SMI/Division of DCX-CHOL Enterprises, Inc. *and* Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers Union, Local 835, A/W Retail, Wholesale, Department Store Union, United Food & Commercial Workers Union. Cases 25–CA–117090, 25–CA–117093, 25–CA–117097, 25–CA–117151, 25–CA–117254, 25–CA–120437, and 25–CA–125968

December 15, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On September 23, 2014, Administrative Law Judge Geoffrey Carter issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to amend the remedy, 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 a $100 employee bonus on November 4, 2013. We also agree with the judge, notwithstanding the arguments of our dissenting colleague, that the Respondent violated the Act when it (1) denied a union representative access to its facility on August 22, 2013; (2) threatened, on October 16, 2013, that it would divide into two companies, one union and one nonunion; (3) withdrew recognition from the Union on January 3, 2014; and (4) unilaterally changed employee pay dates in April 2014 without notice and opportunity to bargain with the Union.

1. Union Access

On August 9, 2013,[4] the Respondent became the successor employer to Stuart Manufacturing, Inc. and, as the Respondent admitted in its answer to the complaint, in early August it adopted and agreed to abide by its predecessor's collective-bargaining agreement (CBA) with the Union. The Respondent stated that it would be requesting various modifications to the CBA, but did not indicate at that time that it desired any change in the Union's access to employees at the facility.

On August 22, Union Representative David Altman participated in the monthly grievance meeting at the Respondent's facility. Following that meeting, Altman asked if he could meet with employees in the break room. Gerald Pettit, Respondent's Vice President and General Manager, refused. As found by the judge, the Respondent's predecessor, Stuart Manufacturing, had maintained a 7-year past practice of allowing union representatives to access the employee break room upon request after monthly grievance meetings, and, as stated, the Respondent had not given any notice that it would discontinue that practice. In those circumstances, the judge found, and we agree, that the Respondent's refusal to allow Altman access violated Section 8(a)(5) and (1) of the Act.

The Respondent was not obligated to adopt its predecessor's CBA with the Union as its initial terms and conditions of employment. But when the Respondent voluntarily chose to do so, Board precedent is clear that, as a matter of law, it also adopted the existing practices that had informed and given meaning to the provisions of the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In making his credibility determinations and finding that the Respondent unlawfully threatened employees, the judge relied on *Relco Locomotives, Inc.*, 358 NLRB 298 (2012). In determining that the Respondent should not be required to read the notice to employees during work time, the judge relied on the standard set forth in *Marquez Bros. Enterprises*, 358 NLRB 509 (2012). Both of these cases were decided by panels that included two persons whose appointments to the Board were held invalid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, a properly constituted Board has since reaffirmed the decision in *Marquez Bros. Enterprises*. See 361 NLRB 1375 (2014), enfd. 650 F. App'x 25 (D.C. Cir. 2016). In addition, prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Eighth Circuit enforced the Board's Order in *Relco Locomotives*, see 734 F.3d 764 (8th Cir. 2013), and there is no question regarding the validity of the court's judgment.

[2] No party excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by threatening employees with job loss and plant closure if they did not approve the Respondent's proposal to change employee pay dates, and Sec. 8(a)(5) by dealing directly with employees by soliciting them to resign from the Respondent and begin working for a nonunion company.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found. We shall substitute a new notice to conform to the Order as modified.

[4] All dates are in 2013 unless specified otherwise.

CBA as its initial terms and conditions of employment. See, e.g., *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981), cert. denied 456 U.S. 936 (1982) (finding that successor employer that had adopted its predecessor's collective-bargaining agreement unlawfully discontinued predecessor's practice of paying a year-end bonus, notwithstanding that the bonus was not reflected in the agreement and that the successor only became aware of it after adopting the agreement). Like the successor employer in *Pepsi-Cola*, the Respondent here voluntarily adopted its predecessor's CBA. The successor employer in *Pepsi-Cola* assured employees that "working conditions would remain the same." Id. at 870. Here, the Respondent's Vice President of Human Resources, Carol Goods-North, gave a letter to the Union on August 19, which was the Respondent's first correspondence with the Union following its acquisition of Stuart Manufacturing, which stated that the Respondent "would *request* various modifications" (emphasis added) to its predecessor's CBA. Thus, the Respondent implicitly indicated that it would not unilaterally set any new terms and conditions of employment. The Respondent later confirmed that it had not set any new terms and conditions of employment when Goods-North explicitly stated on August 29 in written correspondence with Altman that the Respondent would be requesting a change in pay dates, but that *all other work rules would remain the same*. And while ignorance of past practice by a successor is no defense to its unilateral discontinuation of a past practice,[5] holding the Respondent to Stuart Manufacturing's past application of the union access provision is particularly appropriate in this case as Goods-North had been Stuart Manufacturing's Director of Human Resources. In that capacity, she had not only been aware of Stuart Manufacturing's practice of routinely granting union access requests after monthly grievance meetings, she personally had granted many of those requests. Thus, Goods-North was aware of the relevant practice at all material times.

Our dissenting colleague—advancing an argument not made by the Respondent—insists that the Respondent did not change a term or condition of employment when it denied Union Representative Altman's access request. In his view, the Respondent, as a *Burns* successor,[6] was free to set initial terms and conditions of employment, the Respondent's adoption of the CBA constituted its setting of initial terms, and those initial terms included only the express terms of that agreement, not any of the preexisting practices that had developed under those terms. He thus concludes that the Respondent's denial of Altman's access request conformed to Section 14.2 of that agreement, which stated that a Union representative would be granted admission "after his request has been granted by the senior management."

Because "this argument is raised for the first time by our colleague in dissent, it is not properly before the Board." *Security Walls, Inc.*, 365 NLRB No. 99, slip op. at 4 (2017).[7] But, even if we were to consider it, our colleague's conclusion is precluded by Board law, and we thus have no difficulty rejecting it. Our colleague unpersuasively quarrels with our reading of *Pepsi-Cola*, supra, a decision he declines to endorse, but we choose to follow as precedent. Further, contrary to our colleague's assertion, nothing in our holding is inconsistent with the Supreme Court's decision in *Burns*, supra. We have not imposed its predecessor's past practices on the Respondent; rather, we have held that when the Respondent voluntarily chose to adopt its predecessor's collective-bargaining agreement, it necessarily chose to adopt the past practices developed under that agreement as initial terms and conditions of employment, which it was not free to change unilaterally thereafter.[8]

In this context, our colleague's distinction between contract and the practice under the contract is untenable. There is no suggestion in the record that the Respondent itself intended to distinguish between the CBA and past practice, much less that it communicated such a distinction to employees, when it set the initial terms and conditions of employment.[9] (Indeed, quite to the contrary, the Respondent subsequently confirmed that—with specified exceptions—all other work rules would remain the same.) Under our colleague's view, a successor employer that adopted its predecessor's contract in establishing initial terms and conditions of employment would nevertheless be free to change, at any subsequent time, any pre-existing term and condition of employment that was not contained in the contract or that was not expressly adopted along with the contract. Not only is this contrary to law, but the rule advanced by our colleague is a recipe for creating labor unrest, if we appropriately factor in the

[5] *Rosdev Hospitality, Secaucus, LP,* 349 NLRB 202 (2007).

[6] *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972).

[7] See also *UPS Supply Chain Solutions, Inc.*, 364 NLRB No. 8, slip op. at 2 (2016); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000).

[8] Despite our colleague's insistence, neither Sec. 8(d) of the Act, nor the Supreme Court's decision in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), have any bearing here. We are not imposing any contractual terms; rather, we hold only that the Respondent could not alter a past practice without first giving the Union notice and an opportunity to bargain, as required by Sec. 8(a)(5) of the Act.

[9] See generally *301 Holdings, LLC*, 340 NLRB 366, 367 (2003) (successor unlawfully changed initial terms and conditions of employment that it was free to set, when it made change that was not announced to employees initially).

perspective of employees. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184–185 (1973). When an employer voluntarily adopts an existing collective-bargaining agreement, employees would understand this to mean a continuation of existing terms and conditions of employment (both contractual and noncontractual). Actions by an employer that are contrary to employees' legitimate expectation may cause employees to react accordingly, resulting in labor strife. Id. That result is precisely what the labor-law successorship doctrine aims to avoid. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–44 (1987).

2. Threat that Stuart Manufacturing would be Nonunion

Stuart Manufacturing was a minority-owned business and qualified as a "HUB zone" entity,[10] which made it eligible to work on certain contracts. Because the Respondent did not meet either of those criteria, Lionel Tobin, the owner of Stuart Manufacturing, proposed to operate Stuart Manufacturing as a separate company that would compete for contracts for which the Respondent did not qualify. Tobin thus remained the owner of Stuart Manufacturing, which operated as a shell company, with no assets beyond the funds in its bank account. Tobin continued to use his old office space and telephone at the Respondent's facility and began approaching individual employees, including employee Jamarcus Tinker, to determine if they would be interested in leaving the Respondent to work for Stuart Manufacturing.

On October 16, 2013, Goods-North spoke by phone with Altman and Tinker for their monthly grievance meeting. After the grievance discussion had concluded, Altman asked Goods-North for more information about the sale of the company, specifically whether the Respondent and Stuart Manufacturing were still considering having two companies. Goods-North said that the Respondent and Stuart Manufacturing were still considering having two companies and that both would be located in the Respondent's facility. Altman then asked whether Goods-North had heard that Tobin had been soliciting employees of the Respondent to come work for Stuart Manufacturing, and Goods-North told him that Tobin needed employees who live in the HUB zone so that he could continue to handle certain contracts. Finally, Altman asked whether the Respondent and Stuart Manufacturing would be under the same or different CBAs. Goods-North said that the Respondent would operate under the CBA, but Stuart Manufacturing would not because it would be nonunion. The judge found Goods-North's statement was an unlawful threat. We agree.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." In determining whether a statement violates Section 8(a)(1), the Board assesses the objective tendency of the statement to coerce employees. *Miller Electric Pump & Plumbing*, 334 NLRB 824, 825 (2001). The employer need not be threatening his own employees for the threat to be unlawful. A threat directed at employees of another employer can also be unlawful. "The prohibition [contained in Section 8(a)(1)] is not limited to interference with the rights of *his* employees." See *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011) (emphasis in original), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013). As the judge found, employees would have reasonably understood Goods-North to be saying that, following the finalization of the arrangements, the Respondent would be dividing into two entities with the reconstituted Stuart Manufacturing operating out of the Respondent's facility and hiring some of the Respondent's employees and that union membership would be incompatible with employment at the reconstituted Stuart Manufacturing. As the judge noted, the Board has held that "[w]hen an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the seller's employees to ensure its nonunion status. Thus, such statements are coercive and violate Section 8(a)(1)." *Kessel Food Markets*, 287 NLRB 426, 429 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989). The fact that the reconstituted Stuart Manufacturing never got off the ground does not detract from how employees would have reasonably understood Goods-North's statement at the time she made it. Furthermore, the judge found that the Respondent and Tobin were negotiating over which contracts each would handle, and Tobin approached approximately 15 of the Respondent's employees to determine if they would be interested in leaving the Respondent to work for the reconstituted Stuart Manufacturing. Thus it is possible that Stuart itself would have been a successor employer with an obligation to recognize and bargain with the Union.

Accordingly, we reject our dissenting colleague's view that the judge's conclusion is based on the implicit (and mistaken) assumption that the Respondent and Stuart Manufacturing constituted a single enterprise and his assertion that Goods-North's statement that Stuart Enterprises would be a nonunion company was a truthful statement that does not violate Section 8(a)(1).

[10] Tobin testified that a business qualifies as a "HUB zone" entity if it is located in an area targeted for economic development and at least 35 percent of the business' employees reside in that area.

3. Withdrawal of Recognition

On January 3, 2014, the Respondent withdrew recognition from the Union. The judge correctly found that the Union was entitled to a 6-month period of bargaining, during which the successor bar doctrine precluded the Respondent from unilaterally withdrawing recognition from the Union based on a claimed loss of majority support. *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011). Our dissenting colleague would reject the successor bar doctrine and return to *MV Transportation*, 337 NLRB 770 (2002). Contrary to our dissenting colleague, and for the reasons stated in *FJC Security Services, Inc.*, 360 NLRB 929, 929 (2014), we see no basis for departing from the successor bar doctrine.

4. Unilateral Change to Pay Date

At the end of March 2014, the Respondent unilaterally changed the pay dates of bargaining unit employees without notifying the Union or giving the Union the opportunity to bargain about the change. The judge correctly found this unilateral change violated Section 8(a)(5) and (1). As noted above, the Respondent's withdrawal of recognition was unlawful, as was its unilateral change to employee pay dates. See *Abernathy Excavating*, 313 NLRB 68, 69 (1993) (finding respondent violated Section 8(a)(5) and (1) by, among other things, unilaterally changing employees' payday from Thursday to Friday). Because he would find the withdrawal of recognition lawful, our dissenting colleague also disagrees with the judge's finding that this unilateral change was unlawful. We necessarily reject his conclusion.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain steps to effectuate the policies of the Act. Having adopted the judge's findings that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and unilaterally changing terms and conditions of employment, we shall order the Respondent to (1) recognize and, on request, bargain in good faith with the Union, and (2) rescind any or all of the unilateral changes and restore the previously existing terms and conditions of employment. To the extent that the unlawful unilateral changes have improved the terms and conditions of unit employees, the Order set forth below shall not be construed as requiring or authorizing the Respondent to rescind such improvements unless requested to do so by the Union.

We shall further order the Respondent to make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes in the manner prescribed 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). We shall also order the Respondent to compensate all affected unit employees and former unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

The judge included an affirmative bargaining provision in his Order to remedy the Respondent's unlawful withdrawal of recognition. For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we agree that this remedy is warranted. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, supra, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, supra, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's withdrawal of recognition and resulting refusal to bargain with the Union for a successor collective-bargaining agreement. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice

the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Further, to the extent such opposition exists, it may be at least in part the product of the Respondent's unfair labor practices.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured by the possibility of a decertification petition or by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's refusal to bargain with the Union in these circumstances, because it would permit another challenge to the Union's majority status before the taint of the Respondent's unlawful withdrawal of recognition has dissipated, and before the employees have had a reasonable time to regroup and bargain through their representative in an effort to reach a successor collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's withdrawal of recognition would likely have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board orders that the Respondent, SMI/Division of DCX-CHOL Enterprises, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the Union) and failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

(b) Unilaterally denying union officials access to the employee break room at Respondent's facility after employee grievance meetings without notifying the Union and giving it an opportunity to bargain.

(c) Threatening employees that Respondent will divide into two separate companies, one union and one nonunion.

(d) Unilaterally changing employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity without notifying the Union and giving it an opportunity to bargain.

(e) Unilaterally changing employee pay dates without notifying the Union and giving it an opportunity to bargain.

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

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

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

(b) Rescind and restore the status quo ante as to the unlawful unilateral change of denying union officials access to the employee break room at Respondent's facility after employee grievance meetings.

(c) On request by the Union, rescind and restore the status quo ante as to the unlawful unilateral change of announcing and implementing a $100 bonus based on productivity.

(d) On request by the Union, rescind and restore the status quo ante as to the unlawful unilateral change of employee pay dates.

(e) Make bargaining unit employees whole for any losses they may have incurred as a result of the above-described unilateral changes, plus interest, as described in the amended remedy portion of this decision.

(f) Make whole affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allo-

cating the backpay awards to the appropriate calendar years for each employee.

(g) Within 14 days after service by the Region, post at its facilities in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 22, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. December 15, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting in part.

My colleagues adopt the judge's findings that the Respondent, a manufacturer of electrical wires, cables, and harnesses, violated the National Labor Relations Act (NLRA or Act) in multiple respects after it became the legal successor of predecessor Stuart Manufacturing. Although I agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a $100 employee bonus on November 4, 2013, I disagree with the judge's other unfair labor practice findings. Specifically, I disagree that the Respondent violated the Act when it denied a union representative access to its facility on August 22, 2013, and when it withdrew recognition from the Union on January 3, 2014. I also disagree that the Respondent threatened, on October 16, 2013, that it would divide into union and nonunion companies. As to these issues, as explained below, I respectfully dissent.

1. *The Respondent Did Not Change a Term or Condition of Employment When It Denied a Union Representative's Access Request.* Predecessor Stuart Manufacturing was party to a collective-bargaining agreement with the Union effective February 9, 2011, to February 8, 2014 (the CBA). In August 2013, the Respondent acquired Stuart Manufacturing's assets, hired Stuart Manufacturing's employees, commenced operations, recognized the Union, and adopted the CBA. On August 22, Union Representative David Altman attended a monthly grievance meeting at the Respondent's facility. After the meeting, Altman asked Vice President and General Manager Gerald Pettit if he could meet employees in the break room. Pettit declined. Altman explained that Stuart Manufacturing had allowed him to meet with employees in the break room every month after the grievance meeting. Pettit repeated his denial of the request.

Section 14.2 of the CBA—which, again, the Respondent had just adopted—stated that "[a]n International representative of the Union shall be granted admission to the facility during work hours *after his request has been granted by the senior management*" (emphasis added). Thus, CBA Section 14.2 conditioned union access to the Respondent's facility on the consent of senior management. Vice President and General Manager Pettit withheld consent, and thus Altman was not entitled to access. The Respondent complied with the plain language of the CBA it had just adopted.

The judge found, and my colleagues agree, that the Respondent violated Section 8(a)(5) and (1) of the Act when it denied Altman access. The judge based this finding on Stuart Manufacturing's "seven-year past practice of allowing union representatives to access the employee break room at its facility upon request after grievance meetings," a past practice the judge found the Respondent unilaterally changed when it denied Altman access. But *the Respondent* did not have a past practice of allowing access to the break room after grievance meetings. The August 22 grievance meeting was the first

[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."

such meeting after the Respondent commenced operations. Moreover, the Respondent had adopted the CBA. Its denial of Altman's access request conformed to CBA Section 14.2, and there is no evidence that the Respondent made any statements in which it adopted any of its predecessor's extra-contractual practices as part of its initial terms and conditions of employment.[1]

My colleagues erroneously find that the Respondent was bound by the past practice of its predecessor, and therefore, when the Respondent denied Altman's access request, it unilaterally *changed* a term and condition of employment. My colleagues' findings are contrary to the Supreme Court's decision in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), which established that a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." Id. at 294.[2] The Supreme Court in *Burns* rejected the contention that a successor implements an unlawful "change" by setting initial employment terms that differ from its predecessor's. The Court explained as follows:

> Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8(a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. *It is difficult to understand how Burns could be said to have changed unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1* [when Burns commenced operations]*, no outstanding terms and conditions of employment from which a change could be inferred.* The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by [predecessor] Wackenhut . . . , but *it does not follow that Burns changed its terms and conditions of employment when it specified the initial basis on which employees were hired on July 1*.

Burns, 406 U.S. at 294 (emphasis added).

Thus, as the Supreme Court held in *Burns*, a successor does not *have* any employment terms before it initially sets them, and therefore, when it initially sets employment terms that differ from its predecessor's, it does not *change* its employment terms. Of course, it may not thereafter change those initial employment terms without providing the union notice and an opportunity to request bargaining (assuming the union has demanded recognition). A successor, however, does not change *its* employment terms when it departs from its predecessor's past practice in setting its initial terms and conditions of employment.

My colleagues contend, however, that when the Respondent adopted its predecessor's CBA with the Union as its initial terms and conditions of employment, "as a matter of law, it also adopted the existing practices that had informed and given meaning to the provisions of the

[1] I disagree with my colleagues' reliance on August 29 correspondence between Respondent's Vice President of Human Resources Carol Goods-North and Union Representative Altman. Here, my colleagues claim that Goods-North stated the Respondent would be requesting a change in pay dates but that all other work rules would remain the same, and my colleagues interpret the latter statement—that all other work rules would remain the same—as proof that the Respondent "had not set any new terms and conditions of employment." There are several problems with my colleagues' contention. First, Goods-North's forward-looking statement on August 29 (that work rules would remain the same) obviously was issued *after* the Respondent had already adopted its initial employment terms; therefore, the August 29 reference to then-current work rules has no relevance to whether the Respondent *previously*, as part of its initial employment terms, may have adopted the predecessor's practices. Second, the "work rules" mentioned in the Goods-North correspondence may reasonably have referred only to the specific rules set forth in the adopted CBA, which would also beg the question as to whether the Respondent contemplated that the predecessor's practices had remained the same. Third, even if it included the predecessor's practices, the phrase "work rules" typically refers only to basic requirements applicable to *employees*, and this phrase would not normally encompass rules exclusively relating to *the Union* (such as limitations or requirements governing Union access to the facility). Fourth, and most importantly, even if the phrase "work rules" included predecessor practices that were not part of the CBA, and even if the phrase "work rules" encompassed matters such as Union access, my colleagues mischaracterize the Goods-North correspondence: it did not *affirm* that "all other work rules would remain the same." Rather, it merely *proposed* keeping work rules the same, which—if agreed to by the Union—would have been part of a package that would have included changes in employee pay dates. To this effect, the communication stated: "I would like to *propose* the following: SMI accepts the existing contract with a minor change. The pay period changes from every other Wednesday to the 5th and 20th of the month. . . . All the other Work Rules remain the same. If you can agree to this, I believe I can get the new owner to sign" (emphasis added; typographical errors corrected). It is undisputed, however, that the Union *never accepted this proposal*. Therefore, regardless of what the proposal contemplated, it never went into effect, and the Board cannot properly regard the proposal as being determinative as to what had been implemented or agreed to by the Respondent or the Union.

[2] The Supreme Court carved out an exception to this rule for cases where "it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Burns*, 406 U.S. at 294. The Board interpreted this "perfectly clear" exception in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975). There, it restricted the exception "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." 209 NLRB at 195 (footnote omitted). There is no allegation here that the Respondent was a perfectly clear successor.

CBA." In support, they cite *Pepsi-Cola Distributing Co.*[3] As I will show, my colleagues misconstrue and misapply *Pepsi-Cola Distributing*. Moreover, the "Board-imposed-predecessor-practices" principle for which my colleagues cite *Pepsi-Cola Distributing* is preposterous, it has no support in existing law, and it runs headlong into two immovable objects: the Supreme Court's decision in *Burns*, and the NLRA's plain language.

(a) *The "Board-Imposed-Predecessor-Practices" Principle Is Not Supported by* Pepsi-Cola Distributing. In *Pepsi-Cola Distributing*, after a successor employer purchased a predecessor's assets, officials from both companies met with the predecessor's route salesmen. Id. at 870, 875. The successor's president told the salesmen that there would be no change in pay structure, and the successor's vice president and general manager added that everything would be run just like it had been run. Id. The predecessor had a practice—not mentioned or reflected in the predecessor's collective-bargaining agreement (CBA)—of paying the route salesmen a year-end bonus, and the successor had no knowledge of this practice when it agreed to adopt the CBA. Id. at 870, 873. After the successor learned that the predecessor paid year-end bonuses, it refused to pay them on the basis that they were not contained in the contract. Id. at 870. On these facts, the Board found that the successor violated Section 8(a)(5) of the Act by failing to make the bonus payments that were previously made by the predecessor. Id.

The Sixth Circuit enforced the Board's order in *Pepsi-Cola Distributing* because the successor had "assured employees that their compensation would be the same as it [previously] had been. . . ." *NLRB v. Pepsi-Cola Distributing of Knoxville, Tenn., Inc.*, 646 F.2d 1173, 1176 (6th Cir. 1981). According to the court, "the year-end payments were not mere bonuses, but were a regularly calculated part of the route salesmen's compensation." Id. Therefore, the court affirmed the Board's finding that the successor violated Section 8(a)(5) because the successor "*promised to continue previously established compensation*," id. (emphasis added), and then unilaterally *discontinued* part of that compensation.[4]

At most, *Pepsi-Cola Distributing* stands for the unremarkable proposition that, when a successor employer establishes initial employment terms, it has a duty to provide notice and the opportunity for bargaining before making subsequent changes in those employment terms. By comparison, there is no evidence that the Respondent in the instant case ever said anything that could be understood as adopting its predecessor's union-access practices as part of its initial terms and conditions of employment. Thus, *Pepsi-Cola Distributing* does not support the majority's position that the Respondent was bound, as a matter of law, by its predecessor's practices regarding union access.[5]

(b) *The "Board-Imposed-Predecessor-Practices" Principle Contradicts the* Burns *Holding that a Predecessor's Employment Terms Do Not Bind Its Successor.* Again, my colleagues hold that whenever a successor has adopted its predecessor's CBA as its initial terms and conditions of employment, "as a matter of law, it has also adopted the existing practices that had informed and given meaning to the provisions of the CBA." This holding is flatly contradicted by the Supreme Court's decision in *Burns*. As explained above, the Court in *Burns* held that a successor—although it is obligated to recognize and, on request, bargain with the predecessor's union—does not *change* its terms and conditions of employment when it establishes initial employment terms that differ from the predecessor's. Thus, just as a successor does not violate Section 8(a)(5) when it elects not to adopt its predecessor's CBA, so also it does not violate Section 8(a)(5) when it chooses not to adopt its predecessor's non-contractual employment practices. Thus here, as in *Burns*, the Board cannot reasonably find that the Respondent "changed unilaterally any pre-existing term or

[3] 241 NLRB 869 (1979). enfd. 646 F.2d 1173 (6th Cir. 1981), cert denied 456 U.S. 936 (1982).

[4] The dissenting judge on the Sixth Circuit panel would have found that the statements made by the successor's managers, who were unaware of the predecessor's practice regarding bonus payments, meant only that the route salesmen's *contractual* compensation would not change. Id. at 1177. I do not pass on whether *Pepsi-Cola Distributing* was correctly decided, nor do I choose between the conflicting positions expressed by the court majority and dissent in that case.

[5] My colleagues also cite *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202 (2007). In *Rosdev*, the Board found that a successor violated Sec. 8(a)(5) by unilaterally departing from an extra-contractual past practice of its predecessor. But the successor employer in *Rosdev* was a "perfectly clear" successor. As explained above in fn. 1, "perfectly clear" successorship is an exception to the rule of *Burns* that a successor is free to set its own initial employment terms. A "perfectly clear" successor cannot change its predecessor's terms and conditions of employment unilaterally. Here, the Respondent is *not* a perfectly clear successor, and *Rosdev* is clearly inapplicable. However, the fact that my colleagues cite *Rosdev* is revealing. It is of a piece with their misinterpretation and misapplication of *Pepsi-Cola Distributing*, supra, through which they treat the Respondent as though it *were* a perfectly clear successor to the extent that they bind the Respondent to a past practice of its predecessor that it did not adopt as part of its initial terms and conditions of employment. By doing so, my colleagues add this case to the growing list of cases in which the majority has sought to erode the crucial distinction between regular *Burns* successors and "perfectly clear" successors. See *Creative Vision Resources, LLC*, 364 NLRB No. 91 (2016); *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016).

condition of employment . . . when it had no previous relationship whatsoever to the bargaining unit and, prior to [commencing operations], no outstanding terms and conditions of employment from which a change could be inferred."[6] The Respondent chose to adopt its predecessor's CBA, but it did not adopt by word or deed any of its predecessor's extra-contractual practices, including those pertaining to union access. *Burns* establishes that a successor is not required to honor the predecessor's CBA, and it is just as contrary to *Burns* for the Board to impose on successors who do adopt the predecessor's CBA all of the predecessor's "existing practices" that supposedly "informed" and had "given meaning to the provisions of the [predecessor's] CBA." Whether the Board improperly imposes substantive contract terms on a successor or improperly requires the successor to continue the predecessor's non-contractual practices, in either case it contravenes the important policies that prompted the Court in *Burns* to hold that successors do not inherit such obligations unless they voluntarily agree to them.[7] Contrary to my colleagues' claim that the "Board-imposed-predecessor-practices" principle is established in existing law, the proposition they support strongly resembles the NLRB's contention that the Supreme Court rejected in *Burns*, namely, that "the new employer [must be] held to have assumed, *as a matter of federal labor law*, the obligations under the contract entered into by the former employer."[8]

(c) *The "Board-Imposed-Predecessor-Practices" Principle Contradicts the* Burns *Holding Regarding the Voluntary Nature of the Successor's Assumption of Its Predecessor's Obligations*. In *Burns*, the Court addressed whether the Board may order a successor to observe predecessor obligations that the successor "had not voluntarily assumed," and the Court held that it may not.[9] However, the Court observed that "in a variety of circumstances . . . the Board might properly find as a matter of fact that the successor *had* assumed the obligations under the old contract."[10] My colleagues' "Board-imposed-predecessor-practices" principle disregards this requirement of voluntary assumption. In their view, whenever a successor voluntarily agrees to adopt certain obligations, it *involuntarily* inherits other obligations as a matter of law. Here as well, my colleagues' position is foreclosed by *Burns*, where the Supreme Court stated: "'[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.'"[11]

(d) *The "Board-Imposed-Predecessor-Practices" Principle Exceeds the Board's Authority Under Section 8(d)*. Whether the Board seeks to compel agreement regarding terms set forth in a predecessor's CBA or regarding a predecessor's extra-contractual practices, in either case the Board exceeds its authority under the Act. Not only was this the express holding of *Burns*, as explained above, but Section 8(d) of the Act provides that the duty to bargain imposed by the Act "does not compel either party to agree to a proposal or require the making of a concession." In accordance with Section 8(d), the Supreme Court in *H. K. Porter Co. v. NLRB*[12] held that the Board lacks authority to impose substantive employment terms on parties as a matter of law. In reasoning that has equal application here, the Supreme Court explained:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that, through collective bargaining, the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might, in some cases, be impossible, and *it was never intended that the Government would, in such cases, step in, become a party to the ne-*

[6] *Burns*, 406 U.S. at 294.

[7] The Court in *Burns* explained those policies as follows:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

406 U.S. at 287–288.

[8] *Burns*, 406 U.S. at 285 (emphasis added).

[9] *Burns*, 406 U.S. at 274.

[10] *Burns*, 406 U.S. at 291 (emphasis added).

[11] *Burns*, 406 U.S. at 287 (quoting *H. K. Porter Co*. v. *NLRB*, 397 U.S. 99, 108 (1970)).

[12] 397 U.S. 99 (1970).

gotiations, and impose its own views of a desirable settlement.

* * *

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, *leaving the results of the contest to the bargaining strengths of the parties*. It would be anomalous indeed to hold that, while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining *under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract*.[13]

Based on the above considerations, I believe that my colleagues erroneously find that the Act required the Respondent to adhere to Stuart Manufacturing's past practice. Contrary to my colleagues' finding that the Respondent violated Section 8(a)(5), the Respondent had the right to set its own initial employment terms, including those pertaining to union access. The initial terms it set were those set forth in Stuart Manufacturing's CBA with the Union, which the Respondent decided to adopt. Regarding union access, CBA Section 14.2 was the Respondent's initial term, and Section 14.2 conditioned union access on the consent of senior management. As *Burns* teaches, the Respondent did not change its terms and conditions of employment when it set that initial term, and neither did the Respondent implement a change when it adhered to Section 14.2 on August 22 by exercising its contractual right to deny Altman's access request. Absent any change, the Respondent could not have violated Section 8(a)(5) as alleged,[14] and this allegation must be dismissed.

2. *The Respondent Did Not Threaten to Divide into Union and Nonunion Companies*. Stuart Manufacturing, owned by Lionel Tobin, qualified for certain contracts because it was a minority-owned business and a "HUBzone" employer, i.e., an employer located in an area targeted for economic development, at least 35% of whose employees resided in that area. The Respondent was not minority-owned and did not qualify for those contracts. Thus, although the Respondent purchased Stuart Manufacturing's assets, it could not perform some of Stuart Manufacturing's business. Tobin had aspirations to resurrect Stuart Manufacturing to bid on contracts for which the Respondent was ineligible. Stuart Manufacturing continued in existence as a shell corporation, and the Respondent permitted Tobin to keep his old office and telephone; but Tobin was not employed by the Respondent in any capacity. Tobin also engaged in preliminary discussions with some of the Respondent's employees to assess their interest in working for Stuart Manufacturing if it were to resume operations, and he also spoke with the Respondent about the possibility of leasing some of its space and equipment. As it turned out, Tobin's aspirations never came to fruition.

On October 16, 2013, a time when Tobin was still exploring the possibility of resuming operations as Stuart Manufacturing, the Respondent and the Union held their monthly grievance meeting by telephone. Present on the call were Union Representative Altman, Respondent's Vice President of Human Resources Carol Goods-North, and employee Jamarcus Tinker. After discussing grievances, conversation turned to Tobin's plans concerning Stuart Manufacturing. Altman asked Goods-North whether Tobin's company would operate under the same or different collective-bargaining agreements. Goods-North answered that the Respondent would continue to operate under the union contract, but Tobin's company would not because it would be nonunion. Altman replied that if Tobin's company started out nonunion, Altman would talk to Tobin's employees and unionize them. Goods-North did not respond.

The judge concluded, and my colleagues agree, that Goods-North's statement—that the Respondent would continue to operate under the union contract, but Tobin's company would not because it would be nonunion—was a threat "that Respondent would divide into two separate companies, one union and one nonunion." I disagree.

First, the judge's conclusion was based on the implicit assumption that the Respondent and Stuart Manufacturing constituted a single enterprise.[15] There is no basis for this assumption. The Respondent is a division of DCX-CHOL Enterprises, Inc. Stuart Enterprises, Inc. was a separate legal entity from the Respondent. Moreover, the General Counsel did not allege, the parties did not liti-

[13] 397 U.S. at 103–104, 107–108 (emphasis added; footnotes omitted).

[14] See *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that "an employer's unilateral change in conditions of employment . . . is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal" to bargain on request).

[15] The judge relied on what he perceived to be a "close, if not cozy, relationship" between the Respondent and Stuart Manufacturing.

gate, and the judge did not find that the Respondent and Stuart Enterprises constituted a single employer or alter egos. Goods-North could not have threatened to divide the Respondent and Stuart Enterprises into two separate companies, as the complaint alleged,[16] because they already *were* two separate companies.

Second, Goods-North did not say that the Respondent would divide into union and nonunion companies as the General Counsel alleged in the complaint, and there is nothing coercive about what she did say. She said the Respondent would adhere to the union contract, and *Tobin's* company—Stuart Enterprises, a legally separate entity—would be nonunion. This was a true statement. At the time the statement was made, Stuart Enterprises existed as a shell corporation. It had no assets (other than a bank account), it was not engaged in operations, and most importantly, it had no employees. Thus, if Stuart Enterprises acquired assets, hired employees and resumed operations, on day one it *would* have been nonunion. Before an employer can lawfully recognize a union as the collective-bargaining representative of an appropriate bargaining unit of employees under Section 9(a) of the Act, the majority of the employees in that unit must first designate or select the union as their bargaining representative. See NLRA Section 9(a); *International Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann)*, 366 U.S. 731, 737–738 (1961).[17] On day one of a reconstituted Stuart Enterprises, its employees would not have had an opportunity yet to express their wishes concerning representation. Thus, Tobin's company would be nonunion, as Goods-North accurately stated.[18] Contrary to the judge's decision, Goods-North did not indicate "that union membership would be incompatible with employment at Stuart Manufacturing." She stated that Tobin's company would be nonunion, which was true. Moreover, Union Representative Altman clearly did not understand Goods-North's statement the way the judge interprets it. Altman responded to her statement by saying that if Tobin's company started out nonunion, Altman would talk to Tobin's employees and unionize them, and Goods-North did not take issue with Altman's response. The record does not support an unfair labor practice finding.

My colleagues strain unsuccessfully to rescue the judge's factually baseless finding. They cite *New York New York Hotel & Casino*, 356 NLRB 907 (2011)—an utterly inapposite case[19]—for the broad proposition that an employer *may* interfere with the Section 7 rights of another employer's employees. They do not explain, however, how or why that proposition applies to the facts of this case. Instead, they cite another inapposite case, *Kessel Food Markets*, 287 NLRB 426 (1987).[20] In *Kessel Food Markets* the respondent's owner, Albert Kessel, discriminated in hiring against the union-represented employees of several Kroger stores Kessel was acquiring. Kessel also violated the Act by telling the Kroger employee-applicants that his stores would be nonunion. Thus, in *Kessel Food Markets*, the person who made the "nonunion" statement was the person making the hiring decisions, and he made the statement to the very individuals against whom he was discriminating. "The coercive aspect of an unlawful threat derives from the ability of the speaker or party to carry out the threat."[21] Here, in contrast, the Respondent had no power to make hiring decisions for Stuart Manufacturing (which was not hiring and never did hire anyone). Goods-North's statement was not a threat at all, let alone an unlawful threat.

3. *The Respondent Lawfully Withdrew Recognition Based on a Decertification Petition Signed by a Majority of the Unit*. On November 12, 2013, an employee of the Respondent filed a petition to decertify the Union signed by a clear majority of the unit employees. On November 25, the Union requested that the parties begin negotiating for a new collective-bargaining agreement, and the parties agreed to meet on January 6, 2014 to commence bargaining. However, in December, the Respondent received a copy of the decertification petition. According-

[16] Complaint ¶ 5(b) alleged that the Respondent "threatened employees with the division of Respondent into two separate companies, one unionized company and one nonunionized company."

[17] Under Sec. 8(f) of the Act, an employer in the construction industry may enter into a collective-bargaining agreement with a union regardless of whether a majority of its employees support the union. Indeed, a construction-industry employer may enter into such an agreement before it has hired any employees at all. However, Tobin's company, if it ever hired employees and resumed operations, would not have been an employer in the construction industry, and any bargaining representative of its employees could only have been a Sec. 9(a) representative.

[18] My colleagues suggest in passing that "it is possible that Stuart [Manufacturing] itself would have been a successor employer with an obligation to recognize and bargain with the Union." They cite no precedent, however, for the remarkable proposition that Stuart Manufacturing could become a *Burns* successor of the Respondent without purchasing it or acquiring its assets, and where the Respondent would remain in business unchanged.

[19] Enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S. Ct. 1580 (2013). In *New York New York Hotel & Casino*, the Board found that the respondent hotel and casino violated Sec. 8(a)(1) of the Act when it excluded from its property off-duty employees of a food-service contractor—Ark Las Vegas Restaurant Corporation, which operated restaurants within the hotel and casino—who sought access to the respondent's property for the purpose of soliciting customers to support their organizing efforts. A set of facts more remote from those presented in the instant case would be difficult to imagine.

[20] Enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989).

[21] *Smithfield Packing Co.*, 344 NLRB 1, 9 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006).

ly, on January 3, 2014, the Respondent notified the Union that although it would continue to honor the parties' existing collective-bargaining agreement, it was legally obligated to honor the petition and therefore would not negotiate for a new agreement.

The judge found that the Respondent withdrew recognition from the Union on January 3, 2014, and that the withdrawal of recognition was unlawful because it was made within the "successor bar" period, during which an employer may not "withdraw recognition from the union based on a claimed loss of majority support." *UGL-UNICCO Service Co.*, 357 NLRB 801, 808 (2011). I have indicated that I would refrain from applying the "successor bar." Instead, I would adhere to the Board's prior standard that "'an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar' whenever a rival petition is filed." *FJC Security Services*, 360 NLRB 929, 930 (2014) (quoting *MV Transportation*, 337 NLRB 770, 770 (2002) (emphasis in original)). And as the decertification petition demonstrates, the presumption of continuing majority status has been rebutted here.

The General Counsel alternatively argues that, under *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Respondent's unfair labor practices tainted the decertification petition upon which the Respondent relied when withdrawing recognition, rendering the withdrawal of recognition unlawful on that separate and independent basis. Again, the decertification petition was signed by a majority of the unit employees, and the signatures on the petition were dated August 21–23, 2013. The only unfair labor practice I would find—the $100 bonus on November 4, 2013—occurred after employees signed the petition and thus could not have tainted the petition. Thus, I would find that the Respondent lawfully withdrew recognition in reliance on the petition.[22]

Accordingly, I respectfully dissent from the majority's finding of the violations discussed above.

Dated, Washington, D.C. December 15, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

[22] Since I would find the withdrawal of recognition lawful, I also disagree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee pay dates after it withdrew recognition.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from and fail and refuse to recognize and bargain with Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (Union) as the exclusive collective-bargaining representative of the bargaining unit employees.

WE WILL NOT unilaterally deny Union officials access to the employee break room at our facility after employee grievance meetings without notifying the Union and giving it an opportunity to bargain.

WE WILL NOT threaten employees that we will divide into two separate companies, one union and one nonunion.

WE WILL NOT unilaterally change employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity without notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally change employee pay dates without notifying the Union and giving it an opportunity to bargain.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The unit is as follows:

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's pro-

duction facilities located in the City of Fort Wayne and County of Allen, Indiana.

WE WILL rescind and restore the status quo ante as to the unlawful unilateral change of denying union officials access to the employee break room at our facility after employee grievance meetings.

WE WILL, on request by the Union, rescind and restore the status quo ante as to the unlawful unilateral change of announcing and implementing a $100 bonus based on productivity.

WE WILL on request by the Union, rescind and restore the status quo ante as to the unlawful unilateral change of employee pay dates.

WE WILL make bargaining unit employees whole for any losses you may have incurred as a result of the above-described unilateral changes, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.

The Board's decision can be found at www.nlrb.gov/case/25-CA-117090 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Rebecca Ramirez and *Ryan Funk, Esqs.*, for the General Counsel.

H. Joseph Cohen, Esq., for Respondent.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Fort Wayne, Indiana, on July 15–16, 2014. The Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (the Union) filed the charges at issue here on the following dates:

Case	*Charge Filing Date*
25–CA–117090	November 15, 2013
25–CA–117093	November 15, 2013
25–CA–117097	November 15, 2013
25–CA–117151	November 18, 2013
25–CA–117254	November 19, 2013
25–CA–120437	January 13, 2014
25–CA–125968	April 7, 2014[1]

On April 30, 2014, the General Counsel issued a complaint covering the first six cases. Subsequently, on June 9, 2014, the General Counsel issued a consolidated complaint covering all seven cases listed above.

In the consolidated complaint, the General Counsel alleges that SMI/Division of DCX-CHOL Enterprises, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), and also Section 8(a)(1) of the Act, by: on August 19, 2013, threatening employees with job loss and plant closure if they did not agree to accept Respondent's proposal to change employee pay dates; on October 16, 2013, threatening to divide the Company into two entities (one union, and one nonunion) because employees engaged in union and protected activities; and, on October 16, 2013, bypassing the Union and dealing directly with employees to solicit them to leave Respondent and begin working for a nonunion company.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by: since August 20, 2013, refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit; on August 22, 2013, denying union officials access to the employee break room; on November 4, 2013, bypassing the Union and dealing directly with employees to announce and distribute $100 bills to employees; on January 3, 2014, withdrawing recognition from the Union as the exclusive representative of the bargaining unit, and thereafter refusing to meet and bargain with the Union to negotiate a collective-bargaining agreement; and, on or about March 27, 2014, unilaterally changing employee pay dates. Respondent filed a timely answer denying the violations alleged in the consolidated complaint.

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

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a corporation with an office and place of business in Fort Wayne, Indiana, manufactures wires, cables and harnesses at its facility that is also located in Fort Wayne, Indi-

[1] All dates are from 2013 to 2014, unless otherwise indicated.

[2] Although I have included several citations in the findings of fact to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

ana. In the twelve months preceding the date of the consolidated complaint in this case, Respondent: sold and shipped goods valued in excess of $50,000 from its Fort Wayne facility directly to points outside of the State of Indiana; and, at its Fort Wayne facility, purchased and received goods valued in excess of $50,000 from points outside of the State of Indiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Stuart Manufacturing

In July 2001, Lionel Tobin became the owner of Stuart Manufacturing, a company that manufactures electronic parts, wires, cables and harnesses. (Tr. 17, 243, 250.) Since Stuart Manufacturing was a minority-owned business and also qualified as a "HUB zone" entity,[3] Stuart Manufacturing was eligible to work on contracts (often with the Federal Government) that provided incentives to hire companies with those characteristics. (Tr. 19.)

2. The Union

Since 2000,[4] David Altman has served as the Union's representative for the following appropriate bargaining unit at Stuart Manufacturing:

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

(Tr. 105; Jt. Exh. 1, Article I.) In 2011, the Union and Stuart Manufacturing negotiated and executed a collective-bargaining agreement effective from February 9, 2011, to February 8, 2014. (Jt. Exh. 1.)

B. DCX-CHOL Buys Stuart Manufacturing's Assets

1. The asset purchase

In 2013, Stuart Manufacturing began experiencing some financial difficulty and accordingly hired a consultant to assist with finding potential buyers for the Company. (Tr. 38–39, 48.) As a result of that search, on August 9, 2013, DCX-CHOL Enterprises, Inc. (DCX-CHOL)[5] bought the assets of Stuart Manufacturing, and began operating the business under its current name, SMI/Division of DCX-CHOL Enterprises, Inc. (Tr. 18–19, 44–45; Jt. Exh. 2.)

Since DCX-CHOL was not a minority-owned business and was not eligible to perform HUB zone work, the asset purchase left a void that Tobin proposed to fill by operating Stuart Manufacturing as a separate company that would compete for contracts that DCX-CHOL could not handle. (Tr. 19, 35–36, 84–85.) Tobin therefore continued to be the owner of Stuart Manufacturing, albeit under circumstances where Stuart Manufacturing was a shell corporation with no assets beyond the funds in its bank account. (Tr. 34–35; Jt. Exh. 2.)

2. Respondent meets with employees and the Union

After finalizing the asset purchase, Respondent's owner, Neal Castleman (joined by Tobin), met with employees in August 2013, to announce the ownership change. (Tr. 48–49, 80, 221–222.) Later, on August 19, Respondent and the Union participated in a special meeting to discuss the transition process. Carol Goods-North, Respondent's Vice President of Human Resources,[6] provided the Union with a letter that stated as follows:

> Dear Dave [Altman]:
>
> This memo serves as a formal notification of change in ownership of Stuart Manufacturing, Inc.
>
> Effective August 9, 2013, DCX-Chol out of Los Angeles, CA has purchased the assets of the Company; Mr. Tobin still owns Stuart Manufacturing, Inc. The Fort Wayne location will be named SMI – a Division of DCX.
>
> The two owners are currently ironing out the particulars as it pertains to which customers will be serviced by Stuart Manufacturing, Inc. or DCX.
>
> Gerry Pettit remains on board as the General Manager for SMI; I will stay on as an employee of DCX as a Liaison/Human Resources Director. My position is a proposed position; finalization will take place within the next coming weeks.
>
> DCX understands that by purchasing the Stuart assets, they became a successor,[7] [and] therefore would request various modifications to the Bargaining Unit Agreement in order to effectively and successfully manage the operations at SMI.
>
> We expect to have a proposal of [] DCX's requests for modifications within the next week.
>
> In the interim, please forward any questions or concerns to me. . . .
>
> We look forward to an amiable exchange to finalize the agreement between DCX and [Union] members.

(Jt. Exh. 2; see also Tr. 106–109, 151.)

Regarding possible modifications to the collective-bargaining agreement, Goods-North explained that Respondent would likely need to request a change in employee pay dates,

[3] According to Tobin, a business qualifies as a HUB zone entity if it is located in an area targeted for economic development (based on U.S. Census data concerning area poverty levels) and at least 35 percent of the business' employees reside in that area. (Tr. 19–20.)

[4] The Union has represented employees at the facility since the 1980's, through various changes in ownership. (Tr. 105.)

[5] DCX-CHOL has a total of six divisions: four in California; one in Illinois; and one (SMI/Division of DCX-CHOL) in Indiana. (Tr. 44, 76.)

[6] Goods-North is Tobin's sister, and previously served as Stuart Manufacturing's director of human resources. (Tr. 43–44.)

[7] At trial, Respondent stipulated that on August 9, 2013 (the date that it purchased Stuart Manufacturing's assets), it became the successor employer to Stuart Manufacturing. (Tr. 47.)

since Stuart Manufacturing paid its employees on a biweekly basis (every other Wednesday), and Respondent paid its employees on the fifth and twentieth of each month. Altman responded that he did not anticipate that it would pose a problem to modify the pay dates, but advised that he nonetheless would need to submit the proposed modification to the bargaining unit for a vote.[8] (Tr. 50–53, 106–108; see also Jt. Exh. 1, Article XIV, Section 14.6.)

C. The August 22, 2013, Grievance Meeting

1. Union access history

The collective-bargaining agreement states that "[a]n International representative of the Union shall be granted admission to the facility during work hours after his request has been granted by the senior management." (Jt. Exh. 1, Article XIV, Section 14.2.)

For the past seven years, Respondent (and its predecessor, Stuart Manufacturing) generally met with the Union each month to conduct grievance meetings, with Goods-North typically representing the Company, and Altman representing the Union. After many of those meetings, Altman asked Goods-North if he could meet with employees in the break room. Goods-North routinely granted Altman's requests.[9] (Tr. 55–57, 99.)

2. Union access on August 22, 2013

On August 22, 2013, Altman participated in the monthly grievance meeting at Respondent's facility. Gerald Pettit, Respondent's vice president and general manager, represented Respondent in person at the grievance meeting, while Goods-North participated by telephone. After the grievance meeting, Altman asked Pettit if he could meet with employees in the break room. Pettit refused because he believed that it was not a good time for Altman to visit because employees were trying to attain certain production goals, and because Respondent had only recently purchased Stuart Manufacturing's assets and Pettit did not want Altman to cause a disruption by stirring up speculation about the implications of the asset purchase transaction. Altman explained that Goods-North allowed him to visit the break room every month after their grievance meetings, and asserted that it would not be disruptive to meet with employees because he (Altman) would only see employees who were on break or at lunch. When Pettit again refused, Altman decided to leave the facility without meeting with employees. (Tr. 86–87, 109–111, 224–225; GC Exh. 2, p. 5.) On all other occasions since August 22, 2013, Respondent has granted Altman's requests to meet with employees in the break room after grievance meetings. (Tr. 68, 95, 167, 236–237.)

D. August/September 2013 – Respondent and the Union Table Further Discussions about Contract Modifications

On August 26, 2013, Altman followed up with Goods-North about what modifications she planned to propose to make to the collective-bargaining agreement. Specifically, Altman advised Goods-North as follows:

> We are having a membership meeting on Wednesday. If you can provide me with the contract modifications [you're] looking for, I will discuss them with my members at Wednesday's meeting.

(GC Exh. 3, p. 1; see also Tr. 113, 118.)

On August 29, 2013, Goods-North replied to Altman about the collective-bargaining agreement. Goods-North stated:

> Dave, in response to establishing an agreement with [the Union] and the new company; as I stated earlier in the week, we are trying to finalize the transition from Stuart Manufacturing to DCX (SMI). Many challenges are taking a great amount of time to work through.
>
> I would like to propose the following:

---

[8] Both Altman and Union Chair Jamarcus Tinker testified that Goods-North warned them that Respondent could close the facility and move the work if the Union refused to agree to change the employee pay dates. (Tr. 108, 223–224; see also GC Exh. 2, p. 1 (Altman's notes from the meeting).) Goods-North denied making the alleged threat, describing the notion that she would make such a statement as "absurd." (Tr. 66.) All three witnesses were equally forthright and credible when they testified about this issue.

I do not see a basis for crediting Altman's and Tinker's testimony over Goods-North's testimony, particularly when one considers the letter that Goods-North presented to the Union at the meeting. Respondent's August 19, 2013 letter raised the issue of potential contract modifications in a conciliatory tone, and that fact undermines the proposition that Respondent was dead set on modifying the contract to change employee pay dates as soon as possible. Furthermore, since Respondent did not change the employee pay dates until in or about April 2014, and there is no suggestion that Respondent viewed the pay date change as an urgent matter, it does not stand to reason that Respondent (through Goods-North or anyone else) would draw a line in the sand on that issue within days of the asset purchase.

Ultimately, the evidence that the General Counsel presented about the alleged August 19, 2013, threat to close the facility and move the work was, at best, equally credible to Respondent's contrary evidence on that issue. Accordingly, I find that the "tie" goes to Respondent and I have credited Goods-North's denial on this point, since the General Counsel bears the burden of proving the allegations in the complaint by a preponderance of the evidence. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

[9] I have not credited Goods-North's testimony that she denied Altman access to the break room on one occasion in the past because "there was something going on and [Altman] agreed." Goods-North admitted to having trouble recalling the circumstances about this occasion because "it was a long time ago." Given Goods-North's uncertainty about this incident, I do not find her testimony on this point to be reliable. Instead, at most, the evidence shows that on one occasion, Goods-North asked Altman to keep his break room visit short because employees had a work assignment that needed attention. Altman agreed. (Tr. 56–57.)

I do credit Gerald Pettit's testimony that he did not allow the Union to meet with employees in the break room when he was in charge of representing the Company at grievance meetings. Pettit, however, has not held that role for seven years – instead, Goods-North has handled everything concerning grievance meetings for the past 7 years. (Tr. 95, 99–100.)

> SMI accepts the existing contract with a minor [change.] The Pay period changes [from] every other Wednesday to the 5th and 20th of the month. As I mentioned before, the difference is merely 1 day.
>
> All other Work Rules [remain] the same. If you can agree to this, I believe I can get the new owner to sign.
>
> Also, I have attached a copy of the Purchase Agreement; please advise if you have any questions.
>
> Please advise your thoughts. Thank you.

(GC Exh. 4, p. 1.)

Goods-North and Altman communicated again about possible modifications to the collective-bargaining agreement on September 3, 2013. As indicated in the following email exchange, Goods-North and Altman agreed to put the issue of contract modifications aside because of uncertainty related to the asset purchase, and because a petition to decertify the Union had been filed:

> Altman: Good morning Carol, If the payday is the only modification you [are] looking for, I suggest that I put together a secret ballot, and conduct the voting in the break room at the plant in order to exp[e]dite the process. Otherwise Thursday will be the first opportunity I'll have to get it to the members for a vote. Let me know your thoughts.
>
> G-N: Good morning Dave. We received notification that a petition has been filed with the NLRB for decertification of the current contact [sic]; I've been informed that you are aware and have provided a response. At this point we should wait on the Board's decision before moving forward, do you agree?
>
> Altman: Carol, [i]f you prefer to wait, we can wait.
>
> G-N: There are too many unanswered questions surrounding the current contract in place; especially since Stuart Manufacturing is still in business. I don't believe we have a choice.

(GC Exh. 4, p. 2; see also Tr. 118–120, 158–159, 251–252.)[10]

E. September/October 2013—Stuart Manufacturing's Ongoing Presence at the Facility

1. Tobin maintains connections to Respondent's facility

Consistent with his idea of operating Stuart Manufacturing as a smaller business that would be eligible for HUB zone and minority-owned business contracts, Tobin (with Respondent's consent) continued to use his old office space and telephone at Respondent's facility, even though he was not on Respondent's payroll as an employee after the asset purchase was completed.[11] Tobin also hoped to lease equipment and facility space from Respondent for Stuart Manufacturing, and to that end established a separate mailing address (1613 East Wallace Street) that was at the same location as Respondent's facility (1615 East Wallace Street). (Tr. 23–25, 32–34, 84.)

In addition, Tobin (again, with Respondent's consent) began speaking to individual employees to determine if they would be interested in leaving Respondent to work for Stuart Manufacturing. Specifically, Tobin separately approached a total of about 15 employees (including employees Angela Dixon, Joe Horton and Jamarcus Tinker) while they were working and, either on the shop floor or in Respondent's conference room, asked if they would be interested in working for a newly constituted version of Stuart Manufacturing. Tobin assured the employees that their working conditions would remain the same. (Tr. 20, 25–28, 90, 175–177, 189, 202–204, 214–215, 225–226.) There is no evidence that Tobin stated or indicated in these meetings that Stuart Manufacturing would operate as a nonunion company. (Tr. 38, 215.)

2. The October 16 grievance meeting

On October 16, 2013, Goods-North spoke with Altman and Tinker by telephone for their monthly grievance meeting. After some initial discussion about employee grievances, Altman asked Goods-North for an update on the sale of the company, and in particular an update on whether the parties to the sale were still considering having two companies. Goods-North answered yes, and added that DCX-CHOL would be located at 1615 Wallace Street, while Tobin's company would be at 1613 Wallace Street.

Next, Altman asked Goods-North if, as Altman had heard, Tobin had been going on to the shop floor to solicit employees to come and work for his company. Goods-North responded that Tobin needed employees who live in the HUB zone so he could continue handling certain government contracts.

Finally, Altman asked Goods-North whether DCX-CHOL and Tobin's company would be under the same or different collective-bargaining agreements. When Goods-North responded that DCX-CHOL would operate under the union contract, but Tobin's company would not because it would be non union, Altman expressed concern about that arrangement and asserted that if Tobin's company began as non union, Altman would talk to Tobin's employees and unionize them.[12] (Tr. 120–124, 226–227; GC Exh. 2, pp. 6–9; see also Tr. 23.)

3. Relationship between Respondent and Stuart Manufacturing goes sour

Later in the fall of 2013, the relationship between Respondent and Tobin soured, in part due to disputes that arose about contract payments that Tobin received erroneously because a

[10] According to employee Michelle Stump, she filed a decertification petition on August 28, 2013, but that petition was denied due to timeliness issues. (Tr. 252.)

[11] In fact, at least one of Respondent's customers continued to interact with Tobin as if he owned the facility. Tobin forwarded the customer's information to Respondent as needed. Respondent did not compensate Tobin for taking on this role. (Tr. 29–30.)

[12] Goods-North did not testify about the October 16 grievance meeting, other than (in response to a closed question) to deny telling the Union that there was a plan between Stuart Manufacturing and DCX-CHOL to make a nonunion facility. (Tr. 67.) I do not find Goods-North's general denial to be persuasive because it does not rebut Altman's and Tinker's testimony. Indeed, Goods-North only denied that there was a joint effort between DCX-CHOL and Stuart Manufacturing to create a nonunion company – that limited denial stopped well short of addressing Altman's and Tinker's testimony that Goods-North advised them that Tobin's company would operate as a nonunion company.

customer failed to update its payment information to show Respondent as the new owner of the company. Respondent accordingly stopped allowing Tobin access to the facility unless he obtained permission in advance, and any discussions about Stuart Manufacturing leasing Respondent's equipment or facility space came to a halt. (Tr. 22, 30–32, 39–41, 85, 225.)

F. November 4, 2013—Respondent Gives each Employee a Surprise $100 Bonus

1. November 4, 2013—the $100 bonus

In the latter part of October, Respondent's managers observed that the facility was approaching one million dollars in sales. Since the facility had not reached that level of sales for some time (as it normally averaged $600,000 to $800,000 in sales per month), Respondent encouraged its employees to pick up their production even further to reach the one million dollar sales mark for the month. (Tr. 77, 79, 87–88, 91–93, 244–245.)

Respondent and its employees ultimately succeeded in reaching the one million dollar sales mark for October. To reward employees (including supervisors, bargaining unit employees, and non-bargaining unit employees) for their efforts, Castleman directed Pettit to give everyone a crisp $100 bill as a bonus. Accordingly, on November 4, Pettit called an all-employee meeting to announce the bonus, and later that day, supervisors passed out envelopes containing $100 bills to all employees (which all employees accepted). In at least one instance, Production Manager Jerome Stallworth told an employee that employees might earn additional bonuses in the future if they kept up the good work.[13] Respondent did not notify or bargain with the Union before announcing and distributing the $100 bonuses to employees. (Tr. 61–62, 76–79, 88–89, 91–93, 99, 126, 177–178, 204–207, 212–214, 227–228, 243–248.)

2. November 4, 2013—Union meeting

At 4:30 pm, Altman met with Tinker and two other employees for the Union's monthly meeting. (Normally, Union meetings occur when the work day ends at 2:30 p.m., but on November 4, Tinker notified employees that the meeting would start at 4:30 p.m. because employees were working overtime and thus would still be on the clock at 2:30 p.m.) The paltry attendance (Altman plus three employees) at the November 4 Union meeting was surprising because: employees still had questions related to the recent change in ownership; the Union was electing officers that day; and Union meetings normally drew 8–15 employees. (Tr. 125–126, 178–179, 204, 207, 214, 228–231, 238–240.)

3. Respondent's and Stuart Manufacturing's history regarding bonuses and gifts to employees

Before Respondent purchased Stuart Manufacturing's assets, Stuart Manufacturing had a varied history regarding gifts and bonuses to employees. From the 1980's to the August 2013 asset sale to Respondent, Stuart Manufacturing did not award cash bonuses to employees for their individual performance, nor did it award cash bonuses to all employees based on the Company's performance. In fact, when Goods-North suggested awarding "Stuart Dollars" (pretend dollars that could be used to purchase items at periodic "auctions") to employees based on their performance, the Union opposed the idea because employees would not receive the same amount of Stuart Dollars. (Tr. 66, 71–72, 90, 102, 229.) However, Stuart Manufacturing did have a history of giving or awarding the following items to employees without notifying or bargaining with the Union: turkeys for Thanksgiving; chances to win (via free drawing/raffle) coffee mugs, hats, T-shirts, bags, cameras, televisions and other items that the purchasing department received as free gifts from companies like Staples; and food at company picnics and parties. (Tr. 65, 70–71, 97–98, 100–102, 180–184, 186–188, 191–192, 210–212, 218–219.)

In the past, DCX-CHOL has paid cash awards to employees in its Illinois and California facilities for their performance. (Tr. 69.) The November 4 bonus was the first cash award that Respondent paid to SMI division employees. (Tr. 79–80.) Regarding other gifts to SMI division employees, Respondent provided interested employees with up to two free tickets to see the movie "Lee Daniels' The Butler" in August 2013,[14] and provided food and free raffle prizes (e.g., candy, flowers, a camera) for the company Christmas dinner in December 2013. Respondent did not notify or bargain with the Union before providing these gifts. (Tr. 49–50, 71, 101, 179–181, 207–208, 217–218.)

G. November 12, 2013—Second Decertification Petition Filed

On November 12, 2013, employee Michelle Stump filed a second petition to decertify the Union as the representative of the employees in the bargaining unit. Twenty-nine employees in the bargaining unit signed the petition between August 21–23, 2013.[15] Pettit received a copy of the petition in December 2013 (someone placed a copy in his office), and decided to hold onto it until Respondent figured out what to do with it. (Tr. 73–74, 95–97, 162–163, 252–254; R. Exh. 1.)

H. November 25, 2013—Union Requests Bargaining for New CBA

On November 25, 2013, Altman sent a letter to Goods-North to request that the Union and Respondent commence bargaining for a new collective-bargaining agreement. Altman's letter stated as follows:

> Dear Ms. Goods-North
>
> With reference to the Agreement now in effect by and between Stuart Manufacturing, Inc. and [the Union]:
>
> In accordance with the provisions of the Agreement please be

[13] At trial, Castleman agreed that he intended to award employees a $100 bonus each month that Respondent reached the one million dollar mark in sales. (Tr. 77, 78–79.) At the time of trial, October 2013 was the only month that Respondent reached the one million dollar sales benchmark – accordingly, Respondent has not awarded any additional cash bonuses based on that production goal. (Tr. 246.)

[14] Employees at DCX-CHOL's Illinois and California facilities also received movie tickets. (Tr. 49–50.)

[15] The record does not include a definitive statement about the size of the bargaining unit, but witnesses estimated that the bargaining unit includes between 40 and 54 employees. (Tr. 240, 253.)

> advised that the Union desires to terminate the agreement.
>
> It is further desired by the Union to meet with you and/or your representatives as soon as possible within this period prior to the expiration of the present Agreement, for the purpose of negotiating a new Agreement.
>
> We are also requesting a list of all employees with their present classifications and wage rates, plus the Company's cost on all fringe benefits.
>
> An early reply will be appreciated.

(GC Exh. 5, p. 1; see also Tr. 53, 127.)

Goods-North replied to Altman on November 27, essentially to assert that Altman's request for bargaining was premature. Specifically, Goods-North stated:

> Dear Dave,
>
> We are in receipt of your letter dated November 25, 2013, requesting termination of the current agreement and to negotiate a new agreement.
>
> The current Agreement states that you may make the request (60) sixty days prior to the expiration of the Agreement.[16] As you know, the expiration of the Agreement is February 8, 2014.
>
> Your request is pre-mature; therefore, we ask that you withdraw your request at this time.

(GC Exh. 5, p. 3.) Altman did not respond to Goods-North's letter. (Tr. 127.)

I. December 2013—Respondent and the Union Prepare for Bargaining

Notwithstanding Goods-North's initial assertion that the Union requested bargaining prematurely, in December 2013, the parties agreed to begin bargaining for a new collective-bargaining agreement on January 6, 2014. The Union also sent its contract proposal to Respondent, but was disappointed when Respondent did not reciprocate with its own proposal and instead merely planned to respond to the Union's submission. (GC Exh. 6, pp. 1–2; Tr. 128–132; see also GC Exh. 7 (the Union's contract proposal, sent on December 31); GC Exh. 8, p. 1.)

On December 31, 2013, Goods-North emailed Altman to thank him for sending the Union's contract proposal. Goods-North also stated, however, that she would need additional time to respond to the Union's proposal, and thus asked to postpone the first contract bargaining session from January 6 to January 9 or 10. Goods-North concluded her email by stating that she was "looking forward to reaching an agreement that is amiable to the Company and the Union." (GC Exh. 8, p. 1; see also Tr. 54–55, 131.)

[16] The collective-bargaining agreement states that the agreement "shall remain in full force and effect from February 9, 2011 until and including February 8, 2014 and shall continue thereafter in full force and effect from year to year unless sixty (60) days prior to the expiration of this Contract . . . either party gives written notice . . . of its desire to terminate the entire Agreement or to change, modify, or add to the same." (Jt. Exh. 1, Article XVI.)

J. January 3, 2014—Respondent Notifies the Union that it Cannot Negotiate for a New Contract

On January 3, 2014, Respondent (through counsel) notified the Union that Respondent could not negotiate for a new contract. (Jt. Exh. 3; see also Tr. 54 (Goods-North consulted with Respondent's attorney after sending her December 31, 2013 email to Altman).) Respondent advised the Union as follows in its letter:

> Dear Mr. Altman:
>
> I recently received a copy of your correspondence dated December 31, 2013, which included the Union's Proposals for a new Collective Bargaining Agreement. At this time, DCX-CHOL is in possession of a document signed by a majority of the DCX-CHOL bargaining unit employees indicating that they do not wish to be represented by the Union going forward.
>
> Importantly, we will honor the Collective Bargaining Agreement that is currently in effect as required by law. However, the mere fact that the Union has filed a blocking charge does not alter the fact that we are in possession of a document signed by a majority of the bargaining unit employees indicating that they do not wish to be represented by [the Union]. As such, we believe that we are legally obligated to honor that Petition and cannot negotiate for a contract that would cover a period of time within which the Union no longer represents the employees.
>
> If you believe that we are in error in our legal analysis, please do not hesitate to provide us immediately law which suggest we are in error. We would obviously review such information and reconsider our position. However, we believe that we are legally bound to honor the clear directive of the majority of the unit employees.
>
> If you wish to discuss this matter in greater detail or forward information, please do not hesitate to contact us.

(Jt. Exh. 3; see also Tr. 55, 69–70, 134, 168–169.) The Union did not respond to Respondent's January 3, 2014 letter because the Union viewed the letter as a refusal to bargain. (Tr. 168–169.)

K. Respondent Changes Employee Pay Dates

In April 2014, Respondent began paying employees on the fifth and twentieth of each month (instead of every other Wednesday, as stated in the collective-bargaining agreement) because Respondent wanted to have its employees on the same payroll as DCX-CHOL employees in other locations. Respondent did not notify or bargain with the Union before making this change to employee pay dates. (Tr. 62–63, 67–68, 126–127, 135, 184–185, 208–209, 229–230, 237–238; Jt. Exh. 1, Section 14.6.)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB 298, 309 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Relco Locomotives,* 358 NLRB 298, 309.

In this case, most of the operative facts are not in dispute. However, where witnesses presented conflicting testimony on material issues, I have stated my credibility findings in the findings of fact for this decision.

B. Did Respondent Unlawfully Threaten Employees in Violation of the Act?

1. Applicable legal standard and complaint allegations

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. *Relco Locomotives*, 358 NLRB 298, 309.

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. Id. Apart from a few narrow exceptions (none of which apply in this case), an employer's subjective motivation for its conduct or statements is irrelevant to the question of whether those actions violate Section 8(a)(1) of the Act. Id.

The General Counsel alleges that Respondent violated Section 8(a)(1) (as well as Section 8(a)(5) and (1)) by: (1) on or about August 19, 2013, threatening employees with job loss and plant closure if they did not approve Respondent's proposal to contractually change employee pay dates (GC Exh. 1(t), pars. 5(a), 9); and (2) on or about October 16, 2013, threatening employees that Respondent would divide into two separate companies, one unionized and one nonunionized, because the employees engaged in union and protected concerted activities. (GC Exh. 1(t), pars. 5(b), 9.)

2. Discussion – August 19 threat of job loss and plant closure

As noted above, the General Counsel maintained that in a meeting on August 19, Goods-North asserted that Respondent could close its Fort Wayne facility and move the work if the Union did not agree to modify the collective-bargaining agreement on certain issues. I find that the General Counsel fell short of meeting its burden of proving that Goods-North made the offending statement. Although the General Counsel presented credible evidence that Goods-North made the offending statement (see Altman's and Tinker's testimony, plus Altman's notes from the meeting), Respondent's evidence to the contrary was equally credible (see Goods-North's testimony, plus Respondent's letter that used a conciliatory tone to request contract modifications). (Findings of Fact (FOF), Section II(B)(2).) Given the equally credible, but conflicting, accounts, the General Counsel failed to prove by a preponderance of the evidence that Respondent (through Goods-North) threatened job loss and plant closure if the Union did not agree to modify the collective-bargaining agreement. Accordingly, I recommend that the allegation in paragraph 5(a) of the complaint be dismissed.

3. Discussion--October 16 threat of dividing into two companies

In the Findings of Fact, I found that Goods-North did tell the Union that Respondent would operate under the collective-bargaining agreement, but Tobin's company (Stuart Manufacturing) would not because it would be non union. (FOF, Section II(E)(2).) I therefore turn to the question of whether Goods-North's statement had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

The context for Goods-North's statement is significant. When Goods-North made her representations about whether Respondent and Stuart Manufacturing would be unionized, Respondent and Tobin still shared a close, if not cozy, relationship. Immediately after the asset purchase, Respondent advised the Union that Tobin still owned Stuart Manufacturing, and added that Respondent and Stuart Manufacturing were working out the details about the customers that each company would handle going forward. (FOF, Section II(B)(2).) Consistent with that statement of ongoing cooperation and coordination between the two companies, Respondent allowed Tobin to (among other things): keep using his old office and telephone at the facility; and enter Respondent's shop floor to chat with multiple employees about the possibility of working with him at Stuart Manufacturing. (FOF, Section II(E)(1).)

In light of the close connection between Respondent and Stuart Manufacturing at the time (i.e., before the relationship went sour), and the brother-sister relationship between Tobin and Goods-North, a reasonable employee would have taken Goods-North at her word when she represented that Respondent's employees would be unionized while Stuart Manufacturing's employees would be non union. Furthermore, by telling the Union that Stuart Manufacturing would operate as a non union company once it reopened, Respondent informed the Union (and its members) that union membership would be incompatible with employment at Stuart Manufacturing, and thereby violated Section 8(a)(1) of the Act by making statements that had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[17]

[17] To the extent that the General Counsel alleged that Respondent's October 16 threat to divide Respondent into two companies (one union and one nonunion) also constituted an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act (see GC Exh. 1(t), par. 9), I recommend that this additional theory be dismissed because such a violation (if found) would be cumulative and would not materially affect the remedy. See *Management Consulting Inc. (MANCON)*, 349 NLRB 249, 249 fn. 2 (2007).

See *Ryder Truck Rental*, 318 NLRB 1092, 1094–1095 (1995) (finding that the employer violated Section 8(a)(1) of the Act when it told employees that the new facility to which they were transferred would be non union); *Kessel Food Markets*, 287 NLRB 426, 429 (1987) (explaining that when "an employer tells applicants that it will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the [predecessor's] employees to ensure its nonunion status"), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied, 493 U.S. 820 (1989).

C. Did Respondent Unlawfully Deny Union Officials Access to the Employee Break Room?

1. Applicable legal standard and complaint allegation

"Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 5 (2011). Notably, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183–184 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, on or about August 22, 2013, denying Union officials access to the employee break room located in Respondent's facility. (GC Exh. 1(t), par. 7(b).)

2. Discussion

The evidentiary record establishes that Respondent, and its predecessor Stuart Manufacturing, had a seven-year past practice of allowing union representatives to access the employee break room at its facility upon request after grievance meetings.[18] (FOF, Section II(C)(1).) In light of that lengthy and virtually uninterrupted history of union access, I find that Respondent and its predecessor allowed the Union to access its employee break room with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis.

The Board has held that "access by representatives of an incumbent union for representational purposes is a mandatory subject of bargaining." *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997); see also *Granite City Steel Co.*, 167 NLRB 310, 315 (1967). As a result, "the Act requires that, instead of implementing its own solution to perceived abuse, the [employer] bargain with the [u]nion over possible solutions to any problems with access." *Frontier Hotel & Casino*, 323 NLRB at 817; see also *Peerless Food Products*, 236 NLRB 161, 161 (1978).

In this case, it is undisputed that Respondent did not notify or bargain with the Union before (on August 22, 2013) unilaterally changing its practice of allowing the Union to access Respondent's employee break room after grievance meetings. It is also undisputed that after August 22, Respondent resumed its practice of allowing the Union to access the employee break room. (FOF, Section II(C)(2).) Based on those facts, Respondent asserts that it did not violate the Act because the one-time unilateral change to Respondent's break room access practice was not a material, substantial and significant change. See *Peerless Food Products*, 236 NLRB at 161 (dismissing an alleged Section 8(a)(5) and (1) claim because the unilateral change at issue was not material, substantial and significant).

I am not persuaded by Respondent's argument that the one-time unilateral change to its union access practices was not material, substantial and significant. To the contrary, the Board has held that where an employer, through unilateral action, denies or reduces the ability of the union to access its employees for representational purposes, the unilateral action or change is material in nature. See *Frontier Hotel & Casino*, 323 NLRB at 818 (finding that the employer violated Section 8(a)(5) and (1) when it denied union representatives access to its facility on one occasion because they refused to sign a document acknowledging the employer's new union access policy).[19] Respondent committed that precise violation here, as it unilaterally changed its past practice of allowing the Union to meet with employees in the break room, and thus denied the Union the ability to confer with employees about workplace

[18] As noted in the findings of fact, the collective-bargaining agreement included a provision stating that a Union representative "shall be granted admission to the facility during work hours after his request has been granted by the senior management." (FOF, Section II(C)(1).) Since the contract does not include a clear and unmistakable waiver of the Union's right to bargain about union access (including changes to Respondent's policies or practices regarding such access), I do not find that the contract language in this case regarding union access undermines the General Counsel's allegation that Respondent unlawfully changed its union access practices. See *Dearborn Country Club*, 298 NLRB 915, 920 (1990) (noting that a contractual waiver "will not be lightly inferred but rather, must be stated in 'clear and unmistakable' language").

[19] The Board's decision in *Peerless Food Products*, 236 NLRB 161 is distinguishable. In *Peerless Food Products*, the employer unilaterally changed its union access practices, but only in such a way as to limit the union's ability to "engage unit employees in conversations on the production floor when those conversations are unrelated to contract matters." The Board did not find that unilateral change to be material, substantial and significant. Id. at 161. In this case, by contrast, Respondent's unilateral change precluded all conversation between the Union representative and employees at the facility in the day in question, including conversations in the employee break room for representational purposes. That broad unilateral change was unlawful. See *Frontier Hotel & Casino*, 323 NLRB at 818.

issues and concerns (including concerns about Respondent's arrival as the new owner, a development that occurred only days earlier). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally denied Union officials access to the employee break room at Respondent's facility on August 22, 2013.

D. Did Respondent Unlawfully Bypass the Union and Deal Directly with its Employees?

1. Applicable legal standard and complaint allegations

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (citing *Southern California Gas Co.*, 316 NLRB 979 (1995)).

In this case, the General Counsel alleges that Respondent unlawfully engaged in direct dealing when Tobin, on or about October 16, 2013, bypassed the Union and directly solicited employees to resign from Respondent and join him at Stuart Manufacturing, which would operate as a nonunion company. (GC Exh. 1(t), par. 7(c).) The General Counsel also alleges that Respondent engaged in unlawful direct dealing on or about November 4, 2013, when it bypassed the Union and announced and distributed $100 bonuses directly to employees. (GC Exh. 1(t), par. 7(d).)

2. Discussion – Tobin's October 2013 meetings with employees

The General Counsel's assertion that Respondent (through Tobin) engaged in unlawful direct dealing with employees about joining Stuart Manufacturing turns, at least initially, on whether Tobin was Respondent's agent. Since there is no dispute that Tobin was not one of Respondent's employees (and thus lacked actual supervisory authority), the General Counsel maintains that Tobin's conduct is attributable to Respondent because Tobin had apparent authority to act on Respondent's behalf.

"The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action." *Pan Oston Co.*, 336 NLRB 305, 305 (2001) (collecting cases and other supporting authority). "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." Id. at 305–306. "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief." Id. at 306. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management," taking into account "the position and duties of the employee in addition to the context in which the behavior occurred." Id. "The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. . . . In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties." Id. "Although not dispositive, the Board will consider whether the statements or actions of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority." Id. And finally, the Board has emphasized that "an employee may be an agent of the employer for one purpose but not another." Id.

Turning to the facts of this case, I find that although Respondent's employees would have been uncertain about Tobin's precise role with Respondent, Respondent's employees would reasonably have believed that Tobin was authorized to act on Respondent's behalf when he spoke to employees about joining Stuart Manufacturing. Immediately after the asset purchase, Respondent (and Tobin) made it clear that there had been a change in ownership, and that Castleman now owned Respondent and all of its assets. However, Respondent also indicated that it was still coordinating with Tobin about which customers Respondent would retain, and which customers Tobin would handle through Stuart Manufacturing. (FOF, Section II(B)(1)–(2).) In addition, in September and October 2013, Respondent allowed Tobin to use his old office and telephone at Respondent's facility, and also allowed Tobin to go on the shop floor to ask employees if they might be interested in working for him at Stuart Manufacturing.[20] (FOF, Section II(E)(1).) Based on those facts, I find that Tobin had apparent authority to act on Respondent's behalf when he spoke to employees about working for Stuart Manufacturing, because Respondent's employees reasonably would have believed that Respondent and Tobin were working together to restart Stuart Manufacturing, with Tobin as the point-person for that venture.

Although the General Counsel established that Tobin had apparent authority to act on Respondent's behalf when speaking to employees about joining Stuart Manufacturing, the General Counsel did not present sufficient evidence to show that Tobin's conversations with employees about joining Stuart Manufacturing constituted unlawful direct dealing. To the contrary, although the record establishes that Tobin communicated directly with union-represented employees to the exclusion of the Union, the General Counsel did not show that Tobin's conversations with employees were for the purpose of establishing or changing wages, hours, and terms and conditions of employment, or undercutting the Union's role in bargaining. When Tobin spoke to employees, he essentially put out feelers to see if the employees might be interested in joining him at Stuart Manufacturing. It was not possible to discuss any specifics about the revamped company (beyond generally as-

[20] There is no evidence that shop-floor employees were aware that Tobin was erroneously receiving payments on some of Respondent's contracts, or that he was forwarding those payments to Respondent. Accordingly, I have not relied on those facts to support my finding that Tobin had apparent authority to act on Respondent's behalf while speaking to employees about working with him at Stuart Manufacturing.

suring employees that their working conditions would remain the same) because the idea of restarting Stuart Manufacturing was just that – an idea. Given the uncertainty about Stuart Manufacturing's future, and the preliminary nature of Tobin's inquiries to employees about whether they might be interested in working for Stuart Manufacturing, I cannot find that Respondent engaged in unlawful direct dealing even though Tobin had apparent authority to act as Respondent's agent regarding that issue. See generally *Fremont Medical Center*, 357 NLRB 1899, 1904–1905 (2011) (finding no direct dealing violation where a manager made preliminary inquiries to employees about shift changes, but never mentioned the union, had no role in ongoing bargaining, did not attempt to negotiate with or make promises to employees, and had no authority to make shift changes). Accordingly, I recommend that the allegation in paragraph 7(c) of the complaint be dismissed. (See GC Exh. 1(t), par. 7(c).)

3. Discussion – $100 bonuses to employees

There is no dispute that on November 4, 2013, Respondent announced and paid a $100 bonus to all employees because the Company reached one million dollars in sales for the preceding month. The evidentiary record shows that Respondent did not notify or bargain with the Union about the bonus, and also shows that Respondent planned to award the $100 productivity bonus to all employees for any future month that the facility reached the one million dollar sales mark. (FOF, Section II(F)(1).) As its defense, Respondent maintains that the $100 bonus was simply a gift to employees that did not need to be bargained with the Union.

It is well established that an employer and the representative of its employees have a mandatory duty to bargain with each other in good faith about wages, hours, and other terms and conditions of employment. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). The Board has held, however, that employers do not have to bargain about gifts that they give to their employees. Id. As the Board has explained, items "given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors" are properly characterized as gifts. *Benchmark Industries*, 270 NLRB 22, 22 (1984). Conversely, items that are "so tied to the remuneration which employees receive for their work that [the items] are in fact a part of the remuneration" are properly characterized as wages and are subject to the mandatory duty to bargain. *North American Pipe Corp.*, 347 NLRB at 837.

Applying the Board's guidance, I find that the $100 bonus at issue here was not a gift, and instead was a form of compensation that is subject to the duty to bargain. Respondent awarded the bonus because its employees, collectively, reached a performance and production goal for the preceding month. In addition, Respondent promised additional bonuses if employees reached the productivity goal (one million dollars in sales) in future months. There was, therefore, a clear nexus between employees' production and the bonuses that employees received, such that Respondent had a mandatory duty to bargain with the Union.[21]

With that issue resolved, I now turn to the allegation that the General Counsel made about the $100 bonus in the complaint. The General Counsel alleged that Respondent violated the Act when it announced and paid the $100 bonus because those acts constituted unlawful direct dealing with employees. That legal theory is misplaced, however, because there is no evidence that Respondent attempted to negotiate or have a discussion with employees about the $100 bonus – instead, Respondent unilaterally announced and implemented the new bonus program. As the Board has held, "simply notifying the employees that a unilateral change will affect them does not constitute unlawful direct dealing." *Capitol Ford*, 343 NLRB 1058, 1058, 1067 (2004); see also *Spurlino Materials, LLC*, 353 NLRB 1198, 1218 (2009) (dismissing a direct dealing allegation because the employer did not attempt to bargain with employees, but rather, announced a predetermined company decision), adopted in 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011).

Perhaps because it realized this deficiency in its complaint, the General Counsel argued in its posttrial brief that the $100 bonus was both an unlawful unilateral change and an instance of unlawful direct dealing. (See GC Posttrial Br. at 18–19.) While the General Counsel arguably should have amended the complaint before or during trial to add an allegation that the $100 bonus constituted an unlawful unilateral change, it is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990)). That standard has been met here, since: (a) the parties fully litigated the $100 bonus by, among other things, presenting extensive evidence about the nature of the bonus, both Stuart Manufacturing's and Respondent's past practices regarding gifts and bonuses, and the fact that Respondent did not notify or bargain with the Union about the bonus; and (b) the (new) allegation that Respondent's $100 bonus is an unlawful unilateral change is closely related to the (original) allegation that Respondent engaged in unlawful direct dealing when it announced and implemented the $100 bonus, since under either theory, the General Counsel maintains that Respondent unlawfully failed and refused to bargain with the Union about the bonuses. I therefore will consider whether Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally announced and implemented the $100 bonus.

Applying the unilateral change standard (set forth in Section C(1), supra) to the findings of fact in this case, I find that the $100 bonus at issue here constitutes an unlawful unilateral change that violated Section 8(a)(5) and (1) of the Act. The

[21] I am not persuaded by Respondent's argument that the $100 bonus here was a gift because it was given to all employees regardless of their individual performance. Although it is true that an individual employee could theoretically ride the coattails of his or her coworkers and receive a bonus despite contributing little to the cause, the fact remains that the bonus depended on employees collectively achieving some measure of production. The fact that the bonus hinged on employee production makes it a form of remuneration that requires bargaining.

$100 bonus was a new development at Respondent's facility that had a direct impact on employee compensation and the terms and conditions of employment. Respondent fell short with its attempt to show that the $100 bonus was consistent with past practices (of both Stuart Manufacturing and DCX-CHOL), because neither company had an established practice of giving employees at the Fort Wayne facility cash bonuses for collectively reaching a productivity goal. Although both Stuart Manufacturing and Respondent occasionally treated employees to holiday meals, Thanksgiving turkeys, and free raffles, all of those instances were examples of gifts to employees that did not require bargaining. See *Benchmark Industries*, 270 NLRB at 22 (finding that Christmas hams and dinners given to employees over a period of three years were gifts that did not trigger a duty to bargain); see also FOF, Section II(F)(3). The $100 bonus, by contrast, was an unprecedented award of additional compensation at the facility since there was no established practice of paying bonuses to employees for collectively reaching a productivity goal. See *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003) (finding that the employer did not have a past practice of awarding bonuses, since, at most, the employer intermittently handed out bonuses to specific employees at its discretion), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004). Since the $100 bonus was a form of compensation subject to a mandatory duty to bargain, and since Respondent did not fulfill its duty to bargain with the Union before implementing the $100 bonus, Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented the bonus.

In sum, I recommend that the direct dealing allegation in paragraph 7(d) of the complaint be dismissed. (See GC Exh. 1(t), par. 7(d).) I find, however, that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the terms and conditions of employment on November 4, 2013, by announcing and implementing a $100 bonus based on productivity.

E. Did Respondent Unlawfully Withdraw Recognition from the Union?

1. Applicable legal standard and complaint allegation

In *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), the Board reinstated the "successor bar" rule. As the Board explained, the successor bar rule applies where a successor employer has abided by its legal obligation to recognize an incumbent union, and the "contract bar" is inapplicable. "In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for election raised by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period." Id., at 808.

The Board also defined the term "reasonable period of bargaining" for purposes of the successor bar rule. Specifically, "where the successor employer has expressly adopted existing terms and conditions of employment as the starting point for bargaining, without making unilateral changes," the reasonable period of bargaining shall be 6 months, measured from the date of the first bargaining meeting between the union and the successor employer." Id., at 809. However, "where the successor employer recognizes the union, but unilaterally announces and establishes initial terms and conditions of employment before proceeding to bargain," the reasonable period of bargaining shall be a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the union and the successor employer. Id. The party invoking the successor bar rule bears the burden of showing that a reasonable period of bargaining has not elapsed. Id.

In this case, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union on or about January 3, 2014, and thereafter refused to meet and bargain with the Union to negotiate a successor collective-bargaining agreement. (GC Exh. 1(t), pars. 7(h)–(i).)

2. Discussion

After considering the relevant facts, I find that the successor bar applies in this case, and I find that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on January 3, 2014 while the successor bar was still in effect. The evidentiary record establishes that on or about August 19, 2013, Respondent acknowledged that it is a successor employer and recognized the Union as the exclusive collective-bargaining representative of employees in the bargaining unit. Respondent also accepted the terms of the existing collective-bargaining agreement as the starting point for bargaining (i.e., without making unilateral changes, though Respondent did attempt to negotiate certain changes). (FOF, Section II(B)(2), (D).) Under those circumstances, the Union was entitled to a six month period of bargaining, during which Respondent was precluded (under the successor bar) from unilaterally withdrawing recognition from the Union based on a claimed loss of majority support. *UGL-UNICCO Service Co.*, 357 NLRB 801, 808.[22]

Respondent did not comply with the six-month period of bargaining required by the successor bar. Instead, as alleged in the complaint and established in the evidentiary record, Respondent withdrew recognition from the Union on January 3, 2014, without participating in any bargaining sessions with the Union before or after that date despite the Union's requests for bargaining. (FOF, Section II(J).) I find that Respondent's withdrawal of recognition from the Union and failure and refusal to bargain under these circumstances violated Section 8(a)(5) and (1) of the Act.[23]

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[22] Respondent questions the validity of the Board's decision in *UGL-UNICCO Service Co.* (see R. Posttrial Br. at 22–24.), but the Board's decisions are binding on my analysis. Respondent retains the right, of course, to present its arguments about the *UGL-UNICCO Service Co.* decision directly to the Board if Respondent decides to appeal my decision on this issue.

[23] Because I have found that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in violation of the successor bar, I need not rule on the General Counsel's alternative theory that Respondent's decision to withdraw recognition from the Union based on a claimed loss of majority support was tainted

F. Did Respondent Violate the Act when it Unilaterally Changed Employee Pay Dates?

1. Applicable legal standard and complaint allegation

As previously noted, "[u]nder the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes." *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 5.

The General Counsel alleges that on or about March 27, 2014, Respondent unilaterally changed the pay dates of bargaining unit employees without notifying the Union or giving the Union the opportunity to bargain about the change. (GC Exh. 1(t), pars. 7(e), (g).)

2. Discussion

The unilateral change doctrine not only applies to changes to employees' terms and conditions of employment while a collective-bargaining agreement is in effect, but also to changes to employees' terms and conditions of employment after a collective-bargaining agreement expires (with certain exceptions not applicable here). Specifically, if contract negotiations between an employer and a union are pending (e.g., negotiations for a successor collective-bargaining agreement), an employer has a duty to maintain the status quo with the terms and conditions of employment set forth in an expired collective-bargaining agreement. *Southwest Ambulance*, 360 NLRB 835, 843(2014).

The collective-bargaining agreement in this case, though it expired on February 8, 2014, requires Respondent to pay employees every other Wednesday. It is undisputed that in April 2014, Respondent unilaterally changed employee pay dates to the fifth and twentieth of each month, without first notifying or bargaining with the Union. (FOF, Section II(A)(2), (K).)

By unilaterally changing employee pay dates from what was specified in the expired collective-bargaining agreement, and by making this change without notifying or bargaining with the Union, Respondent failed to fulfill its obligation to maintain the status quo regarding employees' terms and conditions of employment. I therefore find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 7(e) and (g) of the complaint.

CONCLUSIONS OF LAW

1. By, on or about August 22, 2013, unilaterally denying Union officials access to the employee break room at Respondent's facility after an employee grievance meeting, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By, on or about October 16, 2013, threatening employees that Respondent would divide into two separate companies, one union and one nonunion, Respondent violated Section 8(a)(1) of the Act.

3. By, on or about November 4, 2013, unilaterally changing employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity without first notifying or bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

4. By, on or about January 3, 2014, withdrawing recognition from the Union and thereafter refusing to meet and bargain with the Union to negotiate a successor collective-bargaining agreement when a successor bar was still in effect, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By, in or about April 2014, unilaterally changing employee pay dates without notifying or bargaining with the Union, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By committing the unfair labor practices stated in conclusions of law 1–5 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

7. I recommend dismissing the complaint allegations that are not addressed in the Conclusions of Law set forth above.

REMEDY

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

Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decisions to: on or about November 4, 2013, change employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity; and, in or about April 2014, change employee pay dates. Backpay for these violations shall be computed in accordance with *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 6 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate affected bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Tortillas Don Chavas,* 361 NLRB 101 (2014).

In addition to the standard remedies that I described above, the General Counsel requested that I also order Respondent to have a representative read a copy of the notice to employees during work time. The Board has required that a notice be read aloud to employees where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Marquez Bros. Enterprises*, 358 NLRB 509, 510 (2012).

by the presence of significant, unremedied unfair labor practices. (See GC Posttrial Br. at 21–23.) However, I note that I have made findings of fact (including credibility findings) that are relevant to that theory, should further analysis be necessary.

Applying that standard, I do not find that Respondent's misconduct in this case was sufficiently serious and widespread to warrant an order requiring the notice to be read aloud to employees by one of Respondent's representatives. Although I have found that Respondent committed various unfair labor practices, this case does not involve widespread misconduct. In addition, this is not a case where bargaining unit employees are unfamiliar with exercising their Section 7 rights or being represented by a Union – to the contrary, the Union has represented the bargaining unit at the facility (through various changes in ownership) for over thirty years. (FOF, Section II(A)(2).) Under those circumstances, the standard remedies that I have set forth in my order will serve the purpose of notifying Respondent and bargaining unit employees of the unfair labor practices that Respondent committed and the rights of employees under Section 7 of the Act. I therefore deny the General Counsel's request that I order Respondent to have one of its representatives read the notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

Respondent, SMI/Division of DCX-CHOL Enterprises, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally denying Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (Union) officials access to the employee break room at Respondent's facility after employee grievance meetings.

(b) Threatening employees that Respondent will divide into two separate companies, one union and one nonunion.

(c) Unilaterally changing employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity without first notifying or bargaining with the Union.

(d) Withdrawing recognition from the Union and failing and refusing to meet and bargain with the Union to negotiate a collective-bargaining agreement for employees in the following appropriate bargaining unit:

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

(e) Unilaterally changing employee pay dates without first notifying or bargaining with the Union.

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

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

(a) On request and for a reasonable period of time of six months (measured from the date of the first bargaining meeting), bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement.

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

(b) Make whole Respondent's employees and former employees for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral decisions to: announce and implement $100 bonuses and change employee pay dates, with interest, as provided for in the remedy section of this decision.

(c) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards covering periods longer than 1 year, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

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

(e) Within 14 days after service by the Region, post at its facilities in Fort Wayne, Indiana, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by Respondent's authorized representative, shall be posted by 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 22,

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

[25] 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."

2013.

(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 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. September 23, 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.

WE WILL NOT unilaterally deny Indiana Joint Board, Retail, Wholesale, Department Store Union, United Food & Commercial Workers, Local 835 (Union) officials access to the employee break room at our facility after employee grievance meetings.

WE WILL NOT threaten employees that we will divide into two separate companies, one union and one nonunion.

WE WILL NOT unilaterally change employees' terms and conditions of employment by announcing and implementing a $100 bonus based on productivity without first notifying or bargaining with the Union.

WE WILL NOT withdraw recognition from the Union and fail and refuse to meet and bargain with the Union to negotiate a collective-bargaining agreement for employees in the following appropriate bargaining unit:

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

WE WILL NOT unilaterally change employee pay dates without first notifying or bargaining with the Union.

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

WE WILL, on request and for a reasonable period of time of 6 months (measured from the date of the first bargaining meeting), bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit and, if an understanding is reached, embody the understanding in a signed agreement.

> [A]ll full-time and regular part-time Production and Maintenance employees, but excluding Guards, Professional employees, Technical employees, Supervisors, and all other office employees at the Company's production facilities located in the City of Fort Wayne and County of Allen, Indiana.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral decisions to announce and implement $100 bonuses and change employee pay dates.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters for each bargaining unit employee.

SMI/DIVISION OF DCX-CHOL ENTERPRISES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-117090 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.