

In the Supreme Court of the United States

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

—v—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following the commencement of a strike by Teamsters 174, et al., Oak Harbor Freight Lines, Inc. cancelled contributions to four Union Trust Funds in accordance with the Trust Funds' Subscription Agreements. Oak Harbor Freight Lines, Inc. and Teamsters 174, et al. subsequently reached an agreement on healthcare benefits pending the outcome of the strike and full contract bargaining. After the strike ended, Oak Harbor Freight Lines, Inc. placed returning strikers into its Company medical plan on an interim basis to avoid the "economic exigency" of a loss of healthcare coverage. Stated another way, Oak Harbor Freight Lines, Inc. applied the status quo of the interim healthcare agreement.

The decisions below held that Oak Harbor Freight Lines, Inc. lawfully ceased contributing to three of the four Union Trust Funds. However, the decisions below concluded that Oak Harbor Freight Lines, Inc. violated the National Labor Relations Act by ceasing contributions to the fourth Trust Fund and by unilaterally implementing its Company medical plan for returning strikers.

This case presents the following questions for review by the Supreme Court of the United States:

1. Under the legal principles of economic exigencies, may an employer implement a temporary medical plan, pending the resolution of a full labor agreement, and following good-faith bargaining on the subject?

2. Under the legal principles of equitable estoppel, should a party be estopped from challenging a

position, when such challenge is inconsistent with its prior silence and acceptance of certain facts?

3. Did the National Labor Relations Board exceed its statutory authority by imposing its own interpretation of an agreement inconsistent with the parties' express terms?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Oak Harbor Freight Lines, Inc., a for-profit closely-held corporation organized under the laws of the State of Washington. Oak Harbor Freight Lines, Inc. operates a multi-state transportation, delivery and logistics service business. Oak Harbor Freight Lines, Inc. has no corporate parents and no publicly-held corporation owns more than 10% or more of Oak Harbor Freight Lines, Inc.'s stock.

The Respondent is the National Labor Relations Board.

The International Brotherhood of Teamsters, Local Teamsters Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 were Intervenors in the proceeding before the United States Court of Appeals for the District of Columbia Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Oak Harbor Freight Lines, Inc. respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 2, 2017.



OPINIONS BELOW

The May 2, 2017 opinion of the United States Court of Appeals for the District of Columbia Circuit (“Court of Appeals”) is reported as *Oak Harbor Freight Lines, Inc. v. National Labor Relations Board*, 855 F.3d 436 (D.C. Cir. 2017). The October 31, 2014 final decision and order of the National Labor Relations Board (“NLRB” or “Board”) is reported at 361 NLRB No. 82 (October 31, 2014). The NLRB’s October 31, 2014 final decision and order incorporates by reference the NLRB’s May 16, 2012 decision and order, reported at 358 NLRB No. 41 (May 16, 2012).



STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on May 2, 2017. Oak Harbor Freight Lines, Inc. filed a petition for rehearing *en banc* with the Court of Appeals on June 14, 2017. Oak Harbor Freight Lines, Inc.’s petition for rehearing *en banc* was denied on

July 7, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTES AND REGULATIONS INVOLVED

- **28 U.S.C. § 1254(1)**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

- **29 U.S.C. § 158(a)(1), (a)(5), and (d); Sections 8(a)(5), (a)(1), and (d) of the National Labor Relations Act**

- (a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

[. . .]

- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[. . .]

- (d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual

obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

- **29 U.S.C. § 160(a), (e)-(f)**

- (a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the detective of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

[. . .]

- (e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evi-

dence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in

the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

- **29 U.S.C. § 185;**
Section 301 of the Labor Management Relations Act

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

amount in controversy or without regard to the citizenship of the parties



STATEMENT OF THE CASE

This case presents important questions of federal law concerning the interactions between employers and unions. Supreme Court review is compelled here to resolve important legal questions which have been decided in a way that conflict with Supreme Court precedent and to resolve a circuit split concerning existing labor law principles.

The Board in this case concluded that Oak Harbor Freight Lines, Inc. (“Oak Harbor” or “the Company”) violated Sections 8(a)(5) and (1) of the National Labor Relations Act by unilaterally ceasing benefits contributions to a Union Trust Fund and by unilaterally applying its Company medical plan to returning strikers. The Court of Appeals affirmed the Board’s decision.

Contrary to the conclusions of the Board and the Court of Appeals, federal labor law on “economic exigencies” permitted Oak Harbor’s placement of returning strikers in its Company medical plan. Oak Harbor bargained in good faith with Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, “the Union”) over interim healthcare benefits for returning strikers, pending the outcome of full labor agreement negotiations. Following impasse on this subject, Oak Harbor applied the Company medical plan to the returning strikers

so that they would have medical coverage. The Board's and the Court of Appeals' decisions rejected the legal principles of "economic exigencies," which permit employers to implement interim measures pending the resolution of full contract negotiations. This issue presents an important question of federal law concerning bargaining obligations and an employer's ability to implement time-sensitive proposals while ongoing contract negotiations continue. This issue additionally highlights a circuit split among the federal Courts of Appeals concerning the elements of "economic exigency," warranting Supreme Court review. Supreme Court Rule 10(a). Furthermore, the question presented here concerning "economic exigency" has not been, but should be, settled by this Court. Supreme Court Rule 10(c).

The Board's and the Court of Appeals' decisions further contradict Supreme Court precedent on the legal principles of "equitable estoppel." In the instant case, Oak Harbor announced its intent to cancel a Subscription Agreement, which Oak Harbor reasonably believed was in existence. Oak Harbor's understanding was that the Subscription Agreement contained a cancellation provision, which permitted it to cease contributing to a Union Trust Fund (the "Oregon Trust").

The Union also acted in conformance with the parties' understanding and belief that an Oregon Trust Subscription Agreement existed, containing a benefits cancellation provision. Not once during the timeframe at issue did the Union proclaim that the Subscription Agreement did not exist. Not once did the Union assert that Oak Harbor's cancellation of

Oregon Trust contributions was void due to the lack of a Subscription Agreement cancellation clause. In fact, the Union demanded that Oak Harbor sign new Subscription Agreements and a new Interim Labor Agreement at the conclusion of the strike to reinstate benefits contributions. The Union did not challenge the existence of the Oregon Trust Subscription Agreement until long after Oak Harbor cancelled contributions. The Union instead acted consistently with its own understanding and belief that the Subscription Agreement existed. Despite these facts, the Board and the Court of Appeals rejected Oak Harbor's arguments that the Union should be estopped from belatedly challenging the existence of the Oregon Subscription Agreement. In so holding, the Court of Appeals applied an incorrect standard for assessing equitable estoppel. The Court of Appeals' decision conflicts with relevant decisions of this Court and compels Supreme Court review. Supreme Court Rule 10(c).

Supreme Court review is further warranted in this case because the Board exceeded its statutory authority in its interpretation of an agreement reached between the parties in October 2008. The Court of Appeals rubber-stamped the Board's improper alteration of the parties' temporary benefits agreement. The parties expressly agreed to an interim benefits arrangement, pending the outcome of both the strike and full labor agreement negotiations. Instead of enforcing this agreement, the Board impermissibly substituted its own interpretation of the agreement to limit its duration to the strike. The Board's and the Court of Appeals' decisions contradict relevant Supreme Court precedent on this important subject. Supreme Court review is,

therefore, necessary in accordance with Supreme Court Rule 10(c).

A. Procedural History.

The General Counsel issued a consolidated complaint in the underlying Board proceeding on June 29, 2009. Oak Harbor was named as the Respondent in the NLRB proceedings below. The complaint was amended multiple times. On May 24, 2010, Counsel for the General Counsel issued its fourth amended complaint, and the Regional Director for Region 19 of the NLRB issued a notice of hearing.

A trial was held in this matter from July 6 to 20, 2010, in Seattle, Washington. The Administrative Law Judge (“ALJ”) issued a decision on January 5, 2011 (App.45a-104a). The parties subsequently filed exceptions and cross-exceptions with the NLRB.

On May 16, 2012, the NLRB issued a decision and order (358 NLRB No. 41) (App.29a-44a). That decision and order was the subject of review proceedings before the Court of Appeals and was ultimately remanded to the NLRB on August 1, 2014. (D.C. Circuit Case Nos. 12-1226, 12-1358, and 12-1360).

On October 31, 2014, the Board issued the final decision and order on review in this proceeding (361 NLRB No. 82) (the Board’s “decision”), which incorporated by reference its May 16, 2012 decision (358 NLRB No. 41) (App.17a-28a). On November 4, 2014, Oak Harbor timely filed a petition for review of the Board’s decision with the Court of Appeals. The National Labor Relations Act (“the Act” or “NLRA”) sets no time limit for petitions for review. On November 4, 2014, the Teamsters Union Local 174, et al.,

filed a petition for review in the United States Court of Appeals for the Ninth Circuit involving the same underlying Board decision.

On December 19, 2014, the Ninth Circuit transferred the Union's petition for review to the D.C. Circuit Court of Appeals pursuant to an order of the United States Judicial Panel on Multidistrict Litigation. (Doc. Nos. 1524800, 1526524.) On January 5, 2015, the NLRB filed a cross-application for enforcement of its decision. The Court of Appeals consolidated these related cases by orders dated December 10, 2014 and January 13, 2015.

The NLRB had jurisdiction over the underlying unfair labor practice charges pursuant to 29 U.S.C. § 160(a). The Court of Appeals had jurisdiction over the consolidated cases pursuant to 29 U.S.C. § 160(e)-(f).

The Court of Appeals issued its decision in this matter on May 2, 2017. Oak Harbor files this petition for a writ of certiorari in accordance with 28 U.S.C. § 1254(1). The background facts of this matter are set forth below.

B. Background Facts.

1. The Expired Labor Agreement and Inception of the Strike.

Oak Harbor is a freight transportation company located in the Pacific Northwest. Teamsters Union Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (collectively, "the Union") represent Oak Harbor employees in Washington, Oregon, and Idaho. (App.262a-263a). The last collective bargaining agree-

ment between Oak Harbor and the Union expired on October 31, 2007. (App.262a, 270a).

In August 2007, Oak Harbor and the Union began negotiating a successor labor agreement. (App.152a). However, despite approximately 30 bargaining sessions, including 2 pre-strike mediation sessions, the parties still had no agreement over a year later. (App.152a-153a). Oak Harbor hand-delivered a last best and final offer to the Union on September 22, 2008. *Id.* The Union struck later that same day. (App.153a).

2. The Cancellation of Benefits Contributions, and the Trust Funds' Refusal to Accept Contributions after September 30, 2008.

The expired labor agreement contained Taft-Hartley benefit plans for the Western Conference of Teamsters Pension Trust, the Washington Teamsters Welfare Trust, the Oregon Warehouseman's Teamsters Trust ("Oregon Trust"), and the Washington Retirees Welfare Trust (collectively referred to as the "Trust Funds"). (App.263a-269a).

At least three of the above-referenced Union Trust Funds required the Union, Oak Harbor, and the Union Trust Funds to sign Subscription Agreements¹ containing various contractual payment promises and a cancellation provision. (App.274a-319a). The Subscription Agreements, executed by Oak Harbor, the Union, and the Union Trust Funds, permitted either Oak Harbor or the Union to terminate

¹ The term "Subscription Agreement" used in this petition is also used to refer to the Employer-Union Certification required by the Western Conference of Teamsters Pension Trust.

contributions to the Trust Funds upon contract expiration and five days' written notice. (App.277a, 281a-282a, 287a-288a, 295a-296a, 304a-305a, 313a-314a). Following the commencement of the Union's strike, Oak Harbor exercised its right to cease contributing to the Union Trust Funds consistent with the cancellation provision in the parties' Subscription Agreements. (App.320a-327a). Both the Board and the Court of Appeals concluded that Oak Harbor lawfully ceased contributing to three Union Trust Funds, but not with respect to the Oregon Trust.

At the time it sent its cancellation notices to the Union and the four Union Trust Funds, Oak Harbor was unable to verify the existence of a signed Subscription Agreement for the Oregon Trust. (App.213a-216a, 258a-259a). The Union and Oak Harbor had negotiated into the Oregon Trust in 1995. (App.328a-332a). Oak Harbor believed it had executed a Subscription Agreement for the Oregon Trust, as it had done for the three other Union Trust Funds. (App.213a-216a, 258a-259a, 274a-319a). The Oregon Trust's administrators said they believed they had an executed Subscription Agreement on file for the Oregon Trust, as well. (App.154a-156a). (The Oregon Trust's administrators were also responsible for administering the other three Union Trust Funds. (App.107a-108a, 154a).) The Union also never proclaimed that Oak Harbor was mistaken concerning the existence of the Oregon Trust Subscription Agreement. (App.109a-112a, 134a-138a, 143a-150a, 156a-210a, 224a-254a, 271a-273a, 349a-373a, 376a-395a).

Following September 2008, each of the four Union Trust Funds refused to accept contributions for bar-

gaining unit employees because Oak Harbor had cancelled the Subscription Agreements (including the Oregon Trust). (App.212a-213a, 215a-218a, 320a-327a, 333a-348a). The Union was fully aware of the Trust Funds' (including the Oregon Trust's) refusal to accept contributions following Oak Harbor's cancellation notices. Oak Harbor and the Union discussed this fact on several occasions: in Oak Harbor's October 3, 2008 memorandum to the Union (App.349a-351a); in FMCS mediation on October 9, 2008 (App. 156a-159a); in October and November 2008 correspondence (App.352a-373a); in the parties' February 17, 2009 meeting (App.162a-171a); in February 2009 correspondence (App.376a-395a); and in several telephone conversations between Union representatives and Employer representatives in February 2009 (App.109a-112a, 135a-138a, 163a-210a, 224a-254a). Not once did the Union proclaim that no Oregon Subscription Agreement existed, despite having numerous opportunities to do so. *Id.*²

² The first time Oak Harbor heard that no Subscription Agreement was required for the Oregon Trust was at the July 2010 hearing in this matter. The Board's and the Court of Appeals' decisions that the Oregon Trust did not require a Subscription Agreement were based upon Administrator Mark Coles' July 2010 testimony that the Oregon Trust could accept contributions without a Subscription Agreement and without a new labor agreement. (App.139a-143a). However, the Board and the Court of Appeals inexplicably ignored the critical part of Coles' testimony: that the Oregon Trust could accept contributions without a Subscription Agreement if the ALJ issued an order requiring Oak Harbor to contribute to the Trust. (*Id.*) Moreover, this decision was made only one week before the trial in this matter. (App.139a-141a).

3. October–December 2008: Negotiations Regarding Benefits During the Strike.

In response to the Trust Funds' refusal to accept contributions, Oak Harbor and the Union negotiated an interim benefits arrangement during the strike, pending the outcome of the strike and full contract negotiations. (App.156a-159a, 349a-351a, 369a-373a). In October 2008, Oak Harbor and the Union agreed to the following interim benefits arrangement: (1) place the pension contributions in an Oak Harbor escrow account on behalf of crossovers³; (2) temporarily cover crossovers under the Company medical plan; and (3) place retirees trust contributions in an Oak Harbor escrow account. (App.349a-351a). The parties agreed this would be a temporary arrangement, pending the outcome of overall contract negotiations and the strike. (App.59a-60a, 156a-159a, 349a-351a, 369a-373a).

In December 2008, the Oregon Trust's attorney sought clarification from Oak Harbor about health and welfare contributions made on behalf of four employees whom the Oregon Trust's attorney believed were crossover employees. (App.215a-216a). The Oregon Trust claimed those employees should be covered under the Company medical plan, not the Oregon Trust. *Id.* No Oregon Trust representative asserted that Oak Harbor's cancellation of an Oregon Subscription Agreement was void due to the lack of such an agreement. (App.214a-218a, 345a-346a). No Oregon Trust representative asserted that the Oregon Trust would

³ *I.e.*, bargaining unit employees who crossed the picket line to work during the strike.

accept contributions. *Id.* In fact, the Oregon Trust took the opposite position – it refused to accept contributions. *Id.*

4. February 2009: End of the Strike and Post-Strike Negotiations Regarding Benefits for Returning Strikers.

On February 12, 2009, the Union sent Oak Harbor a letter stating that the strike was ending, and the Union was making an unconditional offer to return to work. (App.374a-375a).

On February 17, 2009, the Union and Oak Harbor representatives met to discuss the strikers' orderly return to work. (App.161a-171a, 228a-235a). At the meeting, Oak Harbor proposed to the Union that the parties maintain the status quo for returning strikers' benefits contributions. (App.271a-273a) Oak Harbor reminded the Union that the Trust Funds were still not accepting contributions for hours compensated after September 30, 2008. *Id.* Thus, Oak Harbor proposed that the parties continue: (1) escrowing pension contributions; (2) escrowing retirees' health and welfare contributions; and (3) covering the returning strikers under the Company medical plan. *Id.*

The Union was displeased. The Union expected Oak Harbor to sign new Subscription Agreements and to initiate contributions back into the Union Trust Funds. (App.223a-224a, 237a-239a). The February 17, 2009 meeting ended with the Union proclaiming that its return was "in neutral." (App.171a, 235a). The strikers did not return to work until February 26, 2009. (App.211a).

A new development occurred on February 18, 2009. The Union Trust Funds conditioned their acceptance of new contributions upon the Union's and Oak Harbor's execution of: (1) new Subscription Agreements and (2) a new Interim Labor Agreement to support the underlying Subscription Agreements. (App. 376a-381a). (The Subscription Agreements required the existence of a valid underlying labor agreement.) The Union therefore demanded that Oak Harbor sign new Subscription Agreements and an Interim Labor Agreement to reinstate contributions to the Union Trust Funds. (App.176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a).

Presented with these facts, Oak Harbor bargained in good faith with the Union regarding a temporary benefits arrangement for the returning strikers – as it had done with respect to the crossover employees in October 2008. (App.108a-133a, 176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a). Oak Harbor even proposed an alternative, middle-ground offer to the Union (Union pension, Company medical, and escrow retirees' health and welfare) in an effort to reach an agreement prior to the strikers' return to work. (App.186a-188a, 192a-193a, 203a). This middle ground was flatly rejected. Instead, the Union maintained a hardline stance, demanding that Oak Harbor sign its Interim Labor Agreement and new Subscription Agreements. (App.176a, 183a-194a, 202a-203a, 243a-251a, 376a-381a, 390a-395a). No agreement was reached. The Union was unwilling to negotiate further. (App.203a).

By the time the strikers returned to work on February 26, 2009, Oak Harbor and Union represent-

atives had discussed the benefits issue by telephone on seven separate occasions. (App.108a-133a, 175a-203a, 241a-254a, 376a-381a, 390a-395a). The parties bargained over benefits for returning strikers to no avail. *Id.* The parties acknowledged and understood that they would continue to bargain healthcare benefits in overall contract negotiations. (App.135a-137a, 189a-190a, 197a-198a, 224a-227a, 242a-254a, 271a-273a, 349a-351a, 376a-378a, 387a-389a, 390a-395a). However, the parties were unable to reach an interim agreement for the returning strikers' medical coverage, pending the outcome of full contract negotiations. *Id.* To avoid a loss of healthcare coverage for the returning strikers, while full contract negotiations continued, Oak Harbor applied the status quo of Company medical benefits to the returning strikers. (App.210a-211a, 220a-223a, 254a-257a, 260a, 271a-273a, 384a-386a). The Union later filed unfair labor practice charges with the Board, which included the matters before this Court.



REASONS FOR GRANTING THE WRIT

A. SUPREME COURT REVIEW IS NECESSARY TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LABOR LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. SUPREME COURT REVIEW IS FURTHER COMPELLED TO RESOLVE A CIRCUIT SPLIT CONCERNING “ECONOMIC EXIGENCIES.”

1. This Case Presents an Important Question of Federal Law Concerning Healthcare Coverage and Bargaining Obligations.

Supreme Court review is compelled here to resolve an important question in federal labor law. Namely, under what circumstances an employer may lawfully implement a time-sensitive matter for employees represented by a union, pending the outcome of full labor agreement negotiations. Supreme Court review is necessary to provide employers and unions nationwide, clear guidance on parties’ bargaining obligations and implementation rights when time-sensitive matters must be addressed prior to the completion of full contract negotiations.

The question presented here is of great importance to parties in bargaining relationships, and is especially relevant in circumstances when bargaining does not result in swift agreement nor complete impasse. It is bargaining unit employees who suffer the consequences when their employers and unions are engaged in protracted contract negotiations. Supreme Court review

is necessary to affirm an avenue for implementing interim measures pending the outcome of full contract negotiations. This case presents a prime opportunity to address parties' bargaining obligations when facing "economic exigencies." The question at issue here has not been, but should be, decided by this Court for all of the reasons set forth below.

2. The Subject Matter of Continued Healthcare Coverage is of Significant National Importance.

At the heart of the dispute in the Oak Harbor case was medical coverage. In particular, what to do about healthcare benefits for returning strikers until the parties reached an overall labor agreement. The importance of healthcare coverage is well recognized on the national stage. Congress has enacted several laws to ensure healthcare coverage is available to employees, who might otherwise be without such coverage. Examples include: the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2614 (requiring employers to maintain employees' healthcare coverage for duration of FMLA leave); the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. §§ 1162-1163 (providing for continuation of healthcare coverage to employees following qualifying events, such as employment separation); the Patient Protection and Affordable Care Act ("ACA"), 26 U.S.C. § 4980H (mandating that employers provide healthcare coverage to employees or face tax penalties). Healthcare issues remain front and center on the national stage as Congress continues to debate potential changes to existing healthcare law. The issue of healthcare coverage is of crucial significance, extending well beyond the parties to the instant proceeding.

In this case, Oak Harbor implemented a Company medical plan for returning strikers in February 2009, which was necessary to avoid a lapse in healthcare coverage. (App.210a-211a, 220a-223a, 271a-273a, 384a-386a). Prior to placing returning strikers in the Company medical plan, Oak Harbor bargained with the Union in good faith until the parties reached impasse on this subject. (App.109a-112a, 135a-138a, 163a-210a). The Court of Appeals concluded that continued healthcare coverage was not of such “overriding importance” to justify implementation. (App. 16a). Instead, the Court of Appeals’ and the Board’s decisions would leave employees without healthcare coverage until a full labor agreement is reached, rather than permit an employer to implement a temporary healthcare plan following impasse on this subject. It is difficult to imagine what bargaining subject could be of greater significance than a time-sensitive effort to avoid a complete absence of healthcare coverage.

3. The Imminent Loss of Healthcare Coverage was a Time-Sensitive Bargaining Issue Warranting Implementation Pending Full Contract Negotiations. This was an “Economic Exigency.”

In general, an employer engaged in bargaining with a union may not take unilateral action absent impasse in overall contract negotiations. *Bottom Line Enters.*, 302 NLRB 373, 373-74 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994). “A bargaining impasse – which justifies an employer’s unilateral implementation of new terms and conditions of employment – occurs when ‘good faith negotiations have exhausted the

prospects of concluding an agreement’ . . . leading both parties to believe that they are ‘at the end of their rope.’” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1130 (2002) (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.*, 395 F.2d 622 (D.C. Cir. 1968); *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.*, 836 F.2d 289 (7th Cir. 1987)).

However, exceptions to the general rules apply. Relevant to the instant proceeding is the exception involving “economic exigencies.” Federal labor law recognizes that such matters of “overriding importance” may arise in the midst of ongoing contract negotiations, which require prompt action – such as the imminent loss of healthcare coverage. *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005). An employer does not violate the National Labor Relations Act by implementing healthcare coverage in such circumstances, even in the absence of an impasse in overall contract negotiations. *Id.* Rather, the law permits an employer to address such “economic exigencies” by providing the union with adequate notice and an opportunity to bargain – even in the midst of ongoing, full contract negotiations. *RBE Electronics*, 320 NLRB 80, 81-82 (1995). As the Board has explained:

[T]here are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* [302 NLRB 373 (1991)] exception. Thus, in *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), a case predating *Bottom Line*, the adminis-

trative law judge acknowledged that when negotiations for a contract are ongoing, matters may arise where the exigencies of a situation require prompt action for which bargaining is appropriate. The judge noted that in these and other related circumstances, “management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining.” *Dixon*, 211 NLRB at 244. When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole should not apply. Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

RBE Electronics, 320 NLRB 80, 81-82 (1995) (emphasis added).

The NLRB has previously found that a lapse in healthcare coverage satisfies this “economic exigency” exception to the general requirement that parties bargain to impasse on full contract negotiations prior to implementation of a single issue. *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005) (the Board found an economic exigency permitted the employer to implement a new healthcare plan to avoid a lapse in coverage, pending the outcome of full contract negotiations); *Electrical South, Inc.*, 327 NLRB 270, 270-71 (1998) (the Board held that the employer did not violate the Act by implementing an interim health insurance plan in the midst of ongoing contract negotiations to avoid an imminent lapse in health insurance).

Despite this precedent, both the Board and the Court of Appeals arbitrarily rejected Oak Harbor’s economic exigency arguments. The Board and the Court of Appeals’ decisions beg the question: Under what circumstances may an employer implement an interim, time-sensitive proposal pending the outcome of full contract negotiations?

This is not a matter of an employer trying to circumvent its collective bargaining obligations. To the contrary in the instant case, Oak Harbor and the Union fully understood that healthcare coverage remained a negotiable subject in full contract bargaining. The problem was that the parties were not any closer to a full labor agreement after the strike ended than they were before the strike began. Knowing that a full labor agreement would not be in

place by the time the strikers returned to work, Oak Harbor bargained in good faith with the Union over the returning strikers' benefits. Oak Harbor was willing to meet the Union in the middle on an interim measure pending the outcome of the parties' full contract negotiations. The Union refused to negotiate.

The Board and the Court of Appeals concluded that Oak Harbor should have let its employees go without medical coverage. Oak Harbor strongly disagrees that the law should require a lapse in coverage rather than a temporary benefits arrangement when the bargaining parties fail to reach agreement within a certain timeframe. Interim measures should be favored, not prohibited, in such circumstances.

These circumstances are not unique to Oak Harbor. Employers and unions nationwide would benefit from Supreme Court review of this case to expound upon parties' bargaining obligations and implementation rights in the face of time-sensitive matters arising in the midst of ongoing contract negotiations. The NLRB has held that exceptions exist under federal labor law to the general rules prohibiting unilateral implementation absent full contract impasse (*e.g.*, "economic exigencies"). However, the Board's departure from its own precedent (*Mail Contractors of America, supra*) in the instant proceeding, rubber-stamped by the Court of Appeals, directly undercuts the existence of this labor law principle.

The realities of bargaining between employers and unions include necessary resolution of time-

sensitive matters prior to full contract agreement or impasse. Rather than promote bargaining in good faith on important, time-sensitive interim measures, the Board and the Court of Appeals' decisions would have employers instead rush to impasse in full contract negotiations in order to implement a single, interim measure. Such an outcome is wholly inconsistent with labor law principles designed to promote labor peace and collective bargaining. This Court should review this case to uphold good-faith bargaining principles in the face of "economic exigencies." Compelling reasons exist here for granting Oak Harbor's writ of certiorari to resolve this important matter in accordance with Supreme Court Rule 10(c).

4. Supreme Court Review is Further Necessary to Resolve a Circuit Split in Defining "Economic Exigency."

The Court of Appeals' decision additionally highlights a circuit split concerning this important matter compelling Supreme Court review. Federal Circuit Courts of Appeals disagree over the test for demonstrating "economic exigency." The D.C., Second, Sixth, and Tenth Circuits follow one test, while the First and Eleventh Circuits use another test for "economic exigency." Resolution by this Court is necessary to definitively resolve this circuit split and end the confusion concerning this important matter.

The D.C., Second, Sixth, and Tenth Circuits utilize a two-part test, requiring the employer to prove the following to demonstrate "economic exigency": (1) that compelling business justifications require prompt action, and (2) the exigent circumstances were beyond the employer's control, caused by external events, or

not reasonably foreseeable. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000) (“[a]n economic exigency must be a ‘heavy burden’ and must require prompt implementation . . . [t]he employer must additionally demonstrate that ‘the exigency was caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.’”); *Cibao Meat Prod., Inc. v. NLRB*, 547 F.3d 336, 340 (2d Cir. 2008) (“economic exigency” only available under “circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action . . . “and the circumstances must present “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.”); *Pleasantview Nursing Home, Inc. v. NLRB* is instructive. 351 F.3d 747, 755-56 (6th Cir. 2003) (“economic exigency” requires a “compelling business justification,” requiring “prompt action” and “caused by external events, . . . beyond the employer’s control, or . . . not reasonably foreseeable.”); *Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1181 (10th Cir. 2003) (“economic exigency” applied only when “time is of the essence,” and “the exigency was caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.”).

The Courts of Appeals for the First and Eleventh Circuits use a different test to determine if the “economic exigency” exception has been met. These Circuit Courts merely require the employer demonstrate either “extenuating circumstances” or “a compelling business justification.” *See, e.g., NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 734 (11th Cir. 1998), *cert. denied*, 525 U.S. 1067, 119 S.Ct. 795, 142

L.Ed.2d 657 (1999) (articulating the standard as requiring “either a showing of extenuating circumstances or a compelling business justification.” *Id.* (internal quotation marks omitted) (emphasis added); *Visiting Nurse Servs. of W. Massachusetts, Inc. v. NLRB*, 177 F.3d 52, 56 (1st Cir. 1999) (citing *NLRB v. Triple A Fire Protection, Inc.* for “economic exigency” test).

In contrast to the D.C., Second, Sixth, and Tenth Circuits, the First and Eleventh Circuits do not require that the employer show both “extenuating circumstances” and a “compelling business justification.” Demonstrating either is sufficient to meet the “economic exigency” test in the First and Eleventh Circuits.

A definitive test established by the Supreme Court is necessary to bring uniformity and to eliminate confusion concerning when “economic exigencies” permit an employer to implement a time-sensitive condition of employment pending the outcome of full contract negotiations. Supreme Court Rule 10(a).

B. THE COURT OF APPEALS' DECISION REQUIRING AN AFFIRMATIVE ASSERTION TO APPLY "EQUITABLE ESTOPPEL" CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT. THE COURT OF APPEALS' DECISION RAISES AN IMPORTANT QUESTION OF THE REQUIRED ELEMENTS OF ESTOPPEL COMPELLING REVIEW.

1. The Court of Appeals' Decision Warrants this Court's Review, as it Conflicts with Relevant Supreme Court Precedent.

Supreme Court review is also compelled because the Court of Appeals decided an important federal question concerning estoppel in a way that conflicts with Supreme Court precedent. Supreme Court Rule 10(c). The Court of Appeals' decision rejected Oak Harbor's equitable estoppel arguments – which are based on the fact that both Oak Harbor and the Union operated under the assumption that a Subscription Agreement existed for the Oregon Trust – on the grounds that Oak Harbor had not presented “affirmative evidence that the Union had informed Oak Harbor that the subscription agreement existed.” (App.13a).

In requiring an affirmative representation, the Court of Appeals' decision appears to apply a standard applicable in cases involving governmental agencies. For example, the D.C. Circuit Court of Appeals has required a “definite representation” or “affirmative misconduct” upon which a party detrimentally relied when seeking to estop the government. *See, e.g., Graham v. S.E.C.*, 222 F.3d 994, 1007 n.24 (D.C. Cir. 2000) (recognizing that a heightened standard for analyzing estoppel claims is required when a litigant

is seeking to estop the government) (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 60, 104 S.Ct. 2218 (1984)); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988) (similar).

However, contrary to the Court of Appeals' decision, a claim of equitable estoppel under federal common law does not require an affirmative statement upon which Oak Harbor must have relied to its detriment. In requiring such a statement, the Court of Appeals' decision created a conflict with the decisions of this Court and other Circuit Courts of Appeals.

The Supreme Court has consistently held that conduct, silence, inaction, and acquiescence may all form the basis of an estoppel claim, so long as the other party relied to its detriment. The Supreme Court stated as early as 1879 that:

The law upon the subject [concerning equitable estoppel] is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden.

Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (1879) (holding that a former owner of land was estopped from later claiming the same land after his conduct led another to sell the land). *See, also*, *Boston & M. R. R. v. Hooker*, 233 U.S. 97, 145, 58 L. Ed. 868 (1914) ("Estoppel *in pais* presupposes an actual fault or a culpable silence"). The Supreme Court has affirmed this long-standing precedent as recently as 2013. *See, Heimeshoff v. Hartford Life & Acc. Ins.*

Co., 134 S.Ct. 604, 615, 187 L. Ed.2d 529 (2013) (“If the administrator’s conduct causes a participant to miss the deadline for judicial review, waiver or estoppel may prevent the administrator from invoking the limitations provision as a defense.”).

Supreme Court precedent is clear that silence and conduct can form the basis of equitable estoppel. An affirmative assertion is not required.

In Oak Harbor’s case, the Court of Appeals should have followed Supreme Court precedent. The Court of Appeals should have estopped the Union from taking a position contrary to its earlier conduct, silence, or acquiescence, upon which Oak Harbor relied to its detriment. Not once during the strike did the Union deny the existence of the Oregon Subscription Agreement. Not once during negotiations in 2009 concerning returning strikers’ medical coverage did the Union assert that no Subscription Agreement existed for the Oregon Trust. The Union remained unjustifiably silent when it should have spoken. The Union made no distinction between the Oregon Trust and the other three Union Trust Funds. Instead, the Union demanded that Oak Harbor execute an Interim Labor Agreement addressing benefits for both Washington and Oregon Teamsters members. The Union’s conduct evinced its understanding and belief, shared by Oak Harbor, that Oak Harbor had effectively cancelled an Oregon Trust Subscription Agreement.

By requiring an affirmative representation, the Court of Appeals’ holding altered the elements of estoppel in contravention of Supreme Court precedent. The principles of equitable estoppel have far-reaching implications for parties in bargaining and contractual

relationships. Courts should not condone a party's failure to raise a purported challenge in a timely manner to the detriment of the other party. Instead, federal courts should encourage fair dealing between parties in bargaining and contractual relationships. This includes barring legal claims based on facts in direct contradiction of a claimant's prior conduct (*i.e.*, equitable estoppel). Supreme Court review is compelled here in accordance with Supreme Court Rule 10(c).

2. The Court of Appeals' Decision Additionally Conflicts with the Law of its Sister Circuits and its Own Precedent.

The D.C. Circuit Court of Appeals' decision in this matter also conflicts with the equitable estoppel principles established in other Circuit Courts of Appeals. Black letter law, recognized by court after court, is that affirmative oral statements are not necessary to demonstrate equitable estoppel. *E.g.*, *Mabus v. Gen. Dynamics C4 Sys., Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011) (“[e]quitable estoppel requires: ‘(1) misleading conduct, which may include not only statements and actions but silence and inaction’” (internal citations omitted); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 726 (2d Cir. 2001) (“we hold that a party may be estopped where that party makes a definite misrepresentation (or, in the present case, a misrepresentation by silence”)); *Lovell Mfg., a Div. of Patterson-Erie Corp. v. Exp.-Imp. Bank of U.S.*, 777 F.2d 894, 898 (3d Cir. 1985) (“[e]stoppel requires 1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things;”) (internal citations omitted); *N.Y. Trust Co. v. Watts-Ritter & Co.*, 57

F.2d 1012, 1014-15 (4th Cir. 1932) (“Where a person . . . remains inactive for a considerable time, or by his conduct induces another to believe that he will not question a transaction, and that other, relying on such attitude, incurs material expenses, such person is estopped from impeaching the transaction to the other’s prejudice”) (internal citation omitted) (emphasis added); *In re Varat Enterprises*, 81 F.3d 1310, 1318 (4th Cir. 1996) (“ . . . [Defendant] reasonably relied upon [plaintiff’s] silence and passivity in withdrawing its own objection”); *Nat’l Am. Ins. Co. of California v. Certain Underwriters at Lloyd’s London*, 93 F.3d 529, 540 (9th Cir. 1996) (“The object of equitable estoppel is to ‘prevent a person from asserting a right which has come into existence by contract, statute or other rule of law where, because of his conduct, silence or omission, it would be unconscionable to allow him to do so.’”) (internal citations omitted); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 706 (9th Cir. 1989) (“[a] party, by his action or inaction, may cause another to act to his detriment”); *Crane Co. v. James McHugh Sons*, 108 F.2d 55, 59 (10th Cir. 1939) (“[s]ilence under circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred”).

The D.C. Circuit Court of Appeals also failed to follow its own precedent that holds a party may be estopped from challenging another party’s position by engaging in conduct demonstrating acquiescence (through inaction, silence, or otherwise). *Louis Werner Saw Mill Co. v. Helvering*, 96 F.2d 539, 542 (D.C. Cir. 1938) (when a party “does what amounts to a recogni-

tion of the transaction as existing, or acts in a manner inconsistent with its repudiation, or permits the other party to deal with the subject matter under belief that the transaction has been recognized, there is acquiescence”) (internal citations omitted); *Parker v. Sager*, 174 F.2d 657, 661 (D.C. Cir. 1949) (essential elements of equitable estoppel include “[c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert. . . .”) (quoting 19 Am. Jur., Estoppel, § 42).

Not surprisingly, the National Labor Relations Board also recognizes that a party’s conduct or silence may estop it from asserting a claim when another party reasonably relied on such conduct or silence to its detriment. *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1223 (2005) (citing *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961)); *see also Speidel Corp.*, 120 NLRB 733, 741 (1958) (Board found silence to constitute acquiescence and waiver where union failed to challenge the employer’s asserted interpretation of a bargaining proposal).

The D.C. Circuit Court of Appeals’ decision now creates a circuit split concerning the necessary elements of an equitable estoppel claim. Review of this matter is compelled to resolve this circuit split in defining estoppel. Supreme Court Rule 10(a).

C. SUPREME COURT REVIEW IS NECESSARY BECAUSE THE COURT OF APPEALS' AND THE BOARD'S DECISIONS CONTRADICT SUPREME COURT PRECEDENT AND ARE OUTSIDE THE AUTHORITY GRANTED TO THE BOARD.

Throughout the events at issue and the legal proceedings to date, Oak Harbor has maintained that its placement of the returning strikers into the Company medical plan, as of February 26, 2009, was the appropriate application of the “status quo.” (App.108a-133a, 175a-203a, 241a-254a, 271a-273a, 376a-381a, 390a-395a). The Union has disputed Oak Harbor’s understanding of the “status quo.” *Id.* As discussed previously in this petition, the parties bargained at length in February 2009 over the disputed “status quo” and what to do about benefits for the returning strikers, pending the outcome of full contract negotiations. Oak Harbor maintains that it fully satisfied its legal obligations to bargain in good faith with the Union over the returning strikers’ benefits. Oak Harbor further maintains that it lawfully placed the returning strikers in the Company medical plan following impasse on this issue. (*See* Oak Harbor’s healthcare economic exigency arguments above.) However, the same result – that Oak Harbor lawfully placed returning strikers in its Company medical plan – should have been affirmed by the Court of Appeals as a lawful continuation of the parties’ October 2008 bargained-for agreement. In other words, as a lawful continuation of the “status quo.”

Oak Harbor and the Union agreed that they would temporarily cover employees under the Company

medical plan pending the outcome of the strike and full contract negotiations. (App.156a-159a, 349a-373a). In enforcing the Board's order, the Court of Appeals claimed the record showed, "that the agreement on crossover employees during the strike was temporary and that Oak Harbor itself described it as an 'interim measure pending the outcome of bargaining and of the strike.'" (App.15a-16a). The Court of Appeals ignored the clear language of the parties' agreement: that the Company medical plan continue "pending the outcome of bargaining" – not just for the duration of the strike. The Board's decision, rubber-stamped by the Court of Appeals, impermissibly exceeded its statutory authority by altering the parties' October 2008 agreement. Such abuse of the Board's statutory authority must be reviewed and reversed by this Court.

The Board cannot compel or rewrite the specific terms of agreements between the parties. *See* Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d). Under the National Labor Relations Act, the Board is empowered to remedy unfair labor practices and "oversee and referee" interactions between the parties. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08, 90 S.Ct. 821, 25 L. Ed. 2d 146 (1970). The Board's authority is limited by Congress. *See id.* In its role as "referee," the Board is required to "leav[e] the results of the contest to the bargaining strengths of the parties . . ." rather than compel the parties to reach any specific agreement. *Id.* at 108.

"Agreements" between the parties do not need to be signed collective bargaining agreements to be enforceable in the labor law context. The Supreme Court, in interpreting Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185, expounded on the definition of what constitutes a binding agreement between a labor organization and an employer to those that are “significant to the maintenance of labor peace between them.” *Retail Clerks Int’l Assoc., Local 128, 633 v. Lion Dry Goods*, 369 U.S. 17, 28, 82 S.Ct. 541, 7 L.Ed.2d 503 (1962). In *Retail Clerks*, the Supreme Court broadly defined what constitutes an agreement or contract in the labor law context. 369 U.S. at 28. In that case, the Supreme Court determined that a strike settlement agreement between the union and the employer was a binding agreement under applicable labor law. *Id.*

In Oak Harbor’s case, the October 2008 agreement reached between Oak Harbor and the Union is a binding agreement. The parties evidenced their agreement through an exchange of written correspondence and verbal communications. (App.156a-159a, 349a-373a). The parties’ agreement was intended to provide medical coverage for bargaining unit workers pending the outcome of full contract negotiations. As the Supreme Court has provided, “federal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can be best obtained only in that way.” *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448, 455, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Here, the Board and the Court of Appeals should have simply followed the binding agreement reached between the parties, rather than alter the terms of the agreement to limit its duration to the strike. The Board’s contrary decision, improperly upheld by the Court of Appeals, conflicts with Supreme Court precedent and exceeds its statutory authority. Supreme

Court review is necessary to address the Board's improper attempt to exceed its statutory authority.



CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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OCTOBER 4, 2017

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OPINION OF THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
(MAY 2, 2017)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

TEAMSTERS 174 AND TEAMSTERS LOCAL
NUMBERS 81, 174, 231, 252, 324, 483, 589, 690,
760, 763, 839, AND 962,

Intervenors.

No. 14-1226

Consolidated with 14-1273, 15-1002

On Petitions for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before: GARLAND, Chief Judge, ROGERS, Circuit
Judge, and WILLIAMS, Senior Circuit Judge.

- *Peter N. Kirsanow* argued the cause for petitioner Oak Harbor Freight Lines, Inc. With him on the briefs were *John M. Payne* and *Selena C. Smith*. *Patrick O. Peters* entered an appearance.
- *Thomas A. Leahy* argued the cause and filed the briefs for petitioner Teamsters Union Local 174, et al.
- *Jared D. Cantor*, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Richard F. Griffin, Jr.*, General Counsel, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, and *Usha Dheenan*, Supervisory Attorney.
- *Peter N. Kirsanow*, *John M. Payne*, and *Selena C. Smith* were on the brief for intervenor Oak Harbor Freight Lines, Inc.
- *Thomas A. Leahy* was on the brief for intervenors Teamsters Local 174, et al.

ROGERS, Circuit Judge:

The National Labor Relations Act requires employers to bargain in good faith “with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(a)(5), (d). Upon the expiration of a collective bargaining agreement, the parties to that agreement have an ongoing obligation to maintain the “status quo” as to all mandatory subjects of bargaining until they reach a new agreement or an impasse. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Laborers Health & Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988); *Triple A Fire Prot., Inc.*, 315 NLRB 409, 414 (1994). Absent an impasse, unilateral action changing the status quo of a mandatory subject of

bargaining violates Section 8(a)(5) of the Act as a “circumvention of the duty to negotiate.” *Katz*, 369 U.S. at 743. Pension and healthcare benefits are mandatory subjects of bargaining. *See Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 180 (1971). Both requirements are implicated here.

Oak Harbor Freight Lines, Inc. and several locals of the Teamsters Union established four health benefit and pension trusts, so-called “Taft-Hartley” trusts, as part of their collective bargaining agreement. Under that agreement, Oak Harbor was required to make monthly contributions to the trusts. When the agreement expired and no new agreement was reached after a year, Union employees went on strike. When Oak Harbor ceased making contributions to the trusts, the Union filed unfair labor practice charges. The National Labor Relations Board ruled the Union had waived its right to bargain over the cancellation of contributions in subscription agreements to three of the trusts after the collective bargaining agreement expired, and Oak Harbor, having failed to prove a fourth subscription agreement existed or other basis to find a union waiver, violated Sections (8)(a)(5) and (1) of the National Labor Relations Act by ceasing to make payments to the fourth trust. The Board also ruled that Oak Harbor’s unilateral imposition of its medical plan after the strike ended violated the Act. Both Oak Harbor and the Union filed petitions for review of the Board’s Decision and Order. For the following reasons, we deny the petitions for review and grant the Board’s cross-application to enforce its Order.

I.

Oak Harbor is a freight transportation company operating throughout the northwestern United States. Since at least 1992, local Teamsters unions (together, “the Union”) have represented Oak Harbor employees based in Washington, Oregon, and Idaho, engaging in joint bargaining for a single collective bargaining agreement. As relevant, the latest collective bargaining agreement was effective from November 1, 2004 until October 31, 2007. It required Oak Harbor to make monthly contributions to four “Taft-Hartley” trusts for employee health benefits and pensions, 29 U.S.C. § 186(c)(5), and set the contribution rate for each trust.

Negotiations for a new collective bargaining agreement began in August 2007. More than a year later, the parties still had not reached a new agreement, and on September 22, 2008, Union employees went on strike. Oak Harbor sent letters to the Union and to the four trusts, notifying them of its intent to cease making contributions to the trusts five days after the notices were received. The letters to three trusts—Washington Teamsters Welfare Trust, the Western Conference of Teamsters Pension Trust Fund, and the Retirees Welfare Trust—referenced cancellation provisions in the trust subscription agreements or employer-union pension certifications (collectively, “subscription agreements”). The cancellation provision in the Retirees Welfare Trust’s subscription agreement stated:

Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent

App.5a

expired bargaining agreement until such time as the [employer or union] either notifies the other party in writing . . . of its intent to cancel such obligation five days after receipt of notice or enter[s] into a successor bargaining agreement.

The cancellation provisions for the other two trusts were virtually identical. With respect to the fourth trust—the Oregon Warehouseman’s Trust—Oak Harbor wrote:

We are not certain whether Oak Harbor Freight Lines has a subscription agreement with the Oregon Warehouseman’s Trust, which contains a Notice to Cancel Provision. If such a provision exists in a Subscription Agreement signed by Oak Harbor Freight Lines, please be advised that this constitutes Notice of Intent to Cancel.

Letter from John M. Payne, Esq. (Sept. 23, 2008). Five days after receipt of the letters, Oak Harbor ceased contributions to the four trusts.

During the strike, Oak Harbor hired strike replacements, which included “crossover employees,” i.e., Union members who crossed the picket line. It considered itself obligated to continue making trust payments for the crossovers during the strike. When informed the trusts would not accept contributions on behalf of only these Union members, Oak Harbor proposed that for the duration of the strike it would make pension contributions to an escrow account and “temporarily cover its crossovers” under Oak Harbor’s medical plan. Mem. from John M. Payne, Esq., to Union Representatives Al Hobart, Buck Holliday, and Ken

Thompson (Oct. 3, 2008). The Union agreed. Then, on February 17, 2009, five days after the Union extended an unconditional offer for its members to return to work, Oak Harbor proposed “to continue the [February 17] status quo regarding wages and benefits” for the returning strikers; that is, the interim strike arrangement would continue for all employees: pension contributions would be paid to escrow accounts and medical coverage would be provided under Oak Harbor’s medical plan. The Union disagreed with Oak Harbor’s understanding of its “status quo” obligation and countered with a proposal for an “interim agreement” with the trusts in order to allow trust contributions to resume during negotiations for a new collective bargaining agreement. Oak Harbor refused, and when strikers returned to work on February 26, 2009, Oak Harbor unilaterally imposed the terms in its February 17th letter.

The Union filed unfair labor practice charges with the Board in light of Oak Harbor’s cessation of trust payments and unilateral imposition of its medical plan after the strike ended. An administrative law judge (“ALJ”) found no unfair labor practice by Oak Harbor in ceasing to make contributions to the trusts in view of the subscription agreements, but concluded Oak Harbor’s unilateral action placing Union employees under its medical plan after the strike ended violated Sections 8(a)(5) and (l) of the Act. Both parties appealed. The Board adopted the ALJ’s finding and conclusions on Union waiver except with regard to Oak Harbor’s cessation of payments to the Oregon Warehouseman’s Trust. As to that trust, the Board found Oak Harbor had failed to prove there was a subscription agreement or present other evidence that

the Union had clearly and unmistakably waived its right to bargain over the cancellation of contributions. It ordered Oak Harbor, upon the Union's request, to make all post-strike payments to the Oregon Warehouseman's Trust, restore the pre-strike status quo for health care benefits, and reimburse employees, with interest, for any expenses resulting from the failure to make the required payments to that trust. The Union and Oak Harbor petition for review of the Board's Decision and Order.

II.

The Union challenges the Board's finding that it clearly and unmistakably waived its right to bargain over cancellation of contributions to the three trusts. It maintains that the Board inappropriately considered extrinsic evidence to the expired collective bargaining agreement when it looked to the terms of the subscription agreements, and that those agreements were only "ministerial" documents incapable of demonstration of the Union's clear and unmistakable waiver. The court will uphold the decision of the Board unless it was arbitrary or capricious or contrary to law, and as long as its findings of fact are supported by substantial evidence in the record as a whole. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011); *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008). Substantial evidence, which is "more than a mere scintilla," is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 217 (1938); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

The Board properly concluded that the Union waived its statutory rights to receive and bargain over continued contributions to the Washington Teamsters Welfare Trust, the Retirees Welfare Trust, and the Western Conference of Teamsters Pension Trust Fund. Applying its own test, the Board determined that the subscription agreements for those trusts “clearly and unmistakably” authorized Oak Harbor to cease trust contributions upon expiration of the collective bargaining agreement after five days’ notice. Under this court’s precedent, when an “employer acts pursuant to a claim of right under the parties’ agreement, the resolution of that refusal to bargain charge rests on an interpretation of the contract at issue.” *NLRB v. United States Postal Ser.*, 8 F.3d 832, 837 (D.C. Cir. 1993). Although the Board has declined to adopt this view of the law, *see, e.g., Enloe Medical Center v. NLRB*, 433 F.3d 834, 837-38 (D.C. Cir. 2005), this non-acquiescence issue does not matter here. No party raises the “contract coverage” issue, the Union maintains that the Board misapplied its own precedent, and the court would reach the same result regardless of which doctrine is applied. Contrary to the Union’s contention that the Board erred in considering the extrinsic evidence of the subscription agreements but failing to consider its “extrinsic evidence” that the cancellation terms were not the product of bargaining, the Board properly concluded that considering the Union’s additional evidence would not have changed its analysis or outcome.

The Union contends that the Board misapplied its own waiver precedent. In *Cauthorne Trucking*, the Board found a clear and unmistakable waiver of a union’s right to bargain over contributions to trust

funds after the expiration of the collective bargaining agreement where the subscription agreement stated:

It is understood and agreed that at the expiration of any particular collective bargaining agreement by and between the Union and [the employer,] any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.

256 NLRB at 722. The Union attempts to show that the subscription agreements here were "ministerial" and "therefore not indicative of a bargained-for waiver," Union Pet'r's Br. 34, relying on *Schmidt-Tiago Construction Company*, 286 NLRB 342 (1987), and *American Distributing Company*, 264 NLRB 1413 (1982). It also questions the precedential force of *Cauthorne Trucking*.

The Union maintains that the cancellation provisions for the three "Taft-Hartley" trusts are better compared to the subscription agreements in *Schmidt-Tiago* and *American Distributing* where the Board concluded the text was ambiguous. An examination of those precedents reveals no error by the Board. In *Schmidt-Tiago*, the subscription agreement stated that the employer and union "certify that a written labor agreement is in effect between the parties providing for contributions to the [Trust Fund]," and that the employer and union "agree to be bound by the [collective bargaining agreement] and the [subscription agreement] as now constituted or as hereinafter amended." 286 NLRB at 365. The Board found the agreement "does not on its face, as in *Cauthorne Trucking*, specifically state that [the

employer's] obligation to contribute to the pension trust fund ends with the expiration of the current collective-bargaining contract." *Id.* at 366. Similarly, in *American Distributing*, where the subscription agreement stated, "[t]he undersigned employer and [u]nion hereby certify that a written pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the [Trust Fund]," the Board found no unmistakable waiver of bargaining after the expiration of the collective bargaining agreement; the Board explained that "[s]uch language [did] no more than ministerially attach to the enabling collective-bargaining agreement for verification and collection purposes." 264 NLRB at 1415. Given the plain terms of the cancellation provisions in the subscription agreements for the three trusts, there can be no serious disagreement that the Board properly concluded these cancellation provisions on their face were more like that in *Cauthorne Trucking*, 256 NLRB at 722, than in the two cases on which the Union relies.

To the extent the Union correctly points out that the Board has applied *Cauthorne Trucking* "narrowly," *The Finley Hospital*, 359 NLRB 156, 159 n.5 (2012), that is not the same as questioning its precedential value. Rather, the Board has explained that it will find a clear and unmistakable waiver of the right to bargain over the cancellation of trust payments only where there is explicit contract language authorizing an employer to cancel its obligations. *Id.* at 157-158. The three subscription agreements did just that. There is no merit to the Union's view that a ministerial subscription agreement cannot constitute a valid waiver. As the Board stated, "even assuming that the

cancellation language had been dictated by the Funds and was not specifically bargained over by the parties, the signed documents establish that the Unions waived their right to bargain” over cancellation of contributions to the three trusts. Board Decision and Order, 1 n.2.

III.

Oak Harbor’s challenges to the Board’s Decision and Order are also unpersuasive.

A.

Regarding trust contributions, the Board, as noted, has determined that waiver of the right to bargain must be shown to be clear and unmistakable. *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 810 (2007); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Oak Harbor, as the party claiming waiver, had the burden of proof. *Good Samaritan Hosp.*, 335 NLRB 901, 918 (2001). The ALJ apparently inferred the existence of a subscription agreement for the Oregon Warehouseman’s Trust based on the existence of subscription agreements for the other three trusts. But the Board’s contrary finding is supported by substantial evidence in the record. There was no evidence that a fourth subscription agreement actually existed, which, absent other grounds for waiver, was necessary to find that the Union had clearly and unmistakably waived its right to bargain over the cancellation of contributions to the Oregon Warehouseman’s Trust. Oak Harbor attempted to demonstrate the Union’s waiver through the testimony of its attorney John Payne, but his testimony was hardly dispositive. He testified one Oregon Warehouseman’s Trust employee had told him: “I believe we have a subscription

agreement,” and another told him she was “almost sure” there was a subscription agreement, “but I’ll have to double check, but we almost always do require one.” Neither was there evidence that the Oregon Warehouseman’s Trust expressly denied the existence of a subscription agreement to Oak Harbor. On the other hand, Oak Harbor does not maintain that it ever received a copy of a subscription agreement from the Oregon Warehouseman’s Trust or any confirmation one existed beyond the trust’s general practice that agreements typically existed.

The Board reasonably concluded that, at most, there was speculation based on an asserted usual practice to have a subscription agreement that one existed for the Oregon Warehouseman’s Trust, but no evidence specific to that Trust. Indeed, even the evidence of the Oregon Warehouseman’s Trust’s general practice was called into question; an Oregon Warehouseman’s Trust administrator testified that the trust did not generally require a subscription agreement. Although the parties’ expired collective bargaining agreement required Oak Harbor to make monthly contributions to four trusts, it did not require that there be subscription agreements with the trusts, much less that they include a cancellation provision. Oak Harbor’s notice of cancellation letter to the Oregon Warehouseman’s Trust confirms the speculative nature as to the evidence of the existence of a subscription agreement. Absent evidence to support a finding that a fourth subscription agreement existed, much less that it existed and contained an unequivocal cancellation provision like that in the subscription agreements for the other three trusts, Oak Harbor failed to meet its burden to show the Union had clearly

and unmistakably waived its right to bargain on contributions to the Oregon Warehouseman's Trust.

Oak Harbor's other attempts to block the Union's right to bargain also fail. The Board reasonably rejected its argument that the Union was estopped from challenging the existence of a fourth subscription agreement. As Oak Harbor sees it, because the Union never informed it that there was no subscription agreement for the Oregon Warehouseman's Trust, the Union is "in no position to now benefit by [its] silence and [its] acquiescence and seek retroactive contributions." Oak Harbor Pet'r's Br. 23. But this is not affirmative evidence that the Union had informed Oak Harbor that the subscription agreement existed, and the Board precedent on which Oak Harbor relies is inapposite. In *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1224 (2005), the Board found estoppel based on the union's repeated acquiescence to the employer's unilateral changes to the employer's profit-sharing plan as a management prerogative. *Id.* The union had repeatedly raised the issue of profit-sharing during negotiations, the employer had repeatedly rejected the union's proposal to guarantee profit-sharing, and the union had ultimately agreed to a collective bargaining agreement that did not address the profit-sharing plan. *Id.* at 1223. The Board concluded that there was "a clear understanding that the profit-sharing plan would remain a management prerogative, and that the Union, by its conduct . . . bargained away its interest in the plan." *Id.* at 1224 (internal quotations omitted). By contrast, no evidence exists here as would show that the Union discussed and "bargained away" its interest in maintaining contributions to the Oregon Warehouseman's Trust. Nor did the Union fail

to object contemporaneously that Oak Harbor was not bargaining in good faith.

Lehigh Portland Cement Co., 286 NLRB 1366, 1383 (1987), does not advance Oak Harbor's estoppel claim. There, the employer took action over the course of a year consistent with its acceptance of a merger of two unions, including dealing with the representatives of the newly-merged union. The Board found that the employer was estopped from challenging the validity of the merger a year later because "the [e]mployer knew of the merger and behaved in a way which encouraged justified reliance by the Union." *Id.* Likewise, in *Alpha Associates and Union of Needletrades*, 344 NLRB 782 (2005), the employer was estopped from challenging the validity of the union in light of the employer's "voluntary recognition of the [u]nion" and its "conduct of bargaining with the [u]nion for more than a year prior to its repudiation of the bargaining agreement," *id.* at 783.

It is true that the Union did not challenge the cancellation of contributions to the Oregon Warehouseman's Trust on the ground there was no subscription agreement, but it did challenge Oak Harbor's cancellation of contributions to all four trusts less than a month after the strike ended when it filed unfair labor charges. There is no history of Union acquiescence or an element of surprise in the Union's position that Oak Harbor violated the Act when it ceased to make contributions to the four trusts. Oak Harbor's consistent position that it validly cancelled its contributions to the Oregon Warehouseman's Trust, in turn, presents no bar to the Union's challenges.

The Board also properly found there was no evidence that a "mutual mistake" prevented the Union

from challenging the cessation of contributions to the Oregon Warehouseman's Trust. Oak Harbor's reasoning follows its estoppel argument and is equally unpersuasive. Its reliance on *Americana Healthcare Center*, 273 NLRB 1728 (1985), is misplaced. There, the Board referred to a mutual mistake only in reaching the conclusion that terms inadvertently omitted from a collective bargaining agreement could be read into the final document, and in ruling that the collective bargaining agreement's "zipper clause" therefore could not be invoked by the employer. *Id.* at 1733; *see also NLRB v. Americana Healthcare Ctr.*, 782 F.2d 941, 945 (11th Cir. 1986). The record shows no similar circumstances here.

B.

As to the unilateral action of imposing its medical plan on employees after the strike ended, in some cases economic exigency may justify an employer's unilateral change, but this is not one of them. Oak Harbor contends that it was merely applying the status quo in order to assure that returning employees had health benefits, and that by February 2009, the status quo had changed as a result of the parties' arrangement for crossover employees to be covered by Oak Harbor's medical plan. The record shows, however, that the agreement on crossover employees during the strike was temporary and that Oak Harbor itself described it as an "interim measure pending the outcome of bargaining and of the strike." Mem. from John M. Payne, Esq., to Union Representatives Hobart, Holliday and Thompson (Oct. 3, 2008).

Alternatively, Oak Harbor contends that it was justified in unilaterally placing Union workers on its

medical plan because the parties had reached an impasse or Oak Harbor faced an economic exigency. These defenses were properly rejected by the Board. “A bargaining impasse . . . occurs when good faith negotiations have exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope.” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (internal quotations and citation omitted). Typically, the parties must have reached an impasse as to overall bargaining: “[i]mpasse over a single issue” will create an overall bargaining impasse only if that issue “is of such overriding importance that it frustrates the progress of further negotiations.” *Laurel Bay Health & Rehab. Ctr.*, 353 NLRB 232, 232 (2008) (internal quotations and citations omitted).

The Board found that there was no overall impasse to negotiations in February 2009, a finding Oak Harbor does not challenge. Nor does Oak Harbor suggest that the matter of health insurance was of such “overriding importance” that its unilateral action was justified in the absence of an overall impasse. The Board also could properly reject Oak Harbor’s position that an economic exigency authorized it to act unilaterally, finding that Oak Harbor failed to show that it faced an economic exigency that posed a “heavy burden” and “require[d] prompt implementation” to justify its conduct at the end of the strike. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000).

Accordingly, we deny the petitions for review, and we grant the Board’s cross-application to enforce its Order.

**DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
(OCTOBER 31, 2014)**

NATIONAL LABOR RELATIONS BOARD

OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252,
324, 483, 589, 690, 760, 763, 839, and 962
and TEAMSTERS LOCAL 174.

361 NLRB No. 82

Cases 19-CA-031797, 19-CA-031827, 19-CA-031865,
19-CA-032030, 19-CA-032031, 19-CA-031526,
19-CA-031536, 19-CA-031538, and 19-CA-031886

By Chairman PEARCE and
Members HIROZAWA and JOHNSON

On May 16, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 41. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Charging Party Unions filed a petition for review in the United States Court of Appeals for the Ninth Circuit. The Unions' petition for review was subsequently transferred to the United States Court of

Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.¹

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

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, *supra*, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's remedy and recommended Order to

¹ On October 7, 2014, Teamsters 206 Employers Trust filed a motion to intervene in this proceeding. The Respondent filed a response, and Teamsters 206 Employers Trust filed a reply brief. We deny the motion as untimely. The Trust provided no explanation for its failure to seek intervention before the judge at the hearing stage or before the Board while the case was pending on exceptions. Further, the Trust has not shown any changed circumstances warranting its late intervention.

the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 41, which is incorporated herein by reference, and as further revised and set forth in full below.²

² We shall modify the Order and notice to provide that, upon the Union's request, the Respondent shall rescind the health care plan it unilaterally implemented on February 26, 2009. *See, e.g., Lexus of Concord*, 330 NLRB 1409, 1418 (2000); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 7 (2011), modified on reconsideration on other grounds 2011 WL 5931998 (Nov. 29, 2011). We shall also substitute a new notice in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

In rejecting the Respondent's equitable estoppel argument, Member Johnson notes that the Respondent does not contend that either a subscription agreement or an employer union pension certification has ever existed for the Oregon Trust, nor does it contend that it did not have the opportunity to bargain about it. *Cf. Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005) (finding union was equitably estopped from challenging the employer's unilateral change in its profit-sharing plan, noting that the issue had been discussed at bargaining and that the union had acquiesced in all previous changes).

Further, Member Johnson agrees that the judge did not abuse his discretion in denying the Respondent's motion to amend its answer to allege the additional affirmative defense that the parties had reached impasse on the issue of benefits for returning strikers. Member Johnson finds that, even if the Respondent's defense had been properly raised, the defense fails on its merits because the Respondent has not established the requisite "economic exigency." Specifically, the Respondent has not shown that its action was caused by external events, was beyond its control, or was not reasonably foreseeable. *See RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

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.

Having found that the Respondent unlawfully discontinued contributions to the Oregon Warehouseman Trust, we shall order the Respondent to make whole its unit employees covered by the Oregon Trust by making all delinquent Oregon Trust fund contributions on behalf of those employees, including any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).³ Further, the Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions to the Oregon Trust, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that were not covered by the Respondent's medical plan but would have been covered by the Oregon Trust. 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 for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).⁴

³ We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit fund in order to satisfy our "make whole" remedy. *Merryweather Optical Co.*, *supra*.

⁴ To the extent that an employee has made personal con-

Having unilaterally implemented its company health care plan for unit employees, the Respondent shall be ordered, upon the Union's request, to restore the status quo ante by ceasing to give effect to its unilaterally implemented company health care plan for unit employees and by bargaining in good faith with the Unions over health care benefits. Further, we shall order the Respondent to restore the status quo ante in the expired collective-bargaining agreement with respect to the Oregon Trust and to continue to make contributions to that fund pursuant to the expired collective-bargaining agreement until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.⁵

Order

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Unilaterally discontinuing required contributions into the Oregon Warehouseman Trust.

tributions 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.

⁵ In light of our finding that the Respondent's obligations to the Washington Teamsters Welfare Trust were lawfully cancelled in September 2008, we shall not order a return to the terms of the expired collective-bargaining agreement with respect to that trust or a monetary remedy for the failure to make contributions to that trust after its cancellation.

(b) Unilaterally implementing terms and conditions of employment, including its company health care plan, without having reached a genuine impasse with the Unions, and refusing to bargain in good faith with the Unions with respect to health care benefits for employees in the following appropriate bargaining unit:

All truckdrivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pickup, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Respondent excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) Confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and

(d) nonbargaining unit employees.

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

2. Take the Following Affirmative Action Necessary to Effectuate the Policies of the Act

(a) Upon the Union's request, restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to the Respondent's health care plan for bargaining unit employees, and bargain in good faith with the Unions over health care benefits.

(b) Make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, restore the status quo ante in the expired collective-bargaining agreement with respect to that fund, and continue to make contributions to that fund until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.

(c) Reimburse unit employees covered by the Oregon Warehouseman Trust, with interest as provided in the amended remedy section of this decision, for any expenses resulting from its failure to make the required payments to the Oregon Warehouseman Trust.

(d) 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 amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each laid-off bargaining unit employee, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the

⁶ 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."

Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

/s/
Mark Gaston Pearce, Chairman

/s/
Kent Y. Hirozawa, Member

/s/
Harry I Johnson, III, Member

(Seal)
National Labor Relations Board

Dated, Washington, D.C. October 31, 2014

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.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement terms and conditions of employment, including our own health care plan, without having reached a genuine impasse with Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 (the Unions) and **WE WILL NOT** refuse to bargain in good faith with the

Unions with respect to health care benefits for our employees in the bargaining unit:

All truckdrivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by us excluding however, the classifications set forth immediately below in section 1.04

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) Confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

WE WILL NOT unilaterally discontinue required contributions to the Oregon Warehouseman Trust.

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

WE WILL, upon the Union's request, restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to our company health care plan for our employees in the above-described bargaining unit and WE WILL bargain in good faith with the Unions over health care benefits.

WE WILL make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, and WE WILL restore the status quo ante in the expired collective-bargaining agreement with respect to that fund and continue to make contributions to that fund until we negotiate in good faith to a new agreement or to a lawful impasse.

WE WILL reimburse unit employees covered by the Oregon Warehouseman Trust, with interest, for any expenses resulting from our failure to make the required payments to the Oregon Warehouseman Trust.

Oak Harbor Freight Lines, Inc.

**DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
(MAY 16, 2012)**

NATIONAL LABOR RELATIONS BOARD

OAK HARBOR FREIGHT LINES, INC.,

v.

TEAMSTERS LOCALS 81, 174, 231, 252,
324, 483, 589, 690, 760, 763, 839,
962 and TEAMSTERS LOCAL 174.

358 NLRB No. 41

Cases 19-CA-031797, 19-CA-031827, 19-CA-031865,
19-CA-032030, 19-CA-032031, 19-CA-031526,
19-CA-031536, 19-CA-031538, and 19-CA-031886

By Chairman PEARCE and
Members HAYES and GRIFFIN

On January 5, 2011, Administrative Law Judge John J. McCarrick issued the attached decision. The Acting General Counsel filed limited exceptions and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the Acting General Counsel and the

Charging Party each filed answering briefs, and the Respondent filed reply briefs.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings,² findings, and

¹ No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to reinstate employee Jeff Gibson to his former position. After the issuance of the judge's decision, the parties entered into a non-Board settlement agreement with respect to the Gibson allegations. By Order dated April 18, 2011, the Board severed and remanded Case 19-CA-32001 to the Regional Director for further processing pursuant to that settlement. Accordingly, Case 19-CA-32001 is no longer before the Board.

² At the hearing, the Unions sought to introduce rebuttal evidence in order to establish that the Respondent's Director of Labor Relations and Human Resources Robert Braun had never negotiated changes to trust fund subscription agreements (SAs) or employer union pension certifications (EUs) covering the Respondent. The parties stipulated that the proffered exhibits were authentic, but the judge rejected them, finding that they were not "appropriate rebuttal at this point in time." Tr. 1583. The Unions except to the judge's refusal to admit the proffered evidence, asserting that it is relevant to establishing that the Respondent's SAs and EUs do not reflect a bargained-for waiver of the Unions' bargaining rights. They request that the exhibits be included in the record and that, in the event of a remand, they be allowed to present testimony concerning those exhibits.

We find, without regard to whether the judge erred in not admitting the proffered evidence, that the result in this case would not change even if the evidence had been admitted. The cancellation language in the documents clearly and unambiguously privileges the employer to discontinue trust contributions after expiration of the collective-bargaining agreement and after written

conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.³

We agree with the judge, for the reasons he states, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its company health care plan for unit employees at the conclusion of the strike⁴ and, thereafter, refusing to bargain in good faith with regard to health benefits. We also agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally ceasing its payments into the Washington Teamsters Welfare Trust, the Western Conference of Teamsters Pension Trust Fund, and the Retirees Welfare Trust. Consistent with the judge's findings, we find that the signed cancellation language in the Subscription Agreements (SAs)

notice of its intent to cancel the contribution obligation, and the documents were agreed to and signed by the parties. Therefore, even assuming that the cancellation language had been dictated by the Funds and was not specifically bargained over by the parties, the signed documents establish that the Unions waived their right to bargain over the Respondent's cessation of fund payments upon notice after the expiration of the parties' contract. See *Cauthorne Trucking*, 256 NLRB 721 (1981), remanded on other grounds 691 F.2d 1023 (D.C. Cir. 1982).

³ We shall modify the judge's conclusions of law, remedy, Order, and notice to delete references to severed Case 19-CA-032001 pertaining to the failure to reinstate Jeff Gibson, and to conform to the violations found. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

⁴ The Respondent excepts to the judge's finding that the unlawful implementation of the Respondent's company health plan occurred on February 17, 2009, rather than February 26, 2009, when the strikers returned to work. We agree with the Respondent and shall correct the implementation date.

for the Washington Teamsters Welfare Trust and the Retirees Welfare Trust, and in the employer union pension certifications (EUs) for the Western Conference of Teamsters Pension Trust Fund, constituted a waiver. Specifically, we find that the Unions waived their right to bargain with the Respondent concerning its cancellation of contributions into the funds upon the expiration of the parties' collective-bargaining agreement.

The judge additionally found that the Unions had waived their right to receive trust payments for the Oregon Warehouseman Trust (Oregon Trust). In reaching that conclusion, the judge found that the Oregon Trust required that the parties execute SAs or EUs and that Local Unions 81, 324, and 962 had signed the requisite SA and EU agreements for the Oregon Trust in November 2005. We disagree with these findings and accordingly find that the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing its payments into the Oregon Trust.

Unlike the other three funds at issue in this case, the Oregon Trust did not require an SA or EU agreement. Mark Coles, co-account executive for the Oregon Trust, testified that "the Oregon Trust does not require a subscription agreement."⁵ Further, the Respondent has not produced any documentary evidence that the Unions executed one for that fund. Because no cancellation language, as set forth in the SAs and EUs, applied to the Oregon Trust, the Unions did not waive their right to bargain about the Respondent's unilateral stoppage of payments into the Trust. Accordingly, the Respondent violated Section

⁵ Tr. 903.

8(a)(5) and (1) by taking that action without providing the Unions with notice and the opportunity to bargain over its decision to stop its payments.

The Respondent asserts that, even if no such cancellation language applied to the Oregon Trust, the Unions should be equitably estopped from challenging its stoppage of payments into the Trust based on its prior acquiescence in the Respondent's actions. Specifically, the Respondent relies on the fact that, during the events at issue, the Oregon Trust or the Unions never denied the existence of an SA for that fund, despite Respondent's requests for clarification about whether such an SA had been signed.

It is clear that, at the time of the events in this case, none of the parties appear to have understood whether the parties had signed an SA or EU for the Oregon Warehouseman Trust. Respondent's attorney John Payne testified that when he attempted to confirm with the Oregon Trust in September 2008, that an SA for that fund had been executed, he was told by the trust administrators that they "were almost sure" that a signed SA existed.⁶ Further, Oregon fund administrator, Coles, admitted that neither he nor administrator, Linda Philbrick, ever notified the Respondent that no Oregon-based SA existed.⁷ Even in response to Payne's September 23, 2008 conditional Notice of Intent to Cancel, and Payne's follow-up letter of September 24 asking whether the fund would accept contributions in light of the conditional Notice of Intent to Cancel, the fund did not notify the Res-

⁶ Tr. 986.

⁷ Tr. 921-923.

pondent that no SA—and therefore no relevant cancellation language—existed. Instead, the fund attorney, Jerome Buckley, rejected contributions for crossovers without providing any explanation.

Despite the existence of confusion concerning whether a SA existed for the Oregon Trust, we reject the Respondent's equitable estoppel argument. When the Respondent ceased its contributions to the Oregon fund pursuant to its conditional cancellation notice, it acted without having clear knowledge of its contractual authority to do so. Although neither the Unions nor the Oregon Trust administrators informed the Respondent of its error, the Respondent nevertheless acted at its peril in discontinuing fund payments based on cancellation language that it was not certain even existed. Because no such termination or cancellation language existed, we agree with the Acting General Counsel and the Unions that the judge erred in finding clear and unmistakable waiver as to the Oregon Trust. We therefore find, contrary to the judge, that the Respondent was not entitled to unilaterally discontinue contributions to the Oregon Trust and that it violated Section 8(a)(5) and (1) by unilaterally ceasing its payments into that fund.

Amended Conclusions of Law

1. The Respondent, Oak Harbor Freight Lines, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing required contributions to the Oregon Warehouseman Trust.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act on and after February 26, 2009, by unilaterally implementing its company health care plan for bargaining unit employees, and thereafter failing and refusing to bargain in good faith with regard to health care benefits.

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

6. The Respondent has not otherwise violated the Act.

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.

Having found that the Respondent unlawfully discontinued contributions to the Oregon Warehouseman Trust, we shall order the Respondent to make whole its unit employees covered by the Oregon Trust by making all delinquent Oregon Trust fund contributions on behalf of those employees, including any additional amounts due the fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁸ Further, the Respondent shall be required

⁸ 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 fund in order to satisfy our “make

to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions to the Oregon Trust, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), including all medical expenses that were not covered by the Respondent's medical plan but would have been covered by the Oregon Trust. 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*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).⁹

Having unilaterally implemented its company health care plan for unit employees, the Respondent shall be ordered to restore the status quo ante by ceasing to give effect to its unilaterally implemented company health care plan for unit employees and by bargaining in good faith with the Unions over health care benefits. Further, we shall order the Respondent to restore the status quo ante in the expired collective-bargaining agreement with respect to the Oregon Trust and to continue to make contributions to that fund pursuant to the expired collective-bargaining agree-

whole" remedy. *Merry-weather Optical Co., supra*.

⁹ 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.

ment until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.¹⁰

Order

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Unilaterally discontinuing required contributions into the Oregon Warehouseman Trust.

(b) Unilaterally implementing terms and conditions of employment, including its company health care plan, without having reached a genuine impasse with the Unions, and refusing to bargain in good faith with the Unions with respect to health care benefits for employees in the following appropriate bargaining unit:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed

¹⁰ In light of our finding that the Respondent's obligations to the Washington Teamsters Welfare Trust were lawfully cancelled in September 2008, we shall not order a return to the terms of the expired collective-bargaining agreement with respect to that trust or a monetary remedy for the failure to make contributions to that trust after its cancellation.

by the Respondent excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

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

2. Take the Following Affirmative Action Necessary to Effectuate the Policies of the Act

(a) Restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to the Respondent's health care plan for bargaining unit employees, and bargain in good faith with the Unions over health care benefits.

(b) Make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as

well as any additional amounts due to the fund, restore the status quo ante in the expired collective-bargaining agreement with respect to that fund, and continue to make contributions to that fund until the Respondent negotiates in good faith to a new agreement or to a lawful impasse.

(c) Reimburse unit employees covered by the Oregon Warehouseman Trust, with interest as provided in the amended remedy section of this decision, for any expenses resulting from its failure to make the required payments to the Oregon Warehouseman Trust.

(d) 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 amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each laid-off bargaining unit employee, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 19, 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

¹¹ 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."

to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2009.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated Washington, D.C. May 16, 2012.

/s/

Mark Gaston Pearce, Chairman

/s/

Brian E. Hayes, Member

App.41a

/s/_____

Richard F. Griffin, Jr., 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.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement terms and conditions of employment, including our own health care plan, without having reached a genuine impasse with the Unions and **WE WILL NOT** refuse to bargain in good faith with the Unions with respect to health

care benefits for our employees in the bargaining unit:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by us excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

WE WILL NOT unilaterally discontinue required contributions to the Oregon Warehouseman Trust.

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

WE WILL restore the status quo ante as it existed prior to February 26, 2009, by ceasing to give effect to our company health care plan for our employees in the above-described bargaining unit and WE WILL bargain in good faith with the Unions over health care benefits.

WE WILL make unit employees covered by the Oregon Warehouseman Trust whole by paying all delinquent contributions to the Oregon Warehouseman Trust, as well as any additional amounts due to the fund, and WE WILL restore the status quo ante in the expired collective-bargaining agreement with respect to that fund and continue to make contributions to that fund until we negotiate in good faith to a new agreement or to a lawful impasse.

WE WILL reimburse unit employees covered by the Oregon Warehouseman Trust, with interest, for any expenses resulting from our failure to make the required payments to the Oregon Warehouseman Trust.

Oak Harbor Freight Lines, Inc.

**ADMINISTRATIVE LAW JUDGE DECISION
(JANUARY 5, 2011)**

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

OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252,
324, 483, 589, 690, 760, 763, 839, and 962
and TEAMSTERS LOCAL 174.

JD(SF)-54-10

Cases 19-CA-031797, 19-CA-31797,
19-CA-31827, 19-CA-31865, 19-CA-32001,
19-CA-32030, 19-CA-32031m 19-CA-31526,
19-CA-31536, 19-CA-31538, 19-CA-31886

JOHN J. MCCARRICK, Administrative Law Judge.

- Irene Hartzell Botero, Esq. and Daniel Apoloni, Esq. and *Helena A. Fiorianti, Esq.* for the General Counsel.
- *Michael R. McCarthy, Esq.* and *David Ballew, Esq.* (Reid, Pedersen, McCarthy & Ballew, LLP) of Seattle, Washington.

- *John M. Payne, Esq., Christopher L. Hilgenfeld, Esq. and Selena C. Smith, Esq.* (Davis Grimm Payne & Marra), of Seattle, Washington.
- *Nelson Atkin, Esq.* (Barran Liebman LLP), of Portland, Oregon, for the Respondent.

Statement of the Case

This case was tried in Seattle, Washington, from July 6 to 16, and 20, 2010, upon the fourth order consolidating cases, fourth amended consolidated complaint (complaint), as amended¹, and notice of hearing

¹ At the beginning of the hearing, GC Exh. 1(xx) replaced the fourth paragraph of complaint paragraph 17 which sets forth the remedy for Respondent's alleged violation of Section 8(a)(5) of the Act for failure to apply the expired collective-bargaining agreement's health and welfare and pension benefits to returning strikers. At the hearing, counsel for the General Counsel moved to delete complaint pars. 1(i) and (o), 11(b) and (e) as to alleged discriminatee Tuttle, (f) and (h). The complaint was further amended by the written stipulation of the parties (Jt. Exh. 3) to reflect the non-Board settlements reached during the hearing of several charges and complaint allegations. The parties jointly moved to sever complaint pars. 1(k), (l), (m), (n), 11(g) and (i) and the portions of paragraph 15 related to employees Gentry and Dyche and that Case 19-CA-32030 be remanded to the Regional Director to process the settlement. In addition the parties moved to sever complaint allegations 1(e), (f), and (g), 12, 13(b) and the portion of 13(c) referring to 13(b) the portion of 13(d) referring to 13(b), the portion of 15 referring to 12 and the portion of 16(b) referring to 13(b) and that Case 19-CA-31827 be remanded to the Regional Director to process the settlement. The parties further moved to sever complaint allegations 1(h), 11(d) and the portions of 11(e) and (f) and 15 related to employee Neubauer and that Case 19-CA-31865 be remanded to the Regional Director to process the settlement. The motion was granted. After the hearing the parties filed a joint motion to sever complaint paragraphs 6, 7, 14, 16, and those portions of 17 making reference to pars. 6, 7, 14, and 16.

issued on May 24, 2010, by the Regional Director for Region 19.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging striking employee Jeff Gibson from his former or substantially equivalent position of employment because he assisted the Union and engaged in protected concerted activities.

The complaint, as amended, further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing to apply the terms of the expired collective-bargaining agreement to the Employee Benefit Trust Funds and the Pension Trust and by applying its own health care plan to striking employees after the Unions' unconditional offer for the strikers to return to work.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing and raised several affirmative defenses including:

[. . .]

7. Without conceding that Respondent is obligated to adhere to the terminated and expired collective bargaining agreement in all sections, Respondent has followed and acted in compliance with the enforceable provisions of the expired collective bargaining agreement and the Act.
8. Any change in business operations which Respondent implemented were done for substantial legitimate business justifications and were in compliance with the provisions

The motion was granted.

of the expired collective bargaining agreement and the Act.

9. Any alleged unilateral changes made by Respondent were lawfully accomplished in accordance with the Act, including prior good faith notice to the Unions and an opportunity to bargain.²

Issues

As noted in footnote 1 most of the issues herein were resolved during the course of the hearing by settlement. The remaining issues for resolution are:

1. Did Respondent violate Section 8(a)(1) and (5) of the Act by unilaterally ceasing to make payments into the trust funds?
2. Did Respondent violate Section 8(a)(1) and (5) of the Act by unilaterally implementing its health care plan for returning strikers?
3. Did Respondent violate Section 8(a)(1) and (3) of the Act by suspending, terminating and failing to reinstate striker Jeff Gibson?

Findings of Fact

Upon the entire record³ herein, including the briefs from the counsel for the General Counsel,

² At the end of its case in chief, Respondent moved to amend its answer to allege an additional affirmative defense that the parties had reached impasse on the issue of benefits for returning strikers. Since the case had been fully litigated at the time Respondent offered its motion, the motion was denied.

³ Counsel for the Acting General Counsel filed a Motion to Correct Record on September 30, 2010. On October 4, 2010, Res-

Charging Party, and Respondent, I make the following findings of fact.

I. Jurisdiction

Respondent admitted it is a State of Washington corporation with offices and places of business located throughout the States of California, Idaho, Oregon and Washington where it is engaged in the business of transporting freight. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$500,000 for the transportation of freight from the States of California, Idaho, Oregon and Washington directly to points outside the States of California, Idaho, Oregon, and Washington.

Annually, Respondent in the course of its business operations purchased and received goods valued in excess of \$50,000 at its facilities in the States of California, Idaho, Oregon, and Washington directly from points located outside the States of California, Idaho, Oregon, and Washington.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted and I find that Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839 and 962 are labor organizations within the meaning of Section 2(5) of the Act.

pondent filed a letter indicating it had no opposition to the Motion to Correct Record. In its brief Charging Party essentially agreed with counsel for the Acting General Counsel's Motion. The Motion to Correct Record is granted.

III. The Alleged Unfair Labor Practices

A. The Facts

1. The Respondent's Business and Bargaining History

Respondent is engaged in the business of transporting freight from over 30 terminals located in California, Idaho, Oregon, and Washington. Respondent's director of labor relations and human resources is Robert Braun (Braun). Respondent's Mount Vernon, Washington terminal manager is Michael Apodaca (Apodaca). In its answer to the complaint Respondent admitted that the above-named individuals are supervisors or agents within the meaning of the Act.

Respondent has had a long term collective-bargaining relationship with the above captioned Teamsters Local Unions, collectively the Unions, whose jurisdictions include Respondent's terminals in Washington, Oregon, and Idaho, and has memorialized that collective-bargaining relationship in a series of collective-bargaining agreements (CBA), the latest of which was effective from November 1, 2004 to October 31, 2007.⁴ Over the years the 12 local Unions have engaged in joint bargaining with Respondent, resulting in one collective-bargaining agreement signed by each local.

Paragraph 1.03 of the expired CBA provides for the bargaining unit of the Respondent's employees covered by the contract:

⁴ GC Exh. 2.

App.51a

Scope of Agreement:

1.03 The execution of this Agreement on the part of the Employer shall cover all line haul and pickup and delivery operations of the Employer that are covered by this Agreement, and shall only have application to the work performed by the following designated unit of employees:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility

for directing the work or recommending hiring and firing; and

(d) nonbargaining unit employees.

The most recent CBA at paragraphs 17 and 18 provide that Respondent is obligated to make contributions for bargaining unit employees to the Washington Teamsters Welfare Trust, the Oregon Warehouseman Trust, the Western Conference of Teamsters Pension Trust Fund and the Retirees Welfare Trust.

In order to implement the CBA trusts described above, the parties must execute subscription agreements (SA) or employer union pension certifications (EU). These form agreements provide, inter alia:

COLLECTIVE BARGAINING AGREEMENT

. . . Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement which conforms to the trust policy on acceptance of employer contributions, whichever occurs first. . . .

ACCEPTANCE OF TRUST AGREEMENT

The undersigned further acknowledge that with each successive collective bargaining agreement to the one identified above that provides for contributions to continue to be made to (appropriate trust listed), the parties agree to continue to be bound by the terms of the trust agreement and any subsequent amendments thereto. This subscription agreement will automatically continue until such time as contributions are no longer required to be made to the trust under a collective bargaining agreement between the parties;⁵

Respondent and the various local Unions signed the requisite SA and EU agreements in November 2005.

2. 2007-2008 Prestrike Bargaining for a New Contract

The parties commenced bargaining for a new collective-bargaining agreement in 2007. Respondent was represented during the course of negotiations by its attorney John Payne (Payne) and its Director of Labor Relations and Human Resources Robert Braun. The local Unions were represented by a representative of each local and were led by a variety of union officials including John Hobart (Hobart). Hobart was president of Teamsters Joint Council 28 and was the Unions' chief spokesman from August 2008.

⁵ GC Exhs. 36-41.

3. The Strike and Cancellation of the Trust EU and SA Agreements

On September 22, 2008, Respondent's employees in the unit represented by the various Teamsters Locals commenced a work stoppage. Respondent hired strike replacements and a number of current unit employees chose to continue working and crossed the picket line. Between September 23 and 26, 2008, Payne advised the Unions and the Trusts that Respondent intended to cancel its subscription agreements and employer union pension certifications.⁶

The letters provided:

Please be advised that this constitutes Notice of Intent to Cancel Obligations to the (appropriate trust stated), five (5) days after receipt of this notice.

This notice is being provided pursuant to the (appropriate trust named) Subscription Agreement (or Employer-Union Pension Certification), regarding Oak Harbor Freight Lines.

In addition on September 24, 2008, Payne sent letters⁷ to the Trusts advising that Respondent was obligated under the Act to continue making trust fund contributions for employees who chose not to strike but crossed the picket lined and continued to work. The letters provide:

Under the NLRA, Oak Harbor Freight Lines is required to continue to make (the

⁶ GC Exhs. 42-45(a).

⁷ GC Exhs. 46-49.

appropriate trust named) and other benefit contributions on behalf of current bargaining unit employees who choose not to strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under medical plans that were in place under the expired agreement for these current employees who cross the picket line. These are current Oak Harbor employees who did not join the strike, but chose instead, to cross the picket line and continue working (“crossovers”).

By contrast, Oak Harbor Freight Lines does not intend to make benefit contributions to the (appropriate trust named) on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send the Notice of Intent to Cancel which is dated September 23, 2008.

Please let me know whether the Trust fund will accept such contributions and process the claim of the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours.

The trusts each replied that they would not accept contributions from Respondent.⁸ Payne admitted that at the time he sent his September 24 letter he was aware that the Western Conference of Teamsters Pension Trust required contributions on behalf of all bargaining unit employees, including strike replace-

⁸ GC Exhs. 50-53.

ments and crossovers. Payne likewise admitted that the purpose of the cancellation of the SA and EU agreements was so that he could provide different benefits to strike replacements.

As a result of the Trusts' response, on October 3, 2008 Payne wrote⁹ the Union advising that Respondent proposed for crossover employees:

1. Pension. We propose that contributions would be placed in an Oak Harbor escrow account on behalf of crossovers. We will hold these contributions in abeyance, depending upon the outcome of the strike.
2. Health & Welfare. The WTWT and Oregon teamsters Local 206/Employers Trust won't pay claims after October 31. Therefore, the Employer proposes to temporarily cover its crossovers (after October 31) under its Company medical plan (during the strike), so that they do not go without coverage. This would be an interim measure pending the outcome of bargaining and of the strike.
3. Retirees Welfare. The Washington Retirees Trust will not accept contributions for crossovers after September hours, October contributions. Oak Harbor proposes to place post-October contributions in an escrow account pending the outcome of negotiations and the strike.

⁹ GC Exh. 54.

4. Bargaining During the Strike

On October 9, 2008, the parties met to bargain over a successor collective-bargaining agreement. Prior to this meeting on September 22, 2008, Respondent had given the Union its last, best, and final offer.¹⁰ The Union brought its counterproposal to Respondent's last, best and final offer to the October 9, 2008 meeting.¹¹ At this meeting Respondent's attorney Payne asked Union spokesman Hobart if he had a response to his letter of October 3 dealing with trust payments for crossovers. Hobart agreed to escrow pension and retirees contributions for crossovers and noted that crossovers were covered by Respondent's medical plan. No agreement was reached concerning poststrike coverage for strikers under Respondent's medical plan or for poststrike continued escrow of returning strikers' pension and retiree trust funds.

During the October 9, 2008 meeting Payne asked Hobart what it would take to end the strike and Hobart reviewed the terms of the Union's counterproposal noting particularly the importance of maintaining health and welfare and pension benefits. Later, Payne indicated Respondent was withdrawing its 5-year duration of contract proposal and noted that Respondent would review the Union's latest proposal.¹²

The next bargaining session took place on November 7, 2008 after the parties exchanged correspondence discussing bargaining issues. At this meeting the Union made a presentation on a different health

¹⁰ GC Exh. 55.

¹¹ GC Exh. 56.

¹² GC Exh. 57.

and welfare plan the Union considered a compromise between its proposal for health and welfare and Respondent's proposal for its own medical plan.

At about the same time an issue arose concerning vacation pay and concomitant trust contributions for strikers. In a letter to Hobart dated October 24, 2008, Payne stated that it was Respondent's practice to pay its employees vacation pay in January. However, trust contributions were not made until the vacation time was requested.¹³ Payne noted that at least one striker was requesting vacation time in the near future and that the trust funds were not accepting contributions. Payne suggested that since the trusts were not accepting Respondent's contributions that on an interim basis Respondent make the trust contributions directly to the striking employee and that pension contributions be held in escrow. In response by letter¹⁴ dated October 29, 2008, Hobart agreed that the vacation benefits accrued in January 2008 were due to the trusts but that Pension Trust contributions could be hold in escrow.

The issue of vacation pay for strikers was again raised by Payne in his November 7, 2008 letter.¹⁵ Payne stated that Respondent had striking employees who were not paid vacation pay before September 30, 2008, now requesting vacation time off. Payne suggested the Respondent pay Trust contributions directly to the employees and to escrow their pension contributions

¹³ GC Exh. 60(b).

¹⁴ GC Exh. 61.

¹⁵ GC Exh. 65.

on an interim basis. By letter¹⁶ dated November 17, 2008, Hobart agreed to this proposal.

5. Return to Work and Poststrike Bargaining

On February 12, 2009, the Union made an unconditional offer¹⁷ to return to work. On February 17, 2008, the parties met to discuss the terms of striking employees' return to work. At the meeting Payne presented the Union with a letter¹⁸ that stated all striking employees would be returned to work on February 18, 2009, that some employees would be suspended pending investigation of strike misconduct, and that some employees would be laid off due to lack of work. During this meeting Payne gave the Union another letter¹⁹ stating Respondent's understanding of the "status quo" for returning strikers' wages and benefits:

Oak Harbor proposes to continue the status quo regarding wages and benefits. The benefits proposal is based on the fact that the Trust funds (i.e., Pension, Health & welfare, and Washington Retirees H&W) have consistently refused to accept contributions for returning strikers.

Thus, the status quo is the wage rate in the terminated CA. It also includes the agreement reached with the Union in early October 2008 regarding Pension, Washington Retirees Health

¹⁶ GC Exh. 66.

¹⁷ GC Exh. 74.

¹⁸ GC Exh. 24.

¹⁹ GC Exh. 25.

& Welfare, and Teamsters Health & Welfare for returning strikers. Oak Harbor would continue to follow the agreed upon status quo for returning strikers, which is as follows:

*Health & Welfare: Oak Harbor will cover the returning strikers under its Company Plans pending a different agreement with the Union on Health & Welfare. (This will allow these employees to have coverage.)

*Pension: Oak Harbor will place the monthly contributions into an escrow account pending some other agreement on the subject.

*Washington Retirees Health & Welfare: Oak Harbor will put the monthly contributions into an escrow account pending a different agreement on this subject.

Hobart expressed his disagreement with Payne's understanding of the status quo as to wages and benefits for returning strikers as expressed in Paynes' letter. Payne asked Hobart if the Union was placing conditions on the strikers return to work and Hobart replied that the strikers return to work was in neutral.

On February 18, 2009, Hobart sent a letter²⁰ to Payne which reiterated that the strikers had made an unconditional offer to return to work. Hobart stated further that the health and welfare and pension trusts would accept trust contributions if the parties signed an "interim agreement" stating, "that the parties agree to continue their participation in the funds during the period in which they are negotiating a collective bargaining agreement to replace the

²⁰ GC Exh. 75.

expired contract.” Hobart attached the emails²¹ from the trusts to his February 18 letter. The email from the Washington Teamsters Welfare Trust and Retirees Welfare Trust stated:

The Washington Teamsters Welfare Trust and Retirees Welfare Trust will accept a written interim agreement between the parties to participate in the Trusts provided that the agreement complies with each Trust’s operating rules and the parties also execute a new Subscription Agreement for each trust.

The email from Western Conference of Teamsters Pension Trust stated:

Al, you have asked whether or not participation under the Western Conference of Teamsters Pension Trust could be acceptable on the basis of an interim collective bargaining agreement. The short answer is yes, provided that the agreement provides for the continuation of Pension Contributions at the same rate as previously contained in the last acceptable pension agreement. Further, the Trust would require an executed Employer-Union Pension Certification form to be submitted along with the new collective bargaining agreement.

It should be noted that the interim agreement must conform to the Trust’s policies for the Acceptance of Employer Contributions found in the agreement and Declaration of

²¹ GC Exhs. 75(c) and (d).

Trust. Finally, it is critical that the effective date for the commencement date of contributions be clear. The Trust does not permit a “gap” in the payment of Pension Contributions except for periods of strike where the bargaining parties agree that no contributions are due. As a result, contributions to the Trust would have to resume effective with the bargaining unit’s return to work.

Between February 19 and 25, 2009, phone conversations took place between Payne and Union attorney David Ballew (Ballew) concerning Respondent’s position on the status quo as to wages and benefits for returning strikers. During a conversation on February 20, 2009, Payne contended that Respondent’s position (apparently as expressed in his February 17, 2009 letter) regarding the trusts was to maintain the status quo and Ballew contended that the status quo was the terms of the expired collective-bargaining agreement.

During the course of these conversations Payne offered a middle ground as an alternative to his February 17 status quo letter that Respondent would agree to the Union’s Pension Trust. Ballew said the Union could not accept this proposal.

In a February 25, 2009 conversation Payne told Ballew that he was no longer authorized by Respondent to discuss bargaining with Ballew. Payne also said that Respondent and the Union were making progress toward a collective-bargaining agreement.

The striking employees returned to work on February 26, 2009, under the terms outlined in Payne's February 17, 2009 letter.

6. The Trusts' Position on Receiving Contributions

At the hearing Mark Coles, an account executive with Northwest Administrators, who manages the Retirees Trust testified that an interim labor agreement was not necessary to support trust contributions as the expired CBA would be sufficient together with a new SA. Likewise Michael Sander (Sander), vice president of Northwest Administrators and the administrative manager of the Western Conference of Teamsters Pension Trust, explained that the trust could not accept pension contributions from Respondent for crossovers if Respondent did not make contributions for strike replacements as this would violate selectivity rules. Sander also explained that the trust would accept contributions in the absence of an EU or SA and with an expired CBA. In addition Sander testified that the pension trust would accept trust contributions based solely on the expired CBA and an order from the administrative law judge herein. This position was confirmed by Rick Dodge, chairman of the Pension Trust.²²

7. Strike Misconduct—Jeff Gibson

Jeff Gibson (Gibson) worked for Respondent as a delivery driver at its Mt. Vernon, Washington terminal. Gibson was one of the striking employees who was suspended pending investigation into strike misconduct.

²² GC Exh. 91.

Gibson went on strike with fellow employees in September 2008 and engaged in picketing at the Mt. Vernon terminal. Gibson also engaged in ambulatory picketing in which he followed Respondent's trucks and picketed at customers' sites.

When the strike ended, Gibson reported for work at Respondent's Mt. Vernon terminal where he was told that he had been suspended.

A few weeks later an investigatory interview into Gibson's alleged strike misconduct was conducted by Respondent. There were 11 incidents of strike misconduct attributed to Gibson by Respondent. During the investigatory interview Gibson was given an opportunity to respond to each of the 11 allegations. On March 16, 2009, Gibson was discharged for strike misconduct.²³

While Braun had a list of 13 employees from Respondent's terminal managers who had engaged in strike misconduct, other than the allegations leveled against Gibson, no other evidence of strike misconduct was offered at trial. Braun was the ultimate decisionmaker concerning discipline for those accused of strike misconduct. In making his decision concerning Gibson, Braun relied solely upon a package of information that was supplied to him by the law firm hired by Respondent to investigate the alleged misconduct.²⁴ That evidence is set forth below together with Gibson's testimony at the hearing.

²³ GC Exh. 35.

²⁴ R. Exh. 36.

8. The Strike Misconduct Incidents Involving Gibson

a. Mike Apodaca

Toward the end of the strike when Gibson was on the picket line, Mt Vernon terminal manager, Mike Apodaca (Apodaca), got out of his car about 20 feet from Gibson on the terminal property. Gibson admitted that he asked Apodaca about Respondent's owner, Ed Vander Pol cheating on his wife and that he then called Apocaca a "real piece of shit." Braun did not consider this incident alone sufficient to terminate Gibson.

b. Bruce Miller

Bruce Miller (Miller) was Gibson's coworker at the Mt. Vernon terminal. Gibson and Miller were friends. On the first day of the strike Miller had a phone conversation with Gibson in which Gibson said that if Miller crossed the picket line he would not live to see retirement. Miller advised Apodaca of Gibson's threat and on February 20, 2009 gave an affidavit concerning the Gibson threat. Gibson denied threatening Miller but admitted saying if Miller crossed the picket line, their friendship was over. I found Gibson to be an evasive witness whose recollection lacked specificity. I will credit Miller. Braun did not consider this incident alone sufficient to terminate Gibson.

c. Joe Velasco—Delivery at a Customer

Joe Velasco (Velasco) was Gibson's coworker at Respondent's Mt. Vernon terminal. While Velasco was making a delivery in November 2008 at a customer's facility in Bellingham, Washington, he saw Gibson getting out of a small pickup truck. Velasco did not

notice any sign indicating the Union was on strike. Gibson approached Velasco and called him a scab and said Velasco would lose his job. A short time later, Gibson told Doug Jensen, the customer's employee, not to take the delivery from Velasco. Jensen told Gibson to leave the property and Gibson left. Velasco reported this incident to Respondent and later filled out a declaration. According to Gibson, he entered the customer's property to engage in ambulatory picketing for informational purposes and so advised the customer who asked Gibson to leave the property. Velasco admitted in his declaration and testimony at trial that he advised the customer that Gibson was there because of a labor dispute with Oak Harbor. There was no evidence in the report Braun reviewed, including Velasco's declaration, to reflect that Gibson yelled or acted rudely toward the customer. Indeed Velasco testified that Gibson, "had some respect for the customer, even though he did get in his face."²⁵ Braun considered this conduct serious enough to warrant a suspension. In its brief Respondent concedes that this incident did not constitute serious misconduct.

d. Joe Velasco—Driving on Guide Meridian Road

In January 2009, Velasco was driving Respondent's truck on Guide Meridian Road in Bellingham, Washington. In the area he was driving the road was one lane in each direction due to road construction. Velasco saw a small pickup truck coming in the opposite direction toward him. The pickup swerved into Velasco's lane and then swerved back out. Velasco estimated

²⁵ Tr. at 1411, LL. 4-7.

that the closing speed of both drivers as they approached each other from opposite directions was 90 to 100 mph. Velasco identified the driver as Gibson. Gibson denied this allegation. Contrary to Respondent's assertion in its brief, Gibson denied he had or drove a small pickup truck. The only pickup truck Gibson admitted he owned was a 1973 full size 3/4 ton red Chevrolet. Gibson stated the truck was not insured and was not driven. The only evidence Braun had concerning this incident was Velasco's declaration which stated:

13. Sometime in November, 2008, I was driving northbound in the Bellingham area through a construction zone, a small, pick-up truck suddenly pulled in front of me. I noticed it was Jeff Gibson in front of me. He smirked at me and then moved back into the lane to my right. I believe he was trying to get me to brake suddenly and lose control of my truck.²⁶

Apparently, Velasco did not consider this incident serious enough to file a report to the police or to Respondent.

In view of Gibson's denial that he owned or drove a small pickup truck and the difficulty Velasco would have identifying anyone coming head on at 100 mph, I do not credit Velasco's testimony that it was Gibson who swerved into Velasco's lane. Moreover, Velasco's declaration does not state that Gibson swerved into Velasco's lane of traffic as Respondent contends. Rather it appears Gibson was passing not coming

²⁶ R. Exh. 36, at 18.

head on at Velaco. If Gibson was coming head on he would have pulled back into the lane to Velasco's left to avoid hitting Velasco. Braun said that he considered this incident serious enough alone to warrant Gibson's termination.

e. Videos

During the course of the strike Gibson videoed various incidents that he considered to be safety violations by Respondent's drivers as well as security guards videoing strikers. Eight of these videos were posted on YouTube.com. Braun gave this little weight in his decision to terminate Gibson.

f. Shane Brantner—Driving on Guide Meridian Road

Toward the end of the strike, on about November 26, 2008, Gibson was driving on Guide Meridian Road in Bellingham, Washington, when he saw one of Respondent's trucks ahead of him which was driven by Respondent's replacement driver Shane Brantner (Brantner). According to Brantner's testimony, he slowed to let the car pass because the car was only one to two feet behind his truck for a few seconds. The car passed Brantner and as it did the driver gave Brantner the finger. The car then pulled in front of Brantner and the driver continued to give Brantner the finger while repeatedly putting on its brakes while not coming to a full stop. Brantner was forced to apply his brakes in response to the car in front of him but was able to control his truck despite Gibson's driving. The evidence Braun used to decide Gibson's fate consisted of Brantner's declaration which did not indicate Gibson was tailgating nor that Gibson pulled

six to seven feet back in front of Brantner, as Brantner testified. When the car and Brantner's truck reached the next stop light, Gibson got out of his car jumped on Brantner's running board and asked Brantner if he was the guy who wanted to beat him up. Brantner said no and Gibson said that the drivers at Oak Harbor had to watch out for him. Brantner reported this incident to Respondent and later gave a declaration. Braun only considered the erratic driving incident to be serious. Gibson denied tailgating Brantner or driving in an erratic fashion but admitted asking if Brantner was the person who threatened him and told Brantner to tell the drivers to watch what they say because word gets around. I found Gibson to have a hostile attitude during the course of his testimony. His recollection was lacking in specifics and there was inconsistency in his testimony concerning prior discipline. On the other hand Brantner at the time of his testimony had not been working for Respondent for at least a year and thus had no motivation to distort his testimony. Brantner's testimony was given without hostility and was detailed and consistent. I will credit Brantner over Gibson.

g. Donald Timm—NAPA Delivery

Near the end of the strike in a NAPA auto parts parking lot, Respondent's replacement driver Donald Timm (Timm) was parked in one of Respondent's trucks. Gibson saw Respondent's truck and parked his car next to the truck. According to Timm, Gibson said, "How would you like it if somebody came to your house and fucked your wife." Timm replied he would not like that. Gibson told Timm that was what he was doing by taking strikers' jobs. About 10 days later at Respondent's Mt. Vernon terminal Gibson repeatedly

said to Timm, “Hey, where’s your wife because I’m going to come over [sic] fuck her like you’re fucking me.” Timm reported this incident to Respondent and gave a declaration. According to Gibson he asked Timm if he would like it if someone was doing his wife while he was at work. I found Timm to be a credible witness whose recollection was detailed and consistent. I found Gibson to be an angry witness with less than a good memory. I will credit Timm’s testimony.

There is no evidence that anyone tried to follow Timm or any other employee to their houses or attempted to locate Timm’s or any other employees’ house. Braun said he considered this a serious incident warranting termination.

h. Jim McDonald Incident Leaving the Mt. Vernon Terminal

Jim McDonald (McDonald), Respondent’s driver, said that during the strike he was leaving the Mt. Vernon terminal in Respondent’s tractor-trailer when he observed Gibson standing about six to eight feet from the trailer. When McDonald started to turn left to enter the road, he lost sight of Gibson, causing him to slam on his brakes because he could not tell where Gibson was. When he left the truck cab, McDonald saw Gibson standing a foot away from his rear tires. There is no evidence that Gibson lunged at McDonald’s truck. All McDonald was able to say is that he lost sight of Gibson while he was making a left turn, that he stopped his truck and that when McDonald got down from his cab, he observed Gibson a few feet away from the left end of the trailer.

Braun said this was a serious incident that alone warranted suspension and when considered with the

other strike misconduct warranted Gibson's termination. Gibson denied jumping in front of or touching Respondent's trucks when entering or leaving Respondent's facilities.

i. Threats of Union Lawsuits

Gibson admitted twice telling crossover employees that the Union would sue them and recover the money they were making during the strike. While Braun considered this a serious incident, it alone was not enough to warrant Gibson's termination.

j. Remarks to Security Guards

During the strike, at the Mt. Vernon terminal while he was picketing, Gibson admitted making crude remarks to Respondent's security guards. Braun said that these incidents were given no weight in his decision to terminate Gibson.

In making his decision considering Gibson's discipline, Braun considered the totality of the alleged strike misconduct as set forth in Respondent's Exhibit 36, which included a summary of Gibson's interview into the strike misconduct allegations.

k. The Postdischarge Conduct of Gibson

Lavance Ross, an African-American, was hired by Respondent in September 2008 as a strike replacement. After Gibson's termination in March 2009, in October 2009, Ross was making a delivery at Respondent's customer, Wallace Farm. While at the Wallace Farm loading dock, Gibson from about 30 feet away said to Ross, "Hey, scab master funk." After some additional conversation and after Gibson had gotten closer to Ross, Gibson said "You scabs caused me to lose my

job and I lost everything. I worked for Oak Harbor for 16 years and I was going to retire in 8 years.” Gibson appeared angry and had his finger about 6-8 inches from Ross’s face. Ross is a large man, significantly bigger than Gibson.

Braun recalled two incidents where Respondent had disciplined employees in the past 3 years for racial comments. In one case a Caucasian mechanic called an African American driver “nigger” twice in one week. The employee was suspended for 1 week. On another occasion a Caucasian employee referred to an African American employee as “boy.” The offending employee was suspended for 1 week. Braun, who is Caucasian, believes the term “scab master funk” was a pejorative term that violated Respondent’s antidiscrimination policy because the term refers to odors emanating from African Americans.

B. The Analysis

1. The Trust Fund Payments

Complaint Paragraph 10(c) alleges that Respondent and the Locals entered into an agreement on or about October 9, 2008, in which Respondent promised to:

- (ii) Provide coverage under its medical plan to its eligible crossover employees represented by the Locals, for claims made after October 31, 2008.

The complaint describes the terms agreed to in paragraph 10(c) as “Temporary Benefit Changes.”

Complaint Paragraph 13(a) alleges that on or about February 26, 2009, after the Locals’ unconditional

offer for the strikers and/or sympathy strikers to return to work, Respondent failed to apply the terms of the expired CBA as it related to the Employee Benefit Trust Funds and the Pension Trust, and, instead, applied the Temporary Benefits Changes to the single unit and/or units of employees, including returning strikers and/or sympathy strikers.

Counsel for the General Counsel contends that Respondent was obligated under the terms of the expired 2003-2007 CBA to continue making trust fund payments on behalf of its employees and its failure to make contributions to the various trusts and its unilateral implementation of its own health care plan and its escrow of funds to the various trusts violated Section 8(a)(5) of the Act. As a remedy counsel for the General Counsel seeks an order requiring Respondent to pay all trust fund payments due the various trusts since February 12, 2009, and reimbursement for medical bills not covered by Respondent's medical plan.

We start with the proposition that after a collective-bargaining agreement expires, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994); *Kingsbridge Heights Rehabilitation & Care Center*, 353 NLRB 631 (2008). This status quo obligation includes making contributions to fringe benefit funds "specified in the expired collective bargaining agreement." *N. D. Peters & Co.*, 321 NLRB 927, 928 (1996). An employer may not implement its own terms and conditions of employment absent impasse or waiver by the Union. In case of impasse, the employer must implement the exact terms of its

final offer. In case of waiver by the union, it must be clear and unequivocal. *Tampa Sheet Metal Comp.*, 288 NLRB 322, 326 (1988). *Carpenter Sprinkler Corp.*, 238 NLRB 974 (1978). *Provena St. Joseph Medical Ctr.*, 350 NLRB 808, 811 (2007).

Whether a bargaining impasse exists is a matter of judgment which relies on factors like bargaining history, the good faith of the parties, the length of the negotiations, the importance of the issue(s) as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475 (1969).

During overall negotiations for a new CBA, an employer may not justify the unilateral implementation of a proposal on a particular subject, on the ground that it gave the union notice and an opportunity to bargain. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

2. The Parties Did Not Reach Impasse on February 17, 2009

In this case there was no impasse in overall negotiations for a collective-bargaining agreement. The parties began bargaining for a new collective-bargaining agreement in 2007. Bargaining continued up to the strike in September 2008, throughout the strike, and after the strike ended.

On about September 22, 2008, Respondent provided its best, last, and final offer to which the Union responded with its counterproposals on October 9, 2008. During the October 9, 2008 meeting Payne asked Hobart what it would take to end the strike

and Hobart reviewed the terms of the Union's counterproposal noting particularly the importance of maintaining health and welfare and pension benefits. Later, Payne indicated Respondent was withdrawing its 5-year duration of contract proposal and noted that Respondent would review the Union's latest proposal.

The next bargaining session took place on November 7, 2008, after the parties exchanged correspondence discussing bargaining issues. At this meeting the Union made a presentation on a different health and welfare plan the Union considered a compromise between its proposal for health and welfare and Respondent's proposal for its own medical plan.

On February 12, 2009, the Union made an unconditional offer to return to work. On February 17, 2009, the parties met to discuss the terms of striking employees' return to work. At the meeting Payne presented the Union with a letter that stated all striking employees would be returned to work on February 18, 2009, that some employees would be suspended pending investigation of strike misconduct, and that some employees would be laid off due to lack of work. During this meeting, Payne gave the Union another letter which stated that Respondent would place returning strikers under its own health care plan and place contributions to the various trust funds into an escrow account. Hobart expressed his disagreement with Payne's understanding of the status quo as to wages and benefits for returning strikers as expressed in Paynes' letter.

Between February 19 and 25, 2009, phone conversations took place between Payne and Union attorney David Ballew (Ballew) concerning Respondent's posi-

tion on the status quo as to wages and benefits for returning strikers. During the course of these conversations Payne offered a middle ground as an alternative to his February 17 status quo letter that Respondent would agree to the Union's Pension Trust. Ballew said the Union could not accept this proposal.

In a February 25, 2009 conversation Payne told Ballew that he was no longer authorized by Respondent to discuss bargaining with Ballew. Payne also said that Respondent and the Union were making progress toward a collective-bargaining agreement.

Clearly as of February 17, 2009, the date Respondent unilaterally implemented its health care plan and escrowed trust fund payments, there was no impasse. Even though Respondent had submitted what it termed its last, best, and final offer on September 22, 2008, on and after February 17, 2009, the parties were still exchanging proposals and there was movement on various terms and conditions of employment. Payne admitted on February 25, 2009 that the parties were still making progress toward a contract.

Thus, I find that as of February 17, 2009 no impasse existed between the parties.

3. Waiver

While otherwise unlawful unilateral acts may be justified in certain circumstances, including waiver or acquiescence by the Union, such waiver of bargaining rights by a union is not to be lightly inferred and must be clearly and unequivocally conveyed. *Provena St. Joseph Medical Ctr.*, 350 NLRB 808, 811 (2007).

At no time, during collective bargaining for a new contract, did the Union agree that terms and conditions

of work for returning strikers included Respondent's health plan and an escrow of trust fund payments. It is clear that the Union agreed only to such terms and conditions of employment for crossover employees during the term of the strike. From the terms of Payne's October 3, 2008 proposal it is clear that Respondent's health plan and escrowed funds applied only to crossover employees during the pendency of the strike. This was not intended as an overall provision of the new collective-bargaining agreement. Such an interim agreement cannot be considered a waiver of the Union's right to bargain over health and welfare and trust payments for an overall CBA.

However, Respondent argues that the Union has waived its right to receive trust fund contributions as a result of the contract language contained in the SA and EU agreements. Respondent contends that the SA and EU agreements give it the unilateral right to discontinue benefit payments upon expiration of the CBA upon 5-days written notice to the Union and the Trust. The relevant EU and SA agreement contain the following language:

COLLECTIVE BARGAINING AGREEMENT

. . . Upon expiration of the current or any subsequent bargaining agreement requiring contributions, the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice or enter into a successor bargaining agreement

(emphasis added) which conforms to the trust policy on acceptance of employer contributions, whichever occurs first. . . .

The Board has found a waiver of the union's right to receive trust contributions from the contractual language in a pension agreement in *Cauthorne Trucking*, 256 NLRB 721 (1981). The parties' pension agreement provided:

IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued. [*Id.* at 722.]

The Board held that this provision constituted a waiver. The Board concluded that this language, explicitly stating that all company obligations under the pension agreement shall "terminate" upon expiration of the contract, expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration. The Board premised its finding of a waiver on the fact that the contract language explicitly addressed the obligation to provide the benefits and the statement in the contract that the obligation would terminate.

Subsequent cases distinguishing *Cauthorne* confirm that the Board will only find a clear and unmistakable waiver of the obligation to continue providing trust payments where there is explicit contract language authorizing an employer to terminate its obligations.

In *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), the Board and administrative law judge found the following contract language failed to clearly and unequivocally waive the union's right to receive trust payments:

This Effects Bargaining Agreement shall be effective as of May 30, 1994, and shall remain in effect until midnight on June 6, 1997, but not thereafter unless renewed or extended in writing by the parties. It is understood that expiration of this Agreement shall not foreclose the post-expiration payment to employees of bonuses or other benefits which accrued to them because of layoff during the term of this Agreement, or the post-expiration presentation in a timely fashion of claims regarding matters arising out of the application of its terms prior to the expiration date.

The administrative law judge concluded that this language dealt solely with the question of whether the effects bargaining agreement remained in effect as a contract after June 6, 1997 and made no provision about the termination of any duties or obligations on the part of Respondent to continue providing fringe benefits.

In *Natico, Inc.*, 302 NLRB 668, 685 (1991), the respondent argued that the following language relieved it of its obligation to make pension contributions:

[Section] 5.16 It is agreed that the pension program effective April 1, 1976 will remain in effect for the term of this agreement with the following changes.

Effective 12/16/83 Add 5/Hr. = 20 cent Total

Effective 12/16/84 Add 5/Hr. = 25 cent Total

The administrative law judge concluded that in section 5.16, the parties agreed not to disturb the pension program effective 1976 except for two 5-cent-per-hour increases. However, the contractual language did not provide that the pension program would terminate on the expiration of the contract. The administrative law judge, with Board approval, found that language to that effect is required either in the collective-bargaining agreement or in the underlying pension agreement to satisfy a waiver condition.

In *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987), the Respondent argued that the Union had waived its right to bargain regarding the Respondent's cessation of payments into the pension trust fund, after expiration of the current collective-bargaining agreement by the following language of the pension certification and declaration of trust:

[Respondent] and [Union] hereby certify that a written labor agreement is in effect between the parties providing for contributions to the Western Conference of Teamsters Pension Trust Fund [Trust Fund] and that such agreement conforms to the trustee policy on acceptance on Employer contributions and is not otherwise detrimental to the plan, and further provides that, the [Union] and [Respondent] agree to be bound by the Western Conference of Teamsters Agreement and Declaration of Trust and Pension Plan as now constituted or as hereinafter amended.

The pension certification and the declaration of trust each contained the following provision:

It is the policy of the Trustees of the Western Conference of Teamsters Pension Trust Fund to accept as Employer Contributions only payment made in accordance with a Pension Agreement that is not detrimental to the Plan. The detective of whether or not a Pension Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion. However, the list of provisions that follows is furnished as an illustration of those whose inclusion in a Pension Agreement may result in a detective by the Trustees that the Pension Agreement is detrimental to the Plan.

Section 9, article I of the trust declaration, entitled "Definitions," defines "Employer Contributions" as follows:

The term Employer Contributions as used herein shall mean payments to the Trust Fund by an employer in accordance with a Pension Agreement. Any contribution to the Trust Fund which are discovered not to have been made pursuant to a valid pension agreement, or which are subsequently discovered to be unacceptable for any other reason, shall be withdrawn from the Trust Fund and credited to a Segregated Account pending the detective of the person or persons entitled thereto.

Section 10, article I of the trust declaration, entitled "Definitions," defines "Pension Agreement," as follows:

The term Pension Agreement as used herein shall mean a written agreement between any Union and any Employer which, among other thing[s], requires payments to the Trust Fund on behalf of employees of such Employer who are represented by such Union. Such agreement may not provide for payments to the Trust Fund with respect to employees not so represented. The term Pension Agreement shall include any extension, renewal or replacement thereof. A Pension Agreement shall be considered as being in effect on any date if it provides for Employer Contributions to be made to the Trust Fund with respect to employment on such date.

The administrative law judge, as affirmed by the Board, found that there was an inadequate basis for implying the existence of a waiver in the above-described language of the pension certification and declaration of trust. The judge found that this language does not on its face, as in *Cauthorne Trucking*, specifically state that Respondent's obligation to contribute to the pension trust fund ends with the expiration of the current collective-bargaining contract.

In another case involving waiver of trust payments, *KBMS, Inc.*, 278 NLRB 826 (1986), the Respondent contended that article III, section 2 of the agreement and declaration of trust prohibited contributions after the expiration of the bargaining agreement. This section provides:

ARTICLE III. Contributions to the Funds

SECTION 2. Effective Date of Contributions.

All contributions shall be made effective as of the date specified in the collective bargaining agreements between AFTRA and the Producers, and said contributions shall continue to be paid as long as a Producer is so obligated pursuant to said collective bargaining agreements. [Emphasis added.]

The administrative law judge found that the declaration of trust language did not constitute a clear and unmistakable waiver since that section did not purport to deal with the termination of the employer's obligation to contribute to the funds particularly in view of Section 1 of that same article which provided "Nothing in this Trust Agreement shall be deemed to change, alter or amend any of said collective bargaining agreements."

Finally, in *American Distributing Co.*, 264 NLRB 1413, 1415 (1982), the administrative law judge concluded that the pension certification did not constitute a waiver.

Pertinent language from the pension certification provides:

The undersigned employer and Union hereby certify that a written pension agreement (in most cases a Teamsters collective bargaining agreement) is in effect between the parties providing for contributions to the Western Conference of Teamsters pension trust fund and that such pension agreement conforms to the trustee policy on acceptance of employer

contributions (as reproduced on the reverse of this form) and is not otherwise detrimental to the plan. A complete copy of the pension agreement (labor contract) is attached or, if not yet available, will be furnished to the area administrative office as soon as available. The undersigned further certify that the following information is true and correct and accurately reflects the provisions of the pension agreement. . . .

The judge held that this language did not make reference to a contract termination date and was not a clear or unequivocal waiver of Respondent's obligation to make trust fund payments.

It appears that the pertinent language in the EU and SA agreements herein," . . . the employer agrees to continue to contribute to the trust in the same manner and amount as required in the most recent expired bargaining agreement until such time as the undersigned either notifies the other party in writing (with a copy to the trust fund) of its intent to cancel such obligation five days after receipt of notice. . . ." is similar to the pension agreement language in *Cauthorne Trucking*,

IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate, unless, in a new collective bargaining agreement, such obligation shall be continued.

Like the pension agreement in *Cauthorne Trucking*, the EU and SA agreements in this case

explicitly state that Respondent's obligations under the trust agreements pursuant to the expired bargaining agreement will continue until one party notifies the other of its intent to cancel such obligation. This contract language expresses a clear intent to relieve Respondent of its obligation to make payments after contract expiration and notice to cancel trust payments. The language of the EU and SA agreements is explicit in stating when Respondent's trust payment obligation ceases unlike the language in *Allied Signal Aerospace, Natico, Inc.*, *Schmidt-Tiago Construction Co.*, *KBMS, Inc.*, or *American Distributing Co.*, supra. I find that the EU and SA language operate as a waiver of the union's right to receive trust contributions. Respondent exercised the right to cease making trust contributions by its notices of September 23-26, 2008.

4. The Unilateral Implementation of Respondent's Health Care Plan

However, the question remains, given the Union's waiver of the right to receive trust contributions at the expiration of the most recent CBA, whether this waiver permitted Respondent to unilaterally apply its health care plan to returning strikers.

The waiver in the SA and EU agreements is limited to permitting Respondent to terminate its trust payments. Nothing in the SA or EU language explicitly permits Respondent to unilaterally implement its own health care plans. As noted above, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc.*; *Kingsbridge Heights Rehabilitation & Care Center*, supra.

Respondent appears to contend that it reached impasse on the trust fund contributions and health care benefits during the strike or during the Payne-Ballem negotiations at the end of the strike and that it accordingly made no unilateral changes. Thus when the strike ended, the employer was legally permitted to place the strikers in its company plans. Respondent's argument is misplaced since the agreement between Respondent and the Union for benefit contributions for crossovers was only a temporary agreement for the duration of the strike and did not apply to modify the extant CBA. Moreover, even assuming arguendo that there was an impasse in discussions between Payne and Ballem concerning the definition of the status quo for benefits for returning strikers, any impasse reached on a single issue such as benefits payments for returning strikers does not justify implementation of Respondent's proposal in the absence of overall impasse in negotiations for an overall CBA. *Bottom Line Enterprises*, supra. Respondent's cites *St. Gobain Abrasives*, 343 NLRB 542 (2004); *Nabors Alaska Drilling, Inc.*, 341 NLRB 610 (2004); and *Brannon Sand & Gravel Co.*, 314 NLRB 282 (1994), for the proposition that an employer may implement individual proposed changes before an impasse was reached in bargaining for a collective-bargaining agreement as a whole. These cases are distinguishable. Each case cited by Respondent involved an employer who had a preexisting annual process of reviewing and adjusting its benefits programs. Accordingly, the employers were not obligated to refrain from implementing their proposed changes regarding benefits until an impasse was reached in bargaining for a collective-bargaining agreement as a whole. Here implementation of Respondent's health care plan for

all bargaining unit employees was introduced for the first time after the strike. The interim agreement reached during the strike for health care coverage clearly applied only to crossover employees for the duration of the strike. Respondent had no preexisting program of adjusting the benefits programs of its employees. Health care benefits were paid to Respondent's employees through the Trusts as a result of Respondent's contributions established in the parties' CBA. Likewise *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), is not apposite as the alleged unilateral changes did not occur in the context of bargaining for an overall collective-bargaining agreement.

Having found the parties were not at impasse as of February 17, 2009, by unilaterally implementing its own health care plan on that date, Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The Jeff Gibson Termination

Complaint paragraph 11(c) alleges that on or about February 26, 2009, Respondent suspended and, since that time, has failed and refused to reinstate striking and/or sympathy striking employee Jeff Gibson, employed within the jurisdiction of Local 231, to his former or substantially equivalent position of employment.

The General Counsel contends that even if Gibson's accusers testimony is credited, his conduct is not serious misconduct that would disqualify him as a striker from reinstatement, or permit his discharge, under the test set forth by the Board in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enf'd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

In *Clear Pine Mouldings*, the Board held:

Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to “refrain from” these activities. *Id.* at 1045.

The Board also noted that certain conduct engaged in by strikers during the course of a strike may deprive an employee of the protection of the Act if they engage in:

[S]erious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. *Id.* at 1045.

Respondent argues that under the *Universal Truss, Inc.*, 348 NLRB 733, 735-736 (2006), test it properly discharged Gibson because it had an honest belief that Gibson engaged in serious misconduct that would reasonably tend to coerce or intimidate employees. Respondent also contends that Gibson’s poststrike conduct involving Lavance Ross warrants Respondent not reinstating Gibson because his conduct violates Respondent’s antidiscrimination policy.

In *Universal Truss*, the Board set forth a test to determine if an employer lawfully discharged an employee for strike misconduct. The employer must first prove that it had an honest belief that the discharged employee engaged in strike misconduct of a serious nature. The Board then defined serious strike misconduct as:

[T]hat which under the circumstances existing . . . may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Id.* at 734.

The Respondent's honest belief may be based on hearsay sources, such as the reports of nonstriking employees, supervisors, and security guards.

When the Respondent has proven that it has an honest belief that the striker engaged in serious strike misconduct, the burden shifts to the General Counsel to show either that the striker did not, in fact, engage in the alleged misconduct or that the conduct was not serious enough for the employee to forfeit the protection of the Act. *Id.* at 735.

In determining whether specific misconduct is serious enough to warrant discharge, it is appropriate to consider all of the circumstances in which the alleged misconduct occurs, including, other instances of vandalism, threats, and violence occurring during the course of the strike. *Id.* at 735.

The Board stated that where violence, property damage, and other egregious misconduct directed at nonstriking employees have occurred earlier in a strike, threats to inflict similar harm in the future are likely to have a greater coercive impact. *Id.* at 735.

In *Hotel Roanoke*, 293 NLRB 182, 207 (1989), the Board, citing the Supreme Court decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941), noted that during strikes, employees sometimes engage in "moments of animal exuberance." Thus, name calling, minor threats, mass picketing, and the like are generally not deemed sufficient to deny employees their statutory protection. However,

when the striker has stepped over the line and engaged in serious threats of physical violence, actual physical violence or property damage, such has a coercive effect on the rights of other employees. *Id.*

In *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168, 178 (1986), the Board adopted an administrative law judge's finding that strikers' remarks such as "we know where you live," "we're going to get you," "I'm waiting for you," "We're going to kill the scabs," "Kill the scabs," "getting even," "we'll fix you," and "I'll whip your ass," reflected "animal exuberance," rather than threats meant to be taken seriously. However, where one such statement was made by a large man, capable of carrying out the threat, the Board found the threat to be violation of Section 8(b)(1)(A) of the Act.

Let us now turn to the specific instances of conduct Respondent relied upon to form its honest belief that Gibson engaged in serious strike misconduct. Initially it should be noted that there is no evidence that Gibson engaged in actual physical violence or property damage. Moreover, Braun admitted that he did not consider the statements to Apodaca, Miller, and the security guards, the videos and threat of lawsuits, standing alone, serious misconduct warranting discipline. Respondent conceded in its brief that Gibson's conduct with Velasco and the customer was not serious misconduct. That leaves the two incidents of alleged dangerous driving involving Brantner and Velasco, the statements to Timm involving his wife and the incident involving getting too close to McDonald's truck.

a. Dangerous Driving Incidents

(1) The Velasco Incident

As noted above, I have not credited the testimony of Velasco that Gibson dangerously swerved head on into Velasco's lane and only at the last minute swerved back into his own lane. The only evidence Braun had of this alleged incident of serious misconduct was Velasco's declaration that is ambiguous at best and suggests that Gibson passed Velasco then "moved back into the lane to my right." This describes the act of passing not coming head on at Velasco. If Gibson was coming head on he would have pulled back into the lane to Velasco's left to avoid hitting Velasco.

This evidence Braun relied upon in firing Gibson is insufficient in itself to support a good faith belief that Gibson was engaged in serious strike misconduct because the only evidence Braun acted on suggests Gibson passed Velasco rather than trying to cause an accident.

(2) The Brantner Incident

In *Altorfer Machinery Co.*, 332 NLRB 130, 143 (2000), the Board agreed with the administrative law judge that a striker had not engaged in tailgating misconduct, because the testimony was limited to general assertions that "the green truck stayed behind me most of the time" but without specific testimony labeling the conduct as tailgating. In *Otsego Ski Club–Hidden Valley*, 217 NLRB 408 (1975), the Board affirmed the administrative law judge who found that strikers who harassed and tailgated a supervisor employee on between 2 and 5 consecutive days did not

engage in serious misconduct where the driving may have been annoying but did place passengers in danger.

Respondent cites both *Universal Truss, Inc.*, 348 NLRB 733, 735-736 (2006), and *Aztec Bus Lines*, 289 NLRB 1021, 1029, 1073 (1988), for the proposition that Gibson's driving in the Brantner incident was serious strike misconduct justifying his discharge. In both *Universal Truss* and *Aztec* there was pervasive evidence of egregious conduct by strikers including widespread property damage, severe assaults on non-strikers, managers and security guards, and following of nonstrikers home. These incidents were accompanied by threats to other nonstrikers and managers, including threats to rape or kill female employees and the wives of male workers, threats to beat nonstrikers and following nonstrikers home.

The incident involving Brantner was isolated and at best suggests Gibson may have tailgated Brantner's truck for a few seconds. Gibson passed Brantner and repeatedly put on his brakes causing Brantner to put on his brakes. There is no evidence that Brantner was unable to control his vehicle or was in danger of hitting Gibson. The incident here is distinguishable from the facts in *Universal Truss* or *Aztec*. Unlike *Universal Truss* or *Aztec*, there was no car chase at high speeds that endangered the drivers or passengers of the vehicles. Like the facts in *Altorfer*, Gibson's driving may have been annoying but did not rise to a level where life or property was in danger. Respondent did not have evidence sufficient to form a good faith belief that this incident involved serious misconduct.

b. Standing Near the Truck

Further, in *Limestone Apparel Corp.*, 255 NLRB 722, 739 (1981), the Board affirmed an administrative law judge's finding that employees who ran alongside a company truck going into the employer's plant, and then stood in front of it did not engage in strike misconduct outside the protection of the Act. The judge found that the strikers' activity in lying down in front of a truck was certainly an unintelligent action, and was a form of misconduct. However, the judge found that there was no actual or implied threat of harm to the truckdriver or to the truck. The judge concluded that this conduct was not of such a serious nature as to disqualify them from their right of reemployment.

In this case there is no evidence that Gibson lunged at the truck or even put himself in a position where he could be harmed. The only evidence Braun had before him was that McDonald lost sight of where Gibson was located and that after McDonald got down from the truck cab, Gibson was near the rear of the truck. There is simply no evidence that Gibson attempted to harm the truck, McDonald, or himself. I find that this evidence does not support a good-faith belief that Gibson engaged in serious misconduct sufficient to disqualify him from the right of reemployment.

c. The Timm Incident

In *Universal Truss*, the Board found that threats to "fuck [somebody's] mother" conveyed a reasonable discernible threat of rape and sexual violence. *Universal Truss*, 348 NLRB at 739-740. In addition the Board concluded that striker's threats to rape a nonstriker's

wife and threats to rape or kill an employee's daughter were serious strike misconduct that justified failure to reinstate and termination. However, it must be noted that in *Universal Truss*, the Board found these threats to rape were credible and serious because they occurred in the context of pervasive violence, including the severe beating of a nonstriker, multiple incidents of property damage, multiple threats of bodily harm to nonstrikers and following nonstrikers by striking employees.

In the instant case no evidence of pervasive property damage was shown. No evidence of assaults to nonstrikers by striking employees was established. No evidence was presented suggesting strikers followed nonstriking employees home.

According to Timm, Gibson said, "How would you like it if somebody came to your house and fucked your wife." Gibson told Timm that was what he was doing by taking strikers' jobs. Gibson later told Timm, "Hey, where's your wife because I'm going to come over [sic] fuck her like you're fucking me." I do not find that these were credible threats by Gibson. They occurred in the context of Gibson comparing what strike replacements were doing to him and were hyperbole in very bad taste. However, absent evidence that strikers or Gibson in particular engaged in violence toward nonstrikers or nonstrikers family members, I do not find that Gibson's conduct was serious strike misconduct justifying his termination.

d. The Other Incidents

Braun found that the Miller threat, the threat of lawsuits and the statements to Apocaca were not alone enough to warrant Gibson's termination. I find

that even in the aggregate these incidents are insufficient to justify Gibson's termination.

I find that the Gibson's name calling comments to Apodaca were what the Board and Supreme Court termed "moments of animal exuberance" that would not support termination for strike misconduct. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941); *Hotel Roanoke*, 293 NLRB 182, 207 (1989). Moreover, the statement to Miller that if he crossed the picket line he would not live to see retirement, was not a credible threat given their past friendship and the absence of violence directed by strikers to nonstrikers. This threat would not support termination for strike misconduct. Finally, Gibson's threats that the Union would sue nonstrikers and recover the money they were making during the strike is yet another example of "animal exuberance" that does not support Gibson's termination.

e. The Post Termination Incident with Ross

It was Braun's subjective opinion that the term "scab master funk" had some pejorative racial connotation. Ross also opined that the term was related to his race. However, these subjective opinions were unsupported with any objective evidence as to the meaning of the term. The dictionary definition of the noun "funk" is defined in the Encarta Dictionary as (noun) 1. musical style; 2. earthy musical quality; 3. lack of worldliness; 4. melancholy; 5. bad smell. There is no reference to any racial connotation. Other than Braun and Ross's subjective belief, the term does not appear to be a racial epithet.

Moreover, Respondent's 1 week suspension of other Caucasian employees who called African American

employees “nigger” and “boy” suggests Respondent’s disparate treatment of Gibson is a belated attempt to concoct a defense to justify its action terminating Gibson because of his protected activity.

I conclude that Respondent was not justified in terminating and failing to rehire Gibson and that he was terminated for his Section 7 activity in violation of Section 8(a)(1) and (3) of the Act.

Conclusions of Law

1. The Respondent, Oak Harbor Freight Lines, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Locals 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (5) of the Act subsequent to February 17, 2009, by unilaterally implementing its company health care benefits to returning strikers who are bargaining unit members of the Union and thereafter failing and refusing to bargain in good faith with regard to such benefits.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Jeff Gibson to his former or substantially equivalent position of employment.

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

6. Respondent has not otherwise violated 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.

The Respondent will be ordered to offer reinstatement to Jeff Gibson who it unlawfully denied reinstatement following the close of the strike, and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth Co*, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Having unilaterally implemented its company health care plan Respondent shall be ordered to bargain in good faith with the Unions over such benefits and cease giving effect to its unilaterally implemented health care plans.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

²⁷ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

Order

The Respondent, Oak Harbor Freight Lines, Inc., California, Oregon, Washington, and Idaho, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Refusing to bargain with the Unions as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

(a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;

- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

(b) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

(c) Refusing to reinstate employees because they engage in concerted protected activity.

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

2. Take the Following Affirmative Action Necessary to Effectuate the Policies of the Act

(a) Offer immediate and full reinstatement to Jeff Gibson to his former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make him whole with interest as provided in the Remedy section of this decision.

(b) Remove from its files any reference to the unlawful suspension and termination of Jeff Gibson and notify him, in writing, that this has been done and that the suspension and termination will not be used against him in any way.

App.100a

(c) Restore the status quo ante as it existed prior to February 17, 2009, by ceasing to give effect to Respondent's health care plan for bargaining unit members and bargain in good faith with the Unions over such benefits.

(d) 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.

(e) Within 14 days after service by the Region, post at its facilities in the States of California, Oregon, Washington, and Idaho, and mail a copy thereof to each bargaining unit member laid off subsequent to February 17, 2009, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 19, 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. 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

²⁸ 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."

customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2009.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

/s/

John J. McCarrick

Administrative Law Judge

Dated, Washington, D.C. January 5, 2011

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

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unilaterally implement our own health care plan without having reached a genuine impasse with the Unions and **WE WILL NOT** refuse to bargain in good faith with the Unions with respect to those benefits for our employees in the bargaining unit:

App.103a

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and other such employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this agreement;
- (c) office supervisors exercising independent judgment with respect to the responsibility for directing the work or recommending hiring and firing; and
- (d) nonbargaining unit employees.

WE WILL NOT suspend, terminate, or refuse to reinstate employees for engaging in activities protected by Section 7 of the Act.

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

App.104a

WE WILL restore the status quo ante as it existed prior to February 17, 2009 by ceasing to give effect to our own health care plan for our employees in the above-described bargaining unit.

WE WILL offer striking employee Jeff Gibson reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment without any loss of rights and benefits, and WE WILL make him whole for any loss of wages or other benefits he may have suffered as the result of the discrimination against.

WE WILL notify Jeff Gibson that we have removed from our files any reference to his suspension and termination and that the suspension and termination will not be used against him in any way.

Oak Harbor Freight Lines, Inc.
(Employer)

**ORDER OF THE CIRCUIT COURT
DENYING PETITION FOR REHEARING EN BANC
(JULY 7, 2017)**

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

TEAMSTERS 174 AND TEAMSTERS
LOCAL NUMBERS 81, 174, 231, 252, 324,
483, 589, 690, 760, 763, 839, and 962,

Intervenors,

September Term, 2016

No. 14-1226

Consolidated with 14-1273, 15-1002
NLRB-19 CA031797

Before: GARLAND, Chief Judge; HENDERSON,
ROGERS, TATEL, BROWN, GRIFFITH,
KAVANAUGH, SRINIVASAN, MILLETT*,

* Circuit Judge Millett did not participate in this matter.

PILLARD, and WILKINS, Circuit Judges;
WILLIAMS, Senior Circuit Judge

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer
Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

**TRANSCRIPT OF HEARING—
RELEVANT EXCERPTS
(JULY 8, 2010)**

BEFORE THE NATIONAL
LABOR RELATIONS BOARD REGION 19

In the Matter of:
OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839, and 962,

and

TEAMSTERS LOCAL 174.

Case Nos 19-CA-31797 19-CA-31827 19-CA-31865
19-CA-32001 19-CA-32030 19-CA-32031 19-CA-
31526 19-CA-31536 19-CA-31538 19-CA-31886

Before: John J. McCARRICK,
Administrative Law Judge

*[July 8, 2010 Transcript, p. 459]
[Examination of Al Hobart]*

- Q. BY MS. HARTZELL-BOTERO: Mr. Hobart, at the time of the mailing of these, I guess, Notices of Intent to Council, was there a specific organization administering these various trust funds?
- A. Yes.

Q. Who was that organization?

A. The Northwest Administrators.

Q. After receiving these letters, the Notices of Intent to Council, were you thereafter copied on any correspondence between the Employer and Northwest Administrators?

A. I was.

Q. Could you please go ahead and turn to the next exhibit? It should be General Counsel's Exhibit No. 46.

(General Counsel's Exhibit No. 46,
marked for identification.)

Q. BY MS. HARTZELL-BOTERO: Do you have that?

A. Yes, I do.

Q. Did you receive this letter on or about September 24th of 2008?

A. I did.

MS. HARTZELL-BOTERO: General Counsel offers General Counsel's Exhibit No. 46.

JUDGE McCARRICK: Any objection to the receipt of General Counsel's Exhibit No. 46?

MR. PAYNE: No objection.

MR. McCARTHY: none from the Charging Party.

[. . .]

[Examination of David Ballew, p. 590]

. . . sometimes we just exchanged short messages.

- Q. Were these conversations in person, telephonic, both? What kind of conversations were these?
- A. They were all by phone.
- Q. When did you have your first substantive conversation with Mr. Payne?
- A. February 19th.
- Q. How long did that conversation last?
- A. About 30 or 45 minutes.
- Q. Who initiated the call?
- A. I had called John and left a message on February 18th, left him a voice mail. He called back the next morning while I was driving, and then we ended up talking later during the day when I was in my office.
- Q. And just to the best of your recollection, who said what during that conversation? How did that conversation start?
- A. Well, I started off by telling John I wanted to have just an off-the-record conversation. Find out, you know, what his position was, how we could try to put things together, and this was in the aftermath of a meeting that was held Wednesday, February 17th, between Oak Harbor and the Union, regarding returning to work.
- Q. Okay, and you stated that you had reviewed the letter of February 18th, when you had this conversation with Mr. Payne?
- A. Yes, I had.
- Q. Did that letter have any bearing on the conversation with him?

A. Yes, it did. The—to go back one second. There were two letters from February 17th, Exhibits 24 and 25. In one letter, the Company was taking the position, generally, about discipline of strikers, returning strikers, and then in the second letter which I understood was given at the end of the meeting, Exhibit No. 25, and that has to do with what they were now asserting was the status quo for returning strikers regarding pension, health and welfare, and retirees' coverage.

So, the February 18th letter for Mr. Hobart to John Payne addresses the pension, health and welfare issues, and how that was put together, so that was basically the—the essence of what I was calling John about, that is what I told him.

Q. Okay, and continue to the best of your recollection, what did you tell him and what did he say to you?

A. Well, initially John said, "I want to talk off the record and just see where we are at when we get done," and John Payne took the position that Mr. Hobart's letter of February 18th was placing conditions on Union's unconditional offer to return to work by indicating that they wanted the Company to sign, what are called subscription agreements with the trust funds, and those are kind of third-party agreements that trusts often require bargaining parties to sign. [Indiscernible] for that. I told John that these are not conditions, but our position was we are just trying to get back to the status quo pre-strike, and that by making an unconditional offer to return to work, that didn't give the company license to implement unilateral terms, act illegally, but then I said, "Not that we have staked out our positions, let's

just put the labels aside and talk about where we are at.”

He indicated that his client had a concern about a term that was in one of the emails that Mr. Hobart had forwarded the day before. One of the trusts had used the term that they would want to have an interim bargaining agreement as well as a subscription agreement, and he was concerned what that meant. I told him that my understanding was that that was just an ERISA requirement, written agreement, and that people use terms loosely, and that it was not my understanding that the trust was seeking a full-fledged Collective Bargaining Agreement dealing with every issue under the sun.

We then—I reminded him of the case that I had with this firm back in 2004; it was called the Murray’s case, and that is where I represented the Western Conference of Teamsters Pension Trust, and Murray’s, there had been a strike there, and the Employer made contributions on the cross-overs, the pension contributions on cross-overs, but not on strike replacements, and in that case, the Trust sued and we collected contributions for everybody who did bargaining at work during the strike, and that was because there was a written agreement in place between the Company and the Trust, that continued the terms of the expired Collective Bargaining Agreement.

And so, it is an issue where an expired Collective Bargaining Agreement can set the status quo in terms of pension and those type of things, but a Trust, in order to bring an ERISA action, once a Collective Bargaining Agreement has expired, then

it is just an 8(a)(5) situation and only the National Labor Relations Board has jurisdiction to that, so trusts required subscription agreements, or in the pension trusts, it is call the Employer Union Pension Certification.

So, in talking with John, I reminded him of that, that there are ERISA issues, and if they are using terminology, let's not get caught up in what they are doing, that these are minimal requirements. We then talked about pension and I raised the point that if—what I understood from the Company, what his position was, is that they were going to put money that was pension contributions into a savings account, and I said that the economic impact is the same, whether you are putting—making pension contributions or putting those monies into a savings account, there is no economic difference, so we should just be able to get back to the status quo.

At that point, he then started talking about the health and welfare, and he said that he thought there had been an agreement reached in terms of covering—the expired Collective Bargaining Agreement with the Washington Teamsters Health and Welfare Trust, during the strike the moved the cross-overs to the Company health and welfare plan, and he said he felt he had an agreement with the Union, that they had—that they had an agreement with the Union that that was—they had simply agreed completely to move to the Company health and welfare, and away from the Washington Teamsters Health and Welfare Trust.

Q. Did Mr. Payne make a reference to his letter of October 3rd, that was sent to—that was provided to the Union?

A. Not specifically. He did—I said, “Hey, look. The only thing I have seen in writing from the Union, in terms of any agreement, had to do with escrow and pension, and that was specific to strikers and vacation pay, pre-strike paid, post-strike, and pension contributions,” and I said, “That is the only thing I have seen in response to your earlier, your October 3rd letter, so if you have something else, I would be happy to see it, happy to review it,” and then we moved on and stayed on the health and welfare—just a moment. I am trying to get back on track on—his position was that they had agreed to make this move, and I said I understood that I had heard that in prior bargaining before the strike, that there were some what-if proposals back and forth, and part of it was, as part of a global Collective Bargaining Agreement, there may be movement where the Union would move from the Teamsters Health and Welfare to the Company, but that was part global collective bargaining, and—

JUDGE McCARRICK: What do you mean by “part of global collective bargaining?”

THE WITNESS: What was going on pre-strike was that the Union and the Company were bargaining on all terms and conditions of employment. The Collective Bargaining Agreement had expired in 2007, and so the whole range of issues, seniority, wages, discipline, Union security, anything that could be on the table, then the strike happens, and now when I am talking to John, the strike

has ended, but they still have not reached a full agreement, and so what I was talking to him about was just the narrow focus on the one hand, the discipline which happens sometimes during a strike [indiscernible], but this assertion by Mr. Payne that what they had done during the strike that was limited to cross-overs, was now supposed to be the terms and conditions that applied to all employees, now that the strike was over. There were no cross-overs at that point. So, there had been an agreement back in October, proposed by Mr. Payne in October of 2008, for an interim agreement relating to cross-overs, which he defined in his letters as people who worked for the Company before the strike and then crossed the picket line.

To back up a little bit, and I don't know what you have already covered, but prior to that, you cancelled the agreements with the trust and then a few days later wrote to the trust and said, paraphrasing, "Acknowledging an obligation, an 8(a)(5) obligation to the cross-overs and offering to make contributions on them, but not make contributions on replacements," so the trust had said no, because that is selection against the trust, and so I knew from his October 3rd letter that what he was proposing back then, was something which he defined as interim and limited only to cross-overs.

Q. Okay.

A. Okay, so fast forward back up to our first conversation in February of 2009, I had told him that in terms of the global Collective Bargaining Agreement, there might have been some indication

that the Union was willing perhaps to move to Company health and Welfare, but part is the whole give and take on other issues made in exchange for something else, and that it was perceived that what the Company was doing now at the end of the strike was cherry-picking, saying, "Well, we are going to take health and welfare now and declare a victory on that, because we are going to claim that that is the status quo." We still have to bargain all of the other issues, but now this really big piece, health and welfare, they have just simply taken off the table and decided they have already achieved that.

JUDGE McCARRICK: You said that was the position that you explained. That was your understanding.

THE WITNESS: Correct. That this is how it is being perceived, that you are now cherry-picking.

MR. PAYNE: Excuse me, Your Honor, for clarification, I understand context is sometimes important in testimony, but what was said by Mr. Payne and what was said by Mr. Bellew is what is most important here, it seems to me, and I just want to make sure—

JUDGE McCARRICK: Yes.

THE WITNESS: I was just responding to your question. When I made the comment about cherry-picking and I did explain, as I just said, that they were trying to take that piece out, Mr. Payne did say, well, that he understood it could be perceived that way, but that wasn't what he intended. That was not what he intended. They just had a different position. They were maintaining it was the status quo, and we were disagreeing with that.

Our position is as I stated to him, and I have always, status quo is what is in the expired Collective Bargaining Agreement, and it would have been in place—the agreement had been expired for almost a year by the time of the strike, so it was clear to us what the status quo was, and that his October 2008 letter was plainly limited just to cross-overs, but as part of his call, as lawyers, we were trying to stake out our positions—

MR. PAYNE: Your Honor, objection. I think we were said into a who said what in a phone call, and I would like to make sure that is where we are at.

JUDGE McCARRICK: Yes, I would like to do this by question and answer.

MS. HARTZELL-BOTERO: I attempted to, Your Honor, but I think you wanted some context, so that is where Mr. Bellew went, but let's get back to question and answer.

Q. BY MS. HARTZELL-BOTERO: Now, you used the word "cherry-picking."

A. Yes.

Q. Did you use that word in your conversation with Mr. Payne?

A. I did.

Q. All right, so why don't we pick it up from there. Use your words, as best as you can remember, as to what you said with respect to cherry-picking, and whether Mr. Payne responded, and whether the conversation continued.

- A. Well, my comment about cherry-picking was that, as I said, that the Union had indicated in a global negotiation, they might go there, and the view was that the Company was cherry-picking and taking health and welfare off the table.
- Q. Okay, did you have any more conversations about health and welfare during this phone call?
- A. I think at that point we talked about the disciplinary issues and then agreed to try to keep talking. John wanted to talk to his clients and get back to me.
- Q. Is that how the conversation ended, that he would get back to you?
- A. Yes.
- Q. When was the next conversation you had with Mr. Payne?
- A. The following day.
- Q. How long did that conversation last?
- A. That was about an hour.
- Q. And where were you when you had this conversation?
- A. In my office.
- Q. Did you recall which person called which person?
- A. John Payne called me back from the day before.
- Q. And just to the best of your recollection, who said what during this conversation?
- A. He started the call by telling me that he had talked to his clients, that they were open to seeing what we had to talk about, but didn't have

any ideas necessarily, and wanted to know if I had any ideas to talk about.

Q. And what did you say?

A. I said, yes, and then the first topic we talked about was the discipline issue.

JUDGE McCARRICK: What did you say?

THE WITNESS: At the time there was—

JUDGE McCARRICK: What did you say?

THE WITNESS: Well, that his letter of February 17 referred to 13 people and that we were concerned that he was being—keeping his options open that there may be more, and I thought it was important if we could at least limit it to that, to the thirteen that could help, and also, Mr. Hobart's letter of February 18th had raised about arbitration, and John had said they were not willing to arbitrate those things, but I raised the possibility, that if you do go beyond the thirteen, then maybe we can talk about arbitrating those people, so those kind of ideas.

And then he asked, "Well, what about Pension Health and Welfare," and I said that what I thought that we could do was that he and I could go together and we could meet with the various people at the trust funds, the three trust funds, and find out what is the minimum they need just to get back to the status quo. I wanted to make sure—in terms that they are not seeking a full Collective Bargaining Agreement and we can—if we have questions about that, if you have questions, let's just do it together, so it is just an open exchange and we are both on the same page.

Q. BY MS. HARTZELL-BOTERO: And did Mr. Payne respond to that proposal during this call?

A. No. Not to that proposal. He said he would think about that one.

Q. Was there any discussion during his conversation about what the status quo was?

A. Yes.

Q. And who said what about that?

A. The next part of the call as quite a bit about discipline, and then we moved back to the pension, health and welfare, and Mr. Payne said, "Well, we are just maintaining the status quo," and I took the position, "No, you are not, the status quo is the expired Collective Bargaining Agreement and the pre-strike." But that, you know, let's just stop getting stuck on that and trying to argue each other's position with each other, and just figure out where we are going.

But I did say, "Look, if you are going to push that you think there is an agreement that establishes this is a new status quo, then send me what you have, because I have not seen anything." I had seen, like I told him, the October letter that related to strikers, and he said, well, he has some things that are better than that.

Q. Did you talk about pension?

A. We talked about pension.

Q. What did you say on pension? Who said what?

A. I told him with regards to pension, that the notion that the new status quo for pension, replacing Western Conference Teamsters Pension

Trust, with just putting money into a savings account, I thought was a ridiculous argument, that that would not be agreed to replace participation in a pension fund, with just putting money into a savings account, and I told him that I thought he needed to think about the implications under ERISA for taking money that was designated as pension money and just putting it into a savings account.

Q. Did Mr. Payne substantively respond to that comment?

A. No, not with complete sentences, “Well,” just kind of stammered, and then we agreed that—he said, “Well, I will talk to my clients and get back to you.”

Q. Was that the end of that phone call?

A. Yes.

Q. When did you next speak with Mr. Payne?

A. Later that night, after about 5:00, he called me back and said he had not yet reached his clients, and he would call me either later in the evening or that next day.

Q. And either later that evening or the next day, did you have a substantive conversation with him?

A. Yes, he called me the next afternoon, a Saturday, and reached me at home, and told me he had—there were still two of his clients that he needed to reach.

Q. Was that the end of that conversation?

A. It was.

- Q. Did you have a following conversation with Mr. Payne?
- A. Yes, the next day he called me again.
- Q. Where were you when he called?
- A. I was at home.
- Q. How long did that conversation last?
- A. Five, maybe ten minutes.
- Q. And who said what during that conversation?
- A. He said that he had talked to his clients and he was not interested in going with me to meet with representatives of the trust funds, but that if I wanted to draft something, that might be acceptable to those trust funds, that I should do that and he would take a look at it, but that he wasn't agreeing to anything, just simply he would take a look at it.
- Q. Did he express any concerns that he had during that conversation?
- A. Not during that conversation, just that he didn't want to be a part of a joint meeting with the trust funds.
- Q. Was that the end of that conversation?
- A. Yes.
- Q. When was your next—well, let me back up a second. Did you actually draft an interim agreement then for the Employer to consider?
- A. I did.
- Q. I am going to hand you a document, a series here. I am actually going to hand you three

documents and just look at the first one, if you will.

This is General Counsel Exhibit No. 80.

(General Counsel Exhibit No. 80,
marked for identification.)

Q. BY MS. HARTZELL-BOTERO: Mr. Bellew, could you please take a look at General Counsel Exhibit No. 80?

A. Yes, I have.

Q. Do you recognize this document?

A. I do.

Q. Is this the document that you had initially drafted?

A. Yes, it is.

Q. After you had drafted this agreement, what is the very next thing you did?

A. After I drafted it, I sent a copy by e-mail to the Western Conference of Teamsters Trust, the Washington Teamsters Welfare Trust, and the Retirees Welfare Trust. It was a single e-mail to the three, and asked you to review it.

Q. Okay, let's look at that. Turn to the next exhibit, which is General Counsel Exhibit No. 81.

(General Counsel Exhibit No. 81,
marked for identification.)

Q. BY MS. HARTZELL-BOTERO: Was General Counsel Exhibit No. 80 then attached to this e-mail which is General Counsel Exhibit No. 81?

A. Yes.

Q. Now, so there are three names on here: Don Ditter, there is a D. McInnes, and an M. Coles.

A. Yes.

Q. So, who is D. McInnes?

A. D. McInnes is the—is an account representative for the Washington Teamsters Welfare Trust.

Q. And how about Mr. Ditter?

A. Mr. Ditter is an area manager for the Western Conference of Teamsters Pension Trust.

Q. And who is M. Coles?

A. Mark Coles, he is the administrator of the Retirees Welfare Trust.

MS. HARTZELL-BOTERO: General Counsel offers General Counsel Exhibit No. 80 and 81.

JUDGE McCARRICK: Is there any objection?

MR. PAYNE: No objection, Your Honor.

MR. McCARTHY: No objection from the Charging Party, Your Honor.

JUDGE McCARRICK: General Counsel Exhibit No. 80 and 81 are received.

(General Counsel Exhibit No. 80 and 81,
received into evidence.)

Q. BY MS. HARTZELL-BOTERO: Did these gentlemen respond to your e-mail?

A. Yes, they did.

Q. And after they responded, what did you do next, if anything? Did you forward this agreement to anybody?

A. I did. After I heard back from each of the three that the agree was okay with them—

JUDGE McCARRICK: In what form did you hear back from them?

THE WITNESS: I heard from Mr. Ditter and Mr. McInnes by phone, and Mr. Coles responded by e-mail.

Q. BY MS. HARTZELL-BOTERO: After you heard back from these gentlemen, what did you do?

A. I then sent a copy of that—an attachment of that interim agreement to John Payne for his review.

Q. Okay, go ahead and turn to General Counsel Exhibit No. 82(a) and 82(b).

(General Counsel Exhibit No. 82(a) and 82(b),
marked for identification.)

Q. BY MS. HARTZELL-BOTERO: Do you recognize General Counsel Exhibit No. 82(a)?

A. Yes, I do.

Q. And if you will look at General Counsel Exhibit No. 82(b), is this the document that you attached to 82(a) and forwarded it to Mr. Payne?

A. Yes, it is.

Q. It looks a little different that General Counsel Exhibit No. 80. Are there any material differences between the two documents?

A. The only difference is up top, where it says, "Interim Agreement by and between Oak Harbor Freight Lines," and then lists all of the Teamsters locals, which is basically the same caption that

was on the expired Collective Bargaining Agreement.

MS. HARTZELL-BOTERO: General Counsel offers General Counsel Exhibit No. 82(a) and 82(b).

JUDGE McCARRICK: Any objection to (a) and (b), General Counsel Exhibit No. 82?

MR. PAYNE: none, Your Honor.

MR. McCARTHY: none from the Charging Party.

JUDGE McCARRICK: Okay, General Counsel Exhibit No. 82(a) and (b) are received.

(General Counsel Exhibit No. 82(a) and 82(b),
received into evidence.)

Q. BY MS. HARTZELL-BOTERO: Mr. Bellew, did you speak with Mr. Payne after you forwarded him this document that appears in General Counsel Exhibit No. 82(b)?

A. Yes, I did.

Q. When did you next speak to Mr. Payne?

A. February 24th.

Q. How long did you speak with Mr. Payne?

A. Approximately five minutes.

Q. Where were you when he called you?

A. I was at the airport in Pasco, Washington.

Q. And what did you say and what did he say during this conversation?

A. He said that he had received the draft that I sent to him, and that he had talked it over with his client, and that they had a sentence about

the last sentence of the document and wanted to know what it meant.

Q. Okay, and looking at the last sentence, it says, "Nothing in this interim agreement shall relieve either party from its obligations under the law concerning conditions of employment, pending bargaining."

What exactly did he say? Did he say what his concern was?

A. He said they didn't know what it meant.

Q. Did you tell him what it meant?

A. I told him that it really had two purposes, that because we were not part of negotiations of a global Collective Bargaining Agreement, that this was just specifically targeted to this one issue about getting the status quo going on the pension health and welfare, that it was drafted to make clear that the parties still had to negotiate all other terms and conditions of employment, and so Oak Harbor, for example, couldn't claim, "Well, hey, this is our Collective Bargaining Agreement and only talks about pension health and welfare, so we have the ability to change anything else we want, because we have no agreement on that."

Q. When you explained this to Mr. Payne, did he respond?

A. He said, "Okay, as far as that one."

I said, "It had a second purpose, as well, in my view, that if the Company cancelled this interim agreement, that the status quo would still survive, as far as their 8(a)(5) obligations."

Q. And did Mr. Payne respond to that?

A. He said, "Okay, well, I will pass that on to my client, and let you know."

Q. Was that the end of your conversation?

A. I told him I was over in Pasco for a hearing, that I thought I would be out late afternoon, and that I would give him a call when I was done.

Q. Was that the end of your—

A. That was the end.

Q. Did you call Mr. Payne once your hearing was over?

A. Yes.

Q. When did you call him?

A. It was probably about 4:30.

Q. Did you actually—

JUDGE McCARRICK: That same day?

THE WITNESS: Yes, that same day, after the hearing, it was about 4:30 in the afternoon, I did call, but I only received his voicemail.

Q. BY MS. HARTZELL-BOTERO: Did you leave him a voicemail message?

A. I did.

Q. And what message did you leave?

A. I said, "I am done with my hearing," but that I would be boarding a flight in whatever, twenty minutes or so, and if he could reach me before then, great, and otherwise, to give me a call that night or the next day.

Q. Did Mr. Payne call you back?

A. The next day, he did.

Q. Where were you when he returned your call?

A. I was in my office.

MR. PAYNE: Excuse me, Your Honor, could we have a date here?

THE WITNESS: The next day, 2/25.

MR. PAYNE: Are you sure?

THE WITNESS: That's absolutely correct.

Q. BY MS. HARTZELL-BOTERO: I'm sorry, where were you when he called you?

A. In my office.

Q. Did you have a conversation with Mr. Payne?

A. I did.

Q. For how long?

A. Only about five minutes, the first conversation.

Q. So you had two conversations with Mr. Payne on the 25th of February?

A. Yes.

Q. Start with the first one. You were in your office?

A. I was in my office.

Q. And—

A. He called and said that he had talked to his clients and that they had told him that he was no longer authorized to talk to me, that Bob Braun was going to be talking—had talked to Al Hobart in terms of negotiations for the global Collective

Bargaining Agreement, and that they thought they had been making headway but then they had received a letter from Al Hobart that day.

Q. Okay, did you—were you aware of what letter Mr. Payne was referring to when you had this conversation?

A. I was.

Q. And let me show you a document. I believe it is General Counsel Exhibit No. 77, I think. Yes, 77.

A. Okay.

Q. Is that the letter or was there a different letter?

A. Exhibit 77 is the letter.

Q. Okay, please continue with the remainder of your conversation.

A. In that conversation he indicated that Mr. Braun and Mr. Hobart would be talking, and then this letter, Exhibit No. 77 arrived, and they don't understand what is going on, so he was not to talk to me anymore.

Q. Did your conversation continue?

A. It did. I told him that I had heard rumors that one of the facilities either up in Burlington or Mount Vernon, that the Company was actually hiring people off of the street, and I asked him if he knew anything about that, and he said, "No, it wouldn't make sense for them," but that he would check into it.

We then talked a little bit more about this letter, Exhibit No. 77, and Mr. Hobart had said—indicated that basically, the "Union was going to

take steps—the Union viewed—maintained the benefits as reflected in the parties—the Company’s refusal to maintain the benefits is reflected in the parties expired bargaining agreement as illegal and counter-productive, and the Union will pursue its legal remedies as we see fit.”

So, we talked about that. I said we will file a charge, file a Unfair Labor Practice, at least, while negotiations for global collective bargaining go on, but we have to deal with this. Mr. Payne said that he thought that the documentation that he had on pension, his argument for status quo, what he had for pension, was better than for health and welfare.

I said, “Well, I haven’t seen anything that you are relying on. I don’t know what you are talking about.”

The conversation ended then with him telling me that he would check into the issue about Mount Vernon, Burlington, and get back to me.

Q. Okay, did that conversation end?

A. Yes.

Q. Did you have another conversation with Mr. Payne that day?

A. Yes.

Q. Where were you when you had that conversation?

A. Still in my office.

Q. How long did that conversation last?

A. Only a couple minutes.

Q. Who said what?

- A. Well, he called back, maybe it was a half an hour after the conversation ended, he said that he had checked into the rumor about the Burlington and Mount Vernon terminal, and that nobody was being hired. He said that employees—the Union should contact Bob Braun in terms of the return to work, and that he had told Bob that they should follow the status quo, the expired Collective Bargaining Agreement, and return people by seniority.
- Q. Okay.
- A. Then, we talked about, you know, given the duration of the strike, there maybe people that were out of the area, that they may not be able to reach, that the Company might send them a letter, and he would send a copy to the Union, in that case.
- Q. Did your conversation—
- A. It ended.
- Q. Was that the last conversation that you had with Mr. Payne about the topic?
- A. Yes.
- Q. When you were having this conversation with Mr. Payne, what authority had your client given with respect to the topics that—if your client had given you authority with respect to any specific topics that you were to discuss with Mr. Payne?
- A. I was only talking to Mr. Payne about the assertion he had made regarding a new status quo, and the first two conversations, we talked a little bit about the disciplinary issues, but then that was

it. I—I had not talked to Mr. Payne ever, about a global package. That had never been part of any bargaining, at a bargaining table, or that type of thing.

Q. So, did you have authority from your client to speak with Mr. Payne about an overall Collective Bargaining Agreement?

A. No.

MS. HARTZELL-BOTERO: No further questions for Mr. Bellew.

JUDGE McCARRICK: Charging Party?

MR. McCARTHY: Is there an affidavit on file for this witness?

MS. HARTZELL-BOTERO: Yes.

There are some handwritten notes with respect to the phone conversation. There is one page of typed notes, an e-mail, and then there is the Board affidavit. Seven pages of typed dated June 4th, 2010.

JUDGE McCARRICK: Let the record reflect that those are being given to Counsel for Respondent, but in the interim, let's have any examination by Charging Party.

Go ahead.

Cross Examination

Q. BY MR. McCARTHY: What areas of law do you specialize in?

A. Union side labor law, and ERISA.

Q. You testified that your conversations with Mr. Payne were off the record?

A. Yes.

**TRANSCRIPT OF HEARING—
RELEVANT EXCERPTS
(JULY 9, 2010)**

BEFORE THE NATIONAL
LABOR RELATIONS BOARD REGION 19

In the Matter of:
OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839, and 962,

and

TEAMSTERS LOCAL 174,

Case Nos 19-CA-31797 19-CA-31827 19-CA-31865
19-CA-32001 19-CA-32030 19-CA-32031 19-CA-
31526 19-CA-31536 19-CA-31538 19-CA-31886

Before: John J. McCARRICK,
Administrative Law Judge

*[July 9, 2010 Transcript, p.629] [Examination of
David Ballew]*

- Q. Where it says pension retirees, he sees N.W.A., North West Administrator's emails as conditions, I don't, but agreed to put that label aside. The N.W.A. emails you're referring to here, are those emails attached to the February 18th, 2009 letter?

A. Yes.

Q. That would be General Counsel's Exhibit 75 and the emails are attached.

A. Correct.

JUDGE MCCARRICK: We just identified 75.

Q. Okay. So where it says he sees N.W.A. emails as conditions, you were referring to these emails that are attached to Exhibit 75 is that correct?

A. That's what you said, okay; and I presume that you were talking about the emails from the prior day, I mean, I'm pretty sure that we talked about this, 'the emails from yesterday, that type of thing.'

Q. Okay, and you said, I don't, meaning I don't see these as conditions to the cessation of the strike but we agreed to put that aside, correct? Is that what this is all about?

A. That label aside.

Q. That label aside, okay. Alright, then, your notes go on to say confirm that it would only be pending bargaining.

A. Correct.

Q. Tell me what the discussion was when that subject that lead to this note that you entered on your notes.

A. That the parties were still in the process of trying to negotiate a global collective bargaining agreement. That I had no involvement in that and all I was talking to you about was trying to focus

on what would be the minimum necessary to get back to the status quo.

Q. Okay and when you say minimum necessary?

A. On pension and health and welfare retirees.

Q. And that's what you had said, is that correct?

A. Yes.

Q. Okay, what was being discussed was the health and welfare and the pension and the retirees' benefit for the returning strikers, what would be done with those benefits, is that true?

A. That is the group that we were talking about, the returning strikers.

Q. Okay.

A. And our view is that those benefits had already expired, that the collective bargaining agreement set the status quo.

Q. Okay, and so what was being discussed was that the overall collective bargaining agreement was just what were the terms and conditions going to be for those returning strikers, true?

A. Not necessarily terms and conditions for returning strikers, it was just that issue, you had taken the position on February 17th, in your letter that said there was a new status quo on those issues. So, I wasn't talking about any other terms and conditions for returning strikers, it was really in response to your letter from February 17th.

Q. Okay, but what I'm trying to make sure we get for the record is to distinguish that the conversation between you and me, John Payne, was

about the pension, the health and welfare, and the retirees' benefits for the returning strikers at that point in time as opposed to discussing what the terms and conditions of the overall labor agreement would be.

A. Correct.

Q. Okay. Now, the last three lines of your notes?

A. Yes.

Q. I think it said we discussed Murray's case, Murray's case was a returning striker's case or was it a strike case?

A. Yes, it was a case involving a strike where contributions had been made on behalf of the crossovers, but not on behalf of the strike replacements working side by side.

Q. Okay and then there was a law requiring a written agreement, is that what your notes say?

A. Law requires.

Q. Requires a written agreement?

A. Right.

Q. And that would mean a written agreement to accept contributions for pension, is that true?

A. It includes that under Section 302, the law requires a written agreement for trust fund, so an expired collective bargaining agreement as in Murray's, could be the written agreement to satisfy Section 302. And then what we talked about with the Murray's case, in that situation, the Western Conference and Teamsters' Pension Trust also has as a separate written agreement that it requires,

report's side, that binds the parties to the Declaration of Trust and requires continual contributions post expiration and that allows the Trust then after, expiration of the collective bargaining agreement, to have standing over ERISA, which is Section 515, collection action for delinquent contributions.

- Q. So, it's an underlying subscription agreement, so to speak, or it's referred to as a pension EU agreement, that allows the Trust to come after the Employer for contributions after the labor agreement expires, is that true?
- A. Well, otherwise, the NLRB has jurisdiction post expiration.
- Q. Right.
- A. And for the trust to have their own standing.
- Q. Their own remedy?
- A. Right, their own ability to go to court, they have the EU or subscription agreement type of thing.
- Q. Okay. Let's go to Page 2 of your notes now.
- A. Okay.
- Q. Can you decipher Page 2 of your notes for us line by line?
- A. Yes, first line, people use terms loosely.

**TRANSCRIPT OF HEARING—
RELEVANT EXCERPTS
(JULY 12, 2010)**

BEFORE THE NATIONAL
LABOR RELATIONS BOARD REGION 19

In the Matter of:
OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839, and 962,

and

TEAMSTERS LOCAL 174.

Case Nos 19-CA-31797 19-CA-31827 19-CA-31865
19-CA-32001 19-CA-32030 19-CA-32031 19-CA-
31526 19-CA-31536 19-CA-31538 19-CA-31886

Before: John J. McCARRICK,
Administrative Law Judge

*[July 12, 2010 Transcript, p. 909] [Examination of
Mark Coles]*

. . . administrative law judge in this case?

A. Yes.

Q. Have you been in contact with the trustees or
any other representative of the trust to confirm
those representations?

A. Yes.

Q. With whom have you been in contact?

A. I contacted John Mack, who's the chairman of the trust; and Mr. Joe Tessier, who's the secretary of the trust.

Q. Are there any time limitations with respect to how far in the future the trust would accept contributions without a subscription agreement?

A. Yes, the trustees requested that after six months, starting from August 1st, 2010, that they be allowed to revisit the issue if a collective bargaining agreement hadn't been entered into or a subscription agreement signed by that time.

Q. Have you made the Oregon Warehouseman's Trust aware of the remedy the Board is seeking in this case?

A. Yes.

Q. What is the position of the Oregon Warehouseman's Trust with respect to the remedy the Board is seeking in this case?

MR. PAYNE: Objection, foundation, Your Honor.

JUDGE McCARRICK: Sustained.

Q. Who have you made aware of the Oregon Warehouseman's Trust of the remedy the Board is seeking?

A. Jerry Buckley, counsel for the trust.

Q. When did you have contact with Mr. Buckley?

A. Last week.

Q. What is the position of the Oregon Warehouseman's Trust with respect to the remedy the Board is seeking in this case?

MR. PAYNE: Objection, Your Honor, foundation again.

JUDGE McCARRICK: In what regard?

MR. PAYNE: This witness testified he made Jerry Buckley, who is the attorney for the trust, aware of the potential remedy in this case. There's no evidence, no testimony I've heard yet to indicate this witness has made any trustees aware whether there's been a presentation made to anybody, what was said to Mr. Buckley, what was said to any trustees, where he gets his authority, etc.

JUDGE McCARRICK: Alright. Get some more foundation.

Q. BY MS. BOTERO: Does Mr. Buckley have authority to speak on behalf the trustees.

A. He does not.

Q. Are you aware whether Mr. Buckley has been in contact with the trustees in order to support your statement that the Oregon Warehouseman's Trust would accept contributions based on the remedy the Board is seeking in this case?

MR. PAYNE: Objection, foundation, Your Honor, and hearsay, whatever Mr. Buckley has said or done.

JUDGE McCARRICK: Overruled as to hearsay. It's coming in just for the purpose what the understanding is. But rephrase the question.

Q. What authority does Mr. Buckley have with respect to the trust?

MR. PAYNE: Objection, Your Honor, asked and answered. He said he has no authority with respect to the trust.

JUDGE McCARRICK: I think that was with respect to another person. Go ahead and answer the question, sir.

Q. If you know, what authority does Mr. Buckley have with respect to the trust's position on the remedy the Board is seeking?

A. Mr. Buckley advised me that he had spoken with the trust chairman, Tom Leadham, and that it was acceptable for the trust to accept the contributions if so ordered by the administrative law judge.

Q. And what authority does Mr. Leadham have with respect to the trust?

A. Mr. Leadham is the chairman of the trust and has the authority to set policy.

Q. Is it your responsibility to carry out that policy?

A. It is.

MR. PAYNE: Your Honor, I'm going to object, motion to strike. This is now third level hearsay. It went from Buckley to Leadham, back to Buckley, and then over to Mr. Coles.

JUDGE McCARRICK: I'll overrule the objection and receive the information.

Q. What is the position of the Oregon Warehouseman's Trust with respect to the remedy the Board is seeking in this case?

A. They would accept contributions if ordered by the administrative law judge.

MR. PAYNE: I can't hear, Your Honor, I'm sorry.

A. The trust has taken the position that they would accept contributions if so ordered by the administrative law judge.

Q. Has the trust indicated to you if there'd be time restraints or constrictions on the acceptability on Employer contributions if ordered by the administrative law judge?

A. No restrictions.

Q. Has any attempt been made by the Employer to restart contributions on behalf of Oak Harbor employees to the Oregon Trust since you received that letter from Mr. Payne attempting to restart contributions for crossover employees?

A. Not that I'm aware of.

Q. Is the expired collective bargaining agreement sufficient for the Employer to restart contributions on behalf of Oak Harbor employees to the Oregon Warehouseman's Trust?

A. Yes.

Q. Does the Oregon Warehouseman's Trust require any other executed documents other than the expired collective bargaining agreement between Oak Harbor and the locals in order for the Employer to restart the contributions?

A. No.

[p. 921]

[...]

A. She did.

Q. How did you come to be in possession of it?

A. She faxed it to me.

Q. Okay. Did she discuss with you a response to this letter?

A. I don't recall.

Q. Okay. Do you know whether there was a response to this letter?

A. I believe Mr. Buckley responded to that letter.

Q. Okay. In General Counsel Exhibit 52 is Mr. Buckley's reply, is it not?

A. It appears to be.

Q. Okay. Did you see Mr. Buckley's reply after it went out?

A. Yes, I did.

Q. Can you read it for a moment?

(Long pause)

Q. It says there's no subscription agreement in place for Oregon, is there?

A. No.

Q. You never called or notified anybody from Oak Harbor to say there's no subscription agreement in place for Oregon, did you?

A. I did not.

Q. You never asked or instructed Linda Philbrick to call anybody from Oak Harbor and say there's no subscription agreement here in Oregon, did you?

A. I did not.

Q. Okay. And you never told anybody from Oak Harbor that making contributions on behalf of crossovers, but not strike replacements, would create a selectivity problem, did you?

A. I did not.

Q. Okay. To your knowledge, Mr. Buckley never told anybody from Oak Harbor that making contributions for crossovers but not strike replacements would create a selectivity problem, did he?

A. I don't know what Mr. Buckley—

Q. But to your knowledge, do you—

A. No, I don't know.

Q. And he's the trust attorney, right?

A. He is.

Q. Okay. To your knowledge, Linda Philbrick never told anybody at Oak Harbor that making contributions on behalf of crossovers but not strike replacements would create a selectivity problem, did she?

A. Not to my knowledge.

Q. Okay. To your knowledge, has anybody from the Oregon Warehouseman's Trust ever told this Employer that it does not have a subscription agreement from the time the strike started until February 18th, 2009?

A. I don't know.

Q. Do you know—up until you just testified 20 minutes ago, has anybody ever told Oak Harbor from the Oregon Warehouseman's Trust that

there's no subscription agreement in place for Oak Harbor Freight Lines, to your knowledge?

A. Not to my knowledge.

Q. Okay. Mr. Coles, the Oregon Warehouseman's Trust is now part of—it's administered by Northwest Administrators. Is that correct?

A. That's correct.

Q. Does Dean McInnes from Northwest Administrators play a role in that administration process?

A. He does not.

Q. Who plays a role in that administration process over the Oregon Trust?

A. Linda Philbrick and myself.

Q. Okay. Do you know whether that trust fund, this Oregon Warehouseman's Trust, has a policy of generally requiring a subscription agreement when a contract is signed?

A. My understanding is that they do not.

Q. Okay. What are you basing that understanding on?

A. My conversation with Mr. Buckley.

Q. Okay. You don't have independent knowledge. Is that correct?

A. Yes.

Q. One last question about Mr. Buckley for a moment. If you could look at General Counsel Exhibit 52, which is Buckley's

[p. 929]

[. . .]

. . . the Employer and say you'll take contributions without a subscription agreement?

A. No.

Q. At no time did you ever contact anyone representing Oak Harbor and say you'll take contributions without a written interim agreement, did you?

A. No.

Q. Let me ask you a couple more questions. I believe when it came to the Oregon Warehouseman's Trust, you said you talked to Mr. Buckley as it relates to whether or not they would accept contributions based an administrative law judge's remedy. Is that correct?

A. That's correct.

Q. I believe you said Mr. Buckley talked to one of the trustees on the trust. Is that correct?

A. Correct.

Q. That trustee is Tom Leedham, right?

A. Correct.

Q. And Tom Leedham is a Teamster official. Is that correct?

A. He is.

Q. He's the secretary/treasurer of Teamsters Local 206, isn't he?

A. Yes.

Q. You don't have any indication that Mr. Buckley talked to anybody—any of the Employer trustees down there, do you?

[p. 943]

[. . .]

JUDGE McCARRICK: Respondent?

MR. PAYNE: One last question.

Recross-Examination

Q. BY MR. PAYNE: I call your attention to GC—General Counsel Exhibit 75(c).

A. Yes.

Q. After this email was sent, Mr. Coles, you never sent a follow-up email to Oak Harbor Freight Lines saying anything to the effect of, just send the contributions and we'll take them, did you?

A. This particular—

Q. Yes or no, sir.

MR. McCARTHY: Objection, it's confusing. His previous testimony was about the Oregon Trust. This letter is about the Retirees Welfare Trust. The redirect from General Counsel was about Oregon, this is about Retirees Welfare Trust, so it's a confusing question.

JUDGE McCARRICK: Sustained.

Q. Let me ask, did you at any point contact Oak Harbor Freight Lines and say, we'll take contributions, go ahead and send them in, we'll accept them?

MS. BOTERO: Objection, which trust?

MR. McCARTHY: Objection, on behalf of which trust?

MR. PAYNE: I think I said the Oregon Trust.

Q. Did you contact Oak Harbor Freight Lines and say the Oregon Trust will take contributions, just send them in?

A. I did not.

MR. PAYNE: No further questions, Your Honor.

MS. BOTERO: I have a question.

Redirect Examination

Q. BY MS. BOTERO: Was there any reason why you didn't contact—well, strike that. The last attempt that the Employer made to make contributions to the Oregon Warehouseman's Trust was made on behalf of certain employees, do you recall?

A. Yes.

Q. And those employees were referred to as what kind of employees?

A. I'm sorry, can you repeat the question?

Q. Do you recall when the Employer attempted to restart contributions—

A. Yes.

Q. —for certain types of employees?

A. The crossover employees only.

Q. Had the Employer ever notified the trust that it wanted to start contributions on behalf of all employees prior to February—on or before February 18th, 2009?

A. No.

MS. BOTERO: No questions.

JUDGE McCARRICK: Any further?

**TRANSCRIPT OF HEARING—
RELEVANT EXCERPTS
(JULY 13, 2010)**

BEFORE THE NATIONAL LABOR
RELATIONS BOARD REGION 19

In the Matter of:
OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839, and 962,

and

TEAMSTERS LOCAL 174.

Case Nos 19-CA-31797 19-CA-31827 19-CA-31865
19-CA-32001 19-CA-32030 19-CA-32031 19-CA-
31526 19-CA-31536 19-CA-31538 19-CA-31886

Before: John J. McCARRICK,
Administrative Law Judge

*[July 13, 2010 Transcript, p. 982] [Examination of
John M. Payne]*

THE WITNESS: Okay. I have General Counsel's 2 in
front of me.

Q. BY MS. SMITH: Okay. Do you recognize this
contract?

A. Yes, I do.

Q. And what is it?

A. This is the labor agreement that was in effect from 2004 through 2007 that was the basis from which we were bargaining a new contract.

Q. When did this contract expire?

A. October 31, 2007.

Q. When did negotiations begin for a successor contract?

A. In August of 2007.

Q. Has there been a new labor agreement reached yet?

A. Not yet.

Q. How many bargaining sessions did you have prior to the strike?

A. Before the strike we had approximately 30 bargaining sessions.

Q. Did any of those sessions also include a federal mediator?

Q. Yes. Two of them included a federal mediator.

Q. Did Oak Harbor send the union a last, best, and final offer?

A. Yes, we did.

Q. Why did you prepare and send a last, best, and final offer?

A. Well, the union had repeatedly asked for a final offer, and, by the union, I mean Al Hobart. They said just give us your final offer, give us your best shot. I remember him using those terms. And so we wrapped it up and gave him a final offer.

Q. When did you give the union a last, best, and final offer?

A. September 22nd, 2008.

Q. Do you recall approximately what time?

A. Yes. It was hand delivered to Al Hobart at approximately eleven o'clock in the morning.

Q. Was there a strike?

A. Yes, there was.

Q. When did the strike begin?

A. The strike began on September 22nd, 2008 at approximately 6:00 P.M.

Q. Did all of the Teamsters' local unions participate in the strike?

A. Yes, they did.

Q. When did the strike end?

A. The strike ended on February 26th, 2009.

Q. Who was the union's chief spokesman in bargaining?

A. The union spokesman changed. It started as Ken Thompson. It then went to Al Hobart. It then went to Mike Simone. Then I went to Paffenroff. Then it went back to Al Hobart.

Q. Who was the union spokesman when the strike began?

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[. . .]

. . . Exhibit No. 45(a). Do you recognize this document?

A. I do.

Q. And what is it?

A. This is a notice of intent to cancel that I sent—or that pertains to the Oregon Warehousemen's Trust.

Q. Did you know at the time you sent this notice whether or not a subscription agreement was in place?

A. I did not.

Q. What information did you have at that time?

A. At that time I knew that Oak Harbor had signed a letter of understanding to move its Oregon employees into the Oregon Warehousemen's Trust. I knew that that trust was administered by Northwest Administrators and that Northwest Administrators typically mandates a subscription agreement any time their plans are—are executed.

Q. Did you take any steps to determine if a signed subscription agreement existed with the Oregon Trust Fund?

A. I did.

Q. What steps did you take?

A. I called two people at the Oregon Warehousemen's Trust. I called Linda Philbrick and asked her whether or not she knew whether Oak Harbor had

a subscription agreement covering the Oregon Warehousemen's Trust and Linda Philbrick said I'm almost sure we do, she said, but I'll have to double check.

MS. HARTZELL-BOTERO: Objection. Hearsay.

JUDGE McCARRICK: Overruled. This is background. It's collateral.

A. (continuing) She said I'm almost sure we do, but I'll have to double check, but we almost always do require one.

And the second thing that I did—and she suggested then that I call another employee who worked with her named Matt and so I called Matt and asked him the same question and got nearly the identical answer from Matt, which is we almost always require a subscription agreement and so I'm almost sure or positive, I think he said, that there is one in place.

Q. As a result of that information, what did you do?

A. Well, I went ahead and sent this provisional letter to the Oregon Warehousemen's Trust and with a notice of intent to cancel on a provisional basis.

Q. Did the unions or the trust funds ever tell you there was no signed subscription agreement?

A. I've never heard that, no.

Q. What steps did you take regarding medical coverage benefits for the unionized cross-over employees?

A. Well, I sent letters to each of the four trusts to determine whether or not they would be willing

to accept contributions on behalf of the cross-overs after we had sent our notices of cancellation because I wanted to know whether or not these trust funds were going to accept contributions or not.

[p. 991]

[. . .]

. . . that pension be escrowed and that Retirees health and welfare be escrowed.

Q. I'd like to call your attention to General Counsel's Exhibit No. 54. Do you recognize this letter?

A. I do.

Q. And what is it?

A. This is the memo that I sent to Al Hobart, to Buck Holliday, and Ken Thompson with our proposal on the pension, health and welfare and retirees health and welfare with regard to what we were proposing to do with the cross-overs.

Q. Did you receive a response from the unions?

A. I did.

Q. When did you receive a response?

A. On October 9th, 2008.

Q. Was that reply in a meeting or in writing?

A. It was at a meeting.

Q. Where was that meeting held?

A. It was held at the FMCS offices in Seattle.

Q. Who was present at that meeting?

A. Bob Braun and myself represented the employer. Katherine Erskine was the mediator. And repenting the union were Al Hobart, Rick Hicks, and Buck Holliday.

Q. Who was the union spokesman?

A. Al Hobart.

Q. And who was the company spokesman?

A. Myself.

Q. What was said at that meeting?

MS. HARTZELL-BOTERO: Objection. Foundation.

JUDGE McCARRICK: Sustained.

Q. BY MS. SMITH: Mr. Payne, who spoke first at that meeting?

A. I did.

Q. And what did you say?

A. I said to the union I said I have two questions that I'd like to pose to start the meeting. I said the family has asked me to ask you what will it take to end the strike. And I said secondly I said I'd like to know if you have a response to our October 3rd, 2008 memo regarding pension, health and welfare, and retirees health and welfare.

Q. Did anyone from the union respond?

A. Yes.

Q. Who responded?

A. Al Hobart responded.

Q. And what did Mr. Hobart say?

A. Al Hobart said—he said—he started with the second question first. He said, as far as trust funds go, he said the escrow account is okay with us. And I said, well, Al, how about the health and welfare. And he said health and welfare is okay with us also. The company plan is okay with us I think is exactly what was said.

Q. Did the union take a caucus at this meeting?

A. Yes, they did.

Q. And, when they returned, did they say anything; did the union representative say anything to you?

A. Yeah. Al Hobart had a response to the question of what it would take to end the strike. He said that it would take retirees health and welfare. He said it would take sick leave and time lost, which were really one and the same benefit in the labor agreement. He said there has to be a reduction from 1,300 hours to 1,000 hours for employees going from Utility B to Utility A classification. And he also said that there had to be an end—we couldn't have subcontracting in the office was his last comment. Then he said—Hicks, Rick Hicks from Local 174, whispered something in his ear and then Al Hobart said I don't want to wind up saying just one more thing, inferring that I might be adding more and more to this list he said, so give us a chance to caucus he said and we will get back to you. So they then caucused and they came back and Hobart continued talking from there.

Q. Did you take notes at that meeting?

A. I did.

MS. HARTZELL-BOTERO: Objection. Foundation.

JUDGE McCARRICK: Nothing's been offered.

MS. HARTZELL-BOTERO: Okay, but—

JUDGE McCARRICK: This is Respondent's 12, Ms. Kelly?

THE REPORTER: Excuse me?

[p. 1010]

[. . .]

JUDGE McCARRICK: —to use later in the year.

THE WITNESS: Yes. He gets paid. The benefits go to the trust when he actually takes his vacation.

JUDGE McCARRICK: Okay.

A. (continuing) And this was Al Hobart's response explaining what the trust funds would do about this particular issue, and, this, I'm referring to General Counsel 61.

Q. Did you have any other correspondence with Mr. Hobart on the subject of trust fund contributions?

A. We did.

Q. I'd like to call your attention to General Counsel Exhibit 65. Do you recognize this document?

A. I do.

Q. And what is it?

A. This was a letter to Hobart, Al Hobart, from me that explained that, okay, how we would handle these people who were paid in January for vacation and now we have a new issue that had come up which is addressed in the third paragraph, which

is we had striking employees who at their request had not been paid out in January. They wanted to be paid out their vacation later on in time during the year. For example, some employees at Oak Harbor were saying, well, I don't want to get paid my vacation in January, I want to get paid when I use it later on. So but what had happened here is we had a group of employees who had not been what I'll call pre-paid in January, but, when the strike started, then they put in for their vacation, and the concern that I had, and that's why I wrote this letter, was now we had a different issue because these had not been paid before the notice of cancellation. So I made a proposal to Al Hobart and said that we propose then that we just simply pay the health and welfare and the retiree contributions directly to the employee during the strike and the inference—I didn't say it in the proposal, but the inference was that they could then buy COBRA for that month that they needed it and we would pay the pension into an escrow account for those guys and that was my proposal to Mr. Hobart on that day.

- Q. Did Mr. Hobart reply to your November 12th, 2008 letter?
- A. Yes, he did.
- Q. I'd like to call your attention to General Counsel Exhibit No. 56. Do you recognize this document?
- A. I do.
- Q. And what is it?

A. It's a letter from Al Hobart to me on the 27th that addressed two issues. The first issue he addressed was we had just come off of an FMCS session and a guy named John Slattery had helped Al make a proposal about health and welfare, and I had asked Al can I call the is guy directly, and here was his response to me saying, yeah, go ahead and contact him directly. And then the second part of Al's letter is his response on how we deal with these guys who were not pre-paid vacation—these . . .

[p. 1014]

[. . .]

Q. And is this an accurate copy of the letter you sent to Mr. Buckley?

A. Yes, it is.

MS. SMITH: We move to admit Respondent's Exhibit No. 14 into the record.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: No objection.

MR. McCARTHY: No objection from Charging Party.

JUDGE McCARRICK: 14 is received.

(Respondent Exhibit 14 received into evidence)

Q. BY MS. SMITH: Did you have any other correspondence or communications with the union about pension or health and welfare through the end of December, 2008?

A. No, I did not.

Q. When did Oak Harbor learn that the strike was ending?

A. February 12th, 2009.

Q. How did you learn that the strike was ending?

A. I received a one or two sentence letter from Al Hobart by fax on February 12th, 2009.

Q. I'd like to call your attention to General Counsel's Exhibit No. 74. Do you recognize this letter?

A. I do.

Q. And what is it?

A. This is the letter that I received by fax and by regular mail from Al Hobart on February 12th to explain that the union was ending the strike.

Q. Did Oak Harbor immediately reinstate the strikers?

A. Not immediately, but we did in the very—very shortly thereafter.

Q. What steps did Oak Harbor take after receiving this notice from Mr. Hobart?

A. We put together what I call a reinstatement plan, which is a document that had eight points in it and then set forth the method by which we would reinstate the strikers.

Q. Did you meet with the unions to discuss this return to work plan?

A. Yes, we did.

JUDGE McCARRICK: Before you get into that, let's take a break. We've been on the record for about

two hours and 25 minutes. We'll be off the record until eleven o'clock. Off record.

(Off the record)

JUDGE McCARRICK: On the record.

Ms. Smith.

Q. BY MS. SMITH: Mr. Payne, when did you meet with the unions regarding their return to work plan?

A. February 17th, 2009.

Q. Where did that meeting take place?

A. It took place in Al Hobart's conference room at the Teamster Hall in Tukwila.

Q. Who was present for the company?

A. Bob Braun and myself.

Q. Who was present for the unions?

A. There was Al Hobart, Sean Rudolph, who is an International rep. Doug Henderson was there. Local 174 had three people there. They had Rick Hicks. They had Lisa Pau, who's their in house attorney. And Brian Davis got there a little bit late. Ken Thompson was there from Local 231. David Grady was there from Local 763. Tom Strickland was there from Local 81.

Q. Were any documents distributed at this meeting?

A. Yes. I distributed two separate documents at the meeting.

Q. I'd like to call your attention to General Counsel's Exhibit No. 24. Do you recognize this document?

A. I do.

Q. What is it?

A. This is the return to work, what I'll call the return to work, plan that we distributed—that I distributed at the February 17th, 2009 meeting.

Q. Who drafted this letter?

A. I did.

Q. Was it passed out to the unions?

A. It was passed out, yes, at the beginning of the meeting and then we discussed every item in the letter.

Q. Did the unions have questions about this letter?

A. Yes. There were a number of questions posed by a number of the individuals who were there from the unions.

Q. What was discussed first at this meeting?

A. I passed out the document and I walked the union through all eight items briefly and then Al Hobart asked for a caucus. I think what he said was we need a minute to review the document in its entirety, and he then caucused for about—the entire group caucused for about 20 minutes, maybe a half hour, and then came back and Al asked me—he said let's go through this document item by item. He said and then we're going to have questions as we go through them. And so we went through the document item by item and that's how it happened and starting with the—we had a lot of discussion, had a lot of questions over the employees that were suspended pending investigation. I pointed out to the union on Pages—what's labeled here—24(c) and 24(d) that there were 11,

or 13 employees, pardon me, who were suspended pending investigation for strike misconduct. And there were questions then posed about, well, what process does the company intend to utilize for these employees, and we said we would conduct a full investigation on each one of these, I said, and that we would interview the employee, explain to them what the allegations were, we would notify the union, if they wanted to be present, they could be present, the employee would be given an opportunity to respond to the allegations and then we would make our decision from there. There was a question posed by Al Hobart to the effect of can we, rather than suspend these employees without pay pending investigation, will the company suspend them with pay, and we responded no, that we felt the allegations were serious enough they would be suspended without pay. And then Lisa Pau, who is the Teamsters in house attorney, asked me, she said, well, what if the employee is found innocent, and I said, well, then that employee's probably going to get paid for the time that he or she was off. And then Al Hobart said isn't there a way you can let these employees go back to work while you are conducting your investigation. And I said, no, Al, I think these are serious enough allegations that we should be suspending them till further investigation. And that was the discussion we had on that item.

On Item 3 we had some discussion. I had walked the union through Pages 24(e) through Pages 24(t), which was all of the available positions the company had to reinstate the strikers into on a

location by location basis and I explained each of the—I had gone through page by page with everybody in the meeting and explained to them that here's the positions we have available. They asked, well, how'd you come up with these numbers—Hobart asked—and I said this represents the number of people generally that we had in these positions as either cross-overs or strike replacements, so we knew that was the number of positions we were going to need now that it was over. I remember Hobart saying something to the effect of, well, how much of the reduction in force is attributable to the strike versus the economy, and I said there was just no way of knowing. At that point in time, the economy was just—it was a disaster. They had the banking crisis. I mean, you know, so it was a very difficult economy at that point in time and there was just no way of knowing the answer to that question.

Then we had a whole series of questions posed by the various locals on these individual positions, and I remember Local 174, Rick Hicks, had asked questions about, well, if a driver comes back into a warehouse job, can he then become a driver again when a vacancy arises, and Bob Braun answered that question and said yes, that's covered under the expired labor agreement. I remember Local 763, Dave Grady asked questions about where do my—who do my people call to get reinstated. We explained that we asked the unions to contract the strikers and tell the strikers to call their terminal and call their terminal manager and we would start rotating them back into their jobs. I explained that—I said that it's possible that the

No. 6 guy on the seniority list might come back for a few days and then, because Nos. 3 and 4 called a couple days later, then they'll get back into that slot and No. 6 might get laid off, that there was going to be some transition in how—in an orderly way to get this done, but we were using seniority as our criteria is what I said. I remember Local 231, Ken Thompson, asked a question about clericals. He said, well, what are we doing about—he had two clericals up in Everett or something like that—or Mt. Vernon—and I said, well, Ken, they need to file over there, so I followed the work doctrine under the expired labor agreement that, if work goes away but it then resurfaces because customers are in another terminal, then the employees get to follow the work. And Bob Braun explained, actually, the whole follow the work doctrine in response to Ken Thompson's question on that.

Then there were some questions posed by—largely Hobart was asking most of the questions. If you look at the seniority lists that are attached to this document, there are lines drawn about half-way through a couple of the seniority lists and there were a couple of questions, well, what do those lines mean, does that mean there's a cut off or anything, and I said absolutely not, it just happened to be the way the document's copied, it doesn't signify anything about the recall or anything to that effect.

There was a brief discussion about there was a temporary closure of the Everett terminal because there was just not enough work in Everett. We had a brief discussion about that. I remember

Lisa Pau asking me about the drug testing because we were saying, look, these guys—I said these guys have been out of the pool—I've researched this—they've been out of the pool for 30 days or more and, therefore, in order to get back behind the wheel of a truck, they had to become DOT qualified from a drug testing standpoint. So we explained that these guys are going to have to all get drug tested and then come back and that that was going to be part of the process, and I remember Lisa Pau said to me, she said, well, what if they're driving elsewhere and they're already qualified. We said fine and if they're able to transfer their qualification from one job to another job, great, they're welcome to come back right away.

And then there was a question about, well, what about guys who have retired during the strike or what if they resigned during the strike, and I responded to—I think Hobart asked the retired question and I believe Ken Thompson asked the resigned question and my answer was, if they retired or resigned, they're welcome to come back if they want to and, if they don't want to, that's fine, too. I think Tom Strickland asked a question, well, what if, you know, a driver's vacationing in Florida, and I said, Tom, if he's vacationing in Florida and he's able to come back when he's ready to come back, we'll take him. And then I said, but if we don't hear from him, we're probably going to wind up writing him a letter explaining what—you've got recall rights, reinstatement rights, are you interested or are you not, and we'll copy the union on that letter.

And that was—oh, I also said, because there were little questions about the various terminals and sort of how would it work logistically, I also said, you know, on a lot of these logistical questions and on the return to work what I'm going to suggest you do is you guys do is call Bob Braun directly and he will work out and iron out all these issues with you, and I looked at Al and I said is that alright with you, Al, and Al said, sure, fine. And so that's how we covered that issue.

Then at that point I then passed out a document which was the document that explained how we would propose to deal with company medical or the trust fund issues, the medical, health and welfare, retirees health and welfare, and pension.

Q. Mr. Payne, that second document you referred to, I believe it's General Counsel No. 25—

A. Yes.

Q. —is that the letter you were referring to Mr. Payne?

A. Yes, it is. This is the document that I said I passed out toward the end of the meeting that evening and we had a brief discussion about this document.

Q. Mr. Payne, with respect to this second document, General Counsel's Exhibit No. 25, you passed it out to everyone at the meeting, is that correct?

A. That's correct.

Q. Did you offer an explanation with respect to this letter during that meeting, as well?

A. Yes, I did. I passed out the letter and then I literally—I read to everybody in the room the second

paragraph that begins with however and then the part that says Oak Harbor proposes to continue the status quo regarding wages and benefits. And so I read that entire paragraph to everybody in the room and then they were all looking at it and I was explaining to them what the status quo was at the time. I explained what we have in place here for—because the trust funds were taking contributions. I said what we've been doing is we have been having the cross-overs under company medical and we were escrowing union pension and we were escrowing retirees, retirees health and welfare, and I explained that—I think the exact words I used is we want to maintain that status quo.

And Al Hobart responded.

Q. What did Mr. Hobart say?

A. Al Hobart said we—it was words to the effect we are in complete disagreement with this. And then he said we need to take a caucus. And the union took about a 15 minute or 20—maybe 15 minute caucus and they came back in and Al Hobart said we are going to have to talk to our attorneys and our trust attorneys about this, he said, and then we'll get back with you. Lisa Pau, the Local 174 counsel, asked me, she said, are you willing to sign new subscription agreements, and I said, Lisa, I just don't have an answer for you at this time. And about two minutes later she asked me the same exact question. I think she called them contribution agreements actually. And I said again, Lisa, I don't have an answer for you at this time. And at that point it occurred to me that they might actually be placing a condition on their

return and so I asked Al. I said, Al, I said are you placing a condition on your return to work at the end of the strike, and he said something like, no, this meeting's over. And I said, Al, I just want to make sure, are you placing a condition on your return. And, again, he said no, this meeting is over. And then I said, well, the employees are welcome back, the strikers are welcome back. And he said our return is in neutral. And that's how the meeting ended.

Q. Mr. Payne, did Hobart ever say to you wait a minute, we had an agreement in October, 2008, when the strike ends, everybody goes back in union plants?

A. No. There was never ever a statement made like that at that meeting or any other time.

Q. Did you take notes during this meeting?

A. I did.

Q. Did you take those notes contemporaneously during the course of the meeting?

A. Again, I took them as the meeting was progressing.

JUDGE McCARRICK: This will be marked Respondent's 15.

(Respondent Exhibit 15 marked for identification)

Q. BY MS. SMITH: Mr. Payne, do you recognize this document?

[p. 1034]

[...]

... talking about.

JUDGE McCARRICK: Didn't have to do with what we're talking about here?

THE WITNESS: No.

MS. HARTZELL-BOTERO: Those are questions that are settled, Your Honor, so—

MS. SMITH: Okay.

JUDGE McCARRICK: That's my—I wasn't able to understand every single word, but I got a sense that that's where that falls.

MS. SMITH: Okay.

Q. BY MS. SMITH: When the February 17th meeting ended, did the union announce that the strike was over?

A. No. In fact, they said our return is in neutral.

Q. Did the union ultimately end the strike and return to work?

A. Yes, they did.

Q. What day did the strike end and the Teamsters came back to work?

A. They came back to work on February 26th, 2009.

Q. Between February 17th, 2009 and February 26th, 2009 did you have any discussions with a representative of the union about the subject of health and welfare, retiree health and welfare, and pension for the returning strikers?

A. Yes, I did.

Q. With whom did you have this conversation?

A. David Ballew.

Q. And who is Mr. Ballew?

A. He was an attorney who represented the Teamsters Union and Mr. Hobart.

Q. I'd like to call your attention to General Counsel's Exhibit 75. Do you recognize this document?

A. I do.

Q. And what is it?

A. This was a letter that I received from Al Hobart on February 18th, 2009. He faxed it to me and then he also mailed it to me and attached to it were the two e-mails that are attached to this exhibit.

Q. Did you review these documents including the e-mails?

A. I did.

Q. Did you reach any conclusions from the letter and the e-mails?

A. Well, I reached conclusions with regard to the e-mails that the trust funds were going to—or they were requiring two things in order to accept contributions. They were requiring an interim agreement—

MR. McCARTHY: Objection. His conclusion is not conveyed to the union and not relevant. The documents speak for themselves.

JUDGE McCARRICK: Sustained.

THE WITNESS: Well, the—

JUDGE McCARRICK: No. I'm going to allow it. I'm going to allow it. I think his state of mind is important in this case. Go ahead.

A. (continuing) They were requiring an interim agreement and that they were requiring that the company execute new subscription agreements in order to accept contributions for the pension, for the health and welfare, and for the retirees health and welfare.

Q. Did you immediately agree to sign a new underlying labor agreement and new subscription agreement?

A. No.

MR. McCARTHY: Objection. Form of the question. Interim agreement is referenced, not labor agreement.

MS. SMITH: I apologize. I'm sorry.

Q. BY MS. SMITH: Mr. Payne, could you repeat your answer?

A. Well, my answer was, no, I did not immediately agree to sign an interim agreement and subscription agreements.

Q. Did you discuss this with a representative of the union?

A. I did.

Q. With whom did you discuss this?

A. Pardon me?

Q. With whom?

A. David Ballew.

- Q. Do you know if anyone had discussions with Al Hobart about the subject of benefits for returning strikers?
- A. I do. I know Bob Braun had conversations with Al Hobart.
- Q. When did you have your discussion with attorney David Ballew?
- A. We had discussions between the period of February 19th, 2009 and February 25th, 2009.
- Q. How many discussions did you and David Ballew have?
- A. We had five.
- Q. Were these discussions in person or by phone?
- A. They were by telephone.
- Q. Let's talk about these conversations between you and David Ballew. When did the first such conversation occur?
- A. On February 19th, 2009.
- Q. Who called who?
- A. David Ballew called me.
- Q. Who said what?
- A. Dave Ballew called me and said I'm calling on behalf of Al, can we talk off the record. And I said to Dave what I normally say when a union rep or a union attorney wants to talk off the record. I say you can talk anyway you want. And then Dave asked me about the subscription agreements. He said—he said why did the company cancel the subscription agreements. And I said,

well, Dave, we had an issue with a different company called Murray's, which is a garbage company. This was about five years previous. And I said, Dave, what happened in that strike was that the pension trust, because the subscription agreement were in force, had come back around when the strike ended and sued Murray's for contributions for strike replacements and I said so, therefore, Oak Harbor decided it was not going to run that risk and that's why we canceled the subscription agreements. Dave then asked, he said, well, is the company willing to sign an interim labor agreement. And I said, well, Dave, I have some concerns about that, I said, but, you know, I'm just not sure at this point. And then he said something to me about—oh. We had a discussion about the status quo. And he said, well, the status quo requires you to put these guys back into these union plans. And I said, well, Dave, I said, that's not what we have here. I said that what happened was between the time the strike started and where we're at today we had an intervening event and that intervening event was the cancellation of the subscription agreements, I said, and furthermore and the trust funds said we're not going to take contributions anymore. So that was an intervening event that created a new status quo. And I said to Dave, I said, and, furthermore, then the parties had reached an agreement in a mediation session in October about how to handle these cross-overs and that included company medical, escrowing pension and escrowing retirees. And then Dave Ballew said to me, he said—he said, well, you can take—you know, why would you you want to escrow pension. He said you can take the

same amount of money and just pay it into the Western Conference of Teamsters plan. And then Dave said—we had a brief discussion about this notion that Pirnke about the gap between the time a strike starts and the time a strike ends and contributions on pension. Then Dave said to me, he said—he had some questions about the 13 people on suspension pending investigation. He said he wanted to corral, I think was the word he used, or draw a circle around the 13 and the concern he was expressing to me was that the union is concerned that that number is going to—could grow and we want to just draw a circle around those 3. I remember him using those words. Then we went—our discussion went back to the idea of an interim agreement and Dave said, oh, look, I can call Ditter, who's with the pension trust or Pirnke, he said, and all we need is a couple of sentences for an interim agreement and he says I can make a phone call and that's all we need. And then I didn't have a response at that point. I was just listening. And then he said now let's go back to these 13 people who are suspension and he said—he was using an analogy. I just remember him using the word dude. He said, if one dude says another guy did it, he says we need some protection that maybe we can draw a circle around the incidents rather than the individuals so that, if you're accusing one person, and he says, oh, I wasn't me, it was Joe Jones over here, that we would, at least, have a circle around he incidents, and he was trying—that was his suggestion was to draw a circle around the incidents. He also said to me we can't let this turn into a witch hunt. In other words, that this thing keeps

multiplying in terms of the number of people. And I was just listening to what he was saying at that point. And then he again asked, he said—he asked about signing—he asked me do you think Oak Harbor will sign an interim agreement and he says it doesn't have to be very long, only a paragraph or so I remember him saying. And I said, Dave, are you sure the trust funds need a contract. And he said yes. And then, again, he referenced this gap between the time the strike starts and the time the strike ends that the pension trust already has language in place that will deal with that. And then he—and then we once again talked about the 23 employees on suspension and he said, look, we need some way to—he used the word Mike Smith. He said, if Mike Smith says it wasn't me, it was Mr. B, that now, okay, you can investigate Mr. B, but, if in the course of all this you learn something brand new about Mr. C, then you can't go after Mr. C., there has to be an end to this. And that's what he was suggesting to me. And so I—we had a conversation by my saying, well, Dave, I'll think about all this and we'll get back to you.

Q. Did you take notes at this conversation?

A. I did.

Q. When did you take those notes?

A. As we were talking.

JUDGE McCARRICK: This is Respondent's 16 for identification.

(Respondent Exhibit 16 marked for identification)

Q. BY MS. SMITH: Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. These are the notes that I took during my February 19th telephone call with David Ballew.

Q. And are these an accurate copy of your notes?

A. They are.

MS. SMITH: We move to admit Respondent's Exhibit No. 16 into the record.

MS. HARTZELL-BOTERO: Voir dire?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MS. HARTZELL-BOTERO: Mr. Payne, could you turn to Page 1?

A. Sure.

Q. Could you please decipher these notes for us?

A. Okay. The first entry says off the record, question mark, on—and that was Dave's comment about can we talk off the record. The on is my question mark about—because of what I always say is what I just testified to. The Murray's issue is a reference to what I had said about why we cancelled the subscription agreements. That was the Murray's Garbage Company.

The next entry says written agreement concern. Dave asked a question about whether the parties would sign a written interim agreement and the word concern was my—my response. Then we had a discussion about the—it says pension status quo. That's where we had the discussion that I

described about Dave's version of what the status quo was versus my version of what the status quo was. And the gap issues referred to Pirnke e-mail where Pirnke says in his e-mail that—which is Exhibit G. C. 75(d)—he says in his second paragraph the trust does not permit a gap in the payment of pension contributions, et cetera, and we talked about that notion of a gap and how that would work.

And then draw a circle around 13. That was Dave's statement to me.

Q. I think you might have skipped—

A. Oh, I'm sorry. I'm sorry. Yeah. Just above that there's no economic loss to company. That was where Dave was saying that—he was proposing to me that we go back into the union pension because there would be no economic loss to the company since the company is putting the contributions into an escrow account anyway.

Q. All right. Go to the next page, please. The top.

A. David Ballew again.

Q. Is this David speaking?

A. Pardon me?

Q. Is this—what does that indicate?

A. Yeah, that's Dave talking here. He says—he's talking about benefit plans now and he says Sander—he refers to Mike Sander or Don Ditter or—Ditter is with the pension trust—or somebody. He's saying I can get a hold of Sander or Ditter or somebody and ask them what is the one liner

to get it done, and he was referring to the interim agreement.

And then he—under B we start talking about discipline and this is where he says if some other dude did it, don't expand it beyond that, if there is a viable evidence of others, circle around the incidents, wrong identity, at least, we know the incidents. That's what he was saying. If we got the wrong guy, at least, we got a circle around the incidents.

Q. Page 3.

A. And Page 3 that was Dave's saying I don't want this to turn into a witch hunt. He says this would corral it a bit. And then it says incident it—I don't know what the it refers to—or—oh, incident or any other in—or if any other incidents. I think what he was trying to say was let's identify the incident or incidents so that we can corral this and it doesn't turn into more than 13 people. And then he used the word open and notorious. And I think what he was referring to these incidents have to be pretty open and notorious to be able to define them. Then—

Q. And to the right of that does that say Ballew?

A. Ballew.

Q. Okay. Thank you.

A. And then, when we get to C—this is Dave talking—he said, well, what about an interim collective bargaining agreement equals—that was my note—equals contract. And he said it can be as small as is possible, the minimal that a trust requires. He was trying to convince me, in other words, this

doesn't have to be a big collective bargaining agreement, it can be small. And then I asked, on the right hand side, trust needs a contract. And he said yes, just trying to confirm. That's where he was at. They needed an agreement.

And then we again had another discussion about this pension gap issue that was in the Pirnke e-mail. Requires agreement of both sides, gap, contract. I don't know why I had the word contract, question mark, on there. I don't remember what we were talking about that would have raised that reference to contract. Period of strike. Bridge it unless it's due to strike or lockout and that was, again, was referring to Pirnke's e-mail.

And then on the top of Page 4 this is Dave talking about 13 employees. He says Mike Smith, he says I did A, but so-and so did B. If we can establish that, then we can add B. That was his suggestion. But, if they say so-and-so did C and you don't know about it, then what he was trying to say was then you can't take any action against C.

MS. HARTZELL-BOTERO: No objection to the receipt of 16.

MR. McCARTHY: none from the Charging Party.

JUDGE McCARRICK: Respondent's 16 is received.

(Respondent Exhibit 16 received into evidence)

JUDGE McCARRICK: Are you going to get into another topic now?

MS. SMITH: Continuing on with a different conversation.

JUDGE McCARRICK: Let's break at this point. It's 5 after 12:00. We'll be back on the record at 10 after 1:00.

(Whereupon, the hearing in the above entitled matter was recessed for lunch)

Afternoon Session

JUDGE McCARRICK: All right. Go ahead.

Continued Direct Examination

Q. BY MS. SMITH: Mr. Payne, after your phone call with Mr. Ballew on February 19th, 2009, did you speak with again?

A. I did.

Q. When was that next conversation?

A. That next conversation was Saturday, February 21st.

Q. Who called whom?

A. Dave Ballew called me.

Q. And who said what?

A. I said to Dave that I had not had an opportunity to talk to all of the people at Oak Harbor that I needed to talk to. However, at least, preliminarily I wasn't seeing a lot of excitement for this notion of an interim agreement and I said to Dave, however, Dave, if you want to put together an interim agreement and send it to me, that might be helpful. I think I said to Dave, I said, I'm not also not seeing much excitement from my client's side on going back into the union's medical plan. I said, however, the pension, meaning the union's

pension, is a maybe and that was as an alternative to what we had proposed on February 17th and I think I may have even used the words middle ground, this looked like a good middle ground. And Dave said, well, I have to get a hold of Hobart and get back to you. And then Dave asked me about the 13 suspended—I think he may have used the word dischargees, but they were suspended pending investigation, and whether we could draw a circle around them or somehow corral the incidents, and I just said, Dave, if you have a proposal that you want to reduce to writing and give it to me, why don't you do that. And I think I teased him and said you're smarter than I am, anyway. Just put something together so I can look at it. And that was the end of the conversation.

Q. Did you take notes at this conversation?

A. I did.

Q. And when did you take those notes?

A. As we were talking.

JUDGE McCARRICK: This'll be Respondent's 17 for identification.

(Respondent Exhibit 17 marked for identification)

Q. BY MS. SMITH: Mr. Payne, do you recognize this document?

A. I do.

Q. What is it?

A. These are the notes of my telephone conversation with Dave Ballew on February 21, 2009.

Q. Is this an accurate copy of your notes?

A. It is. I made them at the time we were talking.

MS. SMITH: We move to admit Respondent's No. 17 into the record.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: Voir dire?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MS. HARTZELL-BOTERO: Mr. Payne, can we go through these notes, please?

A. Yes.

Q. All right. Could you please decipher these for us? The first line.

A. Sure. The first line says off the record. Question mark. Doesn't care. Question mark. That would indicate to me I may have asked Dave are we still off the record and basically didn't get any response one way or the other.

Q. All right. The next line.

A. The doesn't care was, in other words, my reaction to his response. It's I, that's me talking, not been able to talk to everybody that I need to, but, if you want to talk to pension trust and prepare a document that we would review, that might be helpful.

Q. Continue.

A. And then below that—this is me talking again—I'm not seeing much excitement on my client's side on health and welfare plan—that means the union plan—but the pension is a maybe, meaning

the union pension is a maybe. And the ALT means alternative and what I was saying to Dave is, Dave, this is an alternative to what we had proposed on February 17th.

Q. All right. Continue.

A. And then below that it says Dave, 13 discharges. That was his question what are we going to do about, you know, corralling or drawing a circle around them. And I said you can send me something if you want, I'll look at it, and then I said you are smarter than I am. I said that teasingly, by the way, because I've known Dave for many years.

Q. Is this the sum total of your notes—

A. Yes, it is.

Q. —for February 21st, '09?

A. I'm sorry? Pardon me?

Q. Is this the sum total of your notes for February 21st, '09 of your conversation with Mr. Ballew?

A. Yes, it is.

MS. HARTZELL-BOTERO: No objection.

JUDGE McCARRICK: Charging Party?

MR. McCARTHY: Not from Charging Party.

JUDGE McCARRICK: Respondent's 17 is received.

(Respondent Exhibit 17 received into evidence)

Q. BY MS. SMITH: Did you speak with Mr. Ballew again?

A. I did.

Q. And when was that next conversation?

A. Sunday, February 22nd.

Q. Who called who?

A. Dave Ballew called me.

MS. HARTZELL-BOTERO: I'm sorry, but—

JUDGE McCARRICK: I missed the date on this, too.
The following day?

THE WITNESS: It was Sunday, yeah, the following day, which was a Sunday, February 22nd.

MR. McCARTHY: Thank you.

THE WITNESS: And Dave Ballew called me.

Q. BY MS. SMITH: Who said what in that conversation?

A. Dave started the conversation by saying, John, where are we at, and I said, Dave, I said, my client is willing to consider company health and welfare, going back into the union pension, and escrowing retirees. And he said—he said Hobart won't do it and he said you're going to get it in negotiations. Anyway, referring to company medical, and then he said you already got it, which I concluded meant they had proposed it earlier in October, which they had. I then said—I said, Dave, this is where we're heading. And he then said, well, he said, what about the interim agreement. And I said, well, Dave, if you want to prepare something and send it to me, I said I'm happy to look at it. I said are you sure we need a contract. And he said yes, we do. And then he said he would prepare something and send it to me.

Q. Did you take any notes during this phone conversation?

A. I did.

Q. And when did you take those notes?

A. At the time we were talking.

JUDGE McCARRICK: This will be marked for identification as Respondent's 18.

(Respondent Exhibit 18 marked for identification)

Q. BY MS. SMITH: Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. These are the notes I took during my February 22nd phone conversation with Dave Ballew.

Q. Are these an accurate copy of your notes?

A. Yes, they are.

MS. SMITH: We move to admit Respondent's Exhibit No. 18 into the record.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: Voir dire, please?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MS. HARTZELL-BOTERO: Mr. Payne, these notes reflect a conversation of what length?

A. About, maybe, five minutes total, but I do recall Dave and I were talking about a couple other things before we—or during—it was either before or during our conversation. Dave was involved in

a like a moot court thing with high school that he was telling me about and he was asking me what I had been doing and I had had a—actually, I had some problems with some moles in my backyard. So there was a couple minutes worth of sort of what we were doing on this particular day and then we went into the gist of the conversation.

Q. Okay. Let's go through these. I could read 22 and then Ballew where are we. Who said that?

A. Dave said that to me, where are we. In other words, what's the company's response here.

Q. Continue.

A. And I said the company might be willing to go into union pension, but wants medical company plan and no retirees equal escrow, meaning escrowing the retirees, going into the union pension and company medical.

Q. All right. And then the next one.

A. And then Ballew, which is U, Ballew said no, Hobart won't do it, you'll get it in negotiations anyway, and that's when he said you already got it.

Q. Hold on.

A. Sure.

Q. All right. The next page, please.

A. Yes. At the top of the next page that's when I said, well, this is where the company is looking, referring to the union pension, company medical, and escrowing the retirees health and welfare.

Q. All right. The next line.

A. And then Dave said what about the interim agreement. And then I said don't know what it looks like, do you want a contract. In other words, is this what—are we talking about a labor agreement 2 pages, 80 pages, what. I'm still trying to make sure I had an understanding of what he had in mind. And he says yeah. He said yes. And then I said what kind of contract. And then he—the conversation ended with him saying I'll send one.

Q. He said I'll send you one?

A. Yeah. I'll get you one. Words to that effect, which is exactly what he did.

Q. All right.

MS. HARTZELL-BOTERO: No objection to receipt of 18.

MR. McCARTHY: Can I have just a voir dire question?

JUDGE McCARRICK: You may.

Voir Dire

Q. BY MR. McCARTHY: Page 2 of Respondent Exhibit 18, three lines down, the first letter is U.

A. Yeah.

Q. Just translate for me exactly what the notes are after that.

A. Sure. U and the word agreement interim, meaning Dave was asking me what is the company's position on the interim agreement.

Q. And then next line is where it says don't know what it looks like that's you?

A. That's me.

MR. McCARTHY: Nothing further and we have no objection.

JUDGE McCARRICK: General Counsel?

MS. HARTZELL-BOTERO: No objection or nothing further.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: No.

JUDGE McCARRICK: All right. 18's received.

(Respondent Exhibit 18 is received into evidence)

Q. BY MS. SMITH: After this conversation with Mr. Ballew on February 22nd, 2009, did you receive a document from Mr. Ballew?

A. I did.

Q. What did you receive?

A. He had e-mailed me a cover e-mail and a draft interim agreement.

Q. And when did you receive that draft?

A. I received it about 1:40 in the afternoon on February 23rd.

Q. I'd like to call your attention to General Counsel's Exhibit No. 82. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. This is the e-mail cover note from Dave Ballew to me which attached the draft interim agreement that he had sent me on Monday, February 23rd and attached to it is the draft interim agreement.

Q. Did you review this draft agreement?

A. I did.

Q. Did you discuss it with your client?

A. Yeah. I sent it to Bob Braun and he and I talked about it over the phone.

Q. Did you discuss it with Mr. Ballew?

A. Yes, I did.

Q. When did you and Dave Ballew discuss this document?

A. I talked to Dave Ballew about it on Tuesday, February 24th.

Q. Who called whom?

A. I called Dave Ballew.

Q. And who said what?

A. I told Dave that I had looked at the agreement and what I had done was I took his agreement and printed it out, actually, on pink paper because at that time what I was doing was, when I would get an e-mail I would print it out on pink paper so that I could distinguish it from all the other white pieces of paper on my desk and I had written notes on my pink paper of things that I wanted to ask him about about the interim agreement and then I asked Dave go ahead and walk me through the interim agreement, and, as he did so, we got down to health and welfare—you see right in the middle

there, Article 17, Health and Welfare—and I asked Dave, I said, Dave this is a union plan, right? And he said yeah—yes. And I said with full MOB, meaning maintenance of benefits. And he said, well, whatever was in the prior contract. And then I had asked him, I said, well, what about the company's alternative here to have company medical and union pension. And he said no, we're not interested in that. And then we continued to walk down the document and we had a discussion about the duration, what I refer to as the duration of this do, which is the second to last paragraph where it says the interim agreement shall remain in effect until a new collective bargaining agreement becomes effective, et cetera. I asked Dave, I said, Dave, can you explain this to me. I mean how does it terminate or does it reopen at some point or what happens here. And he said, well, either party can terminate it with five days notice and the said, but the status quo would take effect and he also said that, he said, that this interim agreement plus the subscription agreements would be enough to satisfy the trust funds.

And then we had a discussion about the last sentence which says nothing in this interim agreement shall relieve either party from its obligations under the law concerning terms and conditions of employment pending bargaining. And I said to Dave, I said, Dave, I don't understand what this means. It just—I don't understand it. I don't understand what we would be agreeing to here. And he said, well, he said, the vacations would stay the same, holidays would stay the

same. He said shifts would be the same. And I said, well, what about the duty to arbitrate. He said, no. He said there would be no duty to arbitrate under this. And then, of course, if there's no duty to arbitrate, then I thought, well, there's probably a right to strike and I said, well, Dave wouldn't you have a right to strike under this document. And he said—he said, yeah, but the strike's over. And I said, well, what about the corporate campaign, because they were engaging in what they called the corporate campaign, which is letters to banks and letters to customers and so on. And he said, well, from our perspective that might continue. And that was the essence of the conversation he and I had about this interim agreement and I just said, well, Dave, I'll look at it and I'll get back to you.

Q. Did you take notes of your conversation with Mr. Ballew on February 24th?

A. I did.

Q. And when did you take those notes?

A. At the time we were talking. I had made little notes on my pink sheet to make sure that I talked about when we were talking. So as I was just going down that sheet coupled with the notes I was making as we were talking.

JUDGE McCARRICK: This is Respondent's 19 for identification.

(Respondent Exhibit 19 marked for identification)

Q. BY MS. SMITH: Do you recognize this document?

A. Yes, I do.

Q. And what is it?

A. This is the pink sheet printout of the interim agreement that Dave Ballew had sent me with my notes that I had made to prepare for my conversation with him and behind that are the notes that I took when I was talking to Mr. Ballew.

Q. Is this an accurate copy of the notes you took?

A. Yes, it is.

MS. SMITH: We'd move to admit Respondent's Exhibit No. 18 into the record.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: Voir dire?

JUDGE McCARRICK: Yes.

Voir Dire

Q. BY MS. HARTZELL-BOTERO: Mr. Payne—

A. Yes.

Q. —I just wanted to, for the record, Respondent's 19 is a four page document?

A. Is it 19?

Q. Yes.

A. One, two, three, four. Yes, four pages.

Q. There are no more pages to it?

A. No. No, there are none.

Q. Would you turn to Page 2, please?

A. Okay.

Q. Upper left corner that says phone number?

A. Yes.

Q. Whose phone number is that?

A. That's Dave Ballew's cell phone number.

Q. Could you please decipher your notes for us?

A. Starting on which page?

Q. Starting on Page 2.

A. Sure. It says Dave Ballew at the top. His cell phone number on the left hand side. And, then beneath that, hearing at 1:30. I think that was a reference to the fact that he had a hearing at 1:30. It says document has—this is Dave talking—document has a termination provision agreement, meaning within the agreement. Dave was saying it doesn't alter the status quo obligation, which he was arguing was the expired labor agreement.

Q. All right.

A. And then we had a discussion about status quo again and that's what that note is in the middle of the page and Dave was arguing the status quo was the terms under the expired labor agreement and I was saying to Dave, Dave, that status quo go changed by an intervening event which was the cancellation of the subscription agreements and then the trust funds saying we won't accept contributions. So we had that dialogue again.

Q. Okay. But that's not reflected on your notes.

A. Well, no. Where it says status quo that's what that conversation was about.

Q. Okay. So there was a—where it says status quo—

A. Yeah.

- Q. —there was a discussion that's not reflected on these notes?
- A. Exactly. And then—and then after that it says back to work, and that was Dave saying everybody can come back to work under these terms.
- Q. All right. And then the next line after back to work?
- A. I think I asked him this question. If we terminate, meaning either one of the parties, if we terminate an interim agreement and not follow the status quo, what happens? I was trying to get an understanding of exactly how this would work.
- Q. And the last line. Who—what does that mean and who said it?
- A. Not done bargaining, stop. That was Dave saying words to the effect of look, the parties are still in bargaining, meaning they're just—they've stopped for the time being, they're still in bargaining and that's kind of where they're at, meaning talking about a full contract.
- Q. Okay. And what was that in response to? I'm confused by your prior entry.
- A. Well, if I remember right, what we were talking about was what would happen if either party terminated this interim agreement, and Dave was sort of saying, in essence, saying to me it's not going to happen, John. The parties are—they're not done bargaining and, you know, yeah, they're in a stop, right, in this period here, but it's not going to happen. In other words, in essence, don't be concerned about it, don't worry about it.

- Q. All right. Go to Page 3. You've got a line up there.
- A. Uh huh.
- Q. What does that say and who said it and what does it signify?
- A. At the top?
- Q. Yes.
- A. This is Dave talking. This is an interim agreement. He says the EU and subscription contract this is sufficient to be a written agreement. That's what he was telling me.
- Q. Just a moment. He said this is an interim agreement, the EU and the subscription contract?
- A. Yeah. Well, he starts by saying this I the interim agreement, period. And then he says the EU plus the subscription contract. And then the next thought, this is sufficient to be the interim agreement. In other words, we're going to need the interim agreement, we're going to need the EU and the subscription agreements and all that would be sufficient to be a written agreement.
- Q. All right. And then there's a line and I think it says remainder of terms.
- A. Yes.
- Q. Who was speaking?
- A. That's my question of Dave. Remainder of terms and conditions would be what?
- Q. Okay. And this is his response—
- A. Yes.

Q. —status quo?

A. Yeah. This was my question in reference to the last line of the interim agreement, which I wasn't sure what that meant. And he said status quo, which I inferred to mean he was referring back to the old labor agreement. And he said vacations, holidays, shift would all be what was in the old labor agreement. And then I asked him, beneath that, duty to arbitrate. And he said no.

Q. Okay.

A. And then on the top of the next page I said, well, what about—well, the notes say strike and over. What had happened is I said, well, what about the right to strike. And he said, well, the strike's over.

Q. All right.

A. And then I asked him about the corporate campaign, which this is below that it says fliers and leaflets, which is the fliers and leaflets the union was sending out. And Dave said this might continue from our perspective.

MS. HARTZELL-BOTERO: May I just look at Page 1 for a moment, Your Honor?

Q. BY MS. HARTZELL-BOTERO: All right. If you turn to Page 1.

Q. BY MS. HARTZELL-BOTERO: Sorry. This is going to be out of order on the record, but you made some notations to the right of Article 17, Health and Welfare?

A. I did.

Q. And what does that signify?

A. When David was walking me through the document we got to health and welfare. I asked him does this in—does this include full MOB if the company were to go back into this union health and welfare plan, and that's when he said, well, it's whatever was in the former agreement, and the why was my note to myself. For example, why is the union proposing full MOB. I didn't ask the why of Dave because he just said, well, it would be whatever was in the—whatever was in the expired labor agreement.

JUDGE McCARRICK: Were these notes you made to yourself before you had the conversation? The notes on Page 1. Were these notes you made to yourself before the conversation with Mr. Ballew?

THE WITNESS: They were notes I made to myself before the conversation and that I wanted to make sure I talked to Dave Ballew about as a result.

JUDGE McCARRICK: So they're not properly part of the notes—

MS. HARTZELL-BOTERO: Okay.

JUDGE McCARRICK: —of the meeting. And these were made before the phone call?

THE WITNESS: Yeah. To prepare myself for the phone call, that's correct, Your Honor.

MS. HARTZELL-BOTERO: Oh, I see.

THE WITNESS: And then the check—I checked it off as I was going over it.

JUDGE McCARRICK: So they won't come in as part of the notes—

THE WITNESS: Right.

JUDGE McCARRICK: —of the conversation.

THE WITNESS: Right.

MS. HARTZELL-BOTERO: So I have no objection then to receipt of 2 through 4.

JUDGE McCARRICK: 2, 3, and 4?

MS. HARTZELL-BOTERO: 2, 3, and 4.

MR. McCARTHY: Voir dire questions?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MR. McCARTHY: If you look at Page 2. In the middle of the page I see the words status quo underlined.

A. Yes.

Q. And then it says back to work?

A. Yes.

Q. Can you just translate the next line, please?

A. We terminate interim agreement.

Q. And then it says and not follow status quo? Is that what—

A. Yes.

Q. And is this what you said?

A. No. I was trying to ask Dave. I was posing it as a question, what happens if, you know, either one of us terminate this interim agreement and not follow the status quo. In other words, what happens here under this document the way it reads.

MR. McCARTHY: Nothing further and no objection.

JUDGE McCARRICK: All right. I'll receive Pages 2, 3, and 4. Page 1 is simply notes that were made prior to the conversation and have no bearing on the substantive conversation.

(Respondent Exhibit 19, Pages 2, 3, and 4
received into evidence)

MS. SMITH: Your Honor, we believe Page 1 of Exhibit—Respondent's Exhibit No. 19 would be admissible as it goes to the mental state of Mr. Payne.

JUDGE McCARRICK: I'm not going to receive it. I'll receive 2, 3, and 4.

Q. BY MS. SMITH: Mr. Payne, did you and Mr. Ballew have a subsequent conversation?

A. Yes, we did.

Q. And when did that next conversation occur?

A. The next conversation occurred on February—Wednesday, February 25th, 2009.

Q. Who called whom?

A. Dave Ballew called me.

Q. When did he call?

A. In the morning. Sometime around nine o'clock in the morning.

Q. Who said what?

A. Dave Ballew opened the conversation by saying is the company hiring drivers in Mt. Vernon. And I said, Dave, I would be pretty surprised if that were the case, but I'll check into it. Then I said

to Dave again, I said, Dave, I said, is there—is there any chance here we can get the company medical and the union pension and put this thing together. And he said no. He said we've got to have an interim agreement and the subscription agreements and he said that's the way it's got to be and he said the strikers are coming back and he said we're going to let the NLRB sort out the conditions. And I said, well, Dave, Al Hobart had put the return on hold, is that no longer the case. And he says yes, the strikers are coming back. And then I said to him, I said, well, Dave we tried. I said we tried to go, you know, with the company medical and the union pensions, and escrowing retirees, and he just said no deal.

Q. Did you take notes at this conversation?

A. I did.

Q. When did you take those notes?

A. At the time Dave and I were talking.

JUDGE McCARRICK: This will be marked for identification as Respondent's 20.

(Respondent Exhibit 20 marked for identification)

Q. BY MS. SMITH: Do you recognize this document?

A. I do.

Q. What is it?

A. These are the notes of my February 25th, '09 conversation with Dave Ballew.

Q. Is this an accurate copy of your notes?

A. It is.

MS. SMITH: We move to admit Respondent's Exhibit No. 20 into the record?

MS. HARTZELL-BOTERO: Can I voir dire?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MS. SMITH: Mr. Payne, Respondent's 20 documents a conversation of what length?

A. I'm sorry? Pardon me?

Q. This exhibit—

A. Yes.

Q. —documents a conversation of what length?

A. I know it wasn't very long. It was maybe a minute to two minutes.

Q. All right. I'd like you, please, to decipher. I can read the top part, 2/25/09, Ballew.

A. Yes.

Q. On the left side what is that?

A. That is my—those are my thoughts. He asked is the company hiring in Mt. Vernon, and I made a note to myself maybe this is a line driver who's shown up in Mt. Vernon that the people didn't know or there was a strange face and that was the question or somebody who had come in and crossed. Could be a line driver from another location is what I was thinking maybe that could be and sort of to remind myself to check into that.

Q. Does that say line driver crossed?

A. Yes. And a question mark.

Q. All right. The line immediately under hiring in Mt. Vernon.

A. Uh huh.

Q. Can you decipher that for us, please?

A. Yes. It says will come back and will let NLRB sort out existing conditions. Ballew.

Q. And that was a statement made by Mr. Ballew?

A. That is.

Q. All right. The next couple of lines.

A. The quotes was that Hobart put this on hold, the return to work, and I was asking Dave is that no longer on hold.

Q. All right. And then the next three lines.

A. And then it says—and this is my statement—Dave, we tried to work with you to find an alternative solution for health and welfare, and Dave saying no deal.

Q. And there's a question mark after—

A. Yes.

Q. —health and welfare.

A. Yeah.

Q. What does that signify?

A. Well, what I was saying was, Dave, we tried to find an alternative solution with you for health and welfare, like that. Like here it is. And he just said no deal.

MS. HARTZELL-BOTERO: No objection.

JUDGE McCARRICK: Charging Party?

MR. McCARTHY: No objection.

JUDGE McCARRICK: 20's received.

(Respondent Exhibit 20 received into evidence)

Q. BY MS. SMITH: On or about February 25th, 2009, did any

Oak Harbor representative ever tell you that you can no longer talk with Dave Ballew because Bob Braun has talked with Al Hobart?

A. Absolutely not.

Q. Why are you so sure?

A. Because we wanted to keep as many avenues of communication open as we could. It would have made no sense for the company to cut off one of those avenues of communication.

Q. Did you ever tell Dave Ballew on February 24th, 2009 that you could no longer talk to Mr. Ballew because Bob Braun is having conversations with Al Hobart?

A. Absolutely not.

Q. At the time you spoke to Dave Ballew on February 25th, 2009, had you received any official confirmation from the union that the strikers were not coming back to work on February 26th?

A. No. The first I learned of it was when Dave told me in the phone conversation that morning.

A. Did you ever say to Mr. Ballew I got this letter from Hobart so I can't talk to you any longer?

A. Absolutely not. I hadn't gotten a letter from Hobart yet telling us that they were coming back.

Q. I'd like to call your attention to General Counsel's Exhibit No. 77. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. This is a letter I got from Al Hobart on February 25th, 2009 and it deals with an interim agreement and it says that the unfair labor practice strikers have begun to return to work.

MS. SMITH: Your Honor, if I may have just one minute.

JUDGE McCARRICK: Go ahead.

Q. BY MS. SMITH: Mr. Payne, I just handed you a letter dated February 25th, 2009. Do you recognize this document?

A. I do.

Q. What is it?

A. This is the same letter from Al Hobart dated February 25th that has a fax notation that indicated the time I received it.

Q. Is this an accurate copy of the letter you received?

A. Yes, it is.

MS. SMITH: We'd move to admit Respondent's Exhibit No. 21 into the record?

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: No objection.

MR. McCARTHY: It's already in the record as Exhibit 75. So is it just to get in the fax time?

JUDGE McCARRICK: Is that the purpose, counsel?

MS. SMITH: Yes, Your Honor. I have a line of questions just respect to the fax notation.

JUDGE McCARRICK: All right.

MR. McCARTHY: No objection.

JUDGE McCARRICK: 21's received.

(Respondent Exhibit 21 marked for identification and received into evidence)

Q. BY MS. SMITH: Mr. Payne, when did you receive this letter?

A. I did, in fact, get it at 2:47 in the afternoon from Mr. Hobart.

Q. And how did you receive this letter?

A. By facsimile and by letter—by mail the next day.

Q. You testified that you had one conversation with Mr. Ballew on February 25th, 2009. Is that correct?

A. That's correct.

Q. Did you speak with Mr. Ballew on February 25th, 2009 before you received this letter from Al Hobart or after you received this letter?

A. I spoke to Dave Ballew well before I received this letter from Al Hobart.

Q. Did you have any further conversations with Mr. Ballew on the subject?

A. No, I did not.

Q. Do you have phone bills depicting some of your conversations with Mr. Ballew?

A. I do.

JUDGE McCARRICK: This will be marked for identification as Respondent's 22.

(Respondent Exhibit 22 marked for identification)

Q. BY MS. SMITH: Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. This is my Verizon cell phone bill from February 17th through February 26th. The yellow highlighted items are Dave Ballew's numbers. There are white strips that deal with other calls being made to other clients and other people that aren't Dave Ballew and that aren't related to this particular case.

JUDGE McCARRICK: They're redacted?

THE WITNESS: Yes, Your Honor. They're available if—I think they're somewhere in one of my briefcases if anyone wants to look at them.

Q. BY MS. SMITH: Is this an accurate copy, Mr. Payne, of your phone records?

A. Yes. With the exception of the redacted portions, which as I indicated, are available if anyone wants to look at them.

MS. SMITH: We move to admit Respondent's Exhibit No. 22 into the record.

JUDGE McCARRICK: Any objection?

MS. HARTZELL-BOTERO: Voir dire?

Voir Dire

JUDGE McCARRICK: Yes.

Q. BY MS. HARTZELL-BOTERO: Mr. Payne, are these just your cell phone records?

A. Yes, they are.

Q. All right. So you had conversations with Mr. Ballew at your office phone, as well?

A. Yes, I did.

Q. And you, I guess, whited out what you considered to be irrelevant calls that are not were not to or from Mr. Ballew?

A. They were not to or from Mr. Ballew, that is correct.

Q. From your cell phone?

A. That's correct.

MS. HARTZELL-BOTERO: No objection.

MR. McCARTHY: Voir dire?

JUDGE McCARRICK: Go ahead.

Voir Dire

Q. BY MR. McCARTHY: Do you know whether any of the obscure numbers have a 285 exchange?

A. They do not.

Q. I note that some of the obscured numbers show that the exchange begins with the number 2. You're certain that it's not 285?

A. I'm positive.

Q. Okay.

MR. McCARTHY: No objection.

JUDGE McCARRICK: 22 is received.

(Respondent Exhibit 22 received into evidence)

Q. BY MS. SMITH: When did the union members return to work?

A. On February 26th, 2009.

Q. I'd like to call your attention again to General Counsel Exhibit No. 77 and this is Mr. Hobart's letter dated February 26th, 2009, is that correct?

A. Yes, it is.

Q. Did you respond to this letter?

A. I did.

Q. I'd like to call your attention to General Counsel's Exhibit No. 78. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. This is the response that I gave to—or that I wrote, faxed and sent to Al Hobart on February 25th.

Q. And did you send this to the union?

A. I did.

Q. Is that your signature on the letter?

A. It is.

Q. Did you have any further conversations with Mr. Ballew on . . .

[p. 1095]

[. . .]

- A. That was one category of strikers, that's correct, and then there was a second category of strikers who had not—they didn't want the cash out in January. So some strikers were saying I'll forego my cash out in January, I'll take my cash out during the year when I use my vacation. I want to have a check, in other words, to take with me when I go to California or when I go to Oregon and so those strikers because they weren't paid before the notice of cancellation went to the trust funds, those strikers were paid for their vacation, let's say, in October to go to California and the trust funds were saying we're not taking those contributions because they don't reflect payments made before the cancellation. So I knew both the cross-overs and the strikers were not going to be covered by these trust funds. They told us that. It made logical sense with the way they were applying their rules.
- Q. But the trust funds themselves indicated to you that the reason they weren't taking contributions was solely because they could not take them for cross-over employees?
- A. No. They said because you terminated your subscription agreements.
- Q. And are you saying that those were all the trusts that told you that?
- A. I think either two or three of the trusts used that terminology. The others said we're in receipt of

your letter and we will not be accepting contributions.

Q. Right. And, in fact, the Oregon Warehousemen's Trust they don't have subscription agreements, they never have?

A. I don't know that for a fact.

Q. Well, doesn't Mr. Braun doesn't he keep all records of either subscription agreements, employer/union pension certifications?

A. I'm afraid you'd have to ask Mr. Braun that question.

Q. Well, did you ask Mr. Braun?

A. Yes. I asked Bob Braun whether he had a subscription agreement for the Oregon Health and Welfare Plan.

Q. And that's the first person that you would go to in seeking document that existed between the employer and any of these trusts, correct?

A. It's the—well, it's the first person—he is the first person I went to on the Oregon plan, that is correct.

Q. And he told you there was no such subscription agreement?

A. No. He told I think there—he said we switched health and welfare plans during the life of the 2004-2007 labor agreement. He said I believe we have a subscription agreement—

Q. Yeah.

A. —in place.

Q. But he couldn't find

A. I wanted to verify it.

Q. Sure. But he couldn't find one in his records or the company's records?

A. I don't know whether he—I can't answer that question. I mean he didn't give me one.

JUDGE McCARRICK: Did you ask him to produce one?

THE WITNESS: Yeah. I asked him would you check, Bob, and see if you have one.

Q. BY MS. HARTZELL-BOTERO: And he couldn't produce one?

A. And he said I can't find one at this time. Or, you know, words like that.

Q. To this day, he hasn't been able to produce one, correct?

A. Not that I know of, which is why I wrote the letter the way I wrote it.

Q. And, when Mr. Buckley wrote you back—well, let's look at that letter. Just a moment. I'll get it. I think it's G. C. 52.

A. Yeah. I have it.

Q. You have that?

A. Uh huh.

Q. Okay. And Mr. Buckley advised you that the trust would not accept contributions for those employees that you described as cross-overs for hours worked during October, 2008?

A. That's correct.

Q. He never wrote you at any other time indicating that, because you had cancelled a subscription agreement, that he was not able to accept contributions?

A. Say that again. I missed the question.

Q. Did Mr. Buckley ever write to you or tell you that, because you had cancelled a subscription agreement, he was unable to accept contributions to that Oregon trust?

A. This letter says the trust will not accept employer contributions for those employees that you describe as cross-overs.

Q. All right. Did Mr. Buckley ever write you or tell you at any other time that, because you had sent the letter purporting to cancel the subscription agreement between that trust and the employer that he could not accept contributions for cross-over employees?

A. He wrote me a second letter, yeah, on December 5th, that I think is in the record, rejecting contributions and I had to write back and explain to him—yeah, he wrote me a second letter on December 5th asking about contributions for employees.

Q. Right.

A. On four employees.

JUDGE McCARRICK: Do you have an exhibit number?

MS. HARTZELL-BOTERO: Respondent's 13.

A. (continuing) And then I wrote back to him. I was looking for the letter I wrote back to him.

Q. It's Respondent 14.

A. Okay. That was a December 10th letter I remember. Yes.

Q. Okay.

A. And I was explaining to Mr. Buckley that this referred to strikers, again, that had used hours before the strike and before the notice of cancellation, so that—and then I attached Al Hobart's letter to explain how those people needed to be dealt with.

Q. All right.

A. Buckley—

Q. Well, there's no question pending.

A. Okay.

Q. But, again—

A. Sure.

Q. —did Mr. Buckley ever inform you either in writing, verbally, in any other way that, because you had sent him a letter purporting to cancel a subscription agreement between the employer and the Oregon Trust, that it could no longer accept contributions?

A. Yes. He told me that in two different letters. He told me that in his letter in early October and then he told me that again in a second letter in December and he never said to me—he never called me and said, John, there is no subscription agreement, wait a minute, let's take another look. Buckley never did that.

JUDGE McCARRICK: I think we're putting it the other way around. The question is did Buckley ever give as a reason the Oregon Trust's refusal to accept contributions from Respondent because you had cancelled the subscription agreement? Did he ever state that anywhere?

THE WITNESS: Well, I'd have to look at his—

JUDGE McCARRICK: I don't see it in Respondent's 13.

THE WITNESS: Okay. That's what I'm looking for.

JUDGE McCARRICK: I'm not talking about any inferences. I'm not talking about assumptions. I'm talking about explicitly saying that.

Q. BY MS. HARTZELL-BOTERO: Mr. Payne, please look at 13, 14, and 52.

JUDGE McCARRICK: Respondent's 13, 14 and General Counsel's 52.

MS. HARTZELL-BOTERO: Respondent 13, correct.

Q. BY MS. HARTZELL-BOTERO: Okay?

A. Okay.

Q. Have you looked at all those pieces of correspondence?

A. 13, 52, and 14, yes. I have them.

Q. You have them. All right. Do any of these documents—does Mr. Buckley in any of these documents ever state that the Oregon Trust can't accept contributions from the employer because you sent him a letter purporting to cancel the subscription agreements?

- A. I can't say. Just a moment. Yes. He—the answer's yes.
- Q. All right. Please show me where that is.
- A. If you look at General Counsel Exhibit No. 47.
- Q. Okay. I'm looking at it.
- A. Okay. 47 in the second paragraph—that's my letter to Linda Philbrick—it says by contrast Oak Harbor Freight Lines does not intend to make benefit contributions to the Teamster Warehousemen's Welfare Trust on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send a notice of intent to cancel which is dated September 23rd. So, when he starts his sentence or his letter to me, which is General Counsel No. 52, he said I represent Teamsters Local 206, Employer's Trust. Northwest Administrators has provided me with a copy of your September 24th letter to Norwest Administrators. And then he goes on to say this is to advise you that we will not be accepting contributions for cross-overs.
- Q. I see that.
- A. It's important to read the two letters in conjunction with one another.
- Q. And I'm—
- A. He didn't just write this letter out of the blue.
- Q. Is there another letter that you have from Mr. Buckley that isn't included in the exhibits that have been put into evidence in this case?
- A. No.

Q. All right. At that February 17th meeting that you had with . . .

[. . .]

**TRANSCRIPT OF HEARING—
RELEVANT EXCERPTS
(JULY 14, 2010)**

BEFORE THE NATIONAL
LABOR RELATIONS BOARD REGION 19

In the Matter of:
OAK HARBOR FREIGHT LINES, INC.,

and

TEAMSTERS LOCALS 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839, and 962,

and

TEAMSTERS LOCAL 174.

Case Nos 19-CA-31797 19-CA-31827 19-CA-31865
19-CA-32001 19-CA-32030 19-CA-32031 19-CA-
31526 19-CA-31536 19-CA-31538 19-CA-31886

Before: John J. McCARRICK,
Administrative Law Judge

*[July 14, 2010 Transcript, p. 1117] [Examination of
John M. Payne]*

A. No, they did not.

Q. So what did the company do?

A. The company went forward under the terms and
conditions that was in its proposal.

Q. Fair to say the company unilaterally implemented its so-called proposal?

MR. HILGENFELD: Objection, argumentative, calls for legal conclusion.

JUDGE McCARRICK: Overruled. Again, this isn't your witness, Mr. Hilgenfeld. (indiscernible due to witness coughing into microphone)

A. I'm sorry, your question again was did the company unilaterally implement?

Q. You call it a proposal.

A. Yes.

Q. You agree the union never agreed to the proposal.

A. That's correct.

Q. And that the company went forward with its proposal?

A. That's correct.

Q. So the company unilaterally implemented its proposal over the union's objection? Is that correct?

A. The company put its proposal for returning strikers into place, yes.

Q. Without the union's agreement?

A. That's correct.

Q. At any time between September 22nd, 2008 and February 26th, 2009, did you tell a union representative that the company was privileged to act unilaterally with respect to these benefits issues?

JUDGE McCARRICK: I'm sorry, say that again?

Q. At any time during that time period, did you ever tell anybody at the union that you believed the company was privileged to act unilaterally with respect to these benefits issues?

A. I don't know what you mean like with respect to these benefits issues. We were clearly allowed by contract, meaning these subscription agreements to cancel the agreements. That was a contract that allowed us to do that.

JUDGE McCARRICK: Do you believe you're privileged under the NLRA, under Section 8(a)(5) to do so?

WITNESS: To cancel those subscription agreements?

JUDGE McCARRICK: No, to implement the benefit programs that you ultimately instituted for returning strikers.

MR. McCARTHY: Unilaterally.

WITNESS: I believe if we put the union on notice, with trust fund created and what I'll call an obstacle, and then if we put the union on notice and we bargain with the union about how to deal with this situation the trust fund created, then I believe we are allowed under the law once we've hit a stalemate, we're allowed under the law to put into place what we have proposed.

JUDGE McCARRICK: Did anybody declare impasse with respect to the benefits issues?

WITNESS: Yes, we had made—in February, Your Honor, you mean?

JUDGE McCARRICK: February of 2009.

WITNESS: Yes, we had made our proposal as to what we were prepared to do. We had offered a middle

ground to the union. I had offered it to Dave Ballew and Bob Braun had offered the same middle ground to Al Hobart. We consistently got as a response, no, absolutely not, we're not in agreement with it. And then Dave Ballew's last comment to me was, we're just going to come back. We'll let the NLRB sort out the rights of the parties. So in my mind at that point in time, there was an impasse.

JUDGE McCARRICK: Did anybody declare impasse?

WITNESS: The word, impasse, was never utilized—

MR. McCARTHY: Well, let's get down to other words.

WITNESS:—because impasse is a bilateral situation. Each side has taken its position.

Q. BY MR. McCARTHY: The word, impasse, was never used?

A. That's correct.

Q. Okay. The word, unilateral, was never used either?

A. In what point in time?

Q. In your conversations, for example, with Mr. Ballew, did . . .

[p. 1173]

[. . .]

. . . benefits proposal is based on the fact that the trust funds, i.e. pension, health and welfare, and Washington retirees health and welfare, have consistently refused to accept contributions for returning strikers.”

A. Yes.

Q. At anytime at the February 17th meeting, did Al Hobart or Rick Hicks make any comment about this assertion as it involved returning strikers?

A. No, they didn't.

JUDGE McCARRICK: Well, they disagreed with the entire proposal, didn't they?

WITNESS: Yeah, they just said we don't agree, we want you to go back into the union plans.

JUDGE McCARRICK: They wanted you to go back to the benefits set forth in the expired collective bargaining agreement.

WITNESS: That was exactly the case.

Q. In your phone conversations with David Ballew from February 19th through the 25th, 2009, at any point did Mr. Ballew make any comments about this purported agreement reached in early October 2008 regarding pension, Washington retirees health and welfare and Teamsters health and welfare involving returning strikers?

A. No, his focus was on the Employer—basically, it was a proposal, the Employer should go back into the union pension, . . .

[p. 1175]

[. . .]

JUDGE McCARRICK: I'll let the answer stand.

Q. During the February 17th meeting, did Al Hobart distinguish between Oregon returning strikers and Washington returning strikers?

A. No, he did not.

Q. Did anyone else at the February 17th meeting make that distinction?

A. No, they did not.

Q. In your phone conversations with David Ballew from February 19th through the 25th, 2009, did Mr. Ballew ever distinguish between Oregon returning strikers and Washington returning strikers?

A. No, he did not.

Q. Turning to General Counsel's Exhibit No. 60(b), a letter from you to Mr. Hobart dated October 24th, 2008—

(Long pause)

MR. McCARTHY: I have it now. Thank you for your patience.

Q. Looking at the second paragraph, first sentence, starting with: "Given that the trust will not accept Employer contributions, we are proposing that in such cases involving strikers, the Employer will on an interim basis and until some other agreement is made, simply make health and welfare and Washington Retiree Welfare benefit contribution payments directly to the employee."

Has some other agreement been made?

A. No.

Q. With regard to General Counsel's Exhibit No. 65—

A. Can you tell me what that is?

Q. It is a letter from you to Al Hobart dated November 12th, 2008. Looking at the fourth paragraph and the last line: "An interim basis until some other arrangement is agreed upon," has some other arrangement been agreed upon, Mr. Payne?

A. No, not as it relates to the subject matter of this letter.

(Long pause)

Q. Turning to General Counsel's Exhibits 51, 52, and 54—

(Long pause)

Q. I'm sorry, 51, 52—

(Long pause)

Q. I apologize, I've confused myself. Strike that question. So turning to General Counsel's Exhibit 54, the memo dated October 3rd, 2008—

A. Okay, I have it.

Q. Looking at item no. 2 in the final sentence in that paragraph, "This would be an interim measure pending outcome of bargaining and of the strike." As of February 25th, 2009, had there been an outcome of bargaining?

A. If you're referring to full contract bargaining, no, not at that point.

Q. What were the conditions on the ground when the strikers returned to work?

MR. McCARTHY: Objection, vague.

JUDGE McCARRICK: Sustained.

Q. As of February 25th, 2009, what was your understanding of what the status quo was with respect to returning strikers?

MR. McCARTHY: Objection, “understanding” not relevant.

JUDGE McCARRICK: Overruled.

A. What was my understanding of what?

Q. Of what the status quo was as it relates to returning strikers and focusing on trust fund contributions.

A. It was that the trust funds had refused to accept contributions in October; that the trust funds had written us letters on February 18th, email, saying the circumstances under which they would continue accept contributions. So these were basically new conditions. My understanding of the status quo was at that point in time was we had trust funds that were not accepting contributions as of that time, unless their conditions were satisfied. We had bargained with the union about how to deal with benefits for returning strikers.

Q. With regard to the EU certification subscription agreements, were there any limitations as to the right to cancel?

A. Well, there’s the five-day notice. That was the only—

Q. Other than that—

[Examination of Robert Braun, p. 1228]

[. . .]

Q. And you're making a note of Mr. Hobart's—

A. Comments to me, correct.

Q. —comments?

A. All of that is Mr. Hobart telling us what he needs to have to end the strike.

Q. Alright.

MS. BOTERO: And with that, I have no objection

MR. McCARTHY: none from Charging Party.

JUDGE McCARRICK: Respondent's 24 is received.

(Respondent Exhibit 24 received into evidence)

MR. PAYNE: Thank you, Your Honor.

Continued Direct Examination

Q. BY MR. PAYNE: Mr. Braun, I'd like to call your attention now to February 17th, 2009. Did you attend a February 17th, 2009 meeting with the Teamsters to discuss the return to work of the strikers?

A. I did attend the meeting.

Q. Who else attended that meeting on behalf of Oak Harbor?

A. I'm going to try to remember. Around the table, it was Shawn-Somebody from—

Q. Excuse me, Mr. Braun, who was there on behalf of Oak Harbor?

A. Myself and Mr. Payne.

Q. Okay. Now, who was there on behalf of the union's side?

A. It was Shawn, and I can't remember his last name. It was Al Hobart, then there were three people from Local 174; Lisa Pau, their attorney; Rick Hicks, secretary/treasurer; and Brian Davis. I believe Davis came in a little bit late. I think Mr. Thompson was there for 231; David Grage came for a little while; Tom Strickland from Portland was there. He's a secretary/treasurer of Local 81. I think that's it.

Q. What union does David Grage represent?

A. 763, the office clerical group at the Oak Harbor office in Auburn.

MR. McCARTHY: For the record, David Grage would appreciate—

JUDGE McCARRICK: Would you give the spelling of his name to the—

MR. McCARTHY: You pronounce it Grage. The spelling is—

WITNESS: No wonder he always looked at me ugly when I—

MR. McCARTHY: The spelling, for the record, is G-r-a-g-e.

WITNESS: I'll try and get it right, Mike.

Q. Mr. Braun, do you have General Counsel's Exhibit 24(a) in front of you?

(Long pause)

MR. PAYNE: May I approach, Your Honor? That's the one.

WITNESS: Okay.

Q. Do you have General Counsel Exhibit 24 in front of you now?

A. I do.

Q. Do you recognize this document?

A. I do.

Q. Can you tell us what it is real briefly?

A. Yes, this is the document that was given to the unions in attendance at the meeting of February 17th return to work meeting.

Q. Do you recall any conversations that occurred at this meeting regarding the issues addressed in this document?

A. Yes, I do. In fact, each paragraph was gone through very carefully with the representatives there, such as when would the return to work occur, that some employees had engaged in misconduct that was the list of 13, and what was the company's intention with respect to those 13 people.

The discussion about employees who had either terminated or retired and the fact that they were welcome to come back, we wanted to make clear that all workers were returned to work, even though some would be simultaneously suspended for possible misconduct, pending investigation. Others would be laid off simultaneously with their return to work because there wasn't any work.

We wanted to broach the issue of the Everett terminal, which was temporarily closed because those employees had a right to return somewhere. I believe 231 had some of them and 174 had some

of them. So that issue, we wanted to address. We needed to address the qualifications of drivers because under the DOT rules, we had to make sure that there were drug and alcohol testing procedures in place. We wanted to advise the union on how that would work and what steps we would take to make sure we were in compliance with DOT.

Oak Harbor wanted to make sure that each of the locals knew that we were happy to meet with them on any issues that came up and we'd try to resolve those. Further, that we would be prepared to meet in mediation for the purposes of concluding an overall agreement at some point in time in the future. I think it mentions mediation—yes, in mediation.

Q. In the interest in brevity, I'm not going ask you who said what on all of those topics because—

A. I'm glad.

Q. Okay. I will ask you one question. Was there any discussion about what role you would play in terms of the reinstatement process—or the return to work process in relationship to the other unions sitting around the table? If so, who said what?

A. Yes, John Payne advised everyone present that I would be the key person to contact with respect to any issues that would develop regarding employees' return to work. So the process would be that the local union would work with their local management person, whoever the regular person is that they would be in touch with. If that developed into a problem, then talk to terminal manager. If that developed into a

problem, get a hold of me and we'll get it sorted out so the people can get back to work promptly.

Q. Okay. Mr. Braun, I'm going to hand you a document that's been marked as General Counsel Exhibit No. 25.

A. Alright.

Q. Can you take a moment and read that document?

(Long pause)

A. Okay.

Q. Do you recognize that document?

A. I do.

Q. Have you seen it before?

A. I have.

Q. Can you tell us what it is please?

JUDGE McCARRICK: I think we're all pretty familiar with it by now.

Q. Do you know whether or not this document was distributed at the February 17th, 2009 meeting?

A. It was.

Q. At what point in the meeting was this document distributed?

A. It was distributed late in the meeting after all of the other issues had been pretty well resolved, questions answered, and all of the issues that dealt with the physical return to work had been addressed.

Q. Mr. Braun, do you recall any discussions on the issues that are brought up in General Counsel's

Exhibit 25 that occurred at this February 17th, 2009 meeting?

A. I do. Mr. Hobart—earlier and then even later, there were discussions about the 13 people who were being returned but suspended. That issue had to do with would they be returned to work pending an investigation so that they could come back to work and then do the investigation while they were at work.

There was also a request whether or not the Employer would be willing to arbitrate the issues if, in fact, anybody was found to have engaged in misconduct. There was—yes, the parties talked about—I mean, do you want me to give you the names?

Q. No. Maybe I didn't make my question very clear. Just take a look at this document, General Counsel's 25. Do you have it there?

A. Yeah.

Q. Okay. It addresses Oak Harbor proposes to continue the status quo regarding wages and benefits.

A. That's correct, that's the last sentence in the second paragraph.

Q. Okay. So my question is, do you recall any discussion about—

A. About that last sentence?

Q. —this particular document at that—

A. The whole document or just the last sentence?

Q. Well, no, this document—

A. Yeah.

Q. Okay. Who passed it out?

A. Mr. Payne passed it out.

Q. Okay. When Mr. Payne passed it out, did he say anything about it?

A. Yes, he said there's one more issue that needs to be addressed and we haven't talked about yet, and that is benefits. And he handed out this letter.

Q. Okay.

A. I don't know if there was enough or not, but in any event, Mr. Hobart certainly got a copy. Mr. Hobart looked at the letter and there was a pause. Nobody was talking. Hobart read the letter and Mr. Hobart said, "Well, I don't agree with this." He said, "I don't know about the rest of the committee. I need to talk to the rest of the committee, but I don't agree with this."

Mr. Hobart asked for a caucus presumably to talk to the rest of his committee and you and I left.

Q. Okay. About how long did that caucus take?

A. You know, it's hard for me to measure, but I'm going to say between ten and twenty minutes at the most.

Q. Okay. What happened after the caucus ended? Who said what?

A. Mr. Hobart said, "This is unacceptable." Ms. Pau asked—oh, Mr. Hobart said, "I believe the trust funds will accept the contributions if you sign an EU and agreement—the subscription agreements and an agreement."

Ms. Pau asked, "Are you refusing to sign a subscription agreement?" You responded to that question with, "I'm not prepared to answer right now."

I think at that point, Al said, "This meeting is over." We asked if the employees were going to come back to work. Mr. Hobart said they will. I think we asked him when. He says, "I'll get back to you on that, but for right now, we're in neutral."

Q. How did the meeting end?

A. It ended in neutral, I guess. You and I left.

Q. Was that the last thing said at the meeting that you can recall?

A. I think that's the last thing other than maybe goodbyes or something.

Q. Did you make notes at this meeting that was held on February 17th, 2009?

A. I did.

Q. When were your notes made?

A. They were made during the meeting.

Q. Okay.

(Long pause)

JUDGE McCARRICK: This will be Respondent's 25.

(Respondent Exhibit 25 marked for identification)

Q. I'm handing you a document that's been marked as Respondent's 25. Do you recognize that document?

A. I do.

Q. Can you tell us what it is please?

A. Yes, this—these are my notes on the yellow tablet regarding the meeting with the union in Hobart's office. I didn't put the date on it or list the people. I just said, "per sign-in list," and then attached the sign-in list.

Q. Where is the sign-in list attached?

A. I think it's in the back. Let me just check and see. It's page 8 of this attachment. I made a note on it, "Copied from the union." Some names were cut off. Sean Guy didn't want his name on the list, so he cut it off when he copied it.

Q. How do you know he's the one whose name was cut off?

A. He's the one that's missing. I remember distinctly that event.

Q. What event?

A. He got up to make a copy and when he came back, his name wasn't on the list.

Q. Okay.

A. The date is here and the time the meeting started. This is off Al Hobart's yellow tablet, I think.

Q. What's off of—

A. This is copy—

JUDGE McCARRICK: Page 8.

Q. The sign-in sheet?

A. Yes.

JUDGE McCARRICK: Page 8 of Respondent's 25.

A. Page 8 is a photocopy provided to us by the union, and the photocopy is of a yellow pad, I

believe, that Al Hobart circulated around the room.

Q. Let me call your attention to page 6 of these notes for a moment.

A. Yes.

Q. About two-thirds of the way down the sheet, there's something that looks like, "There is one issue we have not discussed." Do you see those notes?

A. That is the point in this process as I'm writing notes on my tablet where you say to the group, "There's one more issue that needs to be discussed." You then hand out your letter.

Q. When you say I hand out my letter, what—is that General Counsel's 25?

A. I'm sorry, I need to be more specific. Yes, it is General Counsel 25.

Q. Okay. Why don't you take us word-for-word through your notes starting with, "There is one issue?"

A. Okay. "There is one issue we have not discussed." The dash means there was a continuation of that thought. That's where you read the second paragraph of General Counsel 25.

Q. Okay.

A. You read it to the group. There was a question at that point about, "What are you talking about?" And you said, "We will be maintaining the status quo per my letter," meaning General Counsel 25.

“Hobart—This is totally unacceptable to me. I will review with the committee.” There was a caucus at 9:15. At the end of the caucus, Al told us, “This letter raises issues we are not ready to address. We will get back to us.” In this case, the “us” means Payne and Braun. “I think the trust will take contributions if you sign EU.”

Lisa Pau at this point says, “Will you sign a new subscription agreement”—

MS. BOTERO: I’m sorry, I’m sorry. Who said, “I think the trust will take contributions?”

WITNESS: Mr. Hobart.

MS. BOTERO: Thank you.

A. Lisa Pau said, “Will you sign a new subscription agreement?” John Payne—

MS. BOTERO: I’m sorry, could please read that line again? I’m not—does that say “new” or “health and welfare?”

JUDGE McCARRICK: What are you referring to? “Will you sign”—

WITNESS: “Will you sign new subscription agreements?”

MS. BOTERO: Okay, that says “new,” not “hw?” Okay.

WITNESS: No, it’s “new subscription agreements.”

Q. BY MR. PAYNE: Did anyone answer that question?

A. Yes, you did. I didn’t write it down, but you answered, “I’m not ready to respond to that right now.”

Q. What happened next? What's your next entry?

A. I believe that it was also in response to Lisa Pau. You said, "Are you attempting to change the status quo?" There was a response, "Don't know." That response, I believe, was from Al Hobart.

You, Mr. Payne, then said, "If employees are prepared to return, they can return." Mr. Hobart said, "They will return." Mr. Hobart then said, "I am done. This meeting is over." Mr. Payne says, "We will wait until we hear from you. Let me know." Mr. Hobart: "Meantime, we are in neutral." 9:30, the meeting ended.

Q. Okay.

MR. PAYNE: May we go off the record for just a moment, Your Honor?

JUDGE McCARRICK: Off the record.

(Off the record)

JUDGE McCARRICK: Go ahead. What page?

MS BOTERO: Page 7.

WITNESS: Page 7.

Voir Dire

Q. BY MS. BOTERO: At the very bottom on the left, it says, "JP."

A. Yes, ma'am.

Q. Could you just please read the words that are on here?

A. "We will wait until"—I think it—I had to—the next scribble is a scribble, it isn't a word. It was

an attempt to complete a word, but I didn't complete it.

Q. Alright. What word were you attempting to complete?

A. I think it was, "We will wait until you call us or get in touch with us or contact us," because up above, Al had said he'd get back to us.

Q. What does this say on the next line?

A. "Let me know." That's John repeating himself with the same thought but a different way of saying it.

Q. Okay.

JUDGE McCARRICK: It appears—it says, "Meantime, we are in neutral." It appears immediately to the left of that sentence, there's something I can't make out.

WITNESS: That's Al. I think there's a hole punched in it or something.

JUDGE McCARRICK: Okay.

WITNESS: It's Al, "Meantime, we are in neutral."

MS. BOTERO: I have no objection to pages 6, 7 and 8. I really have no objection to any of this.

JUDGE McCARRICK: Charging Party?

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[. . .]

MR. PAYNE: Thank you, Your Honor.

Continued Direct Examination

- Q. BY MR. PAYNE: Mr. Braun, I want to take you to the period now after the February 17, 2009 meeting. Are you with me?
- A. Yes, I am.
- Q. Did you have any conversations with Al Hobart about the company proposal regarding benefits for returning strikers following this Tuesday meeting on the return to work?
- A. I did.
- Q. How many such conversations did you have?
- A. I think there were two, with the second conversation being two parts.
- Q. When did these conversations occur?
- A. I believe they were on the 20th and the 24th.
- Q. Of what month?
- A. February. It was right after this meeting, or shortly thereafter.
- Q. Okay. Let's take these conversations one at a time. Were they in person on phone?
- A. They were by phone in all cases.
- Q. Okay. And let's take the first one. You said it was on the 20th. That would be February 20th?
- A. Yes, it would be February 20th, it was late in the day, maybe around—it was after 5:00, I think. Either Al called me and left a voice message and I called him back—I think that's what happened.
- Q. Okay. Tell me who said what in that conversation.

A. Al sort of opened the conversation with, you know, a greeting, how've you been, and wanted to talk—Al opened the conversation with a greeting and say, “Hey, Bob, do you think we can get this deal put together with the guys coming back to work?” At that time, they were still out on the street. “With the guys coming back to work, and I really need to get that health and welfare and pension in place.”

I said, “Al, you know I can see what I can do to see if we can move it along but I've got to tell you honestly the health and welfare maybe—excuse me, maybe pension, but not health and welfare. The health and welfare has just got too many problems associated with it.” And I said, “You know, we've talked about this before, Al, and it is problematic.”

Remember, this is February of '08 and the economy—

MS. BOTERO: Objection, not responsive.

JUDGE McCARRICK: Sustained.

WITNESS: I'm sorry, I apologize.

Q. Tell me what you said to Mr. Hobart in response to his comment, what you said.

A. I thought that's what I was saying, but—

JUDGE McCARRICK: You said maybe the pension but not the health and welfare.

WITNESS: That's correct.

Q. Tell me what you said to Al.

A. I told Al there were cash flow issues associated with the medical plan and that there were also be some problems—we thought there might be problems with getting guys enrolled and whether their eligibility would be—there's just some issues associated with returning to a medical plan, unlike the pension plan. Pretty straightforward.

I left it on the basis that I would talk to the powers that be and I would get back to him. Al said, "Okay, great, see what you can do." And that was the conclusion of the conversation.

Q. Okay. One follow-up question, when you said there were cash flow issues associated with the medical plan, which medical plan—

A. The company medical plan was more favorable from a cash flow standpoint than the union medical plan. I didn't have to explain it in detail to Al. He understood what I was talking about.

Q. Why do you say he understood what you were talking about?

A. We had talked about it previously, including back in October.

Q. Okay. How did that conversation end?

A. It ended with that I would talk with the powers that be, meaning the family, the Vander Pol family, and that I would get back to him.

Q. On what subject?

A. The subject that he had broached to me, which was returning the strikers to work with the union medical and the union pension plan.

Q. Okay. Did you have a subsequent conversation with Mr. Hobart?

A. I did.

Q. What day was that subsequent conversation?

A. That was on the 24th of February.

Q. About what time was that conversation?

A. Again, it was late in the day. I would say it was after 5:00. I think at this point, I did call Al because I needed to report in to Al and tell him where we were at on these issues.

Q. Did you—was it in person conversation or phone conversation?

A. I called him on my cell phone.

Q. Okay. Tell me what you said and what Al said in that conversation.

A. I said, “Al, I’ve talked to the family and, you know, I tried to predict for you what I thought was going to be the case and it is, in fact, the case. Even though they don’t want to go back into the union pension, they’re willing to. They’re willing to go back into the union pension so the guys get that issue cleared up. But we just can’t go back into the union medical plan and mainly for the issues that we talked about before, and that is that there’s cash flow issues and then there’s all of the subscribing issues and those kind of things.”

JUDGE McCARRICK: Did you mention the subscribing issues in your comments?

WITNESS: In that particular case, Your Honor, I'm not talking about the subscription agreements, I'm talking about getting the employees enrolled in the plan."

JUDGE McCARRICK: But you mentioned that to Mr. Hobart?

WITNESS: Yes, sir.

Q. And what did Al Hobart say, if anything, in response to that?

A. Al said, "It's not good enough. I need the whole thing and the lawyers are telling me that I should have—that you need to do the whole thing." I said, "Al, the heck with the lawyers," I said, "you know, if we want to make a deal, let's just make a deal. Why in the world do we want to continue this fight? You got guys out on the street. Take the pension, bring them back to work. Let's deal with the rest of it later. When we get around to dealing with the contract, we can settle this."

Al mentioned to me that he would agree that we'll get the company plan later. I said, "Al, how about the other way around? If you need to get the union medical, how about if you get that later? And let's just get this thing resolved and move forward."

Q. When you said "take the pension," what were you referring to?

A. The union pension, take the union pension. I'm offering him a middle ground. I'm trying to give him half of what he's looking for and I'm giving him the half that the company can work with. And the other half, we just couldn't see our way clear to agreeing to."

Q. And the half you were giving him was union pension?

A. That's correct.

Q. What was the half that—

A. The company medical plan.

Q. Okay.

A. The real concession here is that I knew we were going to have to sign a new labor agreement and a new subscription agreement.

Q. Did you make notes during either of these two telephone conversations?

A. I made sort of notes on the second one. I'm writing on the armrest of my car.

Q. Okay. So that call was made from your car?

A. It was.

Q. Okay.

(Long pause)

JUDGE McCARRICK: This'll be marked for identification as Respondent's 26.

(Respondent Exhibit 26 marked for identification)

Q. Do you recognize the document I just handed you, which has been marked as Respondent's Exhibit 26?

A. Yes.

Q. Okay. Can you tell us what it is?

A. This is—these are the notes that I took on my armrest of my car on February 24th, "Called Hobart to report"—

Q. Hold on, hold on.

A. I'm sorry.

Q. I'm going to ask you in a moment. And you said you took these notes. When did you take them?

A. While Al and I were talking.

Q. On what date?

A. February 24th.

Q. You were in your car when you made these notes?

A. I was.

Q. Okay. Go and walk us through line-by-line.

MR. McCARTHY: Could I ask that in doing so, he would just read the notes rather than editorializing as he goes so that we can know exactly what they say before we are asked to respond to a motion to admit?

JUDGE McCARRICK: That's fair enough.

Q. Can you read into the record exactly what each word on this document?

A. "Call Hobart for report, advise him offer not good as we have discussed in October. Family okay with pension not medical as told him previously. There's a dash, AH-company medical okay as part of next agreement—had deal in October, no need to change now. Change with new agreement."

JUDGE McCARRICK: Who's saying that?

WITNESS: I am, Your Honor.

A. Next line is, "Legal, so what, continue fight, why?"

JUDGE McCARRICK: Who's saying that?

WITNESS: I am, Your Honor.

A. "We can go with pension." There was a break in the communication, I lost the call and called him back, flipped the tablet over. "We can go with pension. Al don't think this will work." I asked him a question I didn't write in here and then he said, "We will be coming back." That was the end of the conversation.

JUDGE McCARRICK: And that says at the bottom, "end?"

WITNESS: Yes, sir, that's what it says.

MR. PAYNE: Your Honor, we'll move the admission of Respondent's Exhibit 26.

JUDGE McCARRICK: Any objection?

MS. BOTERO: No objection.

MR. McCARTHY: Hearsay.

JUDGE McCARRICK: It is, I agree with you. It comes in as part of bargaining. 26 is received.

(Respondent Exhibit 26 received into evidence)

JUDGE McCARRICK: Let's take a break at this point. Be off the record until five minutes after 3:00.

(Off the record)

JUDGE McCARRICK: Mr. Payne?

Q. BY MR. PAYNE: Mr. Braun, you have Respondent's Exhibit 26 now, those notes, in front of you?

A. I do.

Q. I'd like to have you walk us through these notes and give us context in terms of what was being discussed during this telephone conversation. The beginning of your paragraph says, "Call Hobart to report."

MS. BOTERO: He said "for report."

Q. "For report?" Is that correct?

A. Yes.

Q. Okay.

A. It could be either one, I don't think it changes the meaning one way or the other.

Q. Okay. So who placed the call?

A. I believe that I called Al. I left it with him on the 20th that I would get back to him after I talked to the family.

Q. Okay. Then the next line says, "advise him offer not good as we had"—

A. "Discussed in October."

Q. "Had discussed in October," okay. Explain to me what you said that led you to writing these notes.

A. I called Al and I said, "Al, I'm calling you back as I told you that I would. I talked to the family and we can agree your offer to me of let's do the union health and welfare and the union pension now. And then when we get to a global agreement later, put the company health and welfare in place, that's not going to work for the company. It's not good. We discussed all this in October and you know all the reasons why we're concerned about a cash flow, etc."

I went on to tell him that the—I went on to the next paragraph, family is okay with the pension, meaning union pension, but not the medical, meaning union medical. “That’s consistent with what I told you I thought was going to be the position when I talked to you last week.” So I told him, you know, “That’s the best I can do, Al. I’m trying to get a settlement.” I’m trying to talk him into the settlement I can get really is what I’m trying to do.

Q. So the second paragraph, “family okay with pension.” You said that was union pension?

A. Correct.

Q. Okay. “Not medical,” meaning union medical?

A. That’s correct.

Q. And then, “as told him previously?”

A. Previously.

Q. What was the “previously” referring to?

A. It was the conversation I had with him on the 20th that there were problems with the medical.

Q. Okay.

A. Union medical, let me clarify that.

Q. Alright. And you mean February 20th?

A. Yes.

Q. Okay. Let’s go to the next paragraph, AH, is that the beginning?

A. Correct, that’s Al Hobart. He’s making a commitment to me about where the union would land in the next labor agreement, the total

agreement. It's when we get back to collective bargaining, he's telling me that the union would find the company medical acceptable.

Q. Okay. It says—

A. He's promising me something to come at this point.

Q. What do you mean by that?

A. It means that I don't have it now but that they're willing to give it me. He's making a commitment that I will get it in the future at some point when we get back to collective bargaining on a full contract.

Q. Okay. So were you talking about full contract bargaining in this telephone conversation?

A. Absolutely not, I'm only talking about getting the guys back to work, that's all.

Q. Okay. Let's go down to the fourth paragraph. Who's talking here, starts with "had?"

A. That's me.

Q. Okay.

A. "Had deal in October, no need to change now." That meaning that the conditions as they exist at the moment I'm talking to Al was that the company was including employees in the company medical plan.

We also were escrowing the pension and retirees, but we're prepared to back off of that and prepared to agree to the pension plan. The retirees has kind of been lost in the shuffle here, but our

thought was that we would continue to escrow that money.

MS. BOTERO: I'm sorry, was that part of this conversation?

WITNESS: Yes, it was, just a very brief part. I didn't make a note of it because the retirees has kind of been not emphasized throughout these discussions.

Q. Okay. Let's go down to the fifth entry on this page. What was said as it relates to that?

A. My note is legal, this is a conversation—this is Al telling me that his lawyers are telling him that he needs to have the whole thing and that's when I said, "Who cares about the lawyers?"

Q. That's what "so what" means?

A. Yeah, we got to move beyond the lawyers, so what, there's lawyers.

Q. Alright. So Al was saying we've got to have the whole thing, meaning—

A. His proposal. We proposed to him what we wanted at the original meeting, which would've been the 17th, I think. The next day, Al sent us a counterproposal as what he wanted to have. He attached to it the mechanism for achieving his counterproposal, and that was sign the new agreement and the subscription agreements.

Q. You're referring to the letter Al wrote on February 18th with the attached emails?

A. Correct. He responded to our 17th offer. He responded to it with an 18th counteroffer, if you will, and what the conditions would be to get there.

- Q. Okay. When—just for the record, where it says, “legal, so what,” what did Al say?
- A. Al said his lawyers were telling him he had to have both the union medical and the union pension.
- Q. Okay. That’s what prompted your legal so what?
- A. Correct. The theory is you lawyers can get in the way of making a deal and that’s what I’m trying to communicate.
- Q. Okay. The last line says what?
- A. “Continue to fight, why?”
- Q. Who said that?
- A. I said it. That’s in essence what I said. “Why do we want to continue to fight, Al? You guys want to come back, you’ve given us an offer to come back. Why continue this fight? Let’s just do what we can do and come on back.” Remember, the guys are still on strike.
- Q. Okay. Let’s go to the top of the next page please. Who’s talking here, “We can go with pension?”
- A. Again, this is where I think I lost the connection on the cell phone. I called him back and reintroduced the conversation. I said, “We can go with pension,” meaning the union pension, I’m talking to Al. “We can go with the union pension, Al.” Al responds to me that he doesn’t think that will work. Union pension alone would not work.
- Q. Okay.
- A. He wanted both.
- Q. Both, meaning?

A. Both the union health and welfare and the union pension, and that we sign subscription agreements and that we sign underlying labor agreement.

Q. Okay. Below that, clarify that.

A. "We will be coming back."

Q. Okay.

A. I made that note to myself—I said to Al, "Are the guys going to come back?" And Al said, "We will be coming back."

Q. Okay. Mr. Braun, when these calls were made, were you on your cell phone or landline?

A. The cell phone on both the 20th and the 24th. I was out . . .

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[. . .]

A. I was the contact person for the company.

Q. Okay. Did you ever instruct John Payne that he was not to talk to Dave Ballew?

A. No, in fact, it was the opposite.

Q. What do you mean?

A. We were interested in getting a settlement in the back to work issues.

Q. Okay. Did you ever say anything to John Payne to the effect that, "Because I, Bob Braun, am talking to Hobart, I don't want you talking to Dave Ballew?"

A. I never instructed you not to talk to Dave Ballew.

Q. Okay. To your knowledge, did anyone else at Oak Harbor instruct John Payne not to talk to Dave Ballew?

A. No.

Q. Mr. Braun, when the strikers returned to work in February of '09, do you know what Oak Harbor did regarding pension contributions for the returning strikers?

A. At that point in time, there were no subscription agreements in place and the Employer was putting the money into escrow for pension, putting money into escrow for the retirees, and was providing the funding for a medical plan that employees were covered by.

JUDGE McCARRICK: Was that the Employer plan?

WITNESS: Yes, sir.

Q. And when you say you were putting the money from pension into escrow, what amounts were you putting into the escrow?

A. \$3.21 an hour, I believe, for the pension amount; \$56 or \$54 for the retiree; and the medical benefits are reasonably comparable plan-to-plan.

Q. Comparable of what to what?

A. The Plan B that's specified in the expired labor agreement and the company plan that the employees are covered by.

Q. Where'd you get this \$3.21 per hour figure from on pension?

A. I believe that's what in the labor agreement. It's the total amount—I think the labor agreement specifies a certain amount and a total amount.

Q. You're talking about the expired labor agreement?

A. Yes, I am.

Q. Where'd you get the roughly \$57 a month or so for retirees?

A. The \$50-odd amount for retirees comes out of that same Article 17.

JUDGE McCARRICK: And this was applied to Washington Teamsters Trust, as well as the Oregon trust?

WITNESS: The Oregon trust is not separated, Your Honor. It's—I believe there was testimony earlier that the Oregon trust is a combination of active employee medical and retiree employee medical. So it's not segmented in any way.

JUDGE McCARRICK: I guess my question is, contributions were set aside for that trust as well?

WITNESS: Yes, Your Honor.

JUDGE McCARRICK: And I assume the Oregon employees were also placed under the Employer medical plan?

WITNESS: Yes, sir.

Q. Mr. Braun—

MR. PAYNE: May I approach, Your Honor?

JUDGE McCARRICK: You sure may.

Q. Mr. Braun, I'm going to hand you a document that's been marked already and introduced as

General Counsel No. 92, which is a letter from you.

A. Yes, sir.

Q. Can you take a moment to read it?

A. Yes, sir.

JUDGE McCARRICK: I'm sorry, what exhibit number is that?

WITNESS: 92, Your Honor.

Q. Do you recognize this document?

A. Yes, I do.

Q. Can you tell us what it is?

A. Yes, this is a letter that I wrote to Don Ditter at Northwest Administrators. I faxed it to him and I would've faxed it the same day that appears on the document. It looks like it's August 7th, 2007.

Q. Do you know what benefit trust Don Ditter works with?

A. You know, Don is with Northwest Administrators and he is . . .

[p. 1265]

[. . .]

MS. BOTERO: Well, I haven't objected yet because I haven't heard any hearsay yet.

JUDGE McCARRICK: Alright.

MR. PAYNE: Your Honor, could I address this point for a moment if it's a hearsay issue?

JUDGE McCARRICK: Yeah, it's calling for what appears to be hearsay, so you can respond to it at this point, yeah.

MR. PAYNE: Well, Your Honor, I've already testified as to what transpired in this conversation and have been available for cross-examination on this subject. Mr. Braun is certainly available for cross-examination on this subject. If no other reason, this passes the equivalency test of the authenticity and believability of the evidence.

JUDGE McCARRICK: Well, I think Mr. Braun can testify as to what he said. As to what you said, it's hearsay unless I hear an exception.

MR. PAYNE: Okay. I'm happy to have Mr. Braun testify as to what he said.

JUDGE McCARRICK: Okay.

Q. BY MR. PAYNE: Did you have a conversation with me, John Payne, about the subject of subscription agreements for Oregon?

A. I did.

Q. Okay. Without disclosing what I said, tell me what you said in that conversation.

A. Okay. I said I will look for them and I said that I can't find them. I said—

JUDGE McCARRICK: These are subscription agreements?

WITNESS: Yes, sir.

A. I said, "I'm sure they're here but I don't know where."

Q. Okay. How many of those conversations did you and John Payne have?

A. I believe there were two. You had me look a second time, I did, I couldn't find it the second time.

Q. Okay.

(Long pause)

MR. PAYNE: We have no further questions, Your Honor.

JUDGE McCARRICK: Cross-examination?

MS. BOTERO: Yes, Your Honor.

MR. McCARTHY: Your Honor, may I receive statements and Jencks material from Mr. Braun now?

JUDGE McCARRICK: You may.

MS. BOTERO: I have the declaration of Bob Braun, dated May 26th, 2010. It has attachments, which are exhibits that were just entered into evidence. Another declaration of Bob Braun dated April 6th, 2009, three pages typed. And declaration of Robert Braun, two pages, dated June 2nd, 2009, with several attachments.

JUDGE McCARRICK: Let the record reflect those have been furnished to counsel. What I'm going to do is have General Counsel go forward with her examination. I'll give you an . . .

[p. 1278]

[. . .]

. . . next labor agreement. I just turned it around and said to Al, “Look, Al, if you need to have union medical, we can talk about that in the next labor agreement. The deal that we put together in October is what’s in place now, why change?”

Q. Okay, let’s talk about that. The deal that we put together in October is in place now, what deal?

A. It is the company medical plan. In this particular case, when I say “deal,” I should’ve probably written down company medical is what’s in place now, why change? If you need the union medical, get it in the next contract.

Q. But the deal you had in October applied only to crossover employees.

A. I understand that, ma’am, but that was what was in place on the ground at that moment.

Q. Alright. So let’s go to the next paragraph. Tell me who’s speaking.

A. In this particular line, two people are speaking. The first dash is Al Hobart bringing up the concern that—he’s articulating his attorneys as the reason why he does not want to currently agree to company medical plan. He’s already accepted the idea that we’ll buy into the pension. Now the whole debate is just about medical at this point.

Q. Doesn’t he in fact say in order for strikers—with respect to the end of the strike, the lawyers said we need the whole thing?

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[...]

**ORIGINAL AGREEMENT EXCERPTS
(OCTOBER 21, 2005)**

AGREEMENT by and Between
OAK HARBOR FREIGHT LINES, INC. and
TEAMSTERS LOCALS 81, 174, 231, 252, 324,
483, 524, 690, 760, 763, 839, & 962 covering
certain employees working out of Oak Harbor
Freight Lines facilities located within IDAHO,
OREGON & WASHINGTON

(November 1, 2004 through October 31, 2007)

1.0 Parties to the Agreement

1.01 THIS AGREEMENT is by and between OAK HARBOR FREIGHT LINES, INC. (“Employer”), and Teamster Local Union Nos. 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839, and 962, each affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS (“Local Union”). The parties to this Agreement hereby agree to be bound by the terms and provisions of this Agreement.

1.02 The purpose of this Agreement is to set forth the understanding reached between the parties hereto with respect to wages, hours, and other terms and conditions of employment.

Scope of Agreement:

1.03 The execution of this Agreement on the part of the Employer shall cover all line haul and pickup and delivery operations of the Employer that are specifically covered by this Agreement, and shall only

have application to the work performed by the following designated unit of employees:

All truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and such other employees as may be presently or hereafter represented by each Local Union as referenced in Appendices A, B, C, and D, engaged in local pick-up, delivery and assembling of freight, within the jurisdiction of the Local Union and office-clerical and shop employees employed by the Employer excluding however, the classifications set forth immediately below in Section 1.04.

1.04 The following classifications of employees are specifically excluded from the coverage of this Agreement:

- (a) Confidential employees, supervisory and professional employees within the meaning of the Labor Management Relations Act of 1947, as amended;
- (b) employees already covered by an existing union contract not included in this Agreement;

[. . .]

17.0 Health and Welfare

17.01 Based on the previous month's hours the Employer shall pay each month into the following employee Benefit Trust Funds, the amounts required on behalf of each regular employee who was compensated no less than forty (40) hours and who was employed by the Employer within the jurisdictions of a signatory Local Union in the States of Washington or Idaho covered by Washington Teamsters Welfare

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Trust benefits on the ratification date of this Agreement; provided however, in the case of each regular Class A Utility employee must have been compensated no less than eighty (80) hours:

Effective February 10, 2000 based on January 2000 hours:

- Washington Teamsters Welfare Trust (WT-450) contribution rate \$307.00 per month (\$400 time loss, additional \$2,500 life & \$500 dependent life, LTD and 9 month waiver)
- Northwest Teamsters Dental Plan F contribution rate \$56.00 per month
- Vision Plan E contribution rate \$11.35 per month

Effective August 10th based on July, 2005 hours:

- Washington Teamsters Welfare Trust Plan B (\$638.30) with Life B (\$6.60), Time Loss A (\$22.00), 9 Month Waiver (\$10.25) and LTD (\$6.25)
- Northwest Teamsters dental Plan B (\$83.80)
- Vision Plan EXT (\$11.35)

17.01.1 Retirees Welfare Trust Plan RWT-Plus contribution rate \$39.85 (Paid on all Unit employees who meet the 80 hour compensation test)

Effective January 1, 2005 the \$39.85 shall be increased by \$5.00 to \$44.85

Effective January 1, 2006 the \$44.85 shall be increased by \$5.00 to \$49.85

Effective January 1, 2007 the \$49.85 shall be increased by \$5.00 to \$54.85

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Should the any of the above monthly premium contributions be increased by an amount in excess of five dollars (\$5.00) per month in any twelve (12) month period the amount in excess of five dollars (\$5.00) shall be diverted from wages. In the event of a decrease in contribution amounts diverted from wages shall be restored up to the amount of decreased contribution.

17.02 Effective the tenth (10th) of November 1996, based on the previous month's hours, the Employer shall pay each month into the following employee Benefit Trust Funds, the amounts required on behalf of each regular employee who was compensated no less than forty (40) hours and who was employed by the Employer within the jurisdictions of a signatory Local Union in the State of Oregon covered by the Oregon Warehouseman (a.k.a. 206) Trust benefits on the ratification date of this Agreement; provided however, in the case of each regular Class A Utility employee must have been compensated no less than eighty (80) hours:

- Oregon Warehouseman (a.k.a. 206) Trust Medical/Dental & Vision Plan D (\$825.12)
- Dental Plan (included in Medical)
- Vision (included in Medical)
- Retirees (included in Medical)

The Employer shall only be obligated to Section 17.01 or 17.02 payments but not both.

17.03 Maintenance of Benefits.: The Employer shall during the life of this Agreement pay any increase in rates needed to maintain the benefits set out in Sections 17.01 and 17.02, if required by the Trustees

of the Trust(s) until such time as a majority vote of the affected employees decides to replace such benefits with a Company Health & Welfare Program as otherwise provided for within Section 17.06 below.

17.03.1 In the event one or more of the Trust Funds to which the Employer contributes shall offer “tiered contribution” or “cafeteria” style benefits the Employer may, after consultation with the affected Local Union(s) substitute such program for all or part of Section 17.01 or Section 17.02 as appropriate; provided however, benefits shall remain comparable.

17.04 The Employer and the Local Unions shall be bound by the provisions of the “Agreement and Declaration” of the afore-referenced Trusts or such other Trust as may be agreed to by the parties to this Agreement, and agree that the Trustees of that Trust shall act as Trustees on their behalf. Except by special written agreement between the Employer and Union no contribution shall be made on or be owed for any salaried employee.

17.05 Terminals covered by the Company Health & Welfare Program on January 1, 2005, shall continue such coverage according to the plan as it shall be constituted from time to time; provided however, the benefits provided to unit employees shall be no less than those provided to non-bargaining unit employees. In the event Section 17.06 is not implemented and/or there is no conversion to the Company Health & Welfare Program, those employees covered by the Company Health & Welfare Program may then choose to be included in Section 17.01 benefits to become effective after January of 2007. The Employer shall make contributions on behalf of employees covered by this Section 17.05 into Retiree’s Welfare

Trust Plan RWT-Plus plan pursuant to the provisions of Section 17.01.1, effective as of hours compensated in the first month following ratification of this Agreement.

17.06 The Employer may during the life of this Agreement, but no sooner than November 2006 for commencement no sooner than January 2007 open this Article for the conversion to the Company Health & Welfare Program and/or alternative group coverage; provided however, the Company Health & Welfare Program and/or alternative group coverage shall provide benefits comparable or better than that of Plan being replaced. The Employer shall give notice to the affected Local Unions and shall bargain regarding the details of the plan, its coverage, its maintenance of benefits, and the transition from a Trust to the Company Health & Welfare Program and/or alternative group coverage. Conversion to the Company Health & Welfare Program and/or alternative group coverage shall be by majority vote conducted by a mail ballot of all affected employees. No economic action or implementation shall be permitted.

17.07 Nothing within this Article 17.0 and/or any of its Sections shall in any way be construed so as to obligate and/or require either the Employer or the Union to negotiate on an issue for inclusion into any future Labor Agreement that which is recognized as a permissive subject of bargaining under the National Labor Relations Act.

18.0 Pension

18.01 Pension Contributions: Effective as designated below, the Employer shall pay the amounts stated below to the Western Conference of Teamsters

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Pension Trust Fund on account of each member of the bargaining unit for every hour for which an hourly compensation was paid, said amounts to be computed monthly: provided however, the maximum monthly contribution shall be limited to a maximum of one hundred eighty four (184) hours per month and a maximum of two thousand eighty (2080) hours per calendar year.

Date	Base	Peer	Total
Current	\$2.58	\$0.43	\$3.01
Nov. 1, 2005 (Payable in December, 2005)	\$2.76	\$0.45	\$3.21

- a) Compensable hours shall not include payment of vacation amounts owed upon termination.
- b) Payments required under this Section 18.01 for all bargaining unit employees in Boise, Idaho represented by Teamsters Local 483 shall commence with hours compensated in the month of signing of this Agreement payable the following month.

18.02 Employees covered by this Agreement in Medford Oregon (Local 962) shall become covered by this Article 18.0 based on hours compensated in the month of October, 1996, payable the tenth (10th) of the following month; provided however, the position of Dispatcher-Supervisor is excluded from this Section 18.02 and will for the life of this Agreement continue in the Employer Retirement Plan.

18.03 For probationary employees hired on or after April 1, 2000, the Employer shall pay an hourly contribution rate of ten cents (10¢) including one cent

(1¢) for PEER-80 during the probationary period, but in no case for a period longer than the first ninety (90) calendar days from the date of hire. If and when an employee completes this probationary period the full standard contribution rate shall apply. Contributions shall be calculated on the same basis as described in this Article 18.0 of this Agreement.

19.0 Fringe Benefit Booklets & Self-Premium Payments

19.01 It shall be the responsibility of the employee to read the Labor Agreement Fringe Benefit Booklets in order to familiarize himself with the various plans and determine when he will become eligible for each benefit. If an employee misplaces the plan booklets, he should contact the Plan Administrator for a replacement copy.

[. . .]

23.05 Local Union and Employer Cooperation:

23.05.1 The Local Union, its members, and the Employer shall at all times as fully as it may be within their power to further their mutual interest and interests of the trucking industry and the International Brotherhood of Teamsters nationwide.

23.05.2 The Local Union and the Employer recognize the principle of a fair day's work for a fair day's pay; that jobs and job security of employees working under this Agreement are best protected through efficient and productive operations of the Employer and the trucking industry. The Employer is to receive eight (8) hours of work for eight (8) hours of pay.

24.0 Duration

24.01 This Agreement, including Appendices A through H and LOUs I through VII attached shall become effective on the date of signing, except as otherwise provided herein, and shall remain in effect until October 31, 2007, unless changed by mutual consent. Should either party desire to change, modify or terminate this Agreement on the anniversary date of October 31, 2007, written notice must be given to the other party at least sixty (60) days in advance of October 31, 2007. If notice of termination is not given within such time, the Agreement shall be considered as automatically renewed for an additional period of one year, and in like manner from year to year thereafter.

IN WITNESS WHEREOF, the Employer attaches its signature as of this 21 day of October, 2005.

FOR THE EMPLOYER:

Oak Harbor Freight Lines, Inc.

By: /s/_____

**LETTER FROM JOHN M. PAYNE
(FEBRUARY 17, 2009)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
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Joseph G. Marra
Eileen M. Lawrence
Brian P. Lundgren
Patrick S. Pearce
Selena C. Smith
Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor Freight Lines

Dear Mr. Hobart:

This letter is to confirm our conversations on Tuesday evening wherein Oak Harbor confirmed that it was unconditionally returning striking employees to work.

However, certain returning strikers will be laid off due to lack of work and other returning strikers are being suspended pending investigation into possible discipline for misconduct. Oak Harbor proposes to continue the status quo regarding wages and benefits. The benefits proposal is based on the fact that the Trust Funds (*i.e.*, Pension, Health & Welfare, and Washington Retirees H&W) have consistently refused to accept contributions for returning strikers.

Thus, the status quo is the wage rate in the terminated CBA. It also includes the agreement reached with the Union in early October 2008 regarding Pension, Washington Retirees Health & Welfare, and Teamster Health & Welfare for returning strikers. Oak Harbor would continue to follow the agreed upon status quo for returning strikers, which is as follows:

- Health & Welfare: Oak Harbor will cover the returning strikers under its Company Plans pending a different agreement with the Unions on Health & Welfare. (This will allow these employees to have coverage.)
- Pension: Oak Harbor will place the monthly contributions into an escrow account pending some other agreement on this subject.
- Washington Retirees Health & Welfare: Oak Harbor will put the monthly contributions into an escrow account pending a different agreement on this subject.

If you have any comments on this subject, please contact me. Oak Harbor looks forward to the return of the strikers.

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Sincerely,

/s/ John M. Payne

**WASHINGTON TEAMSTERS WELFARE TRUST
SUBSCRIPTION AGREEMENT SIGNED BY
JOINT COUNCIL PRESIDENT
(SEPTEMBER 6, 2005)**

**WASHINGTON TEAMSTERS WELFARE TRUST
SUBSCRIPTION AGREEMENT**

**Collective Bargaining Agreement Providing for
Participation in Trust**

The Employer and Labor Organization below are parties to a Collective Bargaining Agreement providing for participation in the above Trust. An enforceable Collective Bargaining Agreement must exist as a condition precedent to participation in the Trust.

- **Employer Name**

Oak Harbor Freight Lines, Inc.
1339 -West Valley Highway North
Auburn, Washington 98001-2417

- **Labor Organization (Union) Name**

Teamsters Joint Council 28 on behalf of
Teamster Locals 174, 231, 252,
589, 690, 760, 763, & 839
14675 Interurban Avenue South
Tukwila, Washington 98168

Collective Bargaining Agreement

The parties' Collective Bargaining Agreement is in effect from: November 1, 2004 to October 31, 2007

- **Renewal-Account No._____**
Approximate No. of Covered Employees 350

Information Concerning Type of Employer's Business

- Corporation–State of WA

Benefit Plan(s) Designated in Collective Bargaining Agreement

The Collective Bargaining Agreement provides that contributions will be made to the Trust on behalf of all employees for whom the Employer is required to contribute under the Trust Operating Guidelines for the purpose of providing such employees and their dependents with the following benefit plan(s): (The undersigned parties acknowledge the receipt of a copy of the Trust Operating Guidelines which by this reference are made a part hereof.)

COVERAGE IN BARGAINING AGREEMENT

(For renewals, list all coverages, not just changes)

- Medical
Plan B MB4E
Monthly Rate \$638.30
- Life/AD&D
Plan B MB1F
\$15,000 Life/AD&D (Employee)
\$1,500 Life (Dependent)
Monthly Rate \$6.60
- Time Loss Amount
Plan A TA1F
\$400/week (Amount)
Monthly Rate \$22.00
- LTD
Long Term Disability Income Plan

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Monthly Rate \$6.25

- Waivers

Additional 9 months Disability Waiver of Contributions—Medical only

Monthly Rate \$10.25

- MEDICAL TOTAL \$683.40

- DENTAL

Plan B D21F

Monthly Rate \$83.80

- VISION

Plan EXT V11F

Monthly Rate \$11.35

Will there be any coverage changes before the Collective Bargaining Agreement's expiration?

- Yes

If yes, attach a Subscription Agreement for each change a Subscription Agreement for each change. A Subscription Agreement must be submitted in advance of the effective date below.

Effective Date of Coverage

The contribution rates above are due effective (month/year) November, 2004 based on employment in the prior month.

Note: Coverage is provided using a lag month, therefore coverage is effective in the month following the month contributions are due. For example, contributions due effective April based on March employment will provide coverage in May.

Expiration of Collective Bargaining Agreement

Upon expiration of the above-referenced Collective Bargaining Agreement, the Employer agrees to continue to contribute to the Trust in the same amount and manner as required in the Collective Bargaining Agreement until such time as the Employer and the Labor Organization either enter into a successor Collective Bargaining Agreement, which conforms to the Trust Operating Guidelines, or one party notifies the other in writing (with a copy to the Trust) of its intent to cancel such obligation five (5) days after receiving notice, whichever occurs first. The Trust reserves the right to immediately terminate participation in the Trust upon the failure to execute this or any future Subscription Agreement or to comply with the Trust Operating Guidelines as amended by the Trustees from time to time.

For Employer

/s/ Robert Braun Jr.

Labor Consultant

For Union

/s/ Allen Hobart

President

Date: September 6, 2005

Eligibility to Participate in Trust

Eligibility for benefits is determined in accordance with the requirements established in the Collective Bargaining Agreement provided such requirements are consistent with the Trust guidelines. To establish eligibility for benefits, Trust guidelines require that eligible employees must have the required number of hours in a month and have the contractually required contributions paid on their behalf. Eligibility will commence according to the Trust's lag month eligibility rule. Eligibility continues as long as the employee remains eligible, has the contractually required number of hours per month, and has the required contributions made. The Trust, however, will not recognize any contractual provision that conditions continued eligibility on having less than 40 or more than 80 hours in a month. Eligibility will end according to the Trust's policy for employees who do not have the required number of hours and contributions in a month and who do not qualify for an applicable extension of eligibility, if any.

Employees of a participating employer not performing work covered by the Collective Bargaining Agreement may participate in the Trust only pursuant to a written special agreement approved in writing by the Trustees. The Trustees reserve the right to recover any and all benefits provided to ineligible individuals from either the ineligible individual receiving the benefits or the employer responsible for misreporting them (if applicable).

Reporting Obligation and Consequences of Delinquency

Employer contributions are due no later than ten (10) days after the last day of each month for which

contributions are due. The Employer acknowledges that in the event of any delinquency, the Trust Agreement provides for the payment of liquidated damages, interest, attorney fees, and costs incurred in collecting the delinquent amounts.

Trustees' Authority to Determine Terms of Plans

The parties recognize that the detail of the benefit plans provided by the Trust and the rules under which employees and their dependents shall be eligible for such benefits is determined solely by the Board of Trustees of the Trust in accordance with the terms of the governing Agreement and Declaration of Trust (Trust Agreement). The Trustees retain the sole discretion and authority to interpret the terms of the Trust's benefit plans, the plans' eligibility requirements, and other matters related to the administration and operation of the Trust and its benefits plans. The Trustees may modify benefits or eligibility of any plan for the purpose of cost containment, cost management, or changes in medical technology and treatment.

Mechanism for Handling Contribution Increases

The Trustees' authority shall include the right to adjust the contribution rates to support the benefit plans offered by the Trust and to maintain adequate reserves to cover any extended eligibility and the Trust's contingent liability.

The parties recognize that it is the intent of the Trust not to provide employee benefit plans for less than the full cost of any such plan. If the Collective Bargaining Agreement does not provide a mechanism for fully funding the designated benefit plans, the

Board of Trustees may substitute a plan then available that is fully supported by the employer's contribution obligations. The disposition of any excess employer contributions will be subject to the collective bargaining process.

Acceptance of Trust Agreement

The Employer and the Labor Organization accept and agree to be bound by the terms of the Trust Agreement governing the Trust, and any subsequent amendments to the Trust Agreement. The parties accept as their representatives for purposes of participating in the Trust the Trustees serving on the Board of Trustees and their duly appointed successors.

Provided, however, that in the event that either Section 2 or 3 of Article VIII of the Trust Agreement is amended to change or modify an Employer's liability as specified therein, such amendment will not be deemed applicable to an Employer until such time as the Employer enters into a successor Collective Bargaining Agreement after the expiration of the Employer's then current Collective Bargaining Agreement.

Approval of Trustees

This Agreement has been approved by the Board of Trustees of the Washington Teamsters Welfare Trust.

/s/ Donald Ditter
Administrative Agent
Washington Teamster Welfare Trust

Date: November 4, 2005

**RETIREE'S WELFARE TRUST
SUBSCRIPTION AGREEMENT SIGNED BY
JOINT COUNCIL PRESIDENT
(SEPTEMBER 6, 2005)**

**RETIREE'S WELFARE TRUST
SUBSCRIPTION AGREEMENT**

Collective Bargaining Agreement

THE UNDERSIGNED EMPLOYER AND LABOR ORGANIZATION CONFIRM, AS A CONDITION PRECEDENT TO PARTICIPATION IN THE RETIREE'S WELFARE TRUST, THAT THEY ARE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT PROVIDING FOR CONTRIBUTIONS TO BE MADE TO THE TRUST ON BEHALF OF ALL BARGAINING UNIT EMPLOYEES FOR WHICH THE EMPLOYER IS REQUIRED TO CONTRIBUTE. UPON EXPIRATION OF THE CURRENT OR ANY SUBSEQUENT BARGAINING AGREEMENT REQUIRING CONTRIBUTIONS, THE EMPLOYER AGREES TO CONTINUE TO CONTRIBUTE TO THE TRUST IN THE SAME MANNER AND AMOUNT AS REQUIRED IN THE MOST RECENT EXPIRED BARGAINING AGREEMENT UNTIL SUCH TIME AS THE UNDERSIGNED EITHER NOTIFIES THE OTHER PARTY IN WRITING (WITH A COPY TO THE TRUST FUND) OF ITS INTENT TO CANCEL SUCH OBLIGATION FIVE DAYS AFTER RECEIPT OF NOTICE OR ENTER INTO A SUCCESSOR BARGAINING AGREEMENT WHICH CONFORMS TO THE TRUST POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS, WHICHEVER

OCCURS FIRST. THE PARTIES AGREE TO PROVIDE THE TRUST OFFICE WITH A COPY OF THE CURRENT AND ALL FUTURE COLLECTIVE BARGAINING AGREEMENTS.

Effective Dates of Current Bargaining Agreement:

11/01/2004 to 10/31/2007.

If a new Bargaining Agreement, first payment is due the Trust based on hours worked effective 08/01/05.

Acceptance of Trust Agreement

THE UNDERSIGNED ACKNOWLEDGE RECEIPT OF A COPY OF THE TRUST AGREEMENT AND TRUST POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS (SEE THE BACK OF THIS FORM FOR THE POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS), AND ACCEPT AS THEIR REPRESENTATIVES FOR PURPOSES OF PARTICIPATING IN THE TRUST, THE JOINT LABOR AND MANAGEMENT TRUSTEES SERVING ON THE BOARD OF TRUSTEES AND THEIR DULY APPOINTED SUCCESSORS. THE UNDERSIGNED EMPLOYER AND LABOR ORGANIZATION, BY EXECUTION OF THIS SUBSCRIPTION AGREEMENT, CONSENT TO BE BOUND BY THE TERMS OF THE TRUST AGREEMENT GOVERNING THE RETIREE'S WELFARE TRUST, INCLUDING ANY SUBSEQUENT AMENDMENTS THERETO. THE UNDERSIGNED FURTHER ACKNOWLEDGE THAT WITH EACH SUCCESSIVE COLLECTIVE BARGAINING AGREEMENT TO THE ONE IDENTIFIED ABOVE THAT PROVIDES FOR CONTRIBUTIONS TO CONTINUE TO BE MADE TO THE RETIREE'S WELFARE TRUST, THE PARTIES

AGREE TO CONTINUE TO BE BOUND BY THE TERMS OF THE TRUST AGREEMENT AND ANY SUBSEQUENT AMENDMENTS THERETO. THIS SUBSCRIPTION AGREEMENT WILL AUTOMATICALLY CONTINUE UNTIL SUCH TIME AS CONTRIBUTIONS ARE NO LONGER REQUIRED TO BE MADE TO THE TRUST UNDER A COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES; HOWEVER, THE TRUST RESERVES THE RIGHT TO DISALLOW OR TERMINATE PARTICIPATION IN THE TRUST UPON FAILURE TO EXECUTE THIS SUBSCRIPTION AGREEMENT OR TO COMPLY WITH THE TRUST AGREEMENT OR POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS.

EMPLOYER (Name and Address)

Oak Harbor Freight Lines, Inc.
1339-West Valley Highway North
Auburn, Washington 98001-2417

By: /s/ Robert R. Braun, Jr.
Title: Labor Consultant

Date: September 6, 2005

LABOR ORGANIZATION (Name and Address)

Teamsters Joint Council No. 28 on
behalf of . . . Teamster Locals 174,
231, 252, 589, 690, 760, 763, & 839
14676-Interurban Avenue South
Tukwila, Washington 98168

By: /s/ Al Hobart
Title: President

Date: 09/6/2005

Approval of Trustees

This subscription agreement has been accepted
by the Retiree's Welfare Trust:

By: /s/ Donald Ditter

Date: 11/4/05

**POLICY ON ACCEPTANCE
OF EMPLOYER CONTRIBUTIONS**

RETIREE'S WELFARE TRUST

It is hereby declared to be the policy of the Retiree's Welfare Trust to accept as Employer contributions only payments made in accordance with a Collective Bargaining Agreement and/or Written Agreement which is not detrimental to the Plan.

Accordingly, a Collective Bargaining Agreement and/or Written Agreement which:

- Does not require monthly contributions to be made on behalf of all persons who perform work in the classifications or categories covered in such Collective Bargaining Agreement; or
- Requires a minimum waiting period of employment before contributions are owing; or
- Limits employees on whose account monthly contributions are to be made to those who are compensated for more than eighty (80) hours per month,

will be deemed to be detrimental to the Retiree's Welfare Trust and said contributions will not be acceptable.

The foregoing is only an illustration of Collective Bargaining Agreement and/or Written Agreement provisions which the Trustees have deemed to be detrimental to the Plan and should not be considered as an all inclusive list of all such types of provisions.

App.286a

The determination of whether or not a Collective Bargaining Agreement and/or Written Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion.

NOTE: There is a separate policy on acceptance of employer contributions in the Food Processing Industry. A copy may be obtained from the Trust Administrative Office.

Retiree's Welfare Trust
2323 Eastlake Avenue East
Seattle, WA 98102
(206) 329-4900

**RETIREE'S WELFARE TRUST
SUBSCRIPTION AGREEMENT SIGNED BY
LOCAL 483 SECRETARY-TREASURER
(SEPTEMBER 6, 2005)**

**RETIREE'S WELFARE TRUST
SUBSCRIPTION AGREEMENT**

Collective Bargaining Agreement

THE UNDERSIGNED EMPLOYER AND LABOR ORGANIZATION CONFIRM, AS A CONDITION PRECEDENT TO PARTICIPATION IN THE RETIREE'S WELFARE TRUST, THAT THEY ARE PARTIES TO A COLLECTIVE BARGAINING AGREEMENT PROVIDING FOR CONTRIBUTIONS TO BE MADE TO THE TRUST ON BEHALF OF ALL BARGAINING UNIT EMPLOYEES FOR WHICH THE EMPLOYER IS REQUIRED TO CONTRIBUTE. UPON EXPIRATION OF THE CURRENT OR ANY SUBSEQUENT BARGAINING AGREEMENT REQUIRING CONTRIBUTIONS, THE EMPLOYER AGREES TO CONTINUE TO CONTRIBUTE TO THE TRUST IN THE SAME MANNER AND AMOUNT AS REQUIRED IN THE MOST RECENT EXPIRED BARGAINING AGREEMENT UNTIL SUCH TIME AS THE UNDERSIGNED EITHER NOTIFIES THE OTHER PARTY IN WRITING (WITH A COPY TO THE TRUST FUND) OF ITS INTENT TO CANCEL SUCH OBLIGATION FIVE DAYS AFTER RECEIPT OF NOTICE OR ENTER INTO A SUCCESSOR BARGAINING AGREEMENT WHICH CONFORMS TO THE TRUST POLICY ON ACCEPTANCE OF

EMPLOYER CONTRIBUTIONS, WHICHEVER OCCURS FIRST. THE PARTIES AGREE TO PROVIDE THE TRUST OFFICE WITH A COPY OF THE CURRENT AND ALL FUTURE COLLECTIVE BARGAINING AGREEMENTS.

Effective Dates of Current Bargaining Agreement:

11/01/2004 to 10/31/2007.

If a new Bargaining Agreement, first payment is due the Trust based on hours worked effective 08/01/05.

Acceptance of Trust Agreement

THE UNDERSIGNED ACKNOWLEDGE RECEIPT OF A COPY OF THE TRUST AGREEMENT AND TRUST POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS (SEE THE BACK OF THIS FORM FOR THE POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS), AND ACCEPT AS THEIR REPRESENTATIVES FOR PURPOSES OF PARTICIPATING IN THE TRUST, THE JOINT LABOR AND MANAGEMENT TRUSTEES SERVING ON THE BOARD OF TRUSTEES AND THEIR DULY APPOINTED SUCCESSORS. THE UNDERSIGNED EMPLOYER AND LABOR ORGANIZATION, BY EXECUTION OF THIS SUBSCRIPTION AGREEMENT, CONSENT TO BE BOUND BY THE TERMS OF THE TRUST AGREEMENT GOVERNING THE RETIREE'S WELFARE TRUST, INCLUDING ANY SUBSEQUENT AMENDMENTS THERETO. THE UNDERSIGNED FURTHER ACKNOWLEDGE THAT WITH EACH SUCCESSIVE COLLECTIVE BARGAINING AGREEMENT TO THE ONE IDENTI-

FIED ABOVE THAT PROVIDES FOR CONTRIBUTIONS TO CONTINUE TO BE MADE TO THE RETIREE'S WELFARE TRUST, THE PARTIES AGREE TO CONTINUE TO BE BOUND BY THE TERMS OF THE TRUST AGREEMENT AND ANY SUBSEQUENT AMENDMENTS THERETO. THIS SUBSCRIPTION AGREEMENT WILL AUTOMATICALLY CONTINUE UNTIL SUCH TIME AS CONTRIBUTIONS ARE NO LONGER REQUIRED TO BE MADE TO THE TRUST UNDER A COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES; HOWEVER, THE TRUST RESERVES THE RIGHT TO DISALLOW OR TERMINATE PARTICIPATION IN THE TRUST UPON FAILURE TO EXECUTE THIS SUBSCRIPTION AGREEMENT OR TO COMPLY WITH THE TRUST AGREEMENT OR POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS.

Employer (Name and Address)

Oak Harbor Freight Lines, Inc.
1339-West Valley Highway North
Auburn, Washington 98001-2417

By: /S/ Robert R. Braun, Jr.
Title: Labor Consultant

Date: September 6, 2005

App.290a

LABOR ORGANIZATION (Name and Address)

Teamsters Local Union No. 483
225-North 16th Street Suite 112
Boise, Idaho 83702

By: /s/ Stanley L. Johnson
Title: Secretary-Treasurer

Date: September 6, 2005

Approval of Trustees

This subscription agreement has been accepted
by the Retiree's Welfare Trust:

By: /s/ Donald Ditter

Date: November 4, 2005

**POLICY ON ACCEPTANCE
OF EMPLOYER CONTRIBUTIONS**

RETIREE'S WELFARE TRUST

It is hereby declared to be the policy of the Retiree's Welfare Trust to accept as Employer contributions only payments made in accordance with a Collective Bargaining Agreement and/or Written Agreement which is not detrimental to the Plan.

Accordingly, a Collective Bargaining Agreement and/or Written Agreement which:

- Does not require monthly contributions to be made on behalf of all persons who perform work in the classifications or categories covered in such Collective Bargaining Agreement; or
- Requires a minimum waiting period of employment before contributions are owing; or
- Limits employees on whose account monthly contributions are to be made to those who are compensated for more than eighty (80) hours per month,

will be deemed to be detrimental to the Retiree's Welfare Trust and said contributions will not be acceptable.

The foregoing is only an illustration of Collective Bargaining Agreement and/or Written Agreement provisions which the Trustees have deemed to be detrimental to the Plan and should not be considered as an all inclusive list of all such types of provisions.

App.292a

The determination of whether or not a Collective Bargaining Agreement and/or Written Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion.

NOTE: There is a separate policy on acceptance of employer contributions in the Food Processing Industry. A copy may be obtained from the Trust Administrative Office.

Retiree's Welfare Trust
2323 Eastlake Avenue East
Seattle, WA 98102
(206) 329-4900

**EMPLOYER UNION CERTIFICATION SIGNED BY
JOINT COUNCIL 28 (SEPT. 6, 2005) AND
OAK HARBOR FREIGHT LINES, INC.
(OCTOBER 25, 2005)**

**THE WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND EMPLOYER-UNION
PENSION CERTIFICATION**

(Complete and forward to the
administrative office for new employers)

THE UNDERSIGNED EMPLOYER AND UNION HEREBY CERTIFY THAT A WRITTEN LABOR AGREEMENT IS IN EFFECT BETWEEN THE PARTIES PROVIDING FOR CONTRIBUTIONS TO THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND ("TRUST FUND") AND THAT SUCH AGREEMENT CONFORMS TO THE TRUSTEE POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS (AS REPRODUCED ON THE REVERSE OF THIS FORM) AND IS NOT OTHERWISE DETRIMENTAL TO THE PLAN. A COMPLETE COPY OF THE LABOR AGREEMENT IS ATTACHED OR, IF NOT YET AVAILABLE, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE. THE UNDERSIGNED AGREE THAT THE PROVISIONS OF ANY MEMORANDUM OF UNDERSTANDING, SUPPLEMENT, AMENDMENT, ADDENDUM OR OTHER MODIFICATION OF THE LABOR AGREEMENT DIRECTLY OR INDIRECTLY AFFECTING THE EMPLOYER'S OBLIGATION TO CONTRIBUTE TO THE TRUST FUND SHALL

NOT BIND THE TRUSTEES UNLESS AND UNTIL A COMPLETE WRITTEN AND SIGNED COPY OF THOSE PROVISIONS IS FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AND ACCEPTED BY THE TRUSTEES, AND FURTHER AGREE TO FURNISH THOSE PROVISIONS TO THE AREA ADMINISTRATIVE OFFICE IN A TIMELY MANNER. IF A NEW PENSION ACCOUNT, THE EMPLOYER AGREES TO PROVIDE THE AREA ADMINISTRATIVE OFFICE WITH COMPLETED PAST EMPLOYMENT DATA FORMS. THE NEGOTIATING PARTIES CERTIFY THAT THIS DOCUMENT HAS NOT BEEN MODIFIED IN ANY MANNER.

- NAME OF EMPLOYER

Oak Harbor Freight Lines

- STREET ADDRESS

1339 West Valley Highway N,

- STATE AND ZIP CODE

Auburn, WA 980001-2417

EFFECTIVE DATE OF THIS LABOR AGREEMENT
November 1, 2004

IF THIS CERTIFICATION IS SIGNED BY AN ASSOCIATION, THE ASSOCIATION WARRANTS AND REPRESENTS THAT IT HAS WRITTEN AUTHORIZATION FROM EACH LISTED EMPLOYER TO SIGN THIS CERTIFICATION AND TO SIGN THE LABOR AGREEMENT ON BEHALF OF SUCH EMPLOYER (IF THE LABOR AGREEMENT IS NOT SIGNED BY THE EMPLOYER)

- INDICATE:
RENEWAL
- FOR LABOR AGREEMENT RENEWALS:
INDICATE PENSION ACCOUNT NUMBER(S)
4048149 412586

EMPLOYER IS A: CORPORATION

APPROXIMATE NUMBER OF COVERED EMPLOYEES 580

THE UNDERSIGNED UNION AND EMPLOYER AGREE TO BE BOUND BY THE WESTERN CONFERENCE OF TEAMSTERS AGREEMENT AND DECLARATION OF TRUST AND PENSION PLAN AS NOW CONSTITUTED OR AS HEREAFTER AMENDED, AND TO BE BOUND BY THE ACTS OF THEIR RESPECTIVE UNION AND EMPLOYER TRUSTEES OR THEIR SUCCESSORS. THE EMPLOYER AGREES TO PAY THE TRUST FUND THE PENSION CONTRIBUTIONS SPECIFIED IN THE LABOR AGREEMENT WITH THE UNION. THE UNDERSIGNED UNION AND EMPLOYER SHALL BECOME PARTIES TO SAID AGREEMENT AND DECLARATION OF TRUST UPON ACCEPTANCE AS SUCH BY THE TRUSTEES. UPON THE EXPIRATION OF THIS OR ANY SUBSEQUENT LABOR AGREEMENT, THE EMPLOYER AGREES TO CONTINUE TO CONTRIBUTE TO THE TRUST FUND IN THE SAME AMOUNT AND MANNER AS REQUIRED IN THE MOST RECENT EXPIRED LABOR AGREEMENT UNTIL SUCH A TIME AS THE UNDERSIGNED EITHER NOTIFIES THE OTHER PARTY IN WRITING (WITH A COPY TO THE

TRUST FUND) OF ITS INTENT TO CANCEL SUCH OBLIGATION FIVE DAYS AFTER RECEIPT OF NOTICE OR ENTERS INTO A SUCCESSOR LABOR AGREEMENT WHICH CONFORMS TO THE TRUSTEE POLICY, WHICHEVER EVENT OCCURS FIRST. SIMILARLY, THE TRUSTEES RESERVE THE RIGHT TO GIVE NOTICE TO THE EMPLOYER AND UNION OF INTENT TO TERMINATE ACCEPTANCE OF FURTHER CONTRIBUTIONS FROM THE EMPLOYER. THE UNDERSIGNED AGREES THAT UPON RENEWAL OF THE LABOR AGREEMENT A COMPLETE COPY OF THE RENEWED LABOR AGREEMENT, INCLUDING MODIFICATIONS TO THE AGREEMENT, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE; AND, UPON WRITTEN ACCEPTANCE OF THE RENEWED LABOR AGREEMENT BY THE TRUSTEES, THE FOREGOING TERMS OF THE EMPLOYER-UNION PENSION CERTIFICATION SHALL BE APPLICABLE TO SUCH RENEWAL OF THE LABOR AGREEMENT.

UNION: Joint Council of Teamsters 28 for Locals
174, 231, 252, 589, 690, 760, 765, 830

By /s/ Al Hobart
Title: President
Phone: 206-441-7470

Date: 9-6-2005

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EMPLOYER: Oak Harbor Freight Lines, Inc.

By /s/Robert R. Braun, Jr.
Title: Labor Consultant
Phone: 206-623-5155

Date 10-25-2005

ACCEPTED BY THE TRUSTEES OF THE
WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND.

By: /s/ Michael M. Sanders

Date: November 3, 2005

**TRUSTEE POLICY ON ACCEPTANCE OF
EMPLOYER CONTRIBUTIONS**

(As revised for amendments, extensions
and new Pension Agreements effective
on or after April 1, 2000)

It is the policy of the Trustees of the Western Conference of Teamsters Pension Trust Fund to accept as Employer Contributions only payments made in accordance with a Pension Agreement that is not detrimental to the Plan. The determination of whether or not a Pension Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion. However, the list of provisions that follows is furnished as an illustration of those whose inclusion in a Pension Agreement may result in a determination by the Trustees that the Pension Agreement is detrimental to the Plan. It should be noted, however, that the list is not intended as an inclusive list of all such types of provisions.

1. Provisions that limit the employees on whose account contributions are to be made to those above a specific age.
2. Provisions that limit the employees on whose account contributions are to be made to those who will be eligible for retirement within a specified period.
3. Provisions that limit the employees on whose account contributions are to be made to those who have satisfied a specific minimum period of employment or seniority, except that part-time regular and full-time

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regular employees serving a probationary period may, for a period not to exceed ninety (90) calendar days, be covered under a contribution rate not less than ten (10) cents per hour, including PEER. Casuals, extras, jobbers and hiring hall employees are not subject to the foregoing exception.

4. Provisions that limit the employees on whose account contributions are to be made to those who have worked more than a specified minimum number of hours in a particular period.
5. Provisions that permit contributions on a basis that will produce a contribution less than on all straight time hours worked by the employee, provided that for purpose of this rule paid vacation and paid holiday hours shall be included in straight time hours worked.
6. Provisions which permit or require pension contributions for persons who are not members of the bargaining unit.
7. Provisions which reduce contributions for each compensable hour to less than that which applied prior to any date, except as provided in Number 3 above.
8. Provisions that provide different contribution rates within the same job classification other than during the specified waiting period as defined in Number 3 above. (Different contribution rates for substantially different job descriptions or classifications are permissible as determined by the Trustees in their

sole discretion. To illustrate this concept: driver, warehouse, office, mechanic, sales, production would be considered substantially different descriptions/classifications under this provision.)

In administering the foregoing provisions, the Trustees, with regard to the interpretation of these Guidelines, will attempt to accommodate the bona fide needs of the parties to Pension Agreements as long as the Pension Agreements are not detrimental to the Plan. The Trustees, while retaining sole discretion over these issues, invite the parties to Pension Agreements to present proposals to the Trustees in advance of their adoption so that the Trustees may advise the parties on the acceptability of such proposals.

**Trustee Policy on Acceptance of Extended,
Renewed, Modified or Replaced Pension Agreements
Where Employer Is on Referral to Delinquency
Collection Attorneys**

If a Covered Employer has been on referral to the Trust Fund's attorneys for a period of three months or more for collection of delinquent pension contributions due under a Pension Agreement, then the decision of whether to accept as a Pension Agreement any extensions, renewal, modification or replacement of that Pension Agreement shall be made by the Chairman and Co-Chairman/Secretary, acting jointly, rather than by an Area Administrative Office of the Trust Fund.

This Policy shall not apply to an extension, renewal, modification or replacement of a Pension Agreement where the sole reason the Covered

App.301a

Employer is on referral is a delinquency discovered through an examination of the books and records of the Covered Employer by the Trustees or their representatives or resulting from a Trust billing for contribution amounts supplemental to amounts the Covered Employer has reported to the Trust Fund on monthly transmittal report forms.

This Policy is supplemental to, and not in derogation of, the existing authority of the Chairman and Co-Chairman/Secretary to determine whether a collective bargaining agreement or other written agreement qualifies as a Pension Agreement and whether Employer Contributions under such agreement are accepted under the rules and regulations of the Trust Fund.

**EMPLOYER UNION CERTIFICATION SIGNED BY
TEAMSTERS LOCAL 483 (SEPT. 6, 2005) AND
OAK HARBOR FREIGHT LINES, INC.
(OCTOBER 25, 2005)**

**THE WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND EMPLOYER UNION
PENSION CERTIFICATION**

(Complete and forward to the
administrative office for new employers)

THE UNDERSIGNED EMPLOYER AND UNION HEREBY CERTIFY THAT A WRITTEN LABOR AGREEMENT IS IN EFFECT BETWEEN THE PARTIES PROVIDING FOR CONTRIBUTIONS TO THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND ("TRUST FUND") AND THAT SUCH AGREEMENT CONFORMS TO THE TRUSTEE POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS (AS REPRODUCED ON THE REVERSE OF THIS FORM) AND IS NOT OTHERWISE DETRIMENTAL TO THE PLAN. A COMPLETE COPY OF THE LABOR AGREEMENT IS ATTACHED OR, IF NOT YET AVAILABLE, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE. THE UNDERSIGNED AGREE THAT THE PROVISIONS OF ANY MEMORANDUM OF UNDERSTANDING, SUPPLEMENT, AMENDMENT, ADDENDUM OR OTHER MODIFICATION OF THE LABOR AGREEMENT DIRECTLY OR INDIRECTLY AFFECTING THE EMPLOYER'S OBLIGATION TO CONTRIBUTE TO THE TRUST FUND SHALL

NOT BIND THE TRUSTEES UNLESS AND UNTIL A COMPLETE WRITTEN AND SIGNED COPY OF THOSE PROVISIONS IS FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AND ACCEPTED BY THE TRUSTEES, AND FURTHER AGREE TO FURNISH THOSE PROVISIONS TO THE AREA ADMINISTRATIVE OFFICE IN A TIMELY MANNER. IF A NEW PENSION ACCOUNT, THE EMPLOYER AGREES TO PROVIDE THE AREA ADMINISTRATIVE OFFICE WITH COMPLETED PAST EMPLOYMENT DATA FORMS.

- NAME OF EMPLOYER

Oak Harbor Freight Lines

- STREET ADDRESS

1339 West Valley Highway N,

- STATE AND ZIP CODE

Auburn, WA 980001-2417

EFFECTIVE DATE OF THIS LABOR AGREEMENT
November 1, 2004

IF THIS CERTIFICATION IS SIGNED BY AN ASSOCIATION, THE ASSOCIATION WARRANTS AND REPRESENTS THAT IT HAS WRITTEN AUTHORIZATION FROM EACH LISTED EMPLOYER TO SIGN THIS CERTIFICATION AND TO SIGN THE LABOR AGREEMENT ON BEHALF OF SUCH EMPLOYER (IF THE LABOR AGREEMENT IS NOT SIGNED BY THE EMPLOYER)

- INDICATE:

RENEWAL

EMPLOYER IS A: CORPORATION

APPROXIMATE NUMBER OF COVERED EMPLOYEES 580 (20 Teamster Local 483 members accreted to Labor Agreement)

THE UNDERSIGNED UNION AND EMPLOYER AGREE TO BE BOUND BY THE WESTERN CONFERENCE OF TEAMSTERS AGREEMENT AND DECLARATION OF TRUST AND PENSION PLAN AS NOW CONSTITUTED OR AS HERE-AFTER AMENDED, AND TO BE BOUND BY THE ACTS OF THEIR RESPECTIVE UNION AND EMPLOYER TRUSTEES OR THEIR SUCCESSORS. THE EMPLOYER AGREES TO PAY THE TRUST FUND THE PENSION CONTRIBUTIONS SPECIFIED IN THE LABOR AGREEMENT WITH THE UNION. THE UNDERSIGNED UNION AND EMPLOYER SHALL BECOME PARTIES TO SAID AGREEMENT AND DECLARATION OF TRUST UPON ACCEPTANCE AS SUCH BY THE TRUSTEES. UPON THE EXPIRATION OF THIS OR ANY SUBSEQUENT LABOR AGREEMENT, THE EMPLOYER AGREES TO CONTINUE TO CONTRIBUTE TO THE TRUST FUND IN THE SAME AMOUNT AND MANNER AS REQUIRED IN THE MOST RECENT EXPIRED LABOR AGREEMENT UNTIL SUCH A TIME AS THE UNDERSIGNED EITHER NOTIFIES THE OTHER PARTY IN WRITING (WITH A COPY TO THE TRUST FUND) OF ITS INTENT TO CANCEL SUCH OBLIGATION FIVE DAYS AFTER RECEIPT OF NOTICE OR ENTERS INTO A SUCCESSOR LABOR AGREEMENT WHICH CONFORMS TO THE TRUSTEE POLICY, WHICHEVER EVENT OCCURS FIRST. SIMILARLY, THE TRUSTEES

RESERVE THE RIGHT TO GIVE NOTICE TO THE EMPLOYER AND UNION OF INTENT TO TERMINATE ACCEPTANCE OF FURTHER CONTRIBUTIONS FROM THE EMPLOYER. THE UNDERSIGNED AGREES THAT UPON RENEWAL OF THE LABOR AGREEMENT A COMPLETE COPY OF THE RENEWED LABOR AGREEMENT, INCLUDING MODIFICATIONS TO THE AGREEMENT, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE; AND, UPON WRITTEN ACCEPTANCE OF THE RENEWED LABOR AGREEMENT BY THE TRUSTEES, THE FOREGOING TERMS OF THE EMPLOYER-UNION PENSION CERTIFICATION SHALL BE APPLICABLE TO SUCH RENEWAL OF THE LABOR AGREEMENT.

UNION: Teamsters Local 483

By /s/ Stanley L. Johnson
Title: Secretary-Treasurer
Phone: 208-343-5439
Date 9-6-2005

EMPLOYER: Oak Harbor Freight Lines, Inc.

By /s/Robert R. Braun, Jr.
Title: Labor Consultant
Phone: 206-623-5155
Date 10-25-2005

App.306a

ACCEPTED BY THE TRUSTEES OF THE
WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND.

By: /s/Michael M. Sanders

Date November 3, 2005

**TRUSTEE POLICY ON ACCEPTANCE OF
EMPLOYER CONTRIBUTIONS**

(As revised for amendments, extensions
and new Pension Agreements effective
on or after April 1, 2000)

It is the policy of the Trustees of the Western Conference of Teamsters Pension Trust Fund to accept as Employer Contributions only payments made in accordance with a Pension Agreement that is not detrimental to the Plan. The determination of whether or not a Pension Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion. However, the list of provisions that follows is furnished as an illustration of those whose inclusion in a Pension Agreement may result in a determination by the Trustees that the Pension Agreement is detrimental to the Plan. It should be noted, however, that the list is not intended as an inclusive list of all such types of provisions.

1. Provisions that limit the employees on whose account contributions are to be made to those above a specific age.
2. Provisions that limit the employees on whose account contributions are to be made to those who will be eligible for retirement within a specified period.
3. Provisions that limit the employees on whose account contributions are to be made to those who have satisfied a specific minimum period of employment or seniority, except that part-time regular and full-time

App.308a

regular employees serving a probationary period may, for a period not to exceed ninety (90) calendar days, be covered under a contribution rate not less than ten (10) cents per hour, including PEER. Casuals, extras, jobbers and hiring hall employees are not subject to the foregoing exception.

4. Provisions that limit the employees on whose account contributions are to be made to those who have worked more than a specified minimum number of hours in a particular period.
5. Provisions that permit contributions on a basis that will produce a contribution less than on all straight time hours worked by the employee, provided that for purpose of this rule paid vacation and paid holiday hours shall be included in straight time hours worked.
6. Provisions which permit or require pension contributions for persons who are not members of the bargaining unit.
7. Provisions which reduce contributions for each compensable hour to less than that which applied prior to any date, except as provided in Number 3 above.
8. Provisions that provide different contribution rates within the same job classification other than during the specified waiting period as defined in Number 3 above. (Different contribution rates for substantially different job descriptions or classifications are permissible as determined by the Trustees in their

sole discretion. To illustrate this concept: driver, warehouse, office, mechanic, sales, production would be considered substantially different descriptions/classifications under this provision.)

In administering the foregoing provisions, the Trustees, with regard to the interpretation of these Guidelines, will attempt to accommodate the bona fide needs of the parties to Pension Agreements as long as the Pension Agreements are not detrimental to the Plan. The Trustees, while retaining sole discretion over these issues, invite the parties to Pension Agreements to present proposals to the Trustees in advance of their adoption so that the Trustees may advise the parties on the acceptability of such proposals.

**Trustee Policy on Acceptance of Extended,
Renewed, Modified or Replaced Pension Agreements
Where Employer Is on Referral to Delinquency
Collection Attorneys**

If a Covered Employer has been on referral to the Trust Fund's attorneys for a period of three months or more for collection of delinquent pension contributions due under a Pension Agreement, then the decision of whether to accept as a Pension Agreement any extensions, renewal, modification or replacement of that Pension Agreement shall be made by the Chairman and Co-Chairman/Secretary, acting jointly, rather than by an Area Administrative Office of the Trust Fund.

This Policy shall not apply to an extension, renewal, modification or replacement of a Pension Agreement where the sole reason the Covered Employ-

App.310a

er is on referral is a delinquency discovered through an examination of the books and records of the Covered Employer by the Trustees or their representatives or resulting from a Trust billing for contribution amounts supplemental to amounts the Covered Employer has reported to the Trust Fund on monthly transmittal report forms.

This Policy is supplemental to, and not in derogation of, the existing authority of the Chairman and Co-Chairman/Secretary to determine whether a collective bargaining agreement or other written agreement qualifies as a Pension Agreement and whether Employer Contributions under such agreement are accepted under the rules and regulations of the Trust Fund.

**EMPLOYER UNION CERTIFICATION SIGNED BY
JOINT COUNCIL 37 AND OAK HARBOR
FREIGHT LINES, INC.
(OCTOBER 25, 2005)**

**THE WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND EMPLOYER UNION
PENSION CERTIFICATION**

(Complete and forward to the
administrative office for new employers)

THE UNDERSIGNED EMPLOYER AND UNION HEREBY CERTIFY THAT A WRITTEN LABOR AGREEMENT IS IN EFFECT BETWEEN THE PARTIES PROVIDING FOR CONTRIBUTIONS TO THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND ("TRUST FUND") AND THAT SUCH AGREEMENT CONFORMS TO THE TRUSTEE POLICY ON ACCEPTANCE OF EMPLOYER CONTRIBUTIONS (AS REPRODUCED ON THE REVERSE OF THIS FORM) AND IS NOT OTHERWISE DETRIMENTAL TO THE PLAN. A COMPLETE COPY OF THE LABOR AGREEMENT IS ATTACHED OR, IF NOT YET AVAILABLE, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE. THE UNDERSIGNED AGREE THAT THE PROVISIONS OF ANY MEMORANDUM OF UNDERSTANDING, SUPPLEMENT, AMENDMENT, ADDENDUM OR OTHER MODIFICATION OF THE LABOR AGREEMENT DIRECTLY OR INDIRECTLY AFFECTING THE EMPLOYER'S OBLIGATION TO CONTRIBUTE TO THE TRUST FUND SHALL

NOT BIND THE TRUSTEES UNLESS AND UNTIL A COMPLETE WRITTEN AND SIGNED COPY OF THOSE PROVISIONS IS FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AND ACCEPTED BY THE TRUSTEES, AND FURTHER AGREE TO FURNISH THOSE PROVISIONS TO THE AREA ADMINISTRATIVE OFFICE IN A TIMELY MANNER. IF A NEW PENSION ACCOUNT, THE EMPLOYER AGREES TO PROVIDE THE AREA ADMINISTRATIVE OFFICE WITH COMPLETED PAST EMPLOYMENT DATA FORMS.

- NAME OF EMPLOYER

Oak Harbor Freight Lines

- STREET ADDRESS

1339 West Valley Highway N,

- STATE AND ZIP CODE

Auburn, WA 980001-2417

EFFECTIVE DATE OF THIS LABOR AGREEMENT
November 1, 2004

IF THIS CERTIFICATION IS SIGNED BY AN ASSOCIATION, THE ASSOCIATION WARRANTS AND REPRESENTS THAT IT HAS WRITTEN AUTHORIZATION FROM EACH LISTED EMPLOYER TO SIGN THIS CERTIFICATION AND TO SIGN THE LABOR AGREEMENT ON BEHALF OF SUCH EMPLOYER (IF THE LABOR AGREEMENT IS NOT SIGNED BY THE EMPLOYER)

INDICATE: RENEWAL

EMPLOYER IS A: CORPORATION

APPROXIMATE NUMBER OF COVERED
EMPLOYEES 580

THE UNDERSIGNED UNION AND EMPLOYER AGREE TO BE BOUND BY THE WESTERN CONFERENCE OF TEAMSTERS AGREEMENT AND DECLARATION OF TRUST AND PENSION PLAN AS NOW CONSTITUTED OR AS HEREAFTER AMENDED, AND TO BE BOUND BY THE ACTS OF THEIR RESPECTIVE UNION AND EMPLOYER TRUSTEES OR THEIR SUCCESSORS. THE EMPLOYER AGREES TO PAY THE TRUST FUND THE PENSION CONTRIBUTIONS SPECIFIED IN THE LABOR AGREEMENT WITH THE UNION. THE UNDERSIGNED UNION AND EMPLOYER SHALL BECOME PARTIES TO SAID AGREEMENT AND DECLARATION OF TRUST UPON ACCEPTANCE AS SUCH BY THE TRUSTEES. UPON THE EXPIRATION OF THIS OR ANY SUBSEQUENT LABOR AGREEMENT, THE EMPLOYER AGREES TO CONTINUE TO CONTRIBUTE TO THE TRUST FUND IN THE SAME AMOUNT AND MANNER AS REQUIRED IN THE MOST RECENT EXPIRED LABOR AGREEMENT UNTIL SUCH A TIME AS THE UNDERSIGNED EITHER NOTIFIES THE OTHER PARTY IN WRITING (WITH A COPY TO THE TRUST FUND) OF ITS INTENT TO CANCEL SUCH OBLIGATION FIVE DAYS AFTER RECEIPT OF NOTICE OR ENTERS INTO A SUCCESSOR LABOR AGREEMENT WHICH CONFORMS TO THE TRUSTEE POLICY, WHICHEVER EVENT OCCURS FIRST. SIMILARLY, THE TRUSTEES RESERVE THE RIGHT TO GIVE NOTICE TO THE EMPLOYER AND UNION OF INTENT TO TERMINATE ACCEPT-

ANCE OF FURTHER CONTRIBUTIONS FROM THE EMPLOYER. THE UNDERSIGNED AGREES THAT UPON RENEWAL OF THE LABOR AGREEMENT A COMPLETE COPY OF THE RENEWED LABOR AGREEMENT, INCLUDING MODIFICATIONS TO THE AGREEMENT, WILL BE FURNISHED TO THE AREA ADMINISTRATIVE OFFICE AS SOON AS AVAILABLE; AND, UPON WRITTEN ACCEPTANCE OF THE RENEWED LABOR AGREEMENT BY THE TRUSTEES, THE FOREGOING TERMS OF THE EMPLOYER-UNION PENSION CERTIFICATION SHALL BE APPLICABLE TO SUCH RENEWAL OF THE LABOR AGREEMENT.

UNION: Joint Council of Teamsters 37 for Locals 81,
324, 962

By /s/ Tony Andrews
Title: President
Phone: 503-251-2303
Date 10-25-2005

EMPLOYER: Oak Harbor Freight Lines, Inc.

By /s/Robert R. Braun, Jr.
Title: Labor Consultant
Phone: 206-623-5155
Date 10-25-2005

ACCEPTED BY THE TRUSTEES OF THE
WESTERN CONFERENCE OF TEAMSTERS
PENSION TRUST FUND.

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By: /s/ Michael M. Sanders

Date November 3, 2005

**TRUSTEE POLICY ON ACCEPTANCE OF
EMPLOYER CONTRIBUTIONS**

(As revised for amendments, extensions
and new Pension Agreements effective
on or after April 1, 2000)

It is the policy of the Trustees of the Western Conference of Teamsters Pension Trust Fund to accept as Employer Contributions only payments made in accordance with a Pension Agreement that is not detrimental to the Plan. The determination of whether or not a Pension Agreement is detrimental to the Plan shall be made by the Trustees in their sole discretion. However, the list of provisions that follows is furnished as an illustration of those whose inclusion in a Pension Agreement may result in a determination by the Trustees that the Pension Agreement is detrimental to the Plan. It should be noted, however, that the list is not intended as an inclusive list of all such types of provisions.

1. Provisions that limit the employees on whose account contributions are to be made to those above a specific age.
2. Provisions that limit the employees on whose account contributions are to be made to those who will be eligible for retirement within a specified period.
3. Provisions that limit the employees on whose account contributions are to be made to those who have satisfied a specific minimum period of employment or seniority, except that part-time regular and full-time

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regular employees serving a probationary period may, for a period not to exceed ninety (90) calendar days, be covered under a contribution rate not less than ten (10) cents per hour, including PEER. Casuals, extras, jobbers and hiring hall employees are not subject to the foregoing exception.

4. Provisions that limit the employees on whose account contributions are to be made to those who have worked more than a specified minimum number of hours in a particular period.
5. Provisions that permit contributions on a basis that will produce a contribution less than on all straight time hours worked by the employee, provided that for purpose of this rule paid vacation and paid holiday hours shall be included in straight time hours worked.
6. Provisions which permit or require pension contributions for persons who are not members of the bargaining unit.
7. Provisions which reduce contributions for each compensable hour to less than that which applied prior to any date, except as provided in Number 3 above.
8. Provisions that provide different contribution rates within the same job classification other than during the specified waiting period as defined in Number 3 above. (Different contribution rates for substantially different job descriptions or classifications are permissible as determined by the Trustees in their

sole discretion. To illustrate this concept: driver, warehouse, office, mechanic, sales, production would be considered substantially different descriptions/classifications under this provision.)

In administering the foregoing provisions, the Trustees, with regard to the interpretation of these Guidelines, will attempt to accommodate the bona fide needs of the parties to Pension Agreements as long as the Pension Agreements are not detrimental to the Plan. The Trustees, while retaining sole discretion over these issues, invite the parties to Pension Agreements to present proposals to the Trustees in advance of their adoption so that the Trustees may advise the parties on the acceptability of such proposals.

**Trustee Policy on Acceptance of Extended,
Renewed, Modified or Replaced Pension Agreements
Where Employer Is on Referral to Delinquency
Collection Attorneys**

If a Covered Employer has been on referral to the Trust Fund's attorneys for a period of three months or more for collection of delinquent pension contributions due under a Pension Agreement, then the decision of whether to accept as a Pension Agreement any extensions, renewal, modification or replacement of that Pension Agreement shall be made by the Chairman and Co-Chairman/Secretary, acting jointly, rather than by an Area Administrative Office of the Trust Fund.

This Policy shall not apply to an extension, renewal, modification or replacement of a Pension Agreement where the sole reason the Covered

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Employer is on referral is a delinquency discovered through an examination of the books and records of the Covered Employer by the Trustees or their representatives or resulting from a Trust billing for contribution amounts supplemental to amounts the Covered Employer has reported to the Trust Fund on monthly transmittal report forms.

This Policy is supplemental to, and not in derogation of, the existing authority of the Chairman and Co-Chairman/Secretary to determine whether a collective bargaining agreement or other written agreement qualifies as a Pension Agreement and whether Employer Contributions under such agreement are accepted under the rules and regulations of the Trust Fund.

**NOTICE OF INTENT TO CANCEL
(SEPTEMBER 23, 2008)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
(206) 622-9927 (Fax)
www.dgpmlaw.com

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John M. Payne
Joseph G. Marra
Eileen M. Lawrence
Brian P. Lundgren
Patrick S. Pearce
Selena C. Smith
Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

To: Rick Hicks	Teamsters Local 174
Chuck Eggert	Teamsters Local 231
Tom Strickland	Teamsters Local 81
Ken Troup	Teamsters Local 589
Buck Holliday	Teamsters Local 690
David Grage	Teamsters Local 763
Bob Hawks	Teamsters Local 839
John Parks	Teamsters Local 760
Darren O'Neil	Teamsters Local 252
Cliff Baker	Teamsters Local 324
Daniel Ratty	Teamsters Local 962
Mark Briggs	Teamsters Local 483

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From: John M. Payne

RE: Oak Harbor Freight Lines: Notice of Intent
to Cancel

Please be advised that this constitutes Notice of Intent to Cancel Obligation to contribute to the Washington Teamsters Welfare Trust Plans, five (5) days after receipt of this notice.

This notice is being provided pursuant to the Washington Teamsters Welfare Trust Subscription Agreement, regarding Oak Harbor Freight Lines.

cc: Dean McInnes, Northwest Administrators
Al Hobart

**NOTICE OF INTENT TO CANCEL
(SEPTEMBER 23, 2008)**

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John Parks	Teamsters Local 760
Darren O'Neil	Teamsters Local 252
Cliff Baker	Teamsters Local 324
Daniel Ratty	Teamsters Local 962
Mark Briggs	Teamsters Local 483

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From: John M. Payne

RE: Oak Harbor Freight Lines: Notice of Intent
to Cancel

Please be advised that this constitutes Notice of Intent to Cancel Obligation to contribute to the Teamsters Pension Trust, five (5) days after receipt of this notice.

This notice is being provided pursuant to the Western Conference of Teamsters Pension Trust Fund Employer-Union Pension Certification, regarding Oak Harbor Freight Lines.

cc: Don Ditter, Western Conference of Teamsters
Pension Trust
Al Hobart

**NOTICE OF INTENT TO CANCEL
(SEPTEMBER 26, 2008)**

DAVIS GRIMM PAYNE & MARRA
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701 Fifth Avenue, Suite 4040
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Bob Hawks	Teamsters Local 839
John Parks	Teamsters Local 760
Darren O'Neil	Teamsters Local 252
Cliff Baker	Teamsters Local 324
Daniel Ratty	Teamsters Local 962
Mark Briggs	Teamsters Local 483

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From: John M. Payne

RE: Oak Harbor Freight Lines: Notice of Intent
to Cancel

Please be advised that this constitutes Notice of Intent to Cancel Obligation to contribute to the Teamsters Retirees Trust, five (5) days after receipt of this notice.

This notice is being provided pursuant to the Retirees Welfare Trust Subscription Agreement, regarding Oak Harbor Freight Lines.

cc: Mark Coles, Northwest Administrators
Al Hobart, Teamsters JC 28

**NOTICE OF INTENT TO CANCEL
(SEPTEMBER 23, 2008)**

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John Parks	Teamsters Local 760
Darren O'Neil	Teamsters Local 252
Cliff Baker	Teamsters Local 324
Daniel Ratty	Teamsters Local 962
Mark Briggs	Teamsters Local 483

From: John M. Payne

RE: Oak Harbor Freight Lines: Notice of Intent
to Cancel

We are not certain whether Oak Harbor Freight Lines has a subscription agreement with the Oregon Warehouseman's Trust, which contains a Notice to Cancel provision. If such a provision exists in a Subscription Agreement signed by Oak Harbor Freight Lines, please be advised that this constitutes Notice of Intent to Cancel Obligation to contribute to that Trust, five (5) days after receipt of this notice.

This notice is being provided pursuant to the Oregon Subscription Agreement, if such an Agreement containing a Notice of Intent to Cancel clause exists.

cc: Don Ditter, Western Conference of Teamsters
Pension Trust
Linda Philbrick, Northwest Administrators

**WELFARE AGREEMENT-OREGON
WAREHOUSEMAN'S TRUST
(OCTOBER 27, 2005)**

- TR 6
- 302509
- 302517

AGREEMENT

This Agreement, entered into this 27th day of October 2005, between OAK HARBOR FREIGHT LINES, hereinafter referred to as the "Employer" and TEAMSTER LOCAL UNION NO 81, 324 and 962, affiliated with the International Brotherhood of Teamsters hereinafter referred to as the "Union"

WITNESSETH

WHEREAS the parties hereto desire to enter into a mutual welfare agreement for the benefit of the employees of the Employer, now therefore

IT IS MUTUALLY AGREED TO AS FOLLOWS:

I

The Company shall pay into the Teamsters 206 Employers Trust or its successor for the purpose of the purchase and administration of death, disability, hospital, medical dental and vision. Benefits for eligible active employees end their eligible dependents, and a retiree plan for eligible retired employees and their eligible dependents to provide benefits under Health and Welfare Plan D, Dental Plan D, Vision Plan, and Retiree Plan as follows:

17.0 Health and Welfare

17.02 Effective the tenth (10th) of November 1996 based on the previous month's hours the Employer shall pay each month into the following employee Benefit Trust Funds, the amounts required on behalf of each regular employee who was compensated no less than forty (40) hours and who was employed by the employer within the jurisdictions of a signatory Local Union in the State of Oregon covered by the Oregon Warehouseman (a.k.a. 206) Trust benefits on the ratification date of the Agreement; providing however, in the case of each regular Class A Utility employee must have been compensated no less than eighty (80) hour:

- Oregon Warehouseman (a.k.a. 206) Trust Medical/Dental & Vision D (\$825.12)
- Dental Plan (included in Medical)
- Vision (included in Medical)
- Retirees (included in Medical)

The Employer shall only be obligated to Section 17.01 or 17.02 payments but not both.

17.03 Maintenance of Benefits: The Employer shall during the life of this Agreement pay any increase in rates needed to maintain the benefits set out in Sections 17.01 and 17.02, if required by the Trustees of the Trust(s) until such time as a majority vote of the affected employees decides to replace such benefits with a Company Health & Welfare Program as otherwise provided for within Section 17.06 below.

17.03.01 In the event one or more of the trust Funds to which the employer contributes shall offer

“tired contribution” or “cafeteria” style benefits the employer may, after consultation with the affected Local Union(s) substitute such program for all are part of section 17.01 or section 17.02 as appropriate; provided however, benefits shall remain comparable.

17.04 The Employer and the Local Unions shall be bound by the provisions of the “Agreement and Declaration” of the afore-referenced Trusts or such other trust as may be agreed to by the parties to this Agreement, and agree that the Trustees of that Trust shall act as Trustees on their behalf, except by special written agreement between the Employer and Union no contribution shall be made on or be owed for any salaried employee.

17.05 Terminals Covered by the company Health & Wealth Program on January 1, 2005, shall continue such coverage according to the plan as it shall be constituted from time to time provided however, the benefits provided to unit employees. In the event section 17.06 is not implemented and/or there is no conversation to the company Health & Wealth Program, those employees covered by the company Health & Wealth Program may then choose to be included in the section 17.01 benefits to become effective after January 2007. They in to retiree’s welfare trust plan RWT-plus plan pursuant to the provision of section 17.01.1, effective as of hours compensated in the first month following ratification of this Agreement.

17.06 The employer may during the life the life of this Agreement, but no sooner than November 2006 for commencement no sooner than January 2007 open this Article for conversation to the Company Health & Welfare Program and/or alternative group coverage shall provide benefits comparable or better

than that of plan being replaced. The Employer shall give notice to the affected local unions and shall bargain regarding the detail of the plan, its coverage, its maintenance of benefits, and transaction from the trust to the company Health & Welfare Program and/or alternative group coverage shall be majority vote conducted by a mail ballot of all affected employees. No economic action or implementation shall be permitted.

17.07 Nothing with in this article 17.0 and/or any of its Sections shall in any way be construed so as to obligate and/or require either the employer or the Union to negotiate in an issue for inclusion in any future Labor Agreement that which is recognized as a permissive subject of bargaining under the National Labor Relation Act.

II

The Employer hereby appeal to Trustees Julie Cassidy, Kelly Kenny, et al, as Trustees to administer said fund as representatives in the administration of said fund, or their successors.

III

Failure to make all payments herein provided for, with in the time herein specified, shall be a breach of the Labor Agreement.

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Oak Harbor Freight Lines

By: /s/ Robert Braun
Labor Consultant

Teamsters Local Union No. 81

By: /s/ Jeffery Lee Harum
Secretary-Treasurer

Teamsters Local Union No. 324

By: /s/ Cliff Baker
Secretary-Treasurer

Teamsters Local Union No. 962

By: /s/ Dan Ratty
Secretary-Treasurer

**LETTER FROM
JOHN M. PAYNE TO DON DITTER
(SEPTEMBER 24, 2008)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
(206) 622-9927 (Fax)
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Selena C. Smith
Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Don Ditter
Western Conference of Teamsters Pension Trust
Northwest Administrators
2323 Eastlake Avenue East
Seattle, WA 98102

Re: Oak Harbor Freight Lines

Dear Don:

Under the NLRA, Oak Harbor Freight Lines is required to continue to make Teamsters pension contributions on behalf of current bargaining unit

employees who chose not to strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under the Teamster Pension Plan that was in place under the expired agreement for these employees who cross the picket line. These are current employees who did not join the strike, but chose instead, to cross the picket line and continue working (“crossovers”).

By contrast, Oak Harbor Freight Lines does not intend to make pension contributions to the Western Conference of Teamsters Pension Plan on behalf of strike replacements. This is what caused Oak Harbor to send the Notice of Intent to Cancel which is dated September 23, 2008.

Please let me know whether the Trust Fund will accept such contributions for the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours. If you have any questions about this matter, please contact me.

Sincerely,

/s/ John M. Payne

JMP:tac

cc: Al Hobart
Ken Thompson
Buck Holliday
Bob Braun

**LETTER FROM
JOHN M. PAYNE TO LINDA PHILBRICK
(SEPTEMBER 24, 2008)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Ms. Linda Philbrick
Northwest Administrators
700 NE Multnomah #350
Portland OR 97232

Re: Oak Harbor Freight Lines

Dear Linda:

Under the NLRA, Oak Harbor Freight Lines is required to continue to make Teamsters Warehouseman's Health & Welfare and other benefit contributions on behalf of current bargaining unit employ-

ees who choose not to strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under medical plans that were in place under the expired agreement for these current employees who cross the picket line. These are current Oak Harbor employees who did not join the strike, but chose instead, to cross the picket line and continue working (“crossovers”).

By contrast, Oak Harbor Freight Lines does not intend to make benefit contributions to the Teamster Warehouseman’s Welfare Trust on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send the Notice of Intent to Cancel which is dated September 23, 2008.

Please let me know whether the Trust Fund will accept such contributions and process the claims of the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours. If you have any questions about this matter, please contact me.

Sincerely,

/s/ John M. Payne

cc: Al Hobart
Ken Thompson
Buck Holliday
Bob Braun

**LETTER FROM
JOHN M. PAYNE TO DEAN MCINNES
(SEPTEMBER 24, 2008)**

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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Dean McInnes
Northwest Administrators
2323 Eastlake Avenue East
Seattle, WA 98102

Re: Oak Harbor Freight Lines

Dear Dean:

Under the NLRA, Oak Harbor Freight Lines is required to continue to make Teamsters Health & Welfare and other benefit contributions on behalf of current bargaining unit employees who choose not to

strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under medical plans that were in place under the expired agreement for these current employees who cross the picket line. These are current Oak Harbor employees who did not join the strike, but chose instead, to cross the picket line and continue working (“crossovers”).

By contrast, Oak Harbor Freight Lines does not intend to make benefit contributions to the Washington Teamster Welfare Trust on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send the Notice of Intent to Cancel which is dated September 23, 2008.

Please let me know whether the Trust Fund will accept such contributions and process the claims of the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours. If you have any questions about this matter, please contact me.

Sincerely,

/s/ John M. Payne

cc: Al Hobart
Ken Thompson
Buck Holliday
Bob Braun

**LETTER FROM
JOHN M. PAYNE TO MARK COLES
(OCTOBER 2, 2008)**

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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Mark Coles
Northwest Administrators
2323 Eastlake Avenue East
Seattle, WA 98102

Re: Oak Harbor Freight Lines

Dear Mark:

Under the NLRA, Oak Harbor Freight Lines is required to continue to make Teamsters Retirees Health & Welfare and other benefit contributions on behalf of current bargaining unit employees who

choose not to strike and instead decide to cross the picket line at Oak Harbor Freight Lines. Oak Harbor Freight Lines will continue to make such contributions under benefit plans that were in place under the expired agreement for these current employees who cross the picket line. These are current Oak Harbor employees who did not join the strike, but chose instead, to cross the picket line and continue working (“crossovers”).

By contrast, Oak Harbor Freight Lines does not intend to make benefit contributions to the Washington Retirees Teamster Welfare Trust on behalf of strike replacements. This is what caused Oak Harbor Freight Lines to send the Notice of Intent to Cancel which is dated September 26, 2008.

Please let me know whether the Retirees Trust Fund will accept such contributions on behalf of the crossovers. Additionally, Oak Harbor will make the October 10, 2008 contribution for September hours. If you have any questions about this matter, please contact me.

Sincerely,

/s/ John M. Payne

cc: Al Hobart
Ken Thompson
Buck Holliday
Bob Braun

**REPLY LETTER FROM MICHAEL M. SANDER
(SEPTEMBER 26, 2008)**

Western Conference of Teamsters Pension Trust
An Employer-Employee Jointly Administered
Pension Plan—Founded 1955

Office of the Administrative Manager
2323 Eastlake Ave E, Seattle, WA 98102
(206) 329-4900

Mr. John Payne
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, Washington 98104

Re: Revocation of Employer—Union Pension
Certification—Oak Harbor Freight Lines

Dear Mr. Payne:

This will acknowledge receipt of your letter of
September 23, 2008.

The Western Conference of Teamsters pension
Trust Fund requires that an Employer-Union Pension
Certification be in effect during any period con-
tributions are tendered. Therefore, the Trust will not
accept contributions from Oak Harbor Freight Lines
representing work performed from October 1, 2008
and thereafter.

Please do not hesitate to contact me with any
questions.

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Sincerely,

/s/ Michael M. Sander
Administrative Manager

MMS: ram

cc: Mr. Al Hobart, Joint Council of Teamsters No. 28
Mr. Don Ditter, WCTPT Administrative Office

**LETTER FROM DEAN MCINNES
(SEPTEMBER 30, 2008)**

WASHINGTON TEAMSTERS WELFARE TRUST
An Employer-Employee Jointly Managed Trust

Mr. John Payne
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, Washington 98104

Re: Oak Harbor Freight Lines

Dear John:

The Washington Teamsters Welfare Trust (the Trust) is in receipt of the copy of your Memorandum dated September 23, 2008 constituting Oak Harbor Freight Lines' Notice of Intent to Cancel Obligation to contribute to the Trust Plans five days after receipt of the notice. The Trust is also in receipt of your letter dated September 24, 2008.

As the Trust requires trust Subscription Agreement to be in effect in order for contributions to be accepted, the Trust will not accept contributions from Oak Harbor Freight Lines for work performed from October 1, 2008 and thereafter unless or until a new Subscription Agreement is signed.

Sincerely,

/s/ Dean McInnes
Account Executive

App.344a

DM:dm

cc: John Williams
Randy Zeiler
Al Hobart
Russ Reid
Norm Milks
Pat Wall

**LETTER FROM JEROME B. BUCKLEY JR.
(SEPTEMBER 30, 2008)**

CARNEY, BUCKLEY, HAYS & MARSH
ATTORNEYS AT LAW
Suite 410
811 S.W. Naito Parkway
Portland, Oregon 97204
Telephone: 503-221-0611
Fax: 503-221-1675

Jerome B. Buckley, Jr.
Paul C. Hays
James O. Marsh
Ping Tow-Woram
Richard R. Carney (Retired)

Via Fax 206-522-9927 and U.S. Mail

John M. Payne
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, Washington 98104

Re: Teamsters Local 206 Employers Trust/
Oak Harbor Freight Lines

Dear Mr. Payne:

I represent Teamsters Local 206 Employers Trust. Northwest Administrators has provided me with a copy of your September 24, 2008 letter to Northwest Administrators.

On behalf of the Trust, this is to advise you and your client, Oak Harbor Freight Lines, that the Trust will not accept employer contributions for those em-

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ployees that you describe as “crossovers” for hours worked during October, 2008. Contributions for hours worked by crossover employees in September, 2008 will be accepted and processed in ordinary course.

Enclosed is a copy of an agreement, dated 10/27/2005, between your client and Teamsters Local Unions Nos. 81, 324, and 962.

Very truly yours

Carney, Buckley, Hays & Marsh

/s/ Jerome B. Buckley, Jr.

JBB: mp

Enclosure

Cc: Linda Philbrick (fax & mail)

**LETTER FROM MARK COLES
(OCTOBER 5, 2008)**

RETIREES WELFARE TRUST
2323 Eastlake Ave E.,
Seattle, WA 98102
Phone (206) 329-4900
Fax (206) 726-3209

Mr. John Payne
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, Washington 98104

Re: Oak Harbor Freight Lines

Dear John:

The Retiree's Welfare Trust (the Trust) is in receipt of the copy of your memorandum dated September 26, 2008 constituting Oak Harbor Freight Lines' Notice of Intent to Cancel Obligation to contribute to the Trust Plan five days after receipt of the notice.

As the Trust requires a Trust Subscription Agreement to be in effect in order for contributions to be accepted, the Trust will not accept contributions from Oak Harbor Freight Lines for work performed from October 1, 2008 and thereafter unless or until a new Subscription Agreement is signed.

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Sincerely,

/s/ Mark Coles
Account Executive

MTC/lm

cc: John Mack
Joe Tessier
Russ Reid
Tony Hovey
Mike Greve
Michael Herman
Dean McInnes

**MEMORANDUM LETTER FROM JOHN M. PAYNE
(OCTOBER 3, 2008)**

DAVIS GRIMM PAYNE & MARRA
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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

To: Al Hobart Teamsters JC 28
 Buck Holliday Teamsters Local 690
 Ken Thompson Teamsters Local 231

From: John M. Payne

RE: Trust Fund Letter/Oak Harbor Freight Lines

This is being sent to you because you are the Unions' bargaining team. I have received letters from the Western Conference of Teamsters Pension Trust, the Oregon Teamsters Local 206/Employers Trust, the Washington Teamsters Welfare Trust and the verbal notice from the Washington Retirees Trust. Each

Trust Fund has advised me that it will not accept contributions on behalf of the “crossovers.” “Crossovers” are bargaining unit employees who had been working for Oak Harbor before the strike began, but have crossed the picket lines.

Therefore, to resolve this issue Oak Harbor proposes the following:

1. Pension. We propose that contributions would be placed in an Oak Harbor escrow account on behalf of crossovers. We will hold these contributions in abeyance, depending upon the outcome of the strike.
2. Health & Welfare. The WTWT and Oregon Teamsters Local 206/Employers Trust won't pay claims after October 31. Therefore, the Employer proposes to temporarily cover its crossovers (after October 31) under its Company medical plan (during the strike), so that they do not go without coverage. This would be an interim measure pending the outcome of bargaining and of the strike.
3. Retirees Welfare. The Washington Retirees Trust will not accept contributions for crossovers after September hours, October contributions. Oak Harbor proposes to place post-October contributions in an escrow account pending the outcome of negotiations and the strike.

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For all four Trusts, contributions will be made in October 2008 for September hours. Please contact me if you wish to discuss these proposals. Also, please forward these proposals to the relevant Local Unions.

cc: Bob Braun

**LETTERS FROM JOHN M PAYNE
(OCTOBER 24, 2008)**

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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor Freight Lines

Dear Mr. Hobart:

I am in receipt of your letter of October 23, 2008 regarding Oak Harbor Freight Lines. The Employer is not available to meet on the dates you have proposed due to previous commitments. Bob Braun is out of town that week.

App.353a

We are available to meet on November 7, 2008 at 11:00 a.m. I suggest we meet at the FMCS offices. If this date works for you, I will contact Andy Hall of the FMCS to check on his availability.

Sincerely,

/s/ John M. Payne

JMP: lp

cc: Bob Braun

SECOND LETTER

DAVIS GRIMM PAYNE & MARRA

Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
(206) 622-9927 (Fax)
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William T. Grimm
John M. Payne
Joseph G. Marra
Eileen M. Lawrence
Brian P. Lundgren
Patrick S. Pearce
Selena C. Smith
Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor–Benefit Payments for Compensable Hours for Strikers

Dear Mr. Hobart:

Vacation for most Oak Harbor employees is paid in January of each year. It has recently come to our attention that at least one striker has requested to observe their vacation in the near future. The observance of vacation time-off can trigger “compen-

sable” hours for benefit contributions or establishing the minimum hours required to be eligible for benefit contributions. However, the Pension Trust, the Health & Welfare Trusts and the Washington Retiree Welfare Trust are not currently accepting contributions.

Given that the Trusts will not accept Employer contributions we are proposing that in such cases as above involving strikers the Employer will, on an interim basis and until some other agreement is made, simply make Health & Welfare and Washington Retiree Welfare benefit contribution (the contractual contribution amount) payments directly to the employee. We also propose, on an interim basis, that Pension contributions will be held in an escrow account.

If the Union has some other proposal on the matter please advise me as soon as you can as we would like to resolve this matter in the next seven (7) days.

Thank you for your attention to this matter. If you have any questions please call, leaving a detailed message if I am not available.

Sincerely,

/s/ John M. Payne

JMP: lp

cc: Bob Braun

**RESPONSE LETTER FROM ALLEN HOBART
(OCTOBER 28, 2008)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President

C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
202.624.6800
www.teamster.org

By Facsimile Transmittal and U.S. Mail
(206) 622-9927

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

In response to your letter of October 24, 2008, the Union suggests that the parties meet at the Federal Mediation and Conciliation Service office on November 6 and 7, 2008 and November 8, if necessary. The Union plans to bring in some of its benefits experts who will prepare a written proposal for your consideration. We believe that, in view of the circumstances, the parties should reserve at least three (3)

App.357a

consecutive days to explore every option for an agreement.

Please respond as soon as possible so that the benefits experts who will be attending the meetings can make their arrangements.

Sincerely,

International Brotherhood of
Teamsters

/s/ J. Allen Hobart
Vice-President Western Region

JAH:dm

cc: Bob Braun, Braun Consulting Group by
facsimile (206) 374-2143

Justin "Buck" Holliday, JC-28 Freight Division
Director

Tyson Johnson, IBT Freight Division Director &
Southern Region Vice President

Jim McCall, IBT, Legal Counsel

Bob Paffenroth, IBT Western Region Freight
Division Director

Lisa Pau, Teamsters Local174 Legal Counsel

Beth Schindler, Federal Mediation and Concilia-
tion Service by facsimile (206) 553-6653

App.358a

Gordon Sweeton, IBT Central Region Vice
President

Ken Thompson, JC-28 Freight Division Record-
ing Secretary

All Principal Officers/Committee Members
Signatory to the Oak Harbor Freight Lines
Labor Agreement—LOCALS 81, 174, 231, 252,
324, 483, 589, 690, 760, 763, 839 & 962 and
Joint Councils 28 & 37

**LETTER FROM ALLEN HOBART
(OCTOBER 29, 2008)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President
C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
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www.teamster.org

By Facsimile Transmittal and U.S. Mail
(206) 622-9927

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

In response to your letter dated October 24, 2008, regarding payment of contractual benefit contributions based on vacation paid in January 2008 and the practice of not making benefit payments until the vacation hours were actually taken; please be advised as follows:

As the vacation accrued was paid for in January of 2008, prior to the expiration date of the contract between the parties, the benefit

App.360a

contribution are due to the respective trusts.

I am in agreement to your intent to establish an escrow account for the Western Conference of Teamsters Pension Trust contributions.

Sincerely,

International Brotherhood of
Teamsters

/s/ J. Allen Hobart
Vice-President Western Region

JAH:dm

**REPLY LETTER FROM JOHN M. PAYNE
(OCTOBER 30, 2008)**

DAVIS GRIMM PAYNE & MARRA
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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor Freight Lines

Dear Mr. Hobart:

I am in receipt of your letter of October 28, 2008 regarding Oak Harbor Freight Lines and current use of vacation hours which were paid for in January 2008.

It would help to receive confirmation that the Trust Funds are approving the position you have set forth in your letter which is:

As the vacation accrued was paid for in January of 2008, prior to the expiration date of the contract between the parties, the benefit contributions are due to the respective Trusts.

If the Trust Funds (Health & Welfare, and Retirees Health & Welfare in both Washington and Oregon) are adopting this policy, please have those Trust Funds advise us accordingly.

If we receive such notice, Oak Harbor Freight Lines will make the contributions on behalf of such employees to the Trust Funds.

Thank you very much for your prompt reply to our letter. We look forward to hearing from the Trust Funds.

Sincerely,

/s/ John M. Payne

cc: Bob Braun

**UNION WORKSHEET
REGARDING COMPANY DOCUMENT #8
(NOVEMBER 7, 2008)**

OAK HARBOR

1.04.1 Accretion of New Operations within Contract's jurisdiction	Back to book <u>TA</u>
1.04.2 Accretion outside of contract's jurisdiction	Back to book <u>TA</u>
1.06 Preservation of Bargaining Unit Work – Moving equipment	Company Position
2.02 Subcontracting regarding office work	Issue—Office Work <u>Must have</u>
2.02.2 Request for Informa- tion—Subcontracted routes	Back to book <u>TA</u>
3.05 Picket Lines – Regarding ULP Strikes	Back to book <u>TA</u>
3.07 Inspection – Union visitation – Working schedule vs. work	<u>Union Reject</u> *
3.08 – 3.08.1 – 3.08.2 Check-off	Back to book <u>TA</u>
3.09 DRIVE	Back to book <u>TA</u>

App.364a

<p>4.03.3(b) Floating bid start time – by seniority – 2 or more</p>	<p><u>Could live with</u></p>	
<p>4.03.4 Language (If any)</p>	<p>Company Language Dispatch Rules <u>Union TA</u></p>	
<p>5.01 Gap work regarding overtime</p>	<p>Company Position * <u>Could live with</u></p>	
<p>5.04 Overtime after 8 and 40 – Line Driver Issue overtime</p>	<p><u>TA</u></p>	
<p>8.04 Probation regarding holiday pay – 30 days vs. 90 working days</p>	<p>Company Position 90 days * <u>Could live with</u></p>	
<p>8.05 Holiday pay eligibility</p>	<p><u>Union Back to book</u></p>	
<p>10.05</p>	<p>Absence due to sickness or injury Governed by State Law Seniority – Life of L&I</p>	<p>Company Position 3 years* <u>Could live with</u></p>
<p>10.07</p>	<p>Time Loss – Company proposes to delete and add 15¢ to hourly rate except Utility B and Shop Utility (1) Employees to receive 8 hours for each 40 hours in bank for floating holiday; or (2) Employees to be paid</p>	<p><u>Union Back to book Sick Leave/Time Loss B to B</u></p>

App.365a

	8 hours for each 40 hours; or (3) Employees to use 8 hours for each 40 hours during life of Agreement for sick leave	
10.7.6	Employee option to buy Short Term Disability (STD) by payroll deduction in lieu of above	Re. Company 10.07.6 <u>Union Back to book</u>
10.10	Medical Leave and Disability Time Loss regarding previous Employer proposal sickness or injury	Re. Payments to leaves <u>Union Back to book</u>
11.01.8	Employer right to rely on Employer evidence	Makes non-arbitral
11.03.3	Uniform shorts allowance \$10.00 to \$15.00	\$ <u>TA Union</u>
11.06	Compensation Claims – On the Job Injury Issues pertaining to State Law (Idaho Issue)	Company Position <u>Retain Union position</u>
11.06.1	Pay while seeking medical treatment during normal work shift (Co.)	Company Position <u>Union Back to book</u>
12.0	(All) Status of Employment Issue Calendar days to working days (all of Article) Probation	<u>Union Back to book</u> Hinders achieving seniority

App.366a

	(Co.)	
12.03.1	(1) Increase to 1300 hours from 1000 for Utility/Sorter to be Class A (Co.) (2) Rolling 6 months changed to as measured calendar month by calendar months. (Co.)	<u>Union Back to book</u>
12.03.3	(1) Order of call changed to work opportunity (2) Class B Utility/Sorters work opportunity <u>but not as related to start times</u>	<u>Union could live with</u>
14.03.2	Employee permitted to continue working while investigation after Notice of Intent to Suspend or Discharge	Company Position <u>Union could live with</u>
15.02	Grievance Procedure (1) 45 days to 30 days to take up grievance	<u>TA</u>
15.04.1	Selection of Arbitrators and limit on back pay to 100 calendar days from date of Arbiter's decision	\$\$ *** <u>Union reject</u>
15.09	Mitigation – Employer will to May Provide non-driving job (Co.)	<u>Union could live with</u>
17.01	Health and Welfare – Com-	Reduction Com-

App.367a

<p>pany plan vs. Washington Teamster Trust and Oregon Trust Co. Plan with guarantees with full M.O.B.</p>	<p>pany Plan ** <u>Contingent of final package</u> <u>Need protection from change</u></p>
<p>17.01.1 Retirees – Delete and add 35¢ to wages except Utility B. Company \$333.00 twenty-four (24) month subsidy max.</p>	<p><u>Union reject</u></p>
<p>17.03–17.04 Maintenance of Benefits and Trust Agreements</p>	<p><u>Union reject</u></p>
<p>18.0 Pension – Western Conference of Teamsters Pension – No increase</p>	<p>No Increase *** <u>Union reject</u></p>
<p>20.0 Fringe Benefit Payments</p>	<p>Concern 15.04.1 100 day limit Union reject</p>
<p>21.01 No Strike / No Lockout</p>	<p>Back to book</p>
<p>24.01 Duration – Proposed five (5) years</p>	<p>From date of first of ratification following month</p>
<p>Appendix A–P&D and Utility</p>	<p>\$1,000 full time signing bonus, \$500 part time signing bonus. 1.13, .50, .50, .50 & .50 <u>Union reject</u></p>

App.368a

Appendix B–Line Operations	Utility B – Freeze \$ Utility A – 1.06, .45, .45, .45 & .45 Line Operators – 0.4755, 0.5020, 0.5139, 0.5257, 0.5376 & 0.5494 <u>Union reject</u>
Appendix C–Office Employees	1.09, .48, .48, .48 & .48 (Single rate) Group 1 *** <u>Union reject</u>
Appendix D–Garage Employees	SU 20, .20, .20, 20 & .20 GT 1.09, .48, .48, .48 & .48 M 1.13, .51, .51, .51 & .51 <u>Union reject</u>
Appendix E–Drug & Alcohol (Any test?)	Issue <u>Any</u> Test
Appendix F CDL Training (TA)	
Appendix G–Vacation Details by Terminal	
Appendix H–Attendance Policy	
Letter of understanding I–Negotiated New Job	
Letter of understanding–Mileage rates regarding overtime	<u>TA</u>

**LETTER FROM PAYNE
(NOVEMBER 12, 2008)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
Seattle, WA 98104
(206) 447-0182 (Phone)
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Selena C. Smith
Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor Freight Lines

Dear Mr. Hobart:

This letter addresses the subject of Health & Welfare for strikers who put in for vacation.

It is my understanding that for strikers whose vacation was paid for in January of 2008 and who

App.370a

“took their vacation” after September 30, 2008, the Trust Funds will accept their contributions and pay their benefits claims. We will accordingly make those contributions.

However, we now have other striking employees who (at their request) were not paid their vacation before September 30, 2008, and have now requested vacation pay and time off—after September 30, 2008. (See Section 9.02 of expired contract.)

I propose that Oak Harbor pay the Health & Welfare and Retiree Health & Welfare contributions directly to the employees and place the pension contributions in an escrow account on an interim basis until some other arrangement is agreed upon.

Does the Union have a position on this issue?

Sincerely,

/s/ John M. Payne

JMP:tac

cc: Bob Braun

**RESPONSE LETTER FROM ALLEN HOBART
(NOVEMBER 17, 2008)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President

C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
202.624.6800
www.teamster.org

By Facsimile Transmittal and U.S. Mail
(206) 622-9927

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

This letter is to confirm my statement to you at the conclusion of the Federal Mediation and Conciliation Services session Friday, November 7, 2008, that you may contact John E. Slatery at the International Brotherhood of Teamsters Union directly to address issues rotated to the benefit package discussed at that same meeting.

Mr. Slatery also responded by letter, dated November 14, 2008, to your letter on this issue.

In response to your letter regarding vacation pay and health anti welfare, I agree that those employees receiving vacation pay after September 30, 2008, be paid directly the applicable contribution amount and that pension monies be held in an escrow account.

Sincerely,

International Brotherhood of
Teamsters

/s/ J. Allen Hobart
Vice-President Western Region

JAH:dm

cc: Bob Braun, Braun Consulting Group by
facsimile (206) 374-2143

Justin "Buck" Holliday, JG28 Freight Division
Director

Tyson Johnson, IBT Freight Division Director &
Southern Region Vice President

Jim McCall, IBT, Legal Counsel

Bob Paffenroth, IBT Western Region Freight
Division. Director

Lisa Pau, Teamsters Local 174 Legal Counsel

Beth Schindler, Federal Mediation and Concilia-
tion Service by facsimile (206) 553-6653

Gordon Sweeton, IBT Central Region Vice
President

App.373a

Ken Thompson, JC-28 Freight Division Retarding
Secretary

All Principal Officers/Committee Members Signa-
tory to the Oak Harbor Freight Lines Labor

Agreement-Locals 81, 174, 231, 252, 324, 483,
589, 690, 760, 763, 839 & 962 and Joint Councils
28 & 37

**LETTER FROM ALLEN HOBART
WITH OFFER TO WORK
(FEBRUARY 12, 2009)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President

C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
202.624.6800
www.teamster.org

By Facsimile Transmittal and Hand Delivery
(206) 622-9927

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

Please be advised by this letter, the Teamster Local Union Nos. 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839 and 962, signatory to the Oak Harbor Freight Lines Collective Bargaining Agreement, do hereby make an Unconditional Offer To Return To Work.

Please respond.

App.375a

Very truly yours,

International Brotherhood of
Teamsters

/s/ J. Allen Hobart
Vice-President Western Region

JAH:dm

cc: Bob Braun, Braun Consulting Group by facsimile
(206) 374-2143

Jim McCall, International Brotherhood of
Teamsters Legal Counsel

Mike McCarthy, Reid, Pedersen, McCarthy &
Ballew, LLP

Lisa Pau, Teamsters Local Union No. 174 Staff
Attorney

Tony Andrews, Joint Council of Teamsters No.
37 President

All Principal Officers Signatory to the Oak
Harbor Freight Lines Labor Agreement-Locals
81, 174, 231, 252, 324, 483, 589, 690, 760, 763,
839 & 962

**LETTER FROM ALLEN HOBART
REGARDING INTERIM AGREEMENT
(FEBRUARY 18, 2009)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President

C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
202.624.6800
www.teamster.org

Via Facsimile and First Class Mail

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

As stated in my letter to you of February 12, 2009 and as discussed at our meeting last evening in my office, the Teamster-represented employees of Oak Harbor Freight Lines have made an unconditional offer to return to work. However, at our meeting in the evening of February 17, you stated that Oak Harbor would not continue to contribute to the Washington Teamsters Welfare Trust and Retiree's Welfare Trust and the Western Conference of Teamsters Pension Trust. Rather than resume the

status quo as provided in the parties' expired bargaining agreement, it was Oak Harbor's intent to cover the returning strikers under the Company's health and welfare plans. With respect to the pensions, Oak Harbor maintains that it will place the monthly contributions into an escrow account pending some other agreement on the subject.

I have contacted the health and welfare and pension funds and have been informed by both that Oak Harbor and the Union should sign, an "interim agreement" which states that the parties agree to continue their participation in the funds during the period in which they are negotiating a collective bargaining agreement to replace the expired contract. (See the attached e-mails from the Funds.) If you indicate Oak Harbor's willingness to sign such an interim agreement, the Union will proceed to have said agreement drafted by the funds.

The Union's position is that federal law requires that Oak Harbor permit the unfair labor practice strikers to return to work without the Company making any unilateral changes in the established terms and conditions of employment as reflected in the parties' expired bargaining agreement.

You stated at our meeting that there are at least thirteen (13) strikers, and possibly more, who the Company plans to suspend pending investigation into discipline for misconduct. When asked as to how any disputes on the discipline of strikers would be resolved, you refused to commit on any specific dispute resolution method. The Union suggests that the parties agree to arbitrate any issues regarding discipline for strike misconduct.

App.378a

At your earliest convenience, please provide in writing Oak Harbor's position on signing an interim agreement to continue participation into the health and welfare and pension funds and on whether it will agree to arbitrate issues regarding discipline for alleged strike misconduct. Your responses to these important issues will determine how the parties proceed to resolve their dispute.

Sincerely,

/s/ J. Allen Hobart

Vice-President Western Region
International Brotherhood of
Teamsters

**EMAIL FROM DEAN MCINNES
(FEBRUARY 18, 2009)**

From: Dean McInnes [DMcInnes@nwadmin.com]
Sent: Wednesday, February 18, 2009 9:44 AM
To: Al Hobart
Cc: Russ Reid; Norm Milks; Mark Coles; Dick
Pirnke
Subject: Oak Harbor Freight Lines

Al,

The Washington Teamsters Welfare Trust and Retiree's Welfare Trust will accept a written interim agreement between the parties to participate in the Trusts provided that the agreement complies with each Trust's operating rules and the parties also execute a new Subscription Agreement for each Trust.

Dean McInnes
Senior Account Executive
Northwest Administrators, Inc.
2323 Eastlake Avenue East
Seattle, WA 98102-3305
Tel: 206.726.3254
Fax: 206.726.3209
Email: dmcinnes@nwadmin.com

**EMAIL FROM DICK PIRNKE
(FEBRUARY 18, 2009)**

From: Dick Pirnke [DPirnke@nwadmin.com]
Sent: Wednesday, February 18, 2009 10:01 AM
To: Al Hobart
Cc: Don Ditter; Dean McInnes; RJR@rpmb.com; Jim Berres; Mike Sander
Subject: Interim labor agreement-Oak Harbor Freight

Al, you have asked whether or not participation under the Western Conference of Teamsters Pension Trust could be acceptable on the basis of an interim collective bargaining agreement. The short answer is yes, provided that the agreement provides for the continuation of Pension Contributions at the same contribution rate as previously contained in the last acceptable pension agreement. Further, the Trust would require an executed Employer-Union Pension Certification form to be submitted along with the new collective bargaining agreement.

It should be noted that the interim agreement must conform to the Trust's policies for the Acceptance of Employer Contributions found in the agreement and Declaration of Trust. Finally, it is critical that the effective date for the Commencement date of contributions be clear. The Trust does not permit a "gap" in the payment of Pension Contributions, except for periods of strike where the bargaining parties agree that no contributions are due. As a result, contributions to the Trust would have to resume effective with the bargaining unit's return to work.

App.381a

I hope you find this information helpful. I will be in meetings in Los Angeles tomorrow and Friday. You can reach me on my cell at 425-330-0889 if you need further information, Don will be in attendance as well tomorrow so feel free to give us a call, Thanks!

Richard Pirnke
Northwest Administrators, Inc.
2323 Eastlake Avenue East
Seattle, WA 98102-3305
dpirnke@nwadmin.com

**RESPONSE LETTER FROM HOBART
(FEBRUARY 25, 2009)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President

C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
202.624.6800
www.teamster.org

Via Facsimile Transmittal
Fax # (206) 622-9927
Hard Copy to Follow

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Dear Mr. Payne:

I am writing in follow up to my letter to you of February 18, 2009. In that letter, I asked that you please provide in writing Oak Harbor's position on signing an interim agreement to continue participation in the Washington Teamsters Welfare Trust, the Retirees' Welfare Trust, and the Western Conference of Teamsters Pension Trust. To date, you have not responded.

In the meantime, as you know, the Unfair Labor Practice Strikers have begun to return to work. The

Union, however, continues to view the Company's refusal to maintain the benefits as reflected in the parties' expired Bargaining Agreement as illegal and counterproductive. The Union will pursue its legal remedies as we see fit.

Also, please respond to the Union's suggestion that the parties agree to arbitrate any issues regarding discipline for alleged striker misconduct.

Sincerely,

/s/ J. Allen Hobart

Vice-President Western Region
International Brotherhood of
Teamsters

JAH:dm

cc: David Ballew, Reid, Pedersen, McCarthy &
Ballew, LLP

Bob Braun, Braun Consulting Group by facsimile
(206) 374-2143

Jim McCall, international Brotherhood of Team-
sters Legal Counsel

Mike McCarthy, Reid, Pedersen, McCarthy &
Ballew, LLP

Lisa Pau, Teamsters Local Union No. 174 Staff
Attorney

**LETTER FROM JOHN M. PAYNE
(FEBRUARY 25, 2009)**

DAVIS GRIMM PAYNE & MARRA
Attorneys at Law
701 Fifth Avenue, Suite 4040
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Christopher L. Hilgenfeld
Amy C. Plenefisch (Of Counsel)

Via Facsimile and First-Class Mail

Mr. Allen Hobart, President
Teamsters Joint Council 28
14675 Interurban Avenue S.
Tukwila, WA 98168

Re: Oak Harbor Freight Lines

Dear Mr. Hobart:

At the conclusion of our February 17, 2009 meeting, you had put the subject of the strikers' return to work on hold ("in neutral"). I am now in receipt of your letter of February 25, 2009. Please have the

striking employees contact their supervisors/dispatchers for start times and/or instructions. Some returning strikers may be laid off due to lack of work. In the near future, the Employer will arrange meetings with the 13 employees who are being investigated for misconduct. My 8-point letter of February 17 explains the Employer's return to work plan, number of vacancies, etc.

Your letter of February 18, 2009, asked for a written reply on the subject of health and welfare, pension, Washington Retirees Health & Welfare, and the 13 striking employees who are suspended pending further investigation. The Employer is not interested in arbitrating any issues regarding discipline for strike misconduct. The remainder of your February 18 letter (which incorporates by reference emails from the Trust Funds) places conditions on the Unions' offer to return to work. As just one example, both Trust Funds are requiring a new underlying interim labor agreement. The Unions have not made an "unconditional offer to return to work."

Therefore, Oak Harbor will apply the terms of my February 17 letter to these returning strikers regarding health and welfare, pension, and Washington Retirees Health & Welfare.

Please be advised that in returning the strikers to work, Oak Harbor is not waiving its legal right to argue that the Unions' offer to return to work is conditional. (See Payne's two letters to Hobart hand-delivered on February 17, 2009.)

App.386a

Sincerely,

/s/ John M. Payne

JMP:tac

cc: Bob Braun

**RESPONSE LETTER FROM HOBART
(FEBRUARY 26, 2009)**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

James P. Hoffa
General President
C. Thomas Keegel
General Secretary-Treasurer

25 Louisiana Avenue. NW
Washington. DC 20001
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www.teamster.org

Via Facsimile Transmittal
Fax # (206) 622-9927
Hard Copy to Follow

Mr. John M. Payne, Esquire
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

Re: Oak Harbor Freight Lines

Dear Mr. Payne:

Thank you for your letter dated February 25, 2009.

The e-mails attached to my February 18th letter did not place conditions on the Union's Unconditional offer to Return to Work, as demonstrated by the Strikers' present return to work in compliance with your eight-point letter and the illegally-implemented benefits plans. The information was provided to permit

you to provide a fully informed response to the Union's request that the Company state its position with respect to its continued participation in the Teamster Health and Welfare and Pension Trusts. The Union inferred that the Company needed this information because, in stating that participation in the Company medical plan would "allow employees to have coverage," your second February 17, 2009 letter implied that you did not believe that coverage under the Teamsters Trusts was available and feasible. Furthermore, the Union needed to know the Company's position in order to provide complete information to returning Strikers and to re-commence Collective Bargaining.

The Union will, of course, seek redress for all of the Company's breaches of law through the appropriate channels. In this regard, the Strikers are returning to work unconditionally under the plans and terms unilaterally dictated in two letters provided to the Union by the Company at the February 17th meeting. However, as you should already be aware, the Union is not agreeing to anything in either of the letters.

For all of these reasons, the Union strongly disagrees with your contention that its previous offer to return to work way not unconditional. Nonetheless, in order to clear up any misunderstanding or confusion on the Company's part, please regard this letter as a renewed Unconditional Offer to Return to Work on behalf of all of the members of all of the affected Local Unions.

We look forward to re-commencing good faith Collective Bargaining as soon as possible.

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Sincerely,

/s/ J. Allen Hobart
Vice-President Western Region
International Brotherhood of
Teamsters

JAH:dm

cc: David Ballew, Reid, Pedersen, McCarthy &
Ballew, LLP

Bob Braun, Braun Consulting Group by facsimile
(206) 374-2143

Jim McCall, international Brotherhood of
Teamsters Legal Counsel

Mike McCarthy, Reid, Pedersen, McCarthy &
Ballew, LLP

Lisa Pau, Teamsters Local Union No. 174 Staff
Attorney

**EMAILS FROM DAVID BALLEW
(FEBRUARY 23, 2009)**

From: David Ballew
Sent: Monday, February 23, 2009 10:13 AM
To: 'Don Ditter'; dmcinnes@nwadmin.com;
'mcoles@nwadmin.com'
Cc: Russ Reid; Mike McCarthy
Subject: Oak Harbor
Attachments: INTERIM AGREEMENT.Doc

Gentlemen—

Attached for your review is a draft Interim Agreement which is intended to serve as written agreement confirming Oak Harbor's obligations to re-commence contribution to WCTPT, WTWT and retirees pending bargaining. I have reviewed the document with Russ. Please let me know as soon as possible if the draft language would be acceptable to the trust. Give me a call with any questions.

Thanks,

David

David W. Ballew
Reid, Pedersen, McCarthy
& Ballew L.L.P.
101 Elliott Avenue west,
Suite 550
Seattle, WA 98119
(206) 285-3610 ext. 226

SECOND EMAIL

From: David Ballew
Sent: Monday, February 23, 2009 1:42 PM
To: 'John Payne'
Subject: Oak Harbor
Attachments: Draft Interim Agreement.pdf

John—

In the aftermath of our conversation this weekend, I drafted the attached interim Agreement.

The WCTPT, WTWT and Retirees Trust have each confirmed this interim agreement would be acceptable to once again allow contributions. Please give me a call so that we can discuss where we are at in more detail.

David

David W. Ballew
Reid, Pedersen, McCarthy
& Ballew L.L.P.
101 Elliott Avenue west,
Suite 550
Seattle, WA 98119
(206) 285-3610 ext. 226

INTERIM AGREEMENT

INTERIM AGREEMENT by and between
OAK HARBOR FREIGHT LINES, INC.

and

TEAMSTERS LOCAL UNION NOS. 81, 174, 231,
252, 324, 483, 589, 690, 760, 763, 839, & 962

The Parties are in the process of bargaining for an agreement to succeed the agreement dated November 2004–October 2007 (Prior Agreement). The purpose of the Interim Agreement is to ensure that the Health & Welfare and Pension benefits detailed in article 17 and 18 of the Prior Agreement shall continue in effect during the bargaining for a successor agreement. Therefore effective February ___, 2009 the Parties hereby incorporated in to this Interim Agreement the following provisions of the Prior Agreement:

- Article 17 Health & Welfare
- Article 18 Pension

The Parties will execute the documents required by the respective Trusts necessary to re-commence participation.

This Interim Agreement shall remain in effect until a new collective bargaining agreement between parties becomes effective until remained in accordance with the following procedures. The party desiring to terminate this Interim Agreement shall notify the other party in writing by either personal service or

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certified mail. This Interim Agreement will terminate five days after receipt of such notice

Nothing in this Interim Agreement shall relive either party from its obligations under the law concerning terms and conditions of employment pending bargaining.

**RESPONSE EMAIL FROM MARK COLES
(FEBRUARY 23, 2009)**

From: Mark Coles [MColes@nwadmin.cam]
Sent: Monday, February 23, 2009 11:17 AM
To: David Ballew; Dan Ditter; Dean McInnes
Cc: Russ Reid; Mike McCarthy
Subject: RE: Oak Harbor

Hi David—

As long as Russ has seen it and had no issues-I am fine with it for the RWT.

Mark

From: David Ballew[mailto:David@rpmb.com]
Sent: Monday, February 23, 2009 10:13 AM
To: 'Don Ditter'; dmcinnes@nwadmin.com;
'mcoles@nwadmin.com'
Cc: Russ Reid; Mike McCarthy
Subject: Oak Harbor

Gentlemen—

Attached for your review is a draft Interim Agreement which is intended to serve as written agreement confirming Oak Harbor's obligations to re-commence contribution to WCTPT, WTWT and retirees pending bargaining. I have reviewed the document with Russ. Please let me know as soon as possible if the draft language would be acceptable to the trust. Give me a call with any questions.

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Thanks,

David

David W. Ballew
Reid, Pedersen, McCarthy & Ballew L.L.P.
101 Elliott Avenue west, Suite 550
Seattle, WA 98119
(206) 285-3610 ext. 226