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

NO. 18-1126

INGREDION INCORPORATED d/b/a PENFORD PRODUCTS CO., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

Notice is hereby given this the seventh day of May, 2018, that petitioner Ingredion Incorporated d/b/a Penford Products Co. (hereinafter "Ingredion Incorporated") hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the attached Decision and Order of the National Labor Relations Board entered the first day of May, 2018, in Case Nos. 18-CA-160654 and 18-CA-170682.

A copy of the decision and order is attached to this petition. This petition is proper under 29 U.S.C. § 160(f) and Rule 15 of the Federal Rules of Appellate Procedure.

By *<u>/s/ Brian J. Paul</u>*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18-1126

INGREDION INCORPORATED d/b/a PENFORD PRODUCTS CO., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioner Ingredion Incorporated d/b/a Penford Products Co., by its attorneys, Faegre Baker Daniels LLP, hereby identifies the following parent corporations and publicly held corporations that own 10% or more of its stock:

> Ingredion Incorporated is a publicly traded company. It has no parent company. No publicly traded company has a 10 percent or greater stock ownership in Ingredion Incorporated.

Ingredion Incorporated is a leading global ingredients solutions provider for the food, beverage, paper and corrugating, brewing and other industries.

By */s/ Brian J. Paul*

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Attorneys for Ingredion Incorporated
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Dated: May 9, 2018

CERTIFICATE OF SERVICE

I, Brian J. Paul, hereby certify that on May 9, 2018, I caused a true and complete copy of the Ingredion Incorporated's Petition for Review to be served via First Class Mail to counsel for the parties admitted to participate in the proceedings before the National Labor Relations Board, as follows:

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/s/ Brian J. Paul

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Ingredion, Inc. d/b/a Penford Products Co. *and* BCTGM Local 100G, affiliated with Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO. Cases 18–CA–160654 and 18–CA–170682

May 1, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On August 26, 2016, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs.

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

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

With respect to the principal issue in this case—whether the Respondent unlawfully implemented its last contract offer on September 14, 2015—we agree with the judge that the Respondent's action was unlawful because the parties had not reached an overall impasse in bargaining. In addition to the reasons cited by the judge, we also rely on the fact that Meadows' own initial declaration of impasse on August 18 was negated by his making a new proposal and by the parties' bargaining positions over the subsequent 4 weeks until the Respondent implemented its last offer. During that 4-week period, Meadows demanded and received further concessions from the Union. Further, in a September 11 letter notifying employees of the implementation, the Respondent stated that the parties would continue to work without a contract "until such time as the Union agrees to the terms as contained in our last, best, and final offer." These actions show, at a minimum, that at the time of implementation the parties were not at a deadlock because they had not fully explored all possible paths toward reaching a negotiated agreement. Accordingly, even assuming that both parties had been bargaining in good faith, they had not reached impasse either as of August 18, when the Respondent

[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.

We agree with the judge, for the reasons he explained, that the Respondent's chief labor negotiator, Ken Meadows, engaged in direct dealing with employees when he visited the plant on April 6, 2015. We also agree that Supervisor David Roseberry, at Meadows' direction, denigrated the Union to employees in violation of Sec. 8(a)(1) by falsely stating to employees, in spite of the parties' respective positions at the bargaining table, that the Respondent was willing to and would offer employees a more generous contract, especially as to retirement benefits, but that the Union was unwilling to negotiate. In light of these findings, we find it unnecessary to pass on the judge's additional findings that Roseberry and Supervisor John Swales engaged in direct dealing, and that Swales unlawfully denigrated the Union, as finding these additional violations would not materially affect their respective remedies.

Member Pearce would adopt the judge's findings that Roseberry and Swales engaged in direct dealing, and that Swales unlawfully denigrated the Union. As stated in fn. 3, infra, these additional violations provide further support for a finding that the Respondent violated Sec. 8(a)(5) and (1) by engaging in surface bargaining.

We also agree that the Respondent, through Meadows, violated Sec. 8(a)(5) and (1) by delaying in providing requested information to the Union. In addition to the reasons given by the judge, we note that Meadows initially told the Union that he would not necessarily provide the requested information about the existing defined-benefit pension because his contract proposal did not include continuation of that plan. That information was presumptively relevant to bargaining, as the judge found, and Meadows could not and did not make it irrelevant simply by omitting the existing plan from his own bargaining proposal.

[2] We agree with the judge for the reasons he states that the remedial notice, in addition to being posted, should be read aloud to the unit employees in order to dissipate as much as possible the lingering effects of the Respondent's serious unfair labor practices. We also agree that the notice should be read to unit employees by Meadows, given his dominating role in negotiations and his direct responsibility for most of the violations found, or (at the Respondent's choice) by an agent of the Board with Meadows and other corporate officials responsible for labor relations present. In cases where a particular corporate official, to the knowledge of employees, was directly responsible for many of the violations that justified the read-aloud requirement, the Board has required (with judicial support) that individual to read the notice, in order to make the remedy fully effective. See *Domsey Trading Corp.,* 310 NLRB 777, 779–780 (1993), enfd. 16 F.3d 517 (2d Cir. 1994); *Texas Super Foods, Inc.,* 303 NLRB 209 (1991); *Monfort of Colorado,* 284 NLRB 1429, 1479 (1987), affd. sub nom. *United Food and Commercial Workers Intern. Union, AFL–CIO v. NLRB,* 852 F.2d 1344 (D.C. Cir. 1988); *Conair Corp.,* 261 NLRB 1189, 1285 (1982), enfd. in relevant part 721 F.2d 1355 (D.C. Cir. 1983), cert. denied 467 U.S. 1241 (1984). In other such cases, the Board has—at the employer's option—permitted a Board agent to read the notice with that official present. See *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996).

Member Emanuel would not include a notice-reading requirement in this case. Recognizing that a notice-reading is an extraordinary remedy only for instances in which a respondent's unlawful conduct is widespread and sufficiently serious or egregious, Member Emanuel believes that a notice-reading is neither necessary nor appropriate to remedy the violations in this case because the Board's traditional remedies would suffice to inform employees of the Respondent's unlawful conduct.

We shall further modify the order in accordance with this decision, as set forth below, and we shall substitute the attached notice for that set out in the judge's decision.

initially declared impasse, or as of September 14, when the Respondent implemented its last offer. The implementation therefore violated Section 8(a)(5) and (1) of the Act. See, e.g., *Newcor Bay City Division of Newcor,* 345 NLRB 1229, 1238–1239 (2005), enfd. 219 Fed. Appx. 390 (6th Cir. 2007).[3]

ORDER

The National Labor Relations Board orders that the Respondent, Ingredion, Inc., d/b/a Penford Products Co., Cedar Rapids, Iowa, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Unilaterally implementing its last, best, and final offer at a time when it has not reached a valid impasse in bargaining with BCTGM Local 100G, affiliated with Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO (the Union) for a new collective-bargaining agreement.

(b) Bypassing the Union and dealing directly with employees concerning changes in wages, hours and working conditions.

(c) Unreasonably delaying in providing the Union with relevant and necessary information it requested regarding fringe benefits, including the pension plan.

(d) Threatening employees that they might lose their jobs if they went on strike.

(e) Denigrating the Union by falsely telling employees that the Respondent was willing to offer a better contract but that the Union would not negotiate.

(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, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees employed by the Respondent at its Cedar Rapids, Iowa facility, except all monthly paid employees, and guards and supervisors as defined in the National Labor Relations Act.

(b) On request, rescind the changes in terms and conditions of employment that were unilaterally implemented on September 14, 2015, and put into effect all the terms and conditions of employment established by the collective-bargaining agreement that expired by its terms on

[3] Having found the Respondent's implementation unlawful because the parties had not exhausted the possibility of reaching agreement, we find it unnecessary to pass on the judge's independent finding that the Respondent's implementation was unlawful because the Respondent had engaged in surface bargaining, as finding this additional violation would not materially affect the remedy. For the same reason, we find it unnecessary to pass on the judge's finding that the Respondent, after it implemented its final offer, made additional unilateral changes to unit employees' terms and conditions of employment in violation of Sec. 8(a)(5). The make-whole remedy for the unlawful implementation—restoration, at the Union's request, of the preimplementation terms of employment—will also undo those additional changes.

Member Pearce would adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by engaging in surface bargaining. From the outset of the negotiations, the Respondent refused to consider the existing collective-bargaining agreement—which represented the product of a nearly 70-year bargaining history—and sought an entirely new contract that imposed significant reductions in terms and conditions of employment. Member Pearce agrees with the judge that Meadows made several comments before and during bargaining that demonstrate the Respondent approached the negotiations with a closed mind and would only reach an agreement on its own terms. He further notes that Meadows' explanation for not initially providing the Union with requested pension plan information—that the Respondent's contract proposal eliminated the existing plan—indicates the Respondent had no real intent to compromise or settle differences. See *Regency Service Carts,* 345 NLRB 671, 672 (2005) (employer's statement that union's information request regarding subcontracting was irrelevant because "there won't be any contract with a prohibition on subcontracting" was indicative of bad-faith bargaining). Member Pearce also agrees with the judge that the Respondent's failure to provide a legitimate justification for the dramatic changes it proposed and its refusal to meaningfully address the Union's proposals are evidence of surface bargaining. Even as to those concessions the Respondent did make, Member Pearce would find that they further evince bad faith. As the judge found, the Respondent's concessions involved reversions to the status quo, items of little or no monetary value, or permissive subjects of bargaining. See *Mid-Continent Concrete,* 336 NLRB 258, 260–261 (2001) (finding evidence of bad faith based on the Respondent's negotiating style, which was "to put forward a harsh bargaining proposal, stand by the proposal, then as the negotiations dragged on, concede no more than the status quo, and stall the negotiations by refusing or delaying its response to any additional proposals"), enfd. sub nom. *NLRB v. Hardesty Co.,* 308 F.3d 859 (8th Cir. 2002). Finally, the Respondent's conduct away from the bargaining table—including its efforts to bypass the Union and deal directly with employees, supervisors' statements denigrating the Union, its delay in providing relevant requested information until the day before the existing collective-bargaining agreement expired, and its unilateral changes in terms and conditions of employment—also evidenced bad faith. See, e.g., *Bryant & Stratton Business Institute,* 321 NLRB 1007, 1042, 1044 (1996), enfd. 140 F.3d 169 (2d Cir. 1998); *General Electric Co.,* 150 NLRB 192, 195 (1964), enfd. 418 F.2d 736 (2d Cir. 1969).

Member Pearce would also adopt the judge's findings that the Respondent further violated Sec. 8(a)(5) after it implemented its last contract offer by making additional unilateral changes to the method in which it assigned overtime and the method for scheduling hours. He agrees with the judge that *NCR Corp.,* 271 NLRB 1212 (1984), is inapplicable here and notes that in that case the parties disputed the meaning of a term of their collective-bargaining agreement, whereas here there was no negotiated agreement, only an unlawfully implemented offer.

August 1, 2015, and maintain those terms in effect until the parties have bargained to an agreement or a valid impasse.

(c) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits, with interest as provided for in the remedy section of the judge's decision.

(d) Make contributions, including any additional amounts due, to any funds established by the collective-bargaining agreement with the Union that was in existence on August 1, 2015, into which the Respondent would have paid but for the unlawful unilateral changes as provided for in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, offer all employees discharged, suspended, or otherwise denied work opportunities, solely as a result of the unilateral implementation of the Respondent's last, best, and final offer on September 14, 2015, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make employees whole for any loss of earnings and other benefits suffered due to being suspended, discharged, or otherwise denied work opportunities as a result of the unilateral implementation of the Respondent's last, best, and final offer in the manner set forth in the remedy section of the judge's decision.

(g) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Within 14 days from the date of this Order, remove from its files any reference to discipline imposed pursuant to the Respondent's unilaterally implemented last, best, and final offer on September 14, 2015, and within 3 days thereafter notify those employees, in writing, that this has been done and that the discipline will not be used against them in any way.

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

(j) Within 14 days after service by the Region, post at its facility in Cedar Rapids, Iowa, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 2015.

(k) During the time that the notice is posted, convene the unit employees during working time at the Respondent's Cedar Rapids, Iowa facility, by shifts, departments, or otherwise, and have Ken Meadows read the attached notice to the assembled employees, or permit a Board agent, in the presence of Meadows and other corporate officials responsible for labor relations, to read the notice to employees.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. May 1, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

[4] 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."

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement a last, best, and final offer at a time when we are not at a valid impasse in bargaining with BCTGM Local 100G, affiliated with Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO (the Union) for a new collective-bargaining agreement.

WE WILL NOT bypass the Union and deal directly with you concerning changes in your wages, hours and working conditions.

WE WILL NOT unreasonably delay in providing the Union with relevant and necessary information it requests regarding fringe benefits, including the pension plan.

WE WILL NOT threaten you that you might lose your job if you go on strike.

WE WILL NOT denigrate the Union by falsely telling you that we are willing to offer a better contract but that the Union will not negotiate.

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, on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, for the following appropriate unit:

All hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees employed by the Respondent at its Cedar Rapids, Iowa facility, except all monthly paid employees, and guards and supervisors as defined in the National Labor Relations Act.

WE WILL on request, rescind the changes in terms and conditions of employment that we unilaterally implemented on September 14, 2015, and put into effect all the terms and conditions of employment established by the collective-bargaining agreement that expired by its terms on August 1, 2015, and maintain those terms in effect until we have bargained to an agreement or a valid impasse with the Union.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL make contributions, including any additional amounts due, to any funds established by the collective-bargaining agreement with the Union that were in existence on August 1, 2015, into which we would have paid but for the unlawful unilateral changes.

WE WILL within 14 days of the Board's Order, offer all employees discharged, suspended, or otherwise denied work opportunities, solely as a result of the unilateral implementation of our last, best, and final offer on September 14, 2015, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits suffered due to being discharged, suspended, or otherwise denied work opportunities as a result of the unilateral implementation of our last, best, and final offer, with interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to discipline imposed pursuant to our unilaterally implemented last, best, and final offer on September 14, 2015, and WE WILL, within 3 days thereafter, notify those employees, in

writing, that this has been done and that the discipline will not be used against them in any way.

INGREDION, INC. D/B/A PENFORD PRODUCTS

The Board's decision can be found at www.nlrb.gov/case/18-CA-160654 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.

Tyler Wiese and *Chinyere Ohaeri, Esqs.,* for the General Counsel.
Stuart Buttrick and *Ryan Funk, Esqs.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cedar Rapids, Iowa, on April 18–21 and April 27–April 28, 2016. BCTGM Local 100G, affiliated with, Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO (the Union), filed the charge in Case 18–CA–160654 on September 24, 2015, and an amended charge on December 29, 2015,[1] and the General Counsel issued a complaint on January 28, 2016. On February 29, 2016, the Union filed the charge in Case 18–CA–170682. On March 8, 2016, the General Counsel issued an order consolidating cases and amendment to complaint in Cases 18–CA–160654 and 18–CA–170682 (the complaint). On April 16, 2016, the General Counsel issued a second amendment to the complaint.

At the commencement of the hearing on April 18, 2016, counsel for the Respondent orally denied the substantive allegations of the amendment to the complaint but indicated he had "no other procedural objection to its amendment at this point." (Tr. 10.) In its posthearing brief the Respondent contends that certain complaint allegations in the second amendment to the complaint with respect to statements made by the Respondent's Supervisors David Vislisel, John Swales, and Brad Bumba during the period of July, August, and September 2015 are barred by Section 10(b) of the Act. The Respondent asserts that these complaint allegations were made more than 6 months from the date of the allegedly unlawful statements and are not closely related to a timely filed charge. The April 16, 2016 complaint allegations allege, in summary, that the Respondent violated Section 8(a)(1) by: in July, 2015, Vislisel threatening employees that they would never return to work if they went on strike; in late August 2015 and again in September 2015, Swales misrepresenting the Union's position in bargaining by informing employees that the Union was bargaining in bad faith and was at fault for any failure by the Respondent and the Union to reach an agreement; and about September 14, 2015, Bumba misrepresenting the Union's position in a collective-bargaining by informing employees that the Union was refusing to bargain and was at fault for any failure by the Respondent and the Union to reach an agreement. The charge in 18–CA–160654 was filed on September 24, 2015, and amended on December 29, 2015 (GC Exhs. 1(a) and (c)). As amended, the charge specifically alleges that the Respondent threatened employees with replacement and misrepresented to employees the bargaining positions of the Union and the Respondent in violation of Section 8(a)(1). In order to be considered timely for purposes of Section 10(b) the complaint allegation must be closely related to a charge allegation and must have occurred less than 6 months before the charge was filed. *Old Dominion Freight Line*, 331 NLRB 111 (2000); *Redd-I, Inc*., 290 NLRB 1115, 1116 (1988). The complaint allegations in the second amendment to the complaint referred to above meet both of these requirements and are thus timely under Section 10(b).

The Respondent filed answers to the complaint and the second amendment to the complaint denying the substantive unfair labor practice allegations.[2]

The complaint, as amended, alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by: bypassing the Union and dealing directly with employees; delaying in providing necessary and relevant information to the Union; engaging in surface bargaining; implementing its final offer on September 14, 2015, without reaching a valid impasse; and, after September 14, 2015, making unilateral changes in its amended offer. The complaint also alleges that the Respondent violated Section 8(a)(1) by: threatening to replace employees if the Union did not grant concessions; misrepresenting to employees the Union's bargaining position; and threatening employees they would never return to work if they went on strike.[3]

On the entire record[4], including my observation of the de-

[1] All dates are in 2015 unless otherwise indicated.

[2] At the trial, the General Counsel withdrew, with my approval, paragraphs 4(b) and 5(d) of the complaint, which alleged violations of Sec. 8(a)(1). Near the conclusion of the General Counsel's case in chief, the General Counsel introduced a document entitled "order consolidating cases and amendment to complaint" (GC Exh. 3), which consolidated all of the remaining complaint allegations into one document for use during the remainder of the trial and for the filing of post-hearing briefs. I found this document to be of substantial assistance.

[3] On March 16, 2016, the Regional Director for Region 18, on behalf of the National Labor Relations Board (the Board), filed a petition for an injunction under Section 10(j) of the Act regarding the allegations in the complaint in the United States District Court for the Northern District of Iowa in Case 1:16-cv-00038-LRR (GC Exh. 75). I have been administratively advised that on July 28, 2016, Chief Judge Linda R. Reade issued an order denying the request for an injunction.

[4] After the record closed, the parties entered into a written stipulation correcting the transcript at p. 413 in certain respects. Thereafter, the parties submitted the transcript correction and a corrected version of Jt. Exh. 17. I reopened the record for the limited purpose of receiving

meanor of the witnesses,[5] and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, maintains an office and place of business in Cedar Rapids, Iowa and has been engaged in the manufacture and distribution of ethanol and specialty food, health care, and industrial starches. During the 12-month period ending December 31, 2015, the Respondent, in conducting its business operations described above purchased and received at its Cedar Rapids, Iowa facility goods valued in excess of $50,000 from points directly outside the State of Iowa and sold and shipped from its Cedar Rapids, Iowa facility goods valued in excess of $50,000 directly to points located outside the State of Iowa. The 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

Background

The Respondent is a multi-national food products company. On March 12, 2015, the Respondent purchased Penford Products (Penford), including the milling facility located in Cedar Rapids, Iowa. This facility processes corn into starch, fiber meal and protein. The meal, protein, and fiber are sold as agricultural byproducts and approximately half the starch is processed into cornstarch products for both food and industrial use, and the other half is processed into fuel grade ethanol. In total, there are approximately 230 employees at the Cedar Rapids facility. Approximately 165 employees are in the production and maintenance bargaining unit represented by the Union. The Union has had a history of collective-bargaining for the bargaining unit employees at this facility since 1948.

At the time of the Respondent's purchase of Penford, the Union and Penford were parties to a collective-bargaining agreement which was to expire by its terms on August 1, 2015. (Jt. Exh. 16.) After its purchase of Penford, the Respondent recognized the Union and assumed the existing collective-bargaining agreement at the Cedar Rapids facility and continued to operate the plant under the terms of that agreement. At the time of its purchase of the Cedar Rapids facility, the Respondent operated nine other plans in the United States. At five of those facilities, employees are represented by a union.

During the negotiations that ensued in 2015 between the Respondent and the Union, the Respondent's chief negotiator was Ken Meadows, a director of human resources for the Respondent. Plant Manager Erwin Froehlich, Operations Manager Levi Wood, and Kim Villegas, a director of human resources for the Respondent, were also members of the Respondent's bargaining committee. The Union's chief negotiators were Jethro Head, vice president of the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO, (the International Union) and Christopher Eby, then the local union president. The other members of the Union's bargaining committee were Matt Maas, the local union vice president; Renita Shannon, then the local union recording secretary, and bargaining committee member Kelly Yeisley.

The Respondent's April 6, 2015 Visit to the Facility

Paragraph 5(a) of the complaint alleges that about April 6, 2015, the Respondent, by Meadows, violated Section 8(a)(1) by threatening employees that the Respondent could replace them if the Union failed to give the Respondent the concessions it was seeking. Paragraph 13(a) of the complaint alleges that about April 7, 2015, the Respondent, by Meadows, bypassed the Union and engaged in direct dealing by repeatedly asking employees what they wanted to obtain in upcoming contract negotiations in violation of Section 8(a)(5) and (1).

On April 6, 2015, Meadows visited the Cedar Rapids facility for the first time. He was accompanied by Mark Madsen, a vice president of manufacturing for the Respondent and Becky Tinkham, the Respondent's vice president of human resources. The purpose of Meadows' visit was to meet the management staff and the local union committee. Meadows' uncontradicted testimony establishes that this visit was consistent with his practice of touring plants that the Respondent had purchased.

After meeting with the managers and supervisors at the Cedar Rapids facility, Meadows met with local union officers. Meadows was accompanied by Tinkham, Patricia Drahos, then the human resources manager at the Cedar Rapids facility and Phil Kleutz then the operations manager at the Cedar Rapids facility. Present at the meeting for the Union were Eby, Shannon, Maas, and Vaude Wilford, the then local union vice president.

Shannon testified that Meadows introduced himself as the Respondent's human resources representative and stated that he would be the chief negotiator for the Respondent in the upcoming negotiations for a new contract. Initially, there was some discussion of other matters, including the Respondent's shutting down of the "man-lifts"[6] that were in use in the plant after it took over the operation of the facility in March 2015. Later in the meeting, the topic of the employees' health insurance came up and Drahos indicated that the coverage had 200 and 400

these documents into evidence. I approve the stipulation and order that the transcript be corrected in accordance with the stipulation. I further order that the corrected version of Jt. Exh. 17 replace the original Jt. Exh. 17.

[5] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what a witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.* 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

[6] "Man-lifts" are open elevator that employees, at times, used to go from one floor to another in the facility.

dollar deductible amounts. According to Shannon, Meadows then said "bye-bye" and waived his hand. When the topic of the existing pension plan arose, Meadows again waived his hand and said "bye-bye." Shannon also testified that respect to the upcoming negotiations, Meadows said that "If we went out on strike, he knew what steps he would have- could take up and to getting rid of all the current workforce and hiring back who he wanted." (Tr. 228–229.)

Eby testified that early in the meeting with Meadows, he protested that there was no notification regarding the shutdown of the "man lifts." According to Eby, Meadows said he would not apologize for shutting them off, and that he did not want to have to go to an employee's house and tell somebody that an employee had been injured on one. Meadows also stated that they could have done a better job on giving notice to the Union, but then proceeded to tell Eby that he was not going to be asking permission to do things. Eby testified that during the discussion Meadows said that there were going to be radical changes in the contract and that he had been through a lot of negotiations and knew how it worked, and that "eventually I can replace you." (Tr. 401.)

Shannon testified that when she went home that day after work she drafted some handwritten notes about the meeting with Meadows. Approximately 2 days later, Shannon met with Eby, Maas, and Wilford and together they reviewed her handwritten notes of the meeting with Meadows. Shannon then prepared typewritten notes regarding the meeting based upon the recollection of the four employees (GC Exh. 55).[7] As relevant to the allegations of the complaint, this document indicates "Pat Drahos brought up the 200/$400 deductibles and Mr. Meadows waived his hand bye-bye. "These notes further indicate that Meadows stated "There are several things that are non-negotiable and not open for discussion relating to the contract, we both have options but you will not like yours. You can strike and after a certain number of days I can replace you and hire back whoever I want. (Underline only recalled by M. Maas and R. Shannon.)"

Meadows testified that early in the meeting he discussed the shutdown of the "man-lifts" with Eby and that Eby had indicated that the Respondent could not shutdown the "man-lifts" without the Union's permission. Meadows indicated that Respondent believed that "man lifts" were dangerous and then stated that "some things are not negotiable, Ingredion will not negotiate a man's life" and that the Respondent would not seek permission to shut down the man lifts. Meadows also stated, however, that the Respondent should communicate that type of issue to the Union as it was being done.

Meadows further testified that when Drahos began to describe the health insurance deductibles, he raised his hand to indicate "stop" because he did not want to get into the details of the existing employee insurance because he had not had a chance to review it. Meadows specifically denied that at this meeting he threatened that the Respondent would replace employees.

Phil Kleutz testified briefly regarding this meeting. Kleutz testified only that it was a general discussion and that he recalled some discussion about man lifts and the Respondent's code of conduct.

I credit the testimony of Eby and Shannon to the extent it conflicts with that of Meadows regarding this meeting. I find that the demeanor of Shannon and Eby reflected a sincere desire to testify truthfully. In addition, at the time of the hearing, Eby and Shannon were no longer officers of the Union but were currently employed by the Respondent. As current employees who testified against the interest of the Respondent, it is unlikely that the testimony of Shannon and Eby is false. The Board has noted that when employees testify in a manner which contradicts statements by their supervisors, it is likely to be particularly reliable, since such witnesses are testifying adversely to their own economic interest. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 at 1 fn. 2 (2014); *Bloomington-Normal Seating Co.,* 339 NLRB 191, 193 (2003). See also *Flexisteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). As noted above, the testimony of Eby and Shannon is corroborated in many respects by the notes prepared after the meeting.

Based on Shannon's credited testimony, I find that when Drahos brought up the deductible amounts in the current insurance Meadows waived his hand and said "bye-bye." I also find that when the subject of the pension plan came up, Meadows again waived his hand and said "bye-bye."

With respect to the issue of what Meadows said to the employees present at this meeting regarding replacing employees in the event of the strike, I find that Eby's testimony is the most reliable version of what Meadows said as it is more inherently plausible based on the record as a whole. I also find, however, that the notes compiled by the four employees shortly after the meeting with Meadows, are also reliable to the extent they are consistent with Eby's testimony. Accordingly, based on a synthesis of Eby's testimony and the post-meeting notes, I find that Meadows stated that there was going to be radical changes in the contract. Meadows also stated that he had been through a lot of negotiations and knew how it worked and that they both have options but the Union would not like its option, as it could strike, but eventually he could replace the employees.

In considering whether this statement constituted an unlawful threat in violation of Section 8(a)(1), I note that in *Eagle Comtronics, Inc*., 263 NLRB 515 (1982), the Board held that an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike.[8] The Board has held that such comments do not constitute impermissible threats under Section 8(a)(1) or objectionable conduct to an election. The Board indicated that an employer may address the subject of striker replacement without fully detailing the protections set forth in *Laidlaw,* supra, as long as it does not threaten that as a result of

[7] At the hearing, Shannon testified she no longer had her handwritten notes of the April 6 meeting with Meadows.

[8] It is well established that when employees engage in an economic strike, they may be permanently replaced. *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

strike employees will be deprived of their rights in a manner inconsistent with *Laidlaw*.

In the instant case, applying the principles set forth, I find that the statement that Meadows made to the employees regarding replacing employees in the event of a strike does not violate Section 8(a)(1) of the Act. I find that cases relied on by the General Counsel in support of this allegation are distinguishable. In *Baddour, Inc*., 303 NLRB 275 (1991), and *Larson Tool & Stamping Co*., 296 NLRB 895 (1989), the statements made by the employers indicated that employees who went on strike would lose their jobs, as a result of going on strike and being replaced. Accordingly, I shall dismiss paragraph 5(a) of the complaint.

After meeting with the employee members of the union committee on April 6, Meadows requested to be taken on a tour of the plant. In particular, Meadows was interested in seeing the ethanol department since the Respondent did not have any other facilities that produced ethanol. Meadows was accompanied by Kleutz and Wood on the tour and spoke to approximately seven bargaining unit employees.

Current employee Jeff Rausch, an ethanol operator, testified that on approximately April 5, 2015, during the morning, he was working in the ethanol control room with another employee, David Fuchs. Meadows came into the control room along with Kleutz and Wood. Rausch testified that Meadows introduced himself and said that he had been with the Respondent for approximately 15 years and that he would be negotiating the contract for the Respondent. Meadows then asked Rausch and Fuchs what they would be looking for in a contract. Rausch brought up "gap insurance"[9] and asked if that would be something that the Respondent would continue. Meadows replied that gap insurance "would be something that they would be looking into."

According to Rausch, shortly thereafter, maintenance employee Jeff Kuddes and another maintenance man came into the control room. Meadows introduced himself to the newly arrived employees and Kuddes asked Meadows what kind of a percentage employees would be receiving in a wage increase. Meadows asked Kuddes what kind of a percentage was he thinking about getting, and Kuddes replied 3 to 3.5 percent. Meadows replied "no" It would probably be more like 2 to 2.5 percent. Kuddes also asked Meadows if something could be done for the vacation schedule for maintenance employees. Meadows replied that the maintenance department was understaffed and that the Respondent should be hiring more people, so some employees would not have to work so many days. Meadows also indicated that he believed that the third shift was a dangerous shift to be working and brought up the issue of a shift rotation schedule. Meadows mentioned that he did not think that the employees' present insurance plan was that good and would be under a "Cadillac tax" that the government would place on them for having a policy like that. Meadows also mentioned that pensions were a thing of the past and "would probably be going away." Meadows said that he would be back in May with a plan for negotiations. According to Rausch, Meadows spoke to employees for approximately 25 minutes. Rausch had been employed at the facility since 1988 and this was the first time anybody in management had spoken to him about upcoming negotiations.

Fuchs, who was also employed by the Respondent at the time of the hearing, testified that he was in the ethanol control room with Rausch on approximately April 7, 2015, when Meadows, Kleutz, and Wood came in. According to Fuchs, Kuddes and another maintenance employee came into the control room shortly thereafter. Fuchs recalled Meadows asking what employees were looking for in a contract. Fuchs testified that when the subject of wages came up, in the employees brought up a 3 to 3.5 percent raise and Meadows replied that it would be more like 2 to 2.5 percent. Fuchs recalled Meadows saying that pensions would be gone, along with the current insurance and that employees would have to have "their" insurance. Meadows also brought up a "Cadillac tax" on the existing insurance that would be charged to the Respondent. Fuchs recalled that Kuddes brought up the issue of more vacation for someone with his seniority. Fuchs also testified Meadows said that more employees would be hired. According to Fuchs, Meadows said that third shift work was dangerous to do all the time and brought up the concept of rotating shifts. Fuchs also recalled the conversation with Meadows lasting approximately 25 minutes. Fuchs testified that he worked at the plant since 1984 and that nobody in supervision had ever spoken to him about upcoming negotiations.

Current employee Jeff Kuddes testified that he had been employed at the Cedar Rapids facility for approximately 8 and a half years as a maintenance employee. According to Kuddes, he and another maintenance employee, Jason Nemec, entered the control room in approximately April 2015, and encountered Meadows, Kleutz, Wood, Rausch and Fuchs. As he entered the control room, Kleutz told Meadows "There's two of your six-day a week employees." Meadows said that he did not like that schedule and that it was too many hours of work. After Rausch and Fuchs had finished their conversation, Wood asked Kuddes if he had questions for Meadows. Kuddes first asked Meadows if he was going to have a job after August 1, and Meadows assured him that he was as Meadows had a preference for in-house maintenance. Kuddes then brought up the pay raises because the pay was frozen and he recalled Meadows said that he was going to be looking into that area. Kuddes also raised the issue of employees in his seniority level receiving more vacation. Kuddes recalled being in the meeting for approximately 15 minutes.

At the time of the hearing Bruce Bishop was employed by the Respondent as an operator in the dry starch department and had been employed at the facility since 1987. Bishop testified that in April 2015, he was working in building 95 at the facility when Wood, Kleutz, and Meadows approached him. Wood stated that Meadows was the negotiator for the Respondent. Bishop then told Meadows "Well, great, you and I will just go out for a couple of beers after work tonight, and we'll get this straightened out, and you'll be back on a plane to Chicago in the morning, no problem." Meadows replied by asking Bishop what he would like to see in a contract. Bishop replied on top of

[9] The record establishes that "gap insurance" is health insurance that would cover a retired employee from the time of retirement until the retired employee was eligible for Medicare at 65.

a big raise, he would like to see a $5 raise to his pension multiplier. Meadows replied "I do not think you going to see that." Meadows then stated, "Seriously, what would you like to see?" Bishop stated he was close to retirement and that he was interested in the pension and the gap insurance. Meadows then asked Bishop if he was planning on retiring soon. When Bishop replied that he would like to have that option, Meadows stated that he really did not need any gap insurance unless he was sure that he was going to be retiring soon. Bishop testified that he determined that continuing this meeting was not going to be "a real friendly exchange," and told Meadows that he had a lot of work to do and walked away. Prior to this meeting, no one in management had ever spoken to Bishop about upcoming negotiations.

Meadows testified in a general fashion regarding meetings he had with bargaining unit employees while he was on his tour of the plan. Meadows testified that he told employees that when a company is purchased often employees have a lot of questions about the company that purchased them. He told employees that if there were any questions, he would be more than happy to answer them. According to Meadows, employees asked him questions about products that were made at other Respondent facilities. He recalled a comment made by one employee about getting ready to retire and saying he did not want to lose gap insurance. Meadows said there was no discussion of this issue and he merely responded that if gap insurance was something that was of importance to employees, they should contact the bargaining committee and make sure to let them know. According to Woods, after Meadows was introduced to employees, Meadows only engaged in general conversation with employees, such as asking questions regarding how many years an employee had been with the company and what hobbies and interests that they had. Kleutz testified that he recalled Kuddes bringing up gap insurance and the different vacation levels for employees based on seniority. Wood recalled generally the issue of pay would come up and employees would say they would like to have a raise. According to Kleutz, Meadows did not bring up any of those topics. If the employees raised an issue, Meadows would merely tell them to talk to their bargaining representative about it.

I credit the testimony of Rausch, Fuchs, Kuddes and Bishop over that of Meadows, Kleutz and Woods. The demeanor of all of the employee witnesses convince me they were making a sincere effort to testify truthfully. With regard to Meadows conversation with employees in the ethanol control room, the testimony of Rausch and Fuchs has the type of detail that renders it reliable. The testimony is also a mutually cooperative. I find that their version of this meeting is more reliable than that of Kuddes, as his testimony did not have the same level of detail. I found Bishop to be a very convincing witness regarding his discussion with Meadows because of the detail contained in his testimony. I note that all of the employee witnesses were currently employed by the Respondent and testified adversely against it, thus making it unlikely that their testimony is untruthful. On the other hand, I found the testimony of Meadows, Kleutz, and Wood to be vague and without the type of detail that would render it reliable. Their demeanor convinced me that they were testifying in a manner that they thought would support the Respondent's position.

Based on the credited testimony of the employee witnesses, I find that both in the ethanol control room and in his meeting with Bishop, Meadows asked employees what they wanted to see in a contract and then engaged in a substantive discussion of whether what employees were seeking was something that the Respondent was going to consider. It is clear that this type of questioning of employees by a high level of management official regarding what they wanted to see in a contract, and then debating the relative merits of the issues raised, had not occurred previously in the experience of long tenured employees at the Cedar Rapids facility.

In *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), the Board set forth the criteria that it utilizes in determining whether an employer has engaged in direct dealing in violation of Section 8(a)(5) and (1) as follows:

> (1) [T]hat the Respondent 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.

There is no question regarding the fact that Meadows communicated directly with bargaining unit employees and that the Union was excluded from these conversations. With respect to the second factor noted above, I find that Meadows questioning of employees was for the purpose of changing conditions of employment and undercutting the Union's role in bargaining. I note, in this regard, that Meadows questioning of employees occurred less than 2 months before collective-bargaining negotiations began for the first time between the parties. In addition, after seeking input from employees as to what they would want to see in the contract, Meadows indicated that he would be back in May with a plan for negotiations. These conversations also occurred on the same day that Meadows told the employee members of the union committee that there would be radical changes in the existing contract. In the circumstances present here, it is clear that the Respondent was seeking to ascertain employee opinion prior to the commencement of bargaining. The Board has consistently found that such conduct constitutes direct dealing and violates Section 8(a)(5) and (1). *Allied-Signal, Inc.*, 307 NLRB 752, 753–754 (1992); *Alexander Linn Hospital Association*, 288 NLRB 103, 106 (1988), enfd. 866 F.2d 632, 636 (3d Cir. 1989). Accordingly, I find that on April 6, 2015, the Respondent, through Meadows, engaged in direct dealing with employees in violation of Section 8(a)(5) and (1) of the Act, as alleged in paragraph 13(a) of the complaint.

The Bargaining Between the Parties through September 14, 2015

Facts

On May 11, 2015, Meadows sent a notice to both the Union and the FMCS to terminate the existing contract between Penford and the Union which the Respondent had assumed and which was set to expire on August 1, 2015 (GC Exh. 15). Meadows letter also stated:

> You are further notified that if said proposed negotiating conference fails to result in the execution of a satisfactory contract by the termination date of the existing contract, the existing contract and practices or customs hereunder are hereby declared to be terminated and no further force or effect as of such later date.

In his letter, Meadows also requested that the Union send him available dates to meet beginning on June 1, 2014. On May 13 the Union also sent a notice to reopen the contract to the Respondent (R. Exh. 14).

On May 13, the Union sent a letter to the Respondent (corrected Jt. Exh. 17) requesting a substantial amount of information including the following:

> [T]he total dollar cost . . . For each fringe benefit during the period of May 1, 2014 through May 1, 2015.In addition, the accounting method for the cost of these benefits.
>
> The cents per hour individual cost for each dollar increase to the pension multiplier.
>
> The cents per hour for individual for each 1% increase in the direct contribution plan.

Prior to the commencement of the negotiations, the Respondent provided all the information sought by the Union in its May 13 information request, except for the requested information noted above.

Throughout the 2015 negotiations, Shannon was the primary note taker for the Union while Wood was the primary note taker for the Respondent. The notes taken by Shannon during negotiations were introduced as General Counsel Exhibit 7. During the trial, Shannon testified with more specificity as to who the speaker was with regard to the matters contained in her notes. This annotated version of her notes was introduced as General Counsel Exhibit 7a. Woods notes were introduced as Respondent Exhibit 67. Both Eby and Froehlich took less extensive notes which I have also considered in reaching my factual findings. The notes taken by Shannon are detailed and complete and, for the most part, are consistent with the notes taken by Wood. I have principally relied upon the annotated version of Shannon's notes and the notes taken by Wood in setting forth the facts of what occurred at each bargaining session as I find them to be the most reliable evidence as to what transpired. To the extent necessary, I will resolve conflicts between the notes of Shannon and Wood. I will also resolve, as necessary, conflicts between the notes of Shannon and Wood and the testimony of witnesses. The Board has long held that bargaining notes can be considered as substantive evidence that is useful in determining what occurred at meetings. *Pacific Coast Metal Trades Council (Lockheed Shipbuilding)*, 282 NLRB 239, 239, JD at fn. 2 (1986) *Mack Trucks*, 277 NLRB 711, 725 (1985); *Allis-Chalmers Mfg. Co*., 179 NLRB 1, 2 fn. 9 (1969).

I find that Eby's testimony regarding the bargaining meetings to be generally credible and I have relied on it in making factual findings. Eby's testimony was clear and concise and his demeanor conveyed that he was attempting to testify truthfully. I find Meadows testimony to be not as reliable and I do not credit to the extent it conflicts with that of Eby. Meadows generally appeared to testify in a manner designed to support the Respondent's position. I have in certain instances credited his testimony when it is uncontradicted or firmly supported by the bargaining notes.

The June 1 Meeting

The parties met on June 1 from 1 p.m. to 3 p.m. This meeting began by the parties exchanging proposals. The Union's proposal was based on the format of the existing collective-bargaining agreement (Jt. Exh. 10). The Respondent's proposal set forth an entirely new agreement in both format and substance that bore no resemblance to the existing contract. (Jt. Exh. 1)[10]

When Meadows presented the Respondent's proposal he indicated that his goal was to get a contract, but Ingredion was not Penford and his proposal contained radical changes that would not necessarily make people happy. Meadows also indicated that Respondent intended to make operational changes at the plant in order to integrate the structure of the Cedar Rapids plant with the rest of the Respondent's operations. Meadows read from a document that indicated, in part, "The Company requests that the entirety of the parties' collective-bargaining agreement, and all of its Articles and Sections, be reopened and renegotiated. There are no Articles and Sections from the prior agreement that the Company proposes to remain unchanged." (R. Exh. 29.) Meadows stated that he was not sure about the recognition clause in the existing agreement and had included the word "define" in his proposal regarding the recognition clause (art. 1, sec. 2), because he wanted to have a discussion about the recognition clause to make sure it was correct. Meadows also explained the Respondent's proposal regarding an extra crew. Meadows stated that this proposal would allow extra employees to be trained and be able to fill vacancies when employees retired.

Head presented the Union's proposal and read it to the Respondent. The parties briefly discussed some of the Union's proposals. Meadows reiterated that he was proposing a brand-new contract and if the parties reached an impasse on an issue he suggested that they move on and discuss other issues.

According to the uncontradicted testimony of Meadows, as corroborated by the notes of Wood and Eby, at the conclusion of the meeting, Meadows offered to meet on June 10 and 11. Head responded by proposing that the parties agree to meet again on June 29 and 30; July 13 through July 15, and the entire week of July 27 and Meadows agreed with that proposal.[11]

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[10] At the trial Meadows testified that the Respondent's goal going into the negotiations at the Cedar Rapids facility was to obtain a contract that was consistent with its collective-bargaining agreements at other facilities and that allowed the Respondent "to grow its business." According to Meadows, he attempted to draft the Respondent's proposal based on the existing contract, but concluded that it was not possible to do so. The only explanation given by Meadows for proposing an entirely new collective-bargaining agreement in both form and substance was that the terms of the existing collective-bargaining agreement at the Cedar Rapids facility were inconsistent with that of other Respondent collective-bargaining agreements and did not "fit" the Respondent's operational needs for the plant.

[11] On June 18, 2015, Head sent an email to Meadows (R. Exh. 35) indicating : "Some issues have come up and we will not be able to meet

The June 29 Meeting

On June 29, the parties met from 1 p.m. until 5 p.m. At the commencement of the meeting on June 29, Head gave the Respondent a letter again requesting the above noted information that had not yet been provided to it (GC Exh. 9(b)). According to the credited testimony of Eby and Shannon's notes, Meadows stated he would address the Union's information request but that he would not necessarily provide all of the information. When Head asked Meadows what he meant, Meadows pointed to the requested information regarding a pension multiplier and stated that the Respondent's proposal did not contain a proposal regarding the continuation of the existing pension plan. Head replied that the Union's request for information was not based upon the Respondent's offer.

Meadows then addressed the Union's proposal that was given to the Respondent at the first bargaining meeting. Meadows went through the Union's proposal, article by article, and stated that the Respondent was "not interested" in the vast majority of the Union's proposals and indicated that other Union proposals were incorporated in the Respondent's proposal. However, Meadows discussed the Union's proposal for the Respondent to pay the health insurance premiums for employees on active military duty and Meadows indicated the Respondent would pay for the insurance for both employees and their families. Meadows review of the Union's proposal took approximately 5 to 10 minutes.

After a caucus, the Union presented some additional noneconomic proposals (Jt. Exh.11). The Union's proposal contained a change in article II of the existing contract entitled "Joint Labor Relations Committee-Grievance Procedure." The existing contract provided for a joint labor relations committee composed of three members selected by the Respondent and three selected by the Union. The labor relations committee held regular monthly meetings to discuss contract interpretation issues and consider grievances. The Union's proposal sought to increase the number of union representatives from 3 to 4. Meadows indicated that the labor relations committee was "non-existent" in his proposal. When the union representatives attempted to explain the value of the labor relations committee in reducing the number of grievances filed, Meadows replied that there was no need for a labor relations committee because the Respondent had an open door policy. The Union's proposal also incorporated the Respondent's proposal to provide space for conducting union elections and to increase the amount of time employees had to notify the Respondent that they accept a recall from layoff and the amount of time that employees had to return to work from a layoff. The parties also discussed the Respondent's proposal regarding how seniority was to be computed. Head also indicated that the Union withdrew its proposal to Article X (h) "Flower Account" of the existing contract that the Respondent provide herbal tea and stirrer sticks in break areas.

The notes of both Wood and Froehlich and the uncontradicted testimony of Meadows establish that near the end of the meeting, Head stated that the Union was going to continue to work from the existing contract and Meadows indicated that the Respondent was going to work from the new contract it had proposed. Shannon's notes also confirmed that Meadows stated he would continue to work from his proposal.

The June 30 Meeting

On June 30 parties met from 8:30 a.m. until 9:50 a.m. At the beginning of the meeting Meadows presented a revised Respondent proposal with changes that he believed reflected areas of agreement between the parties. Head stated that there were no tentative agreements between the parties. Head then brought up the Respondent's proposal to change the recognition clause in the existing agreement and its proposal on outsourcing. Head indicated that he was not going to bargain regarding the recognition clause as it was a permissive subject of bargaining.

According to Eby's credited testimony and Shannon's notes, Head then asked how the parties were going to proceed and stated that the parties needed to have an agreed-upon process to negotiate. Head stated that the Union was struggling with the concept of the extra crew and asked Meadows to take his proposals and submit them in relation to the existing contract language and redline them in order to point out what the Respondent was changing.

A synthesis of the notes of Wood's and Shannon establish that Meadows replied that he was not coming off his proposal and he was not going to accept the existing contract language. Meadows added that he had tried to put some of the existing contract provisions in his proposal but that it was not going to be a smooth transition, as it was not Penford anymore and Ingredion was not going to continue to operate in the present manner. The notes of Shannon and Eby and Eby's credited testimony establish that Meadows then stated that if the parties did not come to an agreement, he could give the Union an "LBF" and that he was going to prepare accordingly. (GC Exh. 7a, p.7; GC Exh. 8, p. 4; Tr. 426.)[12] Eby testified that he understood Meadows's reference to a "LBF" to be a last, best, and final offer.

Meadows then stated that perhaps the parties needed a federal mediator but Head stated that he did not want to bring in a mediator at that time. Head further stated that August 1 was not a "drop dead date" for the Union and that the Union was prepared to negotiate beyond that date. According to the credited testimony of Eby and Shannon's notes, Meadows initially replied that it may be for him, but then quickly stated that August 1 was also not a "drop dead date" for the Respondent. After a brief caucus, the Respondent provided the Union with a 1-page outline of its medical coverage proposal (Jt. Exh. 20) which had high deductible amounts of $750/$1500 for in-network and $1000/$2000 for out-of-network for the health reimbursement

July 13–15. As I mentioned during our exchange of proposals we have the entire week of July 27 open. After our sessions scheduled for June 29th and 30th let's plan to meet during the entire week of July 27th. Hopefully this works for your group." Head did not testify at the trial and thus did not explain the reason the Union canceled the meetings scheduled for July 13–15.

[12] I credit the mutually corroborative notes of Shannon and Eby and Eby's testimony on this point over Meadows denial that he made such a statement and the notes of Wood and Froehlich which do not contain a reference to Meadows making such statements. I find that Eby's testimony and notes and Shannon's notes are more plausible based on the record as a whole.

plan. For the health savings plan the deductible amounts were $1500/$3000 for both in-network and out-of -network. The meeting ended after the exchange of this information. The parties were next scheduled to meet on July 27.

The Union's Assessment of the Respondent's June 30 Bargaining Proposal

On July 10, 2015, after an extensive review of the Respondent's June 30 proposal, the Union's bargaining committee created a list of concessions from the terms of the existing contract that the Respondent was seeking from the Union. (GC Exh. 21.) The Union's list of concessions included, inter alia, the following:

> Eliminating the 6th week of vacation for employees hired before August 1, 2004.
> Vacation for all employees at 40 hours a week (for those in employees hired before August 1, 2004 a week is 7 days and 49 hours.
> Elimination of pyramiding of premium pay (e.g. no stacking Sunday with a holiday).
> Sunday pay reduced from 2X to 1.5X.
> No holiday pay for probationary employees.
> Elimination of 3 holidays.
> Funeral leave reduced from 5 days to 3 days for immediate family.
> No funeral leave for grandparents and some step-relatives.
> Required to use vacation on shutdown days.
> Required to use vacation while on FMLA.
> Permanent two-tier wage scale instead of a four-year step up.
> 401(k) Co. match employee contributions at 100% on first 3 percent vs. current 100% match on first 3 percent and 50% match next 3 percent.
> STD reduced from 52 weeks to 26 weeks
> STD per week reduced from $375 to $325.
> Life insurance reduced from $50,000-$25,000 on employees.
> Freeze pension on January 1, 2016.
> Currently approximately 44 members have retiree insurance at current pension multiplier of $51 and free supplement; company to make all employees pay 50% of premium in no supplement.
> Moving to new a job limited to once every 2 years versus multiple times year.
> Company can force 16 hr. consecutive work vs. limited to 12 hours now.
> Only one week of vacation may be taken as single days vs. unlimited
> Company can make and change plant rules at any time simply by posting on board.
> No progressive disciplinary procedure.
> Overtime system is rotational instead of by seniority.
> Employees line up overtime and maintain records.
> Removal of tardy and personal system and replaced by company (unstated) attendance policy.
> Expansion of contractor work.
> Probationary period 6 months instead of 50 working days.
> Loss of seniority if absent for 2 unexcused days.
> Right to transfer employees to other jobs and shifts much more extensive.
> 5th week of vacation after 20 years instead of 18 years.

The Union's list also referred to "Concessions by Omissions in Company Proposal" that included, inter alia,

> Elimination of Contractually set committees: Labor Relations, Joint Safety, Looking Class Steering Committee.
> Eliminate language allowing extra paid lunches and breaks for overtime hours.
> Eliminate advance notice for contracting.
> Reduce time tardy before it becomes unexcused day.
> Eliminate negotiated Substance abuse policy limitations.
> Eliminate Flower Account-pop can money and no-punch penalties go into an account that Union uses for membership welfare (e.g. Funeral Flowers).
> Eliminate severance language benefits.
> Eliminate Union ability to have 8 hours shutdown for contract vote.
> Eliminate Successor and Assignee clause.
> Eliminate 11 Letters of Understanding regarding various provisions in existing contract.

The July 27 Meeting[13]

On July 27, the parties met from 1 p.m. until 4:30 p.m. At this meeting the federal mediator was present for the first time at the request of the Respondent and with the Union's consent. After the mediator was updated regarding the status of negotiations, Head told Meadows that the Union had identified 124 concessions from the existing agreement that the Respondent was seeking in its proposal. Meadows replied that he did not see it that way.

Meadows said that the Respondent was being fair and wanted to negotiate but said that he was sticking with the Respondent's proposal as the current contract did not allow the Respondent to grow. When Head asked why the existing contract did not allow the Respondent to grow, Meadows did not respond. Head then stated that the Union was sticking with its proposal. The parties then began a discussion regarding seniority, Head said that the Union would put additional language regarding seniority in the format of its proposal and Meadows indicated that the Respondent would put seniority language in the format of its proposal. Near the conclusion of the meeting, Meadows asked to see the concessions the Union claimed the Respondent was seeking but the Union did not provide the list of concessions that it had prepared at that time.

The July 28 Meeting [14]

At this meeting the parties met from 9 a.m. until 9:10 p.m. The mediator was again present at this meeting. Meadows gave the Union a new proposal, with the changes marked in red, so that the Union could easily determine the changes from the

[13] In making factual findings regarding this meeting, I have relied on the credited testimony of Eby, Shannon's notes and Froehlich's notes. Froehlich's notes regarding this meeting are fairly detailed but contain a minor error in stating the date of the meeting 7/23. Wood came late to this meeting and his notes are very brief and contain nothing of consequence.

[14] My findings regarding this meeting are based primarily on the notes of Shannon, Wood, and Froehlich and the credible testimony of Eby.

previous proposal. (Jt. Exh. 3) Meadows also gave the Union a summary which compared the Respondent's current proposals to the format of the existing contract. (R. Exh. 36.) In this proposal the Respondent significantly modified its proposal regarding gap insurance. This proposal indicated that employees hired before August 1, 2004 would be able to continue their medical insurance to age 65 at a cost of $51 per month per person. The Respondent also revised its proposal on hours of work to provide that, while the Respondent maintained all rights in maintaining work schedules which would consist of 8 hours shifts, "The Company will consider 12 hours shifts by classification if at least 65% of the classification votes to go to a 12 hour shift." (Jt. Exh. 3, p. 14). The proposal also provided that double time would be paid for Sunday work and that an employee could not be required to work more than 2 consecutive days of overtime. The proposal regarding holidays added 2 additional holidays per year that would be treated as a single day vacation. This proposal also offered 6 weeks of vacation for employees with more than 25 years of seniority

The Respondent's proposal also contained a wage proposal containing a wage increase for all classifications, ranging from $.19 an hour for janitors to $1.90 for warehouse employees, which would become effective August 1, 2015, with percentage increases for the 3 other years of the Respondent's proposal. This proposal also contained a permanent two tier wage system between employees currently employed and those hired after August 1, 2015. The difference between the first and second tier was approximately 20 percent. According to the credited testimony of Eby, under the existing contract, employees in the second tier started at 82 percent of the first tier and were brought up to the first tier wage over a 4-year period. Wood's notes and his credited testimony establish that the only explanation given by Meadows for the permanent two-tier wage proposal was that an overall economic adjustment was needed. (R. Exh. 67, p. 24; Tr. 834)

Head responded to the Respondent's proposal by stating that he appreciated the effort that had been made but that it was not going to get the parties to a settlement. Meadows asked the Union to look at the proposal on the table and give it consideration. The parties then took a caucus.

After the caucus, Head presented a written offer to extend the existing contract for 3 years with an annual 4 percent wage increase per year. The offer also proposed that all employees' weeks of vacation consist of 7 days at 49 hours of pay and that the Respondent pay all of the Union's negotiating costs (GC Exh. 24). The Union also gave the Respondent another lengthy information request. As Head presented the offer, he stated that he felt that negotiations were "headed for a train wreck." Head indicated that the Respondent's proposal gutted the existing contract and that it was disrespectful of the Union.

After another caucus Meadows rejected the Union's offer regarding an extension of the existing contract and provided a written response to the Union's information request of that day. (Jt. Exh. 24). The Respondent's response to the last 21 items on the Union's July 28 information request reflected that these items, which the Union viewed as seeking concessions, produced relatively small or no cost reductions to the Respondent. The parties discussed each of the 21 items and Meadows agreed to withdraw part of his previous proposal and revert back to the terms contained in the existing contract regarding bereavement days; Sundays and holidays counting toward overtime; not requiring employees to use vacation days while on FMLA; employee life insurance and some overtime issues. Meadows also indicated he would reconsider the Respondent's proposal regarding holiday pay and jury duty.

The last of the 21 issues related to the "flower fund." The flower fund was a Respondent account managed by the Union. The account was funded in part by deducting money from employees' paychecks instead of issuing them points for being late. The Union used the money to send flowers on appropriate occasions to employees and their families and to make other donations. According to Shannon's credited testimony, Meadows indicated that the operation of the flower fund would be an "administrative nightmare" and that he was concerned about the legal implications of such a fund. (Tr. 287.) Meadows indicated that the Respondent would simply pay for the flowers that the flower fund had formerly paid for. Eby responded that the point was that this was something that the Union did on behalf of members. The parties then had an acrimonious exchange regarding the Respondent's position over eliminating the flower fund and the meeting ended.

The July 29 Meeting

At this meeting the parties met from 10:15 a.m. until 6 p.m. At the beginning of this meeting, Meadows apologized to Eby for the argument that occurred the previous evening over the flower fund. Meadows stated that he was concerned about the legality of the flower fund and would have the Respondent's attorneys double check to verify whether it was legal and stated that "we will figure something out."

Meadows then presented a revised proposal (Jt. Exh. 4), which included the changes that the Respondent had agreed to make in its proposal the previous day. The Respondent revised its proposed recognition clause by removing the word "define" and adding the term "and quality control technicians" in addition to "production (including warehouse and packing) and maintenance employees."

The Respondent revised its overtime proposal to pay time and one half for work over 8 hours and double time for work after 12 hours; and also proposed that the double time pay be given to a day shift maintenance employee for work between 11:30 p.m. and 7 a.m. The proposal also eliminated the prohibition of probationary employees from receiving overtime pay. The proposal provided that employees who worked on a holiday when they were not scheduled would receive double time and a half pay. The proposal also provided for 5 days of bereavement leave. The proposal revised the Respondent's position on jury duty pay by expanding eligibility, including employees who worked on the third shift. The proposal also allowed employees to "bank" vacations and eliminated the provision seeking to have employees use vacation while on FMLA. The proposal also indicated that sickness and accident insurance would be paid for by the Respondent. Finally, the Respondent increased the sickness and accident benefits from $325 to $375 and increased the life insurance benefits from $25,000 to $50,000. The changes in the Respondent's proposal

were highlighted in red except for the change to the recognition clause.

After some discussion of the Respondent's latest proposal, the parties caucused. After the caucus the Union presented the list of what it viewed as concessions that the Respondent was seeking from the Union's existing contract. (GC Exh. 21.)[15] The parties discussed the items on the list. During the discussion, Meadows stated that he had not addressed the attendance policy in his proposal and also stated that if the Union wanted what it considered to be plant seniority for layoffs he was "okay" with that.

After another caucus, the parties continued to discuss more of the items on the Union's concession list and the Respondent agreed to modify some additional proposals. The Respondent agreed to modify its proposals on the probationary period and vacations. Meadows also informed the Union that he could be flexible on the bidding procedure, bumping rights and would put together a proposal regarding a progressive discipline procedure. Meadows further indicated that insurance and wages needed to be discussed. Meadows testimony and Woods notes establish that at this meeting Meadows told the Union that the Respondent had been making modifications but the Union had not addressed the Respondent's proposal. Meadows asked the Union to let him know where there were issues. (Tr. 1017; R. Exh. 67, p. 31.)

The July 30 Meeting

At this meeting the parties met from 1:50 p.m. until 6:38 p.m. with the mediator present. At the beginning of this meeting, the Union presented another written request for information. (Jt. Exh. 26.) This request included, inter alia, the above noted information that had been requested in May (Jt. Exh. 17) and again in June. According to the notes of Wood, Shannon, and Eby, Head also made a verbal request at this meeting for the Respondent's proposal for attendance and work rules. With respect to the attendance policy, Meadows stated that his proposal did not have a provision regarding attendance and that it remained as it was in the existing contract.

Meadows presented a revised proposal (Jt. Exh. 5) to the Union. This revised proposal included lowering the probationary period from 6 to 4 months. The Respondent also proposed a progressive disciplinary system in article IV(B). The proposal increased from 2 to 3 the number of consecutive days and employee could be absent without a valid excuse before losing his or her seniority. The proposal also revised the period of time an employee must wait after being awarded a bid and turning it down from 24 months to 18 months. The proposal revised the criteria the Respondent would use to determine the order in which to lay off employees to the employee with the least plantwide seniority, as opposed to the least senior employee in the classification affected. The proposal also eliminated lab employees from being exempt from layoffs. Finally, the proposal also eased the eligibility requirements for employees to receive 4 and 5 weeks of vacation.

At this meeting, Meadows also gave the Union the attendance policy the Respondent was proposing (GC Exh. 28). According to Eby's credited testimony, contrary to Meadows assertion the previous day that the attendance policy would be the same as that in the existing contract, there were substantial differences between the two. Under the Respondent's proposal, after seven occurrences in a year an employee would be subject to termination. Under the existing attendance policy there was a division between unexcused absences and being tardy. Under the existing attendance policy, it would take nine occurrences of the same type in 1 year in order for an employee to be terminated. Eby also indicated that the Respondents proposal indicated that doctor's slips will not be accepted unless it was for an application for FMLA or sickness and accident insurance. Eby pointed out is that under the existing policy, as long as an employee had a doctor's note, it was considered an excused absence.

At this meeting, the Respondent also presented the 2015 rates for the health insurance plans it was proposing along with a comparison of the rates for existing health insurance plan, which also included vision insurance. (R. Exh. 40.)[16] According to Eby's credited testimony, he pointed out to Meadows that for a family plan the existing premium payment was less than the premium for the insurance proposed by the Respondent, and the existing plan provided far superior insurance. Eby did not recall Meadows making any response to his statement.

The parties discussed the Respondent's proposals that were made at this meeting but no agreements were reached.

The July 31 Meeting

On July 31 the parties met from 9 a.m.to 3:30 p.m. At the beginning of the meeting, Meadows presented a revised proposal (Jt. Exh. 6). This proposal included a long-term disability insurance policy (article XVIII, section 6). For the first time, the proposal contained language regarding medical insurance did not indicate that such insurance would be the same as that offered to salaried employees (article XXI, section 1).[17] The proposal also indicated that the Respondent would discuss plant rules before implementing them.

Because the Union was concerned about the large number of employees who were considering whether to submit their retirement papers by the end of that day, the parties spent a significant amount of time discussing Respondent's proposal regarding freezing the defined benefit pension plan for senior employees on January 1, 2016, and the Respondent's proposal regarding gap insurance. After this discussion, Meadows stated

[15] The list of items the Union reviewed concessions is dated July 10, 2015, the date it was prepared by the union committee members. Eby testified that it was not presented to the Respondent sooner because the Union assumed that the Respondent was aware of these differences, since Meadows had claimed that he had reviewed the existing contract before making the Respondent's initial proposal.

[16] On June 30, the Respondent had provided the Union with a brief outline of its proposed health insurance.

[17] Throughout the bargaining the Respondent's proposal did not contain specific information regarding the medical insurance. The proposed language indicated that: "Effective 01/01/2016 employees will participate in medical and Rx insurance, dental, and vision insurance as discussed and agreed to during the 2015 negotiations. All employees insurance coverage becomes effective the 1st day of the month following date of employment."

that he had a proposal on the table and asked the Union for feedback on that proposal.

The Respondent also provided a substantial amount of information to the Union at this meeting including the information, noted above, that the Union had originally requested on May 13.

After a caucus, the Union presented a revised proposal regarding the existing defined benefit pension plan for the senior employees which sought to increase the monthly benefits paid pursuant to the plan. (Jt. Exh. 12.) Head also indicated that August 1 was not a drop dead date for the Union and suggested setting up additional days for further negotiations.[18] Head also stated that, given where the parties were in the process, if Meadows wanted to put an offer together he would take it back and present it to the members. Head requested that the Respondent's offer include the existing bidding procedure, the existing insurance, and the Respondent's best wage proposal. Meadows replied by requesting time for putting the final offer together. The parties also discussed releasing employees from the plant the next day at 7 a.m. in order to vote on the offer.

After another caucus, the Respondent presented a document entitled "Company's final offer" (Jt. Exh. 7). In this proposal the Respondent changed bidding procedure to utilize plant seniority (art. 7, sec 1.) The proposal also increased the Respondent's wage offer regarding maintenance employees by an additional $1 an hour, which increased its offer to $2 an hour more than their present rate.

Meadows pointed out that the bidding procedure had been changed to a combination of department and plant seniority and that the wages for maintenance employees was increased by $2. Meadows also rejected the Union's proposal on the pension plan and indicated that the Respondent was standing firm on its proposal for freezing the existing pension plan. The parties then discussed making arrangements for printing sufficient copies of the final offer and furnishing them to the Union so that employees could review it and vote on it the next morning.

After the bargaining session ending, the Union informed 43 employees who were contemplating retirement about the status of the contract negotiations so that they could make a determination as to whether to retire by 5 p.m. that day. Approximately 22 employees submitted their retirement papers by the end of the day.

On August 1, the Union presented the Respondent's final offer to the membership to vote on whether to accept it. The proposed contract was rejected, with approximately 95 percent of the members voting against it.

According to Eby's credited testimony, he called Meadows after the contract was rejected by the membership to inform him of that fact. Meadows indicated he did not understand why it was rejected because he thought it had been a fair offer. Meadows then added that the parties had no contract and therefore he was not bound to honor anything. Eby asked Meadows whether he was saying the parties were at an impasse and he was implementing the terms of an agreement. Meadows replied "No" but that he was not obligated to follow the terms and conditions of the expired agreement. (Tr. 488.) Meadows said that he wanted to negotiate and asked whether he could come down to the plant and start negotiating. Eby replied that the Union also wanted to negotiate but that the Union would contact him regarding scheduling dates for a meeting.[19]

The August 17 Meeting[20]

The parties met on August 17 from 9:15 a.m. until 2:30 p.m.in the presence of the mediator. At the beginning of the meeting, Head explained that 95 percent of the employees had rejected the Respondent's contract offer and that the Respondent needed to make significant movement in order to advance the process. Head further stated that the Respondent wanted to control people's lives and would not accept "our proud contract." Head went on to discuss several other employers that had incurred significant expenses from their failure to reach an agreement with the Union and the litigation that followed. Head stated that he hoped to make progress during the week or the Respondent would "never be the same."

Meadows replied that he did not think that the Respondent had "gutted" the terms of the expired contract. Meadows said that the Respondent had made a good faith attempt to reach an agreement and that he needed to know where the parties were at. Meadows further indicated that he had made adjustments in the Respondent's proposals during the meetings.

Head responded that the Respondent had to make proposals based on the language contained in the expired contract. Head further indicated that the Respondent had a contract it "bought" and that it had to respect that contract. Meadows asked if the Union's proposal of June 29 was still on the table and Head replied that it was. Meadows noted that the only other proposal made by the Union was an offer of a 3-year extension of the expired contract. Head replied that the offer of an extension was a standing offer. When Meadows asked if the Union would agree to a 3-year extension, Head replied that the Union would have to take it back to the membership for approval.

Meadows asked what with the main concerns of the Union were. Head replied that the Union was ready to discuss the terms of the expired contract and that the Respondent had to incorporate its proposals into the format of the expired contract in order to have a path for meaningful discussion. Meadows

[18] I do not credit Eby's testimony or the portion of his notes for that date which indicate that Meadows stated that August 1 was a drop dead date for him. The notes of Shannon and Wood do not contain a reference to Meadows making such a statement and, based on the record as a whole, I find it implausible that Meadows would have made such a statement at this meeting.

[19] Meadows testified that he did not recall a specific conversation with anyone from the Union after the contract was voted down, but denied generally that he ever told the Union that he was not obligated to follow any of the terms and conditions of the expired contract. I credit Eby's specific testimony over Meadows general denial. I note, moreover, that Eby's testimony regarding Meadows statement about the status of the contract is consistent with the statement made by Meadows in his letter giving notice of termination of the contract before negotiations started (GC Exh. 15). There is no evidence, however, that Respondent actually made any unilateral changes in terms and conditions of employment until September 14, 2015.

[20] My findings regarding this meeting are based primarily on the bargaining notes of Shannon which are clear and concise, but I have also relied to a lesser extent on Wood's notes.

replied that the Respondent would go ahead and look at the issues "hard and heavy" and prepare a proposal. When Meadows asked if there was anything that could be considered a tentative agreement, Head stated that there were no tentative agreements but that the Union was willing to move. (Woods notes, R. Exh. 67, p. 41.)

Meadows stated that the Union had not given the Respondent anything. Head replied that in the past the Union had worked from the format of the expired contract and again stated that there needed to be a process. Meadows replied that he had taken out the language in the existing agreement that the Respondent did not like. Head replied that Respondent had not considered anything in the existing contract.[21] At 9:40 a.m. the parties caucused. At 4 p.m. Meadows informed the Union that he would not have anything to present until the following morning.

The Meeting of August 18

On August 18, the parties met from 9:15 a.m. to 5 p.m., with the mediator present. The meeting began by Meadows stating that the Respondent had reviewed the terms of the expired contract to see if it could be incorporated into the Respondent's proposals. Meadows added that he had also reviewed the proposals made by the Union on June 1 and June 29 and the fact that the Union had not presented anything back in response to the Respondent's proposals. Meadows stated that neither the Respondent nor the Union was going to move and the parties were at an impasse.[22]

Meadows then presented a revised proposal entitled "Company's last, best and final offer" (Jt. Exh. 8.) The Respondent's proposal reverted back to the recognition language that was contained in the expired contract and removed language specifying the number of employees on the union bargaining committee and prohibiting nonemployees from being on the union bargaining committee. The proposal amended the discipline procedure (article V) to provide that after consultation between the parties, discipline may be removed from an employee's file after 1 year in the Respondent's discretion. The proposal also indicated that management was responsible for the scheduling of overtime. The proposal removed language limiting the payment sickness and accident benefits during a work stoppage (art. XVIII.) The Respondent's proposal also eliminated prior language that afforded the Union an opportunity to bargain over the decision to close the plant, but retained language regarding the obligation to bargain over the effects of the closure. (art. XXV, sec. 2.)

The proposal also contained a provision (art. and XI, sec. 1) allowing employees to vote on their work schedules as follows:

> The Company shall maintain all rights in determining work schedules which will consist of eight (8) hour shifts. The beginning of a work week will be 7:00 AM on Monday; the Company may very start times to meet the needs of the plant. The Company will consider 12 hour shifts by classification was if at least 65% of the classification votes to go to a 12 hour shift.[23]

Finally, the proposal contained an addendum providing a signing bonus of $2000 per employee that expired on August 22, 2015, and a cash payment to employees in 2016, 2017, and 2018 in order to offset the higher deductible and out of pocket expenses in the Respondent's health insurance proposal.

Meadows explained the changes in the Respondent's proposal involved the following: including the language of the recognition clause set forth in the expired agreement; removing the Respondent's proposal to specify the number of persons on the union bargaining committee; removing language which prohibiting nonemployees from being on the union bargaining committee; removing language stopping the sickness and accident health benefit if the employees went on strike or were laid off; removing the proposal that employees coordinate their own overtime; adding language that the parties would review disciplinary action and consider removing it from an employee's personnel file after a year; and adding language indicating the Respondent's obligation to engage in effects bargaining.

After a caucus, the Union presented a new non-economic proposal, (Jt. Exh. 13), based on the format of the preamble and articles I, II, and III of the expired contract. After Head outlined the Union's proposal, Meadows stated that the Respondent's last, best, and final offer was on the table and that the Union's proposal was not acceptable. Meadows indicated that he did not have an interest in returning to the language of the expired contract, but if there were items in the Respondent's proposal that the Union wanted to address, he would do so for some of the provisions. Meadows also indicated that there was language regarding the Union's proposal in the Respondent's last, best, and final offer. When Head pointed out an error in the Respondent's last, best, and final offer regarding where the Respondent sent dues money, Meadows stated he would correct the error.

After a caucus, the Union presented a wage proposal that was based on the wage provision contained in the expired contract. Meadows stated that he was not interested in going step-by-step through the Union's wage proposal. Meadows added that wages have been included in the last best and final offer

[21] I do not credit Meadows testimony that Head stated that if he were Eby, he would come across the table and cut him. Shannon's notes make no reference to such a statement and Woods notes only contain a cryptic reference that Head stated during this exchange, "Make it clear again Chris will cut you up." Considering the record as a whole, I find it implausible that Head threatened Meadows with physical violence.

[22] During the Respondent's case in chief, Meadows testified on both direct examination (Tr. 1038–1039) and cross-examination (Tr. 1113) that he declared the parties were at an impasse on August 18. His testimony on this point is corroborated by Shannon's bargaining notes. When called by the General Counsel under 611(c), after being shown the Respondent's September 10 letter notifying the Union of its intent to unilaterally implement its last, best and final offer (GC Exh. 35) Meadows testified that the first time he formally declared impasse was on September 10. (Tr. 148). I find that Meadows stated that the parties were at an impasse on August 18 before he presented his final offer based on his corroborated testimony given during the Respondent's case in chief. I find that Meadows testimony regarding September 10 being the first time he formally declared impasse was in reference to the Respondent's September 10 letter.

[23] The Respondent first proposed that employees have an opportunity to vote on their schedule in its July 28 proposal (Jt. Exh. 3, p. 14).

and that he would be happy to talk about that offer and would be willing to "tweak" small issues. At the end of the meeting, Head indicated that the Union was disappointed in the bargaining during the session and that there was no need for the scheduled meeting the next day. The parties agreed to meet again on September 9.

The September 9 Meeting

This meeting lasted approximately 3 minutes during the afternoon of September 9 with the mediator present. The meeting began with Head saying that he was going to go through the Union's proposal based on the expired contract article by article. Meadows said that he had given the Union the Respondent's last, best, and final offer and asked the union representatives what they wanted to do. Meadows stated that he was there to listen but that he was not interested in going through the Union's proposal article by article. Head then responded that "then we're done." Meadows then said that the Respondent would be implementing its agreement on the following Monday and that letters to employees would be in the mail.

The September 10 Meeting

The parties met on September 10 from 9:30 a.m. until 9:20 p.m. with the mediator present. At the beginning of the meeting, Meadows said that he had given the Union the Respondent's last best and final offer but that he would listen to recommendations for changes to that proposal. Head asked if Meadows was willing to consider issues that the Union came up with. Meadows replied that he was going to keep an open mind and respond to a proposal from the Union when he had all of the issues it wished to present. Meadows added that if there was a proposed modification to the last, best, and final offer he was going to consider it. At approximately 9:45 a.m. the parties began a lengthy caucus.

At approximately 9:10 p.m. the parties met again and Head said that he was withdrawing or modifying a number of the Union's original proposals. Head then presented a document entitled "Union Offer Of Settlement" (Jt. Exh. 15). In this proposal, which was based on the format of the expired contract, the Union made a number of changes including eliminating the labor relations committee and proposing a modification to the grievance procedure advanced by the Respondent. The proposal also eliminated a number of letters of understanding relating to contractual issues, including the substance abuse policy. The Union also proposed a modification of the Respondent's extra crew proposal.

After quickly reviewing the proposal, Meadows responded that it was unacceptable as the Respondent's last, best, and final offer was on the table and the he expected to see proposals related to that offer. Meadows indicated, however, that he would review the proposal and get back to the Union that evening. When Head responded that the Union was done negotiating for the night, Meadows gave the Union a letter reflecting the Respondent's intention to unilaterally implement its last, best, and final offer as presented to the Union on August 18, 2015 effective September 14, 2015 (R. Exh. 45). The parties then agreed to meet the following morning.

The September 11 Meeting and the Respondent's Implementation of its Last, Best, and Final Offer

The parties met briefly on the morning of September 11 from 9:15 a.m. until 9:22 a.m. Meadows stated that he was disappointed in the Union's latest proposal and that the Respondent was not interested in it. Meadows stated that his last best and final offer was on the table and he had nothing else to present. Meadows asked the Union if they had any further proposals to make. Head stated that the union committee had made a good faith effort in preparing a proposal but that the Respondent would not consider it. Head stated that the Respondent had not engaged the Union in a meaningful way and that the Respondent could lock employees out or the Union could go on strike and added that there were not many options.[24] The Union offered bargaining dates on October 8 and 9 and Meadows stated that he would respond to the Union by email.

On September 13, Eby sent a letter to the Respondent indicating that the Union did not believe that the parties were at an impasse. The Respondent implemented its last, best and final offer on September 14, 2015. The implemented proposal made substantial changes in the working conditions of bargaining unit employees, including wages, seniority, health insurance, the pension plan, scheduling, overtime, vacations and the grievance procedure.

Postimplementation Developments

On September 28, 2015, Eby and Meadows had a private discussion regarding the status of negotiations in the ethanol control room after discussing a disciplinary matter. Eby testified that they first discussed retiree health care and Meadows told Eby that there would not be any changes in it. Meadows then stated that the parties were going to reach a contract and Eby asked how they would get to a contract when Meadows had declared an impasse, Meadows said we can interpret the proposal, but Eby responded that the Union needed actual language. Eby then stated that both parties had what they considered to be some leverage but they needed "to get to a discussion." Eby then referred to the pending unfair labor practice charge in the instant matter and stated that the parties did not know "which way it would go." Meadows responded that he was not worried about the charge and that if the Board ruled against him, "he would come back to the table and do the exact same thing and get to impasse." (Tr. 547–548.)

Meadows recall having a conversation with Eby in the ethanol control room in late September 2015. Meadows recall Eby asking him if there was a way the Respondent would consider bringing back retired employees if they wanted to return to work. Meadows testified he told Eby that he would check to see if something like that could be done. Meadows also recalled some general discussion about what they could do to reach a contract. Meadows did not recall "any real discussion" about a NLRB charge and specifically denied that he stated that if the NLRB ruled against the Respondent he would do the same

[24] I do not credit the portion of Eby's notes reflecting that Head stated that the parties were not at an impasse. There is no reference to such a statement in the notes of Shannon, Wood, or Froehlich and, as noted previously, Head did not testify at the trial. Consequently, Eby's notes are uncorroborated and I do not find they are sufficiently reliable on this point to base a factual finding.

thing and get to an impasse.

I credit Eby's version of his conversation to the extent it conflicts with that of Meadows. Eby's testimony was more detailed and thorough and his demeanor was more convincing. Accordingly, I find that Meadows made the statement attributed to him by Eby regarding the fact that if the NLRB ruled against them he would do the exact same thing and get to an impasse.

On October 8 and November 4, 2015, the parties conducted collective-bargaining meetings and no progress was made toward reaching an agreement.

Analysis

Whether the Respondent Engaged in Good-Faith Bargaining Through September 14, 2015

Paragraph 14 of the complaint alleges that through September 11, 2014, the Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act. In considering this complaint allegation, I note that Section 8(d) of the Act requires that an employer and a union representing its employees are required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." In construing Section 8(d) the Board has found that an employer must bargain, with "sincere purpose to find a basis of agreement" including making reasonable efforts to compromise its differences with the union representing its employees. *Regency Service Carts*, *Inc*., 345 NLRB 671 (2005); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

In *Regency Service Carts*, supra at 671, the Board further explained an employer's obligation to bargain in good faith as follows:

> "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.,* 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.,* 344 F.2d 210, (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id. ; *Pease Co.* 237 NLRB 1069, 1070 (1978).

In determining whether an employer has bargained in bad faith the Board considers the totality of an employer's conduct at and away from the bargaining table. The Board has noted that relevant factors include: "unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information and unlawful conduct away from the table." *Mid-Continent Concrete*, 336 NLRB at 259–260. The Board has noted, however, there is no requirement that an employer engage in each of those activities before it can be concluded that bargaining has not been conducted in good faith. *Regency Service Carts*, supra at 671.

In order to properly resolve the issue of whether, based on the totality of the Respondent's conduct, it has engaged in surface bargaining through September 11, 2014, it is first necessary for me to resolve the allegations that the Respondent engaged in unlawful conduct away from the bargaining table and unlawfully delayed in providing the Union necessary and relevant information during the bargaining that took place during that period.

The Alleged Violations of Section 8(a)(1) and 8(a)(5) and (1) in July 2015

Paragraph 5(b) of the complaint alleges the Respondent violated Section 8(a)(1) in a July 17, 2015 letter to employees by misrepresenting its bargaining position by claiming it was not seeking to eliminate insurance coverage and was not seeking to remove certain classifications from the bargaining unit, which is inconsistent with the positions the Respondent was taking in bargaining at the time. Paragraph 13(b) of the complaint further alleges, inter alia, that the Respondent's letter also constituted direct dealing in violation of Section 8(a)(5) and (1).

On July 17, 2015, Froehlich sent a letter to employees and their spouses (GC Exh. 20) which states, in relevant part:

> Since the company gave the union leadership its last contract offer, I have heard many rumors about what the company proposed. I would like to set the record straight.
>
> The rumor I have heard most relates to our GAP insurance plan. Let's be clear, the company has no intention of eliminating this plan and, in fact has proposed offering GAP insurance to all employees.
>
> . . .
>
> I've also heard that some employees believe that the company has proposed moving the laboratory technicians' positions out of the bargaining unit. The company has made no such proposal.
>
> . . .
>
> I feel it is very important that each employee educate him or herself on the company's current offer. This is the best way to avoid these unfortunate and unfounded rumors. The best way to become educated is to just ask a member of the union's negotiating committee to review in detail the current proposal

With respect to gap insurance, the then current contract provided that employees hired prior to August 1, 2004, were eligible for gap insurance and the rate of that insurance was $51 for the period from August 1, 2012, through July 31, 2015. (Jt. Exh. 16, pp. 42–43). As explained by Eby, if an employee retired before age 65, the employee could continue the company health insurance for $51 a month until the employee was eligible for Medicare at 65. A spouse covered under the insurance policy could receive the same extension of coverage for another $51 a month. After an employee and/or spouse became eligible for Medicare there was a company paid supplement for Medicare, and the option to have a drug card that was based on a complicated formula. (Tr. 433–434.)

The Respondent's initial proposal contained a provision for gap insurance in article XX, section 3 (Jt. Exh. 1, p. 32). This proposal indicated that retirees and their covered dependents would be eligible for continuation of medical insurance coverage until the retiree and spouse attained age 65 and/or became eligible for Medicare, whichever was sooner. The cost would

be split between the Respondent and the employee on a 50–50 basis prior to reaching Medicare eligibility. The record establishes that the total monthly premium for the Respondent's proposed HSP plan was $500.25. The cost to an actively employed employee would be $85 and the cost to the Respondent would be $415.25 (R. Exh. 40).

With respect to the July 17 letter referencing the Respondent's proposal regarding the recognition clause, the then existing contract described the bargaining unit as "[A]ll hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees at the above-named plant, except, all monthly paid employees, with respect to hours of work, rates of pay and working conditions." (article I, section 1, Jt. Exh. 16, p. 2.)

The Respondent's initial proposal on June 1 was to define the bargaining unit as follows: "[A]ll production (including warehousing and packing) maintenance and (Define) of the Company at Cedar Rapids, Iowa plant, but excludes all office clerical employees, plant clerical employees, foremen, assistant foremen, technical and professional employees, salesmen, guards and supervisors as defined in the National Labor Relations Act." The Respondents proposal on June 30 contained the same proposed recognition clause.

According to Meadows uncontradicted and credited testimony, he proposed such a unit description in order to attempt to establish that it was in accord with the NLRB certification, which he could not find. Meadows testified he told the union representatives when it was first proposed that he wanted to make sure that the parties were clear about the unit description. As noted above, Meadows proposal included the word "(Define)" in his proposed unit description and he testified that he asked the Union to help him craft the unit description so that it accurately captured all of the classifications in the unit. The record establishes that the laboratory technicians are in the starch/service department, which is a production department. There is no evidence in the record establishing that by the time the July 17 letter was sent, Meadows had ever proposed that laboratory technicians be specifically excluded from the bargaining unit.

The General Counsel contends that with respect to the July 17 letter's alleged misrepresentation of the Respondent's proposal regarding gap insurance, the Respondent's proposal involved a prohibitive cost increase to employees. The Respondent's proposal would require employees to pay 50 percent of the premium in order to retain the insurance after retirement and before becoming eligible for Medicare. This would result in a 400 percent increase in the cost of premiums for retired employees over that contained in the existing insurance. The General Counsel contends, this amounts to a de facto termination of gap insurance for those employees, yet the Respondent mentioned nothing about the cost increase, but rather characterized the proposal as an expansion of insurance. The General Counsel also claims that the Respondent's letter did not mention the elimination of the other supplemental benefits in its gap insurance proposal.

The General Counsel also claims that the Respondent's letter of July 19 misled employees with regard to its proposal regarding the scope of the bargaining unit. The General Counsel contends that the fact that the Respondent's proposal did not include specifically laboratory technicians, establishes that the Respondent was seeking to remove laboratory employees from unit.

The Respondent contends that the July 17 letter was accurate and lawful under the Act as it merely informed employees regarding the specifics of proposals that had already given to the Union as their bargaining agent.

In *Safelite Glass*, 283 NLRB 929, 930 (1987), the Board reiterated the principle that an employer has a fundamental right under Section 8 of the Act to communicate with its employees concerning its position on collective-bargaining negotiations, so long as there is nothing in the communications indicating an effort to bargain directly with employees or for them to abandon union on, representation in order to achieve better terms directly from the employer.

In the instant case, in its July 17 letter the Respondent accurately stated that its proposal offered gap insurance to all employees. The fact that the July 17 letter does not contain a complete and detailed comparison between the Respondent's proposal and that of the Union does not make it unlawful. Similarly, the statement in the July 17 letter that the Respondent had not made a proposal seeking to remove the laboratory technician position from of the bargaining unit is also accurate. The Respondent's proposal did not specifically seek to remove laboratory technicians from the unit as that classification is not specifically listed in the unit exclusions. Importantly, there is nothing in the letter to establish that the Respondent was attempting to bargain directly with employees or to seek for them to abandon their union representation in order to obtain better terms from the Respondent. On the contrary, the letter indicated that it was important for employees to educate themselves on the Respondent's current offer and suggested that the best way to do that was to ask a member of the Union's negotiating committee to review the current proposal in detail.

I find the cases relied on by the General Counsel to be clearly distinguishable. In *RTP Co*., 334 NLRB 466, 467 (2001), enfd. 315 F.3d 951 (8th Cir. 2003), the employer sent a letter to employees blatantly misrepresenting the union's bargaining positions and blaming the union for preventing the employees from receiving their customary annual wage increases. Later, the employer sent additional letters informing employees that they were going to do what employees had asked and grant a wage increase regardless of the union. Under these circumstances, the Board found that the employer's letters interfered with Section 7 rights in violation of Section 8 (a)(1) and also constituted direct dealing in violation of Section 8(a)(5) and (1). Similarly in *Faro Screen Process Inc*., 362 NLRB No. 84 (2015), the employer once again blatantly misrepresented a union's bargaining position and informed employees it was rescinding a wage increase because of the union objections in violation of Section 8(a)(1).

In the instant case, in its July 17 letter the Respondent did not, in any way, misrepresent the Union's bargaining position but rather set forth its own bargaining position, as it has a lawful right to do. Accordingly, based on the foregoing, I shall dismiss paragraph 5(b) and the applicable portion of paragraph

13(b) of the complaint.

Paragraph 5(c) of the complaint alleges about July 23, 2015, the Respondent violated Section 8(a)(1) by David Roseberry informing employees who were deciding to retire that the Respondent would retain their current retirement benefits in the next collective-bargaining agreement, thereby misrepresenting to employees the position Respondent was taking at the bargaining table. Paragraph 13(b) of the complaint further alleges that the Respondent's conduct also constituted direct dealing in violation of Section 8(a)(5) and (1).

At the time of the trial, Michael Sarchett was employed by the Respondent as an LNP operator in the ethanol department and was also a union steward. Sarchett testified that in the early part of July 2015, he was considering whether to retire and was discussing his retirement benefits with Ann Junge, the Respondent's retirement benefit coordinator, in her office at the facility. According to Sarchett, David Roseberry, the Respondent's then customer service operation manager, came into Junge's office and told him not to sign the retirement papers. After Sarchett had finished his conversation with Junge and stepped out into the hallway, Roseberry spoke to him again. Roseberry told him not to sign the retirement papers as there was a better contract coming and that Sarchett would like the retirement that the Respondent was going to propose. Roseberry added "do not let a few people in the union body sway what you want to do." Sarchett asked Roseberry who had given him permission to tell him this and why was he getting this information out. Roseberry replied that Meadows had given him permission to talk about it with employees.

Jeff King also testified in support of this complaint allegation on behalf of the General Counsel. King had been employed at the Cedar Rapids facility for 33 years until he retired on August 1, 2015. At the time of his retirement he was a mobile supply operator in the dry starch department and was a union steward. King testified that he met with Junge on approximately July 17 to review his pension calculation with her. At that time, King informed Junge that he had decided to retire and made an appointment with Junge for July 23 in order for him and his wife to sign documents associated with his retirement. On July 17, Junge told King that she would have to notify the operations manager in the human resources department of his decision to retire. On July 17, after his meeting with Junge, King was fueling a piece of machinery when Roseberry approached him and said that he had heard that King was signing his retirement papers. Roseberry told King that he needed to get a hold of the union executive board and get them to go in and negotiate. Roseberry said that the "pension is negotiable, the hours, wages are negotiable, everything is negotiable" and that he needed to call his union representatives and "have them get a hold of the company and start negotiating." King told Roseberry, "I am friends with Matt Maas, the vice president. Are you sure you want me to call him and tell him what you are telling me." Roseberry replied, "yes, we need to get together, we need to get this taken care of." Roseberry stated that he had been instructed to come out and talk to the senior employees about this.

Shortly thereafter, King went into the maintenance shop and saw Sarchett having an animated discussion with two other employees, Karen Sarchett and Renita Shannon. King joined the conversation briefly and heard Sarchett say that he had just had a conversation with Roseberry and that Roseberry had told him that the Union was not telling the employees everything, "that company has a lot to give us," and that the Union and the Company needed to get together and negotiate.

Roseberry testified that he knew from general discussion in the plant that Sarchett and King were thinking of retiring but that he did not seek them out to speak with them.[25] According to Roseberry, he happened to run into Sarchett in the accounting area of the front office. Roseberry had known Sarchett for a long time and asked him how it was going. Sarchett replied that "Not so well. Have to make a decision whether to retire or not." Roseberry told Sarchett as a friend to talk to his financial advisor and to find out from the union committee what the respondent was offering so he could make an educated decision about what was best for him his family.

Roseberry testified that he ran into King in the yard area of the plant and asked him how things were going. King replied that he had to make a decision about whether to retire. Roseberry testified that he told King to make sure that he talked to his financial advisor and try to find out from the union committee what the Respondent was offering so he could make an educated decision on his retirement. Roseberry specifically denied that he told either Sarchett or King that he was sent to talk to them; that the Respondent would make a better contract offer; and that they should try to put pressure on the union committee to start negotiating.

I credit the testimony of Sarchett and King over that of Roseberry. Both Sarchett and King testified in a detailed and cohesive manner regarding their conversation with Roseberry. Their demeanor reflected a sincere desire to testify truthfully about the conversations. In addition, Sarchett was a current employee of the Respondent at the time of the hearing and thus it is unlikely that his testimony is false. Roseberry's version of his conversations with the employees is not as detailed and his demeanor while testifying regarding these events was not impressive. In addition, I find that, under the circumstances, it is implausible that Roseberry would have a general, casual conversation with two employees who were contemplating retirement. It is clear that the possible loss of approximately 28 employees at the same time for retirement in a unit of approximately 160 was of great concern to Respondent.

Based on the credible testimony of Sarchett and King set forth above, I find that on approximately July 17,[26] Roseberry made statements indicating that the Respondent was willing to offer a better contract but that the Union was unwilling to negotiate. I find that by such statements, the Respondent was at-

[25] Clearly, the Respondent had an interest in determining how many employees would be retiring under the retirement provisions of the existing contract which was due to expire on August 1. Pursuant to a request made by Wood, on July 22, Junge sent a list of the 28 employees who had indicated they may retire by July 31 (GC Exh. 57).

[26] I find the King's testimony establishes that the date of these conversations was approximately July 17. King had a more distinct recollection of the approximate date of his conversation with Roseberry than did Sarchett. King credibly testified that he participated in a conversation where Sarchett stated that he had spoken to Roseberry that same day.

tempting to denigrate the Union in the eyes of employees and thus violated Section 8(a)(1) of the Act. *Carib Inn of San Juan*, 312 NLRB 1212, 1222–1223 (1993). I also find that Respondent's conduct constituted direct dealing in violation of Section 8 (5) and (1). In this regard, under the authority of Meadows, Roseberry went to employees and told them that the Respondent was going to make a better contract offer and that the employees needed to contact the Union's bargaining committee and get them to negotiate. These conversations with employees occurred without the presence of the Union and were designed to undercut the Union's role in bargaining.[27] Accordingly, under the standard set forth in *Permanente Medical Group*, supra, the Respondent's conduct constitutes direct dealing in violation of Section 8(a)(5) and (1) of the Act.

The complaint alleges in paragraph 5(e) that in July 2015, the Respondent, through Facility Manager, David Vislisel, threatened employees that they would never return to work if they went on strike in violation of Section 8(a)(1) of the Act.

Bishop testified that in July 2015, he was in the control room in building 95 talking to approximately three other employees about the negotiations and whether there would be a strike. Bishop testified that David Vislisel, the facility manager told the employees "You boys, you might want to think long and hard about walking out on these people. They've got the deep pockets and lots of plants that make the same thing you do. You may not get back in the door if you go out." (Tr. 38.)

Vislisel testified that he did not recall having a conversation with Bishop about a potential strike and denied ever telling employees that they would never return to work if they were on strike. He further denied ever telling employees that they might want to think long and hard about walking out on the Respondent and that the Respondent had deep pockets. Finally, he denied ever telling employees that if they went on strike they might not get back in the door.

I credit Bishop's testimony over that of Vislisel regarding the statements made by Vislisel. Bishop testified consistently regarding the statement Vislisel made to him and the other employees on both direct and cross-examination. I do not agree with the Respondent that Bishop's credibility is diminished by the fact that his affidavit dated August 1, 2015, contains a statement that no one personally told him that he was going to be replaced. According to Bishop's testimony, Vislisel never used the word "replaced" when he spoke to Bishop and the other employees. Thus, I find there is no inconsistency between Bishop's testimony and his affidavit on this issue. Vislisel's denial of the statements attributed to him by Bishop was somewhat perfunctory and his demeanor while testifying was not impressive.

As discussed earlier in this decision, in *Baddour, Inc., and Larson Tool & Stamping Co.*, supra, the Board made it clear that an employer cannot tell employees without an explanation that they would lose their jobs as a consequence of a strike. I find that Vislisel's statement that if the employees went on strike "they might not get back in the door" impliedly threated employees with a loss of their jobs if they went on strike. Vislisel's statement is not a truthful but incomplete statement regarding an employer's right to replace economic strikers that is permitted by *Eagle Comtronics*, supra and its progeny. Accordingly, I find that Vislisel's statement violated Section 8(a)(1) of the Act.

Paragraph 5(f) of the complaint alleges that the Respondent, by maintenance coordinator John Swales, in late August and September, 2015 violated Section 8(a)(1) by informing employees that the Union was bargaining in bad faith and was at fault for any failure to reach an agreement. Paragraph 5(g) of the complaint alleges that about September 14, 2015, the Respondent by its Process Specialist Brad Bumba, violated Section 8(a)(1) in the same fashion.

Current employee Adam Beitz testified that in September 2015, shortly before the Respondent's last, best, and final offer was implemented, he was in the middle house control room talking to two other employees about the negotiations when Maintenance Supervisor, John Swales entered the room. Swales told the employees that he thought that the Respondent was offering a good contract. Swales told the employees that he had been on the union side and he knew how negotiations were. Swales said that the reason that negotiations were not moving forward was because Eby was holding them back by not negotiating and also because of his relationship with Meadows. Swales added that the Union wanted everything and was not willing to give anything and again stated that he thought that the Respondent was offering a fair contract.

Beitz also testified that shortly after the Respondent's last, best, and final offer was implemented, he and another employee spoke to their supervisor, Bumba about questions they had about their schedules. Bumba explained how scheduling was being handled and told them he was doing it in the way that he interpreted the language in the implemented offer. Beitz and the other employee stated that he was not doing the same as other supervisors. Bumba repeated that was how he interpreted the implemented offer and that was how it was going to be done. Beitz replied that he did not think that the implemented offer should be open to interpretation and that everybody should do it the same way. Bumba asked Beitz how long he had been involved with the Union and Beitz answered "four years." Bumba then replied that he had been involved in more than seven different jobs involving unions that he thought he was more knowledgeable that Beitz on the topic. According to Beitz, as Bumba left the room, he stated "Just remember why things are the way they are." When Beitz asked him if he was blaming the Union, Bumba replied "I am not saying it is your fault, I am just making a statement."

Swales testified that he never told Beitz that the Respondent offered the Union a good contract or that the Union wanted everything and was not willing to give anything up.

Bumba testified he received a call from Beitz who asked him to come over to the middle house control room to talk about scheduling overtime, Bumba testified that he spoke to Beitz, employee Austin Coufal, and two or three other employees, about a change in scheduling overtime that had occurred since his initial conversations with them about overtime. According

[27] I find the fact that Sarchett and King were both union stewards at the time these conversations were held does not serve as a defense to a finding of direct dealing as neither employee had any role in the negotiations.

to Bumba, Beitz was upset because he would have to work more overtime based upon the terms of the implemented offer. Bumba testified that he went over how overtime was going to be scheduled. In doing so, Bumba stated that an issue had arisen in another department and that an employee claimed that she was forced to work overtime that was not in her classification. Bumba further stated that whatever happened with that discussion, whether a grievance was filed or not, is what triggered the change in scheduling. According to Bumba, Beitz then asked him if he was blaming it on the Union. Bumba testified he replied by saying that he was not, he was just stating a fact. Bumba explained how overtime would be assigned in the future. He told Beitz that he could talk to his union leadership and file a grievance, if he wished. According to Bumba, at that point Beitz took the "red book" out of his duffel bag and stated that they never had problems with that agreement because things were crystal clear. Bumba replied that was not the case and that he worked in several different unions under different contracts. He added that the every union contract had interpretations and that the "red book" had numerous letters of understanding clarifying the agreement.

I credit the testimony of Beitz over that of Swales regarding their conversation. Beitz testimony was more detailed than Swales' perfunctory denial. I find that Swales' statement that Eby was not negotiating and that Respondent was offering a fair contract, denigrated the Union in violation of Section 8(a)(1) and also constituted direct dealing in violation of Section 8(a)(5) and (1). *Carib Inn of San Juan*, supra; *Permanente Medical Group*., supra.

With respect to the conversation between Beitz and Bumba, I find Bumba's version to be the more reliable and I credit it. Bumba testified in more detail and his account is more plausible than that of Beitz in my view. I find that the conduct of Bumba, in answering Beitz' question as to why overtime scheduling was being administered by him in a certain fashion, did not denigrate the Union or constitute direct dealing. Accordingly, I shall dismiss paragraph 5(g) of the complaint.

The Alleged Delay in Furnishing Information

Paragraph 12 of the complaint alleges that from May 13, 2015, until July 1, 2015, the Respondent violated Section 8(a)(5) and) (1) by delaying in providing the following information: (1) the total dollar cost and cents-per-hour cost for each fringe benefit during the period of May 1, 2014, through May 1, 2015, including the Respondent's accounting method for the cost-per-hour basis for each benefit; (2) the cents-per-hour individual cost for each dollar increase to the pension multiplier; (3) and the cents-per-hour per individual cost for each 1 percent increase in the direct contribution plan.

On May 13, the Union requested, in writing, 12 different items of information from the Respondent. After receiving the request for information, the Respondent provided a substantial amount of the requested information prior to the beginning of negotiations, but did not provide the items listed in the complaint. The Respondent's then Director of Human Resources at the Cedar Rapids facility, Patricia Drahos, worked on the Respondent's response to the Union's information request. The handwritten notes of Drahos that she made on the Union's request indicate with respect to item (1) noted above "I don't have." Next to items (2) and (3) Drahos' notes indicate "not app" (GC Exh. 72). Drahos testified that with respect to items (2) and (3), she did not think the Union's request was applicable because the Respondent was not going to be offering a pension increase. Drahos further testified that she probably would have gone back to gather that information later, but there was a short time to gather the information, and she tried to produce as much of the relevant information as she could before the negotiations began. Drahos further testified that the information requested by the Union in items (1), (2), and (3) would have to be obtained from the Respondent's pension administrator, Mercer, and that it would be expensive and the Respondent would not be able to provide such information in a timely fashion.[28]

On June 29, 2015, the Union again requested in writing items (1), (2), and (3) noted above (GC Exh. 9b). With respect to the Union's request for information regarding the pension information, Meadows told the Union that the Respondent was not intending to provide such information as an increase to the pension plan was not part of the Respondent's proposal. On the same day, Meadows sent an email to Eby addressing the Union's information request for the total dollar cost and cents per hour for fringe benefits (Jt. Exh. 19). Meadows email listed the insurance rates for hourly employees effective January 1, 2014; set forth the cost-per-hour as $6.78 for medical and dental insurance; set forth the number of employees on each medical and dental plan; and set forth the total cost of unemployment for calendar year 2014. Meadows email indicated that "the company has no info on increase to pension."

On July 14, the Union submitted another request for information to the Respondent which sought, inter alia, "cost per hour for 1 year credit/benefit in Pension." (Jt. Exh. 21.) On July 23, the Respondent replied to the Union's July 14 request regarding pension information by stating "The Company is not sure what the actual request is, but in an attempt to meet your request, the Company is responding that the cost per hour for the DB pension is $2.78." (Jt. Exh. 22.)

On July 30, as part of a much larger request for information, the Union again requested items (1), (2), and (3) set forth above. (Jt. Exh. 26). On July 31, the Respondent provided a substantial amount of information to the Union, including specific and detailed information relating to items (1), (2), and (3). (Jt. Exhs. 27 and 28.)

It is clear that information that a union requests that is directly related to the wages, hours and working conditions of unit employees, including information regarding employee insurance and pension plans, is presumptively relevant. *International Protective Services, Inc*., 339 NLRB 701, 704, (2003); *Honda of Hayward*, 314 NLRB 443, 449–451 (1994); *Beyerl Chevrolet, Inc*., 221 NLRB 710, 720–721 (1975). In the instant case, the information sought by the Union is the type of information the Board has determined must be furnished upon request.

The Board has also held that an employer's unreasonable de-

[28] Drahos was transferred to a new position as a recruiter just prior to the beginning of negotiations on June 1 and appeared to have no further role in responding to the Union's request for information after that time.

lay in furnishing information "is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Woodland Clinic*, 331 NLRB 735, 736 (2000). See also *Valley Central Emergency Veterinary Hospital*, 349 NLRB 1126, 1134 (2007).

In the instant case, the record establishes that after the Union's initial May 13 request, the Respondent had not provided any of the information requested in items (1), (2), and (3) prior to the Union's second request for such information made on June 29. After the Union's second request on June 29, that same day the Respondent partially complied with the Union's request by furnishing the information sought in item (1) regarding health insurance. However, on June 29, Meadows stated that the Respondent was not intending to provide information regarding any increase to the pension plan as a pension plan was not part of the Respondent's proposal. Thereafter, on July 14, the Union submitted another request for the Respondent's cost per hour regarding the pension plan and on July 23, the Respondent furnished information regarding the cost per hour for the defined benefit pension plan. On July 30, the Union again requested items (1), (2), and (3) and on July 31 the Respondent provided to the Union specific information relating to all of those items.

In evaluating the promptness of a response to a request for information that an employer is obligated to provide, "the Board will consider the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *West Penn Power Co.,* 339 NLRB 585, 587 (2003); *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). With regard to information that is not in possession of an employer, an employer has a duty, "to make a reasonable effort to secure the requested information and, if unavailable, explain and document the reasons for the asserted unavailability." *Rochester Acoustical Corp*., 298 NLRB 558, 563 (1990); *Goodyear Atomic Corp*., 266 NLRB 890, 896 (1983).

In the instant case, the Respondent has not established that the information sought by the Union in items (1), (2), and (3) was complex to assemble or difficult to retrieve. With respect to information that may have not been within its possession when requested, the Respondent gave no explanation to the Union during bargaining regarding any difficulties it may have experienced in retrieving it.

I recognize that the Respondent provided a substantial amount of information requested by the Union in a timely manner. However, with respect to items (1), the Respondent did not provide any of the requested information regarding the cost of fringe benefits, until it provided some cost information regarding insurance and unemployment on June 29, approximately 6 weeks after the request. It did not provide the remainder of the information with respect to item (1) and none of the requested information in items (2) and (3) until July 31, 2½ months after its request. The Respondent gave no explanation for the delay in providing the information which, because it was requested for the purpose of bargaining, was time sensitive.

The Board has consistently found that similar delays in providing relevant information, without a legitimate explanation, to be violative of Section 8(a)(5) and (1) of the Act. *Bundy Corp*., 292 NLRB 671 (1989) (2½-month delay); *Woodland Clinic*, supra at 737 (7-week delay); *Postal Service*, 310 NLRB 530, 536 (1993) (2-month delay); *Postal Service*, 308 NLRB 547, 550 (1992) (7-week delay).

I find the cases relied on by the Respondent to be distinguishable from the instant case. In this connection, in *West Penn Power*, supra, at 587 the Board found that an employer's delay of between 5 and 7½ months in providing the requested information regarding meter readers at one union organized facility and one facility that was not organized, did not violate Section 8(a)(5) and (1). In that case, the information that was delayed was part of a much larger information request. The employer assigned five full-time employees who spent hundreds of hours gathering the requested information and accorded a higher priority to other information requested. The requested information regarding the meter readers was not time sensitive and the union had requested material for an 8-year period. In addition, the employer had periodically advised the union that it was gathering the requested information.

In *Dallas & Mavis Forwarding Co.*, 291 NLRB 980, 983–984 (1988), the employer did not provide requested information regarding tariffs in the employer's contract with a customer. During the period from the union's request until the employer provided the information, the employer and the union were in continuous discussions regarding the employer's legitimate confidentiality concerns addressing how, and under what circumstances, the information would be provided. Under these circumstances, the Board found no violation of Section 8(a)(5) and (1) with respect to the delay in providing information.

In *Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1085, (2000), the employer did not provide a copy of the venture agreement entered into between Dow and Dupont for approximately 3 months. At the time the union made its request, the document was not signed by the parties. When the union learned 10 days after its request that the document was not signed, it did not clarify its request to seek a copy of the draft agreement. The document was signed in March and a copy was given to the union in April. The Board found that the delay was attributable to a good-faith misunderstanding regarding precisely what was sought and, under the circumstances, the production of the agreement was not unreasonably delayed and consequently there was no violation of Section 8(a)(5) and (1).

In each of these three cases discussed above, there was a reasonable explanation regarding the delay in providing the requested information. As noted above, in the instant case, the Respondent never gave the Union an explanation for the delay in providing the requested presumptively relevant information. Accordingly, on the basis of the foregoing, I find that the Respondent's delay in providing the information requested in items (1), (2), and (3) violated Section 8(a)(5) and (1) of the Act.

The Respondent's Overall Conduct During Bargaining

Applying the principles set forth above regarding a party's obligation to bargain in good faith, I find that the totality of the Respondent's conduct through September 14, 2015, demonstrated that it negotiated with a closed mind and would only reach an agreement on its own terms, and thus failed to comply with its obligation to negotiate with an intent to settle differ-

ences and arrive at a mutually satisfactory agreement.

In this regard, I find that the Respondent's principal negotiator, Meadows, made a number of comments reflecting that the Respondent would only reach an agreement on its own terms. On April 6, 2015, before bargaining began, Meadows met with some members of the union bargaining committee and gave them a preview of the Respondent's proposals. While discussing employee insurance, Drahos mentioned that the current insurance had $200 and $400 deductible amounts and Meadows waived his hand and said "bye-bye." When the existing pension plan was raised, Meadows again waived his hand and said "bye-bye."

Later that day, Meadows engaged in direct dealing with a number of employees by questioning them about what they wanted to see in a contract and telling them some of the positions that the Respondent would take in the upcoming negotiations. Meadows stated that a wage increase would be offered in the range of 2 to 2.5 percent. Meadows also told employees that he did not think that the existing insurance was that good and a "Cadillac" tax would be placed on the Respondent for having an insurance policy like that. Meadows further added that the current pension and insurance would be gone and that the employees would have the Respondent's insurance. Meadows also told Bishop that he was not going to see an increase in his pension multiplier and that he did not need gap insurance unless he was sure he was going to be retiring soon.

Once bargaining actually began, Meadows continued to make statements reflecting the Respondent's desire to only enter into an agreement on its own terms. At only the third bargaining session held on June 30, Meadows told the Union that if the parties did not come to an agreement he could give the Union a last, best, and final offer and he was going to prepare accordingly. Finally, on September 28, after the Respondent had declared impasse and implemented its last, best and final offer, Meadows discussed the pending unfair labor practice charges in the instant case with Eby and stated that if the NLRB ruled against the Respondent, he would come back to the table and do the exact same thing. Such statements establish that the Respondent had no real intent to adjust the differences between it and the Union but rather sought agreement on its own terms and none other. *Regency Service Carts, Inc*., supra at 672.

The Respondent's initial proposal made on June 1, 2015, sought a 4-year agreement with significant reductions in many of the terms and conditions of employment set forth in the existing contract. Both the format and the substantive terms of the Respondent's proposed collective-bargaining agreement was new and bore no resemblance to the provisions of the existing contract. In presenting his proposal, Meadows stated that while his goal was to get a contract, Ingredion was not Penford and his proposal contained radical changes that would not necessarily make people happy. Meadows further indicated that the Respondent intended to make operational changes at the plant in order to integrate the structure of the Cedar Rapids facility with the Respondent's other operations. Near the conclusion of the meeting, Meadows reiterated that he was proposing a brand-new contract and if the parties reached an impasse on an issue he suggested that they move on and discuss other issues.

The Respondent's proposal, inter alia, sought reductions in: paid vacations; premium pay; paid holidays; and paid funeral leave. The proposal sought to have employees use vacation days while the plant was on shutdown and while the employees were on FMLA. The proposal sought to have the existing two tier wage scale be made permanent, rather than having the newly hired employees work at the second-tier level for 4 years and then being brought up to the first tier wage level. The proposal also sought a reduction in short-term disability benefits and employee life insurance. With respect to gap insurance, the proposal sought to have retired employees pay 50 percent of the total monthly premium under the insurance plan with no supplemental benefits. The existing contract provided that retired employees could maintain the Respondent's insurance for $51 a month and also be eligible for supplemental benefits. The Respondent's proposal provided that it have discretion with respect to establishing plant rules and did not provide for a progressive discipline procedure. The proposal sought to greatly expand the Respondent's ability to subcontract maintenance work. The proposal also sought to eliminate several joint labor-management committees, including the labor relations committee. The proposal did not contain a provision regarding substance abuse, while the existing agreement contained a letter of understanding establishing a detailed negotiated policy with respect to substance abuse. Finally, the proposal did not contain a successor clause or a provision for severance benefits.

The Board has found that where a proponent of a regressive proposal fails to provide a legitimate explanation for such a proposal, it is indicative of a failure to bargain in good faith. *Mid-Continent Concrete*, 336 NLRB at 260; *John Ascuaga's Nuggett*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nom. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992). The Board has also considered an employer's refusal to consider a union's proposals, without explanation, to be a factor in finding an employer has failed to bargain in good faith. *Mid-Continent Concrete*, 336 NLRB at 260. In the instant case, I find that the Respondent failed to provide a legitimate explanation to justify the significant differences between the proposals it advanced and the terms and conditions of employment in the existing contract it assumed. I also find that it failed to give a reasonable explanation for its refusal to consider proposals made by the Union based on the format of the contract that expired by its terms on August 1, 2015.

At the second meeting held on June 29, Meadows went through the Union's initial proposal, article by article and replied for the most part that he was "not interested" in the proposal. For some of the Union's proposals, he noted that the proposal was encompassed within the Respondent's proposal, Meadows indicated however, that he would agree to the Union's proposal to pay the health insurance premiums for an employee and their family while the employee was on active military duty meeting. This entire process took 5 to 10 minutes. The parties discussed the new non-economic proposal presented by the Union that would increase the number of union representatives on the labor relations committee from 3 to 4. Meadows stated that his proposal did not provide for labor relations committee and, when the Union tried to explain the benefits of the labor relations committee, Meadows replied that such a

committee was not necessary because of the Respondent's open door policy. At the conclusion of the meeting, both parties indicated they were going to continue making proposals based on the format of their initial proposals.

At the meeting held on June 30, the Respondent submitted a revised proposal. When Meadows presented the proposal, he indicated the changes in the proposal that he believed reflected areas of agreement between the parties. Head stated that there were no tentative agreements between the parties and further stated that the Union was not going to move from presenting proposals based upon the language of the existing agreement. Meadows replied that he was not going to accept the contract as it was written and that he tried to put some of the existing contract provisions in his proposal but that it was not Penford anymore and the Respondent was not going to continue to operate in the same manner. As noted above, Meadows then stated that if the parties did not come to an agreement, he could give the Union an "LBF" and that he was going to prepare accordingly. Head stated that August 1 was not a "drop dead date" and that the Union was prepared to negotiate beyond that date. While Meadows initially replied that it may be a drop dead date for him, he then quickly stated that August 1 was also not a drop dead date for the Respondent.

At the July 27 meeting, Head told Meadows that the Union had identified 124 concessions from the existing agreement that the Respondent was seeking in its proposal. Meadows replied that he did not see it that way and that the Respondent was being fair and wanted to negotiate but that he was sticking with the Respondent's proposal as the current contract did not allow the Respondent to grow. When Head asked why the existing contract did not allow the Respondent to grow, Meadows did not respond. On July 28, the only explanation given by the Respondent for its proposal containing a permanent two tier wage structure was a vague statement that an overall economic adjustment was needed.

After the Respondent made its final offer on August 18, when the Union presented a new non-economic proposal based on the format of the then expired contract, Meadows that the Respondent's last, best, and final offer was on the table and that the Union's proposal was not acceptable and he had no interest in returning to the language of the expired contract. When the Union presented a wage proposal that day based on the wage provisions contained in the expired contract, Meadows said that he was not interested in going through the Union's wage proposal step-by-step. Meadows added that wages were set forth in his last, best, and final offer and that he would be willing to discuss the Respondent's wage offer.

On September 9, when Head stated he was going to go through the Union's proposal article by article, Meadows said he had given the Union a last, best, and final offer and that he was not interested in going through the Union's proposal article by article. On September 10, the Union presented a proposal based on the provisions of the expired contract which contained movement by the Union toward the Respondent's position. After briefly reviewing it, Meadows responded that it was unacceptable as the Respondent's last, best, and final offer was on the table and he expected to see proposals related to that offer. At that meeting, Meadows gave the Union a letter reflecting the Respondent's intention to unilaterally implement its last, best, and final offer on September 14. In brief meeting on September 11, Meadows stated that he was disappointed in the Union's latest proposal and that the Respondent was not interested in it.

While the Respondent admitted at the first bargaining session on June 1, that its proposal contained radical changes that would not necessarily make people happy, the only reason given by the Respondent to the Union during negotiations regarding the basis for its proposal was that it intended to make operational changes at the Cedar Rapids facility in order to integrate its structure into the rest of the Respondent's operations. At the July 27 meeting, when Head told Meadows that the Union had identified 124 concessions from the existing agreement that the Respondent was seeking in its proposal, Meadows replied that he did not see it that way and that the Respondent was being fair and wanted to negotiate but that he was sticking with the Respondent's proposal as the current contract did not allow the Respondent to grow. When Head specifically asked why the existing contract did not allow the Respondent to grow, Meadows did not respond. By the end of July, the Respondent certainly should have been able to explain to the Union specifically what provisions and language in the existing agreement limited its ability to grow. The Respondent had been operating the facility since April and Froehlich and Wood had been in senior management positions at the facility for several years. Similarly, on July 28, the only explanation given by the Respondent for its proposal for a permanent two tier wage structure was the vague statement that an overall economic adjustment was needed.

Even at the trial, the only explanation given by Meadows for the nature of the Respondent's proposals was a generalized statement that the terms of the existing collective-bargaining agreement at the Cedar Rapids facility were inconsistent with that of other collective-bargaining agreements that the Respondent was party to and that it did not "fit" the Respondent's operational needs for the plant.

In addition, to its failure to give any meaningful reasons to the Union for its regressive proposal, the Respondent failed to give a meaningful explanation as to why it did not agree with the Union's proposals, which consisted of enhancements to the existing terms and conditions of employment. Those terms and conditions of employment were derived from a bargaining history of almost 70 years. While the Respondent certainly has a right to seek changes in those terms and conditions of employment, merely rejecting the Union's proposals without a reasonable explanation for doing so does not comport with the Respondent's obligation to make some effort to effectuate a compromise in order to reach a common ground. I find that the Respondent's lack of an explanation for its own proposal, coupled with its failure to explain its rejection of the Union's proposals based on the format of the existing contract, support a finding that the Respondent intended to reach an agreement only on its own terms.

During the bargaining, the Respondent, although refusing to give a meaningful explanation for rejecting the Union's proposals, made a series of concessions that resulted in its last, best and final offer containing some of the terms and conditions of employment of the expired agreement. The Respondent's last,

best, and final offer also included a wage increase for all employees, although it instituted a permanent two-tiered wage system with approximately a 20 percent difference between the two tiers. Viewed under the totality of circumstances test described above, I find that the Respondent's movement from its initial proposal is insufficient to outweigh other factors establishing that it failed to engage in good faith bargaining.

Many of the changes in the Respondent's bargaining position demonstrate that it reverted to a position that was at or near the terms and conditions of the contract that expired by its terms on August 1, 2015 (the red book). The following changes in the Respondent's bargaining position from its first proposal to its last, best, and final offer that was implemented on September 14, regarding the following issues fall into this category: providing double time pay for Sunday work; providing two additional personal holidays; increasing the top level of vacation to 6 weeks for 25 year employees; increasing vacation pay to 45 hours per week; providing time and a half pay for work over 8 hours in a day and double time for over 12 hours in a day; providing double time pay for day shift maintenance employees working at night, removing a holiday pay exclusion for probationary employees; removing the requirement that employees be scheduled in a holiday week to receive holiday pay; the bereavement leave jury duty leave policies; allowing senior employees to bank vacation days to use as single days; removing the requirement to use vacation leave before using FMLA leave; raising the temporary disability benefit from $325 a week to $375 a week, raising the group life insurance benefits from $25,000-$50,000; adding a progressive discipline system; and increasing the number of days of unexcused absences before an employee loses seniority from 2 to 3.[29]

In its last, best, and final offer, the Respondent also finally withdrew from its proposal the following nonmandatory subjects of bargaining; the scope of the bargaining unit; restrictions on the number of persons on the Union's bargaining committee; and the requirement that bargaining committee members be employees of the Respondent. The Respondent also withdrew its proposal discontinuing benefit payments during a work stoppage.

Viewing Respondent's bargaining position in conjunction with its lack of an explanation for a legitimate need to dramatically alter the terms and conditions of employment at the Cedar Rapids facility, and its failure to address the Union's proposals in a meaningful way, in my view, establishes that the Respondent failed in its obligation to bargain in good faith, but rather bargained in a manner designed to reach agreement on its own terms and none other.

As noted above, the Respondent also engaged in conduct away from the table demonstrating a lack of good faith in the manner it conducted the negotiations. In this regard, even before negotiations began, the Respondent demonstrated an intent not to resolve differences, when Meadows told members of the union committee that the existing health insurance with low deductibles and the defined benefit pension plan for senior employees would be gone. As set forth above, during negotiations the Respondent bypassed the Union and engaged in direct dealing with employees in violation of Section 8(a)(5) and (1). Finally, the Respondent delayed in providing presumptively relevant information sought by the Union in violation of Section 8(a)(5) and (1). All of the Respondent's away from the table unfair labor practices had a direct nexus with the Respondent's bargaining position and therefore further establish its intent not to bargain in good faith. On the basis of the foregoing, I find that the Respondent, by its overall course of conduct during the bargaining through September 14, 2015, failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

I do not agree with the Respondent's argument that it cannot be found to have bargained in bad faith because the Union has, in fact, engaged in bad-faith bargaining. There is no allegation that the Union's conduct has violated Section 8(b)(3) of the Act in the instant complaint. The Respondent correctly notes, however, that even without a complaint allegation alleging that a union has bargained in violation of Section 8(b)(3), the Board has long held that a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude a finding of bad faith on behalf of the employer. *Chicago Tribune Co*., 304 NLRB 259, 260 (1991); *Times Publishing Co*., 72 NLRB 676, 63 (1947).

In support of its position, the Respondent principally contends that the Union adopted a take it or leave it approach and refused to consider the Respondent's proposals unless it "bargained from the Red Book." The Respondent also contends that the Union demonstrated bad faith by canceling bargaining meetings and thus indicated an unwillingness to meet with the Respondent.

With respect to the Respondent's contention that the Union demonstrated bad faith by demonstrating a take it or leave it approach to bargaining, the Union made its initial proposal for a new collective-bargaining agreement on June 1, by referring to the provisions of the then existing agreement. As discussed in detail above, the Respondent, however, presented an entirely new proposed collective-bargaining agreement in both the substantive provisions and the format. At the second meeting, the Union indicated that it was going to continue to work from the terms of the existing contract and the Respondent indicated it was going to continue to work from the new contract format it had proposed. At the third meeting held on June 30, Head raised the issue of how the parties were going to proceed and stated that they needed to have an agreed-upon process for negotiations. Head also asked Meadows to take his proposals and submit them in relation to the existing contract language and red line suggested changes. Meadows replied that he was going to continue working from his proposed agreement and that he was not going to accept the existing contract language. Meadows added that he had tried to put some of the existing contract provisions in his proposal but that the facility was no longer operated by Penford and that the Respondent was not going to continue to operate in the same manner. Meadows also threatened the Union that if the parties did not come to an agreement he could give the Union a last, best, and final offer

[29] The Respondent's response to an information request by the Union on July 28, establishes that many of the items that the Respondent withdrew from its initial proposal were either low-cost or no cost items. (Jt. Exh. 24, pp. 912–913.)

and that he was going to prepare accordingly.

When the parties met again on July 27, Meadows stated that the Respondent was sticking with its proposal as the current contract did not allow the Respondent to grow. When Head asked why the current contract did not allow for growth, he did not receive a response from Meadows. Without an explanation from Meadows asked why it was necessary to bargain in the format of the Respondent's entirely new proposed agreement, Head replied that the Union was sticking with its proposal.

At the meetings held on July 28, 29, and 30, the parties discussed a series of revisions that the Respondent made to its proposal for a new collective-bargaining agreement. As noted above, the existing agreement between the parties was scheduled to expire on August 1. At the bargaining meeting held on July 31, Head stated that, given where the parties were in the bargaining process, if Meadows wanted to prepare a final offer, the Union would present it to the membership for a vote. Thereafter, the Respondent prepared a final offer in the new contract format that it had been proposing.

When the Respondent's final offer was presented to the membership, 95 percent of the members voted to reject the offer. When the parties resumed bargaining on August 17, Head stated that given the overwhelming rejection of the Respondent's proposed contract, the Respondent needed to make significant movement in order to advance the bargaining process. Head further stated that the Respondent wanted "to control people's lives" and would not accept the Union's "proud contract." Head indicated that in order to advance the negotiation process, the Respondent had to respect the contract that it had "bought" and had to make proposals based on the terms of that contract in order to have a path for meaningful discussion. Head indicated that while there were no tentative agreements between the parties, the Union was willing to move.

On August18, the Respondent presented its last, best and final offer based on the format of the new agreement it was seeking. When the Union made a counteroffer regarding some noneconomic provisions based on the format of the expired agreement, Meadows rejected it and stated that there was language in the Respondents offer that addressed those issues. Meadows further indicated that if there were issues that the Union wanted to address in the Respondent's offer, he would do so for some of the provisions. At this meeting, the Union also made a wage proposal based on the format of the expired agreement. Meadows refused to go through the Union's wage proposal, indicating that wages were set forth in the Respondent's last best and final offer and that he would be willing to talk about the Respondent's wage proposal.

At the brief meeting held on September 9, Head indicated that he wanted to go through the Union's proposal based on the format of the expired agreement article by article. Meadows indicated he was not interested in going through the Union's proposal article by article as the Respondent had given the Union in its last, best, and final offer. At the September 10 meeting, the Union made a new proposal based on the format of the expired agreement in which it made substantive movement toward the Respondent's position on certain issues. Meadows responded that the Union's proposal was unacceptable as the Respondent's last, best, and final offer was on the table and he expected to see items related to that offer. On September 11, the Respondent formally rejected the Union's latest proposal and gave the Union written notice that it intended to implement its last best and final offer on September 14.

In *88 Transit Lines*, 300 NLRB 177 (1990), the Board found that an employer's refusal to agree to "common 'boilerplate' language, contained in a union's initial bargaining proposal, was not indicative of an intention to evade reaching an agreement. In so finding, the Board noted that it is constrained under Section 8(d) of the Act from making findings that would effectively compel a party to agree to particular proposals or to make particular concessions. The Board, therefore, concluded that it cannot base a finding of bad faith on a party's refusal to agree to the exact language of the other party's proposals. In reaching this conclusion, the Board noted "Indeed, a major function of the bargaining process is reaching common ground that represents modifications of language contained in parties' initial proposals." Id. at 178. The Board further noted, however, that if a party was adamant concerning his own initial positions on a number of significant mandatory subjects it could properly find bad faith was established based on a take it or leave it approach to bargaining.

Applying the analysis of the Board's decision in *88 Transit Lines*, supra, to the instant case, I find that the Union's position that it wanted the Respondent to make proposals based upon the structure and format of the red book, is not indicative of bad faith on the part of the Union. As noted in *88 Transit Lines*, a major function of the bargaining process is attempting to reach a common ground on modifications of language contained in parties' initial proposals. In the instant case, the Union did not insist that the Respondent accept all of the provisions of the red book, rather its position was that negotiations for a new agreement should be based on the structural format of that agreement. The Union's position was not so adamant concerning the mandatory subjects of bargaining contained in its initial proposal so as to establish a take it or leave it approach to bargaining.

After the parties' initial disagreement in June over the format of the proposals that were to serve as a basis for negotiating a new collective-bargaining agreement, the bargaining in July involved discussion of the Respondent's revisions to the entirely new collective-bargaining agreement that it was proposing. After the union membership overwhelmingly rejected the Respondent's July 31 proposed agreement, the Union again indicated on August 17 that in order for the bargaining process to move forward, the Respondent needed to make proposals based upon the format of the existing agreement. On August 18, the Respondent declared impasse and presented the Union with its last best and final offer. Thereafter, while the Union persisted in its position that it wanted to discuss its proposals based on the format of the expired contract, it indicated it was willing to move in order to reach the terms of a new collective agreement. Viewed in its totality, the Union's conduct does not demonstrate that it was so adamant regarding its initial proposal that it constitutes a take it or leave it approach to bargaining.

I also find the instant case to be distinguishable from *Teamsters Local 418,* 254 NLRB 953 (1981), which the Respondent relies on to support its position. In that case, the union consist-

ently maintained a position that it would only sign an agreement with the employer, if the employer agreed to all the economic terms of the Teamsters Master Freight agreement. The Board found that the union's insistence on a contract of its own composition, combined with an intransigent attitude toward proposals made by the employer, constituted bargaining in bad faith in violation of Section 8(b)(3). In the instant case, the Union demonstrated its willingness to consider the Respondent's substantive proposals and, in fact, much of the time spent in bargaining was devoted to a discussion of those proposals. There is no evidence that the Union insisted that it would only reach a contract on its own terms.

With respect to the Respondent's contention that the Union demonstrated bad faith by an unwillingness to meet and bargain, it is undisputed that on June 18 the Union canceled bargaining sessions that had been scheduled for July 13–15. The Respondent did not object to the cancellation of these meetings and the parties met and bargained during the period from July 27 through July 31. At the meeting held on August 18, the Respondent presented the Union with its last, best and final offer, and refused to consider the two proposals made by the Union on that date. At the conclusion of the meeting, Head indicated that the Union was disappointed in the bargaining during that session and indicated there was no need to meet the next day. However, the parties agreed to meet on September 9.

I do not find that the Union's cancellation of four meetings is sufficient to establish that its conduct amounted to an unlawful unwillingness to meet with the Respondent. The parties met and bargained on a regular basis during the period from June 1 through September 14, and beyond the cancellation of the meetings noted above, there is no other conduct that the Union engaged in that demonstrated a lack of diligence in fulfilling its bargaining obligation. I find the Union's conduct to be far different from that of the employers in the cases relied on by the Respondent in support of its position. In *Barclay Caterers*, 308 NLRB 1025, 1035–1037 (1992), the employer engaged in a series of delaying tactics including scheduling limited meetings, canceling meetings and making changes to meeting times and dates at the last minute. Similarly, in *Cable Vision, Inc*., 249 NLRB 412, 420 (1980), the employer engaged in a course of employer conduct that included ignoring the union's request for longer and more frequent meetings; failing to reply in a timely manner to proposals made by the Union and the failure to provide written proposals until the fifth meeting, 3½ months after receiving the Union's initial proposals.

On the basis of the foregoing, I find that there is insufficient evidence to establish that the Union bargained in bad faith in this matter and that its conduct serves as a defense to my conclusion that the Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act.

Whether the Respondent Lawfully Implemented its Final Offer on September 14, 2015

Paragraph 15 of the complaint alleges that the Respondent implemented its final offer on September 14, 2015, without reaching a valid impasse.

In *EAD Motors Eastern Air Devices, Inc*., 346 NLRB 1060, 1063 (2006) the Board summarized the major factors in determining whether a valid impasse has occurred as follows:

> In *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." See also *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards, Inc*., 206 NLRB 22, 23 (1973) enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974), as follows:
>
> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed the subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.[Footnote omitted].
>
> The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile Inc*., 318 NLRB 80, 97 (1995) enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement,[and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co*., supra at 478.

I note that the Board has also recognized that the commission of serious, unremedied unfair labor practices precludes a finding of a valid impasse. *Royal Motor Sales*, 329 NLRB 760, 762 (1999); *Great Southern Fire Protection*, 325 NLRB 9 (1997); *Noel Corp*., 315 NLRB 905 (1994), enf. denied on other grounds, 82 F.3d 1113 (1996).

In the instant case, on August 18, Meadows stated that neither the Respondent nor the Union was going to move on their proposals and that the parties were at an impasse. Meadows then presented the Union with the Respondent's last, best, and final offer. At the brief meeting held on September 9, Head stated that he was going to go through the Union's proposal which was based on the format of then existing contract article by article. Meadows replied that he had given the Union the Respondent's last, best, and final offer and he was there to listen but that he was not interested in going through the Union's proposal article by article. Head responded "then we're done" and the meeting ended.

At the meeting held on September 10, Head asked Meadows if he was going to consider issues that the Union came up with. Meadows replied that he was going to keep an open mind and if there was a proposed modification to the Respondent last, best and final offer he would to consider it. After a lengthy caucus, Head stated that the Union was withdrawing or modifying a number of its original proposals and presented a document entitled "Union Offer of Settlement" which contained proposals that moved closer to the Respondent's position in a number of areas. The Union's proposal, however, was based on the format of the expired contract. After quickly reviewing the Union's new proposal, Meadows responded that it was unacceptable as the Respondent's last, best, and final offer was on the table and

he expected to see a proposal related to that offer. Meadows added, however, that he would review the proposal and get back to the Union later that evening. When Head responded that the Union was done negotiating for the night, Meadows gave the Union a letter reflecting the Respondent's intention to unilaterally implement its last, best, and final offer on September 14, 2015.

On September 11, the parties met briefly, and Meadows stated that he was not interested in the Union's proposal of September 10. Meadows stated that his last, best, and final offer was on the table and that he had nothing else to present. When Meadows asked the Union if they had any further proposals to make, Head stated that the union committee had made a good faith effort to make a proposal, but that the Respondent would not consider it. The Union then offered bargaining dates on October 8 or 9 and Meadows stated he would respond to the Union's request for a meeting by email. The Respondent implemented its last, best, and final offer on September 14, 2015.

As set forth above, I found that the Respondent's overall conduct in bargaining demonstrated a lack of good faith. I have also found that the Respondent engaged in direct dealing in violation of Section 8(a)(5) and (1); that it had failed to produce relevant and necessary information in a timely fashion in violation of Section 8(a)(5) and (1); and that it committed other independent violations of Section 8(a)(1). Thus, the alleged impasse did not occur as a result of good-faith negotiations and also occurred in the context of serious unremedied unfair labor practices. These findings alone are sufficient to establish that the parties were not at a valid impasse at the time that the Respondent unilaterally implemented its last, best and final offer on September 14. There are other factors that are relevant under the standards set forth in *Taft Broadcasting*, supra, however, that additionally support my conclusion that the parties were not at a valid impasse at the time the Respondent implemented its last, best, and final offer.

With respect to the bargaining history between the parties and the length of negotiations, on March 12, 2015, the Respondent became a successor to Penford and assumed the terms of the existing collective-bargaining agreement at the Cedar Rapids facility that was set to expire by its terms on August 1, 2015. Thus, the negotiations between the parties in 2015 involved bargaining over their initial independently negotiated collective-bargaining agreement. The Union, however, has represented the bargaining unit employees at the facility for almost 70 years and had a long history of collective bargaining with the Respondent's predecessors. As discussed in detail above, the Respondent proposed an entirely new collective-bargaining agreement, in both its substantive terms and the language and format. At the first bargaining session on June 1, 2015, Meadows acknowledged that the Respondent was seeking radical changes in the existing terms and conditions of employment from those contained in the existing collective-bargaining agreement. Thus, the bargaining for an initial contract between the parties in 2015, involved the Respondent seeking to make radical changes in terms and conditions of employment that had been arrived at through long history of collective bargaining between the Union and the Respondent's predecessors. Under the circumstances, it is reasonable to expect that it may have taken a substantial amount of time for the parties to arrive at either an agreement or a lawful impasse. The Board has noted that the parties bargaining for initial contract are presented with special problems which are not present if there is a history of bargaining and one or more contracts had been previously executed. *Erie Brush & Mfg. Corp*., 357 NLRB 363, 363 (2011), enf. denied 700 F.3d 17 (D.C. Cir. 2012).

From the first bargaining meeting on June 1, until the Respondent declared the parties were at an impasse on August 18, the parties met 10 times. After the declaration of impasse on August 18, the parties met three more times before the Respondent implemented its last, best and final offer on September 14. Although the parties were negotiating an initial agreement and the Respondent was seeking to make radical changes to existing terms and conditions of employment there was a relatively low number of meetings held before the Respondent declared impasse and implemented its final offer. Under the circumstances, I find that the bargaining history between the parties and the length of negotiation weighs in favor of finding that a lawful impasse was not established.

With respect to the importance of the issue over which the parties were in disagreement, obviously one of the major issues was the format of a new collective-bargaining agreement. As discussed in detail above, the Respondent proposed an entirely new agreement, both with regard to the format and substance, while the Union proposed that the parties use the format of the existing agreement in order to reach a new agreement. When bargaining resumed on June 29, although the parties were still in dispute with respect to the format, the Union incorporated some of the substantive proposals from the Respondent's initial proposal in its June 29 proposal.

In its proposal of July 28, the Respondent incorporated provisions from the existing agreement regarding gap insurance in its proposal. In its July 29 proposal the Respondent also incorporated provisions of the existing contract in its proposal regarding holiday pay. In fact, during the bargaining in the last week of July, the Union addressed the Respondent's proposal by providing the Respondent with a list of concessions that the Respondent sought from the terms of the existing agreement. In addition, the parties specifically discussed 21 of the items from that list which resulted in the Respondent making further revisions to its proposal.

After the union membership overwhelmingly rejected the Respondent's proposed contract, on August 17, the Union indicated that it felt that the path to reaching an agreement would be on the basis of utilizing the format of the then expired agreement. On the very next day, the Respondent declared that the parties were at an impasse. This declaration of impasse occurred after the Respondent had made only one wage proposal, with a modification in that proposal regarding maintenance employees in its final offer, and before the Union had made any specific proposal regarding wages. There had also been relatively little discussion regarding other important economic issues such as health insurance and retirement benefits. It appears, however, that the Respondent became frustrated with the Union's position that the way to reach a new agreement was by having the Respondent formulate its proposals in the format of the existing agreement. As the Board made clear,

in *88 Transit Lines*, supra, however, a major function of the bargaining process is attempting to reach a common ground on modifications of the language contained in initial proposals. Under these circumstances, the Respondent's declaration that the dispute between the parties over the format in which each side would make proposals was intractable and resulted in an impasse was premature. I find that further discussion of substantive terms may very well have resulted in the parties compromising with respect to the format and language of a new agreement.

With respect to the contemporaneous understanding of the parties as to the state of negotiations, on August 17, Head stated that while, in his view, the parties had not reached any tentative agreements, the Union was willing to make movement. In addition, in its September 13 letter, the Union denied that the parties were at an impasse. Importantly, the Union's conduct also demonstrated that it did not believe that the parties were at an impasse, as it made movement from its position in order to attempt to reach an agreement. On August 18, the Union presented a new noneconomic proposal, in the format of the expired contract, in which it made some movement, including adopting some of the Respondent's proposed language regarding dues checkoff and the grievance procedure. On that day the Union also presented its wage proposal, which sought an increase in wages but removed premium pay for training and the cost of living clause for wages. On September 10, the Union made another proposal, in the format of the expired contract that eliminated the labor relations committee and thus acquiesced in much of the Respondent's proposal regarding a new grievance procedure. The proposal also incorporated the Respondent's proposal regarding an extra crew and eliminated many of the letters of understanding that were part of the expired agreement. The Union's conduct at the August 18 and September 10 meetings reflects a willingness to compromise on major issues. Thus, given this indication of flexibility by the Union on major issues, had the Respondent been willing to continue to bargain, the give and take of bargaining may have led the parties closer to an agreement. *Royal Motor Sales*, 329 NLRB 760, 772 (1999); *Grinnell Fire Protection Systems* Co. the 328 NLRB 585, 585–586 (1999), enfd. 236 F.3d 187 (4th Cir. 2000).

The General Counsel and the Union contend that an additional basis to find that the parties were not at a valid impasse at the time the Respondent implemented its last, best, and final offer on September 14, was the fact that the Respondent' implemented offer contained a nonmandatory subject of bargaining. As noted above, the Respondent's implemented offer contained a provision allowing it to change work schedules in classifications to 12 hour shifts "if at least 65% of the classification votes to go to a 12 hour shift." (Jt. Exh. 8, article XI, p. 14.)

This provision differed substantially from the process set forth in the expired agreement that permitted the Respondent to introduce new work schedules. Pursuant to the provisions of a letter of understanding negotiated in 2004, and incorporated in the expired agreement, the Respondent could propose a new work schedule to the joint labor relations committee identifying all areas of the collective-bargaining agreement that would be affected by the scheduling proposal. (Jt. Exh. 16, pp. 69–70.) Thereafter, the Union had an opportunity to review the proposal and the labor relations committee would discuss the proposed schedule and its impact upon bargaining unit members. The letter of understanding provided that employees could then vote regarding a 6-month trial of a proposed schedule. Before such a vote, a Respondent representative could present the proposal to employees and a union member of the labor relations committee would present an impact analysis of the proposal. A union trustee was to be present as the ballots were counted. If the majority of the department's employees voted to accept the trial proposal, it would be implemented within 30 days. After the end of the 6-month trial period, a second vote would be taken and, if the majority of the employees voted in favor of the schedule, it would become permanent.

It is well established that the number of hours worked by employees, including their schedules, is a mandatory subject of bargaining. *Meat Cutters Local 189* v. *Jewel Tea Co*., 381 U.S. 676, 691 (1965); *Tuskegee Transportation System*, 308 NLRB 251, 251–252 (1992), enfd. 5 F.3d 1499 (11th Cir. 1993); *Atlas Microfilming*, 267 NLRB 682, 695–696 (1983), enfd. 753 F.2d 313 (3d Cir. 1985); *Fall River Savings Bank*, 260 NLRB 911, 914 (1982).

The above noted proposal contained in the Respondent's unilaterally implemented offer permitted the Respondent to change schedules regarding the number of hours worked in a shift after a vote taken by employees and provided no role to the Union in the process. The effect of the Respondent's unilaterally implemented proposal was that it could deal directly with employees and conduct a vote with respect to the change in the hours of a scheduled shift, a mandatory subject of bargaining.

In *ServiceNet, Inc*., 340 NLRB 1245, 1246 (2003), an employer insisted to impasse on a proposal which included a provision which permitted the employer to meet with a committee of five bargaining unit members prior to any changes being made in the health insurance plan. In *Service Net*, the Board found that the employer's proposal was a nonmandatory subject of bargaining because it allowed the employer to circumvent the union and negotiate directly with employees for a mandatory subject of bargaining, health insurance. In so finding, the Board relied on its decision in *Retlaw Broadcasting Co*., 324 NLRB 138 (1997), enfd. 172 F.3d 660 (9th Cir. 1999) and noted:

> In *Retlaw Broadcasting Co*., the Board found that an employer's proposal, which allowed direct dealing with employees over mandatory subjects of bargaining that included a merit pay system and personal service contracts with newly hired employees, was a nonmandatory subject of bargaining within the meaning of Section 8(d) of the Act. Approving the Board's decision, the Ninth Circuit noted that the employer's proposal "would be a license for the employer to go to impasse over whether it has to deal with the union; that is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the process." *Retlaw Broadcasting Co. v. NLRB*, 172 F.3d at 666 (quoting *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220, 1224 (D.C. Cir. 1990), remanding 295 NLRB 626 (1989) cert. denied 498 U.S. 1053 (1991)) (internal quotation

marks omitted). The Ninth Circuit, therefore enforced the Board's decision on the basis that an employer "cannot relegate the union to a mere observer on the very matters which the Act prescribes to have a critical role." Id. at 666–667.

In the instant case, the Respondent included the provision regarding giving employees an opportunity to change their shift schedule after a vote, in all of its proposals from July 28 up to and including its last, best and final offer on August 18. The Respondent unilaterally implemented its last, best, and final offer, including this provision, on September 14. The Respondent's conduct in insisting to impasse and unilaterally implementing a last, best and final offer which included a nonmandatory subject of bargaining precludes the existence of a valid impasse and a lawful implementation of its last, best, and final offer.

In further defense of its position that it lawfully implemented its last, best, and final offer, the Respondent argues, as a corollary to its contention that the Union bargained in bad faith, that the Union's conduct frustrated bargaining to the extent that it was privileged to implement its final offer, even in the absence of a valid impasse. I find the cases relied on by the Respondent to support this position are clearly distinguishable. In *M & M Contractors*, 262 NLRB 1472 (1982), the Board found that the union's conduct in delaying bargaining for 7 months despite the employer's diligent efforts to engage in bargaining, justified the employer's action in implementing unilateral changes in terms and conditions of employment. In *Jefferson Smurfit Corp.*, 311 NLRB 41 (1993), the union's conduct in delaying meetings, failing to address important employer proposals, and making extensive last-minute information requests in bad faith for the purposes of delay, privileged the employer to implement its final proposal. In the instant case, as set forth above in detail in addressing the Respondent's contention that the Union's conduct precludes a finding that the Respondent bargained in bad faith, I find the Union's conduct in making proposals based on the format of the prior agreement between the parties and canceling four bargaining meetings, does not constitute conduct that has impaired the collective-bargaining process to the extent that the Respondent was privileged to implement its final offer.

On the basis of all of the foregoing, I conclude that the Respondent had not bargained to a valid impasse at the time it implemented its September 14 last, best, and final offer and therefore has violated Section 8(a)(5) and (1) of the Act.

The Alleged Unilateral Changes After the Implementation of the Last, Best, and Final Offer

Paragraph 16 of the complaint, as amended, alleges that after September 14, 2015, the Respondent unilaterally changed the method for assignment of overtime, the method of scheduling hours, and the scheduling of vacations from its unilaterally implemented last, best, and final offer in violation of Section 8(a)(5) and (1) of the Act.[30]

In the first instance, for the reasons stated in detail above, I have found that the Respondent implemented its last, best, and final offer on September 14, 2015, without reaching a valid impasse in violation of Section 8(a)(5) and (1) of the Act. Consistent with Board precedent, the remedy I will impose for that violation is to order the Respondent to rescind, upon the Union's request, the unilateral changes instituted by the Respondent on September 14, 2015. I will also order the Respondent to make employees whole for any loss of earnings and other benefits they may have incurred because of the lawful unilateral changes instituted on September 14, 2015. *American Standard Cos*., 356 NLRB 4 (2010), reaffirming and incorporating by reference 352 NLRB 644, 646, 659 (2008); *EAD Motors Eastern Air Devices*, *Inc.*, 346 NLRB 1060 (2006); *Newcor Bay City Division*, 345 NLRB 1229 (2005); *Boise Cascade Corp*., 283 NLRB 462, 463 (1987), enfd. 860 F.2d 471 (D.C. Cir. 1988); *Boland Marine and Manufacturing Company, Inc*., 225 NLRB 824 (1976). Thus, the remedial order in this case for the unlawful unilateral changes implemented on September 14, 2015, will, of necessity, remedy the allegations of paragraph 16 of the complaint, as those allegations relate to additional unilateral changes beyond those instituted on September 14. If the Union were to request rescission of the unilaterally implemented provisions of the Respondent's proposed contract, the terms and conditions of employment would revert back to those of the expired agreement. Since, however, an appeal of my decision could result in a finding that the Respondent implemented its, last, best and final offer on September 14, 2015, after reaching a valid impasse, I believe that prudence dictates that I address the allegations of paragraph 16 of the complaint on the merits.

With respect to the merits of this complaint allegation, as set forth earlier in this decision, it is well established that the hours worked by employees, including their schedules, is a mandatory subject of bargaining. Respondent's answer to paragraph 16 admits that the matters referred to therein constitute mandatory subjects of bargaining. It is, of course, undisputed that when an employer unilaterally changes a term and condition of employment which constitutes a mandatory subject of bargaining, without giving notice and an opportunity to bargain to a union representing the employees, it violates Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962) *Times Union, Capital Newspapers*, 356 NLRB 1339, 1350 (2011). The Board also requires, however, that a change in working conditions must be "material, substantial and significant" in order for a bargaining obligation to be present. *Bohemian Club,* 351 NLRB 1065, 1066 (2007); *Mitchellace, Inc*., 321 NLRB 191, 193 (1996).

The General Counsel contends that the changes that occurred were material, substantial and significant and were effectuated without bargaining with the Union and thus violated Section 8(a)(5) and (1). The Respondent defends this issue by claiming that it did not deviate from its last, best, and final offer after it was implemented. In support of its position, the Respondent relies on the proposition that: "[A]n employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting*, *Co*., 163 NLRB 475, 478 (1967). The Respondent also contends that the Board should not intervene in this dispute in order to determine which parties' interpretation of the disputed provisions is correct. *NCR Corp.,* 271 NLRB 1212 (1984).

[30] In his posthearing brief, the General Counsel withdrew the allegation that the Respondent made unilateral changes to the bidding process for job openings.

I will first address the allegation in paragraph 16 regarding the assignment of overtime. Article 11, Section 4 of the Respondent's last, best, and final offer unilaterally implemented on September 14, 2015, states, in relevant part:

> Section 4: Management shall be responsible for maintaining and calling for overtime in accordance with the Overtime Rules as set forth below:
>
> Overtime Rules
>
> When overtime work is required it shall be allocated on a rotational basis to qualified employees in their job classification.
>
> Overtime needs scheduled at least nine (9) days in advance will be assigned on a rotational basis.
>
> 1. If the overtime need is scheduled for less than 48 hours of notice, it will be offered verbally on a volunteer basis from the opportunity list, with the least senior employee assigned in the event that all others decline.
>
> 2. An employee may not be forced more than two consecutive days of overtime.
>
> 3. For a partial shift requirement, overtime will be offered to the employees on the prior shift (hold-over). If the overtime is not filled voluntarily, it shall be assigned to and worked by the least senior eligible employee in the classification and shift.
>
> 4. For a full shift requirement, overtime will be attempted to be filled by splitting the eight (8) hour shift requirement between the prior (hold-over) and following shift (call-in). If the requirement cannot be filled in this matter, eight (8) hours will be offered to the employees of the prior shift, with the least senior eligible assigned if there are no volunteers. In the event that overtime can not be filled in this matter, off-day employees in this classification will be offered the overtime.
>
> 5. For Twelve hour shifts, overtime for up to 4 hours will be offered to the current shift employee by seniority. If no individual accepts, the junior person based on overtime hours worked can be forced. Any vacancy need on a twelve hour shift will be filled by calling off duty employees in the classification to be filled and offered as long as it does not result in back to back shifts.

With respect to overtime rule 1, the General Counsel presented as witnesses Brandon Morris, Todd Railsback, and Adam Beitz, all of whom were current employees at the time of hearing. Morris testified that on November 12, 2015, as he was leaving the facility at the end of the shift he was informed by another employee that he was supposed to work overtime. Morris spoke to his supervisor Greg Smith who informed him that he had to work 4 hours of overtime. Morris told Smith that he had no one to watch his children but Smith replied that he had no choice and had to have him work overtime. Railsback testified that he was in fact notified of overtime assignments that came up within 48 hours. Beitz testified that on an unspecified number of occasions he had been scheduled for overtime within 48 hours without being contacted by a supervisor to tell him he was scheduled, but rather he found out by checking the schedule himself.

With respect to overtime rule 2, Railsback testified that during March 2016, he had been scheduled for overtime on a Friday and, on the preceding Wednesday, he had volunteered for overtime. On Thursday, he was the only employee who was available and was forced to work overtime. Railsback then had to work the Friday overtime for which he was previously scheduled. Railsback raised the fact that he had worked overtime 3 days in a row with Wood, who informed Railsback that because he volunteered for the overtime on Wednesday he had not been forced to work overtime more than 2 consecutive days. The record establishes that Beitz was required to work 3 days of forced overtime the week of October 19, 2015.

With respect to overtime rules 3, 4, and 5 (assigning overtime to employees outside of the classification), current employee and steward Ed Heath testified that on November 27, 2015, he was contacted by employee Ed Coverdill, who informed him that he had been assigned to work 8 hours of overtime and perform not only his job but another job outside of his classification. Coverdill informed Heath that he had told his supervisor, Greg Smith that he was going to run only one of the jobs. Smith told Coverdill that if he did not run both jobs, it would be insubordination and he would risk discipline up through termination. When Heath asked Smith why Coverdill had been assigned 8 hours of overtime outside of his classification, Smith replied that he had spoken to Wood who had instructed him to inform Coverdill that he had to stay over and perform both jobs. Smith said that they knew they were going against the rules but that Coverdill would have to work overtime. Heath informed Coverdill of his conversation with Smith and Coverdill said he would perform the work under protest.

Heath also testified regarding daily schedules which establish that several employees were forced to work overtime outside of their classification on various dates in September and November 2015 (Tr. 616–624; GC Exhs. 80, 82, 83, 85 and 86.) Several grievances have been filed by the Union for forcing employees to work overtime outside of their classification. (GC Exhs. 59 and 61; R. Exh. 50.) The parties have discussed these grievances, but there has been no resolution.

As noted above, article XI, section 4 of the Respondent's last, best, and final offer admitted on September 14, 2015, provides that management is responsible for maintaining and scheduling of overtime in accordance with the overtime rules set forth in that section.

On March 25, 2016, the Respondent posted a bid notice for "Non-Traditional Work" for the position of overtime administrator. (GC Exh. 42.) The posting reflected that the position would last until June 30, 2016. The posting further reflected that the responsibilities for the overtime administrator would include: facilitating the administration of overtime scheduling; making appropriate notifications to employees where applicable; and serving as the point of contact for overtime concerns, amendments, and modifications. Meadows testified at the hearing that the position was filled by a bargaining unit employee (Tr. 138). Andrew Sullivan, the Respondent's human resources

manager at the Cedar Rapids facility, testified that the posting for the position occurred as a result of the grievances that were being filed regarding overtime assignments.

In defending against the claim that it made unilateral changes to its last, best, and final offer regarding the assignment of overtime, the Respondent contends that it bargained over the implementation of the overtime procedures, at the bargaining meeting held on October 8 2015. Eby's credited testimony establishes that at the October meeting the parties discussed the Respondent's difficulty in implementing the overtime procedures of its final offer but that no agreements were reached. Clearly, one meeting on the subject did not result in an impasse. Thus, I find that the alleged changes to the Respondent's implemented offer were instituted unilaterally.

With respect to the General Counsel's contentions with respect to overtime rules 1 and 2, I find that the evidence presented by the General Counsel does not establish that there was a substantial, material, and significant change to those rules after the Respondent implemented its last, best and final offer on September 14. The evidence discussed above establishes at best some isolated breaches of the Respondent's unilaterally implemented policy with respect to those rules.

With regard to the Respondent's defense that it has unilaterally changed the provisions of its implemented offer regarding the assignment of overtime outside of classifications, Sullivan testified generally that articles VI and XV of the last, best, and final offer provide support for the Respondent's ability to assign overtime to employees outside of the classifications. While those articles generally discuss the Respondent's ability to transfer employees outside of their classification, the overtime rule set forth in article XI section 4 specifically address the manner in which overtime is to be assigned. The Respondent presented no evidence to establish that the overtime assignments outside of an employee's classification discussed above were, in fact, performed in accordance with the provisions of article 11, sections 3, 4, and 5.

With respect to the posting of a temporary position for an overtime administrator and filling the position with a bargaining unit employee, Sullivan testified that article IX (Non-traditional Work) of the Respondent's implemented offer supports the Respondent's right to create and fill such a position. Article IX states in relevant part that: "The Company at its discretion may create temporary positions that are non-traditional bargaining unit positions. These positions will include but (are) not limited to training, operation of projects, and area oversight."

Prior to its last, best, and final offer, the Respondent had consistently proposed that bargaining unit employees be responsible for monitoring overtime. As noted above, in its implemented proposal, the Respondent indicated that management has the responsibility to schedule and maintain the overtime provisions.

I find that the evidence discussed above establishes that the manner in which the Respondent assigned overtime outside of the employees classifications constitutes a material, substantial, and significant change from its implemented offer. I also find that posting the position of overtime administrator and filling it with a bargaining unit employee clearly constitutes a material, substantial, and significant change from the Respondent's implemented offer which clearly states, in article XI, section 4, that management has the responsibility of assigning and maintaining overtime.

Accordingly, I find that with respect to these two issues, the Respondent unilaterally changed its method for assigning overtime from that contained in its implemented offer and that, the Respondent's unilateral conduct violated Section 8(a)(5) and (1) of the Act. In so concluding, I find that the Respondent's reliance on *NCR Corp*, supra, is misplaced as that case is clearly distinguishable. In that case, the parties were signatory to a contract when the respondent allegedly transferred unit work and eliminated a job classification. The Board found that each party had an equally plausible interpretation of the contract and that it would not enter the dispute to serve the function of an arbitrator in determining which interpretation was correct. The Board noted, however, that there was no evidence that the respondent had acted in bad faith or acted in any way to undermine the union's status as collective-bargaining representative. The Board also noted that the contract contained a grievance arbitration provision and that the more appropriate forum for resolving the dispute would have been an arbitration proceeding. 271 NLRB at 1213 fn. 7. In the instant case, there is evidence that the Respondent acted in bad faith and sought to undermine the Union's status as the collective-bargaining representative. In addition, while the implemented proposal contains a grievance procedure, which is being utilized by the parties, the Respondent's September 10 letter indicating that it would implement its last, best, and final offer on September 14, specifically stated that the Respondent was not unilaterally implementing the arbitration provision contained in that offer.

With respect to the allegations in paragraph 16 regarding unilateral changes in scheduling, the Respondent's implemented offer contains a provision, article XI, section 1 stating:

> The Company shall maintain all rights in determining work schedules which will consist of eight (8) hour shifts. The beginning of a work week will be 7 am on Monday. The company may very start times to meet the needs of the plant. The Company will consider 12 hour shifts by classification if at least 65% of the classification votes to go to a 12 hour shift.

In a related allegation, Paragraph 13(c) of the complaint alleges that the Respondent engaged in direct dealing in violation of Section 8(a)(5) and (1) by conducting a vote among unit employees employed as a mechanics in order to determine their work schedule.

Maintenance employee Jeff Kuddes credibly testified that at the time of the Respondent's implementation of its last, best, and final offer there were 12 employees in the maintenance department. In approximately the first week October 2015, Maintenance Supervisor Chad Reid presented to the maintenance employees a proposal (GC Exh. 88), indicating that using 10 and 12 hour shifts would meet the Respondent's current needs. The proposal contained a "voting form" that had a blank space for an employee to list his or her name and clock number and then contained a provision reflecting that an employee could vote "Yes" for the proposition that the Respondent could consider and implement a combination of 10 hour and 12 hour

shifts. It also contained a provision allowing an employee to vote "No" for a proposition which reflected that the Respondent could not consider implementing such a combination of shifts and that the employee wanted to stay with an 8-hour shift. The employees voted and Kuddes was later informed by Reid that the proposition to allow 10 and 12 hour shifts had passed. The next day Reid informed maintenance employees that the Union had filed a grievance regarding changing the maintenance schedule and that the new schedule was not going to be implemented. Read said that it was not going to be implemented because 10 hours was not mentioned in the Respondents implemented offer.

Shortly thereafter, Reid presented another proposal to the maintenance employees (GC Exh. 89), that indicated that using 8 and 12-hour shifts in the maintenance department would meet the Respondent's "current needs." A similar voting form was attached to the proposal. This voting form allowed employees to vote "Yes" for the proposition that: "The Company can consider and implement a combination of 8 hour and 12 hour shifts." or "No" for the proposition that: "The Company may not consider implementing a combination of 8 hour and 12 hour shifts. I want to stay with all eight (8) hour shifts." The maintenance employees then voted on the proposal and Kuddes was informed by Reed that all of the maintenance employees voted "yes." No one from the Union was present when either of the two proposals were presented to the maintenance employees or when the voting was conducted.

Since the time of the second vote the employees in the maintenance department have worked a hybrid 8 and 12-hour schedule. Kuddes testified that employees were asked in order of seniority whether they wished to work the 8 hour or the12-hour shift.

The Respondent contends that allowing maintenance employees to vote to change their schedules and thereafter implementing a combination of 8 and 12 hour shifts is reasonably comprehended within its last, best, and final offer and does not constitute a unilateral change.

As set forth above, the Respondent's implemented offer provides that work schedules consist of 8 hours, except that it will consider 12-hour shifts by classification if at least 65 percent of the classification votes to go to a 12-hour shift. There is nothing in the language of the implemented proposal that refers to a combination of 8 and 12 hour shifts within one classification. I find that presenting a proposal to maintenance employees to vote on that provides for a combination of 8 and 12 shifts is a material, substantial, and significant change from the provision set forth Respondent's last, best, and final offer and constitutes a unilateral change in violation of Section 8(a)(5) and (1) of the Act.

I also find, as alleged in paragraph 13(c) of the complaint, that allowing maintenance employees to vote on their schedule without the involvement of the Union, constituted direct dealing in violation of Section 8(a)(5) and (1). The Board has held that an employer's involvement in a vote by employees regarding a change in their working conditions, that is not sanctioned by the union representing the employees, constitutes direct dealing in violation of Section 8(a)(5) and (1) of the Act. *Hacienda Hotel, Inc*., 348 NLRB 854, 867–868 (2006).

With respect to the allegation in paragraph 16 regarding vacations, article XIV of the Respondent's implemented offer contains provisions regarding eligibility for the scheduling of vacations. Article XIV, section 1, provides in relevant part: "An employee who on the 1st day of January has been in the service of the company and has completed 1040 hours of work the previous year shall be entitled to whichever of the following is applicable to the employee." Section 1 goes on to list the various levels of vacation that are based on years of service. Article XIV, section 7, of the Respondent's implemented offer contains "freeze dates" of December 1 and March 1 and provides that if an employee has not applied for vacation prior to those dates, the Respondent may require an employee to give 3 weeks prior notice of the time at which they wish to take a vacation. There is no mention of vacation quotas in the Respondent's implemented offer.

Sullivan testified that the vacation policy became effective upon implementation but that the provisions regarding actually taking a vacation would not become effective until January 1, 2016. Sullivan explained that on January 1, the Respondent was going to start a new vacation policy based upon a calendar year, but that under the expired contract, employees accrued vacation eligibility based on their anniversary date. The record establishes that employees who did not use their accrued vacation by January 1, 2016, were paid for their accrued vacation pay.

Under the terms of the expired contract, the practice had been to establish a quota to allow a certain number of employees who could be on vacation in a department at the same time. While the Respondent implemented the freeze date provisions of the, best, and final offer, it continued to use the quota system as the method for awarding vacations for the remainder of 2015. Railsback testified that he was informed after the offer was implemented on September 14, that he had to use his accrued vacation by the end of the year or he would get accrued vacation pay. Railsback also testified that when the offer was implemented in September 2015, he was informed by Supervisor Scott Maki that the Respondent would permit employees to go on vacation above the quota. However, in November 2015, when Railsback requested Thanksgiving and Christmas as vacation days, Wood told him that he could not have them because it was above the quota. When Railsback's request for vacation days was denied, he requested floating holidays for those 2 days but this request was also denied. Railsback testified that he did not work on Thanksgiving and Christmas and was charged with an unexcused absence, which gave him 2 points under the new absence policy. Railsback testified that employees who are less senior than him were granted leaves of absence for Christmas Day.

The evidence on this issue establishes that while the Respondent may have been somewhat inconsistent in the manner in which it allowed employees to schedule the accrued vacation they had earned under the terms of the expired agreement, there is no evidence to establish that it has made any material, substantial and significant changes in the vacation policy of its implemented offer and accordingly I shall dismiss this allegation in paragraph 16 of the complaint.

In accordance with the foregoing, I find that the Respondent instituted a unilateral changes from its implemented final offer

with respect to the method in which it assigned overtime and the method for scheduling of hours in violation of Section 8 (a)(5) and (1) of the Act. The remaining allegations in paragraph 16 are dismissed.

Conclusions of Law

1. Pursuant to the recognition clause of the collective-bargaining agreement that expired by its terms on August 1, 2015, the Union is now and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

> All hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees employed by the Respondent at its Cedar Rapids, Iowa facility, except all monthly paid employees, and guards and supervisors as defined in the National Labor Relations Act.

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) failing to bargain in good faith with the Union by its overall conduct;

(b) unilaterally implementing its last, best, and final offer, which included the nonmandatory subject of bargaining of permitting employees to vote regarding a change in their schedule without the involvement of the Union, at a time when the parties were not at a valid impasse in bargaining;

(c) unilaterally making changes in its implemented, last, best, and final offer regarding the method by which it assigned overtime and the method for scheduling hours;

(d) bypassing the Union and dealing directly with employees concerning changes in wages, hours and working conditions, including permitting employees to vote regarding a change of the schedule in the maintenance department;

(e) unreasonably delaying in providing the Union with relevant and necessary information it had requested regarding fringe benefits including the pension plan.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) by:

(a) impliedly threatening employees that they would lose their jobs if they went on strike;

(b) denigrating the Union by telling employees that the Respondent was willing to offer a better contract but that the Union would not negotiate.

Remedy

Having found that the 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.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, I shall order it to cease and desist, and to immediately put into effect all terms and conditions of employment provided by the collective-bargaining agreement that expired by its terms on August 1, 2015, and to maintain those terms in effect until the parties have bargained to an agreement or a valid impasse. I shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its, last, best, and final offer on September 14, 2015, as set forth *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). I shall order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health benefits, as set forth in *Kraft Plumbing & Heating, Inc.*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981) with interest as prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*. I shall further order that the Respondent make all contributions to any fund established by the collective-bargaining agreement with the Union which was in existence on August 1, 2015, and which contributions the Respondent would have paid but for the unlawful unilateral changes, including any additional amounts to the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 6 (1979).

I shall further order the Respondent to rescind all disciplinary actions that may have resulted from its unilaterally implemented last, best, and final offer on September 14, 2015, and to provide for all employees discharged, suspended, or otherwise denied work opportunities solely as a result of its unilateral implementation of its last, best, and final offer immediate and full reinstatement to their former positions, or if they are not available, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges, and to make whole those employees either discharged, suspended, or otherwise denied work opportunities solely as a result of the unilateral implementation of said rules.

For any employees discharged, backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate discharged employees for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

For any employees who may have been suspended or otherwise denied work opportunities, backpay shall be computed in accordance with *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.[31]

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with

[31] The remedy I have provided is consistent with the Board orders in *American Standard Cos.*, supra; *EAD Motors Eastern Air Devices*, supra; *Newcor Bay City Division*, supra; and *Boland Marine and Mfg. Co., Inc.*, supra.

AdvoServ of New Jersey, Inc., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 18, a report allocating backpay to the appropriate calendar year for each employee.

Finally, the General Counsel requests that I order the Respondent's chief negotiator, Ken Meadows, to read the notice to assembled employees. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of serious unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1355–1356 (2014); *Libertyville Toyota*, 360 NLRB 1298, 1298 fn. 2 (2014); *Excel Case Ready,* 334 NLRB 4, 4–5, (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations,* 340 NLRB 255, 256 (2003), citing *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The Respondent's failure to bargain in good faith and the implementation of its last, best, and final offer without a reaching valid impasse in violation of Section 8(a)(5) and (1) had a substantial effect on every unit employee. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. I note that Meadows, a director of human resources for the Respondent, was the Respondent's chief negotiator and thus played an important role in effectuating the unfair labor practices committed by it during the bargaining. In addition, Meadows himself engaged in direct dealing in violation of Section 8(a)(5) and (1) and directed Roseberry to also engage in such conduct. Accordingly, I shall require that Meadows read the attached remedial notice to the Respondent's assembled employees in the presence of a Board agent. Alternatively, the Respondent may choose to have a Board agent read the notice to assembled employees in the presence of Meadows.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Ingredion, Inc., d/b/a Penford Products Company, Cedar Rapids, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union by its overall conduct.

(b) Unilaterally implementing its last, best, and final offer, which included the nonmandatory subject of bargaining of permitting employees to vote regarding a change in their schedule without the involvement of the Union, at a time when the parties were not at a valid impasse in bargaining.

(c) Unilaterally making changes in its implemented, last, best, and final offer regarding the method by which it assigned overtime and the method for scheduling hours.

(d) Bypassing the Union and dealing directly with employees concerning changes in wages, hours and working conditions, including permitting employees to vote regarding a change of the schedule in the maintenance department.

(e) Unreasonably delaying in providing the Union with relevant and necessary information it had requested regarding fringe benefits including the pension plan.

(f) Impliedly threatening employees that they would lose their jobs if they went on strike.

(g) Denigrating the Union by telling employees that the Respondent was willing to offer a better contract but that the Union would not negotiate.

(h) 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, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees employed by the Respondent at its Cedar Rapids, Iowa facility, except all monthly paid employees, and guards and supervisors as defined in the National Labor Relations Act.

(b) On request, rescind the changes in terms and conditions of employment that were unilaterally implemented on September 14, 2015, and put into effect all the terms and conditions of employment provided by the collective-bargaining agreement that expired by its terms on August 1, 2015, and maintain those terms in effect until the parties have bargained to an agreement or a valid impasse.

(c) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits, with interest as provided for in the remedy section of this decision.

(d) Make contributions, including any additional amounts due, to any funds established by the collective-bargaining agreement with the Union that was in existence on August 1, 2015, in which the Respondent would have paid but for the unlawful unilateral changes as provided for in the remedy section of this decision.

(e) Within 14 days of the Board's Order, offer all employees discharged, suspended, or otherwise denied work opportunities, solely as a result of the unilateral implementation of the Respondent's last, best, and final offer on September 14, 2015, full restatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously en-

[32] 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.

joyed.

(f) Make employees whole for any loss of earnings and other benefits who were suspended, discharged, or were otherwise denied work opportunities, solely as a result of the unilateral implementation of the Respondent's last, best, and final offer in the manner set forth in the remedy section of this decision.

(g) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Within 14 days from the date of the Board's order, remove from its files any reference to discipline imposed pursuant to the Respondent's unilaterally implemented last, best, and final offer on September 14, 2015, and within 3 days thereafter notify the employees, in writing, that this has been done and that the discipline will not be used against them in any way.

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

(j) Within 14 days after service by the Region, post at its facility in Cedar Rapids, Iowa, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 2015.

(k) During the time that the notice is posted, convene the unit employees during working time at the Respondent's Cedar Rapids, Iowa facility, by shifts, departments, or otherwise, and have Ken Meadows read the attached notice to the assembled employees, or permit a Board agent, in the presence of Meadows, to read the notice to employees.

[33] 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."

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

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

Dated, Washington, D.C., August 26, 2016

APPENDIX

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

The National Labor Relations Board has found that we violated 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 by our overall conduct fail to bargain in good faith with BCTGM Local 100G, affiliated with, Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, AFL–CIO (the Union), as the exclusive representative of the employees in the following appropriate unit:

> All hourly paid factory, janitorial, maintenance, factory storeroom, quality control laboratory, power and boiler house, instrument employees and environmental control employees employed by the Respondent at its Cedar Rapids, Iowa facility, except all monthly paid employees, and guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT unilaterally implement a last, best, and final offer, which includes the nonmandatory subject of bargaining of permitting employees to vote regarding a change in their schedule without the involvement of the Union, at a time when we were not at a valid impasse in bargaining with the Union.

WE WILL NOT unilaterally make changes in our implemented, last, best, and final offer regarding the method by which we assign overtime and the method for scheduling hours.

WE WILL NOT bypass the Union and deal directly with employees concerning changes in wages, hours and working conditions, including permitting employees to vote regarding a change of the schedule in the maintenance department.

WE WILL NOT unreasonably delay in providing the Union with relevant and necessary information it had requested regarding fringe benefits including the pension plan.

WE WILL NOT impliedly threaten employees that they would lose their jobs if they went on strike.

WE WILL NOT denigrate the Union by telling employees that we were willing to offer a better contract but that the Union would not negotiate.

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 Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

WE WILL on request, rescind the changes in terms and conditions of employment that we unilaterally implemented on September 14, 2015, and put into effect all the terms and conditions of employment provided by the collective-bargaining agreement that expired by its terms on August 1, 2015, and maintain those terms in effect until we have bargained to an agreement or a valid impasse with the Union.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL make contributions, including any additional amounts due, to any funds established by the collective-bargaining agreement with the Union that was in existence on August 1, 2015, in which we would have paid but for the unlawful unilateral changes.

WE WILL within 14 days of the Board's Order, offer all employees discharged, suspended, or otherwise denied work opportunities, solely as a result of the unilateral implementation of our last, best, and final offer on September 14, 2015, full restatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits that were discharged solely as a result of the unilateral implementation of our last, best, and final offer, with interest and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make employees whole for any loss of earnings and other benefits that were suspended, or were otherwise denied work opportunities, solely as a result of the unilateral implementation of our last, best, and final offer, with interest.

WE WILL compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to discipline imposed pursuant to our unilaterally implemented last, best, and final offer on September 14, 2015, and within 3 days thereafter notify the employees, in writing, that this has been done and that the discipline will not be used against them in any way.

INGREDION, INC. D/B/A PENFORD PRODUCTS CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18–CA–160654 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.