It was stipulated that Henry returned to work on September 2, but that Quintero and Recio did not return to work. On September 25, the Respondent again laid off Henry and Mapp effective October 4. On October 28, the Respondent again recalled Henry who returned to work on October 29. On October 30, the Respondent again recalled Mapp who returned to work on November 6. On November 26, the Respondent recalled the following nine regular full-time bargaining unit employees who worked between November 26 and December 2: Francisco Bendezu, Nicole Dixon, Gina Quintero, Walter Ortega, Marcelino Quintero, Atdhe Tahiraj, Rosannis Perez Tejada, Segundo Tejada, and Petula Williams.

by which the employer accurately records the time worked of employees.

3. According to your email of June 16, 2015, you claim to have provided in the box you dropped at the Union's office, monthly profit and loss statements for 2013, 2014, and 2015, monthly income and expenses for 2013, 2014, and 2015. The general ledger, cash receipts and disbursements, and accounts receivable ledger for 2013, 2014, and 2015. You claim in your email that the same documents are responsive to each of those categories of requests. We have not been able to identify the documents in your production that are responsive to those requests. Please email me copies of the responsive documents or at least email pages of the documents that you claim are responsive so that we can determine whether they are included in the box and are sufficient.

4. Our records also indicated that you have not yet provided responses to the following requests made in my April letter to you:

a. Any agreements or leases, including amendments thereto, relating to the operation or management of Knollwood, the land upon which Knollwood is located and/or the building in which Knollwood is located in.

b. Any agreements for construction, renovation or rehabilitation of any of the facilities, premises, and grounds of Knollwood including for improvements to the facilities, premises, and grounds for the current year and for the preceding three (3) fiscal years.

5. Also, please provide any report, financial or operational, provided to the membership in 2012, 2013 and 2014.

The evidence shows that in response to the information requests, the Respondent, starting in June 2015, provided some, but not all of the information requested. Also some of the information was furnished substantially after the request.

After hiring a group of summer employees to replace most of the bargaining unit members,[6] the company made an arrangement for the employees to be placed onto the payroll of Mack Staffing Solutions. In August 2015, Robert Mack visited the club for the purpose of interviewing the employees then working. Thereafter, these employees, who had originally been hired by Knollwood, were put on Mack's payroll.

On August 13, 2015, Attorney Persanis sent an email to the Union which set forth the Respondent's position as follows:

> Please be advised that effective immediately Knollwood CC is exercising its rights under the Collective Bargaining Agreement, Article 22, Management Rights ". . . to discontinue, lease or relocate services of operations in whole or in part, or to discontinue performance of services or operations by employees of the Club, . . ." the services provided by those employees covered by the CBA between Local 100 and Federation of Country Clubs. Knollwood CC had a staff of 8, which was reduced to 6 employees who had been performing this work. Knollwood will now seek to outsource this work using leased employees or an outside vendor to provide these services. It is our position that this shall stop all further back pay liability from accruing.

[6] As previously noted, some but not all of the regular full-time bargaining unit employees were recalled starting in August 2015.

III. ANALYSIS

The principle issues in this case involve the Respondent's attempt to replace all or most of the regular full-time bargaining unit employees either with what are described as "summer" employees or by outsourcing their work to a subcontractor. This was done in an effort to save money by essentially seeking to eliminate the requirement to pay the health and pension benefits for full-time regular employees as required by the collective-bargaining agreement. (As noted above, the contract, although requiring the company to pay summer employees at the contract rates, does not require the company to make contributions on their behalf to the health or pension funds. Nor are summer employees entitled to vacation pay, holiday pay, sick pay or seniority.) Moreover, this was done without notification to the Union and without affording it an opportunity to bargain.

With respect to some of the changes, the General Counsel contends that they were made unilaterally and therefore violated Section 8(a)(5) of the Act. For example, the General Counsel alleges that the Respondent violated Section 8(a)(5) by unilaterally and without offering to bargain, subcontracting out bargaining unit work.

In other respects, the General Counsel alleges that certain of the unilateral changes constituted mid-term modifications of the existing labor agreement and therefore were also violative of Section 8(d) of the Act. For example, it is alleged that by failing to recall laid-off employees in order of seniority, or by laying off employees out of seniority, the Respondent breached the seniority and the layoff/recall provisions of the collective-bargaining agreement. Also, by failing to make payments to the Union's pension and health care funds, it is alleged that this too constituted an unambiguous mid-term modification of the collective-bargaining agreement. Finally, it is alleged that by failing to deduct dues and remit them to the Union as required by the contract, the Respondent also violated Section 8(d).

As to the changes alleged as mid-term contract modifications, the General Counsel argues that the Respondent could not make these changes without first obtaining the Union's consent. That is, offering to bargain about the changes would not be enough.

Indeed, the General Counsel asserts that the Respondent, in effect, repudiated the collective-bargaining agreement.

There is also the issue of whether or not the Respondent failed to furnish relevant requested information to the Union.

Finally there is an issue relating to the events that took place when the Union and employees visited the company on April 16, 2015.

The Subcontracting Allegations

With respect to subcontracting, there is no dispute that in January 2015, the Respondent entered into an agreement with Mack Staffing Solutions to provide employees who would be assigned to do bargaining unit work. There is also no dispute that the Respondent first started using Mack to provide such workers on February 7, 2015, and continued to do so throughout the remainder of 2015. The evidence shows that the Union

was not notified of the Respondent's decision to subcontract unit work until August 2015 and it is undisputed that the Respondent never offered to bargain about its decision to subcontract. [7]

In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the employer, for legitimate economic reasons, but without offering to bargain, displaced its existing maintenance employees by subcontracting out their work to a third party. The Court stated;

> The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The issue of subcontracting and bargaining was obliquely revisited by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In that case, which involved the employer's partial closing of its business, the Court held that certain types of managerial decisions could be made without bargaining about the decision, if the decision involved a change in the scope and direction of the enterprise, even if it had a direct effect on employment. The Court defined a test that balanced an "employer's need for unencumbered decision making with the benefit of collective bargaining for labor management relations." At footnote 22, the Court noted; "we of course intimate no view as to other types of management decisions such as plant relocations, sales, and other kinds of subcontracting, automation etc., which are to be considered on the particular facts." The Board in *Dubuque Packing Co.*, 303 NLRB 386 (1991), set forth the criteria it would use to apply the Court's First National Maintenance decision. (Dubuque involved an employer's decision to relocate).

In *Torrington Industries*, 307 NLRB 809 (1992), the employer subcontracted work which resulted in the layoff of 2 bargaining unit employees who were replaced by independent contractors. The Board concluded that subcontracting decisions similar to those in *Fibreboard* were mandatory subjects of bargaining and did not require the burden shift test utilized in *Dubuque Packing Co*., 303 NLRB 386 (1991), even if the decision was not motivated by labor costs. That is, the Board concluded that based on the Supreme Court's decision in *First National Maintenance*, supra, the Court had already struck the balance in favor of finding that decisions to subcontract required bargaining. Nevertheless, the Board did qualify its decision and stated:

> We agree that there may be cases in which the non-labor cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining. We do not reach that issue here, however, because the Respondent' reasons had nothing to do with a change in the "scope and direction" of its business. Those reasons, thus were not matters of core entrepreneurial concern and outside the scope of bargaining.

Subsequent to its decision in *Torrington*, supra, the Board has continued to take the view that employers are required to bargain about a decision to subcontract irrespective of whether the decision was motivated by labor cost factors. For example in *Acme Die Casting*, 315 NLRB 202 fn. 1 (1994), the Board held that the Employer violated Section 8(a)(5) by not offering to bargain about its decision to subcontract. It stated:

> Contrary to the Respondent's contention, the reasoning of Torrington Industries . . . is not limited to situations in which employees are laid off or replaced. Torrington simply recognizes the principle, applicable in this case, that an employer's decision to subcontract is a mandatory subject of bargaining when what is involved is the substitution of one group of workers for another to perform the same work and not a change in the scope and direction of the enterprise. There is no evidence that the decision to subcontract constituted a change in the scope and direction of Respondent's business. Indeed, the plant manager admitted that the subcontracting permitted the Respondent to perform work of the same type done by unit employees in the past while avoiding paying overtime to those employees.

It is argued by the Respondent that the Union waived its right to bargain over the decision to subcontract. In this regard, the Respondent cites article 17 and article 22 of the agreement.

As to article 17, the Respondent claims that this permits the Club to utilize employees who are hired as extras from an agency to work at special contracted group parties. But I don't construe this as giving the employer a blank check to hire only extras for group parties. This entire provision relates to the subject of gratuities where there are parties with more than 20 guests. The point of the provision is that the regular bargaining unit employees who are assigned to work at these parties will receive tips equal to at least 10 percent of the check and that if extras are hired to augment the regular staff, those people will not share in the tips.

Article 22 is the management rights clause. It does not mention subcontracting, albeit it does state that "the rights of management which are not abridged by this Agreement, shall include, but are not limited to . . . to discontinue, lease or relocate services of operations in whole or in part, or to discontinue performance of services or operations by employees of the Club. . ."

I do not believe that a reasonable interpretation of this clause can be read to include an unfettered right to subcontract out

[7] The charge in 02–CA–150410 was filed on April 16, 2015, and it alleged that the Respondent failed and refused to recall the entire bargaining unit from winter layoff upon the Club's reopening; hired new employees to replace bargaining unit members; and effectively repudiated the collective bargaining agreement. Since the failure to rehire was caused at least in part by the company's use of a subcontractor starting on February 7, 2015, the complaint's allegation that the Respondent unilaterally subcontracted out bargaining unit work is closely related. And since the answer filed on October 13, 2015, admits that the Respondent received this charge in April 2015, it is clear to me that it was timely filed within the 6-month statute of limitations period set forth in Sec. 10(b) of the Act.

bargaining unit work. For one thing, I am not really sure what this language means and it looks to me like an exercise in poor draftsmanship that occurred many years ago and has been carried forward in successive contracts. For another thing, the clause does not even mention subcontracting, which in the parlance of labor relations, is a term of art and well understood by people who represent unions and employers. In my opinion, if the parties at the bargaining table had meant to preclude bargaining over subcontracting, I think they would have expressly said so.

The issue here is not which is the better interpretation of the contract. Rather, the question is whether there are provisions in the contract that constitute a clear and unmistakable waiver of the Union's right to bargain over a decision to subcontract.

In *Embarq Corp., a wholly-owned subsidiary of CENTURYTEL, Inc., d/b/a Centurylink*, 358 NLRB 1192, (2012), the Board adopted the finding that an employer violated Section 8(a)(5) by refusing to bargain over a decision to eliminate work classification and consequently to discharge nine cashiers. A Board majority found that neither the management-rights clause nor the layoff section of the collective-bargaining agreement constituted a clear and unmistakable waiver. In this regard, the majority cited *Provena St. Joseph Medical Center*, 350 NLRB 808, 811–815 (2007), where the Board rejected the "contract coverage" theory of waiver.

In my opinion, the contract provisions cited by the Respondent do not constitute a clear and unmistakable waiver of the Union's right to bargain over a decision to subcontract unit work. Nor is there any other evidence to suggest that during bargaining or at any other time, by any other statements or actions of the Union, did it manifest an intention to waive its right to bargain over a decision to subcontract.

I therefore conclude that by subcontracting out bargaining unit work commencing on February 7, 2015, without notifying and affording the Union an opportunity to bargain about that decision, the Respondent has violated Section 8(a)(5) and (1) of the Act.

The 8(d) Allegations

In *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), the Board stated:

> Section 8(a)(5) and 8(d) establish an employer's obligation to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." Generally an employer may not unilaterally institute changes regarding these mandatory subjects before reaching a good faith impasse in bargaining . . . Section 8(d) imposes an additional requirement when a collective-bargaining agreement is in effect and an employer seeks to "modify . . . the terms and conditions contained in" the contract: The employer must obtain the union's consent before implementing the change.

The Respondent argues that the Board does not have the authority to adjudicate claims that a party to a collective-bargaining agreement has breached the terms of the agreement because Section 301 puts that power in the Federal courts or where the parties have agreed to binding arbitration. Citing *NLRB v. Strong*, 393 U.S. 357 (1969). Although acknowledging that the Board may interpret a collective-bargaining agreement in the context of an unfair labor practice case, the Respondent argues that it may not find a violation of Section 8(a)(5) when the party accused of a contract breach has a "sound arguable basis" for its belief that the contract sanctioned its action. Citing *Bay Area Healthcare Group*, 362 NLRB No. 94 (2015); *Bath Iron Works*, 345 NLRB 499, 502 (2005); and *Mine Workers v. NLRB*, 257 F.2d 211, 214, 215 (D.C. Cir. 1958). See also *NCR Corp*., 271 NLRB 1212 (1984).

The issue therefore is whether the provisions of the contract that are claimed to have been breached were subject to reasonably differing interpretations or were unambiguous. See for example, *Daycon Products Co.*, 360 NLRB No. 54 (2014).

In *Oakland Physicians Medical Center, LLC d/b/a Doctors' Hospital of Michigan,* 362 NLRB No. 149 (2015), a Board majority concluded that deferral to arbitration was inappropriate and that an employer violated 8(a)(5) by changing, without the Union's consent, health insurance benefits, based on its finding that the changes constituted mid-term modifications within Section 8(d). With respect to the deferral question, the majority reasoned that the agreement unambiguously stated that the Respondent could not alter the contractually mandated premium co-share schedule and that the Union had to be given notice of any plan design amendments. The majority concluded that deferral was inappropriate because the applicable provision was unambiguous.

In *Mike-Sell's Potato Chip Co.***,** 361 NLRB No. 23 (2014), an employer decided that increases in health insurance deductibles and decreases in reimbursement rates and health savings account contributions were needed to help save costs. It sent the Union a reopener letter before the time period specified for reopeners in the existing contract. The company met with the Union over the proposed changes but nevertheless implemented the changes without the Union's consent. The Board found that the Employer violated Section 8(a)(5) by implementing changes during the middle of the contract term without obtaining the Union's consent and without following the procedures set forth in the agreement's reopener clause.

The General Counsel alleges that the Respondent unilaterally changed and therefore breached the following provisions of the collective-bargaining agreement in violation of Section 8(d). (1) The obligation to recall and/or lay off employees in order of seniority; (b) the obligation to make payments on behalf of bargaining unit employees to the Union's health and pension funds; (c) the obligation to deduct and remit union dues; and (d) the obligation to permit union representatives to visit the premises.

There is no question that in 2015, the Respondent failed to recall its regular full-time staff that had been laid off at the end of the 2014 season. Instead, the Respondent engaged a subcontractor to provide employees for parties held during the winter and then hired a group of other employees to replace the bargaining unit employees. Thereafter, after recalling some but not all of the regular full-time employees starting in August, it laid them off again before the end of the season, while retaining other employees who had less seniority. In my opinion, the contract provisions relating to layoffs and recalls clearly and unambiguously call for the application of seniority. This was

not done in this case, and the Respondent's breach of the contract was clear and unambiguous. I therefore conclude that in this respect, the Respondent violated Section 8(d) and 8(a)(5) of the Act.

Moreover, even if for some reason it could be argued that the contract language is subject to interpretive differences, the failure to recall and/or lay off the regular full-time bargaining unit employees in order of seniority, was a substantial change from past practice. As this was undertaken without notice or bargaining with the Union, I conclude that this unilateral change violated Section 8(a)(5) and (1) of the Act.

There is, in my opinion, nothing ambiguous about the provisions of the contract that require the Respondent to make contributions on behalf of bargaining unit employees to the Union's health and pension funds. The Respondent points out that under the collective-bargaining agreement, it is not required to make such payments for "summer employees." This is true, but those types of employees should not have been hired in the first place to displace the regular full-time employees and to deprive the latter of their contractual seniority recall rights. As I have concluded that the 17 full-time employees should have been recalled in March 2015, their entitlement to backpay would include any withheld contributions to the Union's health and pension funds. I therefore conclude that in this respect, the contract is unambiguous and that the Respondent violated Section 8(d) and 8(a)(5) of the Act.

With respect to the dues check-off provisions of the contract, it is admitted that the Respondent decided to cease making such deductions and to stop remitting those moneys to the Union. The Respondent contends that it could do so because the contract requires employees to sign authorizations permitting such deductions. Again this may be true, but the record shows that for many years, the Respondent has deducted and remitted dues for its regular employees. There is no requirement in the contract that employees reauthorize their check-off authorizations on any periodic basis. These employees have worked at the Respondent for a long time and some have worked there for almost 18 years. Because the Respondent has deducted and remitted dues and/or other periodic fees to the Union for such a long time, I shall presume, in the absence of evidence to the contrary, that those employees for whom dues and fees have been deducted and remitted, have authorized the Respondent to do so. Accordingly, I shall conclude that in this respect, the Respondent has violated Section 8(d) and 8(a)(5) of the Act.

The General Counsel contends that by refusing access to union representatives on April 16, 2015, the Respondent breached the access provisions of the contract. In this regard, the collective-bargaining agreement permits union representatives to visit the facility for a variety of purposes related to representation. Nevertheless, the contract requires, in the absence of an emergency, that the Union give a 1-day notice of an impending visit. The General Counsel argues that by past conduct, the Respondent has waived the notice requirement. And it might also be argued that the failure to recall the regular employees constituted an emergency. Nevertheless, those arguments relate to the interpretation of the contract and a reasonable argument can be made that the contract requires prior notice which was not given by the Union. Accordingly, in this respect, I shall recommend that this allegation of the complaint be dismissed.

However, having found that the Respondent's representative told employees that he had called the police because they congregated outside of the facility, I conclude that in this respect, it violated Section 8(a)(1) of the Act. These long term employees clearly had a right, pursuant to Section 7 of the Act, to concertedly ask when they were going to be recalled to work. Therefore, they had a right to be present outside of the Respondent's facility to engage in this concerted activity, even if it occurred on private property. As such, it is my opinion that a threat to call the police to thwart this activity violates Section 8(a)(1) of the Act. *Roger D. Hughes Drywall*, 344 NLRB 413, 415 (2005); *ITT Industries Inc. v. NLRB,* 413 F.3d 64 (D.C. Cir. 2005).

The General Counsel alleges that the Respondent "repudiated" the collective-bargaining agreement. As shown above, the evidence indicates that the Respondent sought to make substantial mid-term modifications in the collective-bargaining agreement and that in other respects, such as dues check-off and health and pension funds it sought to nullify those provisions. Nevertheless, the evidence does not suggest to me that the Respondent withdrew recognition from the Union and I cannot say that I would go so far as to conclude that it attempted to completely repudiate all of the terms of the contract.

Having found that the Respondent has violated Sections 8(a)(5) and 8(d) with respect to various provisions of the contract and having concluded that an appropriate remedy should be issued, I don't think that anything would be added to this case by a conclusory finding that the Respondent also repudiated the contract.

The Refusal to Furnish Information

The General Counsel argues that the information sought by the Union relates to the Employer's notification that it would rely on article 29 to seek a reduction in wage rates due to economic distress.

On December 9, 2014, the Respondent advised the Union that it was requesting a meeting pursuant to article 29 of the collective-bargaining agreement. This clause permits a signatory to the multiemployer agreement, to go before an arbitrator who can reduce the contract wage rates upon a finding that the company is in sufficient financial distress. The letter went on to state that the Club had suffered a downturn in membership and that; "if we do not hear from you by December 15, 2014, we will assume you agree with our contention and we will reduce payments to employees."

On April 22, 2015, the Union and the Respondent held a meeting with their respective lawyers present. The Respondent stated that the company was experiencing financial difficulties because it had lost membership and had to make cutbacks and adjustments. The Union's attorney asked if finances were so bad, how come the Club was building new facilities and making other renovations. She asked how much money was being spent on renovations. In response, the Respondent asserted that the costs of renovations were not relevant and that the Union was not entitled to such information. Regarding the possibility of an article 29 proceeding, the Union asked if the employees could be recalled while that proceeding was taking place. The

Respondent replied in the negative. The Union's counsel stated that if there was going to be an article 29 proceeding, the Union would need information and pointed out that the Respondent had not yet provided all of the information that had been requested in December 2014. She stated that a new list would be prepared and this was sent on April 29, 2015, with a followup letter in July.

Notwithstanding the employer's notification that it would seek Article 29 relief, it never followed through. Instead, deciding to throw caution to the winds, it engaged in self-help. And in response to the Respondent's actions of hiring replacement workers and subcontracting bargaining unit work, the Union did not follow through on its own set of grievances. Instead, the Union, as was its right, filed the instant unfair labor practice charges. Therefore, at this point in time, the information requested is no longer useful for the purpose of any contract enforcement procedure, either by the Union or the Company. That is, with both parties having foregone arbitration, the information can no longer be utilized for the purposes sought. Nevertheless, despite the current state of mootness, the issue before the Board is whether the Respondent, at the time of the requests, failed to timely furnish requested information that was relevant for some legitimate purpose. *Postal Service,* 359 NLRB No. 4, slip op. at 4 (2012).

Where an employer, either in response to union bargaining demands or in support of its own proposal, makes a claim of inability to pay, a union is entitled to request and review the employer's financial records to assess and substantiate the employer's representations about its financial condition. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Dover Hospitality Services*, 358 NLRB 710 (2012); *North Star Steel Co*., 347 NLRB 1364, 1369–1370 (2006); *R.E.C. Corp*., 307 NLRB 330, 332–333 (1992).

As of December 9, 2014, the Union had reason to assume that the Respondent would invoke arbitration under Article 29 based on an assertion that is equivalent to a claim of inability to pay the contract wage rates. The possibility of an article 29 proceeding was further discussed at a meeting on April 22, 2015. Accordingly, in preparation for the possibility of such a proceeding, the Union was entitled to find out the degree to which the Respondent's financial distress claims were valid and to what extent, if any, the company's actual finances would support an argument to an arbitrator that its request for relief should be granted.

The complaint sets forth those information requests that were either not provided, were partially provided, or provided late. These were as follows:

In the April 29, 2015 letter, the Union requested the events calendars for 2013, 2014, and 2015. The General Counsel posits that these calendars would show the events that took place at the club during each month of each of those years and would tend to show whether, over time, there was a diminution of this type of work. It is conceded that the Respondent provided the calendars for 2014 and 2015, but the Respondent did not provide the calendar for 2013. It is also asserted that calendars for the months of January in 2014 and 2015 were not provided.

Union attorney Barker testified that the Union sought these calendars in relation to the company's claim of economic hardship and that the calendars would be useful in either confirming or disproving that claim.

With respect to the calendars, I think that there is some limited relevance to the Union's request in light of the employer's inability to pay contention. I therefore conclude that because the Respondent did not fully comply with the request, the Respondent violated Section 8(a)(5) and (1) of the Act.

The complaint alleges that the Respondent failed to fully respond to the Union's request for the time cards for its bargaining unit employees from March and April 2015. As to this information request, the General Counsel asserts that the time cards would show how much the Respondent was spending on labor. Although one would think that the company's audited financial statements would be a good deal more revealing as to its financial health, I suppose that this request could have some bearing on the company's expenses and therefore would be relevant to its inability to pay claim. Accordingly, I conclude that in this respect, the Respondent violated Section 8(a)(5) of the Act.

By letter dated April 29, 2015, the Union requested the audited financial statement for 2014. It also asked for financial or operations reports that are provided to the Club's members for the years 2012, 2013, and 2014. And by letter dated July 24, the Union requested the monthly profit and loss statements for the current and the past 3 fiscal years.[8]

The evidence was that the Respondent, in May 2015, provided a copy of its 2013 financial statement. Thereafter, in September, the Respondent provided a draft copy of its annual financial statement for 2014. It ultimately provided the final draft of its 2014 financial statement on February 29, 2016. The Respondent did not provide the Union with a copy of its 2012 financial statement.

Assuming that these union requests encompassed audited financial statements for the years, 2012, 2013, and 2014, it seems that the Respondent failed to supply the 2012 statement, but did supply the 2013 report in a timely fashion. As to the 2014 financial statement, it may be that this statement had not been prepared by the company's accountants until September 2015 and was not fully completed until early 2016. But the Respondent did not proffer evidence suggesting that this was the problem and in its absence, I shall conclude that in this respect it violated Section 8(a)(5) of the Act. I also conclude that by failing to furnish the 2012 financial statement, the Respondent violated Section 8(a)(5) and (1) of the Act.

The April 29 letter requested disbursement ledgers for the current year and for the preceding 3 fiscal years. In response, the company provided its disbursement reports for 2013, 2014, and 2015. It did not provide the 2012 report. As I shall assume that these documents describe company payments made over each of the years covered, they would be relevant to its claim of inability to pay. It seems to me that these reports did not require the gathering of information in order to compile a yearly summary. Therefore, it does not appear that providing the dis-

[8] I am going to assume for purposes of this proceeding that any financial and/or operation reports that are made available to the Club's membership would be the same or equivalent to its audited annual financial reports.

bursement ledger for 2012 would have been onerous. Accordingly, I conclude that in failing to provide the disbursement ledger for 2012 the Respondent violated Section 8(a)(1) of the Act.

At the meeting of April 22 and by letter dated April 29, the Union requested: (a) agreements for leases relating to the operation or management of the Respondent, the land upon which it is located and/or the building in which the Respondent is located in; and (b) any agreements for construction, renovation or rehabilitation of any of the facilities, premises and grounds for the current year and for the preceding 3 fiscal years.

As to the first of these requests, I frankly don't see what relation there is between the ownership of the land and any leases to the Respondent's inability to pay claim. Does the Union contend that the company's financial problem could be solved by selling the 18th hole? In any event, the General Counsel's Brief does not address this request and I shall assume that this claim is dropped.

As to the second of these requests, attorney Barker testified that the Union asked for information about construction and/or renovation projects because it didn't seem that the company's inability to pay claim was consistent with what looked like its construction projects. In this respect, I can see how the Union's request for this type of information could be relevant to the Respondent's claim of financial distress. Therefore to the extent that the company did not provide this information, I conclude that it violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. By subcontracting out bargaining unit work, without notice to the Union or affording it an opportunity to bargain over the decision, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. By failing to recall regular full-time employees in accordance with the seniority provisions of the collective-bargaining agreement, the Respondent has unilaterally modified the provisions of its collective-bargaining agreement during its term, and having done so without the Union's consent, it has violated Section 8(a)(5) & (1) and Section 8(d) of the Act.

3. By failing to abide by the seniority provisions of the collective-bargaining agreement when laying off employees, the Respondent has, without the consent of the Union, unilaterally modified the contract during its term, and has violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

4. By unilaterally and without offering to bargain with the Union, failing to recall employees in order of seniority and by laying off employees without regard to seniority, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By refusing to deduct union dues on behalf of bargaining unit employees, and failing to remit them to the Union, the Respondent, in the absence of the Union's consent, has modified the collective-bargaining agreement during its term, and has violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

6. By refusing to make contributions on behalf of bargaining unit employees to the Union's health and pension funds, the Respondent, in the absence of the Union's consent, has modified the collective-bargaining agreement during its term, and has violated Section 8(a)(5) and (1) and Section 8(d) of the Act.

7. By threatening to call the police and then calling the police when employees visited the Respondent's facility in order to concertedly protest the failure to recall them to work, the Respondent violated Section 8(a)(1) of the Act.

8. By failing to fully and timely respond to the Union's request for financial information in response to the Respondent's claim of inability to pay, the Respondent violated Section 8(5)0 and (1) of the Act.

9. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

With respect to the subcontracting issue, it is recommended that the Respondent be ordered to cease and desist from engaging in subcontracting of bargaining unit work, absent good faith bargaining with the Union. It is also recommended that to the extent that bargaining unit employees were not offered employment for various functions, or recall to employment, or were laid off as a result of such subcontracting, these employees must be made whole for any loss of earnings and other benefits suffered. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

As to the failure to utilize contract seniority to recall regular full-time employees or to lay off such employees, they must be made whole for any loss of earnings and other benefits suffered. In this respect, backpay would run from the dates in March 2015 that employees would reasonably have been expected to be recalled, until the dates that they were actually recalled. Also, to the extent that employees were laid off out of contractually defined seniority in the autumn of 2015, the backpay period would be the dates of their layoffs to the dates that they normally would have been laid off or until December 31, 2015, which is the date that the season normally ends. Backpay for this set of employees shall also be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate these employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

With respect to the failure to make contributions on behalf of

employees to the Union's pension and welfare funds, the Respondent must make these contractually required payments in accordance with the terms of the collective-bargaining agreement. As to this aspect of the Remedy, the make-whole remedy shall be computed in accordance with the practice set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971*),* plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Further, if any employees have incurred losses because of the Respondent's termination of payments to the Welfare Fund, or if the Union has paid such employee claims, it is recommended that the Respondent reimburse, with interest, either the employee or the Union for such losses. See *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981); *Oakland Physicians Medical Center, LLC d/b/a Doctors' Hospital of Michigan*, 362 NLRB No. 149 (2015); and *Brooklyn Hospital Center*, 344 NLRB 404 (2005).

With respect to the failure to deduct union dues and fees and to remit such moneys to the Union, the Respondent must make these contractually required payments to the Union, with interest in accordance with the practice set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971*),* plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). However, if the Respondent can prove at the compliance stage of this proceeding, that any of the employees for whom dues were not deducted had never signed a dues check-off authorization, then the Respondent would be excused from making such payments on behalf of those particular persons. It should be kept in mind that it is the Respondent that would have the burden of proof.

Regarding the failure to furnish information violations, the Respondent shall be ordered to cease and desist from refusing to furnish financial information, if in the future, it makes a claim of inability to pay wages or other terms and conditions of employment. However, the claim in this case, is essentially moot. This claim of inability to pay was made in December 2014 and repeated in April 2015 in connection with the Respondent's assertion that it might seek arbitration pursuant to article 29 of the contract. This provision allows an arbitrator to lower the contractual wage rates upon a showing of undue financial hardship. Notwithstanding the company's notification that it might initiate that procedure, it never actually did so. And since the Union's need for financial information was tied to the company's intention to utilize the article 29 procedure, that need no longer existed after it became clear that the Respondent did not, in fact, intend to initiate that procedure. When the company took self-help action, the Union filed these unfair labor practice charges, which put the issues and the remedy within the sole jurisdiction of the Board. And if the General Counsel needs to acquire any information for purposes of determining backpay, she has the means to do so.

In light of this unusual set of circumstances, I do not think that the information requested is any longer relevant to the purpose for which it was sought. Therefore, despite issuing a cease and desist order, I shall not require the Respondent to furnish this information to the Union at this time.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

ORDER

The Respondent, Knollwood Country Club, Elmsford, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Making mid-term modifications in its collective-bargaining agreement with Unite Here, Local 100 by (i) failing to make contributions to the Union's pension and welfare funds; (ii) by failing to check off and remit to the Union, dues from employees within the bargaining unit; and (iii) by refusing to use seniority as required by the collective-bargaining agreement with respect to layoffs and recalls.

(b) Subcontracting out bargaining unit work without prior notification to the Union and without offering to bargain with the Union.

(c) Refusing to furnish in a complete and timely manner, the financial information requested by the Union where the Respondent has claimed an inability to pay the wages and benefits set forth in the collective-bargaining agreement.

(d) Threatening to call the police and calling the police when employees concertedly visit the Respondent's premises in order to protest their failure to be recalled to work.

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

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

(a) Resume making contributions to the Unite Here Local 100 pension and welfare funds as required by the collective-bargaining agreement.

(b) Resume checking off and remitting dues and other fees to the Union in accordance with the check off provisions of the collective-bargaining agreement with Unite Here Local 100.

(c) Resume utilizing seniority as set forth in the aforesaid collective-bargaining agreement for all purposes including layoffs and recalls.

(d) Make whole in the manner set forth in the Remedy section of this Decision, any employees who have suffered a loss by virtue of the failure to make contractually required contributions on their behalf to the Unite Here Local 100 pension and welfare funds.

(e) Make whole in the manner set forth in the remedy section of this decision, any employees who have suffered a loss by virtue of the unilateral subcontracting of bargaining unit work.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its fa-

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

cilities in Elmsford, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 2015.

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

Dated: Washington, D.C. June 9, 2016

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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT make midterm modifications in our collective-bargaining agreement with Unite Here, Local 100 by (i) failing to make contributions to the Union's pension and welfare funds; (ii) by failing to check off and remit to the Union, dues from employees within the bargaining unit; and (iii) by refusing to use seniority as required by the collective-bargaining agreement with respect to layoffs and recalls.

WE WILL NOT subcontract out bargaining unit work without prior notification to the Union and without offering to bargain with the Union.

WE WILL NOT refuse to furnish in a complete and timely manner, financial information requested by the Union where we have claimed an inability to pay the wages and benefits set forth in the collective-bargaining agreement.

WE WILL NOT threaten to call the police or call the police when employees concertedly visit our premises in order to protest their failure to be recalled to work or to engage in other protected concerted activity.

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

WE WILL resume making contributions to the Unite Here Local 100 pension and welfare funds as required by the collective-bargaining agreement.

WE WILL resume checking off and remitting dues and other fees to the Union in accordance with the check off provisions of our collective-bargaining agreement with Unite Here Local 100.

WE WILL resume utilizing seniority as set forth in the aforesaid collective-bargaining agreement for all purposes including layoffs and recalls.

WE WILL make whole any employees who have suffered a loss by virtue of the failure to make contractually required contributions on their behalf to the Unite Here Local 100 pension and welfare funds.

WE WILL make whole any employees who have suffered a loss by virtue of the unilateral subcontracting of bargaining unit work.

KNOLLWOOD COUNTRY CLUB

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02–CA–150410 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[10] 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."