Nos. 18-1654 & 18-1782

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

PETITION FOR REVIEW OF THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN *FIRSTENERGY GENERATION, LLC, A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP., AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 272, AFL-CIO*, CASE NOS. 06–CA–163303 AND 06–CA–170901, REPORTED AT 366 NLRB NO. 87

APPENDIX OF PETITIONER/CROSS-RESPONDENT
VOLUME I

PETER N. KIRSANOW
RICHARD E. HEPP
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Telephone: 216.363.4500
Facsimile: 216.363.4588

Attorneys for Petitioner/Cross-Respondent FirstEnergy Generation, LLC

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Respectfully submitted,

/s/ Peter N. Kirsanow
PETER N. KIRSANOW (0034196)
RICHARD E. HEPP (0090448)
Benesch, Friedlander, Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Telephone: 216.363.4500
Facsimile: 216.363.4588

Attorneys for Petitioner/Cross-Respondent FirstEnergy Generation, LLC

CERTIFICATE OF COUNSEL

I, Peter N. Kirsanow, pursuant to 6 Cir. R. 30(b)(4)(E) hereby certify that the documents contained in this appendix are properly part of the Agency Record in this matter.

/s/ Peter N. Kirsanow
PETER N. KIRSANOW (0034196)
One of the Attorneys for Petitioner/Cross-Respondent FirstEnergy Generation, LLC

CERTIFICATE OF SERVICE

A copy of the foregoing was filed electronically on the 1st day of October, 2018, and served according to the Court's Electronic Filing guidelines.

/s/ Peter N. Kirsanow
PETER N. KIRSANOW (0034196)
One of the Attorneys for Petitioner/Cross-Respondent FirstEnergy Generation, LLC

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FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local 272, AFL–CIO. Cases 06–CA–163303 and 06–CA–170901

May 16, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 15, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard

[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 adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act when, after the parties reached impasse, the Respondent selectively implemented collective-bargaining proposals that were "inextricably intertwined" with other, unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581 (1982), enfd. 44 F.3d 1320 (6th Cir. 1995); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006). Accordingly, we agree with the judge's finding that during contract negotiations and as set forth in the Respondent's final preimpasse offer (its "Second Comprehensive Offer of Settlement"), the Respondent consistently proposed tying and offsetting the elimination of employees' "in-the-box" retiree health benefits with annual contributions to employees' health-savings accounts (HSA) or 401(k) accounts, general wage increases, equity adjustments, and shift differentials. Upon impasse, however, the Respondent unilaterally eliminated the "in-the-box" retiree health benefits and made HSA or 401(k) payments, but did not implement inextricably intertwined parts of its preimpasse proposal, including the general wage increases, equity adjustments, and shift differentials. We agree with the judge that the principles in *Plainville Ready Mix* readily apply and support a violation here, with a minor clarification. In *Plainville Ready Mix*, the Board adopted the judge's finding that the employer's partial implementation regarding wages and incentive pay and gain sharing plans in its final offer before the second impasse (not the first impasse, as the judge finds) was unlawful. 309 NLRB at 583. That is, in its final proposal before the second impasse, the employer proposed eliminating gain sharing and incentive pay plans "in conjunction with" an offsetting increase in hourly wage rates. Id. at 582. But, after the second impasse, the employer eliminated its gain sharing and incentive pay plans without implementing its inextricably linked proposal of increasing hourly wage rates, and the Board adopted the judge's finding that this partial implementation was unlawful. 309 NLRB at 588.

Member Emanuel took no part in the consideration of *Plainville Ready Mix* and expresses no view as to whether it was properly decided. However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and HSA or 401(k) contributions were "inextricably linked" to the elimination of "in-the-box" retiree health benefits under the narrow doctrine set forth in *Plainville Ready Mix* and its progeny. Throughout bargaining, these proposals were consistently presented as a quid pro quo, with ample record evidence showing that the provision of these employment benefits was explicitly contemplated as a way for the Respondent to help employees offset the increased costs employees would face upon the termination of "in-the-box" health benefits, and to allow employees to share in some of the cost savings brought about by the elimination of the benefits.

Finally, having found that the Respondent violated Sec. 8(a)(5) and (1) based on the rationale set forth above, we find no need to pass on the General Counsel's additional theory that the Respondent unlawfully conditioned the proposed wage increases in its preimpasse offer on ratification of a new collective-bargaining agreement, a permissive subjective of bargaining. See *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958).

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain with the Union when it subcontracted bargaining unit work associated with its unit 1 turbine outage at its Bruce Mansfield facility in 2016 (the "M116 Outage") without providing the Union notice and an opportunity to bargain. In doing so, we reject the Respondent's argument, raised for the first time on exceptions, that it was acting in accordance with a subcontracting provision in the parties' expired collective-bargaining agreement. We deem such argument to be untimely raised and thus waived, as it was not argued before the judge. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir 2009); *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

[2] We shall modify the judge's recommended Order to conform to the Board's findings and its standard remedial language.

Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Unilaterally implementing provisions from the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, that were inconsistent with its final, preimpasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials, in addition to the HSA and 401(k) payments.

(c) Failing and refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

(b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.

(c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.[3]

(d) Make affected bargaining unit employees whole, with interest, for loss of earnings resulting from the Respondent's unilateral subcontracting of bargaining unit work associated with the M116 Outage.

(e) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

(f) Provide the Union in a timely manner the information it requested on February 10, 2016, related to the wages and material costs paid to subcontractor General Electric for the work associated with the M116 Outage.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the

[3] In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), enfd. 112 Fed.Appx. 60 (D.C. Cir. 2004).

[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."

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

Dated, Washington, D.C. May 16, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

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 fail and refuse to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage, without first notifying the Union and giving it an opportunity to bargain about such changes.

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT unilaterally implement provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015, that are inconsistent with our final, pre-impasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT fail and refuse to provide the Union with requested information, such as the wages and material costs paid to General Electric for the M116 Outage work, that is relevant and necessary to the Union's role as your collective-bargaining representative.

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

WE WILL, before implementing any changes to your wages, hours, or other terms and conditions of employment, including, but not limited to, the subcontracting of unit work, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

WE WILL, upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with our Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date we eliminated the "in-the-box" retiree health benefits.

WE WILL make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either our elimination of the "in-the-box" retiree health benefits or our failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in the paragraph above.

WE WILL make you whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the M116 Outage.

WE WILL compensate you for any adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

WE WILL provide the Union in a timely manner the information requested on February 10, 2016, related to the wages and material costs paid to General Electric for the work associated with the M116 Outage.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Board's decision can be found at www.nlrb.gov/case/06–CA–163303 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., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

David Shepley, Esq., for the General Counsel.
Brian W. Easley, Esq., for the Respondent.
Marianne Oliver, Esq., for the Charging Party.

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, Administrative Law Judge. These consolidated cases were tried before me on December 1–2, 2016, in Pittsburgh, Pennsylvania. The International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union or Local 272) filed the underlying charges alleging FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.[1] (Respondent or the Company) committed unfair labor practices affecting the unit employees at its Shippingport, Pennsylvania powerplant.

The first case involves Respondent's partial implementation of its final pre-impasse offer to the Union. Respondent implemented certain proposals, including the elimination of retiree health benefits, but not its proposed increases to wages and shift differentials, stating those increases would be effective only upon contract ratification. The complaint presents two theories for why Respondent's failure to implement the proposed increases to wages and shift differentials violated Sections 8(a)(5) and (1) of the National Labor Relations Act (Act). First, the General Counsel argues that because Respondent proposed the increases as part of a package to compensate for the elimination of the retiree health benefits, it was obligated to also implement those proposed increases when it eliminated the retiree health benefits. Second, the General Counsel alleges that contract ratification is a permissive subject of bargaining, and Respondent was prohibited from making it a condition precedent to implementing the increases. Respondent denies the alleged violations. Based upon the evidence and applicable law, I find Respondent committed the violations as alleged, under both theories.

The second case involves Respondent's subcontracting of scheduled maintenance work historically performed by unit employees. The complaint alleges Respondent violated Sections 8(a)(5) and (1) of the Act when: (1) it subcontracted this unit work without providing the Union with notice and an opportunity to bargain over the decision to subcontract or its effects; and (2) when it failed or refused to provide the Union with the wages and material costs paid by the subcontractor. Respondent denies the allegations. I find Respondent breached its duty to bargain over the decision to subcontract because it announced its decision as a fait accompli. I also find the Union has met its burden of establishing the relevance of the requested subcontracting information.[2] Based on the evidence and applicable law, I find Respondent committed these violations as alleged.[3]

II. STATEMENT OF THE CASE

On November 4, 2015, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–163303. On February 29, 2016, the Union filed an amended unfair charge against Respondent in Case 06–CA–163303. Based on its investigation, on May 27, 2016, the Acting Regional Director for Region 6 of the Board, issued a complaint in Case 06–CA–163303, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act.[4] On June 9, 2016, Respondent

[1] At the hearing, the parties stipulated to amending the pleadings to correct the employer's name to be FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g.,*Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] I make no finding regarding Respondent's alleged failure to engage in effects bargaining because the General Counsel appears to have abandoned that allegation by failing to raise or address it during the hearing or in his posthearing brief.

[4] On March 11, 2016, the Acting Regional Director issued a partial dismissal letter in Case 06–CA–163303, dismissing, among others, the allegation that the Company violated Sec. 8(a)(5) and (1) of the Act when it failed to implement its proposed wage increases. On April 22, 2016, the Regional Director issued an amended dismissal letter rescinding the earlier dismissal, stating the allegations that the Company "failed to implement a proposed wage increase when it implemented its other terms of employment contained in its last comprehensive offer and, conditioned the implementation of this wage and shift differential increase upon membership ratification, are being retained for further

filed its answer in Case 06–CA–163303, denying all alleged violations of the Act.

On March 2, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–170901. Based on its investigation, on July 29, 2016, the Regional Director for Region 6 of the Board issued a complaint in Case 06–CA–170901, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act. On August 11, 2016, Respondent filed its answer in Case 06–CA–170901, denying all alleged violations of the Act.

On November 10, 2016, the Regional Director for Region 6 issued an Order Consolidating Cases in Cases 06–CA–163303 and 06–CA–170901.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[5]

III. FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent has been a corporation with an office and place of business in Akron, Ohio, and has been engaged in the operation of power generation plants in several states, including at its Bruce Mansfield plant located in Shippingport, Pennsylvania ("Bruce Mansfield facility"). In conducting its operations during the 12-month period ending February 29, 2016, Respondent derived gross revenues in excess of $250,000. During the 12-month period ending February 29, 2016, Respondent purchased and received goods at its Bruce Mansfield facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. Respondent's Operations

Respondent operates coal-fired power generating plants throughout Ohio and Pennsylvania, including its Bruce Mansfield facility. The Bruce Mansfield facility contains three identical power generating units, referred to as Unit 1, Unit 2 and Unit 3. Each unit consists of a turbine, a generator, a boiler, valves, and other auxiliary equipment. Each unit operates as an integrated system. The system begins with the burning of coal to boil water to create highly pressurized steam; the steam is then pumped into the turbine-generator to produce electricity; and that electricity is released to the power grid for distribution and consumption. Respondent supplies power to the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), a federally regulated transmission organization that oversees the regional electricity markets.

C. Collective-Bargaining Relationship

The Union represents a unit of approximately 230 production and maintenance employees at the Bruce Mansfield facility.[6] The parties' most recent collective-bargaining agreement was dated from December 5, 2009, to February 15, 2013. On August 16, 2012, the parties entered into a memorandum of agreement extending their collective-bargaining agreement, with certain modifications, until February 15, 2014. The Union never held a ratification vote over this extension agreement.[7]

The parties began negotiations over a successor agreement on December 19, 2013, and those negotiations continued until September 18, 2015. The Company's negotiation committee included Anthony Gianatasio, Labor Relations Representative. Gianatasio reported to Charles Cookman, the Company's Executive Director of Labor Relations and Safety. Cookson participated in the negotiations beginning in late 2014. Gianatasio and Cookman are supervisors and/or agents of the Company within the meaning of Section 2(11) and (13) of the Act. The Union's negotiation committee was led by Herman Marshman, Union President. The parties failed to reach a successor agreement prior to the expiration of the extension agreement, but they continued to negotiate, as detailed below, until reaching an impasse as of October 27, 2015.[8]

IV. UNFAIR LABOR PRACTICES

A. 06–CA–163303

1. Background

As previously stated, the parties began negotiations for a new agreement in December 2013, and those negotiations continued into 2014. On September 25, 2014, the Company gave the Union its Comprehensive Offer of Settlement, which detailed the Company's offer for an overall agreement. (R. Exh.

processing." Both allegations are contained in the complaint in Case 06–CA–163303.

[5] Abbreviations in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

[6] The Union has been the exclusive collective-bargaining representative, within the meaning of Sec. 9(a) of the Act, of all production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, results, and yard departments, employed at Respondent's Shippingport, Pennsylvania facility, excluding technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[7] The Union did not submit this extension for ratification because it was not a new agreement. (Tr. 158.)

[8] At the hearing, the General Counsel and Respondent entered into a stipulation that the parties were at a good-faith impasse in their negotiations as of October 27, 2015. The Union did not participate in, but did not object to, this stipulation, stating that its position has been and remains that the parties were not at impasse. Regardless, the General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir. 2009). Based upon the stipulation, I will accept, without further analysis, the parties were at a good-faith impasse when Respondent implemented the changes at issue on October 27, 2015.

1.) One of the key changes the Company sought during these negotiations was to eliminate retiree health benefits. Article XVIII, Section 3 of the parties' collective-bargaining agreement allowed current employees who retired during the term of the agreement to continue to participate in their chosen health benefit plan until the expiration of the agreement in effect at the time of their retirement, with the Company paying a portion of their health care and prescription drug coverage costs. The parties refer to these as "in-the-box" retirees because the amount the Company paid was set forth in a box chart in Article XVIII of the collective-bargaining agreement. Upon expiration of the agreement, these retirees then come out of the box.[9] "Out-of-the-box" retirees are eligible to enroll in a different, higher-cost company health care plan.[10]

The Company's Comprehensive Offer of Settlement proposed eliminating health benefits for "in-the-box retirees" as of December 31, 2014.[11] This Offer also proposed annual wage increases, referred to as General Wage Increases (GWI), that would go into effect following contract ratification. The proposed increases were scheduled to go in effect as follows: one and one half percent (1½ percent) GWI effective the date of ratification; an additional one percent (1 percent) GWI effective 1 year following the date of ratification; and an additional one percent (1 percent) GWI effective 2 years following the date of ratification. This Offer also proposed increasing the shift differentials paid to employees for hours worked during the afternoon and evening shifts, and on Sundays, all effective upon ratification.[12] (R. Exh. 1.) The Union did not present this Offer to its members for ratification.

2. December 8, 2014 bargaining session[13]

On December 8, 2014, the parties' committees met at the Radisson Hotel in Beaver Falls, Pennsylvania, for bargaining. The evidence about this December 8 bargaining session consisted of the testimony of Charles Cookson, Respondent's executive director of labor relations and safety, and the notes of Respondent's bargaining committee member, Tony Gianatasio.[14]

At this December 8 session, the parties discussed several topics, including Company's proposal to eliminate "in-the-box" retiree health benefits. The Union, through President Herman Marshman, stated the Company should provide some compensation for the loss of the retiree health care subsidies, and asked what percentage of the cost savings from the elimination of these subsidies was the Company willing to share with the Union. There was some discussion. Gianatasio's notes reflect the Company then orally made the following proposal:

> 1. A contribution of $500 for those with individual health care coverage and $1000 for employee/spouse, employee/child and family coverage to [the employee's health savings accounts] HSAs. If they do not participate in a FirstEnergy HSA, the money would be placed in their 401(k) account. This would be in each year of the contract in addition, you can choose one of the options from below:
> 2. If you end the new retiree health care box 12/31/14 we would provide a general wage increase in each year of the contract as follows:
>
> a. 3% at ratification
> b. 2.5% one year after ratification
> c. 2.5% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment[15] to all classifications at the time of ratification
>
> 3. If you end new retiree health care box 12/31/15 we would provide a general wage increase in each year of the contract as follows:
>
> a. 2.5% at ratification
> b. 2.0% one year after ratification
> c. 2.0% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment [to] all classifications at the time of ratification (GC Exh. 11).[16]

In response to Marshman's earlier question about how much of the savings was the Company willing to share with the Union, Cookson stated that the Company would save $1.25 million a year by ending the retiree health care benefits by the end of 2014, and its proposed offer (discussed above) would cost it $1 million a year. The parties then discussed other topics, including safety, before returning to retiree health benefits. Marshman told Cookson he wanted to see if there was a reasonable way to distribute the savings, and Cookson responded that the Company's offer shows it was flexible. Marshman asked if Cookson would seriously entertain a counter offer, and

[9] Charges over retiree health benefits were the subject of prior litigation. See *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012), affd. 362 NLRB No. 66 (2015) (Board reaffirmed prior Board decision which was decided without a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)).

[10] The record does not address what, if any, amounts Respondent pays towards "out-of-the-box" retiree health benefits.

[11] Hereinafter the terms "in-the-box" retiree health benefits and retiree health benefits will be used interchangeably to refer to the health benefits paid to employees for the remainder of the agreement in effect at the time of their retirement.

[12] All the Company's wage proposals stated any increases would be effective upon ratification. Cookson testified the Company has an internal policy that it will not pay increases retroactively. (Tr. 173.)

[13] There was no detailed evidence presented regarding bargaining prior to December 8, 2014.

[14] Gianatasio's notes provide more detail and context as to what was discussed, and nothing in Cookson's testimony contradicted Gianatasio's notes. Gianatasio was not called to testify. No other witness was called to testify about this bargaining session.

[15] As discussed below, Bruce Mansfield unit employees earn less per hour than their counterparts at the Company's Sammis power plant in Stratton, Ohio. This "equity adjustment" refers to the Company's offer to increase wages for Bruce Mansfield unit employees to bring them closer to the Sammis employees.

[16] Cookson confirmed the Company made this December 8 oral proposal because the Union had objected to the Company's proposal in its Comprehensive Offer of Settlement to eliminate "in-the-box" retiree health benefits by the end of 2014, and that the Company made this December 8 oral proposal to offer higher wage increases if the Union agreed to end retiree health benefits by the end of 2014, and lower wage increases if it agreed to end them by the end of 2015. (Tr. 162–163.)

Cookson said he would. Cookson then asked if the Union was rejecting the Company's offer, and that he (Cookson) had just shown how the Company was offering the Union back 80 percent of the savings it would receive from eliminating retiree health benefits. There was some additional discussion about Respondent's proposal, and the Union asked questions about the Company's calculations regarding the amount of the savings. Marshman explained that the Union "can't even get a compromise to formally compensate for what is being lost." Cookson responded, "I've offered you a way to extend the new box to the end of 2015. I offered contributions to the HSA as a way to deal with that going forward." (GC Exh. 11.)

The discussion then moved to the wage disparity that existed between the employees working at Bruce Mansfield and the employees working at the Company's Sammis facility. The Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility. Cookson pointed out that the Company was offering a $.75 per hour equity adjustment across the board to help "bridge that gap" for every employee at the Bruce Mansfield facility. Marshman questioned why the Bruce Mansfield employees should be paid less for the same work. In the end, Marshman rejected the Company's proposal, stating that the parties had a number of other matters to address. That was the end of the session. The Union never presented the Company's oral offer to its members for consideration.

3. Cookson and Marshman one-on-one meetings in July and August 2015

The parties had no further bargaining sessions scheduled following their December 8, 2014 session. In the spring 2015, Cookson contacted Marshman about the two meeting alone. Cookson hoped this would help facilitate the resumption of bargaining. The two agreed to meet on July 7, 2015, at a Perkins Restaurant in Austintown, Ohio.

On July 7, 2015, Cookson and Marshman met as planned. Because the proposals discussed at the December 8, 2014 bargaining session were verbal, Cookson prepared a written summary of where the parties were as of that meeting, and he gave that written summary to Marshman at the start of their July 7 meeting. The summary tracked what the Company had previously verbally proposed, including what the Company was offering in exchange for eliminating retiree health benefits for "in-the-box" retirees. However, because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health benefits ending by December 31, 2015. Also, in the Company's Comprehensive Offer of Settlement, it proposed maintaining the current pension plan for existing employees, but moving to a cash-balance retirement savings account (or defined contribution benefit plan) for new employees hired in the future. Cookson reiterated the Company's desire to implement this for future new hires during his July 7 meeting with Marshman

The two went over Cookson's written summary. Marshman then countered, proposing that the Company keep retiree health benefits until the end of 2017, offer a 12-percent equity adjustment to wages, plus a 3-percent general wage increase, both at ratification, and no cash-balance retirement plans. Cookson responded, stating there was no way the Company could go beyond 2015 for retiree health care; that while the Company was interested in providing an equity adjustment, Marshman's proposed amount was too large; and that the Company had to have cash-balance retirement plans for new hires.

During this July 7 meeting, Cookson also informed Marshman that the Company was going to need to expand its earlier proposals regarding resource sharing and mobile maintenance. Resource sharing is an established procedure that allows the Company to send Bruce Mansfield employees to its other facilities to perform work. Mobile maintenance is a department of employees at one of the Company's other facilities who travel around to the Company's facilities to perform maintenance work. These employees have similar knowledge and skills as the unit maintenance employees, but perform the work at a lower cost. Cookson told Marshman he would be providing written proposals on expanded use of resource sharing and mobile maintenance at their next meeting.

Cookson and Marshman next met on July 21, 2015, at the Perkins Restaurant in Austintown, Ohio. At this meeting, Cookson handed Marshman a multipage document entitled "Summary of New Proposals and Revisions to 9/25/14 Company Comprehensive Proposal and 12/8/14 proposals provided to Union 7/21/15." (R. Exh. 2.) The Company continued to propose an end to "in-the-box" retiree health benefits, now to be effective October 31, 2015, as opposed to the previously proposed December 31 date, as that date had already passed. The Company, however, increased the equity adjustment from $.75 to $1 per hour for all classifications, effective at ratification, and it now offered a general wage increase of 5.5 percent at ratification and 2.0 percent 1 year after ratification. The Company maintained its earlier proposal to make $500/$1000 annual contributions into employees' HSA or 401(k) accounts to help employees save for their health care upon retirement, and it continued to propose having new hires (hired after January 1, 2016) be placed in a cash balance plan, as opposed to the Union's pension plan. Cookson also provided the Company's proposals addressing resource sharing and mobile maintenance.[17]

[17] Although the proposals and discussions over the increased use of non-unit mobile maintenance employees do not directly relate to the allegations in Case 06–CA–163303, they do provide context to the allegations in Case 06—CA–170901, involving subcontracting. In particular, these proposals sparked an exchange between Cookson and Marshman over the current and future size of the bargaining unit and the contracting out of unit work. (GC Exh. 9, pg. 4.) During this July 21 meeting, Marshman pointed out that the Company had not replaced the nearly 130 employees that had left the bargaining unit since 2008. Cookson did not deny this, stating that a reduced headcount through attrition would give the plant a chance to survive. Marshman replied that could not come at the expense of the Union, and that the Union would need some type of an agency fee arrangement and/or contingency plan for contractors who come to the Bruce Mansfield plant. Marshman stated that a lot can be negotiated between the Company and its contractors. But Marshman stated he could not knowingly or willingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." (GC Exh. 9, p. 4.) It was during this exchange that Cookson also informed Marshman that the Company planned to reduce another 40–50 employees from the unit,

Cookson went through the document, explaining the changes. Cookson testified about this meeting, and his meeting notes also were introduced into evidence. (GC Exh. 9.) Cookson's notes provide the most detail about what was discussed. On the issue of wages, Cookson explained to Marshman that, with the equity adjustments and the general wage increases, the Company was now proposing an 8.5-percent increase in wages upon ratification. Cookson emphasized the Company was not proposing any retroactive pay, and the wage increases would be effective at ratification, with the additional increases effective 1 year thereafter. Marshman did not respond to Cookson's comment about ratification.

Marshman responded that the retiree health benefits had to go until 2017; the Company needed to provide a means to compensate the current and future retirees for the loss of their health benefits; the Union was not going to agree to a cash balance plan; and the Union had issues with the Company's proposals regarding resource sharing and mobile maintenance. Cookson asked Marshman to take the proposal to the Union's bargaining committee to review. The two agreed to meet again on August 20, 2015, at the same location.

On August 20, 2015, Cookson and Marshman met as scheduled. Cookson's notes from this meeting again provide the most detail about what was discussed. (GC Exh. 9.) According to the notes, Cookson began with where the parties stood, noting that they left the July 21 meeting with clear disagreements on the following: (1) ending health benefits for in-the-box retirees (the Company proposed ending it as of 10/31/15, and the Union would not accept unless coverage went until 2017); (2) cash balance pension plan for new hires (the Company proposed, and the Union rejected); and (3) making $500/$1000 annual contributions to HSA/401(k) accounts (the Union wanted contributions to for retirees as well, and the Company only was willing to do it for active employees). Cookson then stated that the Company could move on the term of the agreement and still had room to move in the wage area. Marshman responded that retiree health care has a monetary value, and that the Company should provide the savings from the termination of this benefit to the retirees. Cookson's notes reflect he (CC) and Marshman (HM) had the following exchange regarding the termination of health benefits for "in-the-box" retirees:

> (CC) Our position is that it (the box) will end and go away. We are proposing to give $$ to the active employees. We have a fundamental disagreement. We are eliminating this across the board.
> (HM) Not trying to be unreasonable, this is not favorable to us. If I could get something, we could move on.
> (CC) In this area I cannot do any more than I have already offered.
> (HM) How do we get around this?
> (CC) We have offered other things—like an initial 8.5% wage increase.

(GC Exh. 9.)

The two discussed the Company's other proposals, including resource sharing and the mobile maintenance department. In the end, they agreed they were not near an agreement and the parties should return to the bargaining table with their full committees. They agreed to resume bargaining on September 17 and 18, 2015.

4. The September 17–18 bargaining sessions

The parties' committees met on September 17 and 18, at the Radisson Hotel in Beaver Falls, Pennsylvania. At the September 17 session, the Company gave the Union its "Second Comprehensive Offer of Settlement." The document was a redlined version of the parties' collective-bargaining agreement with the revisions Cookson had presented to Marshman during their one-on-one meetings. There were no substantive changes. The parties discussed the Company's offer, and the Union's response remained essentially the same. The Union never presented this Second Comprehensive Offer of Settlement to its members for ratification.

At the September 18 session, the parties focused on the use of the Company's mobile maintenance department and the use of contractors. The Union gave the Company a counterproposal regarding the Company's use of outside contractors. The Union sought to revise the language in Article IV, addressing Management Responsibilities, to prohibit the use of contractors if it deprived unit employees of overtime work. The Company considered and rejected the Union's proposal. The parties ended the September 18 session apart on several key issues, including, wages, retiree health care, cash balance pension plans, mobile maintenance, and resource sharing. The parties scheduled another bargaining session for October 19, 2015. The Union later cancelled the meeting because Marshman was unable to attend due to an illness, and Marshman was unwilling to have negotiations continue without him. The Company requested alternate dates, but the Union provided none.

Thereafter, Company internally concluded that the parties were at impasse. Without further bargaining sessions scheduled, the Company decided to implement certain terms from its Second Comprehensive Offer of Settlement.

5. Announced partial implementation

On October 27, 2015, Cookson and other Company representatives met with Union representatives following a scheduled labor-management meeting. Cookson explained to the Union representatives that the parties were at impasse and the Company was implementing certain terms from its Second Comprehensive Offer of Settlement. Cookson provided written documents explaining what proposals the Company was implementing. Among the implemented terms, the Company was ending retiree health subsidies for all in-the-box retirees by December 31, 2015; it would begin making annual contributions for current employees of $500/$1000 (depending on the type of health insurance coverage) toward Health Savings Accounts (or 401(k) account if no Health Savings Accounts) beginning in 2016; and all employees hired or rehired on or after January 1, 2016, would participate in the Company's cash bal-

primarily in the mechanical and electrical departments. [At the hearing, Cookson estimated that in the last 5 years the unit has gone from 275–300 employees to 230 employees, and the unit size has been steadily declining every year.] (Tr. 189–190.)

ance retirement plan (and not in the existing pension plan).[18] Cookson handed the Union a package of documents related to the impasse and the implemented terms. One of the documents the Company gave the Union was entitled "Summary of Implemented Terms." This document states the following regarding the Company's proposed increases to wages and shift differentials:

> Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates only effective upon ratification of the contract by membership
>
> > Equity adjustment-one dollar per hour increase applied to all wages in effect July 1, 2015, only upon Ratification
> > Effective the date of ratification, a General Wage Increase of five and one half percent (5.5%) will be granted on the wage rates in effect after equity adjustments
> > Effective one year following the date of ratification, a General Wage Increase of two percent (2.0%)
> > Upon ratification, increase Sunday Shift Premium to Two Dollars Five Cents ($2.05) per hour, Afternoon Shift Premium to One Dollar Fifty ($1.50) per hour, Night Shift Premium to One Dollar Fifty Five ($1.55) per hour.

As previously stated, the General Counsel and Respondent stipulated that the parties were at impasse as of October 27, 2015.

B. 06–CA–17901

1. Background

As previously stated, the Bruce Mansfield facility has three identical power-generating units: Unit 1, Unit 2, and Unit 3. Each unit consists of a turbine, a generator, a boiler pump, valves, and other auxiliary equipment. The Company shuts down a unit for periodic maintenance, which is referred to as a scheduled outage. A full-train overhaul is a larger scale outage that includes opening and disassembling the entire turbine-generator unit, inspecting and cleaning the parts, and then reassembling and closing the unit.[19] The bargaining unit employees at Bruce Mansfield historically have performed all the open/clean/close work. (Tr. 47–48.) The Company has contracted out certain specialized work, such as engineering, sandblasting, coating, painting, insulation, pipefitting, nondestructive testing, etc.

2. M116 Outage

In the spring 2016, the Company performed a full-train overhaul of Unit 1. This type of outage occurs approximately every 9 years. This particular outage involved nearly 600 tasks.[20] Christopher Cox, Respondent's Maintenance Manager, testified the Company internally evaluated the project and determined, after consulting with the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), that it could complete the project within 56 days. (Tr. 203–204.) The project was referred to as M116, because it involved Unit 1 at the Bruce Mansfield facility in 2016.

Planning for this particular outage began back in January 2015, when the Company's higher-level managers met to begin discussing the project. One of the topics discussed was who should perform the open/clean/close work. The Company's higher-level managers considered the following three alternatives: (1) have the work performed by bargaining-unit maintenance employees; (2) have the work performed by the Company's mobile maintenance department; or (3) have the work performed by outside contractors. According to internal emails, these managers concluded there were not enough available unit maintenance employees to perform the open/clean/close labor for a full-train turbine outage, while still performing the day-to-day maintenance work on the other two units and related equipment. The managers considered having the mobile maintenance employees perform the open/clean/close work, but the Company's industrial relations department believed it "would be too risky to use [mobile maintenance] in that capacity because the [turbine/generator] work was always performed in house and using [mobile maintenance] at this time would jeopardize ongoing negotiations with the [U]nion." (GC Exh. 12.) Ultimately, the managers focused on subcontracting out the work. There is no dispute the Company never involved the Union in this decision-making process.

The Company contacted General Electric ("GE") in early 2015 to request its bid to perform the M116 open/clean/close work. The Company contacted GE because GE originally manufactured the turbine generator units, and the Company continued to use GE to provide technical direction during outages. Additionally, GE provides a two-year warranty on any work it performs for the Company. GE provided warranties for work performed during prior outages.

In late February 2015, GE provided the Company with its bid to perform the work. Over the next several months, the Company had ongoing discussions with GE about its bid to perform the work. Christopher Cox was involved in overseeing the M116 project, making sure that it was executed on budget, on time, and safely. He testified that by about September 10, 2015, the Company made the decision and received approval to have GE perform the work at issue. Cox worked with GE over the next month or so on additional proposals to try to reduce the costs for the Company.[21] (Tr. 204–205.) On around November 13,

[18] Respondent did (not) implement other proposals from its Second Comprehensive Offer of Settlement. It is unnecessary to discuss them as they are irrelevant to deciding the matters at issue.

[19] Throughout the hearing, various terms were used to describe this work, including, but not limited to, the open/clean/close work, the turbine/generator overhaul, the turbine rebuild, the turbine outage, etc.

[20] The General Counsel introduced an internal report identifying each task performed during the outage, as well as the estimated man hours it would take to complete the each task. (GC Exh. 2.) The General Counsel presented two witnesses who testified that approximately 140-150 of the tasks were previously performed by unit employees. (Tr. 70–71)(Tr. 100–101.)

[21] At the hearing, Cox testified that the labor costs were actually more to use GE to perform the work at issue. (Tr. 205.) Cox provided no explanation or basis for his statement. The Company also did not introduce any documentary evidence to support or explain his statement.

2015, the Company entered into a purchase order to have GE perform the open/clean/close work on Unit 1. (GC Exh. 17.) There is no dispute that the Company did not inform the Union that it contracted with GE to perform this work until February 10, 2016.

Article IV of the parties' expired collective-bargaining agreement contained the management rights provision, which addressed subcontracting. It stated, in pertinent part, that:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

As part of this process, the Company faxed the Union a weekly spreadsheet report with the work the Company has assigned (on an emergency basis) or may assign to outside contractors. The Company continued this practice after the parties' agreement and extension both expired. The Company faxed the Union these reports on Friday, and then parties meet the following Wednesday at a contractors' meeting to discuss the work at issue.

Respondent introduced 10 of these weekly spreadsheet reports, covering certain weeks from June 5, 2015, through November 20, 2015 (specifically, the reports were for 2/6/15, 6/5/15, 7/7/15, 9/4/15, 9/18/15, 9/28/15, 10/2/15, 10/9/15, 11/6/15, and 11/20/15). Some of these reports refer to M116. Some identify the subcontractor and the type of work being performed. However, only two refer to M116 and turbine or generator. (R. Exh. 5.) The first is the June 5, 2015 report, which indicates Thomas Cowher, a higher-level consultant for the Company, requested a contractor for a job described as "Turbine Area General NDE M116." Christopher Cox testified that "NDE" stands for non-destructive examination. Non-destructive examination refers to when the turbine is apart and on the floor, and there is ultrasonic testing to inspect the area for cracks and erosion. Cox confirmed that bargaining unit employees do not perform this non-destructive testing. (Tr. 212–213.) The second is the November 6, 2015 report, which indicates that Thomas Cowher requested a contractor for a job described as "Generator labor M116." (R. Exh. 12.) Neither entry provides any additional information about the nature or scope of the project, when it was going to be performed, and/or who was going to perform it. None of the witnesses present for these weekly meetings could recall any discussions about the subcontracting of the open/clean/close work or the turbine/generator outage work for Unit 1.

The Company holds periodic "all hands" meetings with maintenance department employees. On June 15, 2015, the Company held "all hands" meetings for each of the shifts in which the M116 outage was raised. The Company gave a power-point presentation that generally addressed the outage. Only one of the witnesses, Devin Miller, a senior engineer consultant for Respondent, testified about the meeting, and he could not offer any specifics about what details were shared with employees. Miller confirmed that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. (Tr. 271.)

On January 11, 2016, the Company held a managerial meeting with its outage planners. No Union representative was present for this meeting. At this meeting, there was a power-point presentation, and one of the slides read, "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO." (GC Exh. 3.)

On February 10, 2016, the Company held a contractors information meeting with the Union. At this meeting, Paul Rundt, the Maintenance Superintendent, and Christopher Cox met with union representatives to inform them that the Company had contracted out the open/clean/close work to GE. Dennis Bloom, the Union recording secretary, and Frank Snyder, Union steward, were present for the meeting. Bloom testified that Rundt identified each of the jobs and which contractor was going to be performing the work. Specifically, Rundt stated that the Unit 1 turbine outage work was going to be given to GE. Rundt stated the Unit 1 boiler feed pump work may also go to GE. Bloom responded that the mechanical maintenance employees had performed the outage work in the past, and that it should be done by the unit employees. Rundt replied that the outage work was going to be contracted out to GE.[22] Rundt, however, left open the issue of who would perform the boiler feed pump work, stating that he would check into it and get back to the Union. (Tr. 64–65.) Snyder then requested the contractor information sheets, which would list the contractor, the particular tasks, the estimated man hours, and the estimated costs. As for the costs, Bloom testified Cox responded that the information was proprietary, that the Union was not entitled to that, and the information was not available. (Tr. 66–67.) Cox did not recall any request for information being made during this meeting. (Tr. 226.) Following the meeting, the Company

[22] Cox and Rundt both testified that Rundt informed the Union that the Company "was intending" to contract out the turbine outage work and auxiliary equipment work, including the boiler feed pump work, to GE. I do not credit that Rundt said the Company "was intending" to subcontract out the turbine outage work to GE. I find the Company had already made that decision, and it was final. The Company made the decision to subcontract this work in early 2015. It solicited and received GE's bid in the early spring of 2015. Cox testified the Company made the final decision to subcontract this work to GE on around September 10, 2015, and he continued to negotiate with GE for several more weeks to try to further reduce the cost to the Company. On November 13, 2015, the Company and GE entered into a purchase order to perform the work. At the January 11, 2016 outage readiness meeting, the Company informed managers that it had contracted with GE to perform the "labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract." In light of these circumstances, I credit Bloom's testimony that the Company presented its decision to subcontract the turbine outage work to GE as a final decision.

decided to have the unit employees perform the boiler feed pump work, and Rundt informed the Union of this decision.

3. Information request

Later, Bloom reported to Marshman what had occurred at this meeting. Thereafter, Marshman sent the Company a letter dated February 10, 2016, requesting information. The letter, in pertinent part, stated:

> This is a reaffirmation letter of the company's obligation to provide all information, upon request by Local 272, for contractors working at the Bruce Mansfield Plant. This would include:
>
> • Name
> • Number of employees
> • Estimated man/hours
> • Wages
> • Material costs
>
> (But not limited to).
>
> This letter is also a formal request for all information from paragraph above for the Unit One Outage.

In a letter dated March 14, 2016, Christopher Cox, the Maintenance Manager, responded to Marshman's information request, providing the Union with a three-page chart containing the work order number for the contracted-out job, the abbreviation for the contractor's name on the order, a short description of the work the contractor was to perform, and the estimated number of man-hours to perform the work described. The Company did not provide the wages the contractor paid to the individuals performing the work or the material costs. There is no mention of this information in the Company's response, and no explanation as to why the information was not being provided to the Union.

Marshman testified that after receiving Cox's March 14 letter he called Cox to tell him the response was insufficient. Marshman testified that he complained to Cox about not receiving the requested wage and material cost information. Marshman testified that he kind of gave Cox a summary why the Union needed it, stating that if the Union was going to try to negotiate the work that was performed, it "would need to know apples to apples" of what it was negotiating. (Tr. 124–125.)[23] The Company never provided the requested wage or material cost information, did not inform the Union that it was not going to provide it, or explain why it was not going to provide it. (Tr. 246–248).

The Unit 1 scheduled outage lasted from around March 20, 2016, through May 14, 2016. GE performed the open/clean/close work on the turbine-generator unit. There were no unit employees were involved in this turbine overhaul work. (Tr. 201.) The bargaining unit employees performed the boiler feed pump work. During this period of time, all available bargaining unit employees worked, including voluntary and involuntary overtime. Some of the unit employees turned down opportunities to work overtime.

V. LEGAL ANALYSIS

1. Did Respondent violate Section 8(a)(5) and (1) of the Act when it failed to also implement its proposed increases to wages and shift differentials from its final, pre-impasse offer while implementing other proposals from that same offer

The General Counsel contends Respondent violated Sections 8(a)(5) and (1) of the Act when, after the parties reached an impasse, it failed to implement its proposed increases to wages and shift differentials when it eliminated "in-the-box" retiree health benefits.[24] It is well-established that after the parties reach a good-faith impasse during contract negotiations, an employer may unilaterally implement changes to existing terms and conditions of employment provided those changes are "reasonably comprehended" within the employer's pre-impasse proposal to the union. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), enfd. 395 F.2d 622 (D.C. Cir. 1968). See also *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (implemented terms cannot be "significantly different" than those proposed to and rejected by the union). Moreover, an employer is not required to implement all aspects of its final, preimpasse offer, but may choose to implement portions of it. *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (unilateral raises that encompassed automatic progressions and merit increases held reasonably comprehended in pre-impasse proposals on merit wages even though employer gave higher wages and increased wages for a larger portion of employees than in the past). See also *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), enfd in relevant part, 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983); *Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990). The Board, however, has held that an employer cannot selectively implement proposals that are "inextricably intertwined" with unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006).

In *Plainville Ready Mix*, supra, the employer proposed during contract negotiations to change the wage structure and health insurance plan offered to employees. As for wages, the

[23] Marshman could not recall if he initially spoke with Cox or left him a voicemail message, but he did have this conversation with Cox about the Company's response. Cox testified that he does not recall any further communication with Marshman about this information request. (Tr. 228.) But Cox did recall having conversations with Marshman in the past on the topic of obtaining information from subcontractors, and that Respondent informed Marshman this information is proprietary to the subcontractor, and Respondent will not provide it. (Tr. 248–249.) I credit Marshman's specific recollection of telling Cox that he (Marshman) needed the requested information for negotiations and he needed to know "apples to apples" of what he was negotiating.

[24] Par. 12 of the complaint in Case 06–C–163303 alleges that Respondent violated Secs. 8(a)(5) and (1) of the Act when it "failed to implement the wage adjustments and shift differential proposals contained in its [Second Comprehensive Offer of Settlement] notwithstanding that it implemented the remaining terms from that proposal." As previously established Respondent implemented some but not all of the proposals from its Second Comprehensive Offer of Settlement. In its posthearing brief, the General Counsel made clear that it was alleging that Respondent violated Secs. 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for "in-the-box" retirees. (GC Br. 23.)

employer proposed to lower fixed hourly wage rates but introduced gain sharing and incentive pay plans to help employees make up the difference. The union rejected the proposal. In its final pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans and, instead, offer a higher fixed hourly wage rate. However, after reaching impasse, the employer did not implement the higher hourly wage rate or the gain sharing or incentive pay plans; it simply implemented the lower fixed hourly wage rates. The Board adopted the administrative law judge's finding that the employer violated the Act by doing so, holding that the lower wage rate was not reasonably comprehended in the employer's final offer because the lower hourly wage rate was presented as part of a package with the gain sharing and the incentive pay plans—it was not offered as a stand-alone proposal.

As for health insurance, the employer proposed a new plan that limited certain covered benefits, such as drug and alcohol treatment and psychological treatment, and it increased the employees' premiums, deductibles, and copays. But the new plan also added benefits, such as vision care, emergency care, and a prescription drug card. After reaching impasse, the employer partially implemented the proposed health insurance plan, without the added benefits. The Board adopted the judge's finding that the employer violated the Act when it implemented the proposed plan without the added benefits, stating that, "the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation …" See id. at 585.

In *Cleveland Cinemas Management Co.*, supra, the successor employer acquired a movie theater that employed union-represented projectionists. During negotiations, the successor employer informed the union that it wanted to eliminate the dedicated projectionist positions and have that work performed by supervisors. The union objected. The employer then offered to enter into a service technician agreement which would have two of the projectionists working fulltime covering all three of the employer's area theaters in exchange for eliminating the dedicated projectionist positions. The union rejected this proposal, stating it wanted both the dedicated projectionist positions and the service technician agreement. The employer was unwilling to do this, and it gave the union its written proposal regarding the service technician agreement. Thereafter, the parties reached an impasse, and the employer partially implemented its final offer. The employer eliminated the dedicated projectionist positions and had that work performed by supervisors, but it did not implement the proposed service technician agreement. Applying *Plainville Ready Mix*, the Board adopted the judge's finding that the employer violated the Act by failing to implement the proposed service technician agreement, holding that it was presented to the Union in its final, pre-impasse offer as a "quid pro quo" for the union giving up the dedicated projectionist positions.

Here, the General Counsel relies upon the "inextricably intertwined" theory to support his position that Respondent was obligated to also implement the proposed increases to wages and shift differentials contained in its Second Comprehensive Offer of Settlement because they were presented as part of an overall package to compensate the Union for the elimination of "in-the-box" retiree health benefits.[25] I agree. I find that from December 8, 2014 forward, Respondent proposed the wage increases at issue, as well as annual contributions into employees' HSA or 401(k) accounts, as a quid pro quo for the elimination of "in-the-box" retiree health benefits.[26] There is no dispute that Respondent's December 8 oral proposal directly tied the wage increases to the elimination of the "in-the-box" retiree health benefits. (Tr. 162–163.) Also, it was during this December 8 bargaining session when Marshman asked how much of the savings from the elimination of these retiree health benefits was the Company willing to share with the Union, Cookson responded that the Company would save $1.25 million a year by ending the benefits by the end of 2014, and that the Company's oral proposal to the Union would cost it $1 million a year. When Marshman continued to assert that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson responded that he had already explained how the Company's oral proposal was offering the Union back 80 percent of the savings from the elimination of those benefits.

The Company continued to tie the proposed wage increases to the elimination of the "in-the-box" retiree health benefits when Cookson met one-on-one with Marshman in July and August 2015. At the July 7, 2015 meeting, Cookson reduced the Company's December 8 oral proposal to writing. At the July 21, 2015 meeting, the Company increased the equity adjustment portion of its proposal from $.75 an hour to $1 an hour, but the quid pro quo nature of the proposal remained the same.[27] Cookson pointed out to Marshman at this July 21 meeting that the Company was now proposing an 8.5 percent wage increase, consisting of the combined 7.5 percent general wage increases and the $1 per hour equity adjustment. At their August 20, 2015 meeting, when Marshman continued to chal-

[25] Respondent did implement its proposal to make annual contributions to the employees' HSA or 401(k) accounts as set forth in its Second Comprehensive Offer of Settlement.

[26] The term "proposed wage increases" as used in this Decision encompasses the proposed equity adjustments, general wage increases, and shift differentials referred to in the Company's Second Comprehensive Offer of Settlement.

[27] At the hearing, Cookson confirmed the December 8 oral proposal tied the wage increases to the elimination of the "in-the-box" retiree health benefits, and those increases were higher if the Union agreed to eliminate the benefits by the end 2014, as opposed to the end of 2015. However, he claims the Company abandoned its proposal tying the wage increases to the elimination of the retiree health benefits after the December 31, 2014 deadline passed. (Tr. 137–138.) I do not credit this testimony. Although the proposed incentive to get the Union to agree to end the benefits by the end of 2014 went away with the passage of time, the proposals and discussions continued to tie the wage proposals and elimination of retiree health benefits together. The Company never withdrew its proposal, and it never informed the Union that it was no longer proposing the wage increases and annual contributions to employees' HSA or 401(k) accounts to compensate for the elimination of the retiree health benefits. On the contrary, as previously stated, Cookson continued to make statements showing that the proposals were related when he met with Marshman one-on-one in July and August 2015.

lenge that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson pointed out that the Company was offering an 8.5 percent increase in wages if the retiree health benefits ended in 2015.

When the parties met again for bargaining on September 17 and 18, 2015, there is no dispute that the Company made the same package proposal to the Union that Cookson had presented to Marshman. The Company never modified its proposal as it related to increases to wages and shift differentials and the elimination of retiree health benefits, and it never informed the Union that it would eliminate retiree health benefits without implementing the proposed increases. It was not until October 27, 2015, when Respondent announced it was implementing portions of its Second Comprehensive Offer of Settlement, that the Union learned Respondent was not also implementing the proposed increases to wages or shift differentials.

In its posthearing brief, Respondent initially contended its wage proposals were not linked to any other aspect of its proposal, but a sentence later Respondent claimed that, if anything, its proposals were in response to the Union's stated concerns over the wage gap between the Bruce Mansfield facility and the Sammis facility. (R. Br. 28).[28] I reject this contention, largely because it is contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals, which, as previously stated, directly tied the wage proposals to the elimination of the "in-the-box" retiree health benefits. While Respondent's wage proposals included an equity adjustment, in the form of a flat dollar amount, it was only one aspect of its overall quid pro quo proposal. Another aspect of the proposal was the general wage increase (GWI), which was in the form of percentage increases. If Respondent's wage proposal was limited to bridging the wage gap between the two facilities, it is unclear why it needed to distinguish between an equity adjustment and a general wage increase when it submitted its proposal.

Moreover, while it is true Marshman and the Union complained that the Company was not offering enough to equalize the wages between the two facilities, Marshman never abandoned the Union's position that the Company was not offering enough to compensate for the elimination of the "in-the-box" retiree health benefits. And, as previously stated, when Cookson and Marshman met on August 20, 2015, and Marshman continued to complain that the Company was not offering enough, Cookson responded that the Company was offering the Union an 8.5 percent wage increase. In other words, while the parties discussed the equity adjustments, it was never in isolation or at the exclusion of the other aspects of Respondent's integrated proposal. And when the Union rejected the Company's Second Comprehensive Offer of Settlement, it did so because it objected to several of the Offer's provisions, including aspects of Respondent's quid pro quo proposal. (Tr. 179–181.)

Contrary to Respondent's contentions, I find it proposed an integrated package, which consisted of an equity adjustment, the general wage increases, the shift differentials, and the annual contributions to the employees' HSA or 401(k) accounts, as a quid pro quo for the elimination "in-the-box" retiree health benefits. The fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities does not alter this conclusion, because a proposed wage increase certainly can, and in this case did, serve two objectives.

Accordingly, I find that by implementing the elimination of "in-the-box" retiree health benefits without implementing the general wage increases, the equity adjustments, and the shift differentials, Respondent implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement. Respondent either could have maintained the "in-the-box" retiree health benefits or implemented the proposed increases to wages and shift differentials.

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the wage adjustments and shift differentials on contract ratification

The General Counsel's second argument is that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases upon contract ratification. Contract ratification is a permissive subject of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on ratification. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). Requiring ratification substantially modifies or weakens the independence of the representative chosen by the employees by enabling the employer, in effect, to deal with its employees rather than with their statutory representative. Id. at 350. It is because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs … it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *New Process Steel*, 353 NLRB 111, 114 (2008), revd on other grounds 560 U.S. 674 (2010) (quoting *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 226 (1991) (Chairman Stephens concurring)). Thus, the Board requires the parties have an express agreement to make ratification a condition precedent, and that such an agreement "is not established casually or equivocally." Id. at 114–115. Absent evidence of such an agreement, the union retains sole discretion over whether to ratify the contract or not. Id.

Respondent argues that it repeatedly indicated in its proposals that increases to wages and shift differentials would be effective upon ratification, and the Union did not object or request to bargain over the ratification language. I do not find that constitutes an express agreement binding on the Union.[29]

[28] In its posthearing brief, Respondent addressed arguments it anticipated the General Counsel might make as to how or to what it (Respondent) tied these wage increases to when making its proposals. For example, Respondent anticipated the General Counsel might argue the wage proposals were tied to new productivity standards and/or new work rules. (R. Br. 30–33.) Respondent curiously does not address the argument that the wage proposals were exchange for the elimination of the retiree health benefits.

[29] In its posthearing brief, Respondent claims that it never actually required contract ratification as a condition precedent to paying the increases, and that its use of the phrase "contract ratification" was "merely a proxy" for when the parties reached an agreement, and the

Beatrice/Hunt-Wesson, Inc., supra. Absent such an agreement, Respondent violated the Act when it conditioned implementation of the proposed wage increases on contract ratification.

In its defense, Respondent argues that under Board law it is not unlawful to combine mandatory and permissive bargaining subjects in a proposal, so long as the employer does not insist to impasse on the permissive bargaining subjects. While generally accurate, I find Respondent did, in fact, unlawfully insist on contract ratification when it implemented portions of its pre-impasse offer but withheld the inextricably intertwined wage increases, and then informed the Union and the employees in its October 27, 2015 correspondence that those increases would only be implemented upon contract ratification.

Respondent cites to *White Cap, Inc*., 325 NLRB 1166 (1989), enfd 206 F.3d 22 (D.C. Cir. 2000), as supporting its position. In that case, the employer and union negotiated an agreement, but the employees failed to ratify it. The employer offered monetary incentives to facilitate ratification, but the employees again voted it down. The employer again proposed the added incentives but warned the union that they would be withdrawn if the employees again failed to ratify the agreement within a set time period. When the employees again failed to ratify, the employer followed through and withdrew the added incentives from its offer. A charge was filed, and the Board found that employer acted lawfully.

Respondent argues that if it is lawful to threaten to withdraw—and actually withdraw—wage proposals based upon a union's failure to ratify a new agreement, an employer does not commit an unfair labor practice by timing its wage proposals to coincide with ratification. Respondent further argues that its non-implementation of the wage proposals was an inducement to convince the Union to finalize a new agreement. I reject these arguments. In *White Cap*, the employer was transparent when it informed the union that it was only offering the added incentives as an inducement to get the employees to timely ratify the agreement, and that it would withdraw those incentives if the employees failed to do so. In this case, Respondent never indicated to the Union prior to or when it submitted its Second Comprehensive Offer of Settlement that it would eliminate "in-the-box" retiree health benefits without also implementing the proposed wage increases. Moreover, *White Cap, Inc.* involved the withdrawal of proposed monetary incentives unrelated to any other proposals. In the present case, Respondent proposed the wage increases part of a quid pro quo package to compensate for the elimination of the "in-the-box" retiree health benefits, and, as previously explained, it became obligated to implement those increases when it eliminated the retiree health benefits.

Respondent also argues it was merely abiding by its understanding as to the Union's established practice of submitting agreements to its members for ratification. I reject this argument as well. First, Board law requires the parties have an express agreement on ratification, and there was no such agreement in this case. Second, the parties reached an impasse, not an agreement. As such, there was nothing for the members to ratify. Finally, there is no evidence that this type of situation has happened before, so Respondent has no basis for asserting that it was simply abiding by the Union's established policy or practice when it required ratification.[30]

Based on the foregoing, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases on contract ratification.

3. Did Respondent violate Section 8(a)(5) and (1) of the Act when it subcontracted the outage maintenance work on Unit 1 without providing the Union with notice or an opportunity to bargain over the decision

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it subcontracted out bargaining unit work associated with the Unit 1 outage without providing the Union with notice or an opportunity to bargain. Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires the employer provide timely notice and a meaningful opportunity to bargain over the change at issue. See *First National Maintenance*, 452 U.S. 666, 682 (1981). Once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn*., 275 NLRB 638, 639 (1985). In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

It is well established that a decision to subcontract unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of a contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v.*

intent was that the increases would be effective the same time as the new agreement was reached. (R. Br. 33–34.) Respondent presented no evidence the Union or employees shared this understanding of the use of the term "contract ratification." Moreover, I find Respondent's claim to be disingenuous in light of the fact it distributed a document to the Union and employees on October 27, 2015, entitled "Summary of Implemented Terms" which specifically states, "Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates *only effective upon ratification of the contract by membership*." (Jt. Exh. 8, p. 2.) (emphasis added).

[30] When the parties extended their collective-bargaining agreement to February 15, 2014, they made certain modifications. The Union did not submit the extension for ratification because it was not considered a new agreement. Cookson acknowledged he was made aware of this fact at or around the time of the extension. Respondent, therefore, was aware the Union does not require ratification of when something less than a new agreement is involved.

NLRB, 379 U.S. 203, 215 (1964). See also *Mi Pueblo Foods*, 360 NLRB 1097 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644–647 (2011); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467–469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Torrington Industries*, 307 NLRB 809, 810–811 (1992).[31]

Here, Respondent subcontracted work historically performed by bargaining unit employees without first bargaining with the Union. Respondent, however, contends that it had no obligation to bargain because the decision to subcontract was not based on labor costs.[32] Respondent contends it subcontracted the work to GE because there were not enough unit employees available to perform the work at issue within the timeframe set to complete the project. Additionally, Respondent argues that it had no obligation to bargain because subcontracting the work to GE did not result in any material change or detrimental impact for any of the unit employees. Specifically, Respondent contends no unit employee lost work and, in fact, employees worked or were offered (and some refused) extensive overtime during the outage. Finally, Respondent contends that its decision to subcontract to GE was based, in part, on the fact that GE offered a warranty on the work it performed.

For the reasons stated below, I find Respondent had a duty to bargain, and that the decision to subcontract was based, at least in part, on labor costs.

I find the Board's decision in *Mi Pueblo Foods*, 360 NLRB 1097 (2014), particularly instructive and applicable in response to Respondent's arguments. In that case, the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The judge found no violation because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board reversed, holding that bargaining is not excused simply because there was no evidence of immediate impact on the employees' terms and conditions of employment. The Board held that whenever bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099. In reaching this conclusion, the Board cited to its decision in *Overnite Transportation, Co*., 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), in which it held that the employer had an obligation to bargain even though the subcontracting involved an influx of new work that unit employees could not handle, and where none of the unit employees lost any work. In so finding, the Board in *Overnite Transportation* held:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members. In *Mi Pueblo Foods*, the Board noted another possible topic for negotiation with the union was expanding the bargaining unit. 360 NLRB at 1099.

Respondent claims it had no obligation to bargain because the decision to subcontract was not based on labor costs, but rather on its need to get the project completed within the established time frame, and it would not be able to do so using unit employees.[33] However, as the cases cited above make clear,

[31] In *Torrington Industries*, the Board noted that while there may be non-labor cost reasons for subcontracting that may provide a basis for concluding the decision to subcontract is not a mandatory subject of bargaining, the employer's reason for subcontracting must implicate a matter of core entrepreneurial concern defined by a fundamental change is the "scope and direction" of its business, which would then trigger a balancing of the sort described in *First National Maintenance Corp*. 307 NLRB at 811. There is no contention the subcontracting at issue amounted to a core entrepreneurial decision or involved a fundamental change in the scope or direction of Respondent's business.

[32] Respondent also argues it had no obligation to bargain because it was actually more expensive to subcontract the work to GE than it would have been to have the unit employees perform it. Respondent's only support for this is the testimony of Christopher Cox, who was asked on direct examination whether labor costs played a role in the decision to use GE to perform the work, and he replied "labor costs are actually more for GE." (Tr. 205–206.) Cox provided no explanation or support for this statement, and Respondent offered nothing more. I find Cox's single, conclusory statement insufficient to prove that it was, in fact, more expensive to subcontract the work to GE.

[33] In its posthearing brief, Respondent argues its decision to subcontract was motivated by its concerns about completing the work within "the tight timeframe mandated by the PJM Interconnection." (R. Br. 43). Cox, however, testified the Company was involved in setting the "internal benchmark" for how long it would take to complete the outage. Then, based on the information it received from PJM, including how long comparable outages took, the Company reported to that PJM that it could complete the project within the 56-day timeframe. (Tr. 203–204.) In light of this evidence, I find it misleading for Respondent

that does not authorize Respondent's unilateral action--the Board still imposes a duty to bargain in those situations.

The same is true regarding Respondent's claim that it did not have an obligation to bargain because no unit employee experienced a reduction in hours or loss of overtime opportunity as a result of the subcontracting. As the Board held in *Overnite Transportation* and *Mi Pueblo Foods*, evidence of an immediate impact on employees' terms and conditions of employment is not required. The duty to bargain is triggered by concern that the subcontracting could potentially affect the size of the unit or dilute the union's strength. In this case, these are not hypothetical concerns. During negotiations, Respondent raised concerns over the profitability of the Bruce Mansfield facility and the need to reduce labor costs, which included the need to reduce the size of the bargaining unit. Respondent also proposed changes, including the increased use of mobile maintenance employees, which would allow it to increase the amount of unit work it could assign to nonunit employees. Cookson and Marshman discussed these matters during their July 21, 2015 meeting. It was in this meeting that Marshman raised concerns over the dwindling size of the bargaining unit, noting that Respondent had not replaced the nearly 130 employees that had left the unit since 2008. Cookson replied that a reduced headcount through attrition would give the plant a chance to survive, and he added that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. Marshman stated he could not knowingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." In light of this evidence, I find the continued diminution of the size and strength of the unit as an adverse effect, particularly when Respondent's stated reason for subcontracting to GE was there were not enough unit employees to do the work.

Finally, I reject Respondent's argument that it had no obligation to bargain because its decision to subcontract to was, in part, because GE offered a warranty on the work it performed. The extent or scope of this warranty is unclear from the record, and it appears that GE has warranted other work in the past, including when the unit employees performed the outage work. Regardless, Respondent has cited no authority that the existence of a warranty excuses to a failure to bargain.

Respondent next argues even if it had an obligation to bargain over the decision to subcontract the work at issue, the Union waived that right by failing to timely request bargaining. A union cannot have waived bargaining where it did not receive clear and timely notice of change, nor can it have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001).

Respondent claims it gave the Union timely notice of its decision to subcontract outage work beginning in February 2015, when it began providing the Union with weekly contracting reports addressing the M116 outage, and when it met with the Union during their weekly contractor meetings. Respondent, however, fails to differentiate between work associated with the outage and *bargaining unit* work associated with the outage. There is no dispute that Respondent had a history of subcontracting out work during outages, usually specialized work. Notice that Respondent intended to continue subcontracting out that work during the M116 outage is not notice of a change. The change requiring clear and timely notice is the subcontracting of the open/clean/ close work to GE. None of the weekly notification reports in evidence refer to GE or the open/clean/close work. The only weekly notification report Respondent specifically refers to in its posthearing brief is the June 5, 2015 weekly report, which indicates a need for a contractor for a job described as "Turbine Area General NDE M116." As previously stated, Cox testified that "NDE" stands for non-destructive examination, which was work historically performed by an outside contractor, not bargaining unit employees.[34]

Respondent also argues that it provided notice of the change at issue during the June 15, 2015 "all hands" meetings in which the M116 outage was raised. However, Devin Miller testified that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. Moreover, even if actual information had been shared about who was going to be performing the work, these were employee meetings, and the Board has held that notice to employees does not constitute sufficient notice to the union. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017.

I find the first notice Respondent gave the Union that it was going to subcontract the work at issue to GE was on February 10, 2016, when Rundt announced the decision to Bloom and Snyder after the labor-management meeting. The General Counsel alleges, and I so find, that Rundt announced this change as a fait accompli based on the statements and surrounding circumstances. The evidence establishes that Respondent began negotiating with GE to perform the work in February 2015, and they continued their discussions over the next several months. Cox testified that Respondent made the final decision to subcontract the work at issue to GE on around

to suggest it had no control over the amount of time available to it to perform the Unit 1 outage work.

[34] Although Respondent does not raise it in its posthearing brief, there is the November 6, 2015 weekly notification report, which references a job described as "Generator labor M116." I do not find this limited entry constitutes clear notice to the Union of the Company's decision to subcontract the open/clean/close work, because the report contains no other information about the scope or nature of the project, when it was going to be performed, and/or who was going to perform it. Additionally, none of the witnesses present for these weekly contractors meetings between the Company and the Union could recall any discussions about the subcontracting of the turbine/generator outage or open/clean/close work for Unit 1.

September 10, 2015, and Respondent entered into a formal purchase order with GE on around November 13, 2015. The surrounding circumstances, including the statements made to managers during the January 11, 2016 outage readiness meeting, confirm this was settled. And when Rundt met with Bloom and Snyder on February 10, 2016, he was informing them of the decisions that had been made. He made it clear that Respondent was subcontracting the turbine outage work to GE. There was nothing tentative about that in what he said. What was not settled was who was going to perform the boiler feed pump work. Rundt indicated that work also may go to GE. The Union inquired about having unit employees perform that work, and Rundt said he would check and get back to the Union. He did, and the Union ended up handling the feed pump work. I conclude that while Respondent indicated it was open to discussing the feed pump work, it informed the Union the other work was going to be done by GE. As a result, I find Respondent first informed the Union of its decision to subcontract the work at issue on February 10, 2016, as a fait accompli.[35]

I, therefore, find Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with timely notice and a meaningful opportunity to bargain over the decision to subcontract unit work to GE.[36]

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with the contractor's wage data and material costs

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information referred to in the Union's February 10, 2016 letter. An employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to the union representing its employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held requested information pertaining to subcontracting, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting, the Board has held that a broad, discovery-type standard is utilized in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, supra at 1258; See also *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000). The Board also has held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258, fn. 5. See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003); *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989).

In applying this standard, I find the Union has met its burden of establishing potential or probable relevance of the information at issue based on the statements and circumstances surrounding the request. Marshman submitted the written information request on February 10, 2016, the same day the Union first learned Respondent had subcontracted the work to GE. This written request was made after Union Steward Snyder orally requested essentially the same information, including the subcontractor's cost information. When Cox responded to Snyder's oral request, he did not raise any concern as the relevance of the requested information. Rather, he stated the information was proprietary, the Union was not entitled it, and the information was not available.

After receiving the Company's partial response to the request, Marshman contacted Cox and stated the Union needed the wage and material cost information because it if was going to try to negotiate the work that was to be performed, it "would need to know apples to apples" what it was negotiating. (Tr. 124–125). I find this sufficient to put the Respondent on notice that the Union wanted to negotiate subcontracting of this work,

[35] Respondent contends that after receiving this notice the Union should have requested bargaining, and, if it had, Respondent would have bargained over the decision to subcontract the turbine/generator outage work, as evidenced by its willingness to re-assign the boiler feed pump work to unit employees after the Union asked for them to perform it. I find this contention rings hollow. Respondent knew in early 2015 that it was going to subcontract the turbine/generator outage work, but it withheld that information from the Union for almost a year. In early September 2015, when Respondent made the final decision to subcontract the turbine/generator outage work to GE, Respondent withheld that information from the Union, even though the parties were still bargaining over a new contract, in which one of the contested issues was the performance of unit work by non-unit employees. Respondent continued to withhold information from the Union regarding its subcontracting decision after it entered into the purchase order with GE in November 2015. Respondent waited three more months, and when it informed the Union it presented the decision as final. Under these circumstances, I reject Respondent's claim that it was willing to, or the Union would have been able to, engage in meaningful bargaining over the decision to subcontract this work as of this date.

[36] The complaint in 06–CA–163303 alleges that Respondent also failed to bargain over the effects of its decision to subcontract this unit work. In its posthearing brief, the General Counsel does not mention the effects bargaining allegation. As such, I need not reach the effects bargaining issue. See *Michigan Ladder Co.*, 286 NLRB 21, 22 (1987).

and that it wanted the contractor's wage information and material costs for comparative purposes to facilitate those negotiations.

In its defense, Respondent argues that, in addition to not being relevant, it had no obligation to produce the information because it was not in its possession. An employer's duty to supply relevant information also "extends to situations where the information is not in the employer's possession, but where the information can likely be obtained from a third party with whom the employer has a business relationship." *Earthgrains Co.*, 349 NLRB 389, 397–399 (2007), enfd. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008). See also *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991) (employer failed to meet its burden of demonstrating the information requested by the union was unavailable where there was no evidence it asked the third party subcontractor for the information). At the hearing, Cox acknowledged that the wage and material cost information could be requested from GE, but that he did not make that request or ask someone else to make the request. I find that Respondent has a long-standing, ongoing business relationship with GE, and it should have requested that information from GE in order to respond to the Union's information request.[37]

Consequently, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information from GE, which includes failing to request the information from GE.

Conclusions of Law

1. The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been and is the designated collective-bargaining representative of the following appropriate unit of employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

4. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act by implementing certain provisions from its Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with its pre-impasse proposal to the Union when it implemented the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

5. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, on contract ratification.

6. On or around January 1, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act when it unilaterally subcontracted bargaining unit work during the 2016 Unit 1 outage without providing the Union with notice and an opportunity to bargain about the decision to subcontract that work.

7. On or around February 10, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested wage and material cost information from GE that is relevant and necessary to the Union's role as the unit's collective-bargaining representative.

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

Remedy

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

Affirmatively, the Respondent shall, upon request from the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits. The Respondent shall rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification. The Respondent shall make employees make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the remaining information requested in its February 10, 2016 information request.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event

[37] Respondent makes no contention in its posthearing brief that the information at issue was proprietary or confidential.

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 October 27, 2015. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., shall

1. Cease and desist from:

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work.

(c) Unilaterally implementing provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

(d) Conditioning changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

(e) Failing or refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(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) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

(b) Upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits.

(c) Make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

(d) Compensate the bargaining unit employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

(f) Provide the Union with the requested information sought in its February 10, 2016 request related to the wages and material costs paid by GE during the outage of Unit 1 in 2016.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

[38] 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.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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 do anything to prevent you from exercising the above rights

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local No. 272, AFL–CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT fail or refuse to provide the Union with notice and an opportunity to bargain regarding changes to wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL NOT unilaterally implement changes to wages, hours, or other terms or conditions of employment that are inconsistent with our final, preimpasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT condition implementation of changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative.

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 provide the Union with notice and an opportunity to bargain over changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL, upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in our Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date we implemented the elimination of the "in-the-box" retiree health benefits.

WE WILL make employees whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

WE WILL rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

WE WILL provide the Union with the remaining information requested in its February 10, 2016 information request.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–163303 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.

FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local 272, AFL–CIO. Cases 06–CA–163303 and 06–CA–170901

CORRECTION

On May 16, 2018, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which an inadvertent error appears.

On page 1, the second sentence in the third paragraph of footnote 1 reads:

> "However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and **has** or 401(k) contributions were 'inextricably linked' to the elimination of 'in-the-box' retiree health benefits under the narrow doctrine set forth in Plainville Ready Mix and its progeny."

The sentence should read:

> "However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and **HSA** or 401(k) contributions were 'inextricably linked' to the elimination of 'in-the-box' retiree health benefits under the narrow doctrine set forth in Plainville Ready Mix and its progeny."

Please substitute pages 1–2 for those that previously issued.

Dated, Washington, D.C. May 17, 2018

No.

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW

FirstEnergy Generation, LLC hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board in *FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., and International Brotherhood of Electrical Workers, Local 272, AFL-CIO*, NLRB Cases 06-CA-163303 and 06-CA-170901 entered May 16, 2018 ("Order"), a copy of which is attached hereto and incorporated herein by reference, and to vacate and set aside such Order in its entirety because it is not consistent with law or supported by substantial evidence on the record.

Respectfully submitted,

s/*Peter N. Kirsanow*
PETER KIRSANOW
RICHARD HEPP
Benesch, Friedlander, Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378
Telephone: 216.363.4500
Facsimile: 216.363.4588

Attorneys for Petitioner FirstEnergy Generation, LLC

CERTIFICATE OF SERVICE

Two copies of the foregoing Petition for Review have been served upon:

Marianne Oliver
Gilardi, Oliver, Lomupo
223 4th Avenue, 10th Floor
Pittsburgh, PA 15222
Attorney for International Brotherhood of Electrical Workers, Local 272, 8382

David Shepley, attorney for General Counsel,
National Labor Relations Board, Region 6
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222

by overnight delivery this 6th day of June, 2018

s/*Peter N. Kirsanow*
One of the Attorneys for Petitioner
FirstEnergy Generation, LLC

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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.

FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local 272, AFL–CIO. Cases 06–CA–163303 and 06–CA–170901

May 16, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 15, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard

[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 adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act when, after the parties reached impasse, the Respondent selectively implemented collective-bargaining proposals that were "inextricably intertwined" with other, unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581 (1982), enfd. 44 F.3d 1320 (6th Cir. 1995); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006). Accordingly, we agree with the judge's finding that during contract negotiations and as set forth in the Respondent's final preimpasse offer (its "Second Comprehensive Offer of Settlement"), the Respondent consistently proposed tying and offsetting the elimination of employees' "in-the-box" retiree health benefits with annual contributions to employees' health-savings accounts (HSA) or 401(k) accounts, general wage increases, equity adjustments, and shift differentials. Upon impasse, however, the Respondent unilaterally eliminated the "in-the-box" retiree health benefits and made HSA or 401(k) payments, but did not implement inextricably intertwined parts of its preimpasse proposal, including the general wage increases, equity adjustments, and shift differentials. We agree with the judge that the principles in *Plainville Ready Mix* readily apply and support a violation here, with a minor clarification. In *Plainville Ready Mix*, the Board adopted the judge's finding that the employer's partial implementation regarding wages and incentive pay and gain sharing plans in its final offer before the second impasse (not the first impasse, as the judge finds) was unlawful. 309 NLRB at 583. That is, in its final proposal before the second impasse, the employer proposed eliminating gain sharing and incentive pay plans "in conjunction with" an offsetting increase in hourly wage rates. Id. at 582. But, after the second impasse, the employer eliminated its gain sharing and incentive pay plans without implementing its inextricably linked proposal of increasing hourly wage rates, and the Board adopted the judge's finding that this partial implementation was unlawful. 309 NLRB at 588.

Member Emanuel took no part in the consideration of *Plainville Ready Mix* and expresses no view as to whether it was properly decided. However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and has or 401(k) contributions were "inextricably linked" to the elimination of "in-the-box" retiree health benefits under the narrow doctrine set forth in *Plainville Ready Mix* and its progeny. Throughout bargaining, these proposals were consistently presented as a quid pro quo, with ample record evidence showing that the provision of these employment benefits was explicitly contemplated as a way for the Respondent to help employees offset the increased costs employees would face upon the termination of "in-the-box" health benefits, and to allow employees to share in some of the cost savings brought about by the elimination of the benefits.

Finally, having found that the Respondent violated Sec. 8(a)(5) and (1) based on the rationale set forth above, we find no need to pass on the General Counsel's additional theory that the Respondent unlawfully conditioned the proposed wage increases in its preimpasse offer on ratification of a new collective-bargaining agreement, a permissive subjective of bargaining. See *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958).

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain with the Union when it subcontracted bargaining unit work associated with its unit 1 turbine outage at its Bruce Mansfield facility in 2016 (the "M116 Outage") without providing the Union notice and an opportunity to bargain. In doing so, we reject the Respondent's argument, raised for the first time on exceptions, that it was acting in accordance with a subcontracting provision in the parties' expired collective-bargaining agreement. We deem such argument to be untimely raised and thus waived, as it was not argued before the judge. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed. Appx. 577 (9th Cir 2009); *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

[2] We shall modify the judge's recommended Order to conform to the Board's findings and its standard remedial language.

Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Unilaterally implementing provisions from the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, that were inconsistent with its final, preimpasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials, in addition to the HSA and 401(k) payments.

(c) Failing and refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

(b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.

(c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.[3]

(d) Make affected bargaining unit employees whole, with interest, for loss of earnings resulting from the Respondent's unilateral subcontracting of bargaining unit work associated with the M116 Outage.

(e) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

(f) Provide the Union in a timely manner the information it requested on February 10, 2016, related to the wages and material costs paid to subcontractor General Electric for the work associated with the M116 Outage.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the

[3] In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), enfd. 112 Fed.Appx. 60 (D.C. Cir. 2004).

[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."

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

Dated, Washington, D.C. May 16, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

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 fail and refuse to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage, without first notifying the Union and giving it an opportunity to bargain about such changes.

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT unilaterally implement provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015, that are inconsistent with our final, pre-impasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT fail and refuse to provide the Union with requested information, such as the wages and material costs paid to General Electric for the M116 Outage work, that is relevant and necessary to the Union's role as your collective-bargaining representative.

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

WE WILL, before implementing any changes to your wages, hours, or other terms and conditions of employment, including, but not limited to, the subcontracting of unit work, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

WE WILL, upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with our Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date we eliminated the "in-the-box" retiree health benefits.

WE WILL make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either our elimination of the "in-the-box" retiree health benefits or our failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in the paragraph above.

WE WILL make you whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the M116 Outage.

WE WILL compensate you for any adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

WE WILL provide the Union in a timely manner the information requested on February 10, 2016, related to the wages and material costs paid to General Electric for the work associated with the M116 Outage.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Board's decision can be found at www.nlrb.gov/case/06–CA–163303 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., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

David Shepley, Esq., for the General Counsel.
Brian W. Easley, Esq., for the Respondent.
Marianne Oliver, Esq., for the Charging Party.

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, Administrative Law Judge. These consolidated cases were tried before me on December 1–2, 2016, in Pittsburgh, Pennsylvania. The International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union or Local 272) filed the underlying charges alleging FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.[1] (Respondent or the Company) committed unfair labor practices affecting the unit employees at its Shippingport, Pennsylvania powerplant.

The first case involves Respondent's partial implementation of its final pre-impasse offer to the Union. Respondent implemented certain proposals, including the elimination of retiree health benefits, but not its proposed increases to wages and shift differentials, stating those increases would be effective only upon contract ratification. The complaint presents two theories for why Respondent's failure to implement the proposed increases to wages and shift differentials violated Sections 8(a)(5) and (1) of the National Labor Relations Act (Act). First, the General Counsel argues that because Respondent proposed the increases as part of a package to compensate for the elimination of the retiree health benefits, it was obligated to also implement those proposed increases when it eliminated the retiree health benefits. Second, the General Counsel alleges that contract ratification is a permissive subject of bargaining, and Respondent was prohibited from making it a condition precedent to implementing the increases. Respondent denies the alleged violations. Based upon the evidence and applicable law, I find Respondent committed the violations as alleged, under both theories.

The second case involves Respondent's subcontracting of scheduled maintenance work historically performed by unit employees. The complaint alleges Respondent violated Sections 8(a)(5) and (1) of the Act when: (1) it subcontracted this unit work without providing the Union with notice and an opportunity to bargain over the decision to subcontract or its effects; and (2) when it failed or refused to provide the Union with the wages and material costs paid by the subcontractor. Respondent denies the allegations. I find Respondent breached its duty to bargain over the decision to subcontract because it announced its decision as a fait accompli. I also find the Union has met its burden of establishing the relevance of the requested subcontracting information.[2] Based on the evidence and applicable law, I find Respondent committed these violations as alleged.[3]

II. STATEMENT OF THE CASE

On November 4, 2015, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–163303. On February 29, 2016, the Union filed an amended unfair charge against Respondent in Case 06–CA–163303. Based on its investigation, on May 27, 2016, the Acting Regional Director for Region 6 of the Board, issued a complaint in Case 06–CA–163303, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act.[4] On June 9, 2016, Respondent

[1] At the hearing, the parties stipulated to amending the pleadings to correct the employer's name to be FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g.,*Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] I make no finding regarding Respondent's alleged failure to engage in effects bargaining because the General Counsel appears to have abandoned that allegation by failing to raise or address it during the hearing or in his posthearing brief.

[4] On March 11, 2016, the Acting Regional Director issued a partial dismissal letter in Case 06–CA–163303, dismissing, among others, the allegation that the Company violated Sec. 8(a)(5) and (1) of the Act when it failed to implement its proposed wage increases. On April 22, 2016, the Regional Director issued an amended dismissal letter rescinding the earlier dismissal, stating the allegations that the Company "failed to implement a proposed wage increase when it implemented its other terms of employment contained in its last comprehensive offer and, conditioned the implementation of this wage and shift differential increase upon membership ratification, are being retained for further

filed its answer in Case 06–CA–163303, denying all alleged violations of the Act.

On March 2, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–170901. Based on its investigation, on July 29, 2016, the Regional Director for Region 6 of the Board issued a complaint in Case 06–CA–170901, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act. On August 11, 2016, Respondent filed its answer in Case 06–CA–170901, denying all alleged violations of the Act.

On November 10, 2016, the Regional Director for Region 6 issued an Order Consolidating Cases in Cases 06–CA–163303 and 06–CA–170901.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[5]

III. FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent has been a corporation with an office and place of business in Akron, Ohio, and has been engaged in the operation of power generation plants in several states, including at its Bruce Mansfield plant located in Shippingport, Pennsylvania ("Bruce Mansfield facility"). In conducting its operations during the 12-month period ending February 29, 2016, Respondent derived gross revenues in excess of $250,000. During the 12-month period ending February 29, 2016, Respondent purchased and received goods at its Bruce Mansfield facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. Respondent's Operations

Respondent operates coal-fired power generating plants throughout Ohio and Pennsylvania, including its Bruce Mansfield facility. The Bruce Mansfield facility contains three identical power generating units, referred to as Unit 1, Unit 2 and Unit 3. Each unit consists of a turbine, a generator, a boiler, valves, and other auxiliary equipment. Each unit operates as an integrated system. The system begins with the burning of coal to boil water to create highly pressurized steam; the steam is then pumped into the turbine-generator to produce electricity; and that electricity is released to the power grid for distribution and consumption. Respondent supplies power to the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), a federally regulated transmission organization that oversees the regional electricity markets.

C. Collective-Bargaining Relationship

The Union represents a unit of approximately 230 production and maintenance employees at the Bruce Mansfield facility.[6] The parties' most recent collective-bargaining agreement was dated from December 5, 2009, to February 15, 2013. On August 16, 2012, the parties entered into a memorandum of agreement extending their collective-bargaining agreement, with certain modifications, until February 15, 2014. The Union never held a ratification vote over this extension agreement.[7]

The parties began negotiations over a successor agreement on December 19, 2013, and those negotiations continued until September 18, 2015. The Company's negotiation committee included Anthony Gianatasio, Labor Relations Representative. Gianatasio reported to Charles Cookman, the Company's Executive Director of Labor Relations and Safety. Cookson participated in the negotiations beginning in late 2014. Gianatasio and Cookman are supervisors and/or agents of the Company within the meaning of Section 2(11) and (13) of the Act. The Union's negotiation committee was led by Herman Marshman, Union President. The parties failed to reach a successor agreement prior to the expiration of the extension agreement, but they continued to negotiate, as detailed below, until reaching an impasse as of October 27, 2015.[8]

IV. UNFAIR LABOR PRACTICES

A. 06–CA–163303

1. Background

As previously stated, the parties began negotiations for a new agreement in December 2013, and those negotiations continued into 2014. On September 25, 2014, the Company gave the Union its Comprehensive Offer of Settlement, which detailed the Company's offer for an overall agreement. (R. Exh.

processing." Both allegations are contained in the complaint in Case 06–CA–163303.

[5] Abbreviations in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

[6] The Union has been the exclusive collective-bargaining representative, within the meaning of Sec. 9(a) of the Act, of all production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, results, and yard departments, employed at Respondent's Shippingport, Pennsylvania facility, excluding technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[7] The Union did not submit this extension for ratification because it was not a new agreement. (Tr. 158.)

[8] At the hearing, the General Counsel and Respondent entered into a stipulation that the parties were at a good-faith impasse in their negotiations as of October 27, 2015. The Union did not participate in, but did not object to, this stipulation, stating that its position has been and remains that the parties were not at impasse. Regardless, the General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir. 2009). Based upon the stipulation, I will accept, without further analysis, the parties were at a good-faith impasse when Respondent implemented the changes at issue on October 27, 2015.

1.) One of the key changes the Company sought during these negotiations was to eliminate retiree health benefits. Article XVIII, Section 3 of the parties' collective-bargaining agreement allowed current employees who retired during the term of the agreement to continue to participate in their chosen health benefit plan until the expiration of the agreement in effect at the time of their retirement, with the Company paying a portion of their health care and prescription drug coverage costs. The parties refer to these as "in-the-box" retirees because the amount the Company paid was set forth in a box chart in Article XVIII of the collective-bargaining agreement. Upon expiration of the agreement, these retirees then come out of the box.[9] "Out-of-the-box" retirees are eligible to enroll in a different, higher-cost company health care plan.[10]

The Company's Comprehensive Offer of Settlement proposed eliminating health benefits for "in-the-box retirees" as of December 31, 2014.[11] This Offer also proposed annual wage increases, referred to as General Wage Increases (GWI), that would go into effect following contract ratification. The proposed increases were scheduled to go in effect as follows: one and one half percent (1½ percent) GWI effective the date of ratification; an additional one percent (1 percent) GWI effective 1 year following the date of ratification; and an additional one percent (1 percent) GWI effective 2 years following the date of ratification. This Offer also proposed increasing the shift differentials paid to employees for hours worked during the afternoon and evening shifts, and on Sundays, all effective upon ratification.[12] (R. Exh. 1.) The Union did not present this Offer to its members for ratification.

2. December 8, 2014 bargaining session[13]

On December 8, 2014, the parties' committees met at the Radisson Hotel in Beaver Falls, Pennsylvania, for bargaining. The evidence about this December 8 bargaining session consisted of the testimony of Charles Cookson, Respondent's executive director of labor relations and safety, and the notes of Respondent's bargaining committee member, Tony Gianatasio.[14]

At this December 8 session, the parties discussed several topics, including Company's proposal to eliminate "in-the-box" retiree health benefits. The Union, through President Herman Marshman, stated the Company should provide some compensation for the loss of the retiree health care subsidies, and asked what percentage of the cost savings from the elimination of these subsidies was the Company willing to share with the Union. There was some discussion. Gianatasio's notes reflect the Company then orally made the following proposal:

> 1. A contribution of $500 for those with individual health care coverage and $1000 for employee/spouse, employee/child and family coverage to [the employee's health savings accounts] HSAs. If they do not participate in a FirstEnergy HSA, the money would be placed in their 401(k) account. This would be in each year of the contract in addition, you can choose one of the options from below:
> 2. If you end the new retiree health care box 12/31/14 we would provide a general wage increase in each year of the contract as follows:
>
> a. 3% at ratification
> b. 2.5% one year after ratification
> c. 2.5% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment[15] to all classifications at the time of ratification
>
> 3. If you end new retiree health care box 12/31/15 we would provide a general wage increase in each year of the contract as follows:
>
> a. 2.5% at ratification
> b. 2.0% one year after ratification
> c. 2.0% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment [to] all classifications at the time of ratification (GC Exh. 11).[16]

In response to Marshman's earlier question about how much of the savings was the Company willing to share with the Union, Cookson stated that the Company would save $1.25 million a year by ending the retiree health care benefits by the end of 2014, and its proposed offer (discussed above) would cost it $1 million a year. The parties then discussed other topics, including safety, before returning to retiree health benefits. Marshman told Cookson he wanted to see if there was a reasonable way to distribute the savings, and Cookson responded that the Company's offer shows it was flexible. Marshman asked if Cookson would seriously entertain a counter offer, and

[9] Charges over retiree health benefits were the subject of prior litigation. See *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012), affd. 362 NLRB No. 66 (2015) (Board reaffirmed prior Board decision which was decided without a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)).

[10] The record does not address what, if any, amounts Respondent pays towards "out-of-the-box" retiree health benefits.

[11] Hereinafter the terms "in-the-box" retiree health benefits and retiree health benefits will be used interchangeably to refer to the health benefits paid to employees for the remainder of the agreement in effect at the time of their retirement.

[12] All the Company's wage proposals stated any increases would be effective upon ratification. Cookson testified the Company has an internal policy that it will not pay increases retroactively. (Tr. 173.)

[13] There was no detailed evidence presented regarding bargaining prior to December 8, 2014.

[14] Gianatasio's notes provide more detail and context as to what was discussed, and nothing in Cookson's testimony contradicted Gianatasio's notes. Gianatasio was not called to testify. No other witness was called to testify about this bargaining session.

[15] As discussed below, Bruce Mansfield unit employees earn less per hour than their counterparts at the Company's Sammis power plant in Stratton, Ohio. This "equity adjustment" refers to the Company's offer to increase wages for Bruce Mansfield unit employees to bring them closer to the Sammis employees.

[16] Cookson confirmed the Company made this December 8 oral proposal because the Union had objected to the Company's proposal in its Comprehensive Offer of Settlement to eliminate "in-the-box" retiree health benefits by the end of 2014, and that the Company made this December 8 oral proposal to offer higher wage increases if the Union agreed to end retiree health benefits by the end of 2014, and lower wage increases if it agreed to end them by the end of 2015. (Tr. 162–163.)

Cookson said he would. Cookson then asked if the Union was rejecting the Company's offer, and that he (Cookson) had just shown how the Company was offering the Union back 80 percent of the savings it would receive from eliminating retiree health benefits. There was some additional discussion about Respondent's proposal, and the Union asked questions about the Company's calculations regarding the amount of the savings. Marshman explained that the Union "can't even get a compromise to formally compensate for what is being lost." Cookson responded, "I've offered you a way to extend the new box to the end of 2015. I offered contributions to the HSA as a way to deal with that going forward." (GC Exh. 11.)

The discussion then moved to the wage disparity that existed between the employees working at Bruce Mansfield and the employees working at the Company's Sammis facility. The Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility. Cookson pointed out that the Company was offering a $.75 per hour equity adjustment across the board to help "bridge that gap" for every employee at the Bruce Mansfield facility. Marshman questioned why the Bruce Mansfield employees should be paid less for the same work. In the end, Marshman rejected the Company's proposal, stating that the parties had a number of other matters to address. That was the end of the session. The Union never presented the Company's oral offer to its members for consideration.

3. Cookson and Marshman one-on-one meetings in July and August 2015

The parties had no further bargaining sessions scheduled following their December 8, 2014 session. In the spring 2015, Cookson contacted Marshman about the two meeting alone. Cookson hoped this would help facilitate the resumption of bargaining. The two agreed to meet on July 7, 2015, at a Perkins Restaurant in Austintown, Ohio.

On July 7, 2015, Cookson and Marshman met as planned. Because the proposals discussed at the December 8, 2014 bargaining session were verbal, Cookson prepared a written summary of where the parties were as of that meeting, and he gave that written summary to Marshman at the start of their July 7 meeting. The summary tracked what the Company had previously verbally proposed, including what the Company was offering in exchange for eliminating retiree health benefits for "in-the-box" retirees. However, because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health benefits ending by December 31, 2015. Also, in the Company's Comprehensive Offer of Settlement, it proposed maintaining the current pension plan for existing employees, but moving to a cash-balance retirement savings account (or defined contribution benefit plan) for new employees hired in the future. Cookson reiterated the Company's desire to implement this for future new hires during his July 7 meeting with Marshman

The two went over Cookson's written summary. Marshman then countered, proposing that the Company keep retiree health benefits until the end of 2017, offer a 12-percent equity adjustment to wages, plus a 3-percent general wage increase, both at ratification, and no cash-balance retirement plans. Cookson responded, stating there was no way the Company could go beyond 2015 for retiree health care; that while the Company was interested in providing an equity adjustment, Marshman's proposed amount was too large; and that the Company had to have cash-balance retirement plans for new hires.

During this July 7 meeting, Cookson also informed Marshman that the Company was going to need to expand its earlier proposals regarding resource sharing and mobile maintenance. Resource sharing is an established procedure that allows the Company to send Bruce Mansfield employees to its other facilities to perform work. Mobile maintenance is a department of employees at one of the Company's other facilities who travel around to the Company's facilities to perform maintenance work. These employees have similar knowledge and skills as the unit maintenance employees, but perform the work at a lower cost. Cookson told Marshman he would be providing written proposals on expanded use of resource sharing and mobile maintenance at their next meeting.

Cookson and Marshman next met on July 21, 2015, at the Perkins Restaurant in Austintown, Ohio. At this meeting, Cookson handed Marshman a multipage document entitled "Summary of New Proposals and Revisions to 9/25/14 Company Comprehensive Proposal and 12/8/14 proposals provided to Union 7/21/15." (R. Exh. 2.) The Company continued to propose an end to "in-the-box" retiree health benefits, now to be effective October 31, 2015, as opposed to the previously proposed December 31 date, as that date had already passed. The Company, however, increased the equity adjustment from $.75 to $1 per hour for all classifications, effective at ratification, and it now offered a general wage increase of 5.5 percent at ratification and 2.0 percent 1 year after ratification. The Company maintained its earlier proposal to make $500/$1000 annual contributions into employees' HSA or 401(k) accounts to help employees save for their health care upon retirement, and it continued to propose having new hires (hired after January 1, 2016) be placed in a cash balance plan, as opposed to the Union's pension plan. Cookson also provided the Company's proposals addressing resource sharing and mobile maintenance.[17]

[17] Although the proposals and discussions over the increased use of non-unit mobile maintenance employees do not directly relate to the allegations in Case 06–CA–163303, they do provide context to the allegations in Case 06—CA–170901, involving subcontracting. In particular, these proposals sparked an exchange between Cookson and Marshman over the current and future size of the bargaining unit and the contracting out of unit work. (GC Exh. 9, pg. 4.) During this July 21 meeting, Marshman pointed out that the Company had not replaced the nearly 130 employees that had left the bargaining unit since 2008. Cookson did not deny this, stating that a reduced headcount through attrition would give the plant a chance to survive. Marshman replied that could not come at the expense of the Union, and that the Union would need some type of an agency fee arrangement and/or contingency plan for contractors who come to the Bruce Mansfield plant. Marshman stated that a lot can be negotiated between the Company and its contractors. But Marshman stated he could not knowingly or willingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." (GC Exh. 9, p. 4.) It was during this exchange that Cookson also informed Marshman that the Company planned to reduce another 40–50 employees from the unit,

Cookson went through the document, explaining the changes. Cookson testified about this meeting, and his meeting notes also were introduced into evidence. (GC Exh. 9.) Cookson's notes provide the most detail about what was discussed. On the issue of wages, Cookson explained to Marshman that, with the equity adjustments and the general wage increases, the Company was now proposing an 8.5-percent increase in wages upon ratification. Cookson emphasized the Company was not proposing any retroactive pay, and the wage increases would be effective at ratification, with the additional increases effective 1 year thereafter. Marshman did not respond to Cookson's comment about ratification.

Marshman responded that the retiree health benefits had to go until 2017; the Company needed to provide a means to compensate the current and future retirees for the loss of their health benefits; the Union was not going to agree to a cash balance plan; and the Union had issues with the Company's proposals regarding resource sharing and mobile maintenance. Cookson asked Marshman to take the proposal to the Union's bargaining committee to review. The two agreed to meet again on August 20, 2015, at the same location.

On August 20, 2015, Cookson and Marshman met as scheduled. Cookson's notes from this meeting again provide the most detail about what was discussed. (GC Exh. 9.) According to the notes, Cookson began with where the parties stood, noting that they left the July 21 meeting with clear disagreements on the following: (1) ending health benefits for in-the-box retirees (the Company proposed ending it as of 10/31/15, and the Union would not accept unless coverage went until 2017); (2) cash balance pension plan for new hires (the Company proposed, and the Union rejected); and (3) making $500/$1000 annual contributions to HSA/401(k) accounts (the Union wanted contributions to for retirees as well, and the Company only was willing to do it for active employees). Cookson then stated that the Company could move on the term of the agreement and still had room to move in the wage area. Marshman responded that retiree health care has a monetary value, and that the Company should provide the savings from the termination of this benefit to the retirees. Cookson's notes reflect he (CC) and Marshman (HM) had the following exchange regarding the termination of health benefits for "in-the-box" retirees:

> (CC) Our position is that it (the box) will end and go away. We are proposing to give $$ to the active employees. We have a fundamental disagreement. We are eliminating this across the board.
> (HM) Not trying to be unreasonable, this is not favorable to us. If I could get something, we could move on.
> (CC) In this area I cannot do any more than I have already offered.
> (HM) How do we get around this?
> (CC) We have offered other things—like an initial 8.5% wage increase.

(GC Exh. 9.)

The two discussed the Company's other proposals, including resource sharing and the mobile maintenance department. In the end, they agreed they were not near an agreement and the parties should return to the bargaining table with their full committees. They agreed to resume bargaining on September 17 and 18, 2015.

4. The September 17–18 bargaining sessions

The parties' committees met on September 17 and 18, at the Radisson Hotel in Beaver Falls, Pennsylvania. At the September 17 session, the Company gave the Union its "Second Comprehensive Offer of Settlement." The document was a redlined version of the parties' collective-bargaining agreement with the revisions Cookson had presented to Marshman during their one-on-one meetings. There were no substantive changes. The parties discussed the Company's offer, and the Union's response remained essentially the same. The Union never presented this Second Comprehensive Offer of Settlement to its members for ratification.

At the September 18 session, the parties focused on the use of the Company's mobile maintenance department and the use of contractors. The Union gave the Company a counterproposal regarding the Company's use of outside contractors. The Union sought to revise the language in Article IV, addressing Management Responsibilities, to prohibit the use of contractors if it deprived unit employees of overtime work. The Company considered and rejected the Union's proposal. The parties ended the September 18 session apart on several key issues, including, wages, retiree health care, cash balance pension plans, mobile maintenance, and resource sharing. The parties scheduled another bargaining session for October 19, 2015. The Union later cancelled the meeting because Marshman was unable to attend due to an illness, and Marshman was unwilling to have negotiations continue without him. The Company requested alternate dates, but the Union provided none.

Thereafter, Company internally concluded that the parties were at impasse. Without further bargaining sessions scheduled, the Company decided to implement certain terms from its Second Comprehensive Offer of Settlement.

5. Announced partial implementation

On October 27, 2015, Cookson and other Company representatives met with Union representatives following a scheduled labor-management meeting. Cookson explained to the Union representatives that the parties were at impasse and the Company was implementing certain terms from its Second Comprehensive Offer of Settlement. Cookson provided written documents explaining what proposals the Company was implementing. Among the implemented terms, the Company was ending retiree health subsidies for all in-the-box retirees by December 31, 2015; it would begin making annual contributions for current employees of $500/$1000 (depending on the type of health insurance coverage) toward Health Savings Accounts (or 401(k) account if no Health Savings Accounts) beginning in 2016; and all employees hired or rehired on or after January 1, 2016, would participate in the Company's cash bal-

primarily in the mechanical and electrical departments. [At the hearing, Cookson estimated that in the last 5 years the unit has gone from 275–300 employees to 230 employees, and the unit size has been steadily declining every year.] (Tr. 189–190.)

ance retirement plan (and not in the existing pension plan).[18] Cookson handed the Union a package of documents related to the impasse and the implemented terms. One of the documents the Company gave the Union was entitled "Summary of Implemented Terms." This document states the following regarding the Company's proposed increases to wages and shift differentials:

> Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates only effective upon ratification of the contract by membership
>
> > Equity adjustment-one dollar per hour increase applied to all wages in effect July 1, 2015, only upon Ratification
> > Effective the date of ratification, a General Wage Increase of five and one half percent (5.5%) will be granted on the wage rates in effect after equity adjustments
> > Effective one year following the date of ratification, a General Wage Increase of two percent (2.0%)
> > Upon ratification, increase Sunday Shift Premium to Two Dollars Five Cents ($2.05) per hour, Afternoon Shift Premium to One Dollar Fifty ($1.50) per hour, Night Shift Premium to One Dollar Fifty Five ($1.55) per hour.

As previously stated, the General Counsel and Respondent stipulated that the parties were at impasse as of October 27, 2015.

B. 06–CA–17901

1. Background

As previously stated, the Bruce Mansfield facility has three identical power-generating units: Unit 1, Unit 2, and Unit 3. Each unit consists of a turbine, a generator, a boiler pump, valves, and other auxiliary equipment. The Company shuts down a unit for periodic maintenance, which is referred to as a scheduled outage. A full-train overhaul is a larger scale outage that includes opening and disassembling the entire turbine-generator unit, inspecting and cleaning the parts, and then reassembling and closing the unit.[19] The bargaining unit employees at Bruce Mansfield historically have performed all the open/clean/close work. (Tr. 47–48.) The Company has contracted out certain specialized work, such as engineering, sandblasting, coating, painting, insulation, pipefitting, nondestructive testing, etc.

2. M116 Outage

In the spring 2016, the Company performed a full-train overhaul of Unit 1. This type of outage occurs approximately every 9 years. This particular outage involved nearly 600 tasks.[20] Christopher Cox, Respondent's Maintenance Manager, testified the Company internally evaluated the project and determined, after consulting with the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), that it could complete the project within 56 days. (Tr. 203–204.) The project was referred to as M116, because it involved Unit 1 at the Bruce Mansfield facility in 2016.

Planning for this particular outage began back in January 2015, when the Company's higher-level managers met to begin discussing the project. One of the topics discussed was who should perform the open/clean/close work. The Company's higher-level managers considered the following three alternatives: (1) have the work performed by bargaining-unit maintenance employees; (2) have the work performed by the Company's mobile maintenance department; or (3) have the work performed by outside contractors. According to internal emails, these managers concluded there were not enough available unit maintenance employees to perform the open/clean/close labor for a full-train turbine outage, while still performing the day-to-day maintenance work on the other two units and related equipment. The managers considered having the mobile maintenance employees perform the open/clean/close work, but the Company's industrial relations department believed it "would be too risky to use [mobile maintenance] in that capacity because the [turbine/generator] work was always performed in house and using [mobile maintenance] at this time would jeopardize ongoing negotiations with the [U]nion." (GC Exh. 12.) Ultimately, the managers focused on subcontracting out the work. There is no dispute the Company never involved the Union in this decision-making process.

The Company contacted General Electric ("GE") in early 2015 to request its bid to perform the M116 open/clean/close work. The Company contacted GE because GE originally manufactured the turbine generator units, and the Company continued to use GE to provide technical direction during outages. Additionally, GE provides a two-year warranty on any work it performs for the Company. GE provided warranties for work performed during prior outages.

In late February 2015, GE provided the Company with its bid to perform the work. Over the next several months, the Company had ongoing discussions with GE about its bid to perform the work. Christopher Cox was involved in overseeing the M116 project, making sure that it was executed on budget, on time, and safely. He testified that by about September 10, 2015, the Company made the decision and received approval to have GE perform the work at issue. Cox worked with GE over the next month or so on additional proposals to try to reduce the costs for the Company.[21] (Tr. 204–205.) On around November 13,

[18] Respondent did (not) implement other proposals from its Second Comprehensive Offer of Settlement. It is unnecessary to discuss them as they are irrelevant to deciding the matters at issue.

[19] Throughout the hearing, various terms were used to describe this work, including, but not limited to, the open/clean/close work, the turbine/generator overhaul, the turbine rebuild, the turbine outage, etc.

[20] The General Counsel introduced an internal report identifying each task performed during the outage, as well as the estimated man hours it would take to complete the each task. (GC Exh. 2.) The General Counsel presented two witnesses who testified that approximately 140-150 of the tasks were previously performed by unit employees. (Tr. 70–71)(Tr. 100–101.)

[21] At the hearing, Cox testified that the labor costs were actually more to use GE to perform the work at issue. (Tr. 205.) Cox provided no explanation or basis for his statement. The Company also did not introduce any documentary evidence to support or explain his statement.

2015, the Company entered into a purchase order to have GE perform the open/clean/close work on Unit 1. (GC Exh. 17.) There is no dispute that the Company did not inform the Union that it contracted with GE to perform this work until February 10, 2016.

Article IV of the parties' expired collective-bargaining agreement contained the management rights provision, which addressed subcontracting. It stated, in pertinent part, that:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

As part of this process, the Company faxed the Union a weekly spreadsheet report with the work the Company has assigned (on an emergency basis) or may assign to outside contractors. The Company continued this practice after the parties' agreement and extension both expired. The Company faxed the Union these reports on Friday, and then parties meet the following Wednesday at a contractors' meeting to discuss the work at issue.

Respondent introduced 10 of these weekly spreadsheet reports, covering certain weeks from June 5, 2015, through November 20, 2015 (specifically, the reports were for 2/6/15, 6/5/15, 7/7/15, 9/4/15, 9/18/15, 9/28/15, 10/2/15, 10/9/15, 11/6/15, and 11/20/15). Some of these reports refer to M116. Some identify the subcontractor and the type of work being performed. However, only two refer to M116 and turbine or generator. (R. Exh. 5.) The first is the June 5, 2015 report, which indicates Thomas Cowher, a higher-level consultant for the Company, requested a contractor for a job described as "Turbine Area General NDE M116." Christopher Cox testified that "NDE" stands for non-destructive examination. Non-destructive examination refers to when the turbine is apart and on the floor, and there is ultrasonic testing to inspect the area for cracks and erosion. Cox confirmed that bargaining unit employees do not perform this non-destructive testing. (Tr. 212–213.) The second is the November 6, 2015 report, which indicates that Thomas Cowher requested a contractor for a job described as "Generator labor M116." (R. Exh. 12.) Neither entry provides any additional information about the nature or scope of the project, when it was going to be performed, and/or who was going to perform it. None of the witnesses present for these weekly meetings could recall any discussions about the subcontracting of the open/clean/close work or the turbine/generator outage work for Unit 1.

The Company holds periodic "all hands" meetings with maintenance department employees. On June 15, 2015, the Company held "all hands" meetings for each of the shifts in which the M116 outage was raised. The Company gave a power-point presentation that generally addressed the outage. Only one of the witnesses, Devin Miller, a senior engineer consultant for Respondent, testified about the meeting, and he could not offer any specifics about what details were shared with employees. Miller confirmed that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. (Tr. 271.)

On January 11, 2016, the Company held a managerial meeting with its outage planners. No Union representative was present for this meeting. At this meeting, there was a power-point presentation, and one of the slides read, "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO." (GC Exh. 3.)

On February 10, 2016, the Company held a contractors information meeting with the Union. At this meeting, Paul Rundt, the Maintenance Superintendent, and Christopher Cox met with union representatives to inform them that the Company had contracted out the open/clean/close work to GE. Dennis Bloom, the Union recording secretary, and Frank Snyder, Union steward, were present for the meeting. Bloom testified that Rundt identified each of the jobs and which contractor was going to be performing the work. Specifically, Rundt stated that the Unit 1 turbine outage work was going to be given to GE. Rundt stated the Unit 1 boiler feed pump work may also go to GE. Bloom responded that the mechanical maintenance employees had performed the outage work in the past, and that it should be done by the unit employees. Rundt replied that the outage work was going to be contracted out to GE.[22] Rundt, however, left open the issue of who would perform the boiler feed pump work, stating that he would check into it and get back to the Union. (Tr. 64–65.) Snyder then requested the contractor information sheets, which would list the contractor, the particular tasks, the estimated man hours, and the estimated costs. As for the costs, Bloom testified Cox responded that the information was proprietary, that the Union was not entitled to that, and the information was not available. (Tr. 66–67.) Cox did not recall any request for information being made during this meeting. (Tr. 226.) Following the meeting, the Company

[22] Cox and Rundt both testified that Rundt informed the Union that the Company "was intending" to contract out the turbine outage work and auxiliary equipment work, including the boiler feed pump work, to GE. I do not credit that Rundt said the Company "was intending" to subcontract out the turbine outage work to GE. I find the Company had already made that decision, and it was final. The Company made the decision to subcontract this work in early 2015. It solicited and received GE's bid in the early spring of 2015. Cox testified the Company made the final decision to subcontract this work to GE on around September 10, 2015, and he continued to negotiate with GE for several more weeks to try to further reduce the cost to the Company. On November 13, 2015, the Company and GE entered into a purchase order to perform the work. At the January 11, 2016 outage readiness meeting, the Company informed managers that it had contracted with GE to perform the "labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract." In light of these circumstances, I credit Bloom's testimony that the Company presented its decision to subcontract the turbine outage work to GE as a final decision.

decided to have the unit employees perform the boiler feed pump work, and Rundt informed the Union of this decision.

3. Information request

Later, Bloom reported to Marshman what had occurred at this meeting. Thereafter, Marshman sent the Company a letter dated February 10, 2016, requesting information. The letter, in pertinent part, stated:

> This is a reaffirmation letter of the company's obligation to provide all information, upon request by Local 272, for contractors working at the Bruce Mansfield Plant. This would include:
>
> • Name
> • Number of employees
> • Estimated man/hours
> • Wages
> • Material costs
>
> (But not limited to).
>
> This letter is also a formal request for all information from paragraph above for the Unit One Outage.

In a letter dated March 14, 2016, Christopher Cox, the Maintenance Manager, responded to Marshman's information request, providing the Union with a three-page chart containing the work order number for the contracted-out job, the abbreviation for the contractor's name on the order, a short description of the work the contractor was to perform, and the estimated number of man-hours to perform the work described. The Company did not provide the wages the contractor paid to the individuals performing the work or the material costs. There is no mention of this information in the Company's response, and no explanation as to why the information was not being provided to the Union.

Marshman testified that after receiving Cox's March 14 letter he called Cox to tell him the response was insufficient. Marshman testified that he complained to Cox about not receiving the requested wage and material cost information. Marshman testified that he kind of gave Cox a summary why the Union needed it, stating that if the Union was going to try to negotiate the work that was performed, it "would need to know apples to apples" of what it was negotiating. (Tr. 124–125.)[23] The Company never provided the requested wage or material cost information, did not inform the Union that it was not going to provide it, or explain why it was not going to provide it. (Tr. 246–248).

The Unit 1 scheduled outage lasted from around March 20, 2016, through May 14, 2016. GE performed the open/clean/close work on the turbine-generator unit. There were no unit employees were involved in this turbine overhaul work. (Tr. 201.) The bargaining unit employees performed the boiler feed pump work. During this period of time, all available bargaining unit employees worked, including voluntary and involuntary overtime. Some of the unit employees turned down opportunities to work overtime.

V. LEGAL ANALYSIS

1. Did Respondent violate Section 8(a)(5) and (1) of the Act when it failed to also implement its proposed increases to wages and shift differentials from its final, pre-impasse offer while implementing other proposals from that same offer

The General Counsel contends Respondent violated Sections 8(a)(5) and (1) of the Act when, after the parties reached an impasse, it failed to implement its proposed increases to wages and shift differentials when it eliminated "in-the-box" retiree health benefits.[24] It is well-established that after the parties reach a good-faith impasse during contract negotiations, an employer may unilaterally implement changes to existing terms and conditions of employment provided those changes are "reasonably comprehended" within the employer's pre-impasse proposal to the union. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), enfd. 395 F.2d 622 (D.C. Cir. 1968). See also *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (implemented terms cannot be "significantly different" than those proposed to and rejected by the union). Moreover, an employer is not required to implement all aspects of its final, preimpasse offer, but may choose to implement portions of it. *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (unilateral raises that encompassed automatic progressions and merit increases held reasonably comprehended in pre-impasse proposals on merit wages even though employer gave higher wages and increased wages for a larger portion of employees than in the past). See also *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), enfd in relevant part, 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983); *Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990). The Board, however, has held that an employer cannot selectively implement proposals that are "inextricably intertwined" with unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006).

In *Plainville Ready Mix*, supra, the employer proposed during contract negotiations to change the wage structure and health insurance plan offered to employees. As for wages, the

[23] Marshman could not recall if he initially spoke with Cox or left him a voicemail message, but he did have this conversation with Cox about the Company's response. Cox testified that he does not recall any further communication with Marshman about this information request. (Tr. 228.) But Cox did recall having conversations with Marshman in the past on the topic of obtaining information from subcontractors, and that Respondent informed Marshman this information is proprietary to the subcontractor, and Respondent will not provide it. (Tr. 248–249.) I credit Marshman's specific recollection of telling Cox that he (Marshman) needed the requested information for negotiations and he needed to know "apples to apples" of what he was negotiating.

[24] Par. 12 of the complaint in Case 06–C–163303 alleges that Respondent violated Secs. 8(a)(5) and (1) of the Act when it "failed to implement the wage adjustments and shift differential proposals contained in its [Second Comprehensive Offer of Settlement] notwithstanding that it implemented the remaining terms from that proposal." As previously established Respondent implemented some but not all of the proposals from its Second Comprehensive Offer of Settlement. In its posthearing brief, the General Counsel made clear that it was alleging that Respondent violated Secs. 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for "in-the-box" retirees. (GC Br. 23.)

employer proposed to lower fixed hourly wage rates but introduced gain sharing and incentive pay plans to help employees make up the difference. The union rejected the proposal. In its final pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans and, instead, offer a higher fixed hourly wage rate. However, after reaching impasse, the employer did not implement the higher hourly wage rate or the gain sharing or incentive pay plans; it simply implemented the lower fixed hourly wage rates. The Board adopted the administrative law judge's finding that the employer violated the Act by doing so, holding that the lower wage rate was not reasonably comprehended in the employer's final offer because the lower hourly wage rate was presented as part of a package with the gain sharing and the incentive pay plans—it was not offered as a stand-alone proposal.

As for health insurance, the employer proposed a new plan that limited certain covered benefits, such as drug and alcohol treatment and psychological treatment, and it increased the employees' premiums, deductibles, and copays. But the new plan also added benefits, such as vision care, emergency care, and a prescription drug card. After reaching impasse, the employer partially implemented the proposed health insurance plan, without the added benefits. The Board adopted the judge's finding that the employer violated the Act when it implemented the proposed plan without the added benefits, stating that, "the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation ..." See id. at 585.

In *Cleveland Cinemas Management Co.*, supra, the successor employer acquired a movie theater that employed union-represented projectionists. During negotiations, the successor employer informed the union that it wanted to eliminate the dedicated projectionist positions and have that work performed by supervisors. The union objected. The employer then offered to enter into a service technician agreement which would have two of the projectionists working fulltime covering all three of the employer's area theaters in exchange for eliminating the dedicated projectionist positions. The union rejected this proposal, stating it wanted both the dedicated projectionist positions and the service technician agreement. The employer was unwilling to do this, and it gave the union its written proposal regarding the service technician agreement. Thereafter, the parties reached an impasse, and the employer partially implemented its final offer. The employer eliminated the dedicated projectionist positions and had that work performed by supervisors, but it did not implement the proposed service technician agreement. Applying *Plainville Ready Mix*, the Board adopted the judge's finding that the employer violated the Act by failing to implement the proposed service technician agreement, holding that it was presented to the Union in its final, pre-impasse offer as a "quid pro quo" for the union giving up the dedicated projectionist positions.

Here, the General Counsel relies upon the "inextricably intertwined" theory to support his position that Respondent was obligated to also implement the proposed increases to wages and shift differentials contained in its Second Comprehensive Offer of Settlement because they were presented as part of an overall package to compensate the Union for the elimination of "in-the-box" retiree health benefits.[25] I agree. I find that from December 8, 2014 forward, Respondent proposed the wage increases at issue, as well as annual contributions into employees' HSA or 401(k) accounts, as a quid pro quo for the elimination of "in-the-box" retiree health benefits.[26] There is no dispute that Respondent's December 8 oral proposal directly tied the wage increases to the elimination of the "in-the-box" retiree health benefits. (Tr. 162–163.) Also, it was during this December 8 bargaining session when Marshman asked how much of the savings from the elimination of these retiree health benefits was the Company willing to share with the Union, Cookson responded that the Company would save $1.25 million a year by ending the benefits by the end of 2014, and that the Company's oral proposal to the Union would cost it $1 million a year. When Marshman continued to assert that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson responded that he had already explained how the Company's oral proposal was offering the Union back 80 percent of the savings from the elimination of those benefits.

The Company continued to tie the proposed wage increases to the elimination of the "in-the-box" retiree health benefits when Cookson met one-on-one with Marshman in July and August 2015. At the July 7, 2015 meeting, Cookson reduced the Company's December 8 oral proposal to writing. At the July 21, 2015 meeting, the Company increased the equity adjustment portion of its proposal from $.75 an hour to $1 an hour, but the quid pro quo nature of the proposal remained the same.[27] Cookson pointed out to Marshman at this July 21 meeting that the Company was now proposing an 8.5 percent wage increase, consisting of the combined 7.5 percent general wage increases and the $1 per hour equity adjustment. At their August 20, 2015 meeting, when Marshman continued to chal-

[25] Respondent did implement its proposal to make annual contributions to the employees' HSA or 401(k) accounts as set forth in its Second Comprehensive Offer of Settlement.

[26] The term "proposed wage increases" as used in this Decision encompasses the proposed equity adjustments, general wage increases, and shift differentials referred to in the Company's Second Comprehensive Offer of Settlement.

[27] At the hearing, Cookson confirmed the December 8 oral proposal tied the wage increases to the elimination of the "in-the-box" retiree health benefits, and those increases were higher if the Union agreed to eliminate the benefits by the end 2014, as opposed to the end of 2015. However, he claims the Company abandoned its proposal tying the wage increases to the elimination of the retiree health benefits after the December 31, 2014 deadline passed. (Tr. 137–138.) I do not credit this testimony. Although the proposed incentive to get the Union to agree to end the benefits by the end of 2014 went away with the passage of time, the proposals and discussions continued to tie the wage proposals and elimination of retiree health benefits together. The Company never withdrew its proposal, and it never informed the Union that it was no longer proposing the wage increases and annual contributions to employees' HSA or 401(k) accounts to compensate for the elimination of the retiree health benefits. On the contrary, as previously stated, Cookson continued to make statements showing that the proposals were related when he met with Marshman one-on-one in July and August 2015.

lenge that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson pointed out that the Company was offering an 8.5 percent increase in wages if the retiree health benefits ended in 2015.

When the parties met again for bargaining on September 17 and 18, 2015, there is no dispute that the Company made the same package proposal to the Union that Cookson had presented to Marshman. The Company never modified its proposal as it related to increases to wages and shift differentials and the elimination of retiree health benefits, and it never informed the Union that it would eliminate retiree health benefits without implementing the proposed increases. It was not until October 27, 2015, when Respondent announced it was implementing portions of its Second Comprehensive Offer of Settlement, that the Union learned Respondent was not also implementing the proposed increases to wages or shift differentials.

In its posthearing brief, Respondent initially contended its wage proposals were not linked to any other aspect of its proposal, but a sentence later Respondent claimed that, if anything, its proposals were in response to the Union's stated concerns over the wage gap between the Bruce Mansfield facility and the Sammis facility. (R. Br. 28).[28] I reject this contention, largely because it is contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals, which, as previously stated, directly tied the wage proposals to the elimination of the "in-the-box" retiree health benefits. While Respondent's wage proposals included an equity adjustment, in the form of a flat dollar amount, it was only one aspect of its overall quid pro quo proposal. Another aspect of the proposal was the general wage increase (GWI), which was in the form of percentage increases. If Respondent's wage proposal was limited to bridging the wage gap between the two facilities, it is unclear why it needed to distinguish between an equity adjustment and a general wage increase when it submitted its proposal.

Moreover, while it is true Marshman and the Union complained that the Company was not offering enough to equalize the wages between the two facilities, Marshman never abandoned the Union's position that the Company was not offering enough to compensate for the elimination of the "in-the-box" retiree health benefits. And, as previously stated, when Cookson and Marshman met on August 20, 2015, and Marshman continued to complain that the Company was not offering enough, Cookson responded that the Company was offering the Union an 8.5 percent wage increase. In other words, while the parties discussed the equity adjustments, it was never in isolation or at the exclusion of the other aspects of Respondent's integrated proposal. And when the Union rejected the Company's Second Comprehensive Offer of Settlement, it did so because it objected to several of the Offer's provisions, including aspects of Respondent's quid pro quo proposal. (Tr. 179–181.)

Contrary to Respondent's contentions, I find it proposed an integrated package, which consisted of an equity adjustment, the general wage increases, the shift differentials, and the annual contributions to the employees' HSA or 401(k) accounts, as a quid pro quo for the elimination "in-the-box" retiree health benefits. The fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities does not alter this conclusion, because a proposed wage increase certainly can, and in this case did, serve two objectives.

Accordingly, I find that by implementing the elimination of "in-the-box" retiree health benefits without implementing the general wage increases, the equity adjustments, and the shift differentials, Respondent implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement. Respondent either could have maintained the "in-the-box" retiree health benefits or implemented the proposed increases to wages and shift differentials.

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the wage adjustments and shift differentials on contract ratification

The General Counsel's second argument is that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases upon contract ratification. Contract ratification is a permissive subject of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on ratification. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). Requiring ratification substantially modifies or weakens the independence of the representative chosen by the employees by enabling the employer, in effect, to deal with its employees rather than with their statutory representative. Id. at 350. It is because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs ... it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *New Process Steel*, 353 NLRB 111, 114 (2008), revd on other grounds 560 U.S. 674 (2010) (quoting *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 226 (1991) (Chairman Stephens concurring)). Thus, the Board requires the parties have an express agreement to make ratification a condition precedent, and that such an agreement "is not established casually or equivocally." Id. at 114–115. Absent evidence of such an agreement, the union retains sole discretion over whether to ratify the contract or not. Id.

Respondent argues that it repeatedly indicated in its proposals that increases to wages and shift differentials would be effective upon ratification, and the Union did not object or request to bargain over the ratification language. I do not find that constitutes an express agreement binding on the Union.[29]

[28] In its posthearing brief, Respondent addressed arguments it anticipated the General Counsel might make as to how or to what it (Respondent) tied these wage increases to when making its proposals. For example, Respondent anticipated the General Counsel might argue the wage proposals were tied to new productivity standards and/or new work rules. (R. Br. 30–33.) Respondent curiously does not address the argument that the wage proposals were exchange for the elimination of the retiree health benefits.

[29] In its posthearing brief, Respondent claims that it never actually required contract ratification as a condition precedent to paying the increases, and that its use of the phrase "contract ratification" was "merely a proxy" for when the parties reached an agreement, and the

Beatrice/Hunt-Wesson, Inc., supra. Absent such an agreement, Respondent violated the Act when it conditioned implementation of the proposed wage increases on contract ratification.

In its defense, Respondent argues that under Board law it is not unlawful to combine mandatory and permissive bargaining subjects in a proposal, so long as the employer does not insist to impasse on the permissive bargaining subjects. While generally accurate, I find Respondent did, in fact, unlawfully insist on contract ratification when it implemented portions of its pre-impasse offer but withheld the inextricably intertwined wage increases, and then informed the Union and the employees in its October 27, 2015 correspondence that those increases would only be implemented upon contract ratification.

Respondent cites to *White Cap, Inc.*, 325 NLRB 1166 (1989), enfd 206 F.3d 22 (D.C. Cir. 2000), as supporting its position. In that case, the employer and union negotiated an agreement, but the employees failed to ratify it. The employer offered monetary incentives to facilitate ratification, but the employees again voted it down. The employer again proposed the added incentives but warned the union that they would be withdrawn if the employees again failed to ratify the agreement within a set time period. When the employees again failed to ratify, the employer followed through and withdrew the added incentives from its offer. A charge was filed, and the Board found that employer acted lawfully.

Respondent argues that if it is lawful to threaten to withdraw—and actually withdraw—wage proposals based upon a union's failure to ratify a new agreement, an employer does not commit an unfair labor practice by timing its wage proposals to coincide with ratification. Respondent further argues that its non-implementation of the wage proposals was an inducement to convince the Union to finalize a new agreement. I reject these arguments. In *White Cap*, the employer was transparent when it informed the union that it was only offering the added incentives as an inducement to get the employees to timely ratify the agreement, and that it would withdraw those incentives if the employees failed to do so. In this case, Respondent never indicated to the Union prior to or when it submitted its Second Comprehensive Offer of Settlement that it would eliminate "in-the-box" retiree health benefits without also implementing the proposed wage increases. Moreover, *White Cap, Inc.* involved the withdrawal of proposed monetary incentives unrelated to any other proposals. In the present case, Respondent proposed the wage increases part of a quid pro quo package to compensate for the elimination of the "in-the-box" retiree health benefits, and, as previously explained, it became obligated to implement those increases when it eliminated the retiree health benefits.

Respondent also argues it was merely abiding by its understanding as to the Union's established practice of submitting agreements to its members for ratification. I reject this argument as well. First, Board law requires the parties have an express agreement on ratification, and there was no such agreement in this case. Second, the parties reached an impasse, not an agreement. As such, there was nothing for the members to ratify. Finally, there is no evidence that this type of situation has happened before, so Respondent has no basis for asserting that it was simply abiding by the Union's established policy or practice when it required ratification.[30]

Based on the foregoing, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases on contract ratification.

3. Did Respondent violate Section 8(a)(5) and (1) of the Act when it subcontracted the outage maintenance work on Unit 1 without providing the Union with notice or an opportunity to bargain over the decision

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it subcontracted out bargaining unit work associated with the Unit 1 outage without providing the Union with notice or an opportunity to bargain. Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires the employer provide timely notice and a meaningful opportunity to bargain over the change at issue. See *First National Maintenance*, 452 U.S. 666, 682 (1981). Once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

It is well established that a decision to subcontract unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of a contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v.*

intent was that the increases would be effective the same time as the new agreement was reached. (R. Br. 33–34.) Respondent presented no evidence the Union or employees shared this understanding of the use of the term "contract ratification." Moreover, I find Respondent's claim to be disingenuous in light of the fact it distributed a document to the Union and employees on October 27, 2015, entitled "Summary of Implemented Terms" which specifically states, "Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates *only effective upon ratification of the contract by membership*." (Jt. Exh. 8, p. 2.) (emphasis added).

[30] When the parties extended their collective-bargaining agreement to February 15, 2014, they made certain modifications. The Union did not submit the extension for ratification because it was not considered a new agreement. Cookson acknowledged he was made aware of this fact at or around the time of the extension. Respondent, therefore, was aware the Union does not require ratification of when something less than a new agreement is involved.

NLRB, 379 U.S. 203, 215 (1964). See also *Mi Pueblo Foods*, 360 NLRB 1097 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644–647 (2011); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467–469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Torrington Industries*, 307 NLRB 809, 810–811 (1992).[31]

Here, Respondent subcontracted work historically performed by bargaining unit employees without first bargaining with the Union. Respondent, however, contends that it had no obligation to bargain because the decision to subcontract was not based on labor costs.[32] Respondent contends it subcontracted the work to GE because there were not enough unit employees available to perform the work at issue within the timeframe set to complete the project. Additionally, Respondent argues that it had no obligation to bargain because subcontracting the work to GE did not result in any material change or detrimental impact for any of the unit employees. Specifically, Respondent contends no unit employee lost work and, in fact, employees worked or were offered (and some refused) extensive overtime during the outage. Finally, Respondent contends that its decision to subcontract to GE was based, in part, on the fact that GE offered a warranty on the work it performed.

For the reasons stated below, I find Respondent had a duty to bargain, and that the decision to subcontract was based, at least in part, on labor costs.

I find the Board's decision in *Mi Pueblo Foods*, 360 NLRB 1097 (2014), particularly instructive and applicable in response to Respondent's arguments. In that case, the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The judge found no violation because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board reversed, holding that bargaining is not excused simply because there was no evidence of immediate impact on the employees' terms and conditions of employment. The Board held that whenever bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099. In reaching this conclusion, the Board cited to its decision in *Overnite Transportation, Co.*, 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), in which it held that the employer had an obligation to bargain even though the subcontracting involved an influx of new work that unit employees could not handle, and where none of the unit employees lost any work. In so finding, the Board in *Overnite Transportation* held:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members. In *Mi Pueblo Foods*, the Board noted another possible topic for negotiation with the union was expanding the bargaining unit. 360 NLRB at 1099.

Respondent claims it had no obligation to bargain because the decision to subcontract was not based on labor costs, but rather on its need to get the project completed within the established time frame, and it would not be able to do so using unit employees.[33] However, as the cases cited above make clear,

[31] In *Torrington Industries*, the Board noted that while there may be non-labor cost reasons for subcontracting that may provide a basis for concluding the decision to subcontract is not a mandatory subject of bargaining, the employer's reason for subcontracting must implicate a matter of core entrepreneurial concern defined by a fundamental change is the "scope and direction" of its business, which would then trigger a balancing of the sort described in *First National Maintenance Corp.* 307 NLRB at 811. There is no contention the subcontracting at issue amounted to a core entrepreneurial decision or involved a fundamental change in the scope or direction of Respondent's business.

[32] Respondent also argues it had no obligation to bargain because it was actually more expensive to subcontract the work to GE than it would have been to have the unit employees perform it. Respondent's only support for this is the testimony of Christopher Cox, who was asked on direct examination whether labor costs played a role in the decision to use GE to perform the work, and he replied "labor costs are actually more for GE." (Tr. 205–206.) Cox provided no explanation or support for this statement, and Respondent offered nothing more. I find Cox's single, conclusory statement insufficient to prove that it was, in fact, more expensive to subcontract the work to GE.

[33] In its posthearing brief, Respondent argues its decision to subcontract was motivated by its concerns about completing the work within "the tight timeframe mandated by the PJM Interconnection." (R. Br. 43). Cox, however, testified the Company was involved in setting the "internal benchmark" for how long it would take to complete the outage. Then, based on the information it received from PJM, including how long comparable outages took, the Company reported to that PJM that it could complete the project within the 56-day timeframe. (Tr. 203–204.) In light of this evidence, I find it misleading for Respondent

that does not authorize Respondent's unilateral action--the Board still imposes a duty to bargain in those situations.

The same is true regarding Respondent's claim that it did not have an obligation to bargain because no unit employee experienced a reduction in hours or loss of overtime opportunity as a result of the subcontracting. As the Board held in *Overnite Transportation* and *Mi Pueblo Foods*, evidence of an immediate impact on employees' terms and conditions of employment is not required. The duty to bargain is triggered by concern that the subcontracting could potentially affect the size of the unit or dilute the union's strength. In this case, these are not hypothetical concerns. During negotiations, Respondent raised concerns over the profitability of the Bruce Mansfield facility and the need to reduce labor costs, which included the need to reduce the size of the bargaining unit. Respondent also proposed changes, including the increased use of mobile maintenance employees, which would allow it to increase the amount of unit work it could assign to nonunit employees. Cookson and Marshman discussed these matters during their July 21, 2015 meeting. It was in this meeting that Marshman raised concerns over the dwindling size of the bargaining unit, noting that Respondent had not replaced the nearly 130 employees that had left the unit since 2008. Cookson replied that a reduced headcount through attrition would give the plant a chance to survive, and he added that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. Marshman stated he could not knowingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." In light of this evidence, I find the continued diminution of the size and strength of the unit as an adverse effect, particularly when Respondent's stated reason for subcontracting to GE was there were not enough unit employees to do the work.

Finally, I reject Respondent's argument that it had no obligation to bargain because its decision to subcontract to was, in part, because GE offered a warranty on the work it performed. The extent or scope of this warranty is unclear from the record, and it appears that GE has warranted other work in the past, including when the unit employees performed the outage work. Regardless, Respondent has cited no authority that the existence of a warranty excuses to a failure to bargain.

Respondent next argues even if it had an obligation to bargain over the decision to subcontract the work at issue, the Union waived that right by failing to timely request bargaining. A union cannot have waived bargaining where it did not receive clear and timely notice of change, nor can it have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001).

Respondent claims it gave the Union timely notice of its decision to subcontract outage work beginning in February 2015, when it began providing the Union with weekly contracting reports addressing the M116 outage, and when it met with the Union during their weekly contractor meetings. Respondent, however, fails to differentiate between work associated with the outage and *bargaining unit* work associated with the outage. There is no dispute that Respondent had a history of subcontracting out work during outages, usually specialized work. Notice that Respondent intended to continue subcontracting out that work during the M116 outage is not notice of a change. The change requiring clear and timely notice is the subcontracting of the open/clean/ close work to GE. None of the weekly notification reports in evidence refer to GE or the open/clean/close work. The only weekly notification report Respondent specifically refers to in its posthearing brief is the June 5, 2015 weekly report, which indicates a need for a contractor for a job described as "Turbine Area General NDE M116." As previously stated, Cox testified that "NDE" stands for non-destructive examination, which was work historically performed by an outside contractor, not bargaining unit employees.[34]

Respondent also argues that it provided notice of the change at issue during the June 15, 2015 "all hands" meetings in which the M116 outage was raised. However, Devin Miller testified that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. Moreover, even if actual information had been shared about who was going to be performing the work, these were employee meetings, and the Board has held that notice to employees does not constitute sufficient notice to the union. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017.

I find the first notice Respondent gave the Union that it was going to subcontract the work at issue to GE was on February 10, 2016, when Rundt announced the decision to Bloom and Snyder after the labor-management meeting. The General Counsel alleges, and I so find, that Rundt announced this change as a fait accompli based on the statements and surrounding circumstances. The evidence establishes that Respondent began negotiating with GE to perform the work in February 2015, and they continued their discussions over the next several months. Cox testified that Respondent made the final decision to subcontract the work at issue to GE on around

to suggest it had no control over the amount of time available to it to perform the Unit 1 outage work.

[34] Although Respondent does not raise it in its posthearing brief, there is the November 6, 2015 weekly notification report, which references a job described as "Generator labor M116." I do not find this limited entry constitutes clear notice to the Union of the Company's decision to subcontract the open/clean/close work, because the report contains no other information about the scope or nature of the project, when it was going to be performed, and/or who was going to perform it. Additionally, none of the witnesses present for these weekly contractors meetings between the Company and the Union could recall any discussions about the subcontracting of the turbine/generator outage or open/clean/close work for Unit 1.

September 10, 2015, and Respondent entered into a formal purchase order with GE on around November 13, 2015. The surrounding circumstances, including the statements made to managers during the January 11, 2016 outage readiness meeting, confirm this was settled. And when Rundt met with Bloom and Snyder on February 10, 2016, he was informing them of the decisions that had been made. He made it clear that Respondent was subcontracting the turbine outage work to GE. There was nothing tentative about that in what he said. What was not settled was who was going to perform the boiler feed pump work. Rundt indicated that work also may go to GE. The Union inquired about having unit employees perform that work, and Rundt said he would check and get back to the Union. He did, and the Union ended up handling the feed pump work. I conclude that while Respondent indicated it was open to discussing the feed pump work, it informed the Union the other work was going to be done by GE. As a result, I find Respondent first informed the Union of its decision to subcontract the work at issue on February 10, 2016, as a fait accompli.[35]

I, therefore, find Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with timely notice and a meaningful opportunity to bargain over the decision to subcontract unit work to GE.[36]

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with the contractor's wage data and material costs

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information referred to in the Union's February 10, 2016 letter. An employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to the union representing its employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held requested information pertaining to subcontracting, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting, the Board has held that a broad, discovery-type standard is utilized in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, supra at 1258; See also *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000). The Board also has held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258, fn. 5. See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003); *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989).

In applying this standard, I find the Union has met its burden of establishing potential or probable relevance of the information at issue based on the statements and circumstances surrounding the request. Marshman submitted the written information request on February 10, 2016, the same day the Union first learned Respondent had subcontracted the work to GE. This written request was made after Union Steward Snyder orally requested essentially the same information, including the subcontractor's cost information. When Cox responded to Snyder's oral request, he did not raise any concern as the relevance of the requested information. Rather, he stated the information was proprietary, the Union was not entitled it, and the information was not available.

After receiving the Company's partial response to the request, Marshman contacted Cox and stated the Union needed the wage and material cost information because it if was going to try to negotiate the work that was to be performed, it "would need to know apples to apples" what it was negotiating. (Tr. 124–125). I find this sufficient to put the Respondent on notice that the Union wanted to negotiate subcontracting of this work,

[35] Respondent contends that after receiving this notice the Union should have requested bargaining, and, if it had, Respondent would have bargained over the decision to subcontract the turbine/generator outage work, as evidenced by its willingness to re-assign the boiler feed pump work to unit employees after the Union asked for them to perform it. I find this contention rings hollow. Respondent knew in early 2015 that it was going to subcontract the turbine/generator outage work, but it withheld that information from the Union for almost a year. In early September 2015, when Respondent made the final decision to subcontract the turbine/generator outage work to GE, Respondent withheld that information from the Union, even though the parties were still bargaining over a new contract, in which one of the contested issues was the performance of unit work by non-unit employees. Respondent continued to withhold information from the Union regarding its subcontracting decision after it entered into the purchase order with GE in November 2015. Respondent waited three more months, and when it informed the Union it presented the decision as final. Under these circumstances, I reject Respondent's claim that it was willing to, or the Union would have been able to, engage in meaningful bargaining over the decision to subcontract this work as of this date.

[36] The complaint in 06–CA–163303 alleges that Respondent also failed to bargain over the effects of its decision to subcontract this unit work. In its posthearing brief, the General Counsel does not mention the effects bargaining allegation. As such, I need not reach the effects bargaining issue. See *Michigan Ladder Co.*, 286 NLRB 21, 22 (1987).

and that it wanted the contractor's wage information and material costs for comparative purposes to facilitate those negotiations.

In its defense, Respondent argues that, in addition to not being relevant, it had no obligation to produce the information because it was not in its possession. An employer's duty to supply relevant information also "extends to situations where the information is not in the employer's possession, but where the information can likely be obtained from a third party with whom the employer has a business relationship." *Earthgrains Co.*, 349 NLRB 389, 397–399 (2007), enfd. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008). See also *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991) (employer failed to meet its burden of demonstrating the information requested by the union was unavailable where there was no evidence it asked the third party subcontractor for the information). At the hearing, Cox acknowledged that the wage and material cost information could be requested from GE, but that he did not make that request or ask someone else to make the request. I find that Respondent has a long-standing, ongoing business relationship with GE, and it should have requested that information from GE in order to respond to the Union's information request.[37]

Consequently, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information from GE, which includes failing to request the information from GE.

CONCLUSIONS OF LAW

1. The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been and is the designated collective-bargaining representative of the following appropriate unit of employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

4. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act by implementing certain provisions from its Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with its pre-impasse proposal to the Union when it implemented the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

5. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, on contract ratification.

6. On or around January 1, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act when it unilaterally subcontracted bargaining unit work during the 2016 Unit 1 outage without providing the Union with notice and an opportunity to bargain about the decision to subcontract that work.

7. On or around February 10, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested wage and material cost information from GE that is relevant and necessary to the Union's role as the unit's collective-bargaining representative.

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

REMEDY

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

Affirmatively, the Respondent shall, upon request from the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits. The Respondent shall rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification. The Respondent shall make employees make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the remaining information requested in its February 10, 2016 information request.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event

[37] Respondent makes no contention in its posthearing brief that the information at issue was proprietary or confidential.

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 October 27, 2015. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., shall

1. Cease and desist from:

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work.

(c) Unilaterally implementing provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

(d) Conditioning changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

(e) Failing or refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(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) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

(b) Upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits.

(c) Make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

(d) Compensate the bargaining unit employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

(f) Provide the Union with the requested information sought in its February 10, 2016 request related to the wages and material costs paid by GE during the outage of Unit 1 in 2016.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

[38] 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.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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 do anything to prevent you from exercising the above rights

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local No. 272, AFL–CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT fail or refuse to provide the Union with notice and an opportunity to bargain regarding changes to wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL NOT unilaterally implement changes to wages, hours, or other terms or conditions of employment that are inconsistent with our final, preimpasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT condition implementation of changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative.

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 provide the Union with notice and an opportunity to bargain over changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL, upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in our Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date we implemented the elimination of the "in-the-box" retiree health benefits.

WE WILL make employees whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

WE WILL rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

WE WILL provide the Union with the remaining information requested in its February 10, 2016 information request.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–163303 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.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC	)	
	)	No. 18-1654
Petitioner	)	
	)	
v.	)	Board Case Nos.
	)	06-CA-163303 and
NATIONAL LABOR RELATIONS BOARD	)	06-CA-170901
	)	
Respondent	)	

CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board hereby cross-applies to the Court for enforcement of its Order issued against FirstEnergy Generation, LLC on May 16, 2018, in Board Case Nos. 06–CA–163303 and 06–CA–170901, reported at 366 NLRB No. 87. The Board seeks enforcement of its Order in full.

On June 7, 2018, the Petitioner, FirstEnergy Generation, LLC, filed a petition with this Court to review the same Board Order. The Court has jurisdiction over this cross-application pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e) and (f)), because the Petitioner is aggrieved by the Board's Order. Venue is proper in this Circuit because the Petitioner transacts business within the geographic boundaries of this Circuit.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 11th day of July 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FIRSTENERGY GENERATION, LLC	)	
	)	No. 18-1654
Petitioner	)	
	)	
v.	)	Board Case Nos.
	)	06-CA-163303 and
NATIONAL LABOR RELATIONS BOARD	)	06-CA-170901
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 11th day of July 2018

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.

FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. *and* International Brotherhood of Electrical Workers, Local 272, AFL–CIO. Cases 06–CA–163303 and 06–CA–170901

May 16, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 15, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by unilaterally changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard

[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 adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act when, after the parties reached impasse, the Respondent selectively implemented collective-bargaining proposals that were "inextricably intertwined" with other, unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581 (1982), enfd. 44 F.3d 1320 (6th Cir. 1995); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006). Accordingly, we agree with the judge's finding that during contract negotiations and as set forth in the Respondent's final preimpasse offer (its "Second Comprehensive Offer of Settlement"), the Respondent consistently proposed tying and offsetting the elimination of employees' "in-the-box" retiree health benefits with annual contributions to employees' health-savings accounts (HSA) or 401(k) accounts, general wage increases, equity adjustments, and shift differentials. Upon impasse, however, the Respondent unilaterally eliminated the "in-the-box" retiree health benefits and made HSA or 401(k) payments, but did not implement inextricably intertwined parts of its preimpasse proposal, including the general wage increases, equity adjustments, and shift differentials. We agree with the judge that the principles in *Plainville Ready Mix* readily apply and support a violation here, with a minor clarification. In *Plainville Ready Mix*, the Board adopted the judge's finding that the employer's partial implementation regarding wages and incentive pay and gain sharing plans in its final offer before the second impasse (not the first impasse, as the judge finds) was unlawful. 309 NLRB at 583. That is, in its final proposal before the second impasse, the employer proposed eliminating gain sharing and incentive pay plans "in conjunction with" an offsetting increase in hourly wage rates. Id. at 582. But, after the second impasse, the employer eliminated its gain sharing and incentive pay plans without implementing its inextricably linked proposal of increasing hourly wage rates, and the Board adopted the judge's finding that this partial implementation was unlawful. 309 NLRB at 588.

Member Emanuel took no part in the consideration of *Plainville Ready Mix* and expresses no view as to whether it was properly decided. However, he agrees with his colleagues that the strong record evidence here establishes that the Respondent's proffered wage increases, shift differentials, equity adjustments, and HSA or 401(k) contributions were "inextricably linked" to the elimination of "in-the-box" retiree health benefits under the narrow doctrine set forth in *Plainville Ready Mix* and its progeny. Throughout bargaining, these proposals were consistently presented as a quid pro quo, with ample record evidence showing that the provision of these employment benefits was explicitly contemplated as a way for the Respondent to help employees offset the increased costs employees would face upon the termination of "in-the-box" health benefits, and to allow employees to share in some of the cost savings brought about by the elimination of the benefits.

Finally, having found that the Respondent violated Sec. 8(a)(5) and (1) based on the rationale set forth above, we find no need to pass on the General Counsel's additional theory that the Respondent unlawfully conditioned the proposed wage increases in its preimpasse offer on ratification of a new collective-bargaining agreement, a permissive subjective of bargaining. See *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958).

We also affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain with the Union when it subcontracted bargaining unit work associated with its unit 1 turbine outage at its Bruce Mansfield facility in 2016 (the "M116 Outage") without providing the Union notice and an opportunity to bargain. In doing so, we reject the Respondent's argument, raised for the first time on exceptions, that it was acting in accordance with a subcontracting provision in the parties' expired collective-bargaining agreement. We deem such argument to be untimely raised and thus waived, as it was not argued before the judge. *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir 2009); *Yorkaire, Inc.*, 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

[2] We shall modify the judge's recommended Order to conform to the Board's findings and its standard remedial language.

Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Unilaterally implementing provisions from the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015, that were inconsistent with its final, preimpasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials, in addition to the HSA and 401(k) payments.

(c) Failing and refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(d) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

(b) Upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with the Respondent's Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date the Respondent eliminated the "in-the-box" retiree health benefits.

(c) Make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either the Respondent's elimination of the "in-the-box" retiree health benefits or its failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in paragraph 2(b) above.[3]

(d) Make affected bargaining unit employees whole, with interest, for loss of earnings resulting from the Respondent's unilateral subcontracting of bargaining unit work associated with the M116 Outage.

(e) Compensate affected bargaining unit employees and former bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

(f) Provide the Union in a timely manner the information it requested on February 10, 2016, related to the wages and material costs paid to subcontractor General Electric for the work associated with the M116 Outage.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the

[3] In the event the Union opts to have the Respondent reinstitute the "in-the-box" retiree health benefits, at the compliance stage the Respondent may litigate whether any particular employee's losses resulting from the elimination of those benefits should be offset by any HSA or 401(k) payments the Respondent previously made for the benefit of that employee. See *Active Transportation Co.*, 340 NLRB 426, 426 fn. 2 (2003) (the Board permits the employer to litigate at compliance whether back payments to union funds should be offset by what it spent to provide employer-sponsored benefits), enfd. 112 Fed.Appx. 60 (D.C. Cir. 2004).

[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."

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

Dated, Washington, D.C. May 16, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

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 fail and refuse to bargain with the International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union) as the designated collective-bargaining representative of the following bargaining unit of employees by changing wages, hours, or other terms and conditions of employment of bargaining unit employees, including the subcontracting of bargaining unit work associated with the M116 Outage, without first notifying the Union and giving it an opportunity to bargain about such changes.

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT unilaterally implement provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015, that are inconsistent with our final, pre-impasse offer made to the Union by eliminating "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT fail and refuse to provide the Union with requested information, such as the wages and material costs paid to General Electric for the M116 Outage work, that is relevant and necessary to the Union's role as your collective-bargaining representative.

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

WE WILL, before implementing any changes to your wages, hours, or other terms and conditions of employment, including, but not limited to, the subcontracting of unit work, notify, and on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth above.

WE WILL, upon request by the Union, and at the Union's option, either reinstitute the "in-the-box" retiree health benefits or implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments (while retaining HSA and 401(k) payments previously made), in accordance with our Second Comprehensive Offer of Settlement dated September 17, 2015. In either case, the reinstitution of the "in-the-box" retiree benefits or the implementation of the additional wage increases, equity adjustments, and shift differentials shall be retroactive to the date we eliminated the "in-the-box" retiree health benefits.

WE WILL make all bargaining unit employees and former bargaining unit employees whole, with interest, for their losses resulting from either our elimination of the "in-the-box" retiree health benefits or our failure to implement the general wage increases, equity adjustments, and shift differentials that should have accompanied the implemented HSA and 401(k) payments, depending on which option the Union selects in the paragraph above.

WE WILL make you whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the M116 Outage.

WE WILL compensate you for any adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6 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 year for each employee.

WE WILL provide the Union in a timely manner the information requested on February 10, 2016, related to the wages and material costs paid to General Electric for the work associated with the M116 Outage.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Board's decision can be found at www.nlrb.gov/case/06–CA–163303 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., Room 5011, Washington, DC 20570, or by calling (202) 273-1940.

David Shepley, Esq., for the General Counsel.
Brian W. Easley, Esq., for the Respondent.
Marianne Oliver, Esq., for the Charging Party.

DECISION

I. INTRODUCTION

ANDREW S. GOLLIN, Administrative Law Judge. These consolidated cases were tried before me on December 1–2, 2016, in Pittsburgh, Pennsylvania. The International Brotherhood of Electrical Workers, Local 272, AFL–CIO (Union or Local 272) filed the underlying charges alleging FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.[1] (Respondent or the Company) committed unfair labor practices affecting the unit employees at its Shippingport, Pennsylvania powerplant.

The first case involves Respondent's partial implementation of its final pre-impasse offer to the Union. Respondent implemented certain proposals, including the elimination of retiree health benefits, but not its proposed increases to wages and shift differentials, stating those increases would be effective only upon contract ratification. The complaint presents two theories for why Respondent's failure to implement the proposed increases to wages and shift differentials violated Sections 8(a)(5) and (1) of the National Labor Relations Act (Act). First, the General Counsel argues that because Respondent proposed the increases as part of a package to compensate for the elimination of the retiree health benefits, it was obligated to also implement those proposed increases when it eliminated the retiree health benefits. Second, the General Counsel alleges that contract ratification is a permissive subject of bargaining, and Respondent was prohibited from making it a condition precedent to implementing the increases. Respondent denies the alleged violations. Based upon the evidence and applicable law, I find Respondent committed the violations as alleged, under both theories.

The second case involves Respondent's subcontracting of scheduled maintenance work historically performed by unit employees. The complaint alleges Respondent violated Sections 8(a)(5) and (1) of the Act when: (1) it subcontracted this unit work without providing the Union with notice and an opportunity to bargain over the decision to subcontract or its effects; and (2) when it failed or refused to provide the Union with the wages and material costs paid by the subcontractor. Respondent denies the allegations. I find Respondent breached its duty to bargain over the decision to subcontract because it announced its decision as a fait accompli. I also find the Union has met its burden of establishing the relevance of the requested subcontracting information.[2] Based on the evidence and applicable law, I find Respondent committed these violations as alleged.[3]

II. STATEMENT OF THE CASE

On November 4, 2015, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–163303. On February 29, 2016, the Union filed an amended unfair charge against Respondent in Case 06–CA–163303. Based on its investigation, on May 27, 2016, the Acting Regional Director for Region 6 of the Board, issued a complaint in Case 06–CA–163303, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act.[4] On June 9, 2016, Respondent

[1] At the hearing, the parties stipulated to amending the pleadings to correct the employer's name to be FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.

[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g.,*Daikichi Corp.,* 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] I make no finding regarding Respondent's alleged failure to engage in effects bargaining because the General Counsel appears to have abandoned that allegation by failing to raise or address it during the hearing or in his posthearing brief.

[4] On March 11, 2016, the Acting Regional Director issued a partial dismissal letter in Case 06–CA–163303, dismissing, among others, the allegation that the Company violated Sec. 8(a)(5) and (1) of the Act when it failed to implement its proposed wage increases. On April 22, 2016, the Regional Director issued an amended dismissal letter rescinding the earlier dismissal, stating the allegations that the Company "failed to implement a proposed wage increase when it implemented its other terms of employment contained in its last comprehensive offer and, conditioned the implementation of this wage and shift differential increase upon membership ratification, are being retained for further

filed its answer in Case 06–CA–163303, denying all alleged violations of the Act.

On March 2, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06–CA–170901. Based on its investigation, on July 29, 2016, the Regional Director for Region 6 of the Board issued a complaint in Case 06–CA–170901, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act. On August 11, 2016, Respondent filed its answer in Case 06–CA–170901, denying all alleged violations of the Act.

On November 10, 2016, the Regional Director for Region 6 issued an Order Consolidating Cases in Cases 06–CA–163303 and 06–CA–170901.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[5]

III. FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent has been a corporation with an office and place of business in Akron, Ohio, and has been engaged in the operation of power generation plants in several states, including at its Bruce Mansfield plant located in Shippingport, Pennsylvania ("Bruce Mansfield facility"). In conducting its operations during the 12-month period ending February 29, 2016, Respondent derived gross revenues in excess of $250,000. During the 12-month period ending February 29, 2016, Respondent purchased and received goods at its Bruce Mansfield facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. Respondent's Operations

Respondent operates coal-fired power generating plants throughout Ohio and Pennsylvania, including its Bruce Mansfield facility. The Bruce Mansfield facility contains three identical power generating units, referred to as Unit 1, Unit 2 and Unit 3. Each unit consists of a turbine, a generator, a boiler, valves, and other auxiliary equipment. Each unit operates as an integrated system. The system begins with the burning of coal to boil water to create highly pressurized steam; the steam is then pumped into the turbine-generator to produce electricity; and that electricity is released to the power grid for distribution and consumption. Respondent supplies power to the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), a federally regulated transmission organization that oversees the regional electricity markets.

C. Collective-Bargaining Relationship

The Union represents a unit of approximately 230 production and maintenance employees at the Bruce Mansfield facility.[6] The parties' most recent collective-bargaining agreement was dated from December 5, 2009, to February 15, 2013. On August 16, 2012, the parties entered into a memorandum of agreement extending their collective-bargaining agreement, with certain modifications, until February 15, 2014. The Union never held a ratification vote over this extension agreement.[7]

The parties began negotiations over a successor agreement on December 19, 2013, and those negotiations continued until September 18, 2015. The Company's negotiation committee included Anthony Gianatasio, Labor Relations Representative. Gianatasio reported to Charles Cookman, the Company's Executive Director of Labor Relations and Safety. Cookson participated in the negotiations beginning in late 2014. Gianatasio and Cookman are supervisors and/or agents of the Company within the meaning of Section 2(11) and (13) of the Act. The Union's negotiation committee was led by Herman Marshman, Union President. The parties failed to reach a successor agreement prior to the expiration of the extension agreement, but they continued to negotiate, as detailed below, until reaching an impasse as of October 27, 2015.[8]

IV. UNFAIR LABOR PRACTICES

A. 06–CA–163303

1. Background

As previously stated, the parties began negotiations for a new agreement in December 2013, and those negotiations continued into 2014. On September 25, 2014, the Company gave the Union its Comprehensive Offer of Settlement, which detailed the Company's offer for an overall agreement. (R. Exh.

processing." Both allegations are contained in the complaint in Case 06–CA–163303.

[5] Abbreviations in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

[6] The Union has been the exclusive collective-bargaining representative, within the meaning of Sec. 9(a) of the Act, of all production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, results, and yard departments, employed at Respondent's Shippingport, Pennsylvania facility, excluding technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act.

[7] The Union did not submit this extension for ratification because it was not a new agreement. (Tr. 158.)

[8] At the hearing, the General Counsel and Respondent entered into a stipulation that the parties were at a good-faith impasse in their negotiations as of October 27, 2015. The Union did not participate in, but did not object to, this stipulation, stating that its position has been and remains that the parties were not at impasse. Regardless, the General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed.Appx. 577 (9th Cir. 2009). Based upon the stipulation, I will accept, without further analysis, the parties were at a good-faith impasse when Respondent implemented the changes at issue on October 27, 2015.

1.) One of the key changes the Company sought during these negotiations was to eliminate retiree health benefits. Article XVIII, Section 3 of the parties' collective-bargaining agreement allowed current employees who retired during the term of the agreement to continue to participate in their chosen health benefit plan until the expiration of the agreement in effect at the time of their retirement, with the Company paying a portion of their health care and prescription drug coverage costs. The parties refer to these as "in-the-box" retirees because the amount the Company paid was set forth in a box chart in Article XVIII of the collective-bargaining agreement. Upon expiration of the agreement, these retirees then come out of the box.[9] "Out-of-the-box" retirees are eligible to enroll in a different, higher-cost company health care plan.[10]

The Company's Comprehensive Offer of Settlement proposed eliminating health benefits for "in-the-box retirees" as of December 31, 2014.[11] This Offer also proposed annual wage increases, referred to as General Wage Increases (GWI), that would go into effect following contract ratification. The proposed increases were scheduled to go in effect as follows: one and one half percent (1½ percent) GWI effective the date of ratification; an additional one percent (1 percent) GWI effective 1 year following the date of ratification; and an additional one percent (1 percent) GWI effective 2 years following the date of ratification. This Offer also proposed increasing the shift differentials paid to employees for hours worked during the afternoon and evening shifts, and on Sundays, all effective upon ratification.[12] (R. Exh. 1.) The Union did not present this Offer to its members for ratification.

2. December 8, 2014 bargaining session[13]

On December 8, 2014, the parties' committees met at the Radisson Hotel in Beaver Falls, Pennsylvania, for bargaining. The evidence about this December 8 bargaining session consisted of the testimony of Charles Cookson, Respondent's executive director of labor relations and safety, and the notes of Respondent's bargaining committee member, Tony Gianatasio.[14]

At this December 8 session, the parties discussed several topics, including Company's proposal to eliminate "in-the-box" retiree health benefits. The Union, through President Herman Marshman, stated the Company should provide some compensation for the loss of the retiree health care subsidies, and asked what percentage of the cost savings from the elimination of these subsidies was the Company willing to share with the Union. There was some discussion. Gianatasio's notes reflect the Company then orally made the following proposal:

> 1. A contribution of $500 for those with individual health care coverage and $1000 for employee/spouse, employee/child and family coverage to [the employee's health savings accounts] HSAs. If they do not participate in a FirstEnergy HSA, the money would be placed in their 401(k) account. This would be in each year of the contract in addition, you can choose one of the options from below:
> 2. If you end the new retiree health care box 12/31/14 we would provide a general wage increase in each year of the contract as follows:
>
> a. 3% at ratification
> b. 2.5% one year after ratification
> c. 2.5% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment[15] to all classifications at the time of ratification
>
> 3. If you end new retiree health care box 12/31/15 we would provide a general wage increase in each year of the contract as follows:
>
> a. 2.5% at ratification
> b. 2.0% one year after ratification
> c. 2.0% 2 years after ratification
> d. In addition we would provide a $.75 equity adjustment [to] all classifications at the time of ratification (GC Exh. 11).[16]

In response to Marshman's earlier question about how much of the savings was the Company willing to share with the Union, Cookson stated that the Company would save $1.25 million a year by ending the retiree health care benefits by the end of 2014, and its proposed offer (discussed above) would cost it $1 million a year. The parties then discussed other topics, including safety, before returning to retiree health benefits. Marshman told Cookson he wanted to see if there was a reasonable way to distribute the savings, and Cookson responded that the Company's offer shows it was flexible. Marshman asked if Cookson would seriously entertain a counter offer, and

[9] Charges over retiree health benefits were the subject of prior litigation. See *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012), affd. 362 NLRB No. 66 (2015) (Board reaffirmed prior Board decision which was decided without a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)).

[10] The record does not address what, if any, amounts Respondent pays towards "out-of-the-box" retiree health benefits.

[11] Hereinafter the terms "in-the-box" retiree health benefits and retiree health benefits will be used interchangeably to refer to the health benefits paid to employees for the remainder of the agreement in effect at the time of their retirement.

[12] All the Company's wage proposals stated any increases would be effective upon ratification. Cookson testified the Company has an internal policy that it will not pay increases retroactively. (Tr. 173.)

[13] There was no detailed evidence presented regarding bargaining prior to December 8, 2014.

[14] Gianatasio's notes provide more detail and context as to what was discussed, and nothing in Cookson's testimony contradicted Gianatasio's notes. Gianatasio was not called to testify. No other witness was called to testify about this bargaining session.

[15] As discussed below, Bruce Mansfield unit employees earn less per hour than their counterparts at the Company's Sammis power plant in Stratton, Ohio. This "equity adjustment" refers to the Company's offer to increase wages for Bruce Mansfield unit employees to bring them closer to the Sammis employees.

[16] Cookson confirmed the Company made this December 8 oral proposal because the Union had objected to the Company's proposal in its Comprehensive Offer of Settlement to eliminate "in-the-box" retiree health benefits by the end of 2014, and that the Company made this December 8 oral proposal to offer higher wage increases if the Union agreed to end retiree health benefits by the end of 2014, and lower wage increases if it agreed to end them by the end of 2015. (Tr. 162–163.)

Cookson said he would. Cookson then asked if the Union was rejecting the Company's offer, and that he (Cookson) had just shown how the Company was offering the Union back 80 percent of the savings it would receive from eliminating retiree health benefits. There was some additional discussion about Respondent's proposal, and the Union asked questions about the Company's calculations regarding the amount of the savings. Marshman explained that the Union "can't even get a compromise to formally compensate for what is being lost." Cookson responded, "I've offered you a way to extend the new box to the end of 2015. I offered contributions to the HSA as a way to deal with that going forward." (GC Exh. 11.)

The discussion then moved to the wage disparity that existed between the employees working at Bruce Mansfield and the employees working at the Company's Sammis facility. The Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility. Cookson pointed out that the Company was offering a $.75 per hour equity adjustment across the board to help "bridge that gap" for every employee at the Bruce Mansfield facility. Marshman questioned why the Bruce Mansfield employees should be paid less for the same work. In the end, Marshman rejected the Company's proposal, stating that the parties had a number of other matters to address. That was the end of the session. The Union never presented the Company's oral offer to its members for consideration.

3. Cookson and Marshman one-on-one meetings in July and August 2015

The parties had no further bargaining sessions scheduled following their December 8, 2014 session. In the spring 2015, Cookson contacted Marshman about the two meeting alone. Cookson hoped this would help facilitate the resumption of bargaining. The two agreed to meet on July 7, 2015, at a Perkins Restaurant in Austintown, Ohio.

On July 7, 2015, Cookson and Marshman met as planned. Because the proposals discussed at the December 8, 2014 bargaining session were verbal, Cookson prepared a written summary of where the parties were as of that meeting, and he gave that written summary to Marshman at the start of their July 7 meeting. The summary tracked what the Company had previously verbally proposed, including what the Company was offering in exchange for eliminating retiree health benefits for "in-the-box" retirees. However, because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health benefits ending by December 31, 2015. Also, in the Company's Comprehensive Offer of Settlement, it proposed maintaining the current pension plan for existing employees, but moving to a cash-balance retirement savings account (or defined contribution benefit plan) for new employees hired in the future. Cookson reiterated the Company's desire to implement this for future new hires during his July 7 meeting with Marshman

The two went over Cookson's written summary. Marshman then countered, proposing that the Company keep retiree health benefits until the end of 2017, offer a 12-percent equity adjustment to wages, plus a 3-percent general wage increase, both at ratification, and no cash-balance retirement plans. Cookson responded, stating there was no way the Company could go beyond 2015 for retiree health care; that while the Company was interested in providing an equity adjustment, Marshman's proposed amount was too large; and that the Company had to have cash-balance retirement plans for new hires.

During this July 7 meeting, Cookson also informed Marshman that the Company was going to need to expand its earlier proposals regarding resource sharing and mobile maintenance. Resource sharing is an established procedure that allows the Company to send Bruce Mansfield employees to its other facilities to perform work. Mobile maintenance is a department of employees at one of the Company's other facilities who travel around to the Company's facilities to perform maintenance work. These employees have similar knowledge and skills as the unit maintenance employees, but perform the work at a lower cost. Cookson told Marshman he would be providing written proposals on expanded use of resource sharing and mobile maintenance at their next meeting.

Cookson and Marshman next met on July 21, 2015, at the Perkins Restaurant in Austintown, Ohio. At this meeting, Cookson handed Marshman a multipage document entitled "Summary of New Proposals and Revisions to 9/25/14 Company Comprehensive Proposal and 12/8/14 proposals provided to Union 7/21/15." (R. Exh. 2.) The Company continued to propose an end to "in-the-box" retiree health benefits, now to be effective October 31, 2015, as opposed to the previously proposed December 31 date, as that date had already passed. The Company, however, increased the equity adjustment from $.75 to $1 per hour for all classifications, effective at ratification, and it now offered a general wage increase of 5.5 percent at ratification and 2.0 percent 1 year after ratification. The Company maintained its earlier proposal to make $500/$1000 annual contributions into employees' HSA or 401(k) accounts to help employees save for their health care upon retirement, and it continued to propose having new hires (hired after January 1, 2016) be placed in a cash balance plan, as opposed to the Union's pension plan. Cookson also provided the Company's proposals addressing resource sharing and mobile maintenance.[17]

[17] Although the proposals and discussions over the increased use of non-unit mobile maintenance employees do not directly relate to the allegations in Case 06–CA–163303, they do provide context to the allegations in Case 06—CA–170901, involving subcontracting. In particular, these proposals sparked an exchange between Cookson and Marshman over the current and future size of the bargaining unit and the contracting out of unit work. (GC Exh. 9, pg. 4.) During this July 21 meeting, Marshman pointed out that the Company had not replaced the nearly 130 employees that had left the bargaining unit since 2008. Cookson did not deny this, stating that a reduced headcount through attrition would give the plant a chance to survive. Marshman replied that could not come at the expense of the Union, and that the Union would need some type of an agency fee arrangement and/or contingency plan for contractors who come to the Bruce Mansfield plant. Marshman stated that a lot can be negotiated between the Company and its contractors. But Marshman stated he could not knowingly or willingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." (GC Exh. 9, p. 4.) It was during this exchange that Cookson also informed Marshman that the Company planned to reduce another 40–50 employees from the unit,

Cookson went through the document, explaining the changes. Cookson testified about this meeting, and his meeting notes also were introduced into evidence. (GC Exh. 9.) Cookson's notes provide the most detail about what was discussed. On the issue of wages, Cookson explained to Marshman that, with the equity adjustments and the general wage increases, the Company was now proposing an 8.5-percent increase in wages upon ratification. Cookson emphasized the Company was not proposing any retroactive pay, and the wage increases would be effective at ratification, with the additional increases effective 1 year thereafter. Marshman did not respond to Cookson's comment about ratification.

Marshman responded that the retiree health benefits had to go until 2017; the Company needed to provide a means to compensate the current and future retirees for the loss of their health benefits; the Union was not going to agree to a cash balance plan; and the Union had issues with the Company's proposals regarding resource sharing and mobile maintenance. Cookson asked Marshman to take the proposal to the Union's bargaining committee to review. The two agreed to meet again on August 20, 2015, at the same location.

On August 20, 2015, Cookson and Marshman met as scheduled. Cookson's notes from this meeting again provide the most detail about what was discussed. (GC Exh. 9.) According to the notes, Cookson began with where the parties stood, noting that they left the July 21 meeting with clear disagreements on the following: (1) ending health benefits for in-the-box retirees (the Company proposed ending it as of 10/31/15, and the Union would not accept unless coverage went until 2017); (2) cash balance pension plan for new hires (the Company proposed, and the Union rejected); and (3) making $500/$1000 annual contributions to HSA/401(k) accounts (the Union wanted contributions to for retirees as well, and the Company only was willing to do it for active employees). Cookson then stated that the Company could move on the term of the agreement and still had room to move in the wage area. Marshman responded that retiree health care has a monetary value, and that the Company should provide the savings from the termination of this benefit to the retirees. Cookson's notes reflect he (CC) and Marshman (HM) had the following exchange regarding the termination of health benefits for "in-the-box" retirees:

> (CC) Our position is that it (the box) will end and go away. We are proposing to give $$ to the active employees. We have a fundamental disagreement. We are eliminating this across the board.
> (HM) Not trying to be unreasonable, this is not favorable to us. If I could get something, we could move on.
> (CC) In this area I cannot do any more than I have already offered.
> (HM) How do we get around this?
> (CC) We have offered other things—like an initial 8.5% wage increase.

(GC Exh. 9.)

The two discussed the Company's other proposals, including resource sharing and the mobile maintenance department. In the end, they agreed they were not near an agreement and the parties should return to the bargaining table with their full committees. They agreed to resume bargaining on September 17 and 18, 2015.

4. The September 17–18 bargaining sessions

The parties' committees met on September 17 and 18, at the Radisson Hotel in Beaver Falls, Pennsylvania. At the September 17 session, the Company gave the Union its "Second Comprehensive Offer of Settlement." The document was a redlined version of the parties' collective-bargaining agreement with the revisions Cookson had presented to Marshman during their one-on-one meetings. There were no substantive changes. The parties discussed the Company's offer, and the Union's response remained essentially the same. The Union never presented this Second Comprehensive Offer of Settlement to its members for ratification.

At the September 18 session, the parties focused on the use of the Company's mobile maintenance department and the use of contractors. The Union gave the Company a counterproposal regarding the Company's use of outside contractors. The Union sought to revise the language in Article IV, addressing Management Responsibilities, to prohibit the use of contractors if it deprived unit employees of overtime work. The Company considered and rejected the Union's proposal. The parties ended the September 18 session apart on several key issues, including, wages, retiree health care, cash balance pension plans, mobile maintenance, and resource sharing. The parties scheduled another bargaining session for October 19, 2015. The Union later cancelled the meeting because Marshman was unable to attend due to an illness, and Marshman was unwilling to have negotiations continue without him. The Company requested alternate dates, but the Union provided none.

Thereafter, Company internally concluded that the parties were at impasse. Without further bargaining sessions scheduled, the Company decided to implement certain terms from its Second Comprehensive Offer of Settlement.

5. Announced partial implementation

On October 27, 2015, Cookson and other Company representatives met with Union representatives following a scheduled labor-management meeting. Cookson explained to the Union representatives that the parties were at impasse and the Company was implementing certain terms from its Second Comprehensive Offer of Settlement. Cookson provided written documents explaining what proposals the Company was implementing. Among the implemented terms, the Company was ending retiree health subsidies for all in-the-box retirees by December 31, 2015; it would begin making annual contributions for current employees of $500/$1000 (depending on the type of health insurance coverage) toward Health Savings Accounts (or 401(k) account if no Health Savings Accounts) beginning in 2016; and all employees hired or rehired on or after January 1, 2016, would participate in the Company's cash bal-

primarily in the mechanical and electrical departments. [At the hearing, Cookson estimated that in the last 5 years the unit has gone from 275–300 employees to 230 employees, and the unit size has been steadily declining every year.] (Tr. 189–190.)

ance retirement plan (and not in the existing pension plan).[18] Cookson handed the Union a package of documents related to the impasse and the implemented terms. One of the documents the Company gave the Union was entitled "Summary of Implemented Terms." This document states the following regarding the Company's proposed increases to wages and shift differentials:

> Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates only effective upon ratification of the contract by membership
>
> > Equity adjustment-one dollar per hour increase applied to all wages in effect July 1, 2015, only upon Ratification
> > Effective the date of ratification, a General Wage Increase of five and one half percent (5.5%) will be granted on the wage rates in effect after equity adjustments
> > Effective one year following the date of ratification, a General Wage Increase of two percent (2.0%)
> > Upon ratification, increase Sunday Shift Premium to Two Dollars Five Cents ($2.05) per hour, Afternoon Shift Premium to One Dollar Fifty ($1.50) per hour, Night Shift Premium to One Dollar Fifty Five ($1.55) per hour.

As previously stated, the General Counsel and Respondent stipulated that the parties were at impasse as of October 27, 2015.

B. 06–CA–17901

1. Background

As previously stated, the Bruce Mansfield facility has three identical power-generating units: Unit 1, Unit 2, and Unit 3. Each unit consists of a turbine, a generator, a boiler pump, valves, and other auxiliary equipment. The Company shuts down a unit for periodic maintenance, which is referred to as a scheduled outage. A full-train overhaul is a larger scale outage that includes opening and disassembling the entire turbine-generator unit, inspecting and cleaning the parts, and then reassembling and closing the unit.[19] The bargaining unit employees at Bruce Mansfield historically have performed all the open/clean/close work. (Tr. 47–48.) The Company has contracted out certain specialized work, such as engineering, sandblasting, coating, painting, insulation, pipefitting, nondestructive testing, etc.

2. M116 Outage

In the spring 2016, the Company performed a full-train overhaul of Unit 1. This type of outage occurs approximately every 9 years. This particular outage involved nearly 600 tasks.[20] Christopher Cox, Respondent's Maintenance Manager, testified the Company internally evaluated the project and determined, after consulting with the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), that it could complete the project within 56 days. (Tr. 203–204.) The project was referred to as M116, because it involved Unit 1 at the Bruce Mansfield facility in 2016.

Planning for this particular outage began back in January 2015, when the Company's higher-level managers met to begin discussing the project. One of the topics discussed was who should perform the open/clean/close work. The Company's higher-level managers considered the following three alternatives: (1) have the work performed by bargaining-unit maintenance employees; (2) have the work performed by the Company's mobile maintenance department; or (3) have the work performed by outside contractors. According to internal emails, these managers concluded there were not enough available unit maintenance employees to perform the open/clean/close labor for a full-train turbine outage, while still performing the day-to-day maintenance work on the other two units and related equipment. The managers considered having the mobile maintenance employees perform the open/clean/close work, but the Company's industrial relations department believed it "would be too risky to use [mobile maintenance] in that capacity because the [turbine/generator] work was always performed in house and using [mobile maintenance] at this time would jeopardize ongoing negotiations with the [U]nion." (GC Exh. 12.) Ultimately, the managers focused on subcontracting out the work. There is no dispute the Company never involved the Union in this decision-making process.

The Company contacted General Electric ("GE") in early 2015 to request its bid to perform the M116 open/clean/close work. The Company contacted GE because GE originally manufactured the turbine generator units, and the Company continued to use GE to provide technical direction during outages. Additionally, GE provides a two-year warranty on any work it performs for the Company. GE provided warranties for work performed during prior outages.

In late February 2015, GE provided the Company with its bid to perform the work. Over the next several months, the Company had ongoing discussions with GE about its bid to perform the work. Christopher Cox was involved in overseeing the M116 project, making sure that it was executed on budget, on time, and safely. He testified that by about September 10, 2015, the Company made the decision and received approval to have GE perform the work at issue. Cox worked with GE over the next month or so on additional proposals to try to reduce the costs for the Company.[21] (Tr. 204–205.) On around November 13,

[18] Respondent did (not) implement other proposals from its Second Comprehensive Offer of Settlement. It is unnecessary to discuss them as they are irrelevant to deciding the matters at issue.

[19] Throughout the hearing, various terms were used to describe this work, including, but not limited to, the open/clean/close work, the turbine/generator overhaul, the turbine rebuild, the turbine outage, etc.

[20] The General Counsel introduced an internal report identifying each task performed during the outage, as well as the estimated man hours it would take to complete the each task. (GC Exh. 2.) The General Counsel presented two witnesses who testified that approximately 140-150 of the tasks were previously performed by unit employees. (Tr. 70–71)(Tr. 100–101.)

[21] At the hearing, Cox testified that the labor costs were actually more to use GE to perform the work at issue. (Tr. 205.) Cox provided no explanation or basis for his statement. The Company also did not introduce any documentary evidence to support or explain his statement.

2015, the Company entered into a purchase order to have GE perform the open/clean/close work on Unit 1. (GC Exh. 17.) There is no dispute that the Company did not inform the Union that it contracted with GE to perform this work until February 10, 2016.

Article IV of the parties' expired collective-bargaining agreement contained the management rights provision, which addressed subcontracting. It stated, in pertinent part, that:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

As part of this process, the Company faxed the Union a weekly spreadsheet report with the work the Company has assigned (on an emergency basis) or may assign to outside contractors. The Company continued this practice after the parties' agreement and extension both expired. The Company faxed the Union these reports on Friday, and then parties meet the following Wednesday at a contractors' meeting to discuss the work at issue.

Respondent introduced 10 of these weekly spreadsheet reports, covering certain weeks from June 5, 2015, through November 20, 2015 (specifically, the reports were for 2/6/15, 6/5/15, 7/7/15, 9/4/15, 9/18/15, 9/28/15, 10/2/15, 10/9/15, 11/6/15, and 11/20/15). Some of these reports refer to M116. Some identify the subcontractor and the type of work being performed. However, only two refer to M116 and turbine or generator. (R. Exh. 5.) The first is the June 5, 2015 report, which indicates Thomas Cowher, a higher-level consultant for the Company, requested a contractor for a job described as "Turbine Area General NDE M116." Christopher Cox testified that "NDE" stands for non-destructive examination. Non-destructive examination refers to when the turbine is apart and on the floor, and there is ultrasonic testing to inspect the area for cracks and erosion. Cox confirmed that bargaining unit employees do not perform this non-destructive testing. (Tr. 212–213.) The second is the November 6, 2015 report, which indicates that Thomas Cowher requested a contractor for a job described as "Generator labor M116." (R. Exh. 12.) Neither entry provides any additional information about the nature or scope of the project, when it was going to be performed, and/or who was going to perform it. None of the witnesses present for these weekly meetings could recall any discussions about the subcontracting of the open/clean/close work or the turbine/generator outage work for Unit 1.

The Company holds periodic "all hands" meetings with maintenance department employees. On June 15, 2015, the Company held "all hands" meetings for each of the shifts in which the M116 outage was raised. The Company gave a power-point presentation that generally addressed the outage. Only one of the witnesses, Devin Miller, a senior engineer consultant for Respondent, testified about the meeting, and he could not offer any specifics about what details were shared with employees. Miller confirmed that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. (Tr. 271.)

On January 11, 2016, the Company held a managerial meeting with its outage planners. No Union representative was present for this meeting. At this meeting, there was a power-point presentation, and one of the slides read, "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO." (GC Exh. 3.)

On February 10, 2016, the Company held a contractors information meeting with the Union. At this meeting, Paul Rundt, the Maintenance Superintendent, and Christopher Cox met with union representatives to inform them that the Company had contracted out the open/clean/close work to GE. Dennis Bloom, the Union recording secretary, and Frank Snyder, Union steward, were present for the meeting. Bloom testified that Rundt identified each of the jobs and which contractor was going to be performing the work. Specifically, Rundt stated that the Unit 1 turbine outage work was going to be given to GE. Rundt stated the Unit 1 boiler feed pump work may also go to GE. Bloom responded that the mechanical maintenance employees had performed the outage work in the past, and that it should be done by the unit employees. Rundt replied that the outage work was going to be contracted out to GE.[22] Rundt, however, left open the issue of who would perform the boiler feed pump work, stating that he would check into it and get back to the Union. (Tr. 64–65.) Snyder then requested the contractor information sheets, which would list the contractor, the particular tasks, the estimated man hours, and the estimated costs. As for the costs, Bloom testified Cox responded that the information was proprietary, that the Union was not entitled to that, and the information was not available. (Tr. 66–67.) Cox did not recall any request for information being made during this meeting. (Tr. 226.) Following the meeting, the Company

[22] Cox and Rundt both testified that Rundt informed the Union that the Company "was intending" to contract out the turbine outage work and auxiliary equipment work, including the boiler feed pump work, to GE. I do not credit that Rundt said the Company "was intending" to subcontract out the turbine outage work to GE. I find the Company had already made that decision, and it was final. The Company made the decision to subcontract this work in early 2015. It solicited and received GE's bid in the early spring of 2015. Cox testified the Company made the final decision to subcontract this work to GE on around September 10, 2015, and he continued to negotiate with GE for several more weeks to try to further reduce the cost to the Company. On November 13, 2015, the Company and GE entered into a purchase order to perform the work. At the January 11, 2016 outage readiness meeting, the Company informed managers that it had contracted with GE to perform the "labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract." In light of these circumstances, I credit Bloom's testimony that the Company presented its decision to subcontract the turbine outage work to GE as a final decision.

decided to have the unit employees perform the boiler feed pump work, and Rundt informed the Union of this decision.

3. Information request

Later, Bloom reported to Marshman what had occurred at this meeting. Thereafter, Marshman sent the Company a letter dated February 10, 2016, requesting information. The letter, in pertinent part, stated:

> This is a reaffirmation letter of the company's obligation to provide all information, upon request by Local 272, for contractors working at the Bruce Mansfield Plant. This would include:
>
> • Name
> • Number of employees
> • Estimated man/hours
> • Wages
> • Material costs
> (But not limited to).
>
> This letter is also a formal request for all information from paragraph above for the Unit One Outage.

In a letter dated March 14, 2016, Christopher Cox, the Maintenance Manager, responded to Marshman's information request, providing the Union with a three-page chart containing the work order number for the contracted-out job, the abbreviation for the contractor's name on the order, a short description of the work the contractor was to perform, and the estimated number of man-hours to perform the work described. The Company did not provide the wages the contractor paid to the individuals performing the work or the material costs. There is no mention of this information in the Company's response, and no explanation as to why the information was not being provided to the Union.

Marshman testified that after receiving Cox's March 14 letter he called Cox to tell him the response was insufficient. Marshman testified that he complained to Cox about not receiving the requested wage and material cost information. Marshman testified that he kind of gave Cox a summary why the Union needed it, stating that if the Union was going to try to negotiate the work that was performed, it "would need to know apples to apples" of what it was negotiating. (Tr. 124–125.)[23] The Company never provided the requested wage or material cost information, did not inform the Union that it was not going to provide it, or explain why it was not going to provide it. (Tr. 246–248).

The Unit 1 scheduled outage lasted from around March 20, 2016, through May 14, 2016. GE performed the open/clean/close work on the turbine-generator unit. There were no unit employees were involved in this turbine overhaul work. (Tr. 201.) The bargaining unit employees performed the boiler feed pump work. During this period of time, all available bargaining unit employees worked, including voluntary and involuntary overtime. Some of the unit employees turned down opportunities to work overtime.

V. LEGAL ANALYSIS

1. Did Respondent violate Section 8(a)(5) and (1) of the Act when it failed to also implement its proposed increases to wages and shift differentials from its final, pre-impasse offer while implementing other proposals from that same offer

The General Counsel contends Respondent violated Sections 8(a)(5) and (1) of the Act when, after the parties reached an impasse, it failed to implement its proposed increases to wages and shift differentials when it eliminated "in-the-box" retiree health benefits.[24] It is well-established that after the parties reach a good-faith impasse during contract negotiations, an employer may unilaterally implement changes to existing terms and conditions of employment provided those changes are "reasonably comprehended" within the employer's pre-impasse proposal to the union. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), enfd. 395 F.2d 622 (D.C. Cir. 1968). See also *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (implemented terms cannot be "significantly different" than those proposed to and rejected by the union). Moreover, an employer is not required to implement all aspects of its final, preimpasse offer, but may choose to implement portions of it. *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (unilateral raises that encompassed automatic progressions and merit increases held reasonably comprehended in pre-impasse proposals on merit wages even though employer gave higher wages and increased wages for a larger portion of employees than in the past). See also *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), enfd in relevant part, 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983); *Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990). The Board, however, has held that an employer cannot selectively implement proposals that are "inextricably intertwined" with unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006).

In *Plainville Ready Mix*, supra, the employer proposed during contract negotiations to change the wage structure and health insurance plan offered to employees. As for wages, the

[23] Marshman could not recall if he initially spoke with Cox or left him a voicemail message, but he did have this conversation with Cox about the Company's response. Cox testified that he does not recall any further communication with Marshman about this information request. (Tr. 228.) But Cox did recall having conversations with Marshman in the past on the topic of obtaining information from subcontractors, and that Respondent informed Marshman this information is proprietary to the subcontractor, and Respondent will not provide it. (Tr. 248–249.) I credit Marshman's specific recollection of telling Cox that he (Marshman) needed the requested information for negotiations and he needed to know "apples to apples" of what he was negotiating.

[24] Par. 12 of the complaint in Case 06–C–163303 alleges that Respondent violated Secs. 8(a)(5) and (1) of the Act when it "failed to implement the wage adjustments and shift differential proposals contained in its [Second Comprehensive Offer of Settlement] notwithstanding that it implemented the remaining terms from that proposal." As previously established Respondent implemented some but not all of the proposals from its Second Comprehensive Offer of Settlement. In its posthearing brief, the General Counsel made clear that it was alleging that Respondent violated Secs. 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for "in-the-box" retirees. (GC Br. 23.)

employer proposed to lower fixed hourly wage rates but introduced gain sharing and incentive pay plans to help employees make up the difference. The union rejected the proposal. In its final pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans and, instead, offer a higher fixed hourly wage rate. However, after reaching impasse, the employer did not implement the higher hourly wage rate or the gain sharing or incentive pay plans; it simply implemented the lower fixed hourly wage rates. The Board adopted the administrative law judge's finding that the employer violated the Act by doing so, holding that the lower wage rate was not reasonably comprehended in the employer's final offer because the lower hourly wage rate was presented as part of a package with the gain sharing and the incentive pay plans—it was not offered as a stand-alone proposal.

As for health insurance, the employer proposed a new plan that limited certain covered benefits, such as drug and alcohol treatment and psychological treatment, and it increased the employees' premiums, deductibles, and copays. But the new plan also added benefits, such as vision care, emergency care, and a prescription drug card. After reaching impasse, the employer partially implemented the proposed health insurance plan, without the added benefits. The Board adopted the judge's finding that the employer violated the Act when it implemented the proposed plan without the added benefits, stating that, "the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation …" See id. at 585.

In *Cleveland Cinemas Management Co*., supra, the successor employer acquired a movie theater that employed union-represented projectionists. During negotiations, the successor employer informed the union that it wanted to eliminate the dedicated projectionist positions and have that work performed by supervisors. The union objected. The employer then offered to enter into a service technician agreement which would have two of the projectionists working fulltime covering all three of the employer's area theaters in exchange for eliminating the dedicated projectionist positions. The union rejected this proposal, stating it wanted both the dedicated projectionist positions and the service technician agreement. The employer was unwilling to do this, and it gave the union its written proposal regarding the service technician agreement. Thereafter, the parties reached an impasse, and the employer partially implemented its final offer. The employer eliminated the dedicated projectionist positions and had that work performed by supervisors, but it did not implement the proposed service technician agreement. Applying *Plainville Ready Mix*, the Board adopted the judge's finding that the employer violated the Act by failing to implement the proposed service technician agreement, holding that it was presented to the Union in its final, pre-impasse offer as a "quid pro quo" for the union giving up the dedicated projectionist positions.

Here, the General Counsel relies upon the "inextricably intertwined" theory to support his position that Respondent was obligated to also implement the proposed increases to wages and shift differentials contained in its Second Comprehensive Offer of Settlement because they were presented as part of an overall package to compensate the Union for the elimination of "in-the-box" retiree health benefits.[25] I agree. I find that from December 8, 2014 forward, Respondent proposed the wage increases at issue, as well as annual contributions into employees' HSA or 401(k) accounts, as a quid pro quo for the elimination of "in-the-box" retiree health benefits.[26] There is no dispute that Respondent's December 8 oral proposal directly tied the wage increases to the elimination of the "in-the-box" retiree health benefits. (Tr. 162–163.) Also, it was during this December 8 bargaining session when Marshman asked how much of the savings from the elimination of these retiree health benefits was the Company willing to share with the Union, Cookson responded that the Company would save $1.25 million a year by ending the benefits by the end of 2014, and that the Company's oral proposal to the Union would cost it $1 million a year. When Marshman continued to assert that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson responded that he had already explained how the Company's oral proposal was offering the Union back 80 percent of the savings from the elimination of those benefits.

The Company continued to tie the proposed wage increases to the elimination of the "in-the-box" retiree health benefits when Cookson met one-on-one with Marshman in July and August 2015. At the July 7, 2015 meeting, Cookson reduced the Company's December 8 oral proposal to writing. At the July 21, 2015 meeting, the Company increased the equity adjustment portion of its proposal from $.75 an hour to $1 an hour, but the quid pro quo nature of the proposal remained the same.[27] Cookson pointed out to Marshman at this July 21 meeting that the Company was now proposing an 8.5 percent wage increase, consisting of the combined 7.5 percent general wage increases and the $1 per hour equity adjustment. At their August 20, 2015 meeting, when Marshman continued to chal-

[25] Respondent did implement its proposal to make annual contributions to the employees' HSA or 401(k) accounts as set forth in its Second Comprehensive Offer of Settlement.

[26] The term "proposed wage increases" as used in this Decision encompasses the proposed equity adjustments, general wage increases, and shift differentials referred to in the Company's Second Comprehensive Offer of Settlement.

[27] At the hearing, Cookson confirmed the December 8 oral proposal tied the wage increases to the elimination of the "in-the-box" retiree health benefits, and those increases were higher if the Union agreed to eliminate the benefits by the end 2014, as opposed to the end of 2015. However, he claims the Company abandoned its proposal tying the wage increases to the elimination of the retiree health benefits after the December 31, 2014 deadline passed. (Tr. 137–138.) I do not credit this testimony. Although the proposed incentive to get the Union to agree to end the benefits by the end of 2014 went away with the passage of time, the proposals and discussions continued to tie the wage proposals and elimination of retiree health benefits together. The Company never withdrew its proposal, and it never informed the Union that it was no longer proposing the wage increases and annual contributions to employees' HSA or 401(k) accounts to compensate for the elimination of the retiree health benefits. On the contrary, as previously stated, Cookson continued to make statements showing that the proposals were related when he met with Marshman one-on-one in July and August 2015.

lenge that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson pointed out that the Company was offering an 8.5 percent increase in wages if the retiree health benefits ended in 2015.

When the parties met again for bargaining on September 17 and 18, 2015, there is no dispute that the Company made the same package proposal to the Union that Cookson had presented to Marshman. The Company never modified its proposal as it related to increases to wages and shift differentials and the elimination of retiree health benefits, and it never informed the Union that it would eliminate retiree health benefits without implementing the proposed increases. It was not until October 27, 2015, when Respondent announced it was implementing portions of its Second Comprehensive Offer of Settlement, that the Union learned Respondent was not also implementing the proposed increases to wages or shift differentials.

In its posthearing brief, Respondent initially contended its wage proposals were not linked to any other aspect of its proposal, but a sentence later Respondent claimed that, if anything, its proposals were in response to the Union's stated concerns over the wage gap between the Bruce Mansfield facility and the Sammis facility. (R. Br. 28).[28] I reject this contention, largely because it is contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals, which, as previously stated, directly tied the wage proposals to the elimination of the "in-the-box" retiree health benefits. While Respondent's wage proposals included an equity adjustment, in the form of a flat dollar amount, it was only one aspect of its overall quid pro quo proposal. Another aspect of the proposal was the general wage increase (GWI), which was in the form of percentage increases. If Respondent's wage proposal was limited to bridging the wage gap between the two facilities, it is unclear why it needed to distinguish between an equity adjustment and a general wage increase when it submitted its proposal.

Moreover, while it is true Marshman and the Union complained that the Company was not offering enough to equalize the wages between the two facilities, Marshman never abandoned the Union's position that the Company was not offering enough to compensate for the elimination of the "in-the-box" retiree health benefits. And, as previously stated, when Cookson and Marshman met on August 20, 2015, and Marshman continued to complain that the Company was not offering enough, Cookson responded that the Company was offering the Union an 8.5 percent wage increase. In other words, while the parties discussed the equity adjustments, it was never in isolation or at the exclusion of the other aspects of Respondent's integrated proposal. And when the Union rejected the Company's Second Comprehensive Offer of Settlement, it did so because it objected to several of the Offer's provisions, including aspects of Respondent's quid pro quo proposal. (Tr. 179–181.)

Contrary to Respondent's contentions, I find it proposed an integrated package, which consisted of an equity adjustment, the general wage increases, the shift differentials, and the annual contributions to the employees' HSA or 401(k) accounts, as a quid pro quo for the elimination "in-the-box" retiree health benefits. The fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities does not alter this conclusion, because a proposed wage increase certainly can, and in this case did, serve two objectives.

Accordingly, I find that by implementing the elimination of "in-the-box" retiree health benefits without implementing the general wage increases, the equity adjustments, and the shift differentials, Respondent implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement. Respondent either could have maintained the "in-the-box" retiree health benefits or implemented the proposed increases to wages and shift differentials.

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the wage adjustments and shift differentials on contract ratification

The General Counsel's second argument is that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases upon contract ratification. Contract ratification is a permissive subject of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on ratification. See *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). Requiring ratification substantially modifies or weakens the independence of the representative chosen by the employees by enabling the employer, in effect, to deal with its employees rather than with their statutory representative. Id. at 350. It is because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs … it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *New Process Steel*, 353 NLRB 111, 114 (2008), revd on other grounds 560 U.S. 674 (2010) (quoting *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 226 (1991) (Chairman Stephens concurring)). Thus, the Board requires the parties have an express agreement to make ratification a condition precedent, and that such an agreement "is not established casually or equivocally." Id. at 114–115. Absent evidence of such an agreement, the union retains sole discretion over whether to ratify the contract or not. Id.

Respondent argues that it repeatedly indicated in its proposals that increases to wages and shift differentials would be effective upon ratification, and the Union did not object or request to bargain over the ratification language. I do not find that constitutes an express agreement binding on the Union.[29]

[28] In its posthearing brief, Respondent addressed arguments it anticipated the General Counsel might make as to how or to what it (Respondent) tied these wage increases to when making its proposals. For example, Respondent anticipated the General Counsel might argue the wage proposals were tied to new productivity standards and/or new work rules. (R. Br. 30–33.) Respondent curiously does not address the argument that the wage proposals were exchange for the elimination of the retiree health benefits.

[29] In its posthearing brief, Respondent claims that it never actually required contract ratification as a condition precedent to paying the increases, and that its use of the phrase "contract ratification" was "merely a proxy" for when the parties reached an agreement, and the

Beatrice/Hunt-Wesson, Inc., supra. Absent such an agreement, Respondent violated the Act when it conditioned implementation of the proposed wage increases on contract ratification.

In its defense, Respondent argues that under Board law it is not unlawful to combine mandatory and permissive bargaining subjects in a proposal, so long as the employer does not insist to impasse on the permissive bargaining subjects. While generally accurate, I find Respondent did, in fact, unlawfully insist on contract ratification when it implemented portions of its pre-impasse offer but withheld the inextricably intertwined wage increases, and then informed the Union and the employees in its October 27, 2015 correspondence that those increases would only be implemented upon contract ratification.

Respondent cites to *White Cap, Inc.*, 325 NLRB 1166 (1989), enfd 206 F.3d 22 (D.C. Cir. 2000), as supporting its position. In that case, the employer and union negotiated an agreement, but the employees failed to ratify it. The employer offered monetary incentives to facilitate ratification, but the employees again voted it down. The employer again proposed the added incentives but warned the union that they would be withdrawn if the employees again failed to ratify the agreement within a set time period. When the employees again failed to ratify, the employer followed through and withdrew the added incentives from its offer. A charge was filed, and the Board found that employer acted lawfully.

Respondent argues that if it is lawful to threaten to withdraw—and actually withdraw—wage proposals based upon a union's failure to ratify a new agreement, an employer does not commit an unfair labor practice by timing its wage proposals to coincide with ratification. Respondent further argues that its non-implementation of the wage proposals was an inducement to convince the Union to finalize a new agreement. I reject these arguments. In *White Cap*, the employer was transparent when it informed the union that it was only offering the added incentives as an inducement to get the employees to timely ratify the agreement, and that it would withdraw those incentives if the employees failed to do so. In this case, Respondent never indicated to the Union prior to or when it submitted its Second Comprehensive Offer of Settlement that it would eliminate "in-the-box" retiree health benefits without also implementing the proposed wage increases. Moreover, *White Cap, Inc.* involved the withdrawal of proposed monetary incentives unrelated to any other proposals. In the present case, Respondent proposed the wage increases part of a quid pro quo package to compensate for the elimination of the "in-the-box" retiree health benefits, and, as previously explained, it became obligated to implement those increases when it eliminated the retiree health benefits.

Respondent also argues it was merely abiding by its understanding as to the Union's established practice of submitting agreements to its members for ratification. I reject this argument as well. First, Board law requires the parties have an express agreement on ratification, and there was no such agreement in this case. Second, the parties reached an impasse, not an agreement. As such, there was nothing for the members to ratify. Finally, there is no evidence that this type of situation has happened before, so Respondent has no basis for asserting that it was simply abiding by the Union's established policy or practice when it required ratification.[30]

Based on the foregoing, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases on contract ratification.

3. Did Respondent violate Section 8(a)(5) and (1) of the Act when it subcontracted the outage maintenance work on Unit 1 without providing the Union with notice or an opportunity to bargain over the decision

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it subcontracted out bargaining unit work associated with the Unit 1 outage without providing the Union with notice or an opportunity to bargain. Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires the employer provide timely notice and a meaningful opportunity to bargain over the change at issue. See *First National Maintenance*, 452 U.S. 666, 682 (1981). Once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

It is well established that a decision to subcontract unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of a contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v.*

intent was that the increases would be effective the same time as the new agreement was reached. (R. Br. 33–34.) Respondent presented no evidence the Union or employees shared this understanding of the use of the term "contract ratification." Moreover, I find Respondent's claim to be disingenuous in light of the fact it distributed a document to the Union and employees on October 27, 2015, entitled "Summary of Implemented Terms" which specifically states, "Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates *only effective upon ratification of the contract by membership*." (Jt. Exh. 8, p. 2.) (emphasis added).

[30] When the parties extended their collective-bargaining agreement to February 15, 2014, they made certain modifications. The Union did not submit the extension for ratification because it was not considered a new agreement. Cookson acknowledged he was made aware of this fact at or around the time of the extension. Respondent, therefore, was aware the Union does not require ratification of when something less than a new agreement is involved.

NLRB, 379 U.S. 203, 215 (1964). See also *Mi Pueblo Foods*, 360 NLRB 1097 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644–647 (2011); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467–469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Torrington Industries*, 307 NLRB 809, 810–811 (1992).[31]

Here, Respondent subcontracted work historically performed by bargaining unit employees without first bargaining with the Union. Respondent, however, contends that it had no obligation to bargain because the decision to subcontract was not based on labor costs.[32] Respondent contends it subcontracted the work to GE because there were not enough unit employees available to perform the work at issue within the timeframe set to complete the project. Additionally, Respondent argues that it had no obligation to bargain because subcontracting the work to GE did not result in any material change or detrimental impact for any of the unit employees. Specifically, Respondent contends no unit employee lost work and, in fact, employees worked or were offered (and some refused) extensive overtime during the outage. Finally, Respondent contends that its decision to subcontract to GE was based, in part, on the fact that GE offered a warranty on the work it performed.

For the reasons stated below, I find Respondent had a duty to bargain, and that the decision to subcontract was based, at least in part, on labor costs.

I find the Board's decision in *Mi Pueblo Foods*, 360 NLRB 1097 (2014), particularly instructive and applicable in response to Respondent's arguments. In that case, the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The judge found no violation because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board reversed, holding that bargaining is not excused simply because there was no evidence of immediate impact on the employees' terms and conditions of employment. The Board held that whenever bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099. In reaching this conclusion, the Board cited to its decision in *Overnite Transportation, Co.*, 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), in which it held that the employer had an obligation to bargain even though the subcontracting involved an influx of new work that unit employees could not handle, and where none of the unit employees lost any work. In so finding, the Board in *Overnite Transportation* held:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members. In *Mi Pueblo Foods*, the Board noted another possible topic for negotiation with the union was expanding the bargaining unit. 360 NLRB at 1099.

Respondent claims it had no obligation to bargain because the decision to subcontract was not based on labor costs, but rather on its need to get the project completed within the established time frame, and it would not be able to do so using unit employees.[33] However, as the cases cited above make clear,

[31] In *Torrington Industries*, the Board noted that while there may be non-labor cost reasons for subcontracting that may provide a basis for concluding the decision to subcontract is not a mandatory subject of bargaining, the employer's reason for subcontracting must implicate a matter of core entrepreneurial concern defined by a fundamental change is the "scope and direction" of its business, which would then trigger a balancing of the sort described in *First National Maintenance Corp*. 307 NLRB at 811. There is no contention the subcontracting at issue amounted to a core entrepreneurial decision or involved a fundamental change in the scope or direction of Respondent's business.

[32] Respondent also argues it had no obligation to bargain because it was actually more expensive to subcontract the work to GE than it would have been to have the unit employees perform it. Respondent's only support for this is the testimony of Christopher Cox, who was asked on direct examination whether labor costs played a role in the decision to use GE to perform the work, and he replied "labor costs are actually more for GE." (Tr. 205–206.) Cox provided no explanation or support for this statement, and Respondent offered nothing more. I find Cox's single, conclusory statement insufficient to prove that it was, in fact, more expensive to subcontract the work to GE.

[33] In its posthearing brief, Respondent argues its decision to subcontract was motivated by its concerns about completing the work within "the tight timeframe mandated by the PJM Interconnection." (R. Br. 43). Cox, however, testified the Company was involved in setting the "internal benchmark" for how long it would take to complete the outage. Then, based on the information it received from PJM, including how long comparable outages took, the Company reported to that PJM that it could complete the project within the 56-day timeframe. (Tr. 203–204.) In light of this evidence, I find it misleading for Respondent

that does not authorize Respondent's unilateral action--the Board still imposes a duty to bargain in those situations.

The same is true regarding Respondent's claim that it did not have an obligation to bargain because no unit employee experienced a reduction in hours or loss of overtime opportunity as a result of the subcontracting. As the Board held in *Overnite Transportation* and *Mi Pueblo Foods*, evidence of an immediate impact on employees' terms and conditions of employment is not required. The duty to bargain is triggered by concern that the subcontracting could potentially affect the size of the unit or dilute the union's strength. In this case, these are not hypothetical concerns. During negotiations, Respondent raised concerns over the profitability of the Bruce Mansfield facility and the need to reduce labor costs, which included the need to reduce the size of the bargaining unit. Respondent also proposed changes, including the increased use of mobile maintenance employees, which would allow it to increase the amount of unit work it could assign to nonunit employees. Cookson and Marshman discussed these matters during their July 21, 2015 meeting. It was in this meeting that Marshman raised concerns over the dwindling size of the bargaining unit, noting that Respondent had not replaced the nearly 130 employees that had left the unit since 2008. Cookson replied that a reduced headcount through attrition would give the plant a chance to survive, and he added that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. Marshman stated he could not knowingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." In light of this evidence, I find the continued diminution of the size and strength of the unit as an adverse effect, particularly when Respondent's stated reason for subcontracting to GE was there were not enough unit employees to do the work.

Finally, I reject Respondent's argument that it had no obligation to bargain because its decision to subcontract to was, in part, because GE offered a warranty on the work it performed. The extent or scope of this warranty is unclear from the record, and it appears that GE has warranted other work in the past, including when the unit employees performed the outage work. Regardless, Respondent has cited no authority that the existence of a warranty excuses to a failure to bargain.

Respondent next argues even if it had an obligation to bargain over the decision to subcontract the work at issue, the Union waived that right by failing to timely request bargaining. A union cannot have waived bargaining where it did not receive clear and timely notice of change, nor can it have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001).

Respondent claims it gave the Union timely notice of its decision to subcontract outage work beginning in February 2015, when it began providing the Union with weekly contracting reports addressing the M116 outage, and when it met with the Union during their weekly contractor meetings. Respondent, however, fails to differentiate between work associated with the outage and *bargaining unit* work associated with the outage. There is no dispute that Respondent had a history of subcontracting out work during outages, usually specialized work. Notice that Respondent intended to continue subcontracting out that work during the M116 outage is not notice of a change. The change requiring clear and timely notice is the subcontracting of the open/clean/ close work to GE. None of the weekly notification reports in evidence refer to GE or the open/clean/close work. The only weekly notification report Respondent specifically refers to in its posthearing brief is the June 5, 2015 weekly report, which indicates a need for a contractor for a job described as "Turbine Area General NDE M116." As previously stated, Cox testified that "NDE" stands for non-destructive examination, which was work historically performed by an outside contractor, not bargaining unit employees.[34]

Respondent also argues that it provided notice of the change at issue during the June 15, 2015 "all hands" meetings in which the M116 outage was raised. However, Devin Miller testified that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. Moreover, even if actual information had been shared about who was going to be performing the work, these were employee meetings, and the Board has held that notice to employees does not constitute sufficient notice to the union. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017.

I find the first notice Respondent gave the Union that it was going to subcontract the work at issue to GE was on February 10, 2016, when Rundt announced the decision to Bloom and Snyder after the labor-management meeting. The General Counsel alleges, and I so find, that Rundt announced this change as a fait accompli based on the statements and surrounding circumstances. The evidence establishes that Respondent began negotiating with GE to perform the work in February 2015, and they continued their discussions over the next several months. Cox testified that Respondent made the final decision to subcontract the work at issue to GE on around

to suggest it had no control over the amount of time available to it to perform the Unit 1 outage work.

[34] Although Respondent does not raise it in its posthearing brief, there is the November 6, 2015 weekly notification report, which references a job described as "Generator labor M116." I do not find this limited entry constitutes clear notice to the Union of the Company's decision to subcontract the open/clean/close work, because the report contains no other information about the scope or nature of the project, when it was going to be performed, and/or who was going to perform it. Additionally, none of the witnesses present for these weekly contractors meetings between the Company and the Union could recall any discussions about the subcontracting of the turbine/generator outage or open/clean/close work for Unit 1.

September 10, 2015, and Respondent entered into a formal purchase order with GE on around November 13, 2015. The surrounding circumstances, including the statements made to managers during the January 11, 2016 outage readiness meeting, confirm this was settled. And when Rundt met with Bloom and Snyder on February 10, 2016, he was informing them of the decisions that had been made. He made it clear that Respondent was subcontracting the turbine outage work to GE. There was nothing tentative about that in what he said. What was not settled was who was going to perform the boiler feed pump work. Rundt indicated that work also may go to GE. The Union inquired about having unit employees perform that work, and Rundt said he would check and get back to the Union. He did, and the Union ended up handling the feed pump work. I conclude that while Respondent indicated it was open to discussing the feed pump work, it informed the Union the other work was going to be done by GE. As a result, I find Respondent first informed the Union of its decision to subcontract the work at issue on February 10, 2016, as a fait accompli.[35]

I, therefore, find Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with timely notice and a meaningful opportunity to bargain over the decision to subcontract unit work to GE.[36]

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with the contractor's wage data and material costs

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information referred to in the Union's February 10, 2016 letter. An employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to the union representing its employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held requested information pertaining to subcontracting, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting, the Board has held that a broad, discovery-type standard is utilized in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, supra at 1258; See also *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000). The Board also has held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258, fn. 5. See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003); *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989).

In applying this standard, I find the Union has met its burden of establishing potential or probable relevance of the information at issue based on the statements and circumstances surrounding the request. Marshman submitted the written information request on February 10, 2016, the same day the Union first learned Respondent had subcontracted the work to GE. This written request was made after Union Steward Snyder orally requested essentially the same information, including the subcontractor's cost information. When Cox responded to Snyder's oral request, he did not raise any concern as the relevance of the requested information. Rather, he stated the information was proprietary, the Union was not entitled it, and the information was not available.

After receiving the Company's partial response to the request, Marshman contacted Cox and stated the Union needed the wage and material cost information because it if was going to try to negotiate the work that was to be performed, it "would need to know apples to apples" what it was negotiating. (Tr. 124–125). I find this sufficient to put the Respondent on notice that the Union wanted to negotiate subcontracting of this work,

[35] Respondent contends that after receiving this notice the Union should have requested bargaining, and, if it had, Respondent would have bargained over the decision to subcontract the turbine/generator outage work, as evidenced by its willingness to re-assign the boiler feed pump work to unit employees after the Union asked for them to perform it. I find this contention rings hollow. Respondent knew in early 2015 that it was going to subcontract the turbine/generator outage work, but it withheld that information from the Union for almost a year. In early September 2015, when Respondent made the final decision to subcontract the turbine/generator outage work to GE, Respondent withheld that information from the Union, even though the parties were still bargaining over a new contract, in which one of the contested issues was the performance of unit work by non-unit employees. Respondent continued to withhold information from the Union regarding its subcontracting decision after it entered into the purchase order with GE in November 2015. Respondent waited three more months, and when it informed the Union it presented the decision as final. Under these circumstances, I reject Respondent's claim that it was willing to, or the Union would have been able to, engage in meaningful bargaining over the decision to subcontract this work as of this date.

[36] The complaint in 06–CA–163303 alleges that Respondent also failed to bargain over the effects of its decision to subcontract this unit work. In its posthearing brief, the General Counsel does not mention the effects bargaining allegation. As such, I need not reach the effects bargaining issue. See *Michigan Ladder Co.*, 286 NLRB 21, 22 (1987).

and that it wanted the contractor's wage information and material costs for comparative purposes to facilitate those negotiations.

In its defense, Respondent argues that, in addition to not being relevant, it had no obligation to produce the information because it was not in its possession. An employer's duty to supply relevant information also "extends to situations where the information is not in the employer's possession, but where the information can likely be obtained from a third party with whom the employer has a business relationship." *Earthgrains Co.*, 349 NLRB 389, 397–399 (2007), enfd. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008). See also *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991) (employer failed to meet its burden of demonstrating the information requested by the union was unavailable where there was no evidence it asked the third party subcontractor for the information). At the hearing, Cox acknowledged that the wage and material cost information could be requested from GE, but that he did not make that request or ask someone else to make the request. I find that Respondent has a long-standing, ongoing business relationship with GE, and it should have requested that information from GE in order to respond to the Union's information request.[37]

Consequently, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information from GE, which includes failing to request the information from GE.

Conclusions of Law

1. The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been and is the designated collective-bargaining representative of the following appropriate unit of employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

4. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act by implementing certain provisions from its Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with its pre-impasse proposal to the Union when it implemented the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

5. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, on contract ratification.

6. On or around January 1, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act when it unilaterally subcontracted bargaining unit work during the 2016 Unit 1 outage without providing the Union with notice and an opportunity to bargain about the decision to subcontract that work.

7. On or around February 10, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested wage and material cost information from GE that is relevant and necessary to the Union's role as the unit's collective-bargaining representative.

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

Remedy

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

Affirmatively, the Respondent shall, upon request from the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits. The Respondent shall rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification. The Respondent shall make employees make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the remaining information requested in its February 10, 2016 information request.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event

[37] Respondent makes no contention in its posthearing brief that the information at issue was proprietary or confidential.

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 October 27, 2015. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., shall

1. Cease and desist from:

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work.

(c) Unilaterally implementing provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

(d) Conditioning changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

(e) Failing or refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union's role as collective-bargaining representative.

(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) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

(b) Upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits.

(c) Make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

(d) Compensate the bargaining unit employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

(f) Provide the Union with the requested information sought in its February 10, 2016 request related to the wages and material costs paid by GE during the outage of Unit 1 in 2016.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

[38] 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.

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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 do anything to prevent you from exercising the above rights

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local No. 272, AFL–CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT fail or refuse to provide the Union with notice and an opportunity to bargain regarding changes to wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL NOT unilaterally implement changes to wages, hours, or other terms or conditions of employment that are inconsistent with our final, preimpasse offer made to the Union by implementing the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT condition implementation of changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative.

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 provide the Union with notice and an opportunity to bargain over changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL, upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in our Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date we implemented the elimination of the "in-the-box" retiree health benefits.

WE WILL make employees whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

WE WILL rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

WE WILL provide the Union with the remaining information requested in its February 10, 2016 information request.

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06–CA–163303 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.

JD–18–17
Akron, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.[1]

and **Cases 06–CA–163303**
06–CA–170901

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 272, AFL-CIO

David Shepley, Esq.,
for the General Counsel,
Brian W. Easley, Esq.,
for the Respondent
Marianne Oliver, Esq.,
for the Charging Party,

DECISION

I. INTRODUCTION

Andrew S. Gollin, Administrative Law Judge. These consolidated cases were tried before me on December 1-2, 2016, in Pittsburgh, Pennsylvania. The International Brotherhood of Electrical Workers, Local 272, AFL--CIO ("Union" or "Local 272") filed the underlying charges alleging FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. (Respondent or the Company) committed unfair labor practices affecting the unit employees at its Shippingport, Pennsylvania power plant.

The first case involves Respondent's partial implementation of its final pre-impasse offer to the Union. Respondent implemented certain proposals, including the elimination of retiree health benefits, but not its proposed increases to wages and shift differentials, stating those increases would be effective only upon contract ratification. The complaint presents two theories for why Respondent's failure to implement the proposed increases to wages and shift differentials violated Sections 8(a)(5) and (1) of the National Labor Relations Act (Act). First, the General Counsel argues that because Respondent proposed the increases as part of a package to compensate for the elimination of the retiree health benefits, it was obligated to also implement those proposed increases when it eliminated the retiree health benefits. Second, the General Counsel alleges that contract ratification is a permissive subject of bargaining, and Respondent was prohibited from making it a condition precedent to implementing the

[1] At the hearing, the parties stipulated to amending the pleadings to correct the employer's name to be FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp.

increases. Respondent denies the alleged violations. Based upon the evidence and applicable law, I find Respondent committed the violations as alleged, under both theories.

The second case involves Respondent's subcontracting of scheduled maintenance work historically performed by unit employees. The complaint alleges Respondent violated Sections 8(a)(5) and (1) of the Act when: (1) it subcontracted this unit work without providing the Union with notice and an opportunity to bargain over the decision to subcontract or its effects; and (2) when it failed or refused to provide the Union with the wages and material costs paid by the subcontractor. Respondent denies the allegations. I find Respondent breached its duty to bargain over the decision to subcontract because it announced its decision as a fait accompli. I also find the Union has met its burden of establishing the relevance of the requested subcontracting information.[2] Based on the evidence and applicable law, I find Respondent committed these violations as alleged.[3]

II. STATEMENT OF THE CASE

On November 4, 2015, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06--CA--163303. On February 29, 2016, the Union filed an amended unfair charge against Respondent in Case 06--CA--163303. Based on its investigation, on May 27, 2016, the Acting Regional Director for Region 6 of the Board, issued a complaint in Case 06--CA--163303, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act.[4] On June 9, 2016, Respondent filed its answer in Case 06--CA--163303, denying all alleged violations of the Act.

On March 2, 2016, the Union filed an unfair labor practice charge against Respondent, docketed as Case 06--CA--170901. Based on its investigation, on July 29, 2016, the Regional Director for Region 6 of the Board issued a complaint in Case 06--CA--170901, alleging that Respondent violated Sections 8(a)(5) and (1) of the Act. On August 11, 2016, Respondent filed its answer in Case 06--CA--170901,denying all alleged violations of the Act.

On November 10, 2016, the Regional Director for Region 6 issued an Order Consolidating Cases in Cases 06--CA--163303 and 06--CA--170901.

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[2] Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g.,*Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

[3] I make no finding regarding Respondent's alleged failure to engage in effects bargaining because the General Counsel appears to have abandoned that allegation by failing to raise or address it during the hearing or in his posthearing brief.

[4] On March 11, 2016, the Acting Regional Director issued a partial dismissal letter in Case 06—CA--163303, dismissing, among others, the allegation that the Company violated Sections 8(a)(5) and (1) of the Act when it failed to implement its proposed wage increases. On April 22, 2016, the Regional Director issued an amended dismissal letter rescinding the earlier dismissal, stating the allegations that the Company "failed to implement a proposed wage increase when it implemented its other terms of employment contained in its last comprehensive offer and, conditioned the implementation of this wage and shift differential increase upon membership ratification, are being retained for further processing." Both allegations are contained in the complaint in Case 06--CA--163303.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and General Counsel both filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following[5]

III. FINDINGS OF FACT

A. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent has been a corporation with an office and place of business in Akron, Ohio, and has been engaged in the operation of power generation plants in several states, including at its Bruce Mansfield plant located in Shippingport, Pennsylvania ("Bruce Mansfield facility"). In conducting its operations during the 12-month period ending February 29, 2016, Respondent derived gross revenues in excess of $250,000. During the 12-month period ending February 29, 2016, Respondent purchased and received goods at its Bruce Mansfield facility valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union has been a labor organization with the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction over this case, pursuant to Section 10(a) of the Act.

B. RESPONDENT'S OPERATIONS

Respondent operates coal-fired power generating plants throughout Ohio and Pennsylvania, including its Bruce Mansfield facility. The Bruce Mansfield facility contains three identical power generating units, referred to as Unit 1, Unit 2 and Unit 3. Each unit consists of a turbine, a generator, a boiler, valves, and other auxiliary equipment. Each unit operates as an integrated system. The system begins with the burning of coal to boil water to create highly pressurized steam; the steam is then pumped into the turbine-generator to produce electricity; and that electricity is released to the power grid for distribution and consumption. Respondent supplies power to the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), a federally regulated transmission organization that oversees the regional electricity markets.

C. COLLECTIVE-BARGAINING RELATIONSHIP

The Union represents a unit of approximately 230 production and maintenance employees at the Bruce Mansfield facility.[6] The parties' most recent collective-bargaining agreement was dated from December 5, 2009 to February 15, 2013. On August 16, 2012, the parties entered into a memorandum of agreement extending their collective-bargaining

[5] Abbreviations in this decision are as follows: "Tr.___" for transcript; "GC Exh.__" for General Counsel's Exhibit; "R. Exh. __" for Respondent's Exhibit; "Jt. Exh. __" for Joint Exhibit; "G.C. Br.____" for General Counsel's brief; and "R. Br. ___" for Respondent's brief.

[6] The Union has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of all production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, results, and yard departments, employed at Respondent's Shippingport, Pennsylvania facility, excluding technicians, office clerical employees and guards, professional employees and supervisors as defined in the Act.

agreement, with certain modifications, until February 15, 2014. The Union never held a ratification vote over this extension agreement.[7]

The parties began negotiations over a successor agreement on December 19, 2013, and those negotiations continued until September 18, 2015. The Company's negotiation committee included Anthony Gianatasio, Labor Relations Representative. Gianatasio reported to Charles Cookman, the Company's Executive Director of Labor Relations and Safety. Cookson participated in the negotiations beginning in late 2014. Gianatasio and Cookman are supervisors and/or agents of the Company within the meaning of Sections 2(11) and 2(13) of the Act. The Union's negotiation committee was led by Herman Marshman, Union President. The parties failed to reach a successor agreement prior to the expiration of the extension agreement, but they continued to negotiate, as detailed below, until reaching an impasse as of October 27, 2015.[8]

IV. UNFAIR LABOR PRACTICES

A. 06–CA–163303

1. Background

As previously stated, the parties began negotiations for a new agreement in December 2013, and those negotiations continued into 2014. On September 25, 2014, the Company gave the Union its Comprehensive Offer of Settlement, which detailed the Company's offer for an overall agreement. (R. Exh. 1). One of the key changes the Company sought during these negotiations was to eliminate retiree health benefits. Article XVIII, Section 3 of the parties' collective-bargaining agreement allowed current employees who retired during the term of the agreement to continue to participate in their chosen health benefit plan until the expiration of the agreement in effect at the time of their retirement, with the Company paying a portion of their health care and prescription drug coverage costs. The parties refer to these as "in-the-box" retirees because the amount the Company paid was set forth in a box chart in Article XVIII of the collective-bargaining agreement. Upon expiration of the agreement, these retirees then come out of the box.[9] "Out-of-the-box" retirees are eligible to enroll in a different, higher-cost company health care plan.[10]

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[7] The Union did not submit this extension for ratification because it was not a new agreement. (Tr. 158).

[8] At the hearing, the General Counsel and Respondent entered into a stipulation that the parties were at a good-faith impasse in their negotiations as of October 27, 2015. The Union did not participate in, but did not object to, this stipulation, stating that its position has been and remains that the parties were not at impasse. Regardless, the General Counsel controls the complaint, and the Union may not enlarge upon or change the General Counsel's theory of the case. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. mem. 325 Fed. Appx. 577 (9th Cir. 2009). Based upon the stipulation, I will accept, without further analysis, the parties were at a good-faith impasse when Respondent implemented the changes at issue on October 27, 2015.

[9] Charges over retiree health benefits were the subject of prior litigation. See *FirstEnergy Generation Corp.*, 358 NLRB 842 (2012), affd. 362 NLRB No. 66 (2015) (Board reaffirmed prior Board decision which was decided without a quorum under *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013)).

[10] The record does not address what, if any, amounts Respondent pays towards "out-of-the-box" retiree health benefits.

The Company's Comprehensive Offer of Settlement proposed eliminating health benefits for "in-the-box retirees" as of December 31, 2014.[11] This Offer also proposed annual wage increases, referred to as General Wage Increases ("GWI"), that would go into effect following contract ratification. The proposed increases were scheduled to go in effect as follows: one and one half percent (1½%) GWI effective the date of ratification; an additional one percent (1%) GWI effective 1 year following the date of ratification; and an additional one percent (1%) GWI effective 2 years following the date of ratification. This Offer also proposed increasing the shift differentials paid to employees for hours worked during the afternoon and evening shifts, and on Sundays, all effective upon ratification.[12] (R. Exh. 1). The Union did not present this Offer to its members for ratification.

2. December 8, 2014 Bargaining Session[13]

On December 8, 2014, the parties' committees met at the Radisson Hotel in Beaver Falls, Pennsylvania for bargaining. The evidence about this December 8 bargaining session consisted of the testimony of Charles Cookson, Respondent's Executive Director of Labor Relations and Safety, and the notes of Respondent's bargaining committee member, Tony Gianatasio.[14]

At this December 8 session, the parties discussed several topics, including Company's proposal to eliminate "in-the-box" retiree health benefits. The Union, through President Herman Marshman, stated the Company should provide some compensation for the loss of the retiree health care subsidies, and asked what percentage of the cost savings from the elimination of these subsidies was the Company willing to share with the Union. There was some discussion. Gianatasio's notes reflect the Company then orally made the following proposal:

1. A contribution of $500 for those with individual health care coverage and $1000 for employee/spouse, employee/child and family coverage to [the employee's health savings accounts] HSAs. If they do not participate in a FirstEnergy HSA, the money would be placed in their 401(k) account. This would be in each year of the contract in addition, you can choose one of the options from below:
2. If you end the new retiree health care box 12/31/14 we would provide a general wage increase in each year of the contract as follows:
    a. 3% at ratification
    b. 2.5% one year after ratification
    c. 2.5% 2 years after ratification

[11] Hereinafter the terms "in-the-box" retiree health benefits and retiree health benefits will be used interchangeably to refer to the health benefits paid to employees for the remainder of the agreement in effect at the time of their retirement.

[12] All the Company's wage proposals stated any increases would be effective upon ratification. Cookson testified the Company has an internal policy that it will not pay increases retroactively. (Tr. 173).

[13] There was no detailed evidence presented regarding bargaining prior to December 8, 2014.

[14] Gianatasio's notes provide more detail and context as to what was discussed, and nothing in Cookson's testimony contradicted Gianatasio's notes. Gianatasio was not called to testify. No other witness was called to testify about this bargaining session.

   d. In addition we would provide a $.75 equity adjustment[15] to all classifications at the time of ratification

3. If you end new retiree health care box 12/31/15 we would provide a general wage increase in each year of the contract as follows:
   a. 2.5% at ratification
   b. 2.0% one year after ratification
   c. 2.0% 2 years after ratification
   d. In addition we would provide a $.75 equity adjustment [to] all classifications at the time of ratification

(G.C. Exh. 11).[16]

In response to Marshman's earlier question about how much of the savings was the Company willing to share with the Union, Cookson stated that the Company would save $1.25 million a year by ending the retiree health care benefits by the end of 2014, and its proposed offer (discussed above) would cost it $1 million a year. The parties then discussed other topics, including safety, before returning to retiree health benefits. Marshman told Cookson he wanted to see if there was a reasonable way to distribute the savings, and Cookson responded that the Company's offer shows it was flexible. Marshman asked if Cookson would seriously entertain a counter offer, and Cookson said he would. Cookson then asked if the Union was rejecting the Company's offer, and that he (Cookson) had just shown how the Company was offering the Union back 80 percent of the savings it would receive from eliminating retiree health benefits. There was some additional discussion about Respondent's proposal, and the Union asked questions about the Company's calculations regarding the amount of the savings. Marshman explained that the Union "can't even get a compromise to formally compensate for what is being lost." Cookson responded, "I've offered you a way to extend the new box to the end of 2015. I offered contributions to the HSA as a way to deal with that going forward." (G.C. Exh. 11).

The discussion then moved to the wage disparity that existed between the employees working at Bruce Mansfield and the employees working at the Company's Sammis facility. The Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility. Cookson pointed out that the Company was offering a $.75 per hour equity adjustment across the board to help "bridge that gap" for every employee at the Bruce Mansfield facility. Marshman questioned why the Bruce Mansfield employees should be paid less for the same work. In the end, Marshman rejected the Company's proposal, stating that the parties had a number of other matters to address. That was the end of the session. The Union never presented the Company's oral offer to its members for consideration.

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[15] As discussed below, Bruce Mansfield unit employees earn less per hour than their counterparts at the Company's Sammis power plant in Stratton, Ohio. This "equity adjustment" refers to the Company's offer to increase wages for Bruce Mansfield unit employees to bring them closer to the Sammis employees.

[16] Cookson confirmed the Company made this December 8 oral proposal because the Union had objected to the Company's proposal in its Comprehensive Offer of Settlement to eliminate "in-the-box" retiree health benefits by the end of 2014, and that the Company made this December 8 oral proposal to offer higher wage increases if the Union agreed to end retiree health benefits by the end of 2014, and lower wage increases if it agreed to end them by the end of 2015. (Tr. 162-163).

3. Cookson and Marshman One-On-One Meetings in July and August 2015

The parties had no further bargaining sessions scheduled following their December 8, 2014 session. In the spring 2015, Cookson contacted Marshman about the two meeting alone. Cookson hoped this would help facilitate the resumption of bargaining. The two agreed to meet on July 7, 2015, at a Perkins Restaurant in Austintown, Ohio.

On July 7, 2015, Cookson and Marshman met as planned. Because the proposals discussed at the December 8, 2014 bargaining session were verbal, Cookson prepared a written summary of where the parties were as of that meeting, and he gave that written summary to Marshman at the start of their July 7 meeting. The summary tracked what the Company had previously verbally proposed, including what the Company was offering in exchange for eliminating retiree health benefits for "in-the-box" retirees. However, because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health benefits ending by December 31, 2015. Also, in the Company's Comprehensive Offer of Settlement, it proposed maintaining the current pension plan for existing employees, but moving to a cash-balance retirement savings account (or defined contribution benefit plan) for new employees hired in the future. Cookson reiterated the Company's desire to implement this for future new hires during his July 7 meeting with Marshman.

The two went over Cookson's written summary. Marshman then countered, proposing that the Company keep retiree health benefits until the end of 2017, offer a 12-percent equity adjustment to wages, plus a 3-percent general wage increase, both at ratification, and no cash-balance retirement plans. Cookson responded, stating there was no way the Company could go beyond 2015 for retiree health care; that while the Company was interested in providing an equity adjustment, Marshman's proposed amount was too large; and that the Company had to have cash-balance retirement plans for new hires.

During this July 7 meeting, Cookson also informed Marshman that the Company was going to need to expand its earlier proposals regarding resource sharing and mobile maintenance. Resource sharing is an established procedure that allows the Company to send Bruce Mansfield employees to its other facilities to perform work. Mobile maintenance is a department of employees at one of the Company's other facilities who travel around to the Company's facilities to perform maintenance work. These employees have similar knowledge and skills as the unit maintenance employees, but perform the work at a lower cost. Cookson told Marshman he would be providing written proposals on expanded use of resource sharing and mobile maintenance at their next meeting.

Cookson and Marshman next met on July 21, 2015, at the Perkins Restaurant in Austintown, Ohio. At this meeting, Cookson handed Marshman a multi-page document entitled "Summary of New Proposals and Revisions to 9/25/14 Company Comprehensive Proposal and 12/8/14 proposals provided to Union 7/21/15." (R. Exh. 2). The Company continued to propose an end to "in-the-box" retiree health benefits, now to be effective October 31, 2015, as opposed to the previously proposed December 31 date, as that date had already passed. The Company, however, increased the equity adjustment from $.75 to $1 per hour for all classifications, effective at ratification, and it now offered a general wage increase of 5.5 percent at ratification and 2.0 percent 1 year after ratification. The Company maintained its earlier proposal to make $500/$1,000 annual contributions into employees' HSA or 401(k) accounts to help employees save for their health care upon retirement, and it continued to propose having new hires (hired after January 1, 2016) be placed in a cash balance plan, as opposed to the Union's pension

plan. Cookson also provided the Company's proposals addressing resource sharing and mobile maintenance.[17]

Cookson went through the document, explaining the changes. Cookson testified about this meeting, and his meeting notes also were introduced into evidence. (G.C. Exh. 9). Cookson's notes provide the most detail about what was discussed. On the issue of wages, Cookson explained to Marshman that, with the equity adjustments and the general wage increases, the Company was now proposing an 8.5-percent increase in wages upon ratification. Cookson emphasized the Company was not proposing any retroactive pay, and the wage increases would be effective at ratification, with the additional increases effective 1 year thereafter. Marshman did not respond to Cookson's comment about ratification.

Marshman responded that the retiree health benefits had to go until 2017; the Company needed to provide a means to compensate the current and future retirees for the loss of their health benefits; the Union was not going to agree to a cash balance plan; and the Union had issues with the Company's proposals regarding resource sharing and mobile maintenance. Cookson asked Marshman to take the proposal to the Union's bargaining committee to review. The two agreed to meet again on August 20, 2015, at the same location.

On August 20, 2015, Cookson and Marshman met as scheduled. Cookson's notes from this meeting again provide the most detail about what was discussed. (G.C. Exh. 9). According to the notes, Cookson began with where the parties stood, noting that they left the July 21 meeting with clear disagreements on the following: (1) ending health benefits for in-the-box retirees (the Company proposed ending it as of 10/31/15, and the Union would not accept unless coverage went until 2017); (2) cash balance pension plan for new hires (the Company proposed, and the Union rejected); and (3) making $500/$1000 annual contributions to HSA/401(k) accounts (the Union wanted contributions to for retirees as well, and the Company only was willing to do it for active employees). Cookson then stated that the Company could move on the term of the agreement and still had room to move in the wage area. Marshman responded that retiree health care has a monetary value, and that the Company should provide the savings from the termination of this benefit to the retirees. Cookson's notes reflect he (CC) and Marshman (HM) had the following exchange regarding the termination of health benefits for "in-the-box" retirees:

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[17] Although the proposals and discussions over the increased use of non-unit mobile maintenance employees do not directly relate to the allegations in Case 06--CA--163303, they do provide context to the allegations in Case 06--CA--170901, involving subcontracting. In particular, these proposals sparked an exchange between Cookson and Marshman over the current and future size of the bargaining unit and the contracting out of unit work. (GC Exh. 9, pg. 4). During this July 21 meeting, Marshman pointed out that the Company had not replaced the nearly 130 employees that had left the bargaining unit since 2008. Cookson did not deny this, stating that a reduced headcount through attrition would give the plant a chance to survive. Marshman replied that could not come at the expense of the Union, and that the Union would need some type of an agency fee arrangement and/or contingency plan for contractors who come to the Bruce Mansfield plant. Marshman stated that a lot can be negotiated between the Company and its contractors. But Marshman stated he could not knowingly or willingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." (GC Exh. 9, pg. 4). It was during this exchange that Cookson also informed Marshman that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. [At the hearing, Cookson estimated that in the last 5 years the unit has gone from 275-300 employees to 230 employees, and the unit size has been steadily declining every year. (Tr. 189-190).]

> (CC) Our position is that it (the box) will end and go away. We are proposing to give $$ to the active employees. We have a fundamental disagreement. We are eliminating this across the board.
> (HM) Not trying to be unreasonable, this is not favorable to us. If I could get something, we could move on.
> (CC) In this area I cannot do any more than I have already offered.
> (HM) How do we get around this?
> (CC) We have offered other things—like an initial 8.5% wage increase.

(G.C. Exh. 9).

The two discussed the Company's other proposals, including resource sharing and the mobile maintenance department. In the end, they agreed they were not near an agreement and the parties should return to the bargaining table with their full committees. They agreed to resume bargaining on September 17 and 18, 2015.

4. The September 17-18 Bargaining Sessions

The parties' committees met on September 17 and 18, at the Radisson Hotel in Beaver Falls, Pennsylvania. At the September 17 session, the Company gave the Union its "Second Comprehensive Offer of Settlement." The document was a red-lined version of the parties' collective-bargaining agreement with the revisions Cookson had presented to Marshman during their one-on-one meetings. There were no substantive changes. The parties discussed the Company's offer, and the Union's response remained essentially the same. The Union never presented this Second Comprehensive Offer of Settlement to its members for ratification.

At the September 18 session, the parties focused on the use of the Company's mobile maintenance department and the use of contractors. The Union gave the Company a counter-proposal regarding the Company's use of outside contractors. The Union sought to revise the language in Article IV, addressing Management Responsibilities, to prohibit the use of contractors if it deprived unit employees of overtime work. The Company considered and rejected the Union's proposal. The parties ended the September 18 session apart on several key issues, including, wages, retiree health care, cash balance pension plans, mobile maintenance, and resource sharing. The parties scheduled another bargaining session for October 19, 2015. The Union later cancelled the meeting because Marshman was unable to attend due to an illness, and Marshman was unwilling to have negotiations continue without him. The Company requested alternate dates, but the Union provided none.

Thereafter, Company internally concluded that the parties were at impasse. Without further bargaining sessions scheduled, the Company decided to implement certain terms from its Second Comprehensive Offer of Settlement.

5. Announced Partial Implementation

On October 27, 2015, Cookson and other Company representatives met with Union representatives following a scheduled labor-management meeting. Cookson explained to the Union representatives that the parties were at impasse and the Company was implementing certain terms from its Second Comprehensive Offer of Settlement. Cookson provided written documents explaining what proposals the Company was implementing. Among the implemented terms, the Company was ending retiree health subsidies for all in-the-box retirees by December 31, 2015; it would begin making annual contributions for current employees of

$500/$1000 (depending on the type of health insurance coverage) toward Health Savings Accounts (or 401(k) account if no Health Savings Accounts) beginning in 2016; and all employees hired or rehired on or after January 1, 2016, would participate in the Company's cash balance retirement plan (and not in the existing pension plan).[18] Cookson handed the Union a package of documents related to the impasse and the implemented terms. One of the documents the Company gave the Union was entitled "Summary of Implemented Terms." This document states the following regarding the Company's proposed increases to wages and shift differentials:

> Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates only effective upon ratification of the contract by membership
>
> - Equity adjustment-one dollar per hour increase applied to all wages in effect July 1, 2015, only upon Ratification
> - Effective the date of ratification, a General Wage Increase of five and one half percent (5.5%) will be granted on the wage rates in effect after equity adjustments
> - Effective one year following the date of ratification, a General Wage Increase of two percent (2.0%)
> - Upon ratification, increase Sunday Shift Premium to Two Dollars Five Cents ($2.05) per hour, Afternoon Shift Premium to One Dollar Fifty ($1.50) per hour, Night Shift Premium to One Dollar Fifty Five ($1.55) per hour.

As previously stated, the General Counsel and Respondent stipulated that the parties were at impasse as of October 27, 2015.

B. 06-CA-17901

1. Background

As previously stated, the Bruce Mansfield facility has three identical power-generating units: Unit 1, Unit 2, and Unit 3. Each unit consists of a turbine, a generator, a boiler pump, valves, and other auxiliary equipment. The Company shuts down a unit for periodic maintenance, which is referred to as a scheduled outage. A full-train overhaul is a larger scale outage that includes opening and disassembling the entire turbine-generator unit, inspecting and cleaning the parts, and then reassembling and closing the unit.[19] The bargaining unit employees at Bruce Mansfield historically have performed all the open/clean/close work. (Tr. 47-48). The Company has contracted out certain specialized work, such as engineering, sandblasting, coating, painting, insulation, pipefitting, non-destructive testing, etc.

[18] Respondent did (not) implement other proposals from its Second Comprehensive Offer of Settlement. It is unnecessary to discuss them as they are irrelevant to deciding the matters at issue.

[19] Throughout the hearing, various terms were used to describe this work, including, but not limited to, the open/clean/close work, the turbine/generator overhaul, the turbine rebuild, the turbine outage, etc.

2. M116 Outage

In the spring 2016, the Company performed a full-train overhaul of Unit 1. This type of outage occurs approximately every 9 years. This particular outage involved nearly 600 tasks.[20] Christopher Cox, Respondent's Maintenance Manager, testified the Company internally evaluated the project and determined, after consulting with the Pennsylvania, New Jersey, and Maryland Interconnection ("PJM Interconnection"), that it could complete the project within 56 days. (Tr. 203-204). The project was referred to as M116, because it involved Unit **1** at the Bruce **M**ansfield facility in 20**16**.

Planning for this particular outage began back in January 2015, when the Company's higher-level managers met to begin discussing the project. One of the topics discussed was who should perform the open/clean/close work. The Company's higher-level managers considered the following three alternatives: (1) have the work performed by bargaining-unit maintenance employees; (2) have the work performed by the Company's mobile maintenance department; or (3) have the work performed by outside contractors. According to internal emails, these managers concluded there were not enough available unit maintenance employees to perform the open/clean/close labor for a full-train turbine outage, while still performing the day-to-day maintenance work on the other two units and related equipment. The managers considered having the mobile maintenance employees perform the open/clean/close work, but the Company's industrial relations department believed it "would be too risky to use [mobile maintenance] in that capacity because the [turbine/generator] work was always performed in house and using [mobile maintenance] at this time would jeopardize ongoing negotiations with the [U]nion." (G.C. Exh. 12). Ultimately, the managers focused on subcontracting out the work. There is no dispute the Company never involved the Union in this decision-making process.

The Company contacted General Electric ("GE") in early 2015 to request its bid to perform the M116 open/clean/close work. The Company contacted GE because GE originally manufactured the turbine generator units, and the Company continued to use GE to provide technical direction during outages. Additionally, GE provides a two-year warranty on any work it performs for the Company. GE provided warranties for work performed during prior outages.

In late February 2015, GE provided the Company with its bid to perform the work. Over the next several months, the Company had ongoing discussions with GE about its bid to perform the work. Christopher Cox was involved in overseeing the M116 project, making sure that it was executed on budget, on time, and safely. He testified that by about September 10, 2015, the Company made the decision and received approval to have GE perform the work at issue. Cox worked with GE over the next month or so on additional proposals to try to reduce the costs for the Company.[21] (Tr. 204-205). On around November 13, 2015, the Company entered into a purchase order to have GE perform the open/clean/close work on Unit 1. (G.C.

[20] The General Counsel introduced an internal report identifying each task performed during the outage, as well as the estimated man hours it would take to complete the each task. (G.C. Exh. 2). The General Counsel presented two witnesses who testified that approximately 140-150 of the tasks were previously performed by unit employees. (Tr. 70-71)(Tr. 100-101).

[21] At the hearing, Cox testified that the labor costs were actually more to use GE to perform the work at issue. (Tr. 205). Cox provided no explanation or basis for his statement. The Company also did not introduce any documentary evidence to support or explain his statement.

Exh. 17). There is no dispute that the Company did not inform the Union that it contracted with GE to perform this work until February 10, 2016.

Article IV of the parties' expired collective-bargaining agreement contained the management rights provision, which addressed subcontracting. It stated, in pertinent part, that:

> It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in layoff or demotion of employees or the reduction of hours of work below forty (40) hours per week. Except in emergencies, the parties agree to meet prior to contracting work out and discuss the scope of the work (as to description, location, and estimated duration) involved, and the portion, if any, to be performed by bargaining unit employees.

As part of this process, the Company faxed the Union a weekly spreadsheet report with the work the Company has assigned (on an emergency basis) or may assign to outside contractors. The Company continued this practice after the parties' agreement and extension both expired. The Company faxed the Union these reports on Friday, and then parties meet the following Wednesday at a contractors' meeting to discuss the work at issue.

Respondent introduced 10 of these weekly spreadsheet reports, covering certain weeks from June 5, 2015 through November 20, 2015 (specifically, the reports were for 2/6/15, 6/5/15, 7/7/15, 9/4/15, 9/18/15, 9/28/15, 10/2/15, 10/9/15, 11/6/15, and 11/20/15). Some of these reports refer to M116. Some identify the subcontractor and the type of work being performed. However, only two refer to M116 and turbine or generator. (R. Exh. 5). The first is the June 5, 2015 report, which indicates Thomas Cowher, a higher-level consultant for the Company, requested a contractor for a job described as "Turbine Area General NDE M116." Christopher Cox testified that "NDE" stands for non-destructive examination. Non-destructive examination refers to when the turbine is apart and on the floor, and there is ultrasonic testing to inspect the area for cracks and erosion. Cox confirmed that bargaining unit employees do not perform this non-destructive testing. (Tr. 212-213). The second is the November 6, 2015 report, which indicates that Thomas Cowher requested a contractor for a job described as "Generator labor M116." (R. Exh. 12). Neither entry provides any additional information about the nature or scope of the project, when it was going to be performed, and/or who was going to perform it. None of the witnesses present for these weekly meetings could recall any discussions about the subcontracting of the open/clean/close work or the turbine/generator outage work for Unit 1.

The Company holds periodic "all hands" meetings with maintenance department employees. On June 15, 2015, the Company held "all hands" meetings for each of the shifts in which the M116 outage was raised. The Company gave a power-point presentation that generally addressed the outage. Only one of the witnesses, Devin Miller, a senior engineer consultant for Respondent, testified about the meeting, and he could not offer any specifics about what details were shared with employees. Miller confirmed that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. (Tr. 271).

On January 11, 2016, the Company held a managerial meeting with its outage planners. No Union representative was present for this meeting. At this meeting, there was a power-point presentation, and one of the slides read, "Turbine-Generator Labor. GE will provide project management, supervision and craft labor to open/clean/close the main turbine, turbine valves,

and generator under the alliance contract. Final approval for the GE PO [Purchase Order] was received on 11/12/15. Project team will start planning and scheduling as soon as GE receives the PO." (G.C. Exh. 3).

On February 10, 2016, the Company held a contractors information meeting with the Union. At this meeting, Paul Rundt, the Maintenance Superintendent, and Christopher Cox met with Union representatives to inform them that the Company had contracted out the open/clean/close work to GE. Dennis Bloom, the Union recording secretary, and Frank Snyder, Union steward, were present for the meeting. Bloom testified that Rundt identified each of the jobs and which contractor was going to be performing the work. Specifically, Rundt stated that the Unit 1 turbine outage work was going to be given to GE. Rundt stated the Unit 1 boiler feed pump work may also go to GE. Bloom responded that the mechanical maintenance employees had performed the outage work in the past, and that it should be done by the unit employees. Rundt replied that the outage work was going to be contracted out to GE.[22] Rundt, however, left open the issue of who would perform the boiler feed pump work, stating that he would check into it and get back to the Union. (Tr. 64-65). Snyder then requested the contractor information sheets, which would list the contractor, the particular tasks, the estimated man hours, and the estimated costs. As for the costs, Bloom testified Cox responded that the information was proprietary, that the Union was not entitled to that, and the information was not available. (Tr. 66-67). Cox did not recall any request for information being made during this meeting. (Tr. 226). Following the meeting, the Company decided to have the unit employees perform the boiler feed pump work, and Rundt informed the Union of this decision.

3. Information Request

Later, Bloom reported to Marshman what had occurred at this meeting. Thereafter, Marshman sent the Company a letter dated February 10, 2016, requesting information. The letter, in pertinent part, stated:

> This is a reaffirmation letter of the company's obligation to provide all information, upon request by Local 272, for contractors working at the Bruce Mansfield Plant. This would include:
>
> - Name
> - Number of employees
> - Estimated man/hours
> - Wages
> - Material costs

[22] Cox and Rundt both testified that Rundt informed the Union that the Company "was intending" to contract out the turbine outage work and auxiliary equipment work, including the boiler feed pump work, to GE. I do not credit that Rundt said the Company "was intending" to subcontract out the turbine outage work to GE. I find the Company had already made that decision, and it was final. The Company made the decision to subcontract this work in early 2015. It solicited and received GE's bid in the early spring of 2015. Cox testified the Company made the final decision to subcontract this work to GE on around September 10, 2015, and he continued to negotiate with GE for several more weeks to try to further reduce the cost to the Company. On November 13, 2015, the Company and GE entered into a purchase order to perform the work. At the January 11, 2016 outage readiness meeting, the Company informed managers that it had contracted with GE to perform the "labor to open/clean/close the main turbine, turbine valves, and generator under the alliance contract." In light of these circumstances, I credit Bloom's testimony that the Company presented its decision to subcontract the turbine outage work to GE as a final decision.

(But not limited to).
This letter is also a formal request for all information from paragraph above for the Unit One Outage.

In a letter dated March 14, 2016, Christopher Cox, the Maintenance Manager, responded to Marshman's information request, providing the Union with a three-page chart containing the work order number for the contracted-out job, the abbreviation for the contractor's name on the order, a short description of the work the contractor was to perform, and the estimated number of man-hours to perform the work described. The Company did not provide the wages the contractor paid to the individuals performing the work or the material costs. There is no mention of this information in the Company's response, and no explanation as to why the information was not being provided to the Union.

Marshman testified that after receiving Cox's March 14 letter he called Cox to tell him the response was insufficient. Marshman testified that he complained to Cox about not receiving the requested wage and material cost information. Marshman testified that he kind of gave Cox a summary why the Union needed it, stating that if the Union was going to try to negotiate the work that was performed, it "would need to know apples to apples" of what it was negotiating. (Tr. 124-125).[23] The Company never provided the requested wage or material cost information, did not inform the Union that it was not going to provide it, or explain why it was not going to provide it. (Tr. 246-248).

The Unit 1 scheduled outage lasted from around March 20, 2016 through May 14, 2016. GE performed the open/clean/close work on the turbine-generator unit. There were no unit employees were involved in this turbine overhaul work. (Tr. 201). The bargaining unit employees performed the boiler feed pump work. During this period of time, all available bargaining unit employees worked, including voluntary and involuntary overtime. Some of the unit employees turned down opportunities to work overtime.

V. LEGAL ANALYSIS

1. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to also implement its proposed increases to wages and shift differentials from its final, pre-impasse offer while implementing other proposals from that same offer.

The General Counsel contends Respondent violated Sections 8(a)(5) and (1) of the Act when, after the parties reached an impasse, it failed to implement its proposed increases to wages and shift differentials when it eliminated "in-the-box" retiree health benefits.[24] It is well-

[23] Marshman could not recall if he initially spoke with Cox or left him a voicemail message, but he did have this conversation with Cox about the Company's response. Cox testified that he does not recall any further communication with Marshman about this information request. (Tr. 228). But Cox did recall having conversations with Marshman in the past on the topic of obtaining information from subcontractors, and that Respondent informed Marshman this information is proprietary to the subcontractor, and Respondent will not provide it. (Tr. 248-249). I credit Marshman's specific recollection of telling Cox that he (Marshman) needed the requested information for negotiations and he needed to know "apples to apples" of what he was negotiating.

[24] Paragraph 12 of the complaint in Case 06--CA--163303 alleges that Respondent violated Sections 8(a)(5) and (1) of the Act when it "failed to implement the wage adjustments and shift differential proposals contained in its [Second Comprehensive Offer of Settlement] notwithstanding that it implemented the remaining terms from that proposal." As previously established Respondent

established that after the parties reach a good-faith impasse during contract negotiations, an employer may unilaterally implement changes to existing terms and conditions of employment provided those changes are "reasonably comprehended" within the employer's pre-impasse proposal to the union. See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1976), enfd. 395 F.2d 622 (D.C. Cir. 1968). See also *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343 (5th Cir. 1978) (implemented terms cannot be "significantly different" than those proposed to and rejected by the union). Moreover, an employer is not required to implement all aspects of its final, pre-impasse offer, but may choose to implement portions of it. *Presto Casting Co.*, 262 NLRB 346, 354 (1982) (unilateral raises that encompassed automatic progressions and merit increases held reasonably comprehended in pre-impasse proposals on merit wages even though employer gave higher wages and increased wages for a larger portion of employees than in the past). See also *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973)), enfd in relevant part, 708 F.2d 495 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983); *Emhart Indus. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990). The Board, however, has held that an employer cannot selectively implement proposals that are "inextricably intertwined" with unimplemented proposals. See *Plainville Ready Mix Concrete Co.*, 309 NLRB 581, 588 (1992); and *Cleveland Cinemas Management Co.*, 346 NLRB 785 (2006).

In *Plainville Ready Mix*, supra, the employer proposed during contract negotiations to change the wage structure and health insurance plan offered to employees. As for wages, the employer proposed to lower fixed hourly wage rates but introduced gain sharing and incentive pay plans to help employees make up the difference. The union rejected the proposal. In its final pre-impasse offer, the employer offered to withdraw the gain sharing and incentive pay plans and, instead, offer a higher fixed hourly wage rate. However, after reaching impasse, the employer did not implement the higher hourly wage rate or the gain sharing or incentive pay plans; it simply implemented the lower fixed hourly wage rates. The Board adopted the administrative law judge's finding that the employer violated the Act by doing so, holding that the lower wage rate was not reasonably comprehended in the employer's final offer because the lower hourly wage rate was presented as part of a package with the gain sharing and the incentive pay plans—it was not offered as a stand-alone proposal.

As for health insurance, the employer proposed a new plan that limited certain covered benefits, such as drug and alcohol treatment and psychological treatment, and it increased the employees' premiums, deductibles, and copays. But the new plan also added benefits, such as vision care, emergency care, and a prescription drug card. After reaching impasse, the employer partially implemented the proposed health insurance plan, without the added benefits. The Board adopted the judge's finding that the employer violated the Act when it implemented the proposed plan without the added benefits, stating that, "the plan was presented as a health insurance plan; that the elements of the plan do bear an economic and functional relationship to each other; and that to implement only parts of the plan, a fortiori those parts of the plan principally detrimental to the employees, is an unlawful implementation …" See id. at 585.

In *Cleveland Cinemas Management Co.*, supra, the successor employer acquired a movie theater that employed union-represented projectionists. During negotiations, the successor employer informed the union that it wanted to eliminate the dedicated projectionist

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implemented some but not all of the proposals from its Second Comprehensive Offer of Settlement. In its posthearing brief, the General Counsel made clear that it was alleging that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for "in-the-box" retirees. (G.C. Br. 23).

positions and have that work performed by supervisors. The union objected. The employer then offered to enter into a service technician agreement which would have two of the projectionists working fulltime covering all three of the employer's area theaters in exchange for eliminating the dedicated projectionist positions. The union rejected this proposal, stating it wanted both the dedicated projectionist positions and the service technician agreement. The employer was unwilling to do this, and it gave the union its written proposal regarding the service technician agreement. Thereafter, the parties reached an impasse, and the employer partially implemented its final offer. The employer eliminated the dedicated projectionist positions and had that work performed by supervisors, but it did not implement the proposed service technician agreement. Applying *Plainville Ready Mix*, the Board adopted the judge's finding that the employer violated the Act by failing to implement the proposed service technician agreement, holding that it was presented to the Union in its final, pre-impasse offer as a "quid pro quo" for the union giving up the dedicated projectionist positions.

Here, the General Counsel relies upon the "inextricably intertwined" theory to support his position that Respondent was obligated to also implement the proposed increases to wages and shift differentials contained in its Second Comprehensive Offer of Settlement because they were presented as part of an overall package to compensate the Union for the elimination of "in-the-box" retiree health benefits.[25] I agree. I find that from December 8, 2014 forward, Respondent proposed the wage increases at issue, as well as annual contributions into employees' HSA or 401(k) accounts, as a quid pro quo for the elimination of "in-the-box" retiree health benefits.[26] There is no dispute that Respondent's December 8 oral proposal directly tied the wage increases to the elimination of the "in-the-box" retiree health benefits. (Tr. 162-163). Also, it was during this December 8 bargaining session when Marshman asked how much of the savings from the elimination of these retiree health benefits was the Company willing to share with the Union, Cookson responded that the Company would save $1.25 million a year by ending the benefits by the end of 2014, and that the Company's oral proposal to the Union would cost it $1 million a year. When Marshman continued to assert that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson responded that he had already explained how the Company's oral proposal was offering the Union back 80 percent of the savings from the elimination of those benefits.

The Company continued to tie the proposed wage increases to the elimination of the "in-the-box" retiree health benefits when Cookson met one-on-one with Marshman in July and August 2015. At the July 7, 2015 meeting, Cookson reduced the Company's December 8 oral proposal to writing. At the July 21, 2015 meeting, the Company increased the equity adjustment portion of its proposal from $.75 an hour to $1 an hour, but the quid pro quo nature of the proposal remained the same.[27] Cookson pointed out to Marshman at this July 21 meeting that

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[25] Respondent did implement its proposal to make annual contributions to the employees' HSA or 401(k) accounts as set forth in its Second Comprehensive Offer of Settlement.

[26] The term "proposed wage increases" as used in this Decision encompasses the proposed equity adjustments, general wage increases, and shift differentials referred to in the Company's Second Comprehensive Offer of Settlement.

[27] At the hearing, Cookson confirmed the December 8 oral proposal tied the wage increases to the elimination of the "in-the-box" retiree health benefits, and those increases were higher if the Union agreed to eliminate the benefits by the end 2014, as opposed to the end of 2015. However, he claims the Company abandoned its proposal tying the wage increases to the elimination of the retiree health benefits after the December 31, 2014 deadline passed. (Tr. 137-138). I do not credit this testimony. Although the proposed incentive to get the Union to agree to end the benefits by the end of 2014 went away with the passage of time, the proposals and discussions continued to tie the wage proposals and elimination of

the Company was now proposing an 8.5 percent wage increase, consisting of the combined 7.5 percent general wage increases and the $1 per hour equity adjustment. At their August 20, 2015 meeting, when Marshman continued to challenge that the Union was not getting enough in return for the elimination of the retiree health benefits, Cookson pointed out that the Company was offering an 8.5 percent increase in wages if the retiree health benefits ended in 2015.

When the parties met again for bargaining on September 17 and 18, 2015, there is no dispute that the Company made the same package proposal to the Union that Cookson had presented to Marshman. The Company never modified its proposal as it related to increases to wages and shift differentials and the elimination of retiree health benefits, and it never informed the Union that it would eliminate retiree health benefits without implementing the proposed increases. It was not until October 27, 2015, when Respondent announced it was implementing portions of its Second Comprehensive Offer of Settlement, that the Union learned Respondent was not also implementing the proposed increases to wages or shift differentials.

In its posthearing brief, Respondent initially contended its wage proposals were not linked to any other aspect of its proposal, but a sentence later Respondent claimed that, if anything, its proposals were in response to the Union's stated concerns over the wage gap between the Bruce Mansfield facility and the Sammis facility. (R. Br. 28).[28] I reject this contention, largely because it is contrary to the overwhelming evidence, including the express language in the Company's oral and written proposals, which, as previously stated, directly tied the wage proposals to the elimination of the "in-the-box" retiree health benefits. While Respondent's wage proposals included an equity adjustment, in the form of a flat dollar amount, it was only one aspect of its overall quid pro quo proposal. Another aspect of the proposal was the general wage increase (GWI), which was in the form of percentage increases. If Respondent's wage proposal was limited to bridging the wage gap between the two facilities, it is unclear why it needed to distinguish between an equity adjustment and a general wage increase when it submitted its proposal.

Moreover, while it is true Marshman and the Union complained that the Company was not offering enough to equalize the wages between the two facilities, Marshman never abandoned the Union's position that the Company was not offering enough to compensate for the elimination of the "in-the-box" retiree health benefits. And, as previously stated, when Cookson and Marshman met on August 20, 2015, and Marshman continued to complain that the Company was not offering enough, Cookson responded that the Company was offering the Union an 8.5 percent wage increase. In other words, while the parties discussed the equity adjustments, it was never in isolation or at the exclusion of the other aspects of Respondent's integrated proposal. And when the Union rejected the Company's Second Comprehensive

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retiree health benefits together. The Company never withdrew its proposal, and it never informed the Union that it was no longer proposing the wage increases and annual contributions to employees' HSA or 401(k) accounts to compensate for the elimination of the retiree health benefits. On the contrary, as previously stated, Cookson continued to make statements showing that the proposals were related when he met with Marshman one-on-one in July and August 2015.

[28] In its posthearing brief, Respondent addressed arguments it anticipated the General Counsel might make as to how or to what it (Respondent) tied these wage increases to when making its proposals. For example, Respondent anticipated the General Counsel might argue the wage proposals were tied to new productivity standards and/or new work rules. (R. Br. 30-33). Respondent curiously does not address the argument that the wage proposals were exchange for the elimination of the retiree health benefits.

Offer of Settlement, it did so because it objected to several of the Offer's provisions, including aspects of Respondent's quid pro quo proposal. (Tr. 179-181).

Contrary to Respondent's contentions, I find it proposed an integrated package, which consisted of an equity adjustment, the general wage increases, the shift differentials, and the annual contributions to the employees' HSA or 401(k) accounts, as a quid pro quo for the elimination "in-the-box" retiree health benefits. The fact that the proposal included an aspect that also helped bridge the wage gap between the two facilities does not alter this conclusion, because a proposed wage increase certainly can, and in this case did, serve two objectives.

Accordingly, I find that by implementing the elimination of "in-the-box" retiree health benefits without implementing the general wage increases, the equity adjustments, and the shift differentials, Respondent implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement. Respondent either could have maintained the "in-the-box" retiree health benefits or implemented the proposed increases to wages and shift differentials.

2. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the wage adjustments and shift differentials on contract ratification.

The General Counsel's second argument is that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases upon contract ratification. Contract ratification is a permissive subject of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on ratification. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958). Requiring ratification substantially modifies or weakens the independence of the representative chosen by the employees by enabling the employer, in effect, to deal with its employees rather than with their statutory representative. Id. at 350. It is because "employee ratification marginally diminishes the statutory rights that Congress has bestowed on unions as exclusive bargaining representatives both in the negotiation of labor contracts and in the governance of its internal affairs … it is entirely fitting that the Board insist on clear evidence that a union has agreed as a contractual matter to surrender a degree of its prerogatives." *New Process Steel*, 353 NLRB 111, 114 (2008), revd on other grounds, 560 U.S. 674 (2010) (quoting *Beatrice/Hunt-Wesson, Inc*., 302 NLRB 224, 226 (1991) (Chairman Stephens concurring)). Thus, the Board requires the parties have an express agreement to make ratification a condition precedent, and that such an agreement "is not established casually or equivocally." Id. at 114-115. Absent evidence of such an agreement, the union retains sole discretion over whether to ratify the contract or not. *Id.*

Respondent argues that it repeatedly indicated in its proposals that increases to wages and shift differentials would be effective upon ratification, and the Union did not object or request to bargain over the ratification language. I do not find that constitutes an express agreement binding on the Union.[29] *Beatrice/Hunt-Wesson, Inc.*, supra. Absent such an

[29] In its posthearing brief, Respondent claims that it never actually required contract ratification as a condition precedent to paying the increases, and that its use of the phrase "contract ratification" was "merely a proxy" for when the parties reached an agreement, and the intent was that the increases would be effective the same time as the new agreement was reached. (R. Br. 33-34). Respondent presented no evidence the Union or employees shared this understanding of the use of the term "contract ratification." Moreover, I find Respondent's claim to be disingenuous in light of the fact it distributed a document to the

agreement, Respondent violated the Act when it conditioned implementation of the proposed wage increases on contract ratification.

In its defense, Respondent argues that under Board law it is not unlawful to combine mandatory and permissive bargaining subjects in a proposal, so long as the employer does not insist to impasse on the permissive bargaining subjects. While generally accurate, I find Respondent did, in fact, unlawfully insist on contract ratification when it implemented portions of its pre-impasse offer but withheld the inextricably intertwined wage increases, and then informed the Union and the employees in its October 27, 2015 correspondence that those increases would only be implemented upon contract ratification.

Respondent cites to *White Cap, Inc*., 325 NLRB 1166 (1989), enfd 206 F.3d 22 (D.C. Cir. 2000), as supporting its position. In that case, the employer and union negotiated an agreement, but the employees failed to ratify it. The employer offered monetary incentives to facilitate ratification, but the employees again voted it down. The employer again proposed the added incentives but warned the union that they would be withdrawn if the employees again failed to ratify the agreement within a set time period. When the employees again failed to ratify, the employer followed through and withdrew the added incentives from its offer. A charge was filed, and the Board found that employer acted lawfully.

Respondent argues that if it is lawful to threaten to withdraw—and actually withdraw—wage proposals based upon a union's failure to ratify a new agreement, an employer does not commit an unfair labor practice by timing its wage proposals to coincide with ratification. Respondent further argues that its non-implementation of the wage proposals was an inducement to convince the Union to finalize a new agreement. I reject these arguments. In *White Cap*, the employer was transparent when it informed the union that it was only offering the added incentives as an inducement to get the employees to timely ratify the agreement, and that it would withdraw those incentives if the employees failed to do so. In this case, Respondent never indicated to the Union prior to or when it submitted its Second Comprehensive Offer of Settlement that it would eliminate "in-the-box" retiree health benefits without also implementing the proposed wage increases. Moreover, *White Cap, Inc.* involved the withdrawal of proposed monetary incentives unrelated to any other proposals. In the present case, Respondent proposed the wage increases part of a quid pro quo package to compensate for the elimination of the "in-the-box" retiree health benefits, and, as previously explained, it became obligated to implement those increases when it eliminated the retiree health benefits.

Respondent also argues it was merely abiding by its understanding as to the Union's established practice of submitting agreements to its members for ratification. I reject this argument as well. First, Board law requires the parties have an express agreement on ratification, and there was no such agreement in this case. Second, the parties reached an impasse, not an agreement. As such, there was nothing for the members to ratify. Finally, there is no evidence that this type of situation has happened before, so Respondent has no

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Union and employees on October 27, 2015, entitled "Summary of Implemented Terms" which specifically states, "Wages (Article XVII, Appendix A-1, A-2, Articles XVII, IX) - Wage updates *only effective upon ratification of the contract by membership*." (Jt. Exh. 8, pg. 2) (emphasis added).

basis for asserting that it was simply abiding by the Union's established policy or practice when it required ratification.[30]

Based on the foregoing, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the proposed wage increases on contract ratification.

3. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it subcontracted the outage maintenance work on Unit 1 without providing the Union with notice or an opportunity to bargain over the decision.

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it subcontracted out bargaining unit work associated with the Unit 1 outage without providing the Union with notice or an opportunity to bargain. Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires the employer provide timely notice and a meaningful opportunity to bargain over the change at issue. See *First National Maintenance*, 452 U.S. 666, 682 (1981). Once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn*., 275 NLRB 638, 639 (1985). In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

It is well established that a decision to subcontract unit work is a mandatory subject of bargaining where the employer is merely replacing employees in the bargaining unit with employees of a contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964). See also *Mi Pueblo Foods*, 360 NLRB 1097 (2014); *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644-647 (2011); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467-469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005); *Torrington Industries, Inc.*, 307 NLRB 809, 810–811 (1992).[31]

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[30] When the parties extended their collective-bargaining agreement to February 15, 2014, they made certain modifications. The Union did not submit the extension for ratification because it was not considered a new agreement. Cookson acknowledged he was made aware of this fact at or around the time of the extension. Respondent, therefore, was aware the Union does not require ratification of when something less than a new agreement is involved.

[31] In *Torrington Industries*, the Board noted that while there may be non-labor cost reasons for subcontracting that may provide a basis for concluding the decision to subcontract is not a mandatory subject of bargaining, the employer's reason for subcontracting must implicate a matter of core entrepreneurial concern defined by a fundamental change is the "scope and direction" of its business, which would then trigger a balancing of the sort described in *First National Maintenance Corp.* 307 NLRB at 811. There is no contention the subcontracting at issue amounted to a core entrepreneurial decision or involved a fundamental change in the scope or direction of Respondent's business.

Here, Respondent subcontracted work historically performed by bargaining unit employees without first bargaining with the Union. Respondent, however, contends that it had no obligation to bargain because the decision to subcontract was not based on labor costs.[32] Respondent contends it subcontracted the work to GE because there were not enough unit employees available to perform the work at issue within the timeframe set to complete the project. Additionally, Respondent argues that it had no obligation to bargain because subcontracting the work to GE did not result in any material change or detrimental impact for any of the unit employees. Specifically, Respondent contends no unit employee lost work and, in fact, employees worked or were offered (and some refused) extensive overtime during the outage. Finally, Respondent contends that its decision to subcontract to GE was based, in part, on the fact that GE offered a warranty on the work it performed.

For the reasons stated below, I find Respondent had a duty to bargain, and that the decision to subcontract was based, at least in part, on labor costs.

I find the Board's decision in *Mi Pueblo Foods*, 360 NLRB 1097 (2014), particularly instructive and applicable in response to Respondent's arguments. In that case, the employer operated a chain of grocery stores and a distribution center. The distribution center employees would load food shipments and grocery items onto trucks, and then unit drivers would deliver them to the employer's stores. The employer used a third-party trucking company to deliver products from certain suppliers to the distribution center, where the products would be unloaded and reloaded onto the employer's trucks for the unit drivers to deliver to the stores. Later, in an effort to increase productivity and efficiency, the employer began having the third-party trucking company deliver the supplies directly to certain stores, bypassing the distribution center and the unit drivers. The union representing the drivers filed a charge alleging the employer had an obligation to bargain over the subcontracting of this work. The judge found no violation because no unit drivers were laid off and the drivers' wages and hours were not significantly affected. The Board reversed, holding that bargaining is not excused simply because there was no evidence of immediate impact on the employees' terms and conditions of employment. The Board held that whenever bargaining unit work is assigned to outside contractors, the bargaining unit is adversely affected, and there is an obligation to bargain, because absent an obligation to bargain, an employer "could continue freely to subcontract work and not only potentially reduce the bargaining unit but also dilute the [u]nion's bargaining strength." 360 NLRB at 1099. In reaching this conclusion, the Board cited to its decision in *Overnite Transportation, Co.*, 330 NLRB 1275 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), in which it held that the employer had an obligation to bargain even though the subcontracting involved an influx of new work that unit employees could not handle, and where none of the unit employees lost any work. In so finding, the Board in *Overnite Transportation* held:

> At issue here is a decision to deal with an increase in what was indisputably bargaining unit work by contracting the work to outside subcontractors rather

[32] Respondent also argues it had no obligation to bargain because it was actually more expensive to subcontract the work to GE than it would have been to have the unit employees perform it. Respondent's only support for this is the testimony of Christopher Cox, who was asked on direct examination whether labor costs played a role in the decision to use GE to perform the work, and he replied "labor costs are actually more for GE." (Tr. 205-206). Cox provided no explanation or support for this statement, and Respondent offered nothing more. I find Cox's single, conclusory statement insufficient to prove that it was, in fact, more expensive to subcontract the work to GE.

> than assigning it to unit employees. We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.

330 NLRB at 1276.

The Board reached similar conclusions in *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702–703 (2006). In both cases, the Board concluded that even absent an affirmative showing that subcontracting caused the layoff or job loss of current employees, issues amenable to the collective-bargaining process remained, such as the adjustment of unit employees' workloads or the reemployment of terminated bargaining unit members. In *Mi Pueblo Foods*, the Board noted another possible topic for negotiation with the union was expanding the bargaining unit. 360 NLRB at 1099.

Respondent claims it had no obligation to bargain because the decision to subcontract was not based on labor costs, but rather on its need to get the project completed within the established time frame, and it would not be able to do so using unit employees.[33] However, as the cases cited above make clear, that does not authorize Respondent's unilateral action--the Board still imposes a duty to bargain in those situations.

The same is true regarding Respondent's claim that it did not have an obligation to bargain because no unit employee experienced a reduction in hours or loss of overtime opportunity as a result of the subcontracting. As the Board held in *Overnite Transportation* and *Mi Pueblo Foods*, evidence of an immediate impact on employees' terms and conditions of employment is not required. The duty to bargain is triggered by concern that the subcontracting could potentially affect the size of the unit or dilute the union's strength. In this case, these are not hypothetical concerns. During negotiations, Respondent raised concerns over the profitability of the Bruce Mansfield facility and the need to reduce labor costs, which included the need to reduce the size of the bargaining unit. Respondent also proposed changes, including the increased use of mobile maintenance employees, which would allow it to increase the amount of unit work it could assign to non-unit employees. Cookson and Marshman discussed these matters during their July 21, 2015 meeting. It was in this meeting that Marshman raised concerns over the dwindling size of the bargaining unit, noting that Respondent had not replaced the nearly 130 employees that had left the unit since 2008. Cookson replied that a reduced headcount through attrition would give the plant a chance to survive, and he added that the Company planned to reduce another 40-50 employees from the unit, primarily in the mechanical and electrical departments. Marshman stated he could not knowingly allow the Company to impact headcount long term like this, adding that, "I can't let you impact my ability to represent my members[;] we need to maintain the union as a whole." In light of this evidence,

[33] In its posthearing brief, Respondent argues its decision to subcontract was motivated by its concerns about completing the work within "the tight timeframe mandated by the PJM Interconnection." (R. Br. 43). Cox, however, testified the Company was involved in setting the "internal benchmark" for how long it would take to complete the outage. Then, based on the information it received from PJM, including how long comparable outages took, the Company reported to that PJM that it could complete the project within the 56-day timeframe. (Tr. 203-204). In light of this evidence, I find it misleading for Respondent to suggest it had no control over the amount of time available to it to perform the Unit 1 outage work.

I find the continued diminution of the size and strength of the unit as an adverse effect, particularly when Respondent's stated reason for subcontracting to GE was there were not enough unit employees to do the work.

Finally, I reject Respondent's argument that it had no obligation to bargain because its decision to subcontract to was, in part, because GE offered a warranty on the work it performed. The extent or scope of this warranty is unclear from the record, and it appears that GE has warranted other work in the past, including when the unit employees performed the outage work. Regardless, Respondent has cited no authority that the existence of a warranty excuses to a failure to bargain.

Respondent next argues even if it had an obligation to bargain over the decision to subcontract the work at issue, the Union waived that right by failing to timely request bargaining. A union cannot have waived bargaining where it did not receive clear and timely notice of change, nor can it have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli. *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017-1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). In order to determine whether the employer has presented the union with a fait accompli, the Board considers objective evidence regarding the presentation of the change and the employer's decision-making process. *Bell Atlantic Corp.*, 336 NLRB 1076, 1087 (2001).

Respondent claims it gave the Union timely notice of its decision to subcontract outage work beginning in February 2015, when it began providing the Union with weekly contracting reports addressing the M116 outage, and when it met with the Union during their weekly contractor meetings. Respondent, however, fails to differentiate between work associated with the outage and *bargaining unit* work associated with the outage. There is no dispute that Respondent had a history of subcontracting out work during outages, usually specialized work. Notice that Respondent intended to continue subcontracting out that work during the M116 outage is not notice of a change. The change requiring clear and timely notice is the subcontracting of the open/clean/ close work to GE. None of the weekly notification reports in evidence refer to GE or the open/clean/close work. The only weekly notification report Respondent specifically refers to in its posthearing brief is the June 5, 2015 weekly report, which indicates a need for a contractor for a job described as "Turbine Area General NDE M116." As previously stated, Cox testified that "NDE" stands for non-destructive examination, which was work historically performed by an outside contractor, not bargaining unit employees.[34]

Respondent also argues that it provided notice of the change at issue during the June 15, 2015 "all hands" meetings in which the M116 outage was raised. However, Devin Miller testified that while the employees in attendance learned that an outage would be occurring in 2016, they were not informed who was going to be doing any of the particular work during the outage, including who was going to perform the open/clean/close work. Moreover, even if

[34]Although Respondent does not raise it in its posthearing brief, there is the November 6, 2015 weekly notification report, which references a job described as "Generator labor M116." I do not find this limited entry constitutes clear notice to the Union of the Company's decision to subcontract the open/clean/close work, because the report contains no other information about the scope or nature of the project, when it was going to be performed, and/or who was going to perform it. Additionally, none of the witnesses present for these weekly contractors meetings between the Company and the Union could recall any discussions about the subcontracting of the turbine/generator outage or open/clean/close work for Unit 1.

actual information had been shared about who was going to be performing the work, these were employee meetings, and the Board has held that notice to employees does not constitute sufficient notice to the union. *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB at 1017.

I find the first notice Respondent gave the Union that it was going to subcontract the work at issue to GE was on February 10, 2016, when Rundt announced the decision to Bloom and Snyder after the labor-management meeting. The General Counsel alleges, and I so find, that Rundt announced this change as a fait accompli based on the statements and surrounding circumstances. The evidence establishes that Respondent began negotiating with GE to perform the work in February 2015, and they continued their discussions over the next several months. Cox testified that Respondent made the final decision to subcontract the work at issue to GE on around September 10, 2015, and Respondent entered into a formal purchase order with GE on around November 13, 2015. The surrounding circumstances, including the statements made to managers during the January 11, 2016 outage readiness meeting, confirm this was settled. And when Rundt met with Bloom and Snyder on February 10, 2016, he was informing them of the decisions that had been made. He made it clear that Respondent was subcontracting the turbine outage work to GE. There was nothing tentative about that in what he said. What was not settled was who was going to perform the boiler feed pump work. Rundt indicated that work also may go to GE. The Union inquired about having unit employees perform that work, and Rundt said he would check and get back to the Union. He did, and the Union ended up handling the feed pump work. I conclude that while Respondent indicated it was open to discussing the feed pump work, it informed the Union the other work was going to be done by GE. As a result, I find Respondent first informed the Union of its decision to subcontract the work at issue on February 10, 2016, as a fait accompli.[35]

I, therefore, find Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with timely notice and a meaningful opportunity to bargain over the decision to subcontract unit work to GE.[36]

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[35] Respondent contends that after receiving this notice the Union should have requested bargaining, and, if it had, Respondent would have bargained over the decision to subcontract the turbine/generator outage work, as evidenced by its willingness to re-assign the boiler feed pump work to unit employees after the Union asked for them to perform it. I find this contention rings hollow. Respondent knew in early 2015 that it was going to subcontract the turbine/generator outage work, but it withheld that information from the Union for almost a year. In early September 2015, when Respondent made the final decision to subcontract the turbine/generator outage work to GE, Respondent withheld that information from the Union, even though the parties were still bargaining over a new contract, in which one of the contested issues was the performance of unit work by non-unit employees. Respondent continued to withhold information from the Union regarding its subcontracting decision after it entered into the purchase order with GE in November 2015. Respondent waited three more months, and when it informed the Union it presented the decision as final. Under these circumstances, I reject Respondent's claim that it was willing to, or the Union would have been able to, engage in meaningful bargaining over the decision to subcontract this work as of this date.

[36] The complaint in 06-CA-163303 alleges that Respondent also failed to bargain over the effects of its decision to subcontract this unit work. In its posthearing brief, the General Counsel does not mention the effects bargaining allegation. As such, I need not reach the effects bargaining issue. See *Michigan Ladder Co.*, 286 NLRB 21, 22 (1987).

4. Did Respondent violate Sections 8(a)(5) and (1) of the Act when it failed to provide the Union with the contractor's wage data and material costs?

The General Counsel alleges Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information referred to in the Union's February 10, 2016 letter. An employer's duty to bargain collectively under Section 8(a)(5) of the Act includes the duty to supply requested information to the union representing its employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). Where the union's request is for information pertaining to employees in the bargaining unit, that information is presumptively relevant and the employer must provide the information. However, where the information requested is not presumptively relevant to the union's performance as the collective-bargaining representative, the burden is on the union to demonstrate the relevance of the information requested. *Disneyland Park*, 350 NLRB 1256, 1257-1258 (2007). This burden is satisfied when the union demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant. *Disneyland Park*, supra at 1258.

The Board has held requested information pertaining to subcontracting, even if it relates to the bargaining unit employees' terms and conditions of employment, is not presumptively relevant, and therefore a union seeking such information must demonstrate its relevance. *Disneyland Park*, supra at 1258. Specifically, on the subject of subcontracting, the Board has held that a broad, discovery-type standard is utilized in determining the relevance of requested information, and that potential or probable relevance is sufficient to give rise to an employer's obligation to provide the requested information. Id. In that regard, in *Disneyland Park*, the Board held that to demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, supra at 1258; See also *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000). The Board also has held that "[t]he union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information." *Disneyland Park*, supra at 1258, fn. 5. See also *Schrock Cabinet Co.*, 339 NLRB 182 fn. 6 (2003); *Island Creek Coal*, 292 NLRB 480, 490 fn. 19 (1989).

In applying this standard, I find the Union has met its burden of establishing potential or probable relevance of the information at issue based on the statements and circumstances surrounding the request. Marshman submitted the written information request on February 10, 2016, the same day the Union first learned Respondent had subcontracted the work to GE. This written request was made after Union Steward Snyder orally requested essentially the same information, including the subcontractor's cost information. When Cox responded to Snyder's oral request, he did not raise any concern as the relevance of the requested information. Rather, he stated the information was proprietary, the Union was not entitled it, and the information was not available.

After receiving the Company's partial response to the request, Marshman contacted Cox and stated the Union needed the wage and material cost information because it if was going to try to negotiate the work that was to be performed, it "would need to know apples to apples" what it was negotiating. (Tr. 124-125). I find this sufficient to put the Respondent on notice that the Union wanted to negotiate subcontracting of this work, and that it wanted the contractor's wage information and material costs for comparative purposes to facilitate those negotiations.

In its defense, Respondent argues that, in addition to not being relevant, it had no obligation to produce the information because it was not in its possession. An employer's duty to supply relevant information also "extends to situations where the information is not in the employer's possession, but where the information can likely be obtained from a third party with whom the employer has a business relationship." *Earthgrains Co.*, 349 NLRB 389, 397-399 (2007), enfd. in pertinent part 514 F.3d 422, 429 (5th Cir. 2008). See also *Public Service Co. of Colorado*, 301 NLRB 238, 246 (1991) (employer failed to meet its burden of demonstrating the information requested by the union was unavailable where there was no evidence it asked the third party subcontractor for the information). At the hearing, Cox acknowledged that the wage and material cost information could be requested from GE, but that he did not make that request or ask someone else to make the request. I find that Respondent has a long-standing, ongoing business relationship with GE, and it should have requested that information from GE in order to respond to the Union's information request.[37]

Consequently, I find that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the requested wage and material cost information from GE, which includes failing to request the information from GE.

CONCLUSIONS OF LAW

1. The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, the International Brotherhood of Electrical Workers, Local Union No. 272, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been and is the designated collective-bargaining representative of the following appropriate unit of employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

4. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act by implementing certain provisions from its Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with its pre-impasse proposal to the Union when it implemented the elimination of "in-the-box" retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

5. On or around October 27, 2015, Respondent violated Sections 8(a)(5) and (1) of the Act when it conditioned implementation of the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015 on contract ratification.

[37] Respondent makes no contention in its posthearing brief that the information at issue was proprietary or confidential.

6. On or around January 1, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act when it unilaterally subcontracted bargaining unit work during the 2016 Unit 1 outage without providing the Union with notice and an opportunity to bargain about the decision to subcontract that work.

7. On or around February 10, 2016, Respondent violated Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with the requested wage and material cost information from GE that is relevant and necessary to the Union's role as the unit's collective-bargaining representative.

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

REMEDY

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

Affirmatively, the Respondent shall, upon request from the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the "in-the-box" retiree health benefits. The Respondent shall rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification. The Respondent shall make employees make employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016. The Respondent will compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed, and will file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall provide the Union with the remaining information requested in its February 10, 2016 information request.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 October 27, 2015. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, FirstEnergy Generation, LLC, A Wholly Owned Subsidiary of FirstEnergy Corp., shall

1. Cease and desist from:

(a) Failing or refusing to bargain with Union is the designated collective-bargaining representative of the following bargaining unit of the employees:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain, including, but not limited to, the subcontracting of bargaining unit work.

(c) Unilaterally implementing provisions from our Second Comprehensive Offer of Settlement dated September 17, 2015 that were inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of “in-the-box” retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

(d) Conditioning changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

(e) Failing or refusing to provide the Union with requested information, such as the wages and material costs paid by subcontractors, that is relevant and necessary to the Union’s role as collective-bargaining representative.

(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) Provide the Union with notice and an opportunity to bargain before unilaterally making changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

---

[38] 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.

(b) Upon request by the Union, either reinstitute the “in-the-box” retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in its Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date it implemented the elimination of the “in-the-box” retiree health benefits.

(c) Make employees whole, with interest, for any loss of earnings resulting from Respondent’s unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

(d) Compensate the bargaining unit employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

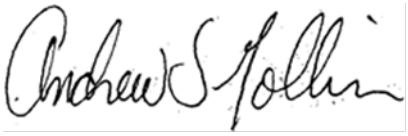
(f) Provide the Union with the requested information sought in its February 10, 2016 request related to the wages and material costs paid by GE during the outage of Unit 1 in 2016.

(g) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania, copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 27, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

[39] 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."

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



Andrew S. Gollin
Administrative Law Judge

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 do anything to prevent you from exercising the above rights

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local No. 272, AFL-CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit:

> All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I&T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards and other professional employees and supervisors as defined in the National Labor Relations Act as amended.

WE WILL NOT fail or refuse to provide the Union with notice and an opportunity to bargain regarding changes to wages, hours, and other terms and conditions of employment, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL NOT unilaterally implement changes to wages, hours, or other terms or conditions of employment that are inconsistent with our final, pre-impasse offer made to the Union by implementing the elimination of “in-the-box” retiree health benefits without also implementing the proposed general wage increases, equity adjustments, and shift differentials.

WE WILL NOT condition implementation of changes to wages, hours, and other terms and conditions of employment of the bargaining unit employees on contract ratification.

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary to its role as collective-bargaining representative.

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 provide the Union with notice and an opportunity to bargain over changes to wages, hours, or other terms and conditions of employment of bargaining unit employees, including, but not limited to, the subcontracting of bargaining unit work.

WE WILL, upon request by the Union, either reinstitute the "in-the-box" retiree health benefits and make whole any affected individual for any loss suffered from any loss of coverage resulting from the elimination of those benefits, or implement the general wage increases, equity adjustments, and shift differentials proposed in our Second Comprehensive Offer of Settlement dated September 17, 2015, retroactive to the date we implemented the elimination of the "in-the-box" retiree health benefits.

WE WILL make employees whole, with interest, for any loss of earnings resulting from our unilateral subcontracting of bargaining unit work during the outage of Unit 1 in 2016.

WE WILL rescind any proposal conditioning the implementation of the general wage increases, equity adjustments, and shift differentials on contract ratification.

WE WILL provide the Union with the remaining information requested in its February 10, 2016 information request.

FIRSTENERGY GENERATION, LLC
A WHOLLY OWNED SUBSIDIARY
OF FIRSTENERGY CORP.

(Employer)

Dated _____ By _____
Representative Title

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/06-CA-163303 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 690-7117.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FIRSTENERGY GENERATION, LLC A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP. **and** **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 272, AFL-CIO**	Cases 06-CA-163303 06-CA-170901

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., March 15, 2017**.**

By direction of the Board:

Gary Shinners

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1015 Half Street SE, Washington, DC 20570, on or before **April 12, 2017.**

1 UNITED STATES OF AMERICA

2 BEFORE THE NATIONAL LABOR RELATIONS BOARD

3 REGION SIX

4 _____

5 FIRSTENERGY CORPORATION

6 Employer

7 and | Case No. 06-CA-163303
No. 06-CA-170901

8 INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION
9 272, AFL-CIO

10 Petitioner

11

12 The above entitled matter came on for hearing pursuant to
13 notice, before Andrew Gollin, Hearing Officer, in Room 904,
William S. Moorhead Federal Building, 1000 Liberty Avenue,
14 Pittsburgh, Pennsylvania 15219, on Thursday, December 1, 2016,
commencing at 10:00 a.m.

15

16

17 MORSE, GANTVERG & HODGE, INC.
Suite 719, One Bigelow Square
18 Pittsburgh, Pennsylvania 15219
412/281-0189

19

20

21

22

23

24

25

1 APPEARANCES:

2 On behalf of the General Counsel:

3 National Labor Relations Board:
David L. Shepley, Esquire
4 412-690-7118
david.shepley@nlrb.gov
5 1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222
6
On behalf of the Petitioner:
7
Gilardi Oliver & Lomupo:
8 Marianne Oliver, Esquire
412-391-9770
9 moliver@lawgol.com
223 Fourth Avenue, 10th Floor
10 Pittsburgh, Pennsylvania 15222

11 On behalf of the Respondent:

12 Jones Day:
Susan E. Kessler, Esquire
13 412-394-7234
skessler@jonesday.com
14 500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219
15
Jones Day:
16 Brian W. Easley, Esquire
612-607-7950
17 beasley@jonesday.com
77 West Wacker Drive,
18 Chicago, Illinois 60601

19 First Energy:
David S. Farkas, Esquire
20 330-203-2578
dfarkas@firstenergycorp.com
21 76 South Main Street
Akron, Ohio 44308
22

23 - - -

24

25

I-N-D-E-X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Thomas Cowher	26	*38	47	*50 **50	*34
Dennis Bloom	56	**83 *88	97		
Joseph Bergles	98	**105 *109	111		
Herman Marshman	112	*128			*126
Michael McShane	132	**134 *134			
Charles Cookson	136				

* Mr. Easley
** Ms. Oliver

E-X-H-I-B-I-T-S

EXHIBIT	IDENTIFIED	IN EVIDENCE
Joint		
1	7	7
2	9	10
3	10	10
4	10	11
5	11	11
6	11	11
7	11	12
8	12	12
9	12	13
10	13	13
General Counsel		
1(a) thru 1(t)	5	6
2	30	35
3	36	38
4	61	62
5	78	85
6	115	122
7	122	127
8	138	139
9	139	140
10	140	141
11	141	142

1 P-R-O-C-E-E-D-I-N-G-S

2 THE HEARING OFFICER: We are go on the record. This hearing
3 will be in order. This is a formal trial before the National
4 Labor Relations Board in cases 06-CA-163303 and 06-CA-170901
5 which have been consolidated. The administrative law judge
6 assigned to this case is Andrew Gollin. I'm assigned to the
7 Washington office of the Division of Judges and communications
8 should be addressed to that office and any request for
9 extensions of time should be addressed to the chief judge or the
10 deputy, associate chief judge in that office.

11 To begin with will counsel or other representatives please
12 state their name starting with General Counsel?

13 MR. SHEPLEY: For General Counsel, David L. Shepley,
14 S-h-e-p-l-e-y, 1000 Liberty Avenue, Room 904, Pittsburgh, PA.

15 THE HEARING OFFICER: The petitioner?

16 MS. OLIVER: Marianne Oliver, Gilardi Oliver & Lomupo, 223
17 Fourth Avenue, 10th floor, Pittsburgh, 15222.

18 THE HEARING OFFICER: Respondent?

19 MR. EASLEY: Brian W. Easley, Jones Day, 77 West Wacker
20 Drive, Chicago, Illinois 60601.

21 THE HEARING OFFICER: All right. If settlement discussions
22 are desired at any point during the trial, I'll be glad to grant
23 a reasonable recess for that purpose; however, I understand that
24 there have been numerous telephone calls involving Judge David
25 Goldman with the parties in an attempt to settle the case which

1 were unsuccessful. Nonetheless, if a brief recess is needed to
2 discuss that, let me know.
3 Trial developments sometimes change attitudes to make
4 settlement possible. Accordingly, I'm advising you now before I
5 have heard any of the testimony that I intend to offer an
6 opportunity for settlement discussions at two specific stages in
7 the trial; first, at the conclusion of the General Counsel's
8 case and second, at the conclusion of the trial. If by
9 inadvertence I over look the matter, please call it to my
10 attention. I invite you to bear in mind that as the trial
11 proceeds the opportunities for discussion of settlement will be
12 available at all times upon request.
13 All right. Mr. Shepley, please introduce the pleadings and
14 other formal papers.
15 MR. SHEPLEY: Before I do that, Your Honor, I believe that
16 Respondent had another individual that would like to state his
17 appearance.
18 MR. FARKAS: I'm fine. I'm Dave Farkas. I'm with the
19 company FirstEnergy Company at 76 South Main Street, Akron,
20 Ohio.
21 THE HEARING OFFICER: All right. Formal papers?
22 (General Counsel Exhibit Nos 1(a) through 1(t) were marked.)
23 MR. SHEPLEY: I would like to introduce the formal papers as
24 General Counsel Exhibit 1(a) through 1(t), 1(t) being an index
25 and description of the entire exhibit. This exhibit has been

1 shown to the parties. At this time I would like to offer into
2 evidence the formal papers.
3 THE HEARING OFFICER: Any objections from the Charging
4 Party?
5 MS. OLIVER: No, Your Honor.
6 THE HEARING OFFICER: Any objection from Respondent.
7 MR. EASLEY: No, Your Honor.
8 THE HEARING OFFICER: Can I have a set of them please and
9 the court reporter has a set?
10 MR. SHEPLEY: Yes.
11 THE HEARING OFFICER: With no objections, I will receive
12 1(a) through 1(t).
13 (General Counsel Exhibit No. 1(a) thru 1(t) was admitted.)
14 THE HEARING OFFICER: It's also my understanding that the
15 parties have worked hard to enter into some stipulations and to
16 create some joint exhibits; is that correct, Mr. Shepley?
17 MR. SHEPLEY: Yes, Your Honor.
18 THE HEARING OFFICER: All right. Do you want to provide me
19 with a set of those joint exhibits?
20 MR. SHEPLEY: Your Honor, would you like me to propose the
21 stipulation and amendment at this time to the complaint?
22 THE HEARING OFFICER: I will do that as soon as I get the
23 joint exhibits in.
24 MR. SHEPLEY: Your Honor, we had extensive discussion about
25 a means of entering into the record certain stipulations and

1 documents related to those stipulations. I will now get those
2 documents and describe them for the record and distribute copies
3 to the parties.
4 Your Honor, if you would like to go off the record, this
5 will take some time to distribute these papers.
6 THE HEARING OFFICER: All right. Let's go off the record.
7 (Discussion off the record.)
8 THE HEARING OFFICER: Let's go back on the record.
9 (Joint Exhibit No. 1 was marked for identification.)
10 MR. SHEPLEY: Your Honor, as I was stating, the parties have
11 worked out some stipulations. These stipulations are set forth
12 in a list. The list being designated as Joint Exhibit 1. There
13 also nine other exhibits which are referred to in Joint Exhibit
14 1, and I will briefly describe them for the record.
15 THE HEARING OFFICER: Let's go through them one at a time.
16 Joint Exhibit 1, any objections, Charging Party or Respondent,
17 to the stipulating facts?
18 MR. EASLEY: No objection.
19 MS. OLIVER: No objection.
20 THE HEARING OFFICER: Joint Exhibit 1 is received.
21 (Joint Exhibit No. 1 was admitted into evidence.)
22 MR. EASLEY: I have the signed copy. Do you want to move
23 that one into evidence?
24 MR. SHEPLEY: Yes. Thank you.
25 THE HEARING OFFICER: Before you move on, you had indicated

that this may be an appropriate time that you would like to make an amendment with regards to the name or relationship with Respondent; is that correct?

MR. SHEPLEY: Yes, Your Honor. I'd like to propose a stipulation be entered into the record. The stipulation would state that FirstEnergy Generation, LLC was, until 2012, known as FirstEnergy Generation Corp.

THE HEARING OFFICER: And, Ms. Oliver, any objection?

MS. OLIVER: No. I would just move to amend the names to be FirstEnergy Generation, LLC a subsidiary of FirstEnergy Corp.

THE HEARING OFFICER: Mr. Shepley, do you have a position on that?

MR. SHEPLEY: Well, I believe that I would like to move for the same thing. Let me state it this way: I would like to amend the pleadings in both complaints in accordance with section 102.17 of the Boards rules and regulations to reflect the change in the name of Respondent, specifically the name of Respondent should properly be stated as generation, FirstEnergy Generation, LLC, a wholly owned subsidiary of FirstEnergy Corp. I make that motion.

THE HEARING OFFICER: Mr. Easley?

MR. EASLEY: No objection.

THE HEARING OFFICER: And, Ms. Oliver, I assume that you have no objections either?

MS. OLIVER: No. I would join in the much more specific

1 motion.
2 THE HEARING OFFICER: So I'll receive and approve the oral
3 motion to amend the pleadings to change the name of the
4 FirstEnergy Generation, LLC to FirstEnergy Generation, LLC a
5 wholly owned subsidiary of First Generation Corp.
6 MR. EASLEY: FirstEnergy Corp.
7 THE HEARING OFFICER: I apologize. Thank you. Let's do
8 that again so we don't have any issues. FirstEnergy Generation,
9 LLC a wholly owned subsidiary of FirstEnergy Corp; is that
10 correct?
11 MR. EASLEY: That is correct.
12 MR. SHEPLEY: That is correct, Your Honor.
13 THE HEARING OFFICER: Ms. Oliver?
14 MS. OLIVER: Yes.
15 MR. SHEPLEY: I believe that counsel for the Respondent
16 hasn't had a chance to respond to the stipulation. You had
17 asked Counsel Oliver but not --
18 THE HEARING OFFICER: No. I think I asked him, but I'll ask
19 him again just to make sure the record is clear.
20 MR. EASLEY: We stipulate, Your Honor.
21 THE HEARING OFFICER: Better to be safe than sorry. Joint
22 Exhibit 1 is received. I believe that I already received the
23 formal papers. Moving onto Joint Exhibit 2.
24 (Joint Exhibit No. 2 was marked for identification.)
25 MR. SHEPLEY: Your Honor, that is a copy of the collective

1 bargaining agreement that was in effect from 2009 to 2013.
2 THE HEARING OFFICER: All right. Any objection, Ms. Oliver?
3 MS. OLIVER: No.
4 THE HEARING OFFICER: Any objection, Mr. Easley?
5 MR. EASLEY: No, Your Honor.
6 THE HEARING OFFICER: Joint Exhibit 2 is received. Go
7 ahead.
8 (Joint Exhibit No. 2 was admitted into evidence.)
9 (Joint Exhibit No. 3 was marked for identification.)
10 MR. SHEPLEY: Joint Exhibit 3 is an agreement to extend the
11 terms of -- to extend Joint Exhibit 2 for one year until 2014.
12 THE HEARING OFFICER: I'm assuming that there's no
13 objection, Ms, Oliver or Mr. Easley?
14 MS. OLIVER: No.
15 MR. EASLEY: That is correct, Your Honor.
16 THE HEARING OFFICER: Joint Exhibit 3 is received.
17 (Joint Exhibit No. 3 was admitted into evidence.)
18 (Joint Exhibit No. 4 was marked for identification.)
19 MR. SHEPLEY: Joint Exhibit No. 4 is a bargaining proposal
20 made by Respondent to the Charging Party herein entitled the
21 second comprehensive offer of settlement. It was dated
22 September 17th, 2015.
23 THE HEARING OFFICER: Any objections, Ms. Oliver or
24 Mr. Easley?
25 MS. OLIVER: No.

1 MR. EASLEY: No objection, Your Honor.
2 THE HEARING OFFICER: All right. Joint Exhibit 4 is
3 received.
4 (Joint Exhibit No. 4 was admitted into evidence.)
5 (Joint Exhibit No. 5 was marked for identification.)
6 MR. SHEPLEY: Joint Exhibit 5 is a summary of Joint Exhibit
7 4.
8 THE HEARING OFFICER: All right. Who prepared this?
9 MR. SHEPLEY: This was prepared by the Respondent.
10 THE HEARING OFFICER: All right. Any objection to Joint
11 Exhibit 5 from Ms. Oliver or Mr. Easley?
12 MS. OLIVER: No.
13 MR. EASLEY: No objection, Your Honor.
14 THE HEARING OFFICER: Joint Exhibit 5 is received.
15 (Joint Exhibit No. 5 was admitted into evidence.)
16 (Joint Exhibit No. 6 was marked for identification.)
17 MR. SHEPLEY: Joint Exhibit 6 is the implemented terms that
18 were implemented by Respondent on October 27, 2015.
19 THE HEARING OFFICER: All right. Any objection, Ms. Oliver
20 or Mr. Easley?
21 MS. OLIVER: No, Your Honor.
22 MR. EASLEY: No objection, Your Honor.
23 THE HEARING OFFICER: Joint Exhibit 6 is received.
24 (Joint Exhibit No. 6 was admitted into evidence.)
25 (Joint Exhibit No. 7 was marked for identification.)

1 MR. SHEPLEY: Joint Exhibit 7 is a letter to Herman
2 Marshman, president of the Charging Party, from Charles
3 P. Cookson of Respondent, which accompanied the implementation
4 of Joint Exhibit 6.
5 THE HEARING OFFICER: All right. Any objection, Ms. Oliver
6 or Mr. Easley?
7 MS. OLIVER: No.
8 MR. EASLEY: No objection, Your Honor.
9 THE HEARING OFFICER: Joint Exhibit 7 is received.
10 (Joint Exhibit No. 7 was admitted into evidence.)
11 (Joint Exhibit No. 8 was marked for identification.)
12 MR. SHEPLEY: Joint Exhibit 8 is a summary of Joint Exhibit
13 6 which was prepared by the company.
14 THE HEARING OFFICER: All right. Any objection, Ms. Oliver
15 or Mr. Easley?
16 MS. OLIVER: No.
17 MR. EASLEY: No objection, Your Honor.
18 THE HEARING OFFICER: All right. Joint Exhibit 8 is
19 received.
20 (Joint Exhibit No. 8 was admitted into evidence.)
21 (Joint Exhibit No. 9 was marked for identification.)
22 MR. SHEPLEY: Joint Exhibit 9 is called a partial dismissal
23 letter which is issued by the acting regional director for
24 Region 6 with respect to allegations in a case 06-CA-163303
25 dated March 11, 2016.

1 THE HEARING OFFICER: Any objection, Ms. Oliver or
2 Mr. Easley?
3 MS. OLIVER: No.
4 MR. EASLEY: No objection, Your Honor.
5 THE HEARING OFFICER: Joint Exhibit 9 is received.
6 (Joint Exhibit No. 9 was admitted into evidence.)
7 (Joint Exhibit No. 10 was marked for identification.)
8 MR. SHEPLEY: Joint Exhibit 10 is a revised partial
9 dismissal letter issued by the regional director for a Region 6
10 in case 06-CA-163303 dated April 22, 2016.
11 THE HEARING OFFICER: All right. Any objection, Ms. Oliver
12 or Mr. Easley?
13 MS. OLIVER: No.
14 MR. EASLEY: No objection, Your Honor.
15 THE HEARING OFFICER: All right. Joint Exhibit 10 is
16 received.
17 (Joint Exhibit No. 10 was admitted into evidence.)
18 THE HEARING OFFICER: Mr. Shepley, let me ask: With regards
19 to Joint Exhibit 9 and 10, what's the significance between the
20 revised version of the dismissals?
21 MR. SHEPLEY: The revised version of Joint Exhibit 10
22 includes language with respect to what was not being dismissed.
23 In the next to last paragraph on page 2 it states, "The
24 remaining allegations that the employer failed to implement a
25 proposed wage increase when it implemented its other terms of

1 employment contained in its last comprehensive offer and
2 condition of this wage and shift differential increase upon
3 membership ratification are being retained for further
4 processing." That paragraph describes what is alleged in a
5 complaint in that case.
6 THE HEARING OFFICER: So basically the document indicates
7 what's different, and I just wanted to make sure there was no
8 facts I was missing. All right. Joint Exhibit 10 is received
9 if I haven't already received it.
10 All right. I appreciate the parties working together to get
11 that done. I understand that there were -- was a subpoena
12 served by General Counsel and Respondent. Petition to vote was
13 filed by Respondent yesterday. It's my understanding that
14 Respondent has produced the subpoenaed documents and is
15 withdrawing it's subpoena issued by General Counsel; is that
16 correct, Mr. Easley?
17 MR. EASLEY: That is correct, Your Honor.
18 THE HEARING OFFICER: And, Mr. Shepley, it's correct that
19 documents that you subpoenaed have produced prior to hearing; is
20 that correct?
21 MR. SHEPLEY: That's my understanding. Yes, Your Honor.
22 THE HEARING OFFICER: All right. So there's nothing that I
23 need to rule on and no prehearing motions; is that correct,
24 Mr. Shepley?
25 MR. SHEPLEY: Is that correct.

1 THE HEARING OFFICER: Is that correct?
2 MR. EASLEY: That's correct, Your Honor.
3 THE HEARING OFFICER: Let me just ask a couple of questions
4 before I ask the parties for their opening statements.
5 Mr. Easley, with regards to your answers you indicate a
6 potential of untimely allegations. Sometimes Respondent Counsel
7 will include catch all affirmative defenses in their answer to
8 cover the event such things occur, but are there specific
9 allegation that you are alleging are untimely in this case?
10 MR. EASLEY: There are not, Your Honor.
11 THE HEARING OFFICER: Additionally, you allege that the
12 Charging Party in this case failed to bargain in good faith and
13 cited to specific provisions under 8.b of the Act. Am I correct
14 in understanding that Respondent has not filed any unfair labor
15 practices against the union?
16 MR. EASLEY: That is correct, Your Honor, and given the
17 representation that was made by counsel for the General Counsel
18 in the prehearing conference call, the question of impasse is
19 not at issue. I don't believe that we will be presenting
20 evidence for that.
21 THE HEARING OFFICER: That gets to my last point. I just
22 want to confirm on the record that all parties agree -- and this
23 may be in your stipulation, and I haven't read it. So if it is
24 bear with me, but I just want to make sure it's on the record.
25 There's no dispute that the parties reached a good faith impasse

1 during negotiations prior to implementation in this case; is
2 that correct, Mr. Shepley?
3 MR. SHEPLEY: In General Counsel's position that is the
4 case.
5 THE HEARING OFFICER: Okay. Ms. Oliver, do you have a
6 different position?
7 MS. OLIVER: No.
8 THE HEARING OFFICER: Respondent, is arguing there was an
9 impasse?
10 MR. EASLEY: That is correct, Your Honor.
11 THE HEARING OFFICER: I wanted to clarify that. All right.
12 Any other motions?
13 MR. SHEPLEY: No other motions from General Counsel.
14 MR. EASLEY: None from Respondent.
15 THE HEARING OFFICER: Mr. Shepley, are you ready to call
16 your first witness?
17 MR. SHEPLEY: I believe that you wanted opening statements?
18 THE HEARING OFFICER: Thank you. I do. I made a special
19 point of noting that. Very good. Go ahead.
20 MR. SHEPLEY: Thank you, Your Honor. We're here today to
21 try two cases. The first charge filed in case 06-CA-163303.
22 General Counsel is alleging 8A5 violation based on two theories.
23 Respondent implemented terms and conditions on October 27, 2015
24 after the parties had engaged in unsuccessful negotiations for a
25 successor contract. General Counsel does not deny that the

1 parties were at impasse as of that date on all terms of
2 Respondent's last offer to the union.
3 However, Respondent violated 8A5 when it implemented all
4 of the terms in its last offer except the wage related terms.
5 This partial implementation was a violation in as much as other
6 benefits related to wages were in fact implemented.
7 The second theory in the complaint is that the failure to
8 implement the wage increases was conditioned upon ratification
9 of Respondent's last proposal. Ratification is a non-mandatory
10 subject of bargaining. Thus, we allege a violation in this
11 manner.
12 The second case, 06-CA-170901 is really very simple. We
13 allege that Respondent subcontracted massive amounts of work
14 that was formally done by union employees without first offering
15 the bargain with the union. In this regard, representatives of
16 Respondent walked into a meeting on February 10, 2016 and told
17 the union representatives for the first time that the work to
18 perform on what is called an outage at the plant was to start on
19 one month later on one of the units in the plant, and this work
20 would be done almost entirely by subcontractors and not by unit
21 personnel. This work was largely done by unit personnel on
22 prior outages on this unit and other units.
23 Now, the announcement was fait accompli and at no time was
24 the union given an opportunity to bargain over this massive
25 amount of subcontracting.

1 The complaint in this case also alleges a failure and
2 refusal to provide certain information that was directly related
3 to the decision to subcontract. That request was made the same
4 day that the union first learned that the subcontracting was to
5 occur. That was February 10th of 2016. Thank you.
6 THE HEARING OFFICER: Ms. Oliver, do you have anything
7 different or additional that you want to add?
8 MS. OLIVER: The only thing that I would add to
9 Mr. Shepley's statement, which I agree with in total, is that at
10 the time that the employer met with the union on February 10th,
11 2016 there was no collective bargaining agreement in effect. I
12 realize, Your Honor, you haven't read the stipulations yet, but
13 that's probably important to the story.
14 THE HEARING OFFICER: Mr. Easley?
15 MR. EASLEY: Thank you, Your Honor. FirstEnergy Corp. is
16 one of the largest investor owned utilities in the United
17 States. Through its subsidiaries, FirstEnergy Generation, LLC,
18 FirstEnergy owns and operates coal fired power generation
19 facilities throughout Ohio and Pennsylvania including the Bruce
20 Mansfield facility involved in these consolidated unfair labor
21 practices.
22 Production and maintenance employees at the Bruce
23 Mansfield facilities are represented for purposes of collective
24 bargaining by the Charging Party. International Brotherhood of
25 Electrical Workers' Local Union No. 272.

1 First FirstEnergy Generation and IBEW Local 272 were
2 parties to a collective bargaining agreement that expired by its
3 terms on February 15th, 2013. That agreement as been admitted
4 as Joint Exhibit 1. On August 12th, 2013 the company and the
5 union entered into a memorandum of agreement that extended the
6 terms of the collective bargaining agreement through February
7 14th, 2014. That extension has been admitted as Joint Exhibit
8 2.
9 The unfair labor practice allegations in case 6-CA-163303
10 arise out of the parties efforts to reach a successor agreement
11 to the contract that expired on February 14th, 2014. Moreover,
12 the facts regarding these negotiations are largely not in
13 dispute.
14 On December 19th, 2013 FirstEnergy and Local 272 commenced
15 negotiations for a successor agreement to replace the expiring
16 CBA. Prior to the expiration of the CBA the parties met ten
17 times for purposes of negotiating a successor agreement;
18 however, the parties failed to reach a successor agreement prior
19 to contract expiration.
20 Post-expiration, the parties continued to negotiate meeting
21 on additional 20 occasions from February 15th, 2014 through
22 September 18th, 2015. In addition to these meetings the parties
23 met nine separate times between May 9th, 2014 and June 19th,
24 2014 to discuss changes to the FirstEnergy Generation Personal
25 Safety Manual prior to merging these discussions with ongoing

1 negotiations for a successor agreement.
2 Despite these additional efforts, the parties were still
3 unable to reach a successor agreement. The parties remained
4 deadlocked on various issues including retiree medical benefits,
5 pension, mobile maintenance and resource sharing.
6 During the course of negotiations, FirstEnergy presented the
7 IBEW with two comprehensive offers of settlement on all open
8 negotiation issues neither of which were submitted by the union
9 to its membership for a ratification vote.
10 The first comprehensive offer of settlement was presented
11 to the IBEW on September 17th, 2014, and the second was
12 presented on September 17th, 2015 and has been admitted as Joint
13 Exhibit 4.
14 On September 18th, 2015 the parties met to continue
15 negotiations. The evidence will show that in this meeting the
16 IBEW chief negotiator, Herman Marshman, made clear that the
17 parties were quote, "miles apart.' In the meeting the union
18 refused to agree to any of the open items in company's second
19 comprehensive offer of settlement.
20 The parties scheduled a follow up meeting for October
21 19th, 2015; however, the union cancelled this meeting and then
22 declined the company's offer to reschedule.
23 Given that the parties were, in the union's words, "miles
24 apart" and given the IBEW's unwillingness to schedule additional
25 meetings, by a letter dated October 27th, 2015, Joint Exhibit 7,

1 FirstEnergy informed the union that the parties had reach a
2 bargaining impasse.
3 Significantly, there's no dispute in this case that the
4 company and the union reached a bonafide impasse of bargaining
5 as of October 27, 2015. As a result in its October 27, 2015
6 letter, FirstEnergy announced that the company would be
7 implementing certain provisions of its second comprehensive
8 offer of settlement which has been admitted as Joint Exhibit 6.
9 These implemented terms and conditions of employment
10 consisted of the company's second comprehensive offer of
11 settlement with certain provisions struck which are not subject
12 to implementation as a matter of law, such as the union security
13 provision, financial rights clause, the no-strike clause, the
14 arbitration clause and the like. Significantly, the implemented
15 terms did not strike for the general wage increases and equity
16 adjustments in the second comprehensive offer of settlement;
17 however, because these wage adjustments were scheduled to be
18 paid on the effective date of the new collective bargaining
19 agreement, that is the ratification date, wage rates were not
20 changed at that time. It is the company's failure to implement
21 its wage proposal as well as increases in shift premiums that
22 forms the basis of the dispute in case 6-CA-163303.
23 However, the evidence will establish that the company's
24 implementation of some but not all of the provisions of its
25 second comprehensive offer of settlement was entirely lawful.

1 Nearly 50 years ago in its decision of Taft Broadcasting
2 Company, 163 NLRB 475, the NLRB recognized that the employer may
3 lawfully implement some or all of the terms of its -- of the
4 terms recently contemplated by its last pre-impasse proposal
5 upon reaching a bargaining impasse.
6 The board further explained in Presto Casting, 262 NLRB
7 346, quote, "In the view of the nature of an impasse there's no
8 requirement that an employer who implement some of his proposals
9 must implement his entire proposal."
10 Despite these well established principals of board law,
11 counsel for the General Counsel asserts two alternative theories
12 or an unfair labor practice finding in this case. First, he
13 claims that FirstEnergy's wage proposals were intertwined with
14 other proposals in the second comprehensive offer of settlement.
15 This contention is belied by the facts. The evidence will
16 demonstrate that the FirstEnergy's wage proposals were not
17 intertwined with any other proposals. Indeed, to the extent
18 that the company's wage proposals were tied to anything, these
19 proposals were related to the wage rates paid at other
20 FirstEnergy power generation facilities and in particular the
21 company's Sammis facility located Stratton, Ohio.
22 Further, even if wages were linked to the company's
23 productivity proposals, FirstEnergy did not implement the
24 company's primary proposal to improve productivity. That is,
25 its proposal that the company's mobile maintenance personnel

1 would be permitted to perform work in the Bruce Mansfield
2 facility.
3 Second, counsel for the General Counsel argues that
4 FirstEnergy's wage proposal itself was unfair labor practice
5 because the company proposed that its wage increase would be
6 effective upon ratification of a new agreement.
7 According to counsel for the General Counsel, linking wage
8 increases to a ratification is an unfair labor practice, because
9 ratification is a permissive bargaining subject; however there
10 two problems with this theory.
11 First, the company's proposal to pay wage increases upon
12 ratification merely meant that the company would not increase
13 wages until the parties reach a new agreement. The evidence
14 will demonstrate that the company's belief was that the IBEW
15 would not enter into a new collective bargaining agreement in
16 the absence of ratification. Accordingly, the reference to
17 ratification was merely a proxy for insisting that the parties
18 reach a binding agreement before wage increases would be paid.
19 This simply does not constitute an unfair labor practice.
20 In addition, even if the company had combined a wage
21 proposal with a progressive bargaining subject, such a
22 combination does not violate the Act. The NLRB previously held
23 in Dependable Storage 328 NLRB 44 that quote, "There is no legal
24 impediment to the linking of mandatory and non-permissive
25 subjects of bargaining."

1 Indeed, it is common practice in collective bargaining to
2 pay a bonus upon ratification of a new agreement. Paying a wage
3 increase based on similar terms simply does not violate the Act.
4 For these reasons the complaint in case 6-Ca-163303 is legally
5 baseless and must be dismissed.
6 The second unrelated case at issue in this proceeding, case
7 6-CA-170901 involves the subcontracting of certain work during a
8 maintenance shutdown or outage at the Bruce Mansfield facility
9 in Mary 2016. The complaint alleged that the company failed to
10 bargain with the union prior to subcontracting the rebuild of
11 unit 1 turbine and generator; however, the allegations in the
12 complaint must fail for two reasons.
13 First the decision to subcontract the turbine and rebuild
14 work was not mandatory bargaining subject because labor costs
15 played no part in the company's decision to subcontract the
16 project. The evidence will show that it was actually more
17 expensive to utilize an outside contractor to perform the
18 disputed work. The reasons that the company hired a contractor
19 had to do with the fact that there were not enough qualified
20 maintenance personnel at the Bruce Mansfield plant to perform
21 the work in the limited time frame required for the outage.
22 Further, the evidence will show that the contractor provided
23 a warranty on the project which the company could not obtain by
24 using its own workforce. Given that labor costs were not a
25 factor, no bargaining was required.

1 Second, the allegations in the complaint failed because
2 FirstEnergy provided notice to the union that outage work would
3 be subcontracted, and the union failed to promptly request
4 bargaining. FirstEnergy provided weekly reports to the union
5 with respect to work that would be subcontracted. In
6 these weekly reports as early as June 2015 the company notified
7 the union that working during the 2016 maintenance outage would
8 be subcontracted.
9 Further, the evidence will demonstrate that the company had
10 weekly subcontracting meetings with the union, and the union
11 never once requested bargaining with respect to the
12 subcontracting of outage work. Consequently the union waived
13 any bargaining rights that did exist with respect to the
14 company's subcontracting decision.
15 For these reasons the complaint and case No. 6-CA-170901
16 must also be dismissed. Thank you, Your Honor.
17 THE HEARING OFFICER: Thank you, you both -- or all three of
18 you. Now, Mr. Shepley, do you have a witness?
19 MR. SHEPLEY: Yes. I would like to call Thomas Cowher.
20 THOMAS COWHER
21 called as a witness by the General Counsel, having been first
22 duly sworn, was examined and testified as follows:
23 THE HEARING OFFICER: Have a seat and please your name and
24 spell it for the record.
25 THE WITNESS: Thomas Cowher, C-o-w-h-e-r.

THE HEARING OFFICER: All right. Go ahead, Mr. Shepley.

MR. SHEPLEY: Your Honor, I would like to ask permission to examine this witness under federal rule of evidence 6.11.C as much as he is associated with the adverse party.

THE HEARING OFFICER: Any objection, Mr. Easley?

MR. EASLEY: No objection.

THE HEARING OFFICER: Go ahead.

DIRECT EXAMINATION

BY MR. SHEPLEY:

Q. Mr. Cowher, do you work for FirstEnergy?

A. Yes, sir.

Q. How long have you worked for FirstEnergy?

A. Approximately 38 years.

Q. What position do you presently hold?

A. My title is consultant. I'm in the technical group at Bruce Mansfield plant.

Q. How long have you held that position?

A. The title specifically, it's been about four years. The position is relatively the same for the past 18 years.

Q. What do you do in that position? Could you briefly describe what you do as a consultant?

A. I basically represent the FirstEnergy in every manner -- in every aspect of the turbine work as far as -- the turbine area is pretty broad. It covers things like the cooling tower, the condenser and other balance equipment, but generally considered

1 a subject matter expert in regards to repairs and problems and
2 solving problems related to the turbine work.
3 Q. Wasn't there an outage of Unit No. 1 in March -- March
4 through May of 2016?
5 A. Yes, sir.
6 Q. And what is an "outage"? What exactly does that mean?
7 A. An outage is just a term. Other people use the term
8 "shutdown." Some people use the term "turn around". It's a
9 period of time that the equipment is out of service for
10 maintenance and not available to generate power.
11 Q. What causes the need for an outage?
12 A. Just equipment deteriorates over time and a power plant of
13 our magnitude is generally expected to operate 24 hours a day
14 seven days a week for years at a time, but nothing lasts
15 forever. So at some convenient point in time, you have to
16 perform maintenance.
17 Q. Is an outage something that's in response to an emergency,
18 or is it something that's planned well in advance?
19 A. There's different types of outages. The one in question is
20 planned well in advance.
21 Q. Other outages in the past have been planned in advanced;
22 have they not?
23 A. We have three different categories of outages. We have a
24 schedule outage, which is a predetermined interval and is
25 planned in advance, and then we have maintenance outages which

1 are generally shorter duration, and they're just taking
2 advantage of an opportunity to do some work, maybe a period of
3 low demand, and then there's a forced outage that comes up
4 8nexpectantly where something fails and a unit comes off. So
5 there's three types of outages, but the one in question is a
6 scheduled outage and planned well in advance.
7 Q. Are there what are called "units" at the Bruce Mansfield
8 power plant?
9 A. Yes, sir. There's three units.
10 Q. And is there a turbine and generator and other equipment in
11 each unit?
12 A. Yes.
13 Q. Is -- are they designated as Unit No. 1, No. 2 and No. 3?
14 A. Exactly.
15 Q. And the outage that occurred in 2016, that I referred to
16 earlier, that was Unit No. 1 only?
17 A. Yes, sir.
18 Q. Is the turbine in Unit No. 1 the same mechanically as the
19 turbine in Unit Nos. 2 and 3?
20 A. Yes, sir.
21 Q. Is there a generator in each of the three units?
22 A. Yes, sir.
23 Q. Is the generator the same in each of the units?
24 A. Yes.
25 Q. Now, in your position as consultant, were you involved in

1 the outage in 2016?
2 A. Yes.
3 Q. So I take it that you observed persons doing that work
4 associated with performing the outage?
5 A. Yes.
6 Q. And some of that work was performed by employees who worked
7 in the plant represented by Local 272; correct?
8 A. Yes.
9 Q. Is some of that work was performed by contractors or
10 subcontractors; was it not?
11 A. Yes.
12 Q. What's -- can you tell what the -- tell us what the
13 difference is between a contractor and a subcontractor?
14 A. From my frame of reference, a contractor is a larger entity
15 that would be awarded the purchase order from FirstEnergy for
16 them to come in and provide the service. A subcontractor would
17 be somebody that that contractor brings in to assist them in the
18 work.
19 I don't generally deal with subcontractors. We give
20 work to a contractor. They could also use the term a vendor,
21 but they're on our property performing a service. We contract
22 directly with them.
23 Q. What contractors were used in the 2016 outage?
24 A. There were quite a few. Do you want me to list all of them?
25 Q. Was General Electric one of them?

1 A. Yes, sir.
2 (General Counsel Exhibit 2 was marked for identification.)
3 Q. Now, I'd like to show you what's been marked as General
4 Counsel's Exhibit 2.
5 MR. SHEPLEY: May I approach the witness?
6 THE HEARING OFFICER: Yes.
7 Q. Can you identify this document? What is it?
8 A. This looks like the standard format for a outage meeting.
9 It's kind of like the agenda. This cover sheet would be the
10 agenda, and then the attached pages are kind of a high level
11 view of the work that's planned for the outage.
12 Q. What's the purpose of this document?
13 A. This just serves as the format for discussion during an
14 outage meeting. During a scheduled outage there would be a
15 meeting every day to talk about the work that's in progress and
16 the work that's coming up over the next few days.
17 Q. You notice on the front page it says March 20, 2016. So
18 does that signify that this was a document that was used on that
19 day only?
20 A. Yes, sir.
21 Q. So each day would have a different document?
22 A. That is correct.
23 Q. And each document, would it not, list the same items? I see
24 there's many listed there. Would each document each day have
25 the same list?

1 A. The list would change on a daily basis.
2 Q. But some of these tasks, these items, would remain from
3 day-to-day; would they not?
4 A. I can't say for certain. I mean, the list changes every
5 day. There's different formats for the meeting. This being on
6 the Sunday would have been one of the first days of the outage.
7 It may contain more information.
8 As you get further into the outage, in an effort to
9 reduce the time of the meetings, they would summarize more of
10 the information. There wouldn't be as many pages.
11 There's different views of the schedule. The pages,
12 like this, are called the primavera schedule. On one day there
13 may be a seven day view of the schedule. On the subsequent day
14 there may be a three day look ahead or a five day look ahead.
15 So that attached information changes as work is complete and as
16 work progresses. If work is finished, it would come off the
17 list. As emerging work develops, it would be added to the list.
18 This changes every day.
19 Q. As of this date, March 20, 2016, the various lines in this
20 document which number -- the last number is 600. These various
21 lines, do they not, show as of that date what tasks were to be
22 done to complete the outage?
23 A. Yes.
24 THE HEARING OFFICER: For that day or for the entire
25 project?

THE WITNESS: Well, you would have to ask me about a specific line. There's so much information here. Can we narrow the question?

THE HEARING OFFICER: My question to you is: Is this agenda for the entire outage for turbine or Unit 1, or is it all the work that was expected to be performed on March 20th, 2016?

THE WITNESS: Well, this work covers several days.

THE HEARING OFFICER: So it's not all that's expected to be performed on March 20th?

THE WITNESS: Usually they have a title on here. This one doesn't, but usually it says three day look ahead or five day look ahead. I'm trying to see from the time frame here. Some of these activities go out to the 22nd, to 24th. So of them go out a little further. So I can't specifically which view of the schedule this is.

THE HEARING OFFICER: All right. Go ahead Mr. Shepley.

BY MR. SHEPLEY:

Q. Would it be correct to say that as of that date the company expected to perform these roughly 600 tasks to complete the outage?

A. Yes.

Q. Now, you notice a column in these various pages with the numbers on the left column of plant areas. Do you see that? It's like this third column.

A. Yes, sir.

Q. Plant areas, there's different entries under plant areas. What do they signify, those entries?
A. They are an area -- my area would be the turbine area. So I would provide an update on the activities that are listed in the turbine area. Other people would be responsibile for the boiler area. People would be responsibile for the balance of plant area.
Q. Let's a specific instance. Turn to page -- it's page 2, and it's line 51.
A. I'm there.
Q. It says in that column of plant area "Ener." What does that signify?
A. That means Enerfab. That's a contractor.
Q. So that tasks, which is described in the next column to the right, "Demo F/A Slurry Tank Interferences," that was plan today be done by the company by the name of Enerfab?
A. That's correct.
Q. And there are other names of companies in that column under plant areas are; there not?
A. Yes, sir.
Q. And those names signify, do they not, that that particular company is going to do that particular task?
A. Yes.
Q. You'll notice that there's colored markings in there. There's some yellow and green. Do you notice that?

1 A. Yes, sir.
2 Q. Now, I'd like you to look at the ones that are marked in
3 green. Let's take numbers -- you'll go to line 235, and I'd
4 like you to look at lines 235 through 309. I'm not asking you
5 to read every word in there, but do you notice that that column,
6 plant areas, has GE listed many, many times?
7 A. That's correct.
8 Q. And that signifies that General Electric -- GE stands for
9 General Electric; right?
10 A. Yes, sir.
11 Q. That signifies that General Electric, a contractor, is going
12 to do those tasks; correct?
13 A. Correct.
14 Q. If you look at those lines that I've you referred you to,
15 isn't it true that those tasks were done by employees
16 represented by the union on prior outages?
17 A. Yes, sir. That's true.
18 MR. SHEPLEY: I'd like to offer into evidence General
19 Counsel's Exhibit 2?
20 MR. EASLEY: Can I have a brief voir dire on this, Your
21 Honor?
22 THE HEARING OFFICER: Yes.
23 VOIR DIRE
24 BY MR. EASLEY:
25 Q. Mr. Cowher, have you seen this document before?

1 A. During the outage. I haven't seen it since March 20th.
2 Q. And this would be a record that is regularly kept by
3 FirstEnergy Generation?
4 A. This is a daily outage meeting package to everybody that
5 attends the meeting on that day.
6 MR. EASLEY: We have no objection, Your Honor.
7 THE HEARING OFFICER: Ms. Oliver, I'm assuming that you have
8 no objection?
9 MS. OLIVER: No objection, Your Honor.
10 THE HEARING OFFICER: All right. So General Counsel's
11 Exhibit 2 is received.
12 (General Counsel Exhibit No. 2 was admitted into evidence.)
13 BY MR. SHEPLEY:
14 Q. Mr. Cowher, I would like to ask you about something else
15 now. Were you present for a meeting that the company held on
16 January 11th, 2016, the plan for the outage on No. 1?
17 A. Yes, sir.
18 Q. Isn't it true that -- somebody ran that meeting. Who ran
19 that meeting if you know?
20 A. I can't recall who ran it. It was probably the outage
21 superintendent who would be Justin Krunkleton.
22 Q. Somebody at that meeting passed out to the people present at
23 the meeting -- let me ask you: What type of people were present
24 at this meeting?
25 A. Can we specifically say the name of the meeting, because

1 there's several meetings every day. Was this the outage
2 readiness review meeting we're referring to?
3 Q. Well, it was on January 11th, 2016. Let me withdraw the
4 question. At this meeting on January 11th, 2016, was a
5 power point presentation given?
6 A. Yes, sir.
7 (General Counsel Exhibit 3 was marked for identification.)
8 Q. And I'd like to show you what's marked as General Counsel's
9 Exhibit 3. If you take whatever time that you need to look at
10 that document, I want to ask you about it.
11 A. Yes, sir. This is what we refer to as the outage readiness
12 meeting. It's a regular scheduled meeting so many days or weeks
13 prior to a scheduled outage.
14 Q. Now that you're memory is refreshed on that, what type of
15 people would be at that meeting?
16 A. It would be the plant leadership, the director, the
17 managers, the superintendents. It would be the fossil fleet
18 leadership people, vice presidents. It would be the outage
19 support groups from the corporate level. It would be people
20 assigned to other facilities that are going to support the
21 outage that are there for the meeting, and it may be directors
22 from other stations that are there to add some perspective.
23 Q. At this meeting was a power point presentation of this
24 information shown to you?
25 A. Yes, sir.

1 Q. And was a written copy of it given out the each person
2 present?
3 A. I would assume so. I think that's normal.
4 Q. Do you recall you receiving that document?
5 A. Well, I would have been involved in preparing the
6 power point. I don't recall having a hard copy at the meeting,
7 but I would have been involved in preparing the slides that make
8 up the turbine area.
9 Q. Does this document reflect what was shown to the
10 participants in this meeting?
11 A. Yes, sir.
12 Q. Do you believe that the document is accurate as far as the
13 statements that it contains? I realize it's quite a few pages.
14 A. It's a lot of pages, and without reviewing specifically
15 every page, I would say yes, it's accurate.
16 Q. Now, no one from Local 272 were present at this meeting;
17 were they?
18 A. They wouldn't normally be at the meeting. So I would assume
19 that they were not.
20 Q. Do you know if this document was ever given to anyone
21 associated with Local 272 at any time after the meeting?
22 A. I don't know that, sir.
23 MR. SHEPLEY: I have no further questions.
24 THE HEARING OFFICER: Do you want to move for the admission
25 of General Counsel Exhibit 3?

1 MR. SHEPLEY: I'm sorry. Yes, Your Honor. Thank you. I
2 would like to move for the admission of General Counsel's
3 Exhibit 3.
4 THE HEARING OFFICER: Any objection, Mr. Easley?
5 MR. EASLEY: No objection, Your Honor.
6 THE HEARING OFFICER: Ms. Oliver, any objection?
7 MS. OLIVER: No objection.
8 THE HEARING OFFICER: General Counsel's Exhibit 3 is
9 received.
10 (General Counsel Exhibit No. 3 was admitted into evidence.)
11 THE HEARING OFFICER: No more questions of the witness, or
12 no more questions with regards to this document?
13 MR. SHEPLEY: I have no questions for this witness.
14 THE HEARING OFFICER: And, Ms. Oliver, I'm going to ask at
15 this point and if I at any point fail to give you an opportunity
16 to question a witness, please speak up and let me know.
17 MS. OLIVER: You're not going to hurt my feelings. I have
18 no questions.
19 THE HEARING OFFICER: Mr. Easley?
20 MR. EASLEY: Thank you, Your Honor.
21 CROSS EXAMINATION
22 BY MR. EASLEY:
23 Q. Mr. Cowher, just a few questions. So when, as best as you
24 can recall, did planning for the Unit 1 outage begin?
25 A. Probably January of 2015.

1 Q. And at the time planning for it commenced what was
2 FirstEnergy's plan with respect to how the turbine rebuild was
3 going to be carried out?
4 A. At that specific point in time?
5 Q. Yes, sir.
6 A. It was unresolved at that time. It would have been
7 discussions with the plant superintendents about how to support
8 the work and divide up the work for it to be done in a timely
9 manner.
10 Q. Were there different alternatives that were in
11 consideration.
12 A. There were three alternatives at that time.
13 Q. What were those?
14 A. One was it would be performed by the plant mechanical
15 maintenance department the way it had always been done in the
16 past. The second would it would be performed by the mobile
17 maintenance group, and the third was it would all be given out
18 to a contractor.
19 Q. Did FirstEnergy request proposals from contractors for this
20 work?
21 A. Yes, sir.
22 Q. And to whom were those request for proposals made?
23 A. It was only submitted to General Electric.
24 Q. Why would you submit it to General Electric?
25 A. General Electric is the OEM of our turbine generator. They

1 built it. They built all of our units. They're probably the
2 leading turbine generator manufacturer in our county any way,
3 but regardless --
4 THE HEARING OFFICER: What's OEM.
5 THE WITNESS: Original equipment manufacturer.
6 Q. Has General Electric been involved in any prior turbine
7 rebuilds?
8 A. They were always involved to some extend as far as we would
9 award work for them to be done off site, and we would also award
10 them a contract to provide technical direction and an engineer
11 to be on site to direct the work from a technical perspective.
12 Q. Do you remember when Unit 1 turbine was installed?
13 A. I believe it was 1975.
14 Q. Who did the installation?
15 A. General Electric.
16 Q. How frequently do you have to do a rebuild on a turbine?
17 A. It's changed over the years. For a while we were on a six
18 year outage interval. Now were -- our fleet goal is nine year
19 interval for a super critical unit like ours.
20 Q. After the Unit 1 turbine was originally installed, who did
21 the first rebuild?
22 A. I wasn't there for the first rebuild, sir, but I would
23 assume that General Electric was heavily involved, but I don't
24 know who performed the labor.
25 Q. Now, turning your attention to what's been admitted as

1 General Counsel's Exhibit 2, do you still that in front of you?
2 A. Yes, sir.
3 Q. I see at the top of the document it has the letter M and
4 numbers 116. Can you tell us what that means?
5 A. It's just a code that's used to filter information in our
6 database. M stands for Mansfield and the first one is Unit 1
7 and the 16 is '16, the year. So it's Mansfield, Unit 1, 2016.
8 Q. And was this M116 a notation used frequently during the
9 outage?
10 A. It would be used frequently.
11 Q. So if, for example, that notation appeared in business
12 records, that would refer to the 2016 outage?
13 A. Yes, sir.
14 Q. Now, turning your attention to page No. -- let's see. Let's
15 go to page No. 8 of General Counsel's Exhibit 2. Do you see
16 where it says "Turbine/Generator GE Overerhaul" at the bottom of
17 the page?
18 A. Yes, sir.
19 Q. I see that the second line, which is marked 238 in the
20 column plant areas it says I&T. Do you see that?
21 A. Yes, sir.
22 Q. What does I&T stand for, sir?
23 A. It stands for Instrument and Test. It's a plant department.
24 It's the people that worked on the controls and the
25 instrumentation associated with the equipment.

Q. So that's bargaining unit employees?
A. That is correct.
Q. And does that indicate that bargaining unit employees were working on the turbine generator overhaul?
A. Yes.
Q. And isn't it true that in the past the turbine/generator overhaul always been shared between bargaining unit employees and contractors?
A. There was always bargaining unit people working on it, and there was always contractors working on it, but the work has changed over the time as far as more work has been going to the contractors.
Q. And how is it determined what work is going to be done by contractors and what work is going to be done by bargaining unit employees?
A. Just discussions with the plant superintendents to have a group of people, based on how many people they have available to perform the work and what other needs the plant has to use those people and the best use of these people to perform the work that needs to be done.
Q. What other work might need to be performed during the outage?
A. Well, you still have two units that are hopefully running units. Bruce Mansfield Unit 2 and Bruce Mansfield Unit 3 are exactly the same as Unit 1. They're still in service. There's

1 still breakdowns every day. There's still emergent work. So
2 there's a need for a certain number of people to be working on
3 things other than Unit 1 every day.
4 Q. Now, I believe that you testified just a few moments ago
5 that there were three alternatives that were considered for
6 getting the work done for the turbine rebuild. Do you remember
7 that testimony?
8 A. Yes.
9 Q. Who was involved in making the decision as to which one of
10 those alternatives would be selected?
11 A. Everybody in the plant leadership team would be involved,
12 and it would ultimately be at the fleet senior management level.
13 Q. Were you personally involved in that decision?
14 A. Yes. I was involved the entire time.
15 Q. What was your involvement?
16 A. My involvement was, "I need to get somebody to do this work.
17 Who's going to do this work?"
18 Q. Did you make a recommendation as to how the work was going
19 to be done?
20 A. Ultimately I recommended that we award the work to GE.
21 Q. Why did you make that recommendation, Mr. Cowher?
22 A. Because we ruled the other two options as not possible.
23 Q. Why did you do that? Why did you find they weren't
24 possible?
25 A. First, if we go back to January of 2015, I would meet with

1 the plant superintendent of maintenance and discuss the workload
2 and how many man hours we're going to need for the time frame
3 and the type of work that they need to do and the schedule they
4 would need to work, and he concluded that he could not support
5 that work with the people that he had under his control.
6 Q. What was the second alternative that you rejected?
7 A. The second alternative was FirstEnergy mobile maintenance.
8 It's a relatively new department. I don't know how long they've
9 been existence. I would say five to six years. I don't know
10 the time on that. They've been doing more and more work.
11 They've been building that group of people to perform turbine
12 outages and larger projects across the entire fleet to try to
13 manage the work more effectively at a lower cost.
14 Q. Why did you not recommend that mobile maintenance do the
15 rebuild in 2016?
16 A. We did recommend that they do it initially, but the
17 FirstEnergy industrial relations department told us that we were
18 not going to do that at that point in time.
19 Q. Was it explained why?
20 A. Yes, because they were in ongoing negotiations with the
21 local union, and they did not want us to pursue the mobile
22 maintenance alternative.
23 Q. You said that currently the cycle for doing these rebuilds
24 is every nine years; correct?
25 A. That's correct.

1 Q. Is it the same every time that you do one of these outage
2 projects?
3 A. It's not the same.
4 Q. How might it be different?
5 A. The scope is different every time. I mean, the one on Unit
6 1 in 2016 would be what we call a "full train" as we're tearing
7 every section of that turbine and generator apart for
8 inspection. That's the first time we've done a full train out
9 since 2003.
10 In 2005, 2006 and 2007 we did the HP section only -- the
11 high pressure section only because we purchased an upgrade from
12 General Electric. So we only did the HP section.
13 In 2008 on Unit 1, 2010 on Unit 2 and 2011 on Unit 3 we
14 did the IP section, the intermediate pressure and the three
15 LP or low pressure sections on those outages.
16 Now back to 2016 -- well, let me fill in the gap there.
17 2012 on Unit 1, 2013 on Unit 2 and 2014 on Unit 3 were more a
18 bare bones, only do what you have to do outage. So we would
19 have only done the turbine valves and any smaller valves to try
20 to control costs.
21 Q. So the scope of work in '16 was larger than the scope of
22 work in prior outages?
23 A. It was probably the largest scope we had since 2003.
24 Q. In connection with request for proposals to General Electric
25 for the turbine rebuild work, was General Electric prepared to

1 issue a warranty for the work that they did?
2 A. Yes. We have an alliance agreement with GE for our entire
3 fleet that they provide a two year warranty on their
4 workmanship.
5 Q. Was the fact that GE going to provide a warranty a factor in
6 the decision to move GE for the project?
7 A. Yes.
8 Q. Now, I would -- I believe that you have in front of you
9 General Counsel's Exhibit 3?
10 A. Yes, sir.
11 Q. And I believe if I understood your testimony on direct
12 examination by the General Counsel you indicated that you had
13 presented during this presentation?
14 A. That is correct.
15 Q. But not to whole presentation; just a portion it?
16 A. That is correct.
17 Q. Which portion is that, sir?
18 A. It would have started on page 36, and the slide number would
19 be 71 where I started, and my part would have gone through page
20 51 with slide 102.
21 Q. And could you explain for the judge what was the purpose
22 this meeting?
23 A. The purpose of the meeting?
24 Q. Yes, sir.
25 A. It's called an outage readiness review. It's a chance for

1 the senior leadership of the generation fleet to come to the
2 plant and kind of sound out the fact that we're ready to execute
3 the work that needs to be done.
4 Q. Was it possible that changes could be made to the plant
5 based upon the feedback you received from the leadership team?
6 A. Yes.
7 Q. Were changes made?
8 A. Yes.
9 Q. So even as late as January when you were presenting this
10 readiness review, there's still a possibly that we could change
11 our plan for how we were going to get the work done?
12 A. Yes.
13 MR. EASLEY: I have no further questions of this witness,
14 Your Honor.
15 THE HEARING OFFICER: Redirect?
16 MR. SHEPLEY: Yes, Your Honor, just a couple.
17 REDIRECT EXAMINATION
18 BY MR. SHEPLEY:
19 Q. Mr. Cowher, you said that the plant leadership team decided
20 which of the three options to go with; is that correct?
21 A. Yes.
22 Q. No one from Local 272 was involved in that process of
23 decision making; were they?
24 A. Not that I'm aware of.
25 Q. You testified that on different years there was outages that

had a different scopes or involved different degrees of the machinery, but on each of these outages whatever the scope, is it not true that the unit personnel at the plant did the large majority of the work on each of those outages before 2016?

A. Specific to the turbine? Yes.

Q. Wouldn't it be true that they did in excess of 90 percent? Would that be a fair figure of the work on the turbine on all the outages?

A. I couldn't comment on percentages, sir. I don't --

Q. Could you say with any degree of assurance that it was over 50 percent each time?

A. I wouldn't comment on percentages. I would say that they performed the open -- what's called open, cleaning and closed labor every time. That's the work of tearing the unit apart, cleaning all of the parts for inspection and for reassembly and reassembling. I would say that they did that work 100 percent of the time to my knowledge.

Q. Wouldn't that mean that most of the work on the turbine was done by the unit personnel in the past on the outages -- various outages?

A. Percentages and mosts I'm having troubles with. There's so many other contractors involved performing work that I don't have a way to do that in my head to say most. I wouldn't -- I would say they did the same work every time; took the equipment apart, cleaned it and put it back together every time. Other

1 contractors are doing work every time also.
2 Q. The most recent outage before 2016 was in what year?
3 A. 2014.
4 Q. And what was on which unit?
5 A. Unit 3.
6 Q. That was fairly recent. So perhaps your memory would be
7 better for that than some general question about all the
8 outages. In that outage in 2014 on the turbine, isn't it true
9 that the unit personnel did the vast majority of that work?
10 A. Yes.
11 Q. General Counsel's Exhibit 3, that power point, you testified
12 that on page 36 was where your part of the presentation
13 began; is that correct?
14 A. That's correct.
15 Q. Do you see slide No. 72 on that page?
16 A. Yes, sir.
17 Q. Do you see the bullet point that is the second one that
18 says, "final approval for the GE PO was received on 11-12-15."
19 Do you see that?
20 A. Yes.
21 Q. And that means, does it not, that the General Electric
22 selection was finalized by November 12th, 2015?
23 A. Yes.
24 Q. Purchase order refers to what?
25 A. Our contract with General Electric to perform the work.

1 Q. PO means purchase order; doesn't it?
2 A. Exactly.
3 MR. SHEPLEY: I have no further questions.
4 THE HEARING OFFICER: All right. Mr. Easley, do you have
5 follow up?
6 MR. EASLEY: Just a couple, Your Honor.
7 RECROSS EXAMINATION
8 BY MR. EASLEY:
9 Q. So the 2014 rebuild was not the same project as the 2016
10 rebuild; was it?
11 A. No, sir.
12 Q. In terms of scope -- let's measure scope by the value of to
13 project. In terms of that scope, how much the larger was 2016
14 than 2014?
15 A. I would say ten times larger.
16 MR. EASLEY: Nothing further, Your Honor.
17 THE HEARING OFFICER: All right.
18 MR. SHEPLEY: Your Honor, Ms. Oliver I believe has some
19 questions.
20 MS. OLIVER: Just briefly.
21 THE HEARING OFFICER: Okay.
22 RECROSS EXAMINATION
23 BY MS. OLIVER:
24 Q. Mr. Cowher, in the prior outages, GE was some what involved
25 in those outages as well providing technical assistance; is that

1 correct?
2 A. That's correct.
3 Q. In fact, in those prior outages they would also provide
4 warranties for --
5 A. For work that they performed on the site.
6 Q. Is that correct?
7 A. Yes.
8 MS. OLIVER: That's all I have.
9 THE HEARING OFFICER: Mr. Easley?
10 MR. EASLEY: Nothing further.
11 THE HEARING OFFICER: Now it's my turn to ask you some
12 questions. The joy of being the judge is that I get to come in
13 here with the least amount of information about the case. So
14 the witnesses need to educate me a little bit.
15 With regards to GC Exhibit 2, we have a column referring to
16 plant areas and what I need to understand is what these mean a
17 little bit, and some of them refer to contractors. Some of them
18 appear to refer to divisions or units within the facility. So I
19 want to make sure that I'm understanding the significance of
20 these terms. So if you look at -- starting with page 1, if you
21 go through the column involving plant areas, Oper, what is that?
22 THE WITNESS: Operations.
23 THE HEARING OFFICER: And for someone that doesn't know this
24 facility, are those employees of the --
25 THE WITNESS: It's a department made up of the folks that

1 operate the unit. They would specifically be called operators.
2 THE HEARING OFFICER: Are those bargaining unit employees?
3 THE WITNESS: Yes. This is shutdown activity. So the unit
4 is still in the hands of the operators. They're in the process
5 of shutting the unit down.
6 THE HEARING OFFICER: Boiler, I'm assuming --
7 THE WITNESS: Boiler is an area that's in the mechanical and
8 maintenance department. The boiler area is the folks that work
9 on the pulverizers and the burners and the equipment closer to
10 the boiler itself.
11 THE HEARING OFFICER: Brand?
12 THE WITNESS: Brand is a contractor. They provide all of
13 our scaffolding, and they're union carpenters.
14 THE HEARING OFFICER: They're not employed by Respondent?
15 THE WITNESS: No. Brand is a company.
16 THE HEARING OFFICER: I think that we talked about, Ener but
17 again, what is it again?
18 THE WITNESS: Enerfab is a general contractor for the boiler
19 work, and they employee boilermakers and pipe fitters and craft
20 labor other than plant employees.
21 THE HEARING OFFICER: LOE.
22 THE WITNESS: LOE is a scheduling term. It means "level of
23 effort." I don't know the exact definition of it. It's more of
24 a -- sometimes it would be called an hammock of how long all of
25 theses activities add up to.

1 THE HEARING OFFICER: So it's not a department or group?
2 THE WITNESS: No.
3 THE HEARING OFFICER: Finish M at 25?
4 THE WITNESS: That's a finish milestone. Again, that's just
5 a scheduling plate to say that's when that activity is supposed
6 to finish.
7 THE HEARING OFFICER: All right. And going through on page
8 2, Start M we talked about. Ener we already talked about.
9 Burn?
10 THE WITNESS: Burn is a contractor. Burnham is the name of
11 the company. They provide all of the installation work on the
12 craft labor.
13 THE HEARING OFFICER: ENGR.
14 THE WITNESS: That would be a plant department, engineering,
15 that would be doing inspection type activities or defining the
16 scope of work.
17 THE HEARING OFFICER: Aval.
18 THE WITNESS: Avalotis, they're a contractor that does
19 sandblasting and painting and coating.
20 THE HEARING OFFICER: All right. FQS.
21 THE WITNESS: FQS is a contractor. They do non-destructive
22 testing. It stands for First Quality Solutions.
23 THE HEARING OFFICER: All right. Page 3 we have I&T, which
24 you talked about. That's a contractor; is that correct?
25 THE WITNESS: No. That's plant union employees.

1 THE HEARING OFFICER: That's correct. Sorry. Okay. All
2 right. All right. Going through the columns -- I guess if you
3 look at 114 API-AIs, is that a unit within the company or are
4 those contractors?
5 THE WITNESS: API, I'm not sure what the ALs means. I think
6 it means Alstom. Our air heaters are made by -- they're
7 serviced by Alstom air preheater company. I think they have
8 different names. I think they're called something different
9 now, but they're name has changed several times, but this
10 specific activity was an engineer from that company to perform
11 an inspection.
12 THE HEARING OFFICER: All right.
13 THE WITNESS: So that's a contractor.
14 THE HEARING OFFICER: And the next page, page 5, you got
15 Elect. Are those electricians?
16 THE WITNESS: Those are plant electricians.
17 THE HEARING OFFICER: All right. I'm looking to see if
18 there's other ones that I don't have information on. You said
19 GE was General Electric, which was the contractor that was
20 brought in. 291 is Shpng. I'm assuming that's shipping?
21 THE WITNESS: Shipping.
22 THE HEARING OFFICER: Is that within the facility employees?
23 THE WITNESS: This one is just coded incorrectly. That
24 would have been GE employees preparing the IP rotor for
25 shipping.

THE HEARING OFFICER: Page 12, Orbit on line 345.

THE WITNESS: Orbit is a contractor, Orbital Energy Services. They provide valve and turbine value actuator type work.

THE HEARING OFFICER: Page 14 you got McCrl starting I think around 394.

THE WITNESS: McCarls is a pipe fitter contractor.

THE HEARING OFFICER: Okay. Page 17 there's SO2 M at line 485.

THE WITNESS: SO2 M is SO2 mechanical maintenance. That would be plant union employees assigned to the scrubber area.

THE HEARING OFFICER: 487 MultiCr.

THE WITNESS: That's a catch all. They would be different crafts involved in that activity.

THE HEARING OFFICER: Those are in-house?

THE WITNESS: Those would all be contractors.

THE HEARING OFFICER: Contractors. MPW at 490?

THE WITNESS: MPW stands for Mobile Power Wash. They're a contractor that does high pressure water blasting and work.

THE HEARING OFFICER: All right. With regards to the meeting on -- just so I'm clear -- on January 11th, 2016, again who was at this meeting? You said plant superintendents?

THE WITNESS: It would have been the plant superintendents or department heads, the plant managers, the plant director and then at the fleet level there would have been vice presidents

1 and senior vice presidents and directors and visitors from other
2 stations.
3 THE HEARING OFFICER: All right. Okay. How long did the
4 shutdown last for for Unit 1?
5 THE WITNESS: It was scheduled for 56 days. I think that it
6 started early and ended a couple of days late. So I don't know
7 the exact duration off the top of my head.
8 THE HEARING OFFICER: Okay. All right. Anyone need to
9 follow up on my questions?
10 MR. SHEPLEY: No, Your Honor.
11 MR. EASLEY: No, Your Honor.
12 THE HEARING OFFICER: Thank you. I appreciate your time.
13 Mr. Shepley, do you have another witness?
14 MR. SHEPLEY: I do, Your Honor. I would like to call Dennis
15 Bloom.
16 DENNIS BLOOM
17 called as a witness by the General Counsel, having been first
18 duly sworn, was examined and testified as follows:
19 THE HEARING OFFICER: Please be seated. State and spell
20 your name for the record.
21 THE WITNESS: Dennis Bloom, B-l-o-o-m.
22 THE HEARING OFFICER: Go ahead, Mr. Shepley.
23 DIRECT EXAMINATION
24 BY MR. SHEPLEY:
25 Q. Mr. Bloom, are you employed by FirstEnergy?

1 A. Yes, sir.
2 Q. When did you begin your employment?
3 A. Back in 1977.
4 Q. What position do you presently hold?
5 A. I'm a mechanic in the mechanical maintenance department.
6 Q. How long have you been in that position?
7 A. Since about 1978 or '79.
8 Q. Do you hold any position with IBEW Local 272?
9 A. Yes, sir. I'm the recording secretary.
10 Q. How long have you been in that position?
11 A. Since -- this time around since May of 2011. I had it
12 several times during my tenure with the company.
13 Q. For the benefit of the administrative law judge, I'm going
14 to now state I'm going to ask questions of the witness relating
15 to case 06-CA-163303.
16 Mr. Bloom, were you at FirstEnergy headquarters in Akron,
17 Ohio on October 27th, 2015?
18 A. Yes, sir.
19 Q. Why were you there?
20 A. President Marshman was ill, and he asked myself and the vice
21 president to attend a labor management meeting which was held in
22 Akron at the general office.
23 Q. What was the purpose of that labor management meeting?
24 A. Labor management meeting is usually held with the different
25 local union representatives from FirstEnergy and upper

1 management where they discuss issues with the company,
2 environmental, marketing and et cetera; just general issues with
3 the company at that particular time, like the state of the
4 company.
5 Q. Are these labor management meetings held on a regular basis?
6 A. I can't tell you that. I attended a few of them. I don't
7 know how often they're is scheduled.
8 Q. So this wasn't the only labor management meeting that was
9 every held?
10 A. No, sir.
11 Q. Did you personally speak to any member of FirstEnergy
12 management that day when you are at the headquarters in Akron?
13 A. Yeah. Mr. Cookson came over and spoke to Mr. Wylie and
14 myself and said he'd like to speak to us at the conclusion of
15 the meeting.
16 Q. Who was the us that you're referring to?
17 A. Mr. Wylie the vice president in attendance.
18 THE HEARING OFFICER: Vice president of IBEW?
19 THE WITNESS: Yes.
20 THE HEARING OFFICER: What's his first name.
21 THE WITNESS: Kevin Wylie.
22 Q. Did Mr. Cookson take you anywhere?
23 A. After the meeting we were escorted upstairs to an office,
24 cubical by Tony Gianatasio and Mr. Cookson joined us later on.
25 Q. And once you were in the cubical did Mr. Cookson speak to

1 you?
2 A. Yes, he did.
3 Q. What did he say?
4 A. He handed Kevin and myself and Mike Welsh our international
5 rep a document, and he said -- he informed us that the company
6 was going to implement this particular document. It was
7 implementing terms of contract effective that date, which was
8 October 27th?
9 Q. Did you give a response to his statements?
10 A. Yes, I did. I told him that we had had a meeting with our
11 committee prior to the meeting that was actually cancelled,
12 because Mr. Marshman got sick where our negotiating committee
13 formulated proposals counter to the company's last offer, and we
14 never had the opportunity to present those to the company,
15 because the meeting wasn't rescheduled.
16 Q. Negotiations for a successor contract had gone on for how
17 long at that point?
18 A. Two years at that point, I think.
19 Q. Now, you referenced that Mr. Cookson gave you something at
20 this meeting. What did he give you precisely?
21 A. He give us a package document. There was four different
22 documents in the package. The first being a letter from
23 Mr. Graf who's the plant manager to all of our bargaining unit
24 members. The second part was a letter from Mr. Cookson to
25 President Marshman, and that's a summary document and then the

1 actually terms.
2 THE HEARING OFFICER: Mr. Shepley, I'll permit you to
3 present the witness with the Joint Exhibits to determine whether
4 or not those documents are those he's referring to.
5 MR. SHEPLEY: Thank you, Your Honor. I'm reaching for them
6 right now.
7 Q. I'd like to show you what's been marked as Joint Exhibit 6.
8 Please take a look at that. Can you identify that?
9 A. This is the terms of contract that the company made
10 effective that date, October 27th.
11 Q. Is that a correct copy of what was handed to you by
12 Mr. Cookson on October 27th?
13 A. This is one part of it.
14 Q. But is that correct what you're seeing there?
15 A. Yes, sir.
16 Q. And I'd like to show you what's marked as Joint Exhibit 8.
17 Please take a look at that. Can you identify that? This is the
18 summary document that basically outlines the terms -- the
19 implemented terms? Was that given to you -- is that a correct
20 copy of what was given to you by Mr. Cookson on October 27th?
21 A. Yes, sir.
22 Q. I would like to show you what's marked as Joint Exhibit 7.
23 Please take a look at that. Can you identify that?
24 A. This is a letter from Mr. Cookson to President Marshman.
25 Q. And was that handed to you by Mr. Cookson on October 27th?

1 A. Yes, sir.
2 Q. Did he make my comment about Mr. Marshman not receiving it
3 directly?
4 A. He would receive it in the mail.
5 Q. I withdraw that question. Did you make any comment to him
6 about receiving that document -- that letter?
7 A. Yes, I did. I said that we had not broken off our
8 negotiation process. We hadn't had a chance to present the
9 company with our counter offer.
10 (General Counsel Exhibit 4 was marked for identification.)
11 Q. Now, I'd like to show you what's marked as General Counsel's
12 Exhibit 4. Can you identify what that document is?
13 A. Yeah. This is a letter from Jim Graf, the plant director,
14 cosigned by Pete Kotsenas. He's the vice president to the
15 members of local IBEW 272.
16 Q. Was that handed to you by Mr. Cookson on October 27th at the
17 cubical?
18 A. Yes, it was.
19 Q. Did you get a copy of that letter in your position as an
20 employee of FirstEnergy separate from what was handed to you on
21 October 27th?
22 A. Yes. I did in the mail.
23 Q. When did you receive that in the mail?
24 A. A couple of days after this was handed to me by Mr. Cookson.
25 It was in the US mail.

1 Q. Did all members of Local 272 get that same letter in the
2 mail?
3 A. Yes, sir.
4 Q. Did Mr. Cookson say anything else at that meeting with
5 respect to the joint exhibit in front of you, Joint Exhibit 6?
6 Did he say anything about that?
7 A. Joint Exhibit 6 was the whole document.
8 Q. I'm sorry. I have the wrong number. Joint Exhibit 8.
9 A. Yes. He read through the summary items line-by-line
10 outlining what the company was implementing on our members.
11 Q. Did he say anything else at the meeting?
12 A. That it would be implemented and as such with the wages
13 being withheld upon ratification.
14 MR. SHEPLEY: Now, I would refer you to a document that's
15 already in evidence here, but first, Your Honor, I'd like to
16 offer into evidence General Counsel's Exhibit 4.
17 THE HEARING OFFICER: Any objection?
18 MS. OLIVER: No objection.
19 MR. EASLEY: No objection, Your Honor.
20 THE HEARING OFFICER: All right. General Counsel's Exhibit
21 4 is received.
22 (General Counsel Exhibit No. 4 was admitted into evidence.)
23 Q. Mr. Bloom, there's exhibit Joint Exhibit 3. Is that in
24 front of you there? It may not be.
25 THE HEARING OFFICER: That's General Counsel's Exhibit 3.

1 No.
2 Q. It would be Joint Exhibit 3. I will give the witness a copy
3 of that.
4 A. I don't have it.
5 Q. Do you know what that document is?
6 A. That is settlement offer from the company.
7 Q. Does it appear to be an extension agreement for the contract
8 to 2014?
9 A. Yes, it is.
10 Q. And this document, this extension of the contract for one
11 year, was that extension put up for a ratification vote by the
12 members of Local 272?
13 A. No, sir. The agreement was reached between Mr. Marshman and
14 company representative Mr. Cookson.
15 Q. Now, Mr. Bloom, I'm going to direct your attention now to
16 matters involving case 06-CA-170901. Did you attend a meeting
17 with FirstEnergy management personnel on February 10, 2016?
18 A. Yes, sir.
19 Q. What was the purpose of that meeting?
20 A. That was a contractor's information meeting that was held
21 with plant management people, department heads and
22 representatives of the union where they notified the union of
23 jobs that the company contracted out.
24 Q. Had there been any prior meetings of this sort prior to
25 February 10, 2016?

A. Yes. Going on for a while.
Q. And who -- why were you at this meeting on February 10 of '16?
A. I was asked to attend with Mr. Snyder as the union representatives to receive the information from the company.
Q. Who else was at this meeting representing Local 272?
A. Frank Snyder.
Q. Does he have a position in the union?
A. He's the executive board steward for the electrical department.
Q. Who were the individuals present representing FirstEnergy at this meeting?
A. Paul Rundt, the maintenance department, Chris Cox, the maintenance department, George Mitch, molecular department and Ron Pugh.
Q. Did Mr. Rundt say anything at this meeting to you and Mr. Snyder?
A. Mr. Rundt pretty much ran the meeting. He put on a power point -- I call it a power point presentation -- on an overhead projector where he listed the jobs on that spreadsheet on the projector and showed the jobs that were being given away, and then he walked through them job-by-job and notified us what the job was and who the contractor was that would get the job.
Q. And these jobs that you're referring to were in reference to what?

1 A. The one job in particular was the contracting out of the
2 Unit 1 turbine outage which was going to happen in March. It
3 was being given to General Electric and also possibly the Unit 1
4 boiler fleet pump overall.
5 Q. Did you say anything in response to Mr. Rundt's statements?
6 A. I said, "Those are jobs that the mechanical maintenance
7 people have done on a routine basis since the plant came online
8 and it should and done by our people," and he said that it was
9 going to be given to General Electric.
10 Q. So who was Mr. Rundt's response to your statements if he had
11 any?
12 A. That it was going to be done by GE, and if the company was
13 still considering the boiler feed pump job if it was going to go
14 to GE or our people were going to do it.
15 Q. Is the boiler feed pump part of the turbine?
16 A. It's in the turbine area. It's not directly attached the
17 turbine, but it's equipment for the turbine.
18 Q. Is it part of the generator?
19 A. No, sir.
20 Q. Now, going into this meeting, did you know that the work on
21 the turbine/generator was going to be subcontracted out for the
22 outage on Unit 1?
23 A. No, I did not.
24 Q. What was your expectation going into that meeting?
25 A. That would be given the normal jobs that would -- they would

1 notify us of jobs being given to various contractors like an
2 expansion joint and other work -- like Enerfab is one of the
3 contractors. They'll do boiler repairs and code welding things
4 like that.
5 Q. Going into this meeting did you know that there was going to
6 be an outage on No. 1 unit in 2016?
7 A. We had heard that there was an outage coming up in the
8 spring, but that was the extent of it.
9 Q. Did any of the individuals that represented FirstEnergy at
10 this meeting state to you or Mr. Snyder at this meeting that
11 FirstEnergy was willing to bargain with the local over the work
12 done on the turbine and generator as part of the outage?
13 A. Not at all.
14 Q. Did Mr. Snyder say anything at this meeting?
15 A. Yeah. Mr. Snyder asked Mr. Rundt for the contractor
16 information sheets which in the past the company shared with the
17 local and on the contractor information sheet it would list the
18 contractor, a particular task that was going to be given away
19 and estimated man hours and estimated cost associated with that.
20 Q. What was the response -- well, let me ask you: I believe
21 that you described contractor information sheet adequate. So
22 I'm going to ask you now: What was the response of any of the
23 representatives of FirstEnergy to his request of the contract
24 information sheet?
25 A. We were told that the information was proprietary and

1 wouldn't be divulged to the union and that was Mr. Cox that made
2 that statement. He told us that we weren't entitled to that
3 information, and it wasn't available at that time.
4 Q. At this meeting was there anything else that the management
5 persons stated; anything that Mr. Mitch stated?
6 A. George Mitch is electrical department. He would have
7 reviewed any jobs in his department that were being contracted
8 out as well as Mr. Pugh.
9 Q. Did Frank Snyder say anything else at this meeting that you
10 recall?
11 A. He insisted on the company furnishing, like I said, the
12 contractor information sheets with the information that we
13 needed.
14 Q. To your knowledge, did anyone from FirstEnergy tell anyone
15 from Local 272 prior to this meeting that there would be
16 subcontracting as part of the upcoming outage in 2016 on Unit
17 No. 1.
18 A. Not to my knowledge.
19 Q. Now, after this meeting ended did you do anything?
20 A. Yes. I immediately called Herman Marshman to inform him
21 that we were just notified they were going to contract out the
22 Unit 1 outage.
23 Q. I would like to turn your attention to a separate but
24 related matter. Have you ever worked on the turbine for any of
25 the three units during any prior outage before 2016?

1 A. Yes, I have; off and on, yes.
2 Q. When would that be to the extent that you can recall?
3 A. I worked some on the outage that was held on Unit 3. I
4 think it was 2013 or 2014 or somewhere in there.
5 Q. What work did you do on these prior outages in 2013 or 2014?
6 A. I worked on the control valves which are associated with the
7 turbine. I've done some of the rigging of the shelving and the
8 diaphragms for removal and things like that.
9 Q. Now, I'd like you to refer you to a document that's in front
10 of you that's called General Counsel's Exhibit 2. It has M116
11 at the top.
12 A. This?
13 Q. Yes. That's the document. I'm going to ask you some
14 questions about that document.
15 A. All right.
16 Q. What is your understanding of the purpose of that document?
17 MR. EASLEY: I'm going to object to lack of foundation, Your
18 Honor. I think that when the General Counsel introduced this
19 exhibit the witness testified this is for management people. So
20 I don't know how this non-management person would have any idea
21 as to what the purpose of it was.
22 THE HEARING OFFICER: Do you want to establish a foundation
23 with the witness?
24 MR. SHEPLEY: Yes, Your Honor.
25 Q. Have you ever seen that document prior to today?

1 A. Yes, I have.
2 Q. And after you saw it, did you review what was the contents
3 of that document?
4 A. I read through it, and I saw that it represented jobs
5 associated with the outage -- for the Unit 1 outage in 2016.
6 MR. SHEPLEY: That's a foundation, Your Honor.
7 MR. EASLEY: That's not foundation of what the purpose of
8 the document is. It's foundation that he received a copy and
9 read it.
10 THE HEARING OFFICER: Well, the document is already received
11 into evidence.
12 MR. EASLEY: I understand the question posed to the witness,
13 Your Honor, was what was the purpose of the document, and the
14 objection was: How would he know the purpose if the document
15 isn't meant for bargaining unit personnel? His foundation was
16 that he received a copy and read it. I don't know now that
17 establishes the purpose or any foundation or knowledge of the
18 purpose.
19 THE HEARING OFFICER: Okay. So you received the document,
20 and you reviewed the document?
21 THE WITNESS: Yes. I saw the document, yes.
22 THE HEARING OFFICER: As far as the purpose of this
23 document, I'll sustain the objection as to his knowledge of the
24 purpose of the document. If you have questions on follow up, go
25 ahead.

Q. Mr. Bloom, do you see on each line there's numbered lines that refer to an activity?
A. Yes, sir.
Q. And when it says "activity," would you consider -- would you look at those various activities and would you consider them also tasks to be performed?
A. That's what I understand they are, yes.
Q. And referring to you lines 234 to 390 if you could look at those, do they refer to a particular area of the outage work?
A. Yes. It says here turbine/generator GE overhaul.
Q. And so are lines 234 through 290 tasks associated with the turbine work on the outage?
A. Yes, sir.
Q. And following the lines 390 are there also lines for work on the generator?
A. Yes. Starting with 405 I guess.
Q. Through what number if you can tell?
A. 405 down through 450.
Q. And you'll notice in that document you're holding there's some markings in green and yellow. Do you know how those colored markings came to be on this document?
A. Yeah. I marked the ones in yellow that were the jobs that were done by our bargaining unit people.
Q. Done when by bargaining unit people?
A. During the outage.

1 Q. The 2016 outage that you're referring to?
2 A. Yes.
3 Q. And that's the yellow markings?
4 A. Yes, sir, the yellow ones.
5 Q. And you notice that there are green markings?
6 A. Yes, sir.
7 Q. Did you make those green markings?
8 A. I didn't make the green ones, no, sir.
9 Q. Did you make any markings on any document that was not green
10 but a different color?
11 A. Yes. And I marked them with an X on the outside border
12 there. The X in any interpretation was work that was done by GE
13 doing this outage that our bargaining unit normally performed.
14 Q. Some of the lines have no color; is that correct?
15 A. Yes, sir.
16 Q. What -- why were they not colored by you in green or yellow?
17 A. The ones that aren't colored are jobs performed by outside
18 contractors that routinely perform these other jobs such as a
19 insulate, the boilermakers and the sandblasters and et cetera.
20 Q. I want to ask you a couple of these lines. I'm not going to
21 go through all several hundred of them. I would like to refer
22 to you line No. 238.
23 A. Okay. 238.
24 Q. 238 on page 9. I'm sorry. 238 is back on page 8.
25 A. 8.

1 Q. Now in the column plant areas it says I&T?
2 A. Yes, sir.
3 Q. Is that is work -- what is that work I&T?
4 A. Instrument testing is a department in the bargaining unit.
5 They do vibration probes, temperature probes and things like
6 that. They connect them and disconnect them and rewire them and
7 whatever.
8 Q. Is that work -- because you work marked it with yellow, does
9 that mean that the work was performed by unit personal in the
10 2016 outage?
11 A. Yes, sir.
12 Q. Let's look now at line 243. In the plant area's column that
13 says GE, and you've marked it in green?
14 A. It says unbolt and remove lower half T1 oil deflector, yes.
15 Q. What does that green marking signify?
16 MR. EASLEY: I'm going to object. He witness testified that
17 didn't put the green markings on the document.
18 THE WITNESS: I have an X on the outside.
19 THE HEARING OFFICER: The question was to the green
20 highlighting. So the objection to the form of the question is
21 sustained. If you want to rephrase the question, you certainly
22 can.
23 Q. Mr. Bloom, you see 243 has an X to the left of it?
24 A. That's my identification of the job that was normally
25 performed by us but at this outage was given to GE.

1 Q. So to clarify, this work on 243 was given to GE, but it was
2 formally performed by bargaining unit employees --
3 A. Yes.
4 Q. -- in prior outages?
5 A. Yes. I would say -- to my knowledge every outage it was
6 performed by us except for this one.
7 Q. Just to make it absolutely clear on the system here of your
8 marking, let's look at line 359. Do you see that that's on page
9 13?
10 A. 359, it says Orbit?
11 Q. Yes. You have no color on that and you have no X or
12 anything the far left -- excuse me.
13 A. No. That identifies that as a vendor that worked for
14 FirstEnergy. So it was someone they had contracted out to a
15 vendor to perform that work.
16 Q. And was that work performed in the past was vendors or not?
17 A. I don't know what the actual work was on that. Preparing
18 the actuator, I don't know that. It's not specific on this
19 piece of paper.
20 Q. Now, I'd like you to look at line 334 and there's an
21 activity listed for 334 and you have an X in the far left-hand
22 side of that page?
23 A. That's on a main stop valves. It says unbolt and remove
24 upper head.
25 Q. Are you familiar with that activity based on your 37 years

1 as a mechanic?
2 A. I've worked on the main stop valves taking them apart, yes.
3 Q. Have you ever seen any other employees do that activity on
4 line 334 during prior outages?
5 A. Bargaining unit people, yes.
6 Q. Have you done it yourself?
7 A. I worked on this job, yes.
8 Q. How many times have you worked on it?
9 A. I would say several over my years there. I can't tell you
10 exactly. I've done it several times.
11 Q. Please look at line 335.
12 MR. EASLEY: Your Honor, this is all duplicative evidence
13 that counsel from General Counsel got from his first witness
14 that all of this work was previously performed by bargaining
15 unit employees. I certain the purpose of belaboring the matter.
16 THE HEARING OFFICER: Well, if you're going to stipulate
17 that this work which has an X by it was previously done by
18 bargaining unit work, then you can entertain that, and probably
19 curtail the questioning, but I'll leave that for the two of you
20 to sort through. Are you proposing that stipulation?
21 MR. EASLEY: No. I'm just saying this is duplicative
22 evidence. He already got it from his first witness.
23 THE HEARING OFFICER: I think from my perspective, we're
24 going through these, and he's testifying as to what he's checked
25 that he's familiar with doing. The first witness indicated that

1 some of the work was done by bargaining unit work in the past.
2 So I'm in a position where I don't fully understand which of
3 these tasks have been done by whom. If he's going through to
4 establish that, I think that has relevance.
5 If there's a way you want to curtail this or reach an
6 agreement so that's not necessary, I'm in favor of that, but I'm
7 assuming that there's some reason that you're trying to go
8 through it with this witness, and that's I'm assuming to
9 establish what in his personal knowledge has been done by
10 bargaining unit employees?
11 MR. SHEPLEY: That's exactly right, Your Honor. I don't
12 want to go through every line, but just one line would not be
13 adequate. I'll also state that if counsel if willing to
14 stipulate that the marks -- the activities that are marked with
15 an X were done by contractors during the outage in '16 but were
16 previously done by unit personnel, I would certainly enter into
17 that stipulation and curtail any further questioning on this.
18 THE HEARING OFFICER: You can propose that to Respondent if
19 you want to have a brief off the record discussion to facilitate
20 that I'm fine with that. I don't want to spend a lot of time
21 going back and forth on the record, and I don't want to spend
22 needless time questioning the witness if that can be done. So
23 I'm going to -- Mr. Easley, would you like to have a brief of
24 the record discussion with Mr. Shepley?
25 MR. EASLEY: Honestly, Your Honor, I don't think that's

1 necessary, because we wouldn't stipulate. We can keep going.
2 THE HEARING OFFICER: Sounds good.
3 BY MR. SHEPLEY:
4 Q. Mr. Bloom, referring to line 335 you'll see there's an X
5 that you placed there?
6 A. Yes, sir.
7 Q. And you see what the name of the activity is?
8 A. Feller check the upper head horizontal. That's a task part
9 of the -- taking a part the stops. You take it apart and check
10 the clearances as you take it apart.
11 Q. And are you familiar with that task?
12 A. Yes. Our people have done that task. I can't say that I
13 personally have done that, but I've been involved in it.
14 Q. Have you ever seen any subcontractor do that work on any
15 outage prior to 2016?
16 A. No, sir.
17 Q. I'm going to ask you about one more line. Let's look
18 another line 348. That's a different area of main stop valves
19 No. 2, line 348.
20 A. Once again, that's unbolt and remove the upper head on the
21 stops. We have four stop and control valves, yes.
22 Q. Let me ask you -- I'll continue with that question. Have
23 you ever seen that -- are you familiar with that work there in
24 line 348?
25 A. Uh-huh.

1 Q. Yes you are because --
2 A. Yes, sir.
3 Q. I'm sorry I'm being duplicate here, and I don't mean to be.
4 A. Yes, sir.
5 Q. And have you ever seen that particular work on main stop
6 valves No. 2 being done by unit personnel in the past?
7 A. Every outage that I've seen, yes, our people did that work.
8 Q. Did you ever do that particular work?
9 A. I've worked on -- like I said, I've done the main stop
10 valves, yes.
11 Q. I'd like you to look through line 234 to 390. Do you see
12 any activities that you performed on any outage prior to the
13 outage in 2016?
14 A. Several.
15 Q. Could you point out ones that you notice that you did
16 previously?
17 A. 325 remove upper and inner shell on the BLP section, 316
18 unbolt and remove cross-over piping. Like I said, several of
19 these jobs I have participated in other the years.
20 Q. Looking at the markings from 234 to 390, do you see any of
21 these activities that you never saw a unit personnel perform in
22 any prior outing?
23 A. Can you restate the question, please?
24 Q. Are all of the items from 234 through 390 where you have an
25 X, are all of those items that you have seen unit personnel

1 perform in the past?
2 A. Yes. Yes, sir. That's why I appropriately marked them with
3 an X and identified them as jobs that we normally perform.
4 (General Counsel Exhibit 5 was marked for identification.)
5 Q. Now, I'm going to change the subject and get off of these
6 lines that we're talking about. I'd like to show you what's
7 been marked as General Counsel's Exhibit 5. Have you ever seen
8 that document before?
9 A. Yes, I have.
10 Q. What is it?
11 A. It's a document that we received from the company when the
12 union met with the company to enter into discussions about the
13 upcoming Unit 2 2017 outage.
14 Q. Was that document given to you personally?
15 A. Yes. I received a copy out of it in a meeting, yes.
16 Q. The date of that meeting was what?
17 A. October the 6th I think.
18 Q. 2016?
19 A. Yes, sir. October the 6th was our meeting, the first one.
20 MR. EASLEY: Your Honor, I'm going to object to this line of
21 questioning. What does what happened on October of 2016 have
22 anything to do with the outage in March through May of 2016?
23 THE HEARING OFFICER: What's your response to that
24 Mr. Shepley?
25 MR. SHEPLEY: There's a portion of this document that I'm

1 going to question the witness on which indicates that prior
2 conduct of the Respondent which is relative to the allegations
3 here. I haven't gotten to that point, but there is a portion
4 that is there.
5 THE HEARING OFFICER: I will allow you a couple more
6 questions to get to that if you could please. I'll overrule the
7 objection at this point.
8 BY MR. SHEPLEY:
9 Q. Mr. Bloom, this was -- who prepared this document; the
10 company or the union?
11 A. The company prepared this, yes.
12 Q. And I would like to refer to you to page 2, and you see
13 there's a chart at the bottom of the page?
14 A. Yes, sir.
15 MR. SHEPLEY: And with the indulgence of, Your Honor, this
16 will take a couple of more -- more than a couple of questions to
17 explain this chart, but that's the purpose of this line of
18 questioning.
19 THE HEARING OFFICER: Go ahead.
20 Q. Mr. Bloom, could you explain the lines? There are lines in
21 this chart, and there are four columns. Can you explain what
22 the lines are?
23 MR. EASLEY: I'm going to object to the form of the
24 question. If this is a document prepared by the company, it's
25 not appropriate for him to ask what the document is unless he's

1 saying this is what the company explained to him, and we can all
2 read what the information says.
3 THE HEARING OFFICER: We can all read it, but I'm not going
4 to know what it means, and if the witness is familiar with these
5 acronyms and abbreviations and they're commonly accepted in the
6 workplace as meaning something that isn't reasonably subject to
7 dispute, I think the witness can answer that.
8 MR. EASLEY: That was not the question to the witness, Your
9 Honor.
10 THE HEARING OFFICER: So the first column which would be
11 departments there's a number of abbreviations or acronyms. Do
12 you see that?
13 THE WITNESS: Yes, sir.
14 THE HEARING OFFICER: Do you know what those -- I'm going to
15 say generally. Do you know what those are and what they mean?
16 THE WITNESS: Yes, I do.
17 THE HEARING OFFICER: How do you know what they are?
18 THE WITNESS: For instance, the MNBLR are the maintenance
19 boiler. Those are bargaining unit jobs. Maintenance boiler,
20 maintenance electrician, the I&T.
21 THE HEARING OFFICER: We will go through what they are in
22 the minute, but you're familiar with them as abbreviations
23 commonly used in your workplace?
24 THE WITNESS: Yes, sir.
25 THE HEARING OFFICER: I'm going to allow him to go through

1 the department column, and we will figure out what we're going
2 to do next. Go ahead, Mr. Shepley.
3 BY MR. SHEPLEY:
4 Q. Mr. Bloom, looking at columns No. 3 and 4 that would be work
5 to be contracted out and work to be contracted and not
6 historically performed by Local 272?
7 A. Yes.
8 Q. And I would like to refer you to the line were it says
9 mobile?
10 A. Yes. Mobile represents -- come down the line of work that
11 was contracted out that represents 32,220 man hours, and that's
12 the number of man hours being given to mobile maintenance to
13 perform the turbine inspection work. Can I go back to the front
14 page for a minute?
15 THE HEARING OFFICER: What I would like to do so I
16 understand this document -- I need to know what the departments
17 are first. So go through the departments, and you'll be subject
18 to cross-examination if Respondent has an issue with how you
19 characterize them. Go head. MNBLR?
20 THE WITNESS: That's the boiler area in this maintenance
21 department.
22 THE HEARING OFFICER: Keep going.
23 THE WITNESS: The next one is a electrical department,
24 in-house group in the bargaining unit. The next one is a
25 instrument and test department. The next one is the SO2

1 maintenance group. They work in the SO2 area, which is our air
2 quality control area, and then we have the turbine area in the
3 maintenance group, and you see the electrical contractor.
4 That's the contractor that the company employees the outside
5 contractor.
6 THE HEARING OFFICER: The words going down, I get except for
7 vac services. What's vac services?
8 THE WITNESS: That's where they use a industrial vacuum
9 tuck for cleaning.
10 THE HEARING OFFICER: So you talked about mobile, and what
11 does mobile mean?
12 THE WITNESS: That's the mobile maintenance group. It's
13 employees that aren't affiliated with our local or the plant.
14 THE HEARING OFFICER: So they work for the company, but they
15 do not work on site?
16 THE WITNESS: Right. They come in and do various jobs, but
17 they wanted to do the turbine on this group.
18 THE HEARING OFFICER: All right. Go ahead.
19 BY MR. SHEPLEY:
20 Q. Mr. Bloom, on the mobile line in the fourth column, do you
21 see that there's nothing listed there?
22 A. Yes. The column is labeled work to be contracted and not
23 historically performed by Local 272. So when the company
24 prepared this document, they're saying that that work in that
25 column --

1 THE HEARING OFFICER: The document says what it says. I'm
2 not going to ask you to characterize what the company meant.
3 The words are what the words are.
4 MR. SHEPLEY: I have no further questions of this witness.
5 THE HEARING OFFICER: Ms. Oliver, do you have questions of
6 the witness?
7 CROSS EXAMINATION
8 BY MS. OLIVER:
9 Q. In the mobile maintenance employees that are listed under
10 the department heading, are those employees members of Local
11 272?
12 A. No, they are not.
13 Q. And the 32,220 --
14 A. Those are man hours associated with the job that the company
15 wants to have them perform on the turbine.
16 MS. OLIVER: That's all I have.
17 MR. SHEPLEY: I'd like to offer into evidence at this time
18 General Counsel's Exhibit No. 5.
19 THE HEARING OFFICER: Do you want to restate your objection?
20 MR. EASLEY: I do for two reasons. First of all, this has
21 nothing to do with the collective bargaining negotiation, and
22 this occurred after the event in question in this proceeding.
23 So it's not relevant to the current proceeding, and plus I'm not
24 convinced that adequate foundation has been laid for the
25 admission of this document.

1 THE HEARING OFFICER: What's your issue with the foundation?
2 He identified that he received it at a meeting from a company
3 official on October 6th, 2016. I believe that's what the
4 evidence has established. Is there a further foundation
5 argument that you have.
6 MR. EASLEY: I'll withdraw that part of my objection.
7 Relevance.
8 THE HEARING OFFICER: Relevance is the objection. Why is
9 this relevant to your case that I have it before me?
10 MR. SHEPLEY: Your Honor, we believe it's relevant because
11 it's in essence an admission to the work that was to be
12 contracted and not historically performed by Local 272. That's
13 an admission by that space in the chart being blank, meaning
14 it's zero.
15 THE HEARING OFFICER: So you would like for me to draw an
16 inference base on this document that involves work after the
17 fact that the company has characterized this work as
18 historically bargaining unit work, and you would like for me to
19 infer that, has it relates back to the UOP allegation; is that
20 correct?
21 MR. SHEPLEY: Yes, Your Honor, and I believe that's a fair
22 inference.
23 THE HEARING OFFICER: Well, I'll receive the document. The
24 basis for the --
25 MR. EASLEY: Can I say on this, Your Honor, before you rule?

1 It says work to be contracted and not historically performed by
2 Local 272. So this would actually undermine the General
3 Counsel's position.
4 THE HEARING OFFICER: It's something that you can argue in
5 your brief; correct?
6 MR. EASLEY: Correct.
7 THE HEARING OFFICER: You both have reasons to cite to this
8 and argue it in your brief. I'll receive it over the
9 objections, and I certainly would like to hear the arguments
10 that you have as it relates to the documents in your briefs.
11 Anything else?
12 (General Counsel Exhibit No. 5 was admitted into evidence.)
13 MR. SHEPLEY: I have no further questions of this witness.
14 THE HEARING OFFICER: So, Ms. Oliver, you asked your
15 questions. I'm assuming what just transpired doesn't cause you
16 to have any additional questions; is that correct?
17 MS. OLIVER: I apologize. I do have a question just on
18 General Counsel Exhibit 2 for a moment.
19 THE HEARING OFFICER: All right.
20 BY MS. OLIVER:
21 Q. Mr. Bloom, you testified that you made Xs on the document --
22 A. Yes.
23 Q. -- starting on page 8 line 235 and thereafter. Those are
24 your tiny Xs?
25 A. Yes, ma'am.

1 Q. And you testified that you didn't put the green highlighting
2 on. Can you explain what happened with regard to this document
3 in terms of the highlighting?
4 A. The highlighter that I used bled through.
5 Q. What color was that?
6 A. It was pink, and it ran through the pages.
7 Q. Did you assist in the preparation of this document with the
8 different color?
9 A. Yes, for this.
10 Q. And do the Xs represent the same thing as a highlighted
11 things?
12 A. The Xs represent the contracted out work and the checkmarks
13 represent the work performed by our bargaining unit. They
14 correspond with the yellow and green markings just as
15 clarification.
16 Q. And the Xs represent?
17 A. Jobs that were contracted out that were normally performed
18 by us.
19 MS. OLIVER: Thank you.
20 THE HEARING OFFICER: So what was previously pink, what's no
21 longer pink?
22 THE WITNESS: What is green. The pink bled through. Like I
23 said, a bad marker.
24 THE HEARING OFFICER: Mr. Easley?
25 MR. EASLEY: If the counsel for the General Counsel has an

1 affidavit from this witness, we would like to review it before
2 cross-examination, Your Honor.
3 THE HEARING OFFICER: Do you have an affidavit or other
4 statements you can provide to Respondent?
5 MR. SHEPLEY: I have one affidavit to provide. I'm
6 providing it at this time.
7 THE HEARING OFFICER: How many pages is it?
8 MR. SHEPLEY: It's about 15 pieces of paper but 31 pages.
9 THE HEARING OFFICER: Mr. Easley, how quickly can you review
10 that?
11 MR. EASLEY: 31 pages is a lot of pages, Your Honor.
12 THE HEARING OFFICER: Can you do it in 15 minutes?
13 MR. EASLEY: I think it will take longer than that.
14 THE HEARING OFFICER: We will give you the 15 minutes, and
15 after the 15 minutes, you tell me if you need more time.
16 MR. EASLEY: Very good.
17 THE HEARING OFFICER: Let's go off the record.
18 (Thereupon, at 12:30 p.m., a luncheon recess was taken to
19 1:15 p.m.)
20 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N
21 THE HEARING OFFICER: Let's go on the record. All right.
22 We are returning from a lunch recess in which Respondent's
23 counsel was given ample opportunity to review the witness'
24 affidavit. Mr. Easley, are you ready to begin your
25 cross-examination?

1 MR. EASLEY: I am your, Your Honor. Thank you.
2 THE HEARING OFFICER: Go ahead.
3 CROSS EXAMINATION
4 BY MR. EASLEY:
5 Q. Mr. Bloom, just a few questions. I believe that you
6 testified on direct examination that you were involved in the
7 collective bargaining negotiations between FirstEnergy
8 Generation and IBEW Local 272; correct?
9 A. Yes.
10 Q. Is it fair to say in those negotiations wage rates were a
11 fairly significant issue?
12 A. They were an issue.
13 Q. In fact --
14 A. I wouldn't say -- there was a lot of discussion.
15 Q. Isn't it true that one of the proposals made by the union
16 was the equalize the wages that were paid at the Bruce Mansfield
17 facility with the rates that were paid at the Sammis, Ohio
18 facility?
19 A. That was discussed.
20 Q. In the meeting on September the 18th of 2015 isn't it true
21 that there was a disagreement between the parties as to whether
22 or not the company's wage proposal in its second comprehensive
23 offer of settlement actually created equalization with the
24 Sammis wages?
25 A. That meaning meeting you're referring to, sir, I was only

1 there for part of it. I had another obligation, and I left. I
2 wasn't there for the whole meeting.
3 Q. You don't remember that discussion?
4 A. I can't say that I was there for the whole discussion.
5 Q. You were aware though that in the second comprehensive offer
6 of settlement that was presented by the company on the 17th, the
7 day before, there was a proposal for a quote, "equity
8 adjustment"? Do you remember that?
9 A. Without having notes to look at, I can't answer that.
10 Q. I believe that you have in front of you Joint Exhibit No. 4
11 which is the second comprehensive offer of settlement. Why you
12 don't you take a look at that?
13 A. What am I looking for?
14 Q. Joint Exhibit No. 4, second comprehensive offer of
15 settlement.
16 THE HEARING OFFICER: Do you want to district him to a
17 specific page?
18 Q. To the first page in fact.
19 A. I have 3, 8, 7 and 6 Joint.
20 THE HEARING OFFICER: Let the record reflect that I've given
21 the witness my copy of Joint Exhibit No. 4, which has no
22 markings on it, myself.
23 Q. You've seen that before have you not, Mr. Bloom?
24 A. I don't believe that's 4 in front of you; is it? Is that
25 No. 5?

1 THE HEARING OFFICER: Joint Exhibit 4.
2 Q. Yours is in color. That's why I'm confused. That's the
3 correct document. Have you seen this document before, sir?
4 A. I would say, yes.
5 Q. You were present on September 17th, 2015 in negotiations?
6 THE HEARING OFFICER: This is the meeting where you say it's
7 September 17th?
8 MR. EASLEY: September 17th.
9 A. One of the meetings I had to leave. I'm not sure if it's
10 the 17th or 18th. I don't have notes in front of me. I can't
11 answer that accurately.
12 Q. You were present for at least part of the meeting on the
13 17th?
14 A. Yes.
15 Q. Do you recall that the company presented the comprehensive
16 proposal in that meeting?
17 A. I think so.
18 Q. Do you see in the middle of the page where it says equity
19 adjustment?
20 A. Yes.
21 Q. It says, "The current wage rate, in effect on July 1, 2015,
22 at each step for all classification swill be increased by
23 one-dollar per hour, effective upon ratification." Do you see
24 that?
25 A. Yes, I see that.

1 Q. Wasn't it explained by the company that that equity
2 adjustment was designed to bring the wages of the Bruce
3 Mansfield employees in line with what we paid at other
4 FirstEnergy Generation facilities including the Sammis plant?
5 A. I don't remember call the reasoning behind it, but I
6 remember the equity adjustment of a dollar.
7 Q. Your testimony is you don't recall being told that's why it
8 was called an equity adjustment because it would make it
9 equitable with the other plants?
10 A. I don't recall that particular statement.
11 Q. You testified on direct examination with respect to Joint
12 Exhibit No. 3. That should be in front of you.
13 A. Yes.
14 Q. Stipulation of settlement?
15 A. Yes.
16 Q. I believe that your testimony was that this document wasn't
17 submitted to the membership of IBEW Local 272 for ratification;
18 correct?
19 A. Correct.
20 Q. Isn't it true that IBEW Local 272 typically submits a new
21 collective barring agreement to its membership for ratification?
22 A. A new bargaining agreement that's been negotiated?
23 Q. Yes, sir.
24 A. Typically a multi-year agreement, yes.
25 Q. And the reason that this particular stipulation of

1 settlement was not submitted was because it was an extension of
2 an existing agreement; is that right?
3 A. Correct.
4 Q. So if there was a new collective bargaining agreement
5 negotiated between FirstEnergy Generation and IBEW Local 272,
6 you would expect that the members would be able to vote on
7 ratification of that agreement?
8 A. If we came to an agreement between the parties?
9 Q. Yes, sir.
10 A. Yes.
11 Q. So now changing gears on you, let's talk a little bit about
12 the subcontracting issue, because you testified at length about
13 that, and I believe that you testified on direct examination
14 that prior to the February 10th, 2016 meeting where specifically
15 the turbine rebuild was discussed that you were aware that there
16 was going to be an outage; is that correct?
17 A. Yes.
18 Q. Isn't it true that as early as June of 2015 there was a
19 maintenance department meeting where the outage and the timing
20 was discussed?
21 A. I don't recall.
22 Q. You don't recall being present at a meeting where Paul Rundt
23 presented a power point which showed when the outage was going
24 to be and what the scope of work was?
25 A. No, sir. What was the date of that?

1 Q. In June of 2015.
2 A. No, I don't.
3 Q. The February 10th, 2016 meeting that you referenced earlier
4 that was a --
5 A. Can I ask you for clarification? What was the meeting in
6 June?
7 Q. June of 2015.
8 A. The date please.
9 Q. I don't have the exact date.
10 A. My reason is: I vacation in June. So I might not have been
11 there.
12 Q. Your answer was you don't remember, which is fine.
13 A. In June I don't remember.
14 Q. So moving to the February 10th, 2016 meeting, that was a
15 subcontracting meeting; correct?
16 A. The --
17 Q. On direct examination you testified that you attended a
18 meeting on February 10th, 2016?
19 A. Yes.
20 Q. And that was a subcontracting meeting?
21 A. That's where the union and the company discussed contracting
22 out issues, yes.
23 Q. Is that's a meeting that happens every week on
24 Wednesday; isn't it?
25 A. Usually on Wednesday, but it's movable to the scheduling.

1 Q. Normally it's every week on Wednesday?
2 A. Yes.
3 Q. And that's going back years?
4 A. No.
5 Q. How long have the Wednesday meetings been taking place?
6 A. It hasn't been going back years.
7 Q. It goes back at least to the beginning of the 2009
8 collective bargaining agreement; does it not?
9 A. No. We did not meet on a regular basis.
10 Q. Why did you not meet on a regular basis?
11 A. There were disagreements between the two parties.
12 Q. So there were meetings scheduled that the union didn't
13 attend is what you're really saying?
14 A. There were some that the company didn't show up for either.
15 Q. Those meetings were typically scheduled to cover where
16 contracting work was going be going on?
17 A. That was the purpose of the meeting.
18 Q. Isn't it true that the company on a weekly basis provided
19 the union with information about what was going to be
20 contracted?
21 A. In those meetings?
22 Q. No. Every week there was a Friday sheet that was faxed to
23 the union to tell them what work was going to be contracted on
24 site?
25 A. I wasn't privy to that information.

1 Q. You're not aware that the company every Friday provided a
2 list of contracted work to the union?
3 A. I said that I wasn't privy that to that information, sir.
4 In the meetings --
5 Q. But you did testify --
6 THE HEARING OFFICER: You're going to let him answer and ten
7 you're going to ask a question. You asked that there was
8 information given out on a Friday and your answer is?
9 THE WITNESS: I'm not privy to that information, sir.
10 THE HEARING OFFICER: Your question is?
11 Q. But you did testify on direct examination that the company
12 never notified the union; isn't that true?
13 A. Until the meeting that I attended on February the 10th.
14 Q. But you had no idea that once a week the company was
15 providing information about contracting?
16 A. I said that we meet on a weekly basis about contracting out.
17 Q. You testified that you're unaware that every Friday the
18 company sent listed contracted work to the union?
19 A. The meetings that I attend on Wednesday is where I get the
20 information I'm privy to.
21 Q. My question was very simple, Mr. Bloom. You're not aware
22 that every Friday the company faxed over a list to the union; is
23 that right?
24 A. I said I'm not privy to that information, sir.
25 Q. So the answer to my question is you're not aware?

1 A. No. Exactly.
2 Q. So if the company had sent over information in one of these
3 Friday sheets informing the union that there was going to be
4 contracted work on the outage, you would have no idea about
5 that?
6 A. I don't see that.
7 Q. Now, I believe that you testified on direct examination --
8 and correct me if I'm wrong -- that some work during an outage
9 is done by contractors and some work is done by bargaining unit
10 employees; correct?
11 A. On what equipment?
12 Q. On an outage generally, some of the work is done by
13 contractors and some is done by bargaining unit employees?
14 A. Yeah.
15 Q. That's been true for a long time?
16 A. To an extent.
17 Q. So the answer to any question is yes?
18 A. To an extent, yes.
19 Q. Even with respect to the turbine that's true; isn't that
20 right?
21 A. The specialty work is done by contractors on turbine.
22 MR. EASLEY: I think that's all I have for this witness,
23 Your Honor.
24 THE HEARING OFFICER: All right. Mr. Shepley, any redirect?
25 REDIRECT EXAMINATION

1 BY MR. SHEPLEY:
2 Q. Mr. Bloom, you testified that specialty work on the turbine
3 was done by contractors.
4 What do you mean by "specialty work"?
5 A. Sandblasting of the various diaphragms and rotors is done by
6 a sandblasting contractor and diaphragm blade repair is done by
7 a contractor usually.
8 Q. Has the local tried to get that work ever?
9 A. No.
10 Q. Why is that?
11 A. Because that's specialized work that -- we realized that
12 they bring in specialized equipment for that, special
13 facilities.
14 MR. SHEPLEY: I have no further questions.
15 THE HEARING OFFICER: Ms. Oliver?
16 MS. OLIVER: No questions.
17 THE HEARING OFFICER: Any recross?
18 MR. EASLEY: No, Your Honor.
19 THE HEARING OFFICER: You can return the affidavit. Let the
20 record reflect that the affidavit has been returned. Can I have
21 my Joint Exhibit 4 back?
22 THE WITNESS: Yes, sir.
23 THE HEARING OFFICER: You are excused. Thank you, very
24 much, sir. Mr. Shepley, the next witness?
25 MR. SHEPLEY: I'd like to call Joseph Bergles.

1 JOSEPH BERGLES
2 called as a witness by the General Counsel, having been first
3 duly sworn, was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MR. SHEPLEY:
6 Q. Mr. Bergles, are you employed by FirstEnergy at the Bruce
7 Mansfield plant?
8 A. I am.
9 Q. What's your position?
10 THE HEARING OFFICER: Let me start by: Can you please state
11 and spell your name for the record?
12 THE WITNESS: Joseph Bergles, B-e-r-g-l-e-s.
13 Q. Mr. Bergles, what is your position at the plant?
14 A. Mechanical maintenance.
15 Q. How long have you worked at the plant?
16 A. 38 plus years.
17 Q. How long have you worked there as a mechanic?
18 A. 38.
19 Q. Were you working at the plant when the outage on Unit No. 1
20 in 2016 was going on?
21 A. I was.
22 Q. And have you worked at the plant on occasions when other
23 outages were going on?
24 A. Most certainly.
25 Q. How often has that been the case?

1 A. My whole career.
2 Q. And that would be how many times?
3 A. Oh, to put a direct number, in excess of 15 at least.
4 Possibly more than that, but I'm throwing the lowest number at
5 you.
6 MR. SHEPLEY: Your Honor, I'm not going to say at this point
7 I'm not going to belabor the testimony here. We're going to get
8 into the document General Counsel's Exhibit 2, but I'm not going
9 to belabor any examination.
10 THE HEARING OFFICER: Okay.
11 Q. Mr. Bergles, do you have in front of you a document General
12 Counsel Exhibit 2?
13 A. Yes, sir.
14 Q. Okay. Now, have you seen this document prior to today?
15 A. I have.
16 Q. Do you notice that there numbered lines in the far left-hand
17 column?
18 A. Where are we at?
19 Q. Well, you see in general the pages have --
20 A. Yes.
21 Q. And do you recognize those numbers referring to different
22 activities or tasks?
23 A. I do.
24 Q. I'd like to ask you to look at line 300.
25 THE HEARING OFFICER: Do you have a page?

1 MR. SHEPLEY: That would be page 11.
2 A. Yes, sir.
3 Q. What is that activity?
4 A. Unbolt and remove upper half of T4 and T5 bearings.
5 Q. Would this be on what general piece of equipment in the
6 unit?
7 A. The intermediate pressure turbine.
8 Q. Are you familiar with that activity listed online 300 based
9 upon your years as a mechanic?
10 A. Oh, yes.
11 Q. Have you ever seen any employee of FirstEnergy in the unit
12 do that particular activity on line 300?
13 A. Yes, sir.
14 Q. How many times have you seen that done?
15 A. Numerous. Probably a large majority of the outages that
16 have gone on in our plant.
17 Q. How recently would that be; most recently?
18 A. 2011.
19 Q. Have you personally done that activity on line 300 at any
20 point in an outage in the past?
21 A. I have.
22 Q. Did you do that activity on the outage in 2016?
23 A. No, sir.
24 Q. Now, I'd like to direct your attention to lines 234 through
25 290, and I'm going to give you a little bit of time here to

1 orient yourself to those lines.
2 A. I think that I get the general flow of the whole thing here.
3 Q. Now, those activities, there's quite a few there. There's
4 156 if you do a little math on those line numbers. Have you
5 ever done any of those activities on any outage prior to 2016?
6 A. Yes.
7 Q. Which ones?
8 A. Nearly all of them. There may be a couple that I haven't,
9 but nearly all.
10 Q. Have you seen other employees of FirstEnergy perform those
11 156 approximately activities?
12 THE HEARING OFFICER: Do you mean bargaining unit employees
13 or employees generally?
14 Q. Bargaining unit employees. Have you seen bargaining unit
15 employees perform those tasks from numbers 234 to 390?
16 A. Oh, yes, sir.
17 Q. How often?
18 A. Every outage that we've had that pertained to these jobs on
19 the turbine up until 2016.
20 Q. Do you know of any reason why bargaining unit employees
21 could not perform the tasks on those lines from 234 to 390 that
22 are marked in green?
23 A. No.
24 MR. SHEPLEY: I have no further questions.
25 THE HEARING OFFICER: Ms. Oliver, do you have any questions?

1 MS. OLIVER: No questions.
2 THE HEARING OFFICER: All right. Mr. Easley?
3 MR. EASLEY: We have no questions of this witness.
4 THE HEARING OFFICER: All right. You're excused. Thank
5 you. Mr. Shepley, before you call your next witness certainly
6 not suggesting how anyone should try their case, but a person
7 who's not familiar how turbines and pumps work, it would be
8 helpful for me to have a witness that can explain that to a
9 lay person.
10 MR. SHEPLEY: Can I recall Mr. Bergles for that purpose?
11 THE HEARING OFFICER: I don't care who you call, but it
12 would be beneficial for me as someone who doesn't live this
13 place to have someone explain what's going on with -- again,
14 I'll leave it to you to decide if you will or how you will. I'm
15 just letting you know from my perspective I'd like to be
16 educated a little bit.
17 MR. SHEPLEY: If, Your Honor, permits I would like to recall
18 Mr. Bergles for that purpose.
19 THE HEARING OFFICER: Mr. Easley, based upon my discussion
20 or conversation, do you have objection to the witness being
21 recalled for the limited purpose of educating me?
22 MR. EASLEY: No, Your Honor.
23 MR. SHEPLEY: Mr. Bergles?
24 MR. EASLEY: Didn't quite get away.
25 THE HEARING OFFICER: Mr. Bergles, you're still under oath.

1 BY MR. SHEPLEY:
2 Q. Mr. Bergles, how long have you worked on the turbines?
3 There are three; correct?
4 A. Correct.
5 Q. How long have you worked on them?
6 A. Nearly my whole career. I maybe missed a couple.
7 Q. Have you worked on the generator during your career?
8 A. No, sir.
9 Q. Why is that?
10 A. Our electrical maintenance does that.
11 Q. Now, could you -- what does a unit consist of? There's
12 three units, but what is a unit?
13 A. Can I refer you to -- what was it lines 235 -- starting at
14 235. Pretty much from 235 the turbine and generator overhaul
15 which consists of the front stand be the turbine, and then the
16 next component -- now, these are almost in line -- they're in
17 line with everything that you see here. These components are in
18 line with maybe a football field long.
19 Q. All of these components are part of a turbine?
20 A. Correct.
21 Q. Please continue.
22 A. So when you start with -- the control valves and the stops
23 are the first thing in the system that let the steam in and out
24 to control the speed of the turbine and what have you, and then
25 the high pressure turbine, the steam goes into it, and it is

1 driven -- it's the driver of the unit and then from that portion
2 it goes back and reheated into the boiler and comes into the
3 intermediate section, which it's also in this line, and then
4 after it comes back from the boiler, it's driving intermediate
5 turbine and then over from the intermediate turbine to the low
6 pressure turbines, which there's three of those. It's a very
7 intense grouping of equipment.
8 Q. All right. What besides the turbine is involved in a unit
9 and how do they relate to the turbine in operation?
10 A. The turbine is driving the generator, and it's what makes
11 the electricity.
12 Q. Is there other equipment that's associated with a unit?
13 A. Of course. On the turbine itself?
14 Q. Not part of the turbine but separate from the turbine and
15 the generator?
16 A. Yes. Yes.
17 Q. What other equipment is there and how do they tie into the
18 turbine and the generator?
19 A. Oh, my goodness. That's pretty extensive when you're
20 looking at entire power plant from the boiler to all the
21 associated systems and the pollution systems. It would be
22 really, really hard for me to sit here and tell you.
23 Q. I see that the boiler is mentioned in this document that
24 have you in front of you. How does the boiler relate to the
25 turbine or the generator?

A. It's what's fired up to make the steam.

Q. And at this plant how is it fired up?

A. Coal.

Q. So to sum up, the steam goes to the turbine which it t and it --

A. Drives in generator.

Q. -- drives the generator which then produces the electricity which ends up in the homes of you and I?

A. Yes.

MR. SHEPLEY: I have no further questions. Perhaps cc has more knowledge.

THE HEARING OFFICER: Go ahead.

CROSS EXAMINATION

BY MS. OLIVER:

Q. I think that you already testified that there are three units?

A. Yes.

Q. Could you describe for us what are those three units?

A. Just units 1, 2 and 3, and they're identical, mirror images of each other.

Q. Now, do you hold a bid spot in the plant?

A. I do.

Q. What was your bid spot?

A. Turbine mechanic.

1 Q. How long had you been a turbine mechanic? How long have you
2 been?
3 A. That's a tough one for me to answer, because even if you're
4 not on the turbine you get commandeered to come in and do these
5 outages.
6 Q. How long have you been doing the turbine for; more than ten
7 years?
8 A. Probably around that area.
9 Q. And if you had to estimate how many pieces of equipment are
10 part of this turbine area that you work in how many would that
11 be?
12 A. Hundreds maybe into the thousands.
13 Q. When you describe the plant, is it one floor? Is it more
14 than one floor?
15 A. It's 16 floors.
16 Q. Where is the turbine?
17 A. The turbine is on the third floor kind of separated from the
18 boiler, and it's only three floors high.
19 Q. You described a football field; is that size of the floor?
20 A. That's the side of one turbine.
21 Q. One turbine in one unit?
22 A. One whole turbine train from the high pressure to the
23 generator.
24 Q. And as part of your work as a turbine mechanic, do you work
25 on these various thousands of pieces of equipment in the

1 turbine?
2 A. Certainly.
3 Q. Do the other union employees do that as well?
4 A. Absolutely.
5 Q. When we take a look at General Counsel Exhibit 2, the
6 various description of the tasks, lines 234 to 390, where it
7 says activity name --
8 A. Yes, ma'am.
9 Q. -- for those various things, is it fair to say that those
10 are describing pieces of equipment or --
11 A. They're describing pieces of equipment that are to be taken
12 apart and inspected and done whatever is necessary to the piece
13 of equipment to put it back in its original form.
14 Q. Now, if you know -- you might not know this, but how many
15 mechanics are there in the bargaining unit?
16 A. 50-some odd guys; between 52 and 56 I believe.
17 Q. And again, about how many people are in the production part
18 of the plant in the bargaining unit?
19 A. I would not know that number.
20 Q. Do the -- mechanics, are they considered the maintenance
21 people?
22 A. Of the 52 or 56?
23 Q. Yeah.
24 A. Mechanical maintenance.
25 Q. What do the people of operations do? Just generally what do

1 they do?
2 A. They run the plant.
3 Q. So --
4 A. They turn on equipment. They shut off equipment. They
5 start up units. They bring down units. It's a wide array of
6 things that they do.
7 Q. And the people who are designated as the maintenance people,
8 just generally, what kinds of things are they doing?
9 A. Tearing apart, rebuilding equipment, troubleshooting,
10 whatever is asked of them. They could be going to fix a toilet.
11 It doesn't matter.
12 Q. On these -- 16 floors in the building?
13 A. Yes, ma'am.
14 Q. Is there equipment on all of those floors?
15 A. Yeah, but it's sparse equipment. There's more equipment on
16 the first three floors than anywhere.
17 Q. Is that where the maintenance people do their repair type
18 work, those floors?
19 A. Yes. Yes.
20 Q. Where do you report to work?
21 A. Mansfield plant.
22 Q. Where do you go once you get there?
23 A. We have a lunchroom we all meet in.
24 Q. Where is that at?
25 A. It's on the -- those floors differ from the operating

1 floors, but it's also on the third floor.
2 Q. And that's where the turbine is?
3 A. Wait a second. I got to get -- there's two different levels
4 in all of these places. Depending on how you go to them,
5 there's first, second, third and fourth floor, and if you're
6 coming out of the -- first floor, being the basement. Second
7 floor being the mezzanine floor and the third floor being the
8 turbine floor.
9 Q. So you're pretty much -- unless you're assigned to do some
10 other work --
11 A. I'm in those areas.
12 Q. You're working on the turbine floor?
13 A. No. Probably more in the basement with associated turbine
14 equipment if you're speaking about all of the time.
15 Q. What about in a turbine outage, where would you be?
16 A. Ordinarily I'd be working on the turbine floor on the
17 turbine.
18 MS. OLIVER: That's all I have.
19 MR. EASLEY: Just a couple.
20 CROSS EXAMINATION
21 BY MR. EASLEY:
22 Q. Did you work during the 2016 outage?
23 A. Yes, sir.
24 Q. What did you do?
25 A. I worked on the boiler feed pump.

1 Q. Did you have 40 hours of work?
2 A. Yes.
3 Q. Did you get overtime?
4 A. The first -- I have to -- I think the first three or four
5 weeks it was. That would be no, and then after that, yes.
6 Q. Just so I'm -- I'm trying to get my head around the
7 explanation of the equipment. Essentially what we're talking
8 about is an integrated system that converts heat from coal to
9 electricity; correct?
10 A. Yes.
11 Q. And as I understood from what you described it, it's in
12 three phases. You have the part of the plant that converts the
13 coal into steam; correct?
14 A. Yes.
15 Q. And you call that boiler and affiliated equipment?
16 A. Yes.
17 Q. And steam that's created in the boiler part goes into the
18 turbine and turns -- actually turns the turbine; correct?
19 A. Correct.
20 Q. And you said that there are three of those?
21 A. Three?
22 Q. Three turbines.
23 A. Three units all together.
24 Q. But each unit has one turbine?
25 A. Yes. Each unit has one turbine.

1 Q. And each one of those three is its own integrated system?
2 A. Correct. And each one of those have one, two -- five or six
3 sections.
4 Q. When the steam comes into the turbine it causes the turbine
5 to turn, and that turning of the turbine is what makes --
6 generates electricity through the generator part, which is the
7 third part of the integrated system that you described?
8 A. Correct.
9 Q. And then that electricity is then put into the grid and as
10 Mr. Shepley said, turns the lights on here; right?
11 A. Yes.
12 MR. EASLEY: Does that clear it up for you, Your Honor?
13 THE HEARING OFFICER: Yes.
14 MR. SHEPLEY: Your Honor, I have a question based upon a
15 question of counsel.
16 THE HEARING OFFICER: Yes.
17 REDIRECT EXAMINATION
18 BY MR. SHEPLEY:
19 Q. You stated, Mr. Bergles, that for the first three to four
20 weeks you had no overtime and then you did get some overtime?
21 A. Yes.
22 Q. Did something change after three to four weeks?
23 A. That's something that I -- the scope of work, I don't know
24 if some of it was pertaining to the other units needing work
25 done on them. It would only be my guess what made a change, but

1 probably, most likely, something was happening on the other
2 units that they needed more manpower.
3 Q. After the three to four weeks did something change with
4 respect to your request for overtime, or did it change with
5 respect to what was offered to you in way of overtime?
6 A. What was offered.
7 MR. SHEPLEY: I have no further questions.
8 THE HEARING OFFICER: Anything?
9 MR. EASLEY: Nothing further.
10 THE HEARING OFFICER: Thank you. I appreciate the
11 explanation and I appreciate counsel helping me get more
12 educated also.
13 THE WITNESS: Okay.
14 THE HEARING OFFICER: Next witness?
15 MR. SHEPLEY: I'd like to call Herman Marshman.
16 HERMAN MARSHMAN
17 called as a witness by the General Counsel, having been first
18 duly sworn, was examined and testified as follows:
19 THE HEARING OFFICER: Please be seated and state and spell
20 your first and last name for me.
21 THE WITNESS: Herman Marshman, H-e-r-m-a-n, M-a-r-s-h-m-a-n.
22 THE HEARING OFFICER: Go ahead.
23 DIRECT EXAMINATION
24 BY MR. SHEPLEY:
25 Q. Mr. Marshman, are you employed by FirstEnergy?

1 A. Yes, sir.
2 Q. When did you begin your employment?
3 A. February 22nd, 1980.
4 Q. And where do you work?
5 A. Currently in the operations department.
6 Q. Is that at the Bruce Mansfield power plant?
7 A. Yes, sir.
8 Q. What position do you hold with FirstEnergy?
9 A. Power plant operator, PPO.
10 Q. Do you -- as an operator -- power plant operator, what do
11 you do in general? What are your duties?
12 A. In the operations department they oversee the actual
13 operating of the equipment that supplies the power for
14 generation. They oversee the turbine, the boiler feed pumps,
15 the boiler systems, air quality control systems. Basically all
16 of the maintenance groups, they supply the resource for the
17 operations. Basically the work that's being performed,
18 operations pretty much dictate what equipment to be worked on at
19 any given period of time.
20 Q. Do you hold any position with the IBEW Local 272?
21 A. I'm currently the president Local 272, sir.
22 Q. How long have you been president?
23 A. Going on 12 years.
24 Q. Now, on February 10th, 2016 did representatives of the local
25 meet with representatives of FirstEnergy on that date?

1 MR. EASLEY: Object to hearsay.
2 THE HEARING OFFICER: Were you present for a meeting on
3 February 10th, 2016?
4 THE WITNESS: No, sir.
5 THE HEARING OFFICER: What are you going to do with this?
6 MR. SHEPLEY: That question was introductory to some
7 information that he was directly involved with. It's a
8 foundation for later testimony here.
9 THE HEARING OFFICER: Well, he wasn't at the meeting. So
10 anything you ask him of what happened at is going to be hearsay
11 and presumably layers of hearsay because he heard it from
12 someone else. So if there are documents and you want to get to
13 the documents, we can do that.
14 MR. SHEPLEY: Yes, Your Honor.
15 Q. I will ask you this: Did you designate anybody from the
16 local to go to that meeting on February 10th?
17 A. Primarily the Wednesday contract meeting is delegated.
18 Sometimes individuals are not there because of vacation or
19 whatever various reason. Frank Snyder is one of the lead
20 delegates to attend the meeting, and if he's not present, then
21 one of the other offers will probably make attendance.
22 I do recall he needed someone to attend that particular
23 meeting that day, and Mr. Bloom, who's not a regular delegate
24 for the meeting, was in attendance.
25 Q. Did Mr. Bloom actually attend that meeting if you know?

1 A. Yes.
2 Q. And did you have any contact with Mr. Bloom on February
3 10th? Did you speak to him?
4 A. I received a telephone call after the meeting in reference
5 to the company announcing contracting out the turbine to GE.
6 MR. EASLEY: Object to hearsay.
7 THE HEARING OFFICER: Are you offering this for the truth of
8 the matter or what he did next?
9 MR. SHEPLEY: For what he did next.
10 THE HEARING OFFICER: If I'm correct, you received a call
11 from Mr. Bloom?
12 THE WITNESS: Yes, sir.
13 THE HEARING OFFICER: He relayed information to you, and
14 based on the information that he relayed to you, you did
15 something next. What did do you next?
16 THE WITNESS: I submitted an information request.
17 THE HEARING OFFICER: You submitted a written information
18 request?
19 THE WITNESS: Yes, sir.
20 (General Counsel Exhibit 6 was marked for identification.)
21 Q. Mr. Marshman, I'm going to show you what's designated as
22 General Counsel's Exhibit 6. Could you please look at that, and
23 I'm going to ask you if you can identify it. Do you know what
24 that is?
25 A. This is the letter that was sent to the company to request

1 information based on the information that I received from
2 Mr. Bloom through telephone communications.
3 Q. And in that letter you note that -- it says there's five
4 bullet points. The second bullet point says "number of
5 employees." What did you mean when you placed that "number of
6 employees" in this letter? What are you referring to?
7 A. To enable me to thoroughly determine the work to be
8 performed and the cost of the work. I generally would need the
9 manpower; meaning how many employees was assigned to the job.
10 Q. Which employees are you referring to when you say "numbered
11 employees"?
12 A. Contractors.
13 Q. The contractors?
14 A. Yes.
15 Q. And you notice there there's a bullet point that says
16 "wages." What were you referring to by "wages"?
17 A. Again, the wages would be associated with the cost to
18 perform the work versus our bargaining unit performing the work.
19 Q. Would those wages be the wages of the subcontractor
20 employees?
21 A. Yes, sir.
22 Q. On the fifth bullet point it says "material cost." What
23 were you referring to there?
24 A. The company has a history of purchasing items at a lot
25 greater cost than through history that we have been able to find

1 different materials from different vendors that are a lot
2 cheaper than what the company purchased.
3 Q. When you say "we," who are the we you're referring to?
4 A. Actually a lot of the members in operations department.
5 Some of them are officers. What historically has happening
6 right now is we have an issue of purchasing equipment meaning
7 that the company instead of fixing various equipment they want
8 to mitigate the issue by putting maybe red tape around the
9 equipment so that it becomes a hazardous issue until we can
10 provide the purchase order to bring the equipment in so that our
11 guys can perform the work on it, and generally sometimes it
12 lasts for months where you have equipment that's off line that
13 needs to be repaired, and the company says, "We don't have the
14 parts" or because of the antiquity or because of the equipment
15 being as old as it is, most of our equipment predates back to
16 the early 70s. So it's hard to find vendors that are associated
17 with -- or the manufacturer went out of business.
18 So a lot of our guys will go online and try to find
19 various places to buy certain equipment to perform our work.
20 Q. So the "we" you're referring to is members of the local --
21 A. Just members, yes.
22 Q. -- 272? Excuse me. You asked for wages. Why did you want
23 to know the wages as you've explained?
24 MR. EASLEY: I'm going to object to this line of
25 questioning. If he didn't communicate it to the company, what

1 difference does it make what he subjectively thought it meant?
2 THE HEARING OFFICER: I tend to agree. I guess, were there
3 further discussions in response to this request? So you
4 submitted this information request. Was there further
5 discussions or a response to this?
6 THE WITNESS: The best way to explain that, Your Honor, is
7 since negotiations, the company has made claims of a financial
8 issue and problems with our business. So a lot of the guys have
9 taken upon themselves to try to keep the company's cost down,
10 and we have had communications with the company in how to do
11 that, but the problem with not being provided certain
12 information in regards to a job -- let's say turn on a boiler
13 feed pump -- I can't argue or debate or negotiate with the
14 company if I don't know if they're paying their contractors.
15 THE HEARING OFFICER: Specifically, this relates to the
16 outage at a Bruce Mansfield plant, and you requested information
17 regarding contractors working around the outage.
18 So specific to that particular issue, what I'm asking is:
19 After you submitted this request that related -- that appears to
20 that specific incident or situation, did you have further
21 communications, or did you get a response that led to
22 discussions about what you specifically meant by any of these?
23 THE WITNESS: I didn't receive wage information.
24 THE HEARING OFFICER: Was there communication or response --
25 when I say, I understand why you would conclude response by the

1 provision of information, but did anyone get back to you about
2 this letter?
3 THE WITNESS: I received information, but it wasn't complete
4 to all of the requests that I sent to the company.
5 THE HEARING OFFICER: I think what you need to do with the
6 witness is go through sequentially what happened, and if there's
7 an issue that the Respondent didn't know what you meant, or
8 provided it or whatever, then we can get into what happened.
9 But I'm going to sustain the objection as far as him testifying
10 about What he was thinking when he wrote this if it's not yet an
11 issue.
12 MS. OLIVER: Your Honor, may I be heard on Mr. Easley's
13 objection?
14 THE HEARING OFFICER: Sure.
15 MS. OLIVER: I think that I would have asked the same
16 question as Mr. Shepley, but the questions go to the relevancy
17 of the information, and, you know, this is part of the analysis
18 of whether they're entitled to it.
19 THE HEARING OFFICER: I understand, you know, that the
20 position may be this is relevant to the issue of the
21 subcontracting and something that needs be provided, but we're
22 establishing at this stage there's been an information request
23 made. It says what it says. If there's an issue as to their
24 responding, "We don't know what you mean. We don't know why you
25 need it," or whatever, and there's communications about that or

1 you want to explain at that point, then I'd see that information
2 as being relevant, but at this point, you have the request and
3 then what I would like to hear is the chain of events that
4 happened next. I'm going to sustain the objection, and I'm
5 going to allow you to proceed with questioning, and see what
6 happens from there.
7 BY MR. SHEPLEY:
8 Q. Mr. Marshman, you address this letter to "Dear Sir," to the
9 Bruce Mansfield Contractor/Outage Coordinator. Was that a
10 particular person?
11 A. There's numerous persons at the facility for each
12 department. They have coordinators, and at that particular
13 time, because of the scope and nature of the work that was going
14 to be contracted out, this was something that had never been
15 done since I been at the facility.
16 Q. But did you send this letter to multiple individuals?
17 A. Actually the letter was to be communicated by the company to
18 the various coordinators -- planners and coordinators at the
19 facility.
20 Q. How was this letter sent; regular mail or fax or what?
21 A. Regular mail.
22 Q. Who was it addressed to then?
23 A. The plant coordinators. They're the front line in regards
24 to planning and coordinating the work to be performed at the
25 facility.

1 Q. Do you have any reason to believe that the company did not
2 receive this letter?
3 A. No.
4 Q. Did anyone from the company, any contractor/outage
5 coordinator get back to you and say, "What do you mean,
6 Mr. Marshman, by wages? What are you talking about"? Did you
7 ever get any inquiry by what you meant by wages?
8 A. Actually, no coordinator or planner addressed this letter
9 and responded.
10 Q. Did anybody from the company get back to you and say, "What
11 do you mean by material cost? What are you talking about" or
12 anything like that?
13 A. There was discussions with regards to material costs being
14 proprietary and also in regards to the wages.
15 Q. Were those discussions subsequent to their receiving this
16 letter?
17 A. Yes.
18 Q. And who were those conversations with?
19 A. I had a conversation with Mr. Cox because the information
20 that was sent to me was incomplete, and I notified him of the
21 extent of -- and the reason why I needed the information.
22 THE HEARING OFFICER: I'm going to -- I need a better
23 understanding of what happened here, because I'm a little lost.
24 So did you put this in the mail with a stamp, or did you leave
25 it in an interoffice mail slot?

1 THE WITNESS: No. It was sent through mail.
2 THE HEARING OFFICER: U.S. mail, postal mail.
3 THE WITNESS: Yes.
4 THE HEARING OFFICER: Who did you address it to?
5 THE WITNESS: Again, it was for the planners and the
6 coordinators at the facility.
7 THE HEARING OFFICER: And in response to this letter did you
8 get information from the company in response to this letter?
9 THE WITNESS: Partial information, yes, sir.
10 THE HEARING OFFICER: When did you receive information in
11 response to this letter?
12 THE WITNESS: I don't know the exact date, but it was
13 several weeks after the letter was sent.
14 THE HEARING OFFICER: And did you receive it in the mail?
15 Did you receive it in person?
16 THE WITNESS: In the mail.
17 THE HEARING OFFICER: So information was mailed to you. Is
18 this one of your next exhibits?
19 MR. SHEPLEY: Yes, Your Honor.
20 THE HEARING OFFICER: Why don't we go -- do you want to move
21 for 6?
22 MR. SHEPLEY: Yes. I would move for that to be admitted.
23 (General Counsel Exhibit No. 6 was admitted into evidence.)
24 (General Counsel Exhibit 7 was marked for identification.)
25 Q. Mr. Marshman, I'm going to show you what's been marked as

1 General Counsel's Exhibit 7. Please look that over, and I want
2 to ask you about it. Can you identify what that is?
3 A. Yes. This is the response that I received.
4 Q. And it's signed by a Christopher Cox. Do you know who that
5 person is?
6 A. He's currently the maintenance manager.
7 Q. And the date on the letter is March 14th. When did you
8 receive it?
9 A. Probably I'd say 15th; no later than the 16th.
10 Q. Now, this document does have several pages -- you'll
11 notice -- of lines of something on it. What are those lines?
12 Let's go to the first line on the first page where there's this
13 extensive list. What information is in that line?
14 A. What you have is -- you have the work order.
15 Q. What is that? Is that just an internal company work order?
16 A. That's a number associated with the job to keep track. You
17 also have in the next column the contractor, which at that time
18 was MPW. You have -- in the next is the description of the work
19 -- I should say the equipment to be worked on, and in the last
20 column you have the estimated man hours.
21 Q. Is that -- a description of that column, would that go for
22 each of the lines on these several pages? That format would be
23 the same or would it not?
24 A. Give me one second please. In review of all pages, yes.
25 Q. And in that -- did you get any additional information from

1 Mr. Cox beyond what is in this letter and attached charts?
2 A. Not that I recall.
3 Q. And in this letter with attached charts, does the company
4 set forth the number of employees for each subcontracting job?
5 A. Could you repeat that question again?
6 Q. In this entire document, which includes the letter and the
7 charts that go with it, anywhere in there is it set forth how
8 many employees, the number of employees, that are to be used for
9 each subcontracting job?
10 A. No, sir.
11 Q. Pardon me?
12 A. No, sir.
13 Q. And anywhere in the letter or the charts does it set forth
14 the wages for the employees of the subcontractors?
15 A. No, sir.
16 Q. Anywhere in that letter or charts does it set forth the
17 statement of material cost for the subcontracting jobs?
18 A. No, sir.
19 Q. Now, after you received this letter from Mr. Cox did you
20 take any action?
21 A. Again, I called Mr. Cox and explained to him that the
22 information that was given to me was insufficient.
23 THE HEARING OFFICER: When did you call him approximately?
24 THE WITNESS: Probably -- if I didn't call him on the 16th,
25 it would have been the 19th after I reviewed the information.

1 Q. What did you tell Mr. Cox?
2 A. Well, I -- you know, I complained to him in regards to the
3 wages and the material costs, and at that time I think that he
4 questioned me on the reason that I would need to know the
5 material cost and the wages, and we had a brief discussion on
6 those issues.
7 Q. When he questioned you on that did you tell him why?
8 A. I kind of gave him a summary of why. If we are to try to
9 negotiate the work that was performed, basically I would need to
10 know apples for apples of what I'm negotiating.
11 Q. At any time after March 14th, the date of this letter, did
12 anyone from FirstEnergy provide Local 272 with the wages or the
13 material cost?
14 A. For the information Exhibit 7, not that I recall.
15 Q. Did they provide it in any manner, shape or form after
16 March 14th?
17 A. Not in reference to Exhibit 7, no.
18 MR. SHEPLEY: I have no further questions.
19 THE HEARING OFFICER: Ms. Oliver, do you have any questions?
20 MS. OLIVER: No questions.
21 THE HEARING OFFICER: Mr. Easley?
22 MR. EASLEY: Is he moving for the admission of GC 7?
23 MR. SHEPLEY: Yes. I'm remiss on that. I would move at
24 this time for the admission of GC 7.
25 THE HEARING OFFICER: Any objection?

1 MR. EASLEY: May I have a brief voir dire?
2 THE HEARING OFFICER: Sure.
3 VOIR DIRE
4 BY MR. EASLEY:
5 Q. Mr. Marshman, if you look at the very last page of General
6 Counsel Exhibit No. 7, I see that on the very last page there's
7 a received stamp. Do you see that?
8 A. Yes.
9 Q. That wasn't on the document that you received from
10 FirstEnergy was it?
11 A. No.
12 MR. EASLEY: If we can remove that part, I have no
13 objection.
14 THE HEARING OFFICER: Do you have an objection?
15 MR. SHEPLEY: I have no objection. That was inadvertent,
16 not by me, but I should know that.
17 THE HEARING OFFICER: Okay. I think that I did state on the
18 call I do want you to mark individual pages on exhibits. So in
19 this instance, I will mark my copy, but I would ask that when we
20 move forward with exhibits that individual pages are marked so
21 everyone knows when we say last page or middle of the document,
22 we can refer to a specific page.
23 MR. SHEPLEY: Yes, Your Honor. Thank you.
24 THE HEARING OFFICER: So assuming that the last page, which
25 is a dates stamp received NLRB Region 6 2016, May 11th at

1 11:50 a.m. is removed as it was not included in the document
2 that the witness received, Mr. Easley there's no objections; is
3 that correct?
4 MR. EASLEY: That's correct, Your Honor.
5 THE HEARING OFFICER: So the document is received.
6 (General Counsel Exhibit No. 7 was admitted into evidence.)
7 THE HEARING OFFICER: I'm marking it has as a total of eight
8 pages from front to back. All right. You had no other
9 questions of the witness?
10 MR. SHEPLEY: I have no further questions.
11 THE HEARING OFFICER: All right. Would you like to cross
12 the witness?
13 MR. EASLEY: If the counsel for the General Counsel has an
14 affidavit from this witness, we would like to review it.
15 THE HEARING OFFICER: If you have any statements in your
16 possession related to this witness, could you turn them over at
17 this time based on the request?
18 MR. SHEPLEY: I will do so. We have an affidavit in this
19 case which makes reference to a prior affidavit in this case.
20 MR. EASLEY: Okay. Great.
21 THE HEARING OFFICER: How much time do you need?
22 MR. EASLEY: 15 minutes should be ample.
23 THE HEARING OFFICER: We're going to go off the record. We
24 will give you 15 minutes but the witnesses questions on direct
25 examination was rather limited. If you believe this witness is

needed for you defense, you can recall him, but we will give you the 15 minutes.

MR. EASLEY: Thank you, Your Honor.

THE HEARING OFFICER: Off the record.

(Recess taken.)

THE HEARING OFFICER: Let's go back on the record. Mr. Easley, you had an opportunity to review the affidavit; is that correct?

MR. EASLEY: That is correct.

THE HEARING OFFICER: You're ready to proceed with cross examination?

MR. EASLEY: I am, Your Honor.

THE HEARING OFFICER: Please do so.

CROSS EXAMINATION

BY MR. EASLEY:

Q. Mr. Marshman, just a few questions for you. I believe that you testified that you received General Counsel's Exhibit 7 which was a response to the request of information that you had provided to the company that was General Counsel's Exhibit 6. Do you remember that testimony?

A. Yes.

Q. And on direct examination you testified you had a telephone conversation after receiving General Counsel's Exhibit 7 with Chris Cox, the maintenance manager of the plant; is that right?

A. Sometime after; yes.

1 Q. And you're quite certain that you had a telephone
2 conversation with him?
3 A. Yeah.
4 Q. Do you remember giving an affidavit to the National Labor
5 Relations Board on April 5th, 2016?
6 A. Go ahead.
7 Q. Do you remember giving an affidavit, sir?
8 A. I don't know the exact date.
9 Q. Were you truthful when you gave the affidavit, sir?
10 A. As much to my recollection.
11 Q. When you provided your affidavit to the National Labor
12 Relations Board, sir, you stated -- and I'm quoting you here --
13 "The employer provided only in response to my February 10
14 information request the name of the contractor or the main
15 hours. This is not responsive to the request, and I informed
16 employer supervisor Chris Cox it was not responsive in a phone
17 message on March 18th." Is that true?
18 A. Yeah. I'd say.
19 Q. So in fact you didn't have a conversation with him; isn't
20 that true?
21 A. I thought that I had a conversation with him, yes.
22 Q. But you mentioned no conversation in your affidavit. You
23 mentioned only a phone message?
24 A. I did, yes.
25 MR. EASLEY: I have nothing else for this witness.

1 THE HEARING OFFICER: Okay. Redirect?
2 MR. SHEPLEY: Nothing further.
3 THE HEARING OFFICER: Did you have a conversation with
4 Mr. Cox regarding your February 10th letter or did -- I mean,
5 whether or not you left a message, do you specifically recall at
6 some point having a conversation?
7 THE WITNESS: I had a conversation in rebuttal to what was
8 not received.
9 THE HEARING OFFICER: Okay. So what I'm asking you is: Do
10 you independently recall having a conversation with Mr. Cox
11 regarding your information request?
12 THE WITNESS: I know that I had called. Like I said, at the
13 particular time that the affidavit was signed it was probably
14 more accurate that I did leave a message. At this point in time
15 right now, I still do recall having a conversation in regards to
16 the information that I did not receive whether it was at the
17 time I left a message or a time after.
18 THE HEARING OFFICER: So what I'm asking you is: Do you
19 recall having a conversation at some point regarding your
20 information request with Mr. Cox?
21 THE WITNESS: Yes. I may have got it confused in regards to
22 the original message versus the actually communications.
23 THE HEARING OFFICER: What I'm going to ask you is: What
24 was the contents of that conversation with Mr. Cox?
25 THE WITNESS: Again, information request in regards to the

1 wages and material costs primarily.
2 THE HEARING OFFICER: All right. Anything to follow up?
3 MR. SHEPLEY: None.
4 THE HEARING OFFICER: Ms. Oliver?
5 MS. OLIVER: No.
6 THE HEARING OFFICER: Mr. Easley?
7 MR. EASLEY: No.
8 THE HEARING OFFICER: There's no further questions of the
9 witness. Thank you. I appreciate it. Mr. Shepley, next
10 witness?
11 MR. SHEPLEY: Michael McShane -- not here? All right. I'll
12 call my next -- I have one other witness. I'll call Charles
13 Cookson.
14 THE HEARING OFFICER: If you want to do this in order, I'm
15 sure someone can go and see if he can be expedited upstairs.
16 MR. SHEPLEY: I don't think that the order matters, Your
17 Honor.
18 THE HEARING OFFICER: Fine. Call your next witness. All
19 right. Who is your next witness?
20 MR. SHEPLEY: Mr. McShane, could you please take the stand?
21 MICHAEL MCSHANE
22 called as a witness by the General Counsel, having been first
23 duly sworn, was examined and testified as follows:
24 THE HEARING OFFICER: Please be seated. State and spell
25 your name.

1 THE WITNESS: Michael McShane, M-c-S-h-a-n-e.
2 DIRECT EXAMINATION
3 BY MR. SHEPLEY:
4 Q. Mr. McShane, are you an employee of FirstEnergy?
5 A. Yes, sir.
6 Q. Do you work at the Bruce Mansfield power plant?
7 A. Yes, sir.
8 Q. What's your position there?
9 A. I am a power plant operator.
10 Q. And do you have any position that you hold with Local 272?
11 A. I formally was the executive board representative of
12 operations.
13 Q. What time period did you hold that position?
14 A. June of 2014 to probably July/August of 2016.
15 Q. And during that time period were there negotiations going on
16 between the company and the local?
17 A. Yes, sir.
18 Q. And were you involved in those negotiations?
19 A. A lot of them, yes.
20 Q. What sort of involvement did you have?
21 A. I took -- I went and was -- sat there and took notes. Not
22 all of my notes were used but some of them were but just
23 represented the operations department on the board and was there
24 to represent the operations.
25 Q. Were you actually present at negotiations?

1 A. Some, Yes.
2 Q. Where did those negotiations occur?
3 A. They occurred at the nuc facility in Chippewa, Pennsylvania,
4 and somewhere that I attended were, I believe, at the Radisson
5 in Beaver Falls.
6 Q. How many sessions of negotiations were you present? I'm
7 sure that you can't give an exact number, but approximately.
8 A. I would say somewhere between five and ten.
9 Q. Did you take notes at each of those sessions?
10 A. Yes.
11 Q. Have you reviewed your notes of those sessions prior to
12 coming here today?
13 A. I glanced at them.
14 Q. Did you review any notes for a session on September 18th,
15 2015?
16 A. Yes, I did.
17 Q. And I would ask you: During that session was there any
18 discussion between the parties of wages?
19 A. I don't know if there was a discussion, but it was part of
20 proposal that the company was giving the union.
21 Q. Was there anything said by anyone by the company with
22 respect to any benefits other than wages?
23 A. Yes. They were -- I believe there was an 8.5 percent
24 increase in wage, freeze the pension. They would supply -- they
25 would give us $500 for single, $1,000 for families into our

1 401k, because they were getting rid of retiree health care,
2 because in return for those three was retire health care would
3 end, and we would also agree to resource sharing and bringing in
4 other plants to do work in our plant.
5 MR. SHEPLEY: I have no further questions.
6 THE HEARING OFFICER: Ms. Oliver?
7 CROSS EXAMINATION
8 BY MS. OLIVER:
9 Q. When you say -- just to clarify, when you say bringing other
10 plants in to do your work, can you describe what you mean by
11 that?
12 A. It guess it's not other plants. It's resource sharing,
13 which would be mobile maintenance. They would be allowed to
14 come in and do our work.
15 Q. And those people were not members of Local 272?
16 A. No.
17 MS. OLIVER: That's all I have.
18 THE HEARING OFFICER: Mr. Easley?
19 MR. EASLEY: Just a few questions.
20 CROSS EXAMINATION
21 BY MR. EASLEY:
22 Q. So you were present at the meeting on -- the meeting I
23 suppose in Beaver Falls on September 17th and September 18th,
24 sir?
25 A. Yes, sir.

1 Q. Do you remember a statement being made by local union
2 president Herman Marshman to the effect that employees at the
3 Bruce Mansfield facility should be paid at least the same as or
4 more than the employees at the Sammis facility?
5 A. I believe that there was some going back and forth between
6 Herman and Mr. Cookson that we wanted to be at same rate.
7 Q. And didn't Mr. Cookson represent that his view was that the
8 proposal made by the company at that time got that employees at
9 Bruce Mansfield equivalent to Sammis?
10 A. I believe so, but it was also our contention that we would
11 have to -- how do I want to put this -- that we weren't coming
12 up to Sammis wages, because by the time that we got our raise,
13 we would be there, and they would have gotten their raise and be
14 above us again.
15 Q. And isn't it true that Mr. Cookson explained in the meeting
16 that the reason there was an equity adjustment in the proposal
17 was to try to get the employees at Bruce Mansfield roughly
18 equivalent to what the employees at the Sammis plant got paid;
19 isn't that true?
20 A. Could you repeat that again?
21 Q. Mr. Cookson represented that the reason there was an equity
22 adjustment in the company's proposal was to make the wages for
23 the Bruce Mansfield employees roughly equivalent to what the
24 company paid the employees at Sammis?
25 A. I cannot recall if that statement was made that it was the

1 equity adjustment bringing us to that, but I'm not going to
2 dispute that he made a statement like that.
3 Q. But the reason that it was called equity was to get you
4 equivalent to employees at other facilities; isn't that true?
5 A. I believe so.
6 MR. EASLEY: Nothing further.
7 THE HEARING OFFICER: Redirect?
8 MR. SHEPLEY: Nothing further.
9 MS. OLIVER: No.
10 THE HEARING OFFICER: Thank you. Mr. Shepley, next witness?
11 MR. SHEPLEY: I would like to call Charles Cookson.
12 CHARLES COOKSON
13 called as a witness by the General Counsel, having been first
14 duly sworn, was examined and testified as follows:
15 THE HEARING OFFICER: Please be seated. State and spell
16 your first and last name.
17 THE WITNESS: Charles Cookson, C-o-o-k-s-o-n.
18 THE HEARING OFFICER: And Charles is the traditional
19 spelling?
20 THE WITNESS: Yes.
21 DIRECT EXAMINATION
22 BY MR. SHEPLEY:
23 Q. Mr. Cookson, you're employed by FirstEnergy?
24 A. FirstEnergy Service Corporation.
25 Q. What is your position?

1 A. Executive director of labor relations and safety.
2 MR. SHEPLEY: Did you -- now, Your Honor, I'd like
3 permission to question this witness under rule 6.11.C.
4 THE HEARING OFFICER: Any objection, Mr. Easley?
5 MR. EASLEY: None.
6 Q. Mr. Cookson, did you attend negotiations for the contract
7 during period of 2014 through 2016?
8 A. Some of the sessions I did, yes.
9 Q. Were you at pretty much most of the sessions or seldom there
10 or how would you characterize it?
11 A. The first session that I went to was December of 2014.
12 Q. And when was your last, if you know?
13 A. The last session that I went to was September 18th, 2015.
14 Q. Now, there's an expression used in negotiations with respect
15 to a certain benefit of in the box or out of the box. Can you
16 please explain what that means; in the box or out? Are you
17 familiar with those expressions?
18 A. Yes, I am.
19 Q. Can you please explain what that means?
20 A. Retirees who are in the box are retirees that retired during
21 the term of the collective bargaining. Retirees out of the box
22 are retirees that are out of the box and they're under --
23 I should back up. In the box retirees retire during the term of
24 the collective bargaining agreement and they're still basically
25 on active health care and pay active health care rates.

1 They come out of the box, they go on FirstEnergy health
2 care and pay retiree health care rates.
3 Q. And during negotiations, did the employer -- did FirstEnergy
4 propose that the box be ended?
5 A. Yes, we did.
6 Q. Isn't it true that if the union agreed to end the box that
7 the employer would give certain wage increases?
8 A. No. They were not tied together. At one point -- if you
9 want me to go through the history. We offered at one point if
10 it ended at the end of '14 we would give them one set of
11 increases. If it ended at the end of '15, we would give them
12 another set of increases which were less. Once we got beyond
13 '14, that date was gone, and we abandoned that proposal.
14 MR. SHEPLEY: Could we go off the record, Your Honor?
15 THE HEARING OFFICER: Yes. We can go off the record.
16 (Discussion off the record.)
17 THE HEARING OFFICER: Let's go back on the record.
18 (General Counsel Exhibit 8 was marked for identification.)
19 Q. Mr. Cookson, I'm going to show you what's marked as General
20 Counsel's Exhibit 8. Now, if you could look at that, can you
21 identify what that document is?
22 A. Yes, I can. We met in December of 2014. The next time that
23 we met was on July 7th of 2015, and it was a small meeting
24 meaning it was just Herman Marshman and myself at the Perkins
25 Restaurant in Austintown, Ohio, and I thought that it would be

1 prudent for us to talk about where we had been at that time, and
2 to give us a place to start from, I prepared this document so we
3 could talk about it and get calibrated as to what proposals were
4 on the table. This was just merely meant to be a summary of
5 discussion starter of where we were at that point in time the
6 last time we met which was December of '14.
7 Q. Did you give this document to Mr. Marshman at that time on
8 July 7th?
9 A. Yes, I did.
10 MR. SHEPLEY: I would move at this time for admission of
11 General Counsel's Exhibit 8.
12 THE HEARING OFFICER: Any objection?
13 MR. EASLEY: No objection, Your Honor.
14 THE HEARING OFFICER: GC Exhibit 8 is received.
15 (General Counsel Exhibit No. 8 was admitted into evidence.)
16 (General Exhibit 9 was marked for identification.)
17 Q. Mr. Cookson, I'd like to know you what's been marked as
18 General Counsel's Exhibit 9. Mr. Cookson, would you look at
19 that document and I want to ask you if you know what that is.
20 A. There are two different things here. So after we met at the
21 Perkins Restaurant on July 7th we met again at the Perkins
22 Restaurant on July 21st, and that begins on page 4, and these
23 are shorthanded notes that I made of our meeting, and we met
24 again, and this is just Mr. Marshman and I at the same Perkins
25 Restaurant on August 20th and these shorthanded notes of that

1 meeting.
2 Q. Who prepared these notes?
3 A. These are my notes.
4 Q. Did you actually get on the word processor and prepare them?
5 A. Yes, I did.
6 MR. SHEPLEY: I'd like to move at this time admission for
7 General Counsel's Exhibit 9.
8 THE HEARING OFFICER: Any objection?
9 MR. EASLEY: No objection.
10 THE HEARING OFFICER: All right. GC Exhibit 9 is received.
11 (General Counsel Exhibit No. 9 was admitted into evidence.)
12 (General Counsel Exhibit 10 was marked for identification.)
13 Q. Mr. Cookson, I'd like to show you what's marked as General
14 Counsel's Exhibit No. 10. Please take what look at that, and I
15 want to ask you about it.
16 A. Okay.
17 Q. Okay. What is that document?
18 A. These are minutes of our contract negotiations meeting at
19 the Beaver Falls Radisson on September 18th, 2015.
20 Q. When it says FirstEnergy, Chuck Cookson that's you; correct?
21 A. Correct.
22 Q. So you were present at that negotiation session?
23 A. Yes.
24 THE HEARING OFFICER: You said September 17th?
25 THE WITNESS: These are minutes from the 18th.

1 Q. And these notes, who prepared these?
2 A. I reviewed them. I don't actually remember who prepared
3 them. I believe that Tony Gianatasio did, but I can't say that
4 with certainty.
5 Q. Is that a person that would actually sit there and take the
6 notes?
7 A. Yes.
8 Q. And he would take those notes and give them to somebody to
9 type up?
10 A. He typed them as we went.
11 Q. He typed at the time --
12 A. At the meeting, yes.
13 Q. -- that negotiations occurred?
14 A. Yes.
15 Q. Do you have any reason to believe that anything in these
16 notes is inaccurate?
17 A. Not that I know of offhand, no.
18 MR. SHEPLEY: I move at this time for General Counsel's
19 Exhibit 10.
20 THE HEARING OFFICER: Any objection?
21 MR. EASLEY: No objection.
22 THE HEARING OFFICER: GC Exhibit 10 is received.
23 (General Counsel Exhibit No. 10 was admitted into evidence.)
24 (General Counsel Exhibit 11 was marked for identification.)
25 Q. Mr. Cookson, I'd like to show you what's marked as General

1 Counsel's Exhibit 11. Please take a look at that, and I want to
2 ask you what that is.
3 A. These are minutes from a meeting at the Beaver Falls
4 Radisson on December 8th, 2014.
5 Q. And you were present for those negotiations?
6 A. Yes, I was.
7 Q. Do you have any reason to believe that these notes -- well,
8 who prepared these notes?
9 A. They were prepared in the same manner as the ones in
10 September by Tony Gianatasio.
11 Q. Do you have any reason to believe that anything in these
12 notes is incorrect?
13 A. No.
14 MR. SHEPLEY: I move at this time for admission of General
15 Counsel's Exhibit 11.
16 THE HEARING OFFICER: Any objection?
17 MR. EASLEY: No objection.
18 THE HEARING OFFICER: All right. GC 11 is received.
19 (General Counsel Exhibit No. 11 was admitted into evidence.)
20 MR. SHEPLEY: I have no further questions for Mr. Cookson.
21 THE HEARING OFFICER: Ms. Oliver, do you have any questions?
22 MS. OLIVER: No questions, Your Honor.
23 THE HEARING OFFICER: Mr. Easley, any questions?
24 MR. EASLEY: Mr. Cookson was going to be a witness as part
25 of the case for the Respondent. We can call him for direct

1 examination as part of our case in questioning him at this time.
2 THE HEARING OFFICER: Do you have any other witnesses?
3 MR. SHEPLEY: I have no other witnesses, but at this time I
4 will not rest, because there's substantial documents to go over
5 that have been supplied under subpoena, and so I would like to
6 continue based upon that possibility that something in those
7 documents calls for other witnesses.
8 THE HEARING OFFICER: All right. It's 2:45. I don't want
9 to rest for the day at 2:45. Do you have individuals -- well, I
10 mean, it's -- Mr. Easley, he's not making an unreasonable
11 request. He did receive the documents at the beginning of the
12 hearing. He didn't have a chance to review them. I'm not going
13 to deny him the right to review documents that me may want to
14 use for a witness.
15 That being said, either we break to give him time to do
16 that and get back on the record after he's had some time to
17 review it today, or you move forward with the witness with the
18 understanding that he's not rested, and he has the ability to
19 call witnesses for the purpose of responding or introducing
20 documents that can be used.
21 MR. EASLEY: Your Honor, it would be the strong preference
22 of Respondent to hear all of the evidence from counsel for the
23 General Counsel before proceeding.
24 THE HEARING OFFICER: I understand. That's not
25 unreasonable. In pages, how many pages did you turn over today?

1 MR. EASLEY: Four or five hundred.
2 THE HEARING OFFICER: Let me ask you this: How many
3 witnesses do you intend to call in part of your case?
4 MR. EASLEY: Right now I'm anticipating four, Your Honor.
5 THE HEARING OFFICER: Length in time in those four witnesses
6 estimating?
7 MR. EASLEY: I would think no more than four hours and
8 probably less.
9 THE HEARING OFFICER: All right. And you obviously don't
10 know if you're going to have any redirect or rebuttal witnesses
11 until you get their case. All right.
12 Well, what we're going to probably need to do is break for
13 the day to give you the time to review. I want to give you the
14 opportunity to present your witness. I don't want to hear him
15 twice, no offense, and with the expectation that it's going to
16 take four hours, we can do that and give you the time to review
17 the documents so that you can determine whether or not you need
18 to call anyone.
19 However, I will say that if you do intend on calling
20 someone based on the documents whether it's an adverse witness,
21 please make sure that you let Mr. Easley know so that the person
22 is here tomorrow and/or make sure that your witness is available
23 so we can get going. I would like to start tomorrow at 8:30 if
24 that's workable for you all.
25 MR. SHEPLEY: Yes.

1 MR. EASLEY: Not a problem.
2 THE HEARING OFFICER: Okay. What I will do is we will rest
3 for the day. We will adjourn for the day. You're going to
4 review the subpoenaed documents. Make sure that you have
5 whatever witnesses that you need, if you need to introduce any
6 of those documents, and you'll be in contact with Mr. Easley to
7 the extent that such a witness is available. I'm assuming if
8 it's anyone subpoenaed, they will still be subject to the
9 subpoena continuing as a hearing continues, but then we're going
10 to get going right away at 8:30 tomorrow morning.
11 I'm not going to break tomorrow morning after you rest to
12 give you a chance to talk settlement. I'll tell you now,
13 tonight is the time do that if you think that's a benefit, and
14 then you're going to get moving forward to try to get things
15 wrapped up.
16 MR. SHEPLEY: I may need to recall Mr. Cookson depending on
17 what documents are here.
18 THE HEARING OFFICER: That's fine. That's fine. Just make
19 sure that you let Mr. Easley know so that everyone is here
20 tomorrow. If they've already been issued a subpoena, they're
21 here until the hearing is concluded and the hearing is excused.
22 So they need to show up any way. If there's anyone else, make
23 sure you notice that they're available and ready to go.
24 MR. EASLEY: That does raise another point. We have
25 Mr. Cowher here. Are we going to require him to be here

1 tomorrow, or can he go back to work?
2 MR. SHEPLEY: I think he can go back to work.
3 THE HEARING OFFICER: And to the extent Mr. Cowher is
4 somehow needed, how far away is he?
5 MR. EASLEY: 90 minutes.
6 THE HEARING OFFICER: Well, to the extent you find out
7 tonight you need him, let Respondent know.
8 MR. SHEPLEY: I will.
9 THE HEARING OFFICER: All right. Well then, we will break
10 for the day and resume tomorrow at 8:30 tomorrow morning.
11 - - -
12 (Thereupon, at 2:50 o'clock p.m., the hearing was
13 concluded.)
14 - - -
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1 C-E-R-T-I-F-I-C-A-T-E

2 This is to certify that the attached proceedings before the
National Labor Relations Board, Region Six, held in Room 904,
3 William S. Moorhead Federal Building, 1000 Liberty Avenue,
Pittsburgh, Pennsylvania 15219, on Thursday, December 1, 2016,
4 were held according to the record, and that this is the
original, complete, true and accurate transcript which has been
5 compared to the reporting accomplished at the hearing; that the
exhibit files have been checked for completeness and no exhibits
6 received in evidence or in the rejected exhibit files are
missing.
7

8 _____
Jill A. Oliver, Official Reporter
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1 APPEARANCES:

2 On behalf of the General Counsel:

3 National Labor Relations Board:
David L. Shepley, Esquire
4 412-690-7118
david.shepley@nlrb.gov
5 1000 Liberty Avenue, Room 904
Pittsburgh, Pennsylvania 15222
6
On behalf of the Petitioner:
7
Gilardi Oliver & Lomupo:
8 Marianne Oliver, Esquire
412-391-9770
9 moliver@lawgol.com
223 Fourth Avenue, 10th Floor
10 Pittsburgh, Pennsylvania 15222

11 On behalf of the Respondent:

12 Jones Day:
Susan E. Kessler, Esquire
13 412-394-7234
skessler@jonesday.com
14 500 Grant Street, Suite 4500
Pittsburgh, Pennsylvania 15219
15
Jones Day:
16 Brian W. Easley, Esquire
612-607-7950
17 beasley@jonesday.com
90 South Seventh Street, Suite 5090
18 Minneapolis, Minnesota 55402

19 First Energy:
David S. Farkas, Esquire
20 330-203-2578
dfarkas@firstenergycorp.com
21 76 South Main Street
Akron, Ohio 44308
22
- - -
23

24

25

I-N-D-E-X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Charles Cookson	*155	**189			
Christopher Cox	*198	241			**212
		**253			**216
					233
					236
Devin Miller	*260	271			**264
		**273			
Paul Rundt	*276	280			
		**284			

* Mr. Easley
** Ms. Oliver

E-X-H-I-B-I-T-S

EXHIBIT	IDENTIFIED	IN EVIDENCE	
General Counsel			
12	150	152	
13	150	152	
14	151	152	
15	151	153	
16	151	153	
17	151	153	
Respondent			
1	157	287	
2	172	175	
3	182	183	
4	207	209	
5	210	214	
6	215	217	
7	217	218	
8	218	219	
9	219	220	
10	220	220	
11	221	221	
12	221	222	
13	222	222	
14	231	234	
15	235	289	withdrawn
16	262	265	

1 P-R-O-C-E-E-D-I-N-G-S
2 THE HEARING OFFICER: Let's go on the record. All right.
3 This is a resumption of the hearing in the case No. 06-CA-163303
4 and 06-CA-170901. This is December 2nd. We left off that
5 General Counsel was going to take the remainder of yesterday and
6 the evening to review the subpoenaed documents to determine
7 what, if any, additional evidence he wanted to put in or call
8 any additional witnesses before resting.
9 Mr. Shepley, have you had an opportunity to review the
10 documents, and are you prepared to move forward?
11 MR. SHEPLEY: Yes, I am, Your Honor. I'd like to move
12 forward by introducing four documents, offering them, and I
13 talked to counsel, Mr. Easley, and he has stated his agreement
14 on these, which he will of course state on the record. I will
15 have no further witnesses.
16 THE HEARING OFFICER: Okay.
17 (General Counsel Exhibit 12 was marked for identification.)
18 MR. SHEPLEY: At this time with your permission I would like
19 to offer into evidence General Counsel's Exhibit 12, and I'll
20 just briefly describe what these are if that's okay with you.
21 THE HEARING OFFICER: That's fine.
22 (General Counsel Exhibit 13 was marked for identification.)
23 MR. SHEPLEY: This is an email from Thomas Cowher who
24 testified yesterday regarding the outage in question. I'd like
25 to also offer into evidence General Counsel's Exhibit 13, which

1 is some notes regarding a meeting involving the outage. The
2 notes are dated April 10th, 2015.
3 (General Counsel Exhibit 14 was marked for identification.)
4 MR. SHEPLEY: I would like to offer General Counsel's
5 Exhibit 14, which are some notes of a conference call. The date
6 of this is September 10th, 2015.
7 (General Counsel Exhibit 15 was marked for identification.)
8 MR. SHEPLEY: I would like to offer General Counsel's
9 Exhibit 15, which is an email form Thomas Cowher regarding a
10 meeting relating to the outage.
11 THE HEARING OFFICER: What's the date of the email at 15?
12 MR. SHEPLEY: The date of that, Your Honor, is January 28th,
13 2015.
14 THE HEARING OFFICER: Thank you.
15 (General Counsel Exhibit 16 was marked for identification.)
16 MR. SHEPLEY: I'd like to offer General Counsel's Exhibit 16
17 which is what is termed a commercial response by GE Power and
18 Water to the Respondent dated February 23, 2015.
19 (General Counsel Exhibit 17 was marked for identification.)
20 MR. SHEPLEY: Finally, I'd like to offer General Counsel's
21 Exhibit 17, which is a purchase order dated March 19th, 2016 --
22 no. I'm sorry. November 13th, 2015. It's a purchase order
23 from General Electric Energy Sources to Respondent. I'll now
24 distribute copies of those.
25 THE HEARING OFFICER: Once I have them in front of me,

1 Mr. Easley and Ms. Oliver, I'll ask your positions on each.
2 Okay? Thanks. Have you distributed them all to every one?
3 MR. SHEPLEY: Yes, I have, Your Honor.
4 THE HEARING OFFICER: Going through General Counsel Exhibit
5 12, Ms. Oliver, do you have any objection to this document?
6 MS. OLIVER: No, Your Honor.
7 THE HEARING OFFICER: Mr. Easley?
8 MR. EASLEY: No objection, Your Honor.
9 THE HEARING OFFICER: 12 received.
10 (General Counsel Exhibit No. 12 was admitted into evidence.)
11 THE HEARING OFFICER: 13. Ms. Oliver, any objection?
12 MS. OLIVER: No, sir.
13 THE HEARING OFFICER: Mr. Easley?
14 MR. EASLEY: No objection, Your Honor.
15 THE HEARING OFFICER: 13 is received.
16 (General Counsel Exhibit No. 13 was admitted into evidence.)
17 THE HEARING OFFICER: 14, Ms. Oliver many objection?
18 MS. OLIVER: No objection.
19 THE HEARING OFFICER: Mr. Easley?
20 MR. EASLEY: No objection, Your Honor.
21 THE HEARING OFFICER: 14 is received.
22 (General Counsel Exhibit No. 14 was admitted into evidence.)
23 THE HEARING OFFICER: If I didn't say it, 13 was received.
24 15, Ms. Oliver, any objection to the document?
25 MS. OLIVER: No objection, Your Honor.

1 THE HEARING OFFICER: Mr. Easley?
2 MR. EASLEY: No objection, Your Honor.
3 THE HEARING OFFICER: All right. 15 is received.
4 (General Counsel Exhibit No. 15 was admitted into evidence.)
5 THE HEARING OFFICER: General Counsel 16, Ms. Oliver, any
6 objection?
7 MS. OLIVER: No objection.
8 THE HEARING OFFICER: Mr. Easley, objection?
9 MR. EASLEY: No objection, Your Honor.
10 THE HEARING OFFICER: All right. General Counsel Exhibit 16
11 is received?
12 (General Counsel Exhibit No. 16 was admitted into evidence.)
13 THE HEARING OFFICER: General Counsel Exhibit 17,
14 Ms. Oliver, any objection?
15 MS. OLIVER: No, Your Honor.
16 THE HEARING OFFICER: Mr. Easley, any objection?
17 MR. EASLEY: No objection, Your Honor.
18 THE HEARING OFFICER: All right. 17 is received.
19 (General Counsel Exhibit No. 17 was admitted into evidence.)
20 THE HEARING OFFICER: So in total I have 17 exhibits from
21 the General Counsel. All have been received into evidence.
22 None have been rejected. Mr. Shepley, any other witnesses?
23 MR. SHEPLEY: No other witnesses, Your Honor.
24 THE HEARING OFFICER: All right. So you rest; is that
25 correct?

1 MR. SHEPLEY: That is correct, Your Honor.
2 THE HEARING OFFICER: I will ask you -- I'm certain that I
3 will get briefs from every one, but I would like a little bit of
4 a head start. What case or cases are you relying upon with
5 regards to the implementation allegation?
6 MR. SHEPLEY: Your Honor, we're relying on Cleveland Cinemas
7 Management. That's at 346 NLRB 785 and 789, 2006 and
8 Plainville, P-l-a-i-n, Ready Mix Concrete 309 NLRB 581, 1982.
9 THE HEARING OFFICER: Okay. Thank you. Ms. Oliver, I
10 believe that I asked you yesterday and it may not have been on
11 the record. So I'll ask you on the record. Do you have any
12 witnesses or exhibits that you wish to introduce?
13 MS. OLIVER: Not at this time, Your Honor, but I do want to
14 clarify what was asked of me on the record yesterday. You asked
15 me about the union's position of an overall impasse. I think
16 that I need to clarify that although the union believes that
17 there is not an overall impasse. That issue was appealed and
18 the board upheld the regional director's position on that, and
19 therefore, there's no pleadings in front of you. However, our
20 position has always been that that's not the case. It's just
21 when you asked me the question yesterday, I was parroting the
22 complaint and what's before you.
23 THE HEARING OFFICER: Okay. Right. And the General Counsel
24 controls the complaint in this case and position it's been
25 relayed that there was an impasse. I understand the union's

1 position, and it's efforts to preserve it's argument, but I'm
2 moving forward as if impasse is not an issue. All right.
3 Mr. Easley, are you prepared to move forward with your case?
4 MR. EASLEY: I am, Your Honor.
5 THE HEARING OFFICER: All right. Then call your first
6 witness.
7 MR. EASLEY: The employer calls Charles Cookson.
8 THE HEARING OFFICER: All right. Mr. Cookson you are
9 already under oath. You remain under oath. If you need me to
10 explain to you about that again, I'm happy to do so.
11 THE WITNESS: Not necessary.
12 THE HEARING OFFICER: All right. We're ready to go.
13 CHARLES COOKSON
14 called as a witness by the Respondent, having been previously
15 duly sworn, was examined and testified as follows:
16 DIRECT EXAMINATION
17 BY MR. EASLEY:
18 Q. Mr. Cookson, yesterday during your testimony I believe that
19 you had explained that you have some responsibility for
20 collective bargaining in your position as executive director of
21 labor relations for FirstEnergy; is that correct?
22 A. That is right.
23 Q. And as part of your responsibilities, did you have any
24 involvement with collective bargaining at the Bruce Mansfield
25 facility with IBEW Local 272?

1 A. Yes, I did.
2 Q. What was your role, sir?
3 A. I oversaw the negotiations from a supervisory standpoint and
4 then began to participate in those in December of 2014.
5 Q. Do you recall when those negotiations commenced?
6 A. December of 2013.
7 Q. And your personal participation didn't begin until when?
8 A. December of 2014.
9 Q. And who was responsibile for the bargaining during that
10 period of December 2013 and December of 2014?
11 A. Tony Gianatasio.
12 Q. Why did you become involved in the bargaining?
13 A. It was almost one year past expiration. We were having
14 difficulties, and it was one of those things where I got
15 involved to see if we couldn't move the ball forward.
16 Q. What was the state of play in bargaining when you became
17 involved in December of 2014?
18 A. We made a comprehensive offer to settle with the union in
19 2014. We had received very little, if any, proposals from the
20 union, and we were now one year behind expiration date, and we
21 were trying to find a way to see if the we can somehow get to a
22 deal.
23 MR. EASLEY: Permission to approach the witness, Your Honor?
24 THE HEARING OFFICER: Sure. Mr. Easley, do you mind if I
25 ask a quick question of this witness so I'm clear?

1 Shippingport, Pennsylvania is that Bruce Mansfield? Are they
2 one in the same?
3 THE WITNESS: Yes, they are.
4 THE HEARING OFFICER: Okay. Thanks.
5 (Respondent Exhibit No. 1 was marked for identification.)
6 Q. Mr. Cookson, I've handed you what's been marked for
7 identification purposes as Respondent's Exhibit 1. Can you
8 identify this document, sir?
9 A. Yes. This is the comprehensive offer of settlement that we
10 gave to Local 272 on September 25th of 2014.
11 Q. And when you first became personally involved in the
12 negotiations was this the proposal that the company had on the
13 table?
14 A. Yes, it was.
15 Q. Was there a wage proposal in this first comprehensive offer
16 of settlement?
17 A. Yes, there was.
18 Q. What was that wage proposal?
19 A. Wage proposal upon ratification and 1.5 percent; one year
20 after ratification 1 percent and two years following
21 ratification 1 percent.
22 Q. Can you explain to the judge why the general wage increases
23 were tied to ratification?
24 A. Yeah. In our terminology or at least the way we think about
25 that is basically the effective date of the agreement.

1 Q. And why would you think that ratification would be the
2 effective date of the agreement?
3 A. In our mind, it's when the contract is ratified. It's when
4 it's effective. It's the mechanism the union uses to make the
5 contracts effective.
6 Q. Did you ever have any discussions with the union about the
7 option of ratification on the collective bargaining agreement?
8 A. It was my understanding that in 2012 when we negotiated the
9 one year extension there was no ratification vote. I actually
10 called Mike Walsh from the international union to make sure that
11 was okay. I didn't realize that was or wasn't okay under their
12 bylaws and he said for an extension it was, and it was my
13 understanding that for a new contract they would have to have a
14 ratification vote.
15 Q. When you say the extension, you're talking about Joint
16 Exhibit No. 3?
17 A. Yes, that extended the contract from 2013 to 2014.
18 Q. To knowledge was the collective bargaining agreement, when
19 that was extended, was there a ratification vote for that
20 collective bargaining agreement?
21 A. For that? Yes, for 2009.
22 MR. EASLEY: So the company makes -- I'm sorry. The
23 Respondent moves for admission of Respondent's Exhibit 1.
24 THE HEARING OFFICER: Any objection to it?
25 MR. SHEPLEY: No objection.

1 THE HEARING OFFICER: Ms. Oliver?
2 MS. OLIVER: I'm not sure it's complete. Can I take a
3 moment to look at it?
4 THE HEARING OFFICER: Certainly.
5 MS. OLIVER: Can we go off the record for a moment?
6 THE HEARING OFFICER: Certainly. We can go off the record.
7 (Discussion off the record.)
8 THE HEARING OFFICER: Back on the record. Off the record
9 while charging party's counsel was reviewing the exhibit, I
10 asked Respondent's counsel in the presence of the General
11 Counsel the reason for introducing Respondent's Exhibit 1, and I
12 will ask that Respondent's counsel state it again for the record
13 as to the reason for introducing comprehensive proposal --
14 comprehensive offer of settlement September 25, 2014, Respondent
15 1.
16 MR. EASLEY: The purpose, Your Honor, is to establish what
17 the company's wage proposal was at the time December 2014
18 bargaining.
19 THE HEARING OFFICER: And that's reflected on which pages of
20 this document?
21 MR. EASLEY: That's on the first page, Your Honor.
22 THE HEARING OFFICER: So the sum and substance of your
23 reason for introducing this is contained on the first page; is
24 that correct?
25 MR. EASLEY: That's correct, Your Honor.

1 THE HEARING OFFICER: Ms. Oliver, I'm going to give you an
2 opportunity to respond to the introduction of this document. If
3 your position is you don't think it's complete or that there is
4 something omitted, maybe Respondent's counsel would be willing
5 to limit the introduction to the first page unless you have a
6 dispute as it relates to that. So I'll let you be heard what
7 you position is in Respondent 1.
8 MS. OLIVER: If I could reserve my objection, I don't
9 believe that the document complete, but I haven't had a chance
10 to look -- I just looked at a page.
11 THE HEARING OFFICER: I I understand. It's a 232 page
12 document. Respondent's counsel, do have you a position on the
13 issue?
14 MR. EASLEY: This is the copy that came from the company's
15 file. If it's incomplete, it's a problem with our file, Your
16 Honor. This is the one that was produced to the subpoena as
17 well.
18 THE HEARING OFFICER: Always when I'm offered a voluminous
19 document, I'm going to ask everyone why I'm looking at it and
20 what parts are important, because I don't want to look through
21 232 pages and go fishing. So you don't have any objection to
22 the first being an accurate statement of the company's wage
23 proposal as of this date; do you?
24 MS. OLIVER: Well, it was more of a package offer.
25 THE HEARING OFFICER: Well, I'll reserve my ruling on the

1 introduction of the document at this time, but I'm going to ask
2 your position again before they rest their case. So at some
3 point, have you people behind you that could be doing a
4 comparison.
5 MS. OLIVER: Yes. Thank you.
6 THE HEARING OFFICER: Mr. Shepley, do you a objection to
7 Respondent's 1?
8 MR. SHEPLEY: I have no objection.
9 THE HEARING OFFICER: I'm going to withhold ruling to give
10 Charging Party an opportunity to review and then state her
11 position on the issue. Go ahead.
12 MR. EASLEY: Thank you, Your Honor.
13 BY MR. EASLEY:
14 Q. Taking you back to the December 8th, 2014 meeting,
15 Mr. Cookson, where did that meeting take place?
16 A. The Beaver Falls Radisson.
17 Q. Who was present representing the company at this meeting
18 beside yourself if anyone?
19 A. I believe it was myself and Mike Rawlings who was the
20 director, Fred VonAhn who was the vice president responsible for
21 Bruce Mansfield and Tony Gianatasio.
22 Q. Who was present representing IBEW Local 272?
23 A. Herman Marshman was there. Mike Walsh was there, and there
24 was four of five people from the 272 committee who were there at
25 the time.

1 Q. Just for the purpose of the record who was Mike Walsh?
2 A. Mike Walsh is the international representative that covers
3 Local 272 for the IBEW.
4 Q. Was there anyone else present?
5 A. Mr. Rick Queer who was the mediator from FMCS.
6 Q. What was the purpose of the meeting as you understood it?
7 A. So we had, again, been meeting, and we thought that we would
8 try to facility or see where we could go. At the time I
9 verbally talked to the union about various things that we could
10 do and how we could make improvements to our 2014 proposal and
11 see if there was any way we could get the process moving.
12 Q. Did the company present a written proposal?
13 A. Not written proposals, no.
14 Q. Did the union present any proposals at the meeting?
15 A. They did not.
16 Q. Were there verbal proposals made by the company?
17 A. Yes, there was.
18 Q. Would you describe that verbal proposal?
19 A. At the time it was December of 2014. In our September
20 proposal we had proposed that retiree health care would end at
21 the end of the year, end of 2014, and the union wanted that to
22 go beyond 2014. So at the time what we said was, "You can have
23 more wages if it ends right now at the end of this year, or you
24 can have lesser wages at the end of 2015," in the sense of 3
25 percent upon ratification, 2.5 percent one year after

1 ratification, 2.5 percent two years after ratification if
2 retiree health care ended at the end of 2014. The offer would
3 be 2.5 percent at ratification, 2.0 one year after, and 2.0
4 percent two years after if retiree health care was moved onto
5 the end of 2015.
6 Q. At the time of this meeting there was only about three weeks
7 left in 2014?
8 A. That is correct.
9 Q. Did the company make any other changes to it's first
10 comprehensive offer of settlement?
11 A. We offered to -- beginning 2015 if retiree health care ended
12 at the end of 2014 we offered to give a $500 annual
13 contribution into either an HSA or the 401k of single employees
14 with single medical coverage, and $1,000 contribution to
15 employees that had employee and spouse, employee and child
16 and/or family coverage. That would have begun in 2015 if
17 retiree health care ended at 2014. Conversely if it ended at
18 the end of '15 that would have begun in 2016.
19 Q. And you said HSA. What's HSA?
20 A. Health savings account. So if you're on the FirstEnergy
21 health savings plan, that money goes into your account. If
22 you're not, it would go into your 401k or you can take cash as
23 part of that.
24 Q. Did the company make a proposal for equity adjustments?
25 A. Yes, we did. We offered a 75 cent an hour equity adjustment

1 for all classifications at the Bruce Mansfield plant.
2 Q. When would that be in effect?
3 A. Upon ratification.
4 Q. What is an equity adjustment?
5 A. An equity adjustment in that case was really to just up
6 every classification by that amount to get them closer to Sammis
7 wages. So in our footprint we had various fossil generation
8 plans. The oldest plants are Sammis and Bruce Mansfield, and
9 then the former Ohio Edison, which is our founding company so
10 to speak, and Bruce Mansfield was somewhat behind the Sammis
11 plant, and they wanted to get back up to that point. So we
12 offered the 75 cents an hour to help get them closer to the
13 Sammis wages.
14 Q. Did you explain that to the union in the meeting?
15 A. Yes, I did.
16 Q. What was their response, if any?
17 A. It was not near enough.
18 THE HEARING OFFICER: Sammis, how do you spell that?
19 THE WITNESS: S-a-m-m-i-s. It's in Stratton, Ohio.
20 THE HEARING OFFICER: Where?
21 THE WITNESS: Stratton, Ohio.
22 Q. How long did the meeting last, Mr. Cookson?
23 A. Better part of the day.
24 Q. How did it end? Where were things left at the end of the
25 day?

1 A. It ended where the union said that we were still far apart
2 on retiree health care. We were still far apart on wages. We
3 had continued to propose a cash balance pension plan for new
4 hires, and we were far apart on the cash balance pension plan.
5 In fact, the union said that we were not going to do that, and
6 those were in my mind the three primary things on that day that
7 were sticking points.
8 Q. Did the parties schedule another meeting?
9 A. We did not.
10 Q. And did the parties ever meet again after the December 2014
11 bargaining meeting?
12 A. Yes, we did.
13 Q. When was the next time that the parties met?
14 A. The next time that we met was Herman Marshman and I met in
15 July of 2015.
16 Q. And how did that meeting get arranged?
17 A. So we left the December 2014 meeting. We didn't schedule
18 another meeting. In March/April time frame I sent a letter to
19 Herman and Herman sent a letter back to me, and said, "We got to
20 schedule some dates. We got to schedule a meeting." We didn't
21 pick a date to meet, and at the FirstEnergy shareholder meeting,
22 which is held usually in the middle of May every year I happened
23 to see Herman there, and we talked, and we agreed to meet, and
24 subsequent to that, we sent dates back and forth, and we agreed
25 to meet July 7th, 2015.

1 Q. Where did that meeting take place?
2 A. At the Austintown, Ohio Perkins Restaurant.
3 Q. Who was present?
4 A. Herman Marshman and myself.
5 Q. Were there any proposals exchanged at this meeting?
6 A. We hadn't met now in six or seven months and the stuff that
7 I had given Herman -- the proposals that we discussed in
8 December of 2014 were basically verbal. So I hand Herman a
9 sheet of paper just as a way to calibrate ourselves and say,
10 "Hey, this is a document meant for us to talk about where we are
11 at and level set ourselves and talk about where we might move
12 forward."
13 Q. Is that document General Counsel's Exhibit 8 in front of
14 you?
15 A. Let me just -- I believe that it is. I just -- I'm sorry.
16 It's General Counsel No. 8. That's correct.
17 Q. That's the document that you provided to Mr. Marshman at the
18 as a July 7th, 2015 meeting?
19 A. Yes.
20 Q. And was this a new proposal?
21 A. No.
22 Q. I see that if you take a look at General Counsel's Exhibit 8
23 under that fourth bullet it states "FE offered the following
24 12/8/14." Do you see that?
25 A. Yes.

1 Q. And it says "Retiree Medical Box ends 12/31/14," and it has
2 certain percentages and says, "Retiree Medical Box ends
3 12/31/15," and it has different percentages?
4 A. Yes.
5 Q. And that's the verbal proposals that you described a few
6 moments ago?
7 A. Yes, that is.
8 Q. Now, at the time of this meeting it was after 12/31/14; was
9 it not?
10 A. That is correct.
11 Q. So was this still the company's proposal?
12 A. No. We couldn't do that, because we couldn't end retiree
13 health care at the end of 2014. This was just a summary of
14 where we had been seven months earlier.
15 Q. Can you describe the conversation that took place on July
16 7th at the Perkins Restaurant?
17 A. We talked about this and got a lay of the land as to where
18 we were. Herman said to me, "You have the take retiree health
19 care to the end of 2017. I need 12 percent equity adjustments
20 plus 3 percent both at ratification. No cash balance pension
21 plan for new hires. There's no way I'm going to be negotiate
22 cash balance pension plans for employees that are not on the
23 property today," and those were the basic statements that he
24 made back to me.
25 Q. Let's walk through those one by one. He wanted retiree

1 medical benefits to continue through the end of --
2 A. 2017.
3 Q. And the company's proposals at that time was what?
4 A. I told him that there's no way that we could go beyond 2015.
5 Q. Can you explain what the cash balance pension plan issue
6 was?
7 A. So the cash balance pension plan we propose cash balance
8 pension plan for new hires at the date that we had it was
9 1-1-15. Obviously again we're in the middle of 2015, but it was
10 really a portion for new hires. It's a different kind of
11 pension plan. Leave the pension plan alone for all existing
12 employees and have a new pension plan for new hires.
13 Q. And you said that Mr. Herman had requested an equity
14 increase?
15 A. That is correct.
16 Q. He explain what the basis for that was?
17 A. He said in his mind they were 12 to 15 percent behind Sammis
18 and that's what he wanted; 12 percent equity, 3 percent GWI on
19 ratification which would be 15 percent to get them to Sammis
20 wages.
21 Q. And both of the proposals related to wages or the verbal
22 proposals related to wages made by Mr. Marshman in that meeting
23 were both tied to ratification?
24 A. Yes.
25 MS. OLIVER: I'm going to object. Leading.

1 THE HEARING OFFICER: I'm going to allow the question. I'm
2 going to overrule the objection. GWI is?
3 THE WITNESS: Generally wage increase.
4 Q. Did you respond to the remarks made by Mr. Marshman about
5 the union's position?
6 A. I told them that there was no way that we could go on 2015
7 for retiree health care. I told him that while we were
8 interested in providing equity adjustments I thought that his
9 number was aggressive. It was overly large. I told him that we
10 had to have a cash balance pension plan for new hires. That was
11 an absolute.
12 And I did talk about -- I said, "The way that the
13 business is going, we're going to have to talk about some
14 different proposals." We had a resource sharing proposal on the
15 table back in 2014. I said, "We're going to have to expand
16 that," and I said, "We're going to have to talk about using
17 mobile maintenance in a different fashion going forward." I
18 didn't elaborate on those two. I was just T-ing those up as
19 topics that we needed to talk about.
20 Q. What is mobile maintenance?
21 A. So back in -- I'm going to guess -- 2010 or '11 FirstEnergy
22 created what's called mobile maintenance, and it's a group of
23 people that travel around to our generation plants, both fossil
24 generations and nuclear generations and perform work; outage
25 work, turbine work, general breakdown work and whatever work is

1 necessary, and these are people that have the skill sets that we
2 need, because they're familiar with our equipment, and they work
3 at our plants, but we can send them in for a month and they can
4 do work and they can go over to another plant and do work, and
5 they just travel around. We have two different locals of mobile
6 maintenance. We have a UWUA local. UWUA Local 102 located in
7 Cannonsburg, Pennsylvania, and we have an IBEW local of mobile
8 maintenance, iBEW Local 2357 and they're located in Morgantown,
9 West Virginia.
10 Q. For the record, what's UWUA?
11 A. Utility Workers Union of America.
12 Q. What specifically was the company asked with respect to
13 mobile maintenance in their discussions with IBEW Local 272?
14 A. In this meeting I didn't get into it yet in terms of what we
15 were going to do. I was just giving a Herman a heads up saying,
16 "Hey, next time we meet, when we meet, I'm going have some more
17 to talk to you about mobile maintenance."
18 Q. How did the meeting end?
19 A. It ended that we were still in disagreement over these key
20 areas, but when I asked Herman I said listen, "Here's a summary.
21 We've talked about some different things. What I'd like to do
22 is the give you some language with respect to mobile
23 maintenance. I'd like to give you some language with respect to
24 resource sharing. I'd like to formalize the 500 and 1,000 in a
25 written format so you can look at that. Why don't we meet again

1 and let me give you the language and you can look at that and
2 you can understand what we're talking about."
3 THE HEARING OFFICER: Sorry. What is resource sharing?
4 THE WITNESS: Resource sharing is our proposal to be able to
5 utilize people in Bruce Mansfield and send them to other places.
6 So we have resource sharing agreements at all of our facilities.
7 One of the reasons is that the generation business in
8 FirstEnergy is struggling mightily. So in the spring and in the
9 fall, we don't make enough money to cover the cost associated
10 with producing enough electricity. What we want to have is the
11 ability to send employees.
12 So let's say it's March and in fact in March of the year
13 of the outage we didn't run the plant for over a month. We
14 didn't produce electricity, because it wasn't cost effective.
15 We don't want to lay people off. We don't want to lay them
16 off, have them come back and find other jobs. We would like to
17 resource share them. So that means we can send them to Beaver
18 Valley, to Sammis, to other places to be gainfully employed and
19 to do work for FirstEnergy and to keep their seniority and their
20 jobs and all of those things.
21 Most of our plants, if not all generation plants, have
22 resource sharing agreements that allow us to send employees out.
23 When they come into the host plant, they're treated like
24 contractors. So whatever contractor language we have at those
25 plants or circumstances, we don't negotiate the coming in. We

1 just negotiate the going out under this kind of proposal.
2 THE HEARING OFFICER: Go ahead.
3 BY MR. EASLEY:
4 Q. I think this question on the table was: Did you schedule
5 another meeting?
6 A. Yes. We did for July 21. It was two weeks later.
7 Q. Of what year?
8 A. 2015.
9 Q. And where did that meeting take place?
10 A. Same place. Perkins Restaurant, Austintown, Ohio.
11 Q. Who was present at the meeting?
12 A. Mr. Marshman and myself.
13 Q. And did you, as you had indicated in the July 7th meeting,
14 provide a written proposal at the July 21st, 2015 meeting?
15 A. Yes, I did.
16 MR. EASLEY: Permission to approach the witness, Your Honor?
17 THE HEARING OFFICER: Yes.
18 (Respondent Exhibit No. 2 was marked for identification.)
19 Q. Mr. Cookson, I handed you what's been marked for
20 identification purposes as Respondent's Exhibit 2. Can you
21 identify this document, sir?
22 A. Yes. This is the document that I handed to Mr. Marshman on
23 the morning of July 21st.
24 Q. And how, if at all, was the July 21st, 2015 document
25 different from the summary that had been provided to the union

1 at the July 7th meeting?
2 A. First of all, we had increased the equity adjustment to 1
3 dollar per hour for all classifications effective at
4 ratification. We had gone beyond the end of 2014. So there was
5 no longer to end retiree health care at the end of 2014. So I
6 gave Herman the maximum GWIs, and in terms of when I say maximum
7 is what we give most of our locals which was the 3 percent and
8 the 2. 5 percent and put them together and that formed 5.5
9 percent. They were beyond two normal cycles of increases, which
10 would have been February of '14 and February of '15.
11 And one thing that I didn't mention before is we have a firm
12 internal policy that we do not pay retroactivity when we
13 negotiate contracts, which is another reason for these wages in
14 our mind to be effective at contract expiration. We don't want
15 to encourage our unions to keep going, keep going and come back.
16 I had moved the end of the retiree medical box. So in
17 our discussions in December, it had been 12-31-14. We moved
18 that to the end of October of '15. We moved the cash balance
19 pension plan dates from 1-1 of '15 from our previous written
20 proposal to 1-1 of 16, and we tried to start pension plans on
21 the first of the year. It's a good way for us to do that in
22 terms of how we construct the documents.
23 Then we move the 500 and 1,000 contribution to the HSA
24 or the 401k to '16, because it would have been a year after
25 retiree health care ended which is consistent with how we would

1 have been talking.
2 Then from an operational perspective, I gave them the
3 expanded resource sharing document and that allowed us to --
4 that document would have allowed to us to send people within
5 100 miles to other FirstEnergy facilities, like I said, to keep
6 them employed. There was language in there to follow the IRS
7 tables in terms of the mileage and the per diems and all of
8 those kinds of things.
9 We were going to amend the severance policy. Local 272
10 employees are covered under the corporate severance policy so
11 that a temporary layoff didn't trigger severance so they weren't
12 in that kind of a situation.
13 We then -- I then gave him language with respect to
14 maintenance flexibility so really it expanded our ability to use
15 mobile maintenance in the plant. So today we use mobile
16 maintenance in certain area where we have a historic past
17 practice. This would expand to a much more, I would call it,
18 robust way to use mobile maintenance in the plant so they could
19 come in and come out and do emergent work and not just necessary
20 do outage work. Later on we gave Herman the list of the kind of
21 work that we needed to do, but at this time, I gave him language
22 to describe what that was.
23 We also talked about creating a lower level B maintenance
24 classification. So that would be someone that was paid less
25 money and do less experienced, less complicated maintenance

1 work. It's something that we had in the plant back in the
2 2005/'06 time frame from what I understand.
3 We then talked about the safety manual. We had an on
4 going dispute over whether or not FirstEnergy could unilaterally
5 amend the safety manual. We have a generation wide safety
6 manual that covers our nuclear plants and covers our fossil
7 generation plants, and we wanted the ability to collectively
8 with wall of our locals amend that. We lost at arbitration.
9 The decision said that we had to bargain with that every time
10 with the union. So we wanted to go back to negotiating-- I'm
11 sorry -- having the ability to amend that through this process.
12 MR. EASLEY: The Respondent is moving for the admission of
13 Respondent Exhibit 2.
14 THE HEARING OFFICER: Any objection, Ms. Oliver?
15 MS. OLIVER: No objection.
16 MR. SHEPLEY: No objection.
17 THE HEARING OFFICER: Respondent's 2 is received.
18 (Respondent Exhibit No. 2 was admitted into evidence.)
19 BY MR. EASLEY:
20 Q. Mr. Cookson, did Mr. Marshman respond to your proposals
21 during the July 21st, 2015 meeting?
22 A. Very similar response to the one that we had in July 7th.
23 It was, "I want retiree health care to go longer. It needs to
24 go to 2017. You're not giving me enough money for equity.
25 We're not close to Sammis. We're still too far away. I still

1 think your 12 percent, 5 percent, 3 percent" -- that same type
2 of dialog. "I'm not doing the cash balance pension plan. I
3 can't do that. I won't do that. Resource sharing, I'm having a
4 very" -- Herman words to me -- "I'm having a very strong problem
5 difficult problem with resource sharing. We're sending our
6 people and you're not paying them enough. You pay mobile
7 maintenance more. You're not paying them enough."
8 And then we talked again about mobile maintenance and
9 he was not enamored with our mobile maintenance proposal.
10 Q. How did the meeting end?
11 A. At the end we had talked about -- and maybe to back up, in
12 2012 Herman and I had negotiated the contract extension at this
13 same Perkins in Austintown, and I felt that Herman and I were at
14 least able to talk about things, and I said, "Listen, why don't
15 you take this language. You have language. Show it to your
16 committee. Let's see if we can meet again."
17 So we agreed to meet again, and I don't know if we set the
18 meeting that day or the day after, but we agreed to meet again
19 at August 20th at the same place just to see if there was any
20 way for us to get to a deal.
21 Q. Did that August 20th meeting take place?
22 A. Yes, it did.
23 Q. Where was the meeting?
24 A. Perkins in Austintown, Ohio.
25 Q. It was yourself and Mr. Marshman?

1 A. Is that correct.
2 Q. Can you describe the discussion at that meeting, sir?
3 A. I don't recall giving him any new paperwork. We went
4 through the proposals. We basically came to the same place as
5 we ended this July 21st meeting on August 20th. We were at the
6 same loggerheads of over the same issues. So there was no
7 change in either of our positions.
8 Q. Was there any discussion about equity adjustments in this
9 meeting?
10 A. Still -- yes. Still not enough. Not enough equity
11 adjustment. We got to get close to Sammis. We're still far
12 behind Sammis, and I think that I told Herman, "Listen, I'm
13 going to show you the difference in the classifications. You're
14 still not there, but I don't believe you're as far as apart as
15 you believe you are, but I understand your position."
16 Q. So the discussion between the company and the union at the
17 August 20th meeting was centered creating equity between Bruce
18 Mansfield plant be the Sammis facility?
19 A. Yes.
20 Q. And had that been a consistent theme throughout the
21 discussions you were involved with?
22 A. That began in 2012. We give a 50 cent equity adjustment in
23 2012 to start to get them closer to Sammis when we did the one
24 year extension.
25 Q. Was anything resolved at the August 20th meeting?

A. No.
Q. So how did it end?
A. It ended in Herman said, "I'm going to have to go back to table. Obviously you and I aren't getting in accomplished the way that I had hoped, and we're going to have to meet at a big bargaining table, and I said, "Fine. Let's schedule some meetings."
Q. Were there additional meetings between parties?
A. I offered Herman some dates. We aligned on September 17th and September 18th to meet again.
Q. Did those meetings take place?
A. They did.
Q. Where did those meetings take place?
A. Beaver Falls Radisson.
Q. Who was present representing the company at the Beaver Falls meeting on September 17th?
A. Myself, Jim Graf who was then the plant director, Tony Gianatasio, and Bill Drain who's the maintenance manager.
Q. And who was present representing IBEW Local 272?
A. Herman Marshman, Mike Welsh was there from the international and again four or five people from Herman's committee also.
Q. Anyone else present?
A. No.
Q. No mediator?
A. No mediator at that meeting.

1 Q. And did the company provide any written proposals at the
2 September 17th meeting?
3 A. Yes. September 17th we gave the union what we would call
4 comprehensive No. 2.
5 Q. All right. Is that the document that's been admitted as
6 joint Exhibit No. 4 in front of you?
7 A. I don't believe it's here. Let me take a look.
8 THE HEARING OFFICER: He doesn't have it. It wasn't given
9 to him.
10 MR. EASLEY: Permission to approach?
11 THE HEARING OFFICER: Yes.
12 Q. Is that the document that was presented to the union at the
13 September 17th and 18th bargaining?
14 A. Yes, it is.
15 Q. And how, if at all, was the second comprehensive proposal
16 different from the position that the company had outlined on
17 July 21st of 2015?
18 A. This was -- we hadn't met with a full committee. So this
19 was -- what I told Herman when we met on the 21st was that the
20 proposals that I gave to him then were going to add to and be
21 part of our first comprehensive proposal. So what this did was
22 blended it all together. It was nothing new. It took what I
23 gave him on July 21st and what we had back from December and
24 from September so we were looking at a document that encompassed
25 everything that we had proposed.

1 Q. But no substance change in position?
2 A. Not from July 21st to August 20th, no.
3 Q. When was that proposal given? Was that on the 17th?
4 A. The morning of the 17th.
5 Q. Was there discussion about the proposal?
6 A. Some discussion. Not a great deal, but some discussion. I
7 walked through it again explaining what it was. I wasn't sure
8 what the committee had seen. So we talked through the basic key
9 points of that.
10 Q. Did the union respond?
11 A. Same as before. Not going to do the cash balance pension
12 plan, need retiree health care to go to 2017, the equity is not
13 nearly enough. It's not nearly close to Sammis. You got to
14 give us more equity. Mobile maintenance, we're not going to do
15 the mobile maintenance proposal. Resource sharing, we're upset
16 with resource sharing. They talked about the equity now also
17 morphed into we want the maintenance people to be paid like the
18 mobile maintenance people. They get paid a little more and they
19 travel around. So now they had a new asked that the maintenance
20 people have equity with the mobile maintenance people.
21 Q. Who was the spokesperson for the union making those
22 statement you just relayed?
23 A. Mr. Marshman.
24 THE HEARING OFFICER: Let me ask: Cash balance retirement,
25 describe for me what that is.

1 THE WITNESS: Cash balance pension plan is a little bit like
2 a 401k. We put money in -- you put money in, and we match that
3 money. It goes into an account for you. It's portable, and it
4 takes three years to best. After three years you can take that
5 with you. When you leave at the end of your time, you have a
6 lump sum of money. Everyone else has a defined benefit pension
7 plan. So when you leave you have a pension. That's the best
8 way to put it.
9 THE HEARING OFFICER: Thanks.
10 BY MR. EASLEY:
11 Q. Okay. How did the meeting on the 17th end?
12 A. We were still at odds. We had the next day to meet. We
13 were still at odds on how to move forward.
14 Q. The parties got back together the next day?
15 A. Yes.
16 Q. Did the union present a response or counter proposal on
17 September 18th?
18 A. Yes, they did.
19 Q. Do you recall what that counter proposal was?
20 A. It was a one page document, and an amendment to article
21 four. It had to do with contracting out and what they were
22 basically asking for is if we had contractors in the facility
23 that our people would work overtime all of the time.
24 MR. EASLEY: Permission to approach?
25 THE HEARING OFFICER: Yes.

1 (Respondent Exhibit No. 3 was marked for identification.)
2 Q. Mr. Cookson, I've handed you what's been marked as for
3 identification purposes as Respondent's Exhibit 3. Can you
4 identify this document, sir?
5 A. Yes. This is the what we received from the union on
6 afternoon of September 18th.
7 Q. Was there discussion about this proposal at the meeting?
8 A. Yes. What's in bold is what was changed over the current
9 language, and basically the way that it was described was if we
10 had contractors in the plant we would have our people working
11 overtime.
12 Q. Did the company respond to this proposal?
13 A. We took a cost estimate to take some time to look at it, and
14 came back and said, "This is the total opposite direction of
15 where we need to go with the Bruce Mansfield facility with the
16 maintenance facility," and we said, "We reject your proposal."
17 Q. What, if anything, did the union say in response?
18 A. Again, they reiterated that using mobile maintenance at the
19 facility was a significant issue.
20 Q. Did they comment on the other items in the second
21 comprehensive offer of settlement?
22 A. I think that we ended the meeting understanding that we were
23 still apart on wages. We were still apart on cash balance
24 pension plans. We were still apart retiree health care. We
25 were still apart on mobile maintenance. We were still apart on

1 resource sharing.
2 MR. EASLEY: Respondent moves for the admission of
3 Respondent Exhibit 3.
4 THE HEARING OFFICER: Any objection, Mr. Shepley?
5 MR. SHEPLEY: No objection.
6 THE HEARING OFFICER: Ms. Oliver?
7 MS. OLIVER: No.
8 THE HEARING OFFICER: Respondent Exhibit 3 is received.
9 (Respondent Exhibit No. 3 was admitted into evidence.)
10 Q. After the September 18th, 2015 meeting did the parties
11 schedule any additional meetings, Mr. Cookson?
12 A. We did not. I'm sorry. We did. We scheduled a meeting for
13 October 19th.
14 Q. Of 2015?
15 A. Of 2015.
16 Q. Did that meeting take place?
17 A. It did not.
18 Q. Why not?
19 A. A couple of days before -- I don't remember exactly -- I
20 received a call from Mr. Marshman saying, "I have an illness. I
21 can't make the 19th, and I'm canceling the meeting." And I
22 asked him, "Okay. Is there someone that can take your place?"
23 "No. There's no one that can take my place."
24 I asked him, "Do you know when you might be able to meet
25 again?"

1 "No. I don't know when I'll be able to meet again. This is
2 indefinite. I'm done for a while basically."
3 Q. So what did you do?
4 A. We reconvened and based on the sessions that we had had and
5 based on the fact that we're now --
6 THE HEARING OFFICER: We who?
7 THE WITNESS: We the company. I'm sorry.
8 THE HEARING OFFICER: Okay.
9 A. Internally we reconvened to say we're not getting an
10 agreement here. We have three or four or five things that
11 we're not going to agree on. We have no idea when we're going
12 to meet. There's nobody that's going to take his place. We
13 don't know when we can have discussions again. We believe that
14 we're at an impasse. At that point in time we prepared to
15 implement our September 17th offer.
16 Q. And that's what's been admitted as Joint Exhibit No. 6?
17 A. That's correct. Implemented terms.
18 Q. So I note that the -- on Joint Exhibit 6 there's some words
19 that are struck through. Can you explain for the judge what all
20 that means?
21 A. We struck through things we couldn't implement like
22 management rights and notice to rights clause and things like
23 that.
24 Q. Why can't you implement them?
25 A. Because those would have been a waiver. Those are things

1 that we didn't feel we had the ability to implement.
2 Q. Were there other things that the company decided not to
3 implement in the implemented terms that were legally prohibited
4 from implementation?
5 A. Yes.
6 Q. For example?
7 A. The wages.
8 Q. Why did the company decide not the implement the wages?
9 A. First of all, if you have our first theory or our first
10 tenant that there will be no retroactivity, that was No. 1. No.
11 2, we believed that our wages would be effective at contract
12 expiration date and that's what we communicated all along, and
13 the last piece of it was if we gave them -- we wanted a deal. I
14 mean, we were meeting, and we wanted to get a deal, and our
15 feeling was if we gave the wages, there would never be any
16 contract.
17 Q. You said the wages were effective at contract expiration
18 date?
19 A. I'm sorry. Contract effective date.
20 Q. Okay. And did you notify the union that you had determined
21 that the parties were at impasse, and you were planning to
22 implement terms and conditions of employment?
23 A. Yes, we did.
24 Q. How did you provide notice?
25 A. On October 27th we had all of the fossil union leadership in

1 for a meeting with our key leaders, and we had Mr. Wylie,
2 Mr. Bloom and Mr. Welsh were there for the meeting, and we knew
3 they were going to be there for the meeting. Also, I thought
4 that Herman was going to be there for the meeting and after the
5 meeting I asked him to come up to our labor relations conference
6 room, which they did, and we walked through the document. We
7 notified them that we felt that we were at an impasse. I walked
8 through the terms. I tried to explain the things that we were
9 implementing and the things wee weren't implementing and spend
10 about an hour and half with them talking about where we were
11 going.
12 Q. Let's back up for a second. What type of meeting were they
13 attending?
14 A. We have about every six months what we call a fossil union
15 labor management executive meeting. So they come and --
16 Q. What's the purpose of that meeting?
17 A. Provide buisness updates and talk about where the business
18 is going. So like Don Mall, our senior vice president of Fossil
19 Generation, would make a presentation. We might have people
20 from environmental, from safety talk about various business
21 things. All of our fossil plants are there to talk about
22 basically our fossil generation business.
23 Q. When you say all of our fossil plants, who are they --
24 A. Represented by their internal FE leadership and represented
25 by their local unions.

1 Q. So the union representatives and the management
2 representatives from all of the fossil plants are there?
3 A. They're invited, yes.
4 Q. That would include folks from the Bruce Mansfield facility?
5 A. That's correct.
6 Q. And you mentioned that there was some union representatives
7 from IBEW Local 272 present at the meeting?
8 A. Yes, that's correct.
9 Q. Could you tell us who?
10 A. Sure. Dennis Bloom and Kevin Wylie.
11 Q. And then there was somebody from IBEW international?
12 A. Mike Welsh.
13 Q. And so you spoke to those folks at the broader meeting and
14 suggested that you have a side meeting?
15 A. Yes. I said, "I have some things that I would like to go
16 over with you. Can we go upstairs to our conference room and
17 meet?"
18 Q. Who was present in the conference room at this meeting with
19 just those from IBEW Local 272?
20 A. The three people that I mentioned, myself and
21 Mr. Gianatasio.
22 Q. Did you present any documents to the IBEW Local 272
23 representatives in that meeting on October 27th?
24 A. Yes, we did.
25 Q. What documents did you present to them?

1 A. We gave them the implemented terms.
2 Q. That's Joint Exhibit 8?
3 A. Yes.
4 Q. What else did you give them?
5 A. I'm sorry. Implemented terms are Joint Exhibit 6.
6 Q. I'm sorry, Joint Exhibit 6.
7 A. We gave them a summary of the implement terms.
8 Q. And that's Joint Exhibit 8?
9 A. Yes. We gave them a letter which was address today Herman
10 Marshman regarding our impasse.
11 Q. And that's Joint Exhibit 7?
12 A. Yes. And we gave them a letter that we were going to send
13 to the employees, and what I told them was we were going to send
14 a copy of the whole package to all of the employees. So I gave
15 them a preview of the letter that we were going to send to the
16 employees.
17 Q. And the letter that you're referring to, is that General
18 Counsel's Exhibit 4?
19 A. Let me just make sure. Yes, it is.
20 Q. What, if any, response did you get from the union
21 representative when you presented them with these materials?
22 A. They didn't say a lot. They said that they were going to go
23 back and talk to Herman. They still wanted to bargain, and that
24 was really the end of the meeting.
25 Q. And at any point did you have a discussion with Mr. Marshman

1 about the implemented terms?
2 A. I called him later that day, and we went -- I left a
3 voice mail. I sent a text message, and we spoke. I don't
4 remember whether it was that day or the next day, but we spoke,
5 and I told him what we were doing. I said, "You got the
6 documents?" And he said, "Yes."
7 And at that point what he said to me was, "If you will
8 rescind your implementation, I won't file my labor charges."
9 And I said, "Well, no. That's not possible."
10 MR. EASLEY: We have no further questions of the witness,
11 Your Honor.
12 THE HEARING OFFICER: Would you like to cross?
13 MR. SHEPLEY: I have no questions.
14 THE HEARING OFFICER: Ms. Oliver?
15 MS. OLIVER: Can I take a quick break?
16 THE HEARING OFFICER: Yeah. We will take a ten minute
17 break.
18 (Recess taken.)
19 THE HEARING OFFICER: We will go back on the record.
20 Ms. Oliver, are you ready to question the witness?
21 MS. OLIVER: Yes. Thank you, Your Honor.
22 CROSS EXAMINATION
23 BY MS. OLIVER:
24 Q. Mr. Cookson, how many employees in the bargaining unit were
25 working, say, five years ago?

1 A. I'm not entirely sure. I would say in the neighborhood of
2 275 or 300. I don't know exactly.
3 Q. As of today how many are in the bargaining unit?
4 A. 230.
5 Q. And that number has been steadily decreasing over the years;
6 has it not?
7 A. As far as I know, yes.
8 Q. Now, when you met with Dennis Bloom and Kevin Wylie and Mike
9 Welsh on October 27th, you were in the courtroom yesterday, and
10 you heard Mr. Bloom testify that he told you at that time that
11 he had counters to give the employer?
12 A. He had been telling that right along.
13 Q. He had been telling you that?
14 A. No. I had been hearing that from the union that they had
15 proposals. I'd hear it from the plant. We had never seen
16 anything.
17 Q. And he told you that on October 27th that he did have
18 proposals and he wanted to rescheduled the meeting?
19 A. No. They didn't say they wanted to reschedule the meeting.
20 They had proposals, but there was no future date at all.
21 Q. That was because Herman was in the hospital; was it not?
22 A. I didn't know that Herman was in the hospital. I didn't
23 believe that he was in the hospital at that time.
24 Q. So if I understood your testimony on direct, the first time
25 that you laid a written proposal on the union regarding using

1 these mobile maintenance employees from other locals to come in
2 and do bargaining unit work was on September 17th, 2015; is that
3 correct?
4 A. July 21st of 2015.
5 Q. Well, you gave that one to Herman at the Perkins on July
6 21st, but when you put it in a written proposal was September
7 17th?
8 A. I put it in the written format to the head of the bargaining
9 committee on July 21st, 2015.
10 Q. And your intention -- looking at Respondent's Exhibit 2,
11 your intention -- if you take a look at page 13 of Respondent
12 Exhibit 2 --
13 A. Yes.
14 Q. -- your intention in that underlined language was to use
15 those people to do work -- bargaining unit work?
16 A. To perform corrective backlog work, emergent maintenance
17 work ordinary and customary done by Bruce Mansfield employees so
18 that does not resulted in layoff, yes.
19 MS. OLIVER: That's all I have for this witness.
20 THE HEARING OFFICER: Mr. Easley, any redirect?
21 MR. EASLEY: No, Your Honor.
22 THE HEARING OFFICER: Mr. Shepley, I'm assuming you have no
23 questions?
24 MR. SHEPLEY: I have no questions.
25 THE HEARING OFFICER: All right. The -- I'm going to

1 question the witness a little bit so I get a better
2 understanding of in more laymen's terms of what was actually
3 implemented so I understand the document. Do you have Joint
4 Exhibit 8 in front of you? It's the summary of implemented
5 terms.
6 THE WITNESS: Yes, I do.
7 THE HEARING OFFICER: All right. So flexible benefits and
8 medical opts out with which relates to Article 28, briefly
9 explain to me what is it is that you did here?
10 THE WITNESS: So the union opts out and picks their own
11 health care for their own vendor. We pay to the vendor the same
12 amount of money that company would pay for the FirstEnergy
13 health care. We have a base health care plan that determines
14 how much money that is, and we change the base plan, and that
15 resulted in a small increase from what they got in 2015 into
16 2016 in each tier of the medical coverage.
17 The 500 and 1,000 contribution is something made to active
18 employees, and it's our vehicle for active employees to save for
19 retiree health care. So if I had single health care coverage,
20 annually usually in the first quarter I get 500. I can have
21 that put in my health savings account if I'm in a FirstEnergy
22 high deductible plan. I have can it put in my 401k or I can
23 take cash.
24 If I'm in the other three tiers of coverage -- medical
25 coverage which are employee and spouse, employee and child

1 and/or family, I get $1,000 in the same manner.
2 The idea is to help people save for their retiree health
3 care. We ended retiree health care for employees that were
4 quote "in the box" as we discussed yesterday. There's about 108
5 of them. We ended that at the end of 2015.
6 THE HEARING OFFICER: Those are people that were already
7 retired as of December 31st, 2015?
8 THE WITNESS: They retired before that, and we stopped the
9 subsidy -- we stopped paying the subsidy for the retiree health
10 care.
11 THE HEARING OFFICER: Okay.
12 THE WITNESS: Be the Affordable Health Care Act
13 requirements, what that is is when the union opts out, we have
14 an obligation to offer them as FirstEnergy a plan. We offer
15 them a high deductible health care plan. It's just a way for
16 the union and the company to stay out of any kind of running the
17 file of ACA. So that's the first section. Does that make
18 sense?
19 THE HEARING OFFICER: All right. Yes.
20 THE WITNESS: Pension, new employees after 1-1 of '16
21 participate in the FirstEnergy cash balance pension plan.
22 The second portion here where it says, "Pension Plan dates
23 updated for those hired prior," what we basically tell the union
24 is during the term of the agreement we agree that we will not
25 change the pension plan for existing employees. So it locks it

1 in for the term of the agreement. So again, that's a positive
2 for all of the existing employees. That's the only changes that
3 were effectuated from the pension plan.
4 Vacation banking, vacation employees could bank vacation and
5 keep it for payment at a later date. We eliminated the ability
6 to put vacation into the bank, and we said that all vacation --
7 all banked vacation will be paid at the rate as of 12-31-15 when
8 employees leave. So if I leave in ten years, it's going to age
9 somewhat, and I'm going to have 12-31-15 rate that's payable on
10 termination to employees or they can use it.
11 Implement VPAD that was sort of a corporate vacation
12 process. We have yet to implement that. In my estimation the
13 biggest difference between what they had and what they have is
14 how vacation accrues. It accrues in our process over a year.
15 Over the year, throughout the year. Theirs accrues prior to a
16 year. That's the biggest difference there. That's not
17 effective yet. We made that effective 1-1 of '17.
18 Filling vacancies, we said they used to be six months. We
19 said employees got 30 days to go back. They have to decide
20 quicker, because we have a lot of bidding issues with respect to
21 that, and we have prebid system. We're going to modify that.
22 So once you submit a prebid, it's your job. People would submit
23 a prebid, and I say, "I want to be a mechanic," and a mechanic
24 job would go up, and we would go back to them and say, "I really
25 don't want to be a mechanic." What we said was, "That prebid,

1 that it means something. So once you bit, you get the prebid.
2 Absence management, there's a wait day table. The more days
3 that you're off this year, the longer next year you have to wait
4 for your sick pay each time you have an absence. There's a
5 table in the agreement that kind of defines what that is.
6 LTD, so if I'm off sick, and I no longer can work today, LTD
7 is effective at 12 months. So if I have 12 months of the sick
8 leave, that's great. If I have less than 12 months of sick
9 leave, I'm going to go for some period of time until such time
10 as I'm eligible for LTD. Our non-bargaining corporate standard
11 is six months. We said, "We're going to make you life then so
12 people can afford themselves with the opportunity to maybe get
13 out sooner if they're permanently or totally disabled.
14 Run FML concurrent with sick pay since 1993. We have been
15 allowing employees to take federal -- FML absence after they run
16 their sick pay out, and that's been in place so long we felt the
17 need to bargain that. We want them to use up their FML along
18 with their sick pay so they're not required to run that
19 concurrently.
20 THE HEARING OFFICER: FML is family medical leave; correct?
21 THE WITNESS: Correct. We had an arbitration case that we
22 lost before I came to FirstEnergy that prohibited basically the
23 company doctor from evaluating employees and we want to company
24 doctor to be able to evaluate employees to determine whether
25 they work or not. So that's the first page.

1 Illness verification, we moved it up. After your third
2 occurrence you have to supply documentation why you're off.
3 Safety shoes, today they have a different kind of safety
4 shoe process. We pay for lenses in your safety glasses and
5 things of nature. Now we're just going to give them $120 a
6 year, and basically what this does is it gets us out of the
7 reimbursement business. So rather than you come in and say, "I
8 got new lenses in my glasses. I got this. I got that," it's a
9 way to say, "Here's 120 bucks spend it however you like. Buy
10 new shoes. Buy new glasses. Don't buy anything. We don't
11 care. You get the money, and you can do with it that you need
12 to."
13 Random drug testing, we can only random drug test. We can't
14 random alcohol test. This afforded us the opportunity to test
15 for alcohol in addition to -- for the same terms and conditions
16 just added alcohol as a vehicle upon which we could test.
17 Resource sharing, I explained that before what that was.
18 That would be effected upon implementation, but really we really
19 have yet to use that yet.
20 We have some restrictive work locations where if I'm a
21 mechanic in the plant, and there's a mechanic in the yard, I can
22 only be temporary assigned out to the yard. This sort of
23 eliminates those boundaries and allows to move people more
24 freely throughout the plant in terms of assigning them within
25 their current classification.

1 Replace the accident safety -- Accident Prevention Handbook.
2 So we've had multiple iterations of our generation handbook, and
3 we bargained. We went into great exhaustive detail about what
4 the changes were from the APH to the GPSM. We were implementing
5 the GPSM, which was latest edition of our Generation Personal
6 Safety Manual.
7 And the wages are effective upon ratification, and you can
8 see the various items that are there.
9 THE HEARING OFFICER: Just so I understand, equity
10 adjustment would be -- based on the language would be an
11 immediate 1 dollar an hour increase, and then there would be a
12 5.5 percent of their wage rate added to that, and then the
13 second year it would go up 2 percent?
14 THE WITNESS: Yes.
15 THE HEARING OFFICER: And then there's a shift
16 differentials. So I'm clear in understanding that none of the
17 wage aspects including the shift differential were included or
18 implemented; correct?
19 THE WITNESS: That's correct.
20 THE HEARING OFFICER: Does anybody need to follow up based
21 on what I questioned the witness on?
22 MR. SHEPLEY: No, Your Honor.
23 THE HEARING OFFICER: Ms. Oliver?
24 MS. OLIVER: No, Your Honor.
25 THE HEARING OFFICER: Thank you. Mr. Easley, do you have

1 another witness?
2 MR. EASLEY: I do. The employer calls Christopher Cox.
3 CHRISTOPHER COX
4 called as a witness by the Respondent, having been first duly
5 sworn, was examined and testified as follows:
6 THE HEARING OFFICER: Please be seated. State and spell
7 your name please.
8 THE WITNESS: Christopher Cox, C-h-r-i-s-t-o-p-h-e-r C-o-x.
9 DIRECT EXAMINATION
10 BY MR. EASLEY:
11 Q. Mr. Cox, who do you work for, sir?
12 A. FirstEnergy.
13 Q. FirstEnergy Generation, LLC?
14 A. Yes, sir.
15 Q. And what's your position?
16 A. I am the maintenance manager at the Bruce Mansfield plant.
17 Q. And that plant is located where?
18 A. Shippingport, Pennsylvania.
19 Q. And how long have you worked for FirstEnergy Generation,
20 Mr. Cox?
21 A. 14 years.
22 Q. And to whom do you report from the supervisory standpoint?
23 A. Our plant director James Graf.
24 Q. Could you had briefly describe you job responsibilities as
25 maintenance manager of the Bruce Mansfield plant?

1 A. Yes. I'm responsible for the maintenance of the facility,
2 which includes the outage work and the construction group inside
3 the plant. So in essence we're responsibile for all of the
4 electrical, instrument tests and maintenance activities that
5 occur at the plant from the internal resources along with all of
6 the contractor resources.
7 Q. Approximately how many FirstEnergy employees are under your
8 director or indirect supervision?
9 A. Including management employees there's roughly 90.
10 Q. Are you familiar with the 2016 maintenance outage at the
11 Bruce Mansfield facility?
12 A. I am.
13 Q. How are you familiar with that?
14 A. That outage was executed through the direction of my outage
15 superintendent Justin Crunkleton, and we completed all the
16 maintenance during that outage.
17 Q. And did you personally have any responsibility for the
18 project?
19 A. Indirectly. I'm responsible for making sure that the
20 project is executed on budget, on time and done safely.
21 Q. Who made the decision the utilize the contractor to do the
22 rebuild on the turbine generator during 2016 maintenance outage?
23 A. The management team collectively reviewed our current
24 schedule, the time frame that we had to complete the outage in
25 and we collectively agreed for us to complete the outage in the

1 window that we had, we would have to use a contractor for the
2 turbine minutes.
3 Q. Who were the specific individuals involved in that decision?
4 A. That would have been our vice president Don Mall, our site
5 vice president Pete Kotsanas and our plant director Jim Graf.
6 Tom Cowher was involved in the decision as well as Justin
7 Crunkleton was there. Outage superintendent was involved also.
8 Q. Could you describe for the judge what exactly is encompassed
9 by the turbine rebuild? What's the project look like?
10 A. We have 900 megawatt steam generators. That includes -- the
11 turbine itself is five rotors and also that's a five star
12 generator rotor. So what we do during the outage is during the
13 cycle we have to open and clean and inspect each section of the
14 turbine to ensure it's in good condition. There's no cracking
15 or damage to the equipment to ensure long term reliability of
16 the machine. It was mentioned earlier statements that we're on
17 a nine year interval between turbine outages. So we want to
18 ensure when we take it apart all of the pieces and parts are
19 reinstalled correctly in good working order so we don't have a
20 forced outage between the outage cycles.
21 Q. I believe Mr. Cowher, when he testified on direct
22 examination as part of the counsel for the General Counsel's
23 case, mentioned that in prior outages the disassembly and
24 re-assembly of the turbine had been done by FirstEnergy
25 employees?

1 A. That's correct.
2 Q. Were there other non-FirstEnergy employees that would have
3 been involved in those prior projects?
4 A. Yes, sir.
5 Q. Such as?
6 A. The sandblasting work, generator alignment. There would
7 have been engineering support, technical services. There's also
8 diaphragm repairs, and we've also had assistance with bolt
9 removal over the years to just to name a few.
10 Q. This work with respect to turbine rebuild would have been
11 shared between FirstEnergy employees and contractors in prior
12 outages?
13 A. Yes, sir.
14 Q. And were there FirstEnergy employees that worked on the
15 turbine rebuild in 2016?
16 A. No, sir.
17 Q. Why was that?
18 A. Well, we worked through the outage scope and the amount of
19 work that we had to complete during 2016 outage, which was a
20 significant undertaking. We reviewed the amount of employees
21 that we had on site, the amount of work that we could complete
22 internally in each department, which includes all of the work
23 that we wanted to complete in the boiler area and the SO2 area
24 and the balance of plant, which include some house service water
25 pumps and some cert water pumps, along with the discussion of

1 the boiler feed pump and we were looking at entire scope of the
2 project and trying pry to determine how we could man that.
3 And as we worked through that, our first responsibility
4 is try to utilize our workforce first, and as we went through
5 that we realize that we couldn't attain the outage schedule that
6 we needed to and be completed in 56 days if we tried to take on
7 the turbine work internally, and at that point we decided that
8 we would have to go with a contractor.
9 Our first choice would have been to use mobile, but
10 under the direction of our labor counsel, we didn't exercise
11 that right and we moved towards using General Electric.
12 Q. You used a couple of terms in there that may not be familiar
13 with everyone. So I'm going to go over that. What is the SO2
14 area?
15 A. That's our basically our environmental control area. SO2 is
16 sulfur dioxide. We have to remove that from our gas stream to
17 meet our environmental requirements. So there's an fans in
18 those areas, pumps, nozzles and there's cleaning in those areas
19 that we have to do. So that areas gets cleaned and prepped and
20 prepared during every scheduled outage. It's also a significant
21 portion of how we run the facility clean every day.
22 Q. What's the boiler feed pump?
23 A. The boiler feed pump turbine, we just in general are making
24 steam. So you have to put water through the boiler. We
25 actually have a steam -- a turbine driven boiler feed pump, and

1 part of the scope this year was to open and inspect the boiler
2 feed pump turbine. We had originally considered contracting
3 that work out while we working through manpower and resource
4 loading. We actually determined that we could do that
5 internally. So we elected to do that.
6 Q. With FirstEnergy?
7 A. With FirstEnergy employees, yes.
8 Q. Was the scope of the work that was done in the 2016 outage
9 different than the scope of work in prior outages?
10 A. Yes. This is was the largest outage that we had done at the
11 plant in roughly five years from the overall scope, and it was
12 the largest turbine outage we've done in probably ten years
13 I think was the last time we had the entire thing apart.
14 Q. What was the duration of the outage?
15 A. The required duration was 56 days.
16 Q. How was the duration of the outage determined?
17 A. Collectively over the years we put together a five year look
18 ahead of our outages that gets submitted to PJM, which is he
19 Pennsylvania, New Jersey, Maryland Interconnect, which actually
20 we have to supply plower to, which they intern supply the power
21 to the customer. So we have to schedule our outages in roughly
22 a five year window and look ahead and the 56 days is a -- it's
23 an internal benchmark along with external benchmarks with units
24 our side and how long a typical turbine outage would be. So
25 we're presented that number and we're asked to make sure that we

1 complete our work inside that window.
2 Q. And is that based upon commitments that FirstEnergy
3 Generation has made in terms of the amount of megawattage that's
4 going to be delivered from the plant?
5 A. Yes, sir. Once we lock into our 56 days if we miss that
6 target we're subject to fines and penalties.
7 Q. Was 56 days a long or short duration in terms of the scope
8 of work that had to be done for this outage?
9 A. It's an aggressive schedule, but it's right where we expect
10 it to be. We performed an outage of this duration in this time
11 frame in the past, but we were fully aware that this would take
12 the entire 56 days.
13 Q. When did FirstEnergy make the decision to utilize an outside
14 party to do the turbine and generator rebuild?
15 A. It was early September that we had our last set of
16 conference calls in 2015 when we started to realize that we were
17 not going to be able to actually complete the work scope. The
18 conference call and I think that it was on September 10th or
19 sometime in that week that we had a conference call, and we
20 finally got approval that we can move forward with General
21 Electric. We in turn worked with them over the next several
22 months on additional proposals trying to reduce the cost for the
23 company. I think it was November 13th -- 13th or 14th that we
24 came that agreement, and we issued them a PO to start doing
25 preparation and pulling all of their equipment and lining up

1 resources for the outage.
2 Q. So at some point there was a purchase order that was signed
3 with General Electric for the scope of work?
4 A. Yes. That was roughly November 11 -- November 13th or 14th.
5 Q. I think that you may have in front of you, Mr. Cox, General
6 Counsel's Exhibit 17?
7 THE HEARING OFFICER: It's General Electric purchase order
8 dated November 13, 2015.
9 A. 16 you said?
10 Q. 17, sir.
11 A. I have 16.
12 MR. EASLEY: Permission to approach, Your Honor?
13 THE HEARING OFFICER: Yes.
14 A. I don't see 17 here.
15 Q. I'm going to show you what's been admitted as General
16 Counsel's Exhibit 17. Is that this purchase order, sir?
17 A. Yes, sir.
18 Q. When you were making the decision to utilize General
19 Electric, did you have any history with General Electric as it
20 relates to this turbine?
21 A. Yes. We've used General Electric over the years for the
22 engineering support, because they're the original manufacturer
23 of the turbine along with the majority of any of the parts or
24 off site work that needs to be performed on the rotor or
25 diaphragms, we normally would use GE whenever possible.

1 Q. So GE was a contractor in prior outages?
2 A. Yes, sir.
3 Q. And when the company made the decision to go with General
4 Electric were labor costs a factor in that decision?
5 A. Actually, the labor costs are actually more for GE. So they
6 weren't what we were going for. The only reason that we elected
7 to go with GE is that duration that they could do the task in.
8 Q. Was General Electric providing warranty with respect to
9 parts of workmanship on the project?
10 A. Yes, sir, 24 months.
11 Q. And would FirstEnergy get a warrantee if it used it's own
12 employees to do this work?
13 A. No, sir.
14 Q. Was that a factor in this decision?
15 A. Yes, sir.
16 Q. How far in advance does FirstEnergy plan for an outage like
17 the one that occurred in 2016?
18 A. We began initial planning of general scope roughly 24
19 months before the start of the outage.
20 Q. Are the employees notified that there's going to be an
21 outage?
22 A. There's general discussions that go. We have not issued a
23 formal notification to all employees that it's going to occur.
24 We do multiple in-house meetings and discussion that indicate
25 that we're going to have an outage. Those normally start

1 roughly a year out before the start of the outage, because
2 there's always changes that occur. So right around a year out
3 we begin communicating that we're going to have an outage.
4 Q. Does the company typically notify the union of contractors
5 going to be on the project?
6 A. Historically we would make the notification roughly a month
7 prior to the outage what we intended to contract out.
8 Q. How typically is the union notified about contracting
9 activity at the Bruce Mansfield facility?
10 A. We do send them a weekly speed sheet that has contractor
11 information on it that's faxed to their office every Friday.
12 MR. EASLEY: Permission to approach the witness, Your Honor?
13 THE HEARING OFFICER: Yes.
14 (Respondent Exhibit No. 4 was marked for identification.)
15 Q. Mr. Cox, I've handed you what's I'm marked for
16 identification purpose as Respondent Exhibit 4. Can you tell us
17 what this is?
18 A. This is one of the spreadsheets that's faxed to the union
19 every Friday. We call this a notification or union report.
20 This is contractor work that either has been completed under
21 emergency or potentially will be completed at some point in the
22 future.
23 Q. What's the date of this document?
24 A. February 6th, 2015.
25 Q. And is this document kept in the regular course of business

1 by the company?
2 A. Yes. We keep a copy of it.
3 Q. Is this a document that you custodial control over as the
4 maintenance manager?
5 A. Yes. My planner Matt Balik, he's responsible for this
6 document.
7 Q. And look on the back side of Respondent Exhibit 4. Do you
8 see that?
9 A. Yes.
10 Q. What is that?
11 A. This is just a fax receipt that indicates that it was faxed
12 to this destination, and the results said that it sent okay
13 indicating that it was received.
14 Q. And that's a 724 number?
15 A. Yes. 724-643-8720.
16 Q. Do you know whose fax number that is?
17 A. I do not, sir.
18 Q. But you believe it to be the union's fax?
19 A. Yes.
20 MR. EASLEY: The employer moves for the admission of
21 Respondent Exhibit 4.
22 THE HEARING OFFICER: Any objections, Mr. Shepley?
23 MS. OLIVER: I'm sorry. I didn't hear your last question.
24 THE HEARING OFFICER: Last question was asking him whether
25 or not -- he didn't know the specific number but he believed it

1 to be the union's number; correct?
2 MS. OLIVER: Okay.
3 THE HEARING OFFICER: Is that correct?
4 MR. EASLEY: Correct.
5 MR. SHEPLEY: I have no objection, Your Honor.
6 THE HEARING OFFICER: All right. Ms. Oliver, do you have
7 any objection to this document?
8 MS. OLIVER: No.
9 THE HEARING OFFICER: Okay. Mr. Cox, you prepare this?
10 THE WITNESS: No, sir.
11 THE HEARING OFFICER: Who prepares this?
12 THE WITNESS: Matt Balik.
13 THE HEARING OFFICER: And he works under you?
14 THE WITNESS: He works in our planning department under Jim
15 Mendenhall who works for me.
16 THE HEARING OFFICER: I'll receive Respondent Exhibit 4 with
17 no objection.
18 (Respondent Exhibit No. 4 was admitted into evidence.)
19 Q. Mr. Cox, if you would on Respondent Exhibit 4 could you look
20 right around the middle there's a line that says in the far
21 left-hand column that says B. Kieler?
22 A. Yes.
23 Q. Do you see that?
24 A. Yes, sir.
25 Q. Who is B. Kieler?

1 A. That's Bill Kieler. He's out outage planner. He enters
2 work orders and requisitions for work that we're going to
3 execute during outages.
4 Q. If you go to the column that's marked "job description," do
5 you see that?
6 A. Yes.
7 Q. In that same line do you see where it says M116 waterwall
8 pre-planning?
9 A. Yes, sir.
10 Q. What does that mean?
11 A. This is a work order identifying that we plan to perform
12 waterwall work during our scheduled outage. Enerfab is our
13 boiler contractor. So this work order is in place for us to
14 begin preparing of that work execution so that way we ensure
15 that we can execute the project as planned during outage. So
16 we -- it looks like we put on order in to begin planning at this
17 time.
18 Q. So on Respondent Exhibit 4 FirstEnergy was notifying the
19 union that it had retained a contractor for work on the 2016
20 outage?
21 A. Yes, sir.
22 MR. EASLEY: Permission to approach, Your Honor?
23 THE HEARING OFFICER: Sure.
24 (Respondent Exhibit No. 5 was marked for identification.)
25 Q. Mr. Cox, I've handed you what's been marked as for

1 identification purposes as Respondent Exhibit 5. Can you tell
2 us what this is?
3 A. This looks to be another union notification report that Matt
4 would have put together.
5 Q. What's the date of this report?
6 A. 6-5-2015.
7 MR. EASLEY: The employer moves for the admission of
8 Respondent Exhibit 5.
9 THE HEARING OFFICER: Any objection, Mr. Shepley.
10 MR. SHEPLEY: One moment, Your Honor, please. No objection.
11 THE HEARING OFFICER: Ms. Oliver?
12 MS. OLIVER: I'm going to object on the basis of relevancy.
13 I'm not sure what this is.
14 THE HEARING OFFICER: Well, it's a notification to the union
15 regarding work that's being performed. Is your objection of
16 relevance because it appears to be after the work at issue was
17 performed?
18 MS. OLIVER: No. It goes to the fact that -- I don't see
19 anything here that deals with GE or the outage in dispute. I'm
20 not sure what this is supposed to be.
21 THE HEARING OFFICER: Well, Respondent Exhibit 4 doesn't
22 have GE in it either. I think it's -- what's your position as
23 far as relevance?
24 MR. EASLEY: Well, if you look at the line that says turbine
25 area general NDE M116 it's notifying the union that we're

1 contracting the work on the turbine work, Your Honor.
2 THE HEARING OFFICER: What line is that?
3 MR. EASLEY: It's the line that has TM Cowher in the far
4 left-hand column.
5 THE HEARING OFFICER: Turbine area general NDE M116; is that
6 what you're referring to?
7 MR. EASLEY: It is.
8 THE HEARING OFFICER: This document was dated June 5th,
9 2015; correct?
10 MR. EASLEY: Correct, Your Honor.
11 THE HEARING OFFICER: And this is notifying them that the
12 work had been performed.
13 MR. EASLEY: No, sir. The work was done in 2016.
14 THE HEARING OFFICER: That's correct. I apologize.
15 MR. EASLEY: This is notifying them nine months in advance
16 that we were going to bring a contractor into work on the
17 turbine.
18 THE HEARING OFFICER: I can see the relevance to that. Any
19 other objection?
20 MS. OLIVER: Could I have voir dire on the document?
21 THE HEARING OFFICER: Sure.
22 VOIR DIRE
23 BY MS. OLIVER:
24 Q. Mr. Cox, do you have the document in front of you?
25 A. I do.

1 Q. In the line that says "turbine area general NDE," what does
2 NDE stand for?
3 A. Nondestructive examination.
4 Q. What does that mean, nondestructive examination?
5 A. That means when the turbine is apart and on the floor, we'll
6 do what called ultrasonic testing, which is called UTT that will
7 inspect the area for cracks. We'll also do a mass particle
8 inspection, which is again is like a detection where you
9 actually coat the surface with a material to check for cracks
10 and indications. This will also include surface and erosion
11 inspections during the turbine disassembly when it's on the
12 floor.
13 So basically nondestructive means that everything that
14 we inspect can be reused. There are sometimes that we have a
15 significant cracking that we would have to do destructive type
16 testing. When that would occur, that piece of equipment would
17 not be available. So this is the nondestructive testing for the
18 turbine overhaul during the 2016 outage.
19 Q. So that's not -- the nondestructive testing that you're
20 describing is not work that the unit people do?
21 A. No. It's not work that they've customarily done; correct.
22 THE HEARING OFFICER: Any other objection?
23 MS. OLIVER: I'll just renew my objection on relevancy.
24 THE HEARING OFFICER: Well, you got his testimony which you
25 can rely upon arguing that it isn't notification, and you can go

1 from there, but for purpose of relevance, I'll receive it.
2 MS. OLIVER: Okay.
3 (Respondent Exhibit No. 5 was admitted into evidence.)
4 THE HEARING OFFICER: Can you -- I know that you don't
5 prepare these, but you're familiar with them; correct?
6 THE WITNESS: Yes.
7 THE HEARING OFFICER: And you're able the explain what they
8 mean; correct?
9 THE WITNESS: Yes.
10 THE HEARING OFFICER: When it says "requested by" and then
11 it's got "App by" and then it's got a number of what, I assume,
12 are contractors names; Enerfab, Yates, Burnham Industries,
13 BRAND, MPW, Team Inc. and all others; is that correct?
14 THE WITNESS: Yes.
15 THE HEARING OFFICER: And those are contractors that you
16 use?
17 THE WITNESS: Yes.
18 THE HEARING OFFICER: And the EST I'm assuming is an
19 abbreviation for estimate; correct?
20 THE WITNESS: Correct.
21 THE HEARING OFFICER: What are you estimating in those
22 columns?
23 THE WITNESS: The job duration. Normally the man hours that
24 would incurred with the project.
25 THE HEARING OFFICER: All right. But none of that

1 information is included for any of these projects in 6-5-2015 in
2 Respondent Exhibit 5; correct?
3 THE WITNESS: Correct.
4 THE HEARING OFFICER: I received the Exhibits 4 and 5. Go
5 ahead, Mr. Easley.
6 (Respondent Exhibit No. 6 was marked for identification.)
7 BY MR. EASLEY:
8 Q. All right. Mr. Cox, I have handed you what's been marked
9 for identification purpose as Respondent Exhibit 6. Can you
10 tell us what this is?
11 A. This is another union notification report that's sent on
12 Friday dated July 7th, 2015.
13 Q. And is there anywhere on Respondent Exhibit 6 that
14 demonstrates or informs the union that there will be out source
15 work in connection with the 2016 outage?
16 A. Yes. The first line on the page is the M116 air heater
17 basket material work order.
18 Q. Is the notation M116 as it appears in Respondent's Exhibit 6
19 as well as Respondent's Exhibits 4 and 5 that refers to the 2016
20 outage.
21 A. Yes. The M is for Mansfield, and the 1 is for Unit 1, and
22 the '16 is for 2016.
23 MR. EASLEY: Employer moves for the admission of Respondent
24 Exhibit 6.
25 THE HEARING OFFICER: Any objection?

MR. SHEPLEY: No objection.

THE HEARING OFFICER: Ms. Oliver?

MS. OLIVER: If I can be permitted ask some questions on the document?

THE HEARING OFFICER: Go ahead.

VOIR DIRE

BY MS. OLIVER:

Q. What is the air heater basket material? What is that?

A. The air heater, we use -- it's for the external gas leaving the boiler. It's a way for us to -- it's almost exactly like a heat exchanger. So it sits and it rotates and hot air comes down through the baskets which is just core ton material, and it heats that metal, and as it spins it back around, we utilize that heat again for a efficiency standpoint. That goes into our combustion. So this is for the replacement of those baskets, and this work order was related to purchasing the material so we can perform the replacement of all of the baskets during the outage.

Q. So that's just a purchase order for a pieces of equipment and that's all that that means?

A. Yes. It's to purchase of air heater basket material for the replacement.

MS. OLIVER: I'll object on the basis of relevancy.

THE HEARING OFFICER: I'll overrule the objection on the same basis.

1 (Respondent Exhibit No. 6 was admitted into evidence.)
2 MR. EASLEY: Permission to approach?
3 THE HEARING OFFICER: Yes.
4 (Respondent Exhibit No. 7 was marked for identification.)
5 Q. Mr. Cox, I have handed you what's been marked for
6 identification purposes as Respondent's Exhibit 7. Can you tell
7 us what this is?
8 A. This is another notification report dated September 14th,
9 2015.
10 Q. And it, again, reflects various different tasks that are
11 related to the 2016 outage?
12 A. Yes, sir.
13 MR. EASLEY: The employer moves for the admission of
14 Respondent Exhibit 7.
15 THE HEARING OFFICER: Any objection, Mr. Shepley?
16 MR. SHEPLEY: Your Honor, I'm taking a closer look at this
17 if you give me a moment please. I have no objection.
18 THE HEARING OFFICER: Ms. Oliver?
19 MS. OLIVER: Could I take a moment off the record to review
20 this with our union people, Your Honor?
21 THE HEARING OFFICER: Well, what would be your basis to
22 objecting to it? I mean, if you want to question the witness
23 about it on cross, I'll allow you a period between the
24 conclusion of direct to consult very briefly for that purpose,
25 but to the extend that you have an issues regarding to its

1 authenticity, relevance, et cetera, you can look at the document
2 and make that determination. So I'm going to deny your request
3 at this point to consult with your client about it whether or
4 not it's evidence that can be received into evidence. You'll
5 have time to consult before you cross.
6 MS. OLIVER: I'll object to the same basis on relevancy, and
7 I'll reserve my questions on cross.
8 THE HEARING OFFICER: I'll overrule the objection on
9 relevancy again leaving it to the parties to make arguments in
10 briefs as to what, if any weight, should be given to these
11 documents as it relates to notification. Respondent Exhibit 7
12 is received.
13 (Respondent Exhibit No. 7 was admitted into evidence.)
14 (Respondent Exhibit No. 8 was marked for identification.)
15 Q. Mr. Cox, I handed you what's been mark for identification
16 purposes as Respondent Exhibit 8. Can you tell us what this is?
17 A. This is, again, a union notification with the date of
18 September 18th, 2015.
19 MR. EASLEY: The employer moves for the admission of
20 Respondent Exhibit 8.
21 THE HEARING OFFICER: Let me just ask a question. Can we
22 get at stipulation from the parties that the fax number that's
23 indicated on here is or is not a union telephone number?
24 MS. OLIVER: We can stipulate that's the union's fax number.
25 MR. SHEPLEY: On that basis, General Counsel will stipulate

1 to that.
2 THE HEARING OFFICER: I assume, Mr. Easley, you will join in
3 that stipulation?
4 MR. EASLEY: I will, Your Honor.
5 THE HEARING OFFICER: All right. So we'll stipulate that
6 the telephone listed on each of these Respondent's Exhibits 4
7 through 7 to the extent that they identify 724-643-8720 that is
8 a telephone fax number for Charging Party. All right. So now
9 I'll ask any objections to Respondent's Exhibit 8, Mr. Shepley?
10 MR. SHEPLEY: No objection.
11 THE HEARING OFFICER: All right. Ms. Oliver?
12 MS. OLIVER: Same objection, Your Honor.
13 THE HEARING OFFICER: You're going to argue relevance, and
14 I'm going to overrule the objection, and Respondent's Exhibit 8
15 is received.
16 (Respondent Exhibit No. 8 was admitted into evidence.)
17 (Respondent Exhibit No. 9 was marked for identification.)
18 Q. Mr. Cox, I've handed you what's been marked for
19 identification purpose as Respondent's Exhibit 9. Can you tell
20 us what this is?
21 A. Again, a union notification report dated 9-28-2015.
22 MR. EASLEY: Employer moves for the admission of Respondent
23 Exhibit 9.
24 THE HEARING OFFICER: All right. Mr. Shepley?
25 MR. SHEPLEY: No objection.

1 MS. OLIVER: I'll renew my same objection, Your Honor.
2 THE HEARING OFFICER: I'll overrule the objection and
3 receive the document. What is the notation on page 3 that says
4 correct list dates corrected 9-28-15 and it looks like MBF? Are
5 you familiar with whose handwriting that is?
6 THE WITNESS: That appears to be Matt Balik, but I can't be
7 sure of that.
8 THE HEARING OFFICER: Okay. All right. I'll receive
9 Respondent's Exhibit 9.
10 (Respondent Exhibit No. 9 was admitted into evidence.)
11 (Respondent Exhibit No. 10 was marked for identification.)
12 Q. Mr. Cox, I've handed you what's been marked for
13 identification purposes as Respondent Exhibit 10. Can you tell
14 us what that is?
15 A. This is another union notification report dated 10-2-2015.
16 MR. EASLEY: Employer moves for the admission of
17 Respondent's Exhibit 10.
18 THE HEARING OFFICER: Mr. Shepley, any objection?
19 MR. SHEPLEY: One moment please, Your Honor. I just had it
20 given to me. I have no objection.
21 THE HEARING OFFICER: Ms. Oliver?
22 MS. OLIVER: Objection on the basis of relevance.
23 THE HEARING OFFICER: Overruled, and I'll receive Respondent
24 Exhibit 10.
25 (Respondent Exhibit No. 10 was admitted into evidence.)

1 (Respondent Exhibit No. 11 was marked for identification.)
2 Q. Mr. Cox, I've handed you what's been marked for
3 identification purposes as Respondent's Exhibit 11. Can you
4 tell us what this is?
5 A. This is another union notification report dated October 9th,
6 2015.
7 MR. EASLEY: Employer moves for the admission of Respondent
8 Exhibit 11.
9 THE HEARING OFFICER: Any objections, Mr. Shepley?
10 MR. SHEPLEY: No, Your Honor.
11 THE HEARING OFFICER: Ms. Oliver?
12 MS. OLIVER: I'll object on the basis of relevancy.
13 THE HEARING OFFICER: I'll overrule and admit Respondent's
14 Exhibit 11 on the same basis as previously articulated.
15 (Respondent Exhibit No. 11 was admitted into evidence.)
16 (Respondent Exhibit No. 12 was marked for identification.)
17 THE HEARING OFFICER: Mr. Easley, how many more of these do
18 we have?
19 MR. EASLEY: I have one more after this one, Your Honor.
20 Q. Can you tell us what this is, Mr. Cox?
21 A. This is a union notification report again dated 11-6-2015.
22 MR. EASLEY: The Respondent moves for the admission of
23 Respondent Exhibit 12.
24 THE HEARING OFFICER: Any objection, Mr. Shepley?
25 MR. SHEPLEY: No objection.

1 THE HEARING OFFICER: Ms. Oliver?
2 MS. OLIVER: I'll object on the basis of relevancy.
3 THE HEARING OFFICER: Overruled. I'll receive Respondent's
4 Exhibit 12.
5 (Respondent Exhibit No. 12 was admitted into evidence.)
6 (Respondent Exhibit No. 13 was marked for identification.)
7 MR. EASLEY: Last one, Your Honor.
8 Q. Mr. Cox, I've handed you what's been marked for
9 identification purposes as Respondent Exhibit 13. Can you tell
10 us what this is?
11 A. This is another union notification report and it's dated
12 11-20-2015.
13 MR. EASLEY: Respondent moves for the admission of
14 Respondent Exhibit 13.
15 THE HEARING OFFICER: Mr. Shepley, any objection?
16 MR. SHEPLEY: No objection.
17 THE HEARING OFFICER: Ms. Oliver?
18 MS. OLIVER: Same objection.
19 THE HEARING OFFICER: Your objection is to relevance?
20 MS. OLIVER: Yes.
21 THE HEARING OFFICER: I'll overrule the objection, and
22 Respondent Exhibit 13 is received.
23 (Respondent Exhibit No. 13 was admitted into evidence.)
24 Q. Mr. Cox, looking at these notification sheets, Respondent's
25 Exhibits 4 through 13, is it fair to say that anywhere on these

1 documents that the notations that M116 appears that that's work
2 being contracted to the 2016 outage?
3 A. Yes, sir.
4 Q. If you would just for a moment look at Respondent Exhibit
5 12.
6 A. Yes, sir.
7 Q. The third line from the bottom where it says TM Cowher, do
8 you see that?
9 A. Yes, sir.
10 Q. Do you see what the job description is there?
11 A. Yes. That's to perform the generator labor for the M116
12 outage.
13 Q. And this was sent to the union on November the 6th of 2015?
14 A. That's correct.
15 Q. Mr. Cox, what's the purpose of sending these notification
16 reports to the union?
17 A. The purpose of sending the notification list to the union is
18 to ensure that we're communicating what work is being contracted
19 out, and if there's any questions or concerns related to the
20 incidents that we can discussion them.
21 Q. Does the company have meetings with the union to discuss
22 contracted work?
23 A. We do have a Wednesday notification meeting that's conducted
24 inside of my group every Wednesday by Mr. Paul Rundt.
25 Q. So every Friday the union gets a fax report?

1 A. That's correct.
2 Q. And then the following Wednesday there would be another
3 meeting to discuss subcontracting?
4 A. Yes, sir.
5 Q. And the first report, Respondent Exhibit 4, notified the
6 union that there were going to be contractors working during the
7 2016 outage; is that right?
8 MS. OLIVER: I'm going to object. Leading. He can't walk
9 this witness through.
10 THE HEARING OFFICER: I'll sustain the objection. If you
11 want to go line-by-line and say --
12 Q. Let me ask it this way: Did the company notify the union on
13 February 6th of 2015 that there would be contractors working at
14 the Bruce Mansfield site during the 2016 outage?
15 A. Yes.
16 Q. And at any time after February 6th of 2015, to your
17 knowledge, in the Wednesday subcontracting meetings did the
18 union once ask to bargain about any of that subcontracted work?
19 A. Not to my knowledge.
20 THE HEARING OFFICER: Do you participate in these Wednesday
21 meetings?
22 THE WITNESS: Very rarely. I get an update on the meeting
23 and how it went from Paul.
24 THE HEARING OFFICER: Paul's last name is.
25 THE WITNESS: Rundt, but I did not attend the meetings

1 regularly.
2 Q. You did attend one of these weekly meeting on February 10th
3 of 2016?
4 A. I did.
5 Q. Can you tell us who was present at that meeting?
6 A. Yes. Paul Rundt was present. He was leading the meeting.
7 I believe that George Mitch was there also form the maintenance
8 department. From the union was Dennis Bloom, and I believe that
9 Frank Snyder was there also.
10 Q. Could you describe the discussion that took place during the
11 February 10th, 2016 subcontracting meeting?
12 A. It was the standard format of the meeting. They walked
13 through what work was going to be contracted out in the future
14 and what we were doing, and any emergency work that had
15 occurred, and at that meeting Paul also notified the union of
16 our intent to subcontract the turbine work and boiler feed pump
17 to GE.
18 Q. What was the union's response, if any, to that statement?
19 A. If I remember there was discussion that Dennis asked for
20 clarification that did the feed pump turbine inspection was
21 included in that, and we answered yes, and after that there was
22 just small discussion that that was their work.
23 Q. Was there a request to engage in collective bargaining about
24 it?
25 A. Not to my knowledge.

1 Q. Now, did the union request any information about the turbine
2 subcontractor in this meeting on February 10th?
3 A. During this meeting I don't recall a request for information
4 during that meeting.
5 Q. But we did receive a written request?
6 A. Yes, sir.
7 Q. And I believe that you should have in front of you General
8 Counsel's Exhibit 6.
9 THE HEARING OFFICER: It's a letter.
10 Q. It's a one page letter.
11 A. General Counsel 6?
12 MR. EASLEY: Permission to approach, Your Honor?
13 THE HEARING OFFICER: Yes.
14 Q. I've handed you what has been admitted as 6. Have you seen
15 that before?
16 A. Yes, sir.
17 Q. What is that?
18 A. That's the information request for the information related
19 to the outage work.
20 Q. Did you provide a response to General Counsel's Exhibit 6,
21 Mr. Cox?
22 A. Yes, sir.
23 Q. Is that what's been admitted as General Counsel's Exhibit 7?
24 A. Yes, sir.
25 Q. What is the date of that response, sir?

1 A. March 14th, 2016.
2 Q. When did work commence on the outage?
3 A. The work actually began -- it started early -- I think the
4 original date was the 20th. So I think that work began on the
5 outage on the 16th of March. That would have been that Monday.
6 We started five days early due to the fact that the units
7 weren't in operation, because they were on reserve shutdown.
8 Q. But at the time the response was provided, there was no work
9 being done on the outage because it had not yet commenced.
10 A. There was some pre mobilisation activities, but that was it
11 by the contractors.
12 THE HEARING OFFICER: Pre mobilization means what?
13 THE WITNESS: Bringing in their tools and equipment and
14 breakdown trailers to get set up and to do the work. They
15 bringing their equipment on site to make sure they're ready to
16 do it, and they have staged the location that they're working.
17 Q. Would there have been any way for FirstEnergy to have known
18 how many contractors was deploying before the work started?
19 A. Not exactly. They just give us estimates of the work that
20 they plan to complete. They give us a man hour estimate on the
21 duration on how long it would take to complete that job. Once
22 they get started, the number of men they have on site will vary
23 based on the resources that they can attain from the hall and
24 actually the productivity of their employees. So that will vary
25 once the work activities begin.

1 Q. But at as of the date that you provided the response,
2 FirstEnergy Generation did not have that information?
3 A. We just have their estimated man hours to complete the
4 project.
5 Q. And that information was provided to the union?
6 A. Yes.
7 Q. Now, did you remember having a phone conversation with
8 Herman Marshman about your response to this information request?
9 A. No. I do not recall having a conversation with Herman on
10 the phone for this.
11 THE HEARING OFFICER: Did you get a phone message from
12 Mr. Marshman regarding an information request?
13 THE WITNESS: I do not recall receiving a phone message;
14 however, I get a lot of messages, and I could have inadvertently
15 deleted one, but I don't remember receiving one.
16 Q. Now, I think that you mentioned just a moment ago at the
17 February 10th meeting there was some discussion about the work
18 -- outage work on the boiler feed pump. Do you remember that?
19 A. Uh-huh.
20 Q. Can you explain what was the discussion about the boiler
21 feed pump in the meeting?
22 A. Which meeting?
23 Q. The February 10th meeting?
24 A. The February 10th meeting we just indicate that we were
25 intending to -- considering contracting that portion of the work

1 out to GE also.
2 Q. What was the union's response as it relates to the boiler
3 feed pump?
4 A. Just clarification that that was included in the discussion,
5 and we answered yes and then just the discussion that's our
6 work.
7 Q. Ultimately who did the work on the boiler feed pump during
8 the outage?
9 A. We did have our employees perform the inspection and
10 overhaul of the boiler feed pump turbine during the outage.
11 Q. So bargaining unit employees?
12 A. Yes.
13 Q. Is it fair to say that bargaining unit employees did get the
14 opportunity to work during the outage on the outage project?
15 A. On the outage? Yes, absolutely.
16 Q. And what types of functions would FirstEnergy employees have
17 performed during the outage?
18 A. They performed the boiler feed pump work. They performed
19 the circ pump inspections and bearing PMs. They performed all
20 of our safety valve repairs, our boiler start up valve repairs.
21 They also performed work in the SO2 area, for example nozzle
22 cleaning and those type of activities along with some bottom ash
23 work in general. They also performed all of the tag out of the
24 unit ensuring that all of the systems were isolated and tagged
25 properly and also supported in different cleaning activities

1 that occur during the outage. Our union employees performed the
2 initial boiler wash that occurs during the initial week of the
3 outage where we wash the entire external of the boiler down. So
4 it's a cleaner condition than when we started.
5 Q. Approximately how many FirstEnergy bargaining unit employees
6 worked on the outage project in 2016?
7 A. Overall assigned directly out of the two groups would have
8 been roughly -- out of the maintenance department roughly 50
9 were directly related to the outage. Those employees, they
10 did -- extra employees would have been assigned in shift
11 rotations to manage the emergencies that occur on Units 2 and 3
12 during that time along with our waste disposal and our yard.
13 However, based on the way that we call overtime, all of
14 the employees are available -- are eligible to perform or work
15 overtime during the outage. So they would have had the
16 opportunity to work during outage -- work overtime during the
17 outage and work on the outage. So without looking at all of the
18 sheets, I would say over 90 percent of the employees that we
19 have employed for us would have had an opportunity to work on
20 the outage.
21 THE HEARING OFFICER: When you said "had an opportunity,"
22 what does that mean?
23 THE WITNESS: When we call overtime, we have to follow a
24 list that allows us to have equitable distribution of the
25 overtime to the entire department. So whenever that comes up,

1 even if you would have been working or assigned to work for the
2 balance of plant jobs during a shift rotation, if a shift came
3 up that's available for the outage work that we have overtime
4 for and you accepted, we would allow you to go work the overtime
5 for that shift.
6 So as the work comes up and we need extra people, no matter
7 where you are at in the department, if you accepted the
8 overtime, you would work those jobs during the outage.
9 THE HEARING OFFICER: Okay.
10 (Respondent Exhibit No. 14 was marked for identification.)
11 Q. Mr. Cox, I've handed you what's been marked for
12 identification purposes as Respondent Exhibit 14. Can you tell
13 us what this?
14 A. This is an overtime report, just a summary report of the
15 overtime worked by our Local 272 during the M116 outage that's
16 provided to us from our business services department.
17 Q. How can you tell this is related to outage?
18 A. The title at the top is M116 overtime report by Local 272
19 employees.
20 Q. And so what employees would be included in the report?
21 A. Let me look through it. This report includes the employees
22 from our mechanical maintenance department, our electrical
23 maintenance department, I&T mechanical department and main plant
24 operations.
25 Q. Is that the bulk of the bargaining unit?

1 A. That is the bulk. What I'm not seeing is our yard employees
2 or our WDA employees.
3 THE HEARING OFFICER: What's that stand for?
4 THE WITNESS: Waste disposal area.
5 THE HEARING OFFICER: Don't use abbreviations. They don't
6 help me.
7 Q. Mr. Cox, what's the source of this report?
8 A. This is generated off of the work orders. So you can see
9 where it says the work breakdown structure element description
10 across the top. That just shows the work order that the time
11 was charged to. So the over time, for example, on the first
12 line would have been for Mansfield mechanical inside eight hours
13 and outside 16. As he worked through what would have been for
14 Unit 1 for the SO2 area for the 2016 outage along with boiler
15 tube leaks and some other areas. The work orders would have
16 been associated with why they worked overtime.
17 Q. So this would exclude any overtime that wasn't related to
18 the outage?
19 A. I can't say that for sure, because I don't know what would
20 have been included -- like Jon Artis, the third person down
21 where it says Mansfield electrical, that could have been an
22 overtime call for shift coverage for the running units, but this
23 would have been overtime worked during the outage, which it in
24 tern would have been related to -- if we were short on the shift
25 differential it's more than likely because we had other

1 employees working on the outage, but there's other emergent work
2 that occurs during the outage that would have required overtime.
3 So there may be some of that in this report also.
4 MR. EASLEY: Fair enough. Respondent moves for the
5 admission of Respondent Exhibit 14.
6 THE HEARING OFFICER: Any objection, Mr. Shepley?
7 MR. SHEPLEY: Just a little bit of voir dire.
8 THE HEARING OFFICER: Go ahead.
9 VOIR DIRE
10 BY MR. SHEPLEY:
11 Q. Mr. Cox this report -- does it cover a specific period of
12 time; would it not?
13 A. Yes. They normally have a date on it. I don't see that in
14 this report though.
15 Q. So where it says M116 overtime report by Local 272 employee,
16 that doesn't designate what period of time that this work that
17 this overtime occurred; correct?
18 A. That is correct. It's a general description, which would
19 have potentially indicated that this overtime report would have
20 started on 3-20 and ended on May 14th, but because it's not
21 listed here, I can't testify to that.
22 MR. SHEPLEY: I have no further questions on that, but I
23 would object on the basis there's no way of telling what period
24 of time this covers; therefore, the relevance is questionable.
25 THE HEARING OFFICER: All right. Ms. Oliver, do you have an

1 objection?
2 MS. OLIVER: I would join in the General Counsel's
3 objection.
4 THE HEARING OFFICER: Is there any other document that would
5 indicate the breakdown over what period of time would be covered
6 by this, Mr. Easley?
7 MR. EASLEY: I can't answer that question, Your Honor. This
8 report was run based on the M116 cost center. So that was
9 overtime that was charged based upon the outage, but as far as
10 the dates that it covers, it doesn't reflect it.
11 THE HEARING OFFICER: Well, the witness has authenticated
12 it. It appears to be a business record. What weight would go
13 to it based on the fact that it's not clear what period of time
14 that it covers, is something that you all can argue in your
15 brief. I would note that it's not clear what period of time
16 this covers and concluding that it covers the entire period of
17 the outage is somewhat problematic because there's no indication
18 that that's in fact the case. So I'll receive it over
19 objection, and obviously arguments will be made as to what
20 weight to be given to it.
21 (Respondent Exhibit No. 14 was admitted into evidence.)
22 MR. EASLEY: Very good.
23 BY Mr. EASLEY:
24 Q. So were there opportunities to work overtime that were
25 declined by bargaining unit employees during the outage?

1 A. Yes, sir.
2 Q. Does the company keep records of such things?
3 A. Yes, sir.
4 (Respondent Exhibit No. 15 was marked for identification.)
5 Q. I'm handing you what's been marked as Respondent Exhibit 15.
6 Can you tell us what this is, Mr. Cox?
7 A. Yes. This is our overtime call out statistics report. This
8 tracks the amount of overtime that we are requesting our
9 employees to make along with the number of times that they
10 accept the overtime, number of times they refuse the overtime,
11 the number of times that we're unable the contract them for a
12 response and then the number of times that we draft them, which
13 is actually forcing them to work overtime.
14 Q. What's the source of information on Respondent Exhibit 15?
15 A. This information comes from our time keepers. The
16 individual supervisors for each of the crew pull our employees
17 in the morning asking them if we have available overtime they
18 would like to work that overtime, and then we get those
19 responses, and then they're turned into our time keepers, and
20 they collect the data and enter into this program..
21 Q. Do you have custodial responsibility for this information
22 for these?
23 A. Custodial?
24 Q. Is this a record that you keep?
25 A. This is kept under the maintenance department, yes, by our

1 -- the administrative assistants are our run and control
2 overtime, yes.
3 MR. EASLEY: Respondent moves for the admission of
4 Respondent Exhibit 15.
5 THE HEARING OFFICER: Is this something that's regularly
6 kept in the ordinary course of the operations, or was this
7 something that created now?
8 THE WITNESS: No. This is standard day-to-day operations
9 every day we have -- we're calling overtime and working through
10 this. This is used every single day.
11 THE HEARING OFFICER: This appears to be from a period of
12 February 1st, 2016 to June 1st, 2016. This is not a daily. Is
13 this a summary of your individual daily reports summarized into
14 one document?
15 THE WITNESS: Yes, sir.
16 THE HEARING OFFICER: Who compiled the information?
17 THE WITNESS: This is was Kenny Craig by administrative
18 assistant.
19 THE HEARING OFFICER: Any objection, Mr. Shepley?
20 MR. SHEPLEY: Voir dire please?
21 THE HEARING OFFICER: Go ahead.
22 VOIR DIRE
23 BY MR. SHEPLEY:
24 Q. Mr. Cox, how does Respondent 15 relate to Respondent 14?
25 A. This is just a summary of the -- sorry. Respondent 15 is

1 just a summary of all of the attempts and offers to work
2 overtime. Respondent 14, the information is actually the
3 overtime worked, and the number of hours by employee to what job
4 description they were working overtime on.
5 Q. Well, looking at line 2 on Respondent 15 we have an employee
6 Gerald Anderson. How is it that Gerald Anderson -- please
7 explain how Gerald Anderson could accept 0 percent and yet on
8 this form on 14 it appears he did work some overtime?
9 A. Because if you look over on the number of times drafted, he
10 was forced to work nine times.
11 MR. SHEPLEY: Thank you. Your Honor, I have no more voir
12 dire, and I have no objection.
13 THE HEARING OFFICER: Ms. Oliver?
14 MS. OLIVER: I would object on the basis it's on conclusory.
15 THE HEARING OFFICER: Well, it's a summary of documents. If
16 you question the validity or the accuracy of the summary, you
17 can request that Respondent provide you with the daily sheets to
18 determine whether or not it's accurate if you believe that's
19 something that you need.
20 MS. OLIVER: Are they here?
21 MR. EASLEY: No.
22 MS. OLIVER: Can you turn them over?
23 MR. EASLEY: I suppose. It will probably take a little
24 time.
25 THE HEARING OFFICER: Well, I mean, it's a summary. The

1 rules of evidence require that if upon request --
2 MR. EASLEY: I understand Your Honor.
3 THE HEARING OFFICER: So you know, I'm assuming your
4 objection is you've not been provided yet -- you're maintaining
5 an objection to it's admissibility based upon not having
6 underlying documents?
7 MS. OLIVER: Correct.
8 THE HEARING OFFICER: So I withhold ruling. I mean, I'll
9 sustain the ruling, because the documents have not been
10 provided. It's my understanding that Respondent can provide
11 them.
12 MR. EASLEY: Can I just question the witness about this
13 before you make your ruling, Your Honor?
14 THE HEARING OFFICER: Sure.
15 BY MR. EASLEY:
16 Q. How are these records kept, Mr. Cox?
17 A. There's individual pulling sheets that we collect, and then
18 the input gets entered daily for attempts and request for
19 overtime. So we would have to generate each individual report
20 that rolls up to this.
21 Q. Are -- those daily handwritten ones, are they retained or
22 discarded?
23 A. I would have to talk to our administrative assistants. I
24 don't know if they retain those every day or once it's entered
25 if they discard that or not.

1 Q. But from the business standpoint, how is it stored?
2 A. They file them. This is stored electronically.
3 Q. So to get a report like Respondent Exhibit 15, what do you
4 have to do?
5 A. We're going to have to go through every day and pull the
6 individual report.
7 Q. No. How is the report, Respondent Exhibit 15, created?
8 A. They go through and electronically select the impute dates
9 and pull everything in for those dates.
10 MR. EASLEY: All right.
11 THE HEARING OFFICER: Well, I mean, we have what we have.
12 Is there a -- without asking the witness to make any
13 conclusions, your point of seeking to introduce this document is
14 what?
15 MR. EASLEY: To demonstrate that there was a lot of overtime
16 available to the employees during the outage, Your Honor.
17 THE HEARING OFFICER: And Charging Party going to dispute
18 that?
19 MS. OLIVER: Well, you don't get to decimate the unit and
20 when there's nobody left make the argument that --
21 THE HEARING OFFICER: That's -- I'm talking about the
22 document. You know, he's contending that overtime was made
23 available, and that this document reflects what overtime was
24 made available. Is there a stipulation that can be reached that
25 overtime was made available that was declined?

1 MS. OLIVER: We could make a stipulation that for the first
2 five weeks of the outage our bargaining unit employees received
3 no opportunities for overtime on the turbine, and I think that
4 our witnessed testified to that yesterday.
5 THE HEARING OFFICER: Well, I made my ruling as it relates
6 to the summary and the underlying documents. If your argument
7 is that for the first five weeks assuming there's not a
8 stipulation, I guess you would need underlying documents,
9 because this is a summary for the period of time that covers
10 four months. It doesn't reflect during what week what was
11 offered. So my ruling is what it is.
12 MS. OLIVER: I understand.
13 BY MR. EASLEY:
14 Q. So during the outage project, was there overtime made
15 available to bargaining unit employees?
16 A. Yes.
17 Q. On what frequency?
18 A. Daily for the most part. Almost shiftly as we worked
19 through the outage. So without having every single day in front
20 of me, I can't speak to that exactly, but we did work over
21 20 percent overtime in the bargaining unit during the outage.
22 Q. Did the company have any difficulties getting bargaining
23 unit employees to accept overtime during the outage?
24 A. Their accept percentage was low. We did draft a significant
25 amount of employees during the outage.

Q. So you had to force people during to do work?
A. We did force them, yes.
MR. EASLEY: We have no further questions of this witness.
THE HEARING OFFICER: Are you ready to cross, or would you like a couple of minutes?
MR. SHEPLEY: I need five minutes, Your Honor.
THE HEARING OFFICER: We will come back at 10:50.
MS. OLIVER: I would like to have the opportunity to review the notices with our clients.
THE HEARING OFFICER: Go ahead. Off the record.
(Recess taken.)
THE HEARING OFFICER: Let's go on the record. Mr. Shepley?

CROSS EXAMINATION

BY MR. SHEPLEY:
Q. Mr. Cox, you've looked at Respondent Exhibit 4 through 13 on your direct examination by counsel, and I believe that it's your testimony -- is it your testimony that some of these jobs in here were designated for the 2016 outage on Unit 1?
A. Yes.
Q. And the turbine work on that outage, was it not, ended up being done by General Electric?
A. Yes.
Q. And is there anywhere on any of these documents, R 4 -- Respondent 4 through 13, that GE is even mentioned? Take the time to look if you wish.

1 A. No. General Electric is not on these documents.
2 Q. And if you look at Respondent Exhibit 13 in particular, the
3 date on that is November 20th of '15. GE had already been
4 agreed to or contracted out for that work by that date; were
5 they not?
6 A. Yes. The PO was issued on I believe November 13th or 14th.
7 Q. And you would agree there's nothing on Respondent's Exhibit
8 13 that gives any indication whatsoever that General Electric is
9 going to do a massive amount of work on that outage in 2016?
10 A. Can you repeat that?
11 Q. Would you agree that there is nowhere on Respondent's
12 Exhibit 13 that there's any indication that GE is going to do
13 basically all of the work on the outage on Unit No. 1 coming up,
14 the turbine?
15 A. I agree that there's nothing on this document indicating
16 that GE is going to perform any work on the turbine during the
17 Unit 1 outage, yes.
18 Q. How would anybody at the union have any idea that all of
19 this turbine work on the outage coming up was going to be done
20 by GE? By looking at this, how would anybody at the union know
21 that?
22 A. On November 20th I don't believe that they would have.
23 Q. Also on these documents, Respondent's 4 through 13, let's
24 make clear. There's nothing there that indicates that any
25 bargaining was offered to the union by the company on any of

1 these particular tasks?
2 A. Can you repeat that?
3 Q. Would you agree there's nothing on any of these documents
4 that shows that the company offered bargaining to the union on
5 any of these tasks?
6 A. Is that correct. Notification only.
7 Q. Thank you. You said that you attended some of these
8 Wednesday meetings but very few; is that correct?
9 A. That's correct.
10 Q. How many did you attend?
11 A. I'd say five or six. More over the last couple of months
12 but prior to September-ish very few; one or two.
13 Q. So these few that you did attend, you said two months. What
14 two months are you referring to?
15 A. Say that again.
16 Q. Let me ask you: When were these meetings held that you
17 attended?
18 A. I attended the February 10th meeting, and then I've been
19 attending in the end of September 2016 and October of 2016.
20 Q. And so prior to February 10th of '15 you attended no
21 meetings on Wednesday?
22 A. Without looking back at my records very few, if any.
23 Q. The purpose of those meetings on Wednesday was to inform the
24 union -- at a minimum inform the union what subcontracting was
25 going to be anticipated?

1 A. The purpose of the Wednesday meeting that we're attending is
2 to discussion any upcoming contract work that we're considering
3 contracting out over the next five to seven days, because we
4 have a meeting weekly, and it also includes notification to the
5 union of any emergency work that may have occurred from the last
6 meeting to the current meeting.
7 Q. So to discuss, would you agree at a minimum you first have
8 to inform?
9 A. Yes.
10 Q. So you weren't at these meetings. So would -- would you
11 know whether there was any information given to the union
12 representatives at these meetings about what was to be
13 potentially subcontracted?
14 A. I can't speak to that. I wasn't at the meetings.
15 Q. You weren't there. I understand. Now, in the response that
16 you gave to the union to the request for information, I believe
17 that is General Counsel's Exhibit 7.
18 A. Yes, sir.
19 Q. Nowhere in there -- in your response does it give the wages
20 of the subcontractor employees; does it?
21 A. Is that correct.
22 Q. That information was available to you? If you wanted to get
23 it, you could have got it; right?
24 A. Estimates for the subcontractors is available, yes.
25 Q. You mean the wages for the employees of the subcontractors

1 when you answer it that way?
2 A. Can you repeat that again?
3 Q. The wages of the subcontractor's employees was available to
4 you, was it not, if you wanted to get it?
5 A. That would be very difficult for me to attain. I received
6 the -- what would be the all-in rate. So if a subcontractor --
7 I get what they charge FirstEnergy. I don't get what they pay
8 their individual employees. I get -- the rate that I see is the
9 one that includes their overhead profit, and their are all in if
10 they have different charges. So I don't see the individual rate
11 that they pay their employee.
12 Q. So you didn't have that information when you received the
13 request; correct?
14 A. I only have -- we only have the rates that our plant would
15 pay the contractor. Our supply chain would have those types of
16 rates. I'm sure if we made a request we could obtain them, but
17 it's typically information we don't receive.
18 Q. But you could receive it if you wanted to; couldn't you?
19 Pick up of the phone and call the contractor or the
20 subcontractor. You couldn't; couldn't you?
21 A. No. We're not permitted to call the contractor and ask for
22 those rates. That's their proprietary information. They don't
23 share that with us.
24 Q. Who's proprietary information are you referring to;
25 FirstEnergy proprietary or the subcontractor's proprietary?

1 A. The subcontractors.
2 Q. So you believe that they would have refused your request if
3 you would have asked for the wages of their employees?
4 A. I can't speak to that, because I never made that request.
5 Q. Because you never attempted it; correct?
6 A. I didn't attempt to make that request from them, no.
7 Q. In that document there, which is in the letter with the
8 accompanying information, General Counsel's Exhibit 7, nowhere
9 in there does it have anything about the material cost used by
10 the subcontractors; is that correct?
11 A. That is correct.
12 Q. You could have got that information by the subcontractors by
13 picking up the phone and calling them; couldn't you? You could
14 have; couldn't you?
15 A. We could have attained that material, yes.
16 Q. But you didn't give that to the union in your letter of
17 March 14th; did you?
18 A. No. We did not, because we had historically not provided
19 the union with cost for material or cost for wages.
20 Q. You didn't give it to the union any time after March 14th,
21 did you, the material cost?
22 A. For what?
23 Q. For what was in the letter of February 10th, the request of
24 material cost related to the outage?
25 A. No. We never provided material cost to the union related to

1 the outage that I'm aware of.
2 Q. And you --
3 THE HEARING OFFICER: You never provided it, or you've never
4 provided it in the past?
5 THE WITNESS: Both. We did not provide it for this, and did
6 not provide it in the past.
7 THE HEARING OFFICER: Why didn't you provide it in this
8 instance?
9 THE WITNESS: There was discussion with FE counsel and
10 discussion what we had done in the past, and we determined that
11 we were not going to provide that information.
12 THE HEARING OFFICER: Did you communicate to the union that
13 you were not going to be providing that information? Either the
14 wages that the subcontractors paid or the material costs, did
15 you ever communicate to the union that you were not providing
16 that?
17 THE WITNESS: No, I do not believe so. We did not follow up
18 with another message to indicate that this was the last of the
19 information they were going to receive.
20 THE HEARING OFFICER: You did or did not?
21 THE WITNESS: Did not.
22 THE HEARING OFFICER: So the only communication -- I just
23 want to make sure that I have what's there, and I want to make
24 sure that I know what exists. You have the letter and then you
25 is have the response of the information that you provided.

1 That's the extent of the communication to your knowledge that
2 existed between the union and the employer about this
3 information request?
4 THE WITNESS: Yes.
5 BY MR. SHEPLEY:
6 Q. So I take it that you never gave the union a reason for why
7 you didn't provide information on the wages and material cost?
8 A. No, not officially.
9 Q. Were you here yesterday to hear the testimony of
10 Mr. Marshman?
11 A. I was.
12 Q. And did you hear his explanation of why the union wanted to
13 have the material cost information?
14 A. I heard the start of the conversation. I believe that there
15 was an objection to that, and I think that it stopped at that
16 point.
17 THE HEARING OFFICER: Let me ask you something. You said
18 "not officially" you did not provide the union with information.
19 Do you recall the word that you just used?
20 THE WITNESS: Yeah.
21 THE HEARING OFFICER: What word did you use, because I may
22 be wrong?
23 THE WITNESS: I thought that I said officially.
24 THE HEARING OFFICER: I want to know what you mean when you
25 say officially.

1 THE WITNESS: We did not provide them a letter or document
2 indicating that we would not provide that information.
3 THE HEARING OFFICER: I understand that. Did you
4 communicate in any way or form to the union that you were not
5 going to be providing the information and/or why?
6 THE WITNESS: We have a lot of different meetings that --
7 grievance meetings that Herman attends with us that we sit down
8 and we go through, and there's been discussions that Tony and I
9 sat with the union, and there's been discussion that we had
10 through those that we have talked in the past we will not
11 provide contractor information because it's proprietary to the
12 contractor and the request would have to go through the supply
13 chain. So there's been discussion that we won't provide that
14 information.
15 Herman has indicated in the past to me that I can make
16 additional requests above you to get that information. You
17 should just go get it. So I've -- under our guidance and from
18 our legal department at my level, we have not provided that
19 information, and we were not going to provide it in this
20 instance.
21 THE HEARING OFFICER: All right. Go ahead.
22 BY MR. SHEPLEY:
23 Q. Mr. Cox, I take it you don't know what was told to union
24 representatives at the Wednesday meetings as far as planned
25 subcontracting?

1 A. Which Wednesday meetings are you referring to?
2 Q. The various ones that you weren't there. Was there reports
3 back to you by anyone who was the representative of the company
4 at those meetings as to what was told to the union
5 representatives at the meeting about subcontracting?
6 A. Yes. Paul Rundt attends. He reports to me along with
7 George Mitch who reports in my department. When they attend
8 after the meetings in general I'll ask Paul or George how the
9 meeting went, and they'll indicate, "The meeting went fine."
10 I'll ask general questions of, "Was there any comments and who
11 attended?" And typically it's Frank and Dennis that attend the
12 meetings and for the most part the feedback that I get is the
13 meeting went fine, and there was minimal dialogue and no
14 concerns or no issues. In general is the report I get back. I
15 don't get those every single Wednesday, but in general when I
16 talk through and talk with the guys I'll ask them Wednesdays how
17 the meeting went.
18 Q. So these reports that you get back, in none of these reports
19 did any representative for the company tell you, is it not
20 correct, that they were never told that we have informed the
21 union that there's going to be an outage starting in March on
22 Unit No. 1, and General Electric is going to do the turbine
23 work?
24 A. That -- there was no indication of that communication until
25 February 10th.

1 Q. So February 10th was the first time that the union
2 representatives heard about General Electric going to do a lot
3 of work -- all most all of the work on the turbine for that
4 outage coming up?
5 A. That is correct.
6 Q. Is it not true that during the first four weeks after the
7 outage started that the unit employees were getting no overtime
8 related to the outage?
9 A. I can't say that for sure without the actual document, but I
10 would venture to guess based on my experience that's false.
11 There would have been overtime provided to them within the first
12 four weeks for the outage work. It's too large of a project to
13 believe that we weren't working overtime the first four weeks.
14 I have a summary report here that shows the entire outage. We
15 would have to pull that to be sure, but that's not the case.
16 It's even to the point where we're actually overworking our
17 employees with overtime, and it's actually becomes a work/life
18 balance issue. They get plenty of overtime. So for me to state
19 there was none, I can't do that.
20 Q. During the first four weeks of the outage, can you say that
21 there was a small amount of overtime?
22 A. Again, I can't say that without looking at the numbers. I
23 don't have that information.
24 Q. It's your testimony that you have no idea? It could have
25 been one hour, and it could have been 10,000 hours? You just

1 don't know; is that your testimony?
2 A. My testimony is we were budgeted for 20 percent overtime,
3 which is typically how we schedule and work the work throughout
4 the outage, but to speak to the exact percentage during the
5 first four weeks, I don't have the information at this time.
6 Q. Do you know if there was a change after the first four weeks
7 to the subsequent weeks of the outage as far as the amount of
8 overtime that was being worked by the unit personnel? Was there
9 some sort of change after roughly four weeks?
10 A. No. You'll get a little farther along in the work. You get
11 closer to the deadline. So when you have productivity
12 challenges that we can't get work completed or we're falling
13 behind in areas, we will begin to work more overtime in certain
14 portions of the project.
15 For example, going through this outage, if we would have had
16 a forced outage on one of the other units where we would have
17 elected to move our employees to the other unit to address those
18 emergencies first, obviously that means that the work that we
19 had on the unit was basically on hold and on standby. So in
20 turn, you're falling behind. So when you get back over to that
21 work and can begin, you're now falling behind in that work. So
22 you're going to have to -- because we're under a time crunch to
23 finish, you end up having to work overtime.
24 Because how we typically layout our work is we try to
25 work that work on a daylight shift only, which is an eight hour

1 shift only from 7:00 to 3:00. So in turn, we do have
2 availability to work overtime on afternoon and midnight shift to
3 catch up from a scheduling standpoint.
4 So if we had used resources for other priorities in the
5 plant that were important to us, we would have moved them there
6 and held the work, because we want to do that work, and when we
7 would bring them back over, we would end up working it but have
8 to keep the schedule. So we would have to call additional
9 overtime to complete that work. That's just one example of how
10 that would happen and what could have potentially happened
11 mid-point of the outage was we were falling behind the certain
12 areas which would have meant we needed elevated overtime.
13 Q. You're speculating, aren't you, though that's what happened?
14 A. Without that information in front of me, I can't remember
15 100 percent sure of that, yes.
16 MR. SHEPLEY: I have no further questions.
17 THE HEARING OFFICER: Ms. Oliver?
18 CROSS EXAMINATION
19 BY MS. OLIVER:
20 Q. For the weekly meetings that you did attend, the contractor
21 meetings with the union, for the most part you're telling the
22 union in those meetings, "Hey, we're sending it to this
23 contractor. We're giving work to that contractor"?
24 A. The intent of the meeting is to discuss the upcoming work.
25 There are, from a general discussion, emergency work is told to

1 the contractor that that's going to that contractor. In the
2 event that we get some scaffolding work, which is not typically
3 performed by our union, those type of jobs are in form, "Hey,
4 we're going to build scaffold for this project to be able to
5 complete the task." So there's a little bit of a mix bite from
6 each person on how they deliver the information to the union
7 each week, and we've had discussions related to that on the
8 meetings that I've I attended that I told them we need to
9 encourage dialog on the contractor use. It can't be us
10 indicating that we've already made a decision that we want to
11 contract out. It needs to be on open dialogue to work through
12 what we can do and what we can't do.
13 Q. The meetings that you attended, the union representatives
14 either Frank Snyder or Dennis Bloom or Guy Taylor have said to
15 you, "Hey, we want the work. We want the bargaining unit work"?
16 Haven't they asked that of you?
17 A. They've told us that we want to -- if we're contracting out
18 work that's ordinarily customarily done by them, that's their
19 work, and they want to keep it.
20 Q. And they make that request every time; don't they?
21 A. Yes.
22 Q. And they'll say to you, "You should hire more employees; you
23 should draft more people for overtime" as suggestions?
24 A. They have told us that we need to hire more employees.
25 That's outside my level of responsibility. I have to work at

1 the resource level that we have. That has come up. They've
2 also told us that we need to draft employees. That's come from
3 Frank Snyder that we should draft our employees as much as
4 possible, and we do take those type of considerations into --
5 those types of discussions into consideration. We also have a
6 safety and work/life balance issue to address with our employees
7 and you know --
8 Q. You've never hired more employees at their request; have
9 you? The company hasn't?
10 A. Not to my knowledge.
11 Q. And you've never turned around any work to them after you've
12 decided to give it to a contractor; have you?
13 A. Absolutely. One of the jobs was a boiler feed pump, for
14 example. Dennis made mention that he wanted to boiler feed pump
15 during outage, and we said, "Okay," and we went back and looked
16 at it, and worked with Mr. Rundt, and we discussed, "Is it
17 possibly for us to be able to take over that work?" Because we
18 would really prefer to do all of that work in house. It's the
19 way that we want to do business. So we try to maximize the use
20 of our employees at all times, and based on that conversation we
21 went back and looked and determined a way to continue to do that
22 portion.
23 Paul would have to speak to all of the other times that we
24 went through that. I know that train cleanings which is through
25 our operations group are probably to most prevalent ones.

1 Mr. Snyder routinely asks whenever those come up we utilize our
2 general overtime list to try to do as much train cleaning as we
3 can. There's been times whenever we had intent to contract the
4 train cleanings out they had discussions to use general
5 overtime, and they went back and made an attempt to call general
6 overtime, and we've had enough people accept, and we performed
7 that work.
8 Q. So if you -- you never shared General Counsel Exhibit 17
9 with the union, the purchase order that you entered into with
10 General Electric? You never gave that to the union; did you?
11 A. No, we did not.
12 Q. You never gave the union them -- M116 General Counsel
13 Exhibit 2 that has tasks 234 to 290 and all of these turbine
14 tasks, you never gave that to the union at any point?
15 A. No. This is a management document that's used for hour
16 daily scheduled outage meetings to go through the tasks that
17 were completing in this window. This would not have been
18 provided along with -- historically in the past related to
19 outage work --
20 Q. Did you give it to them or not?
21 A. No, we did not.
22 Q. So when you met with -- you said that you started planning
23 for this outage in January of 2015; isn't that right?
24 A. I would say initial discussions would have started sometime
25 in early 2014.

1 Q. And, for example, General Counsel Exhibit 13 shows that
2 you're present at a turbine outage planning meeting summary on
3 April 10th of 2015?
4 A. I'm sorry. Which document? I don't believe that I have
5 that.
6 MS. OLIVER: May I approach the witness, Your Honor?
7 THE HEARING OFFICER: Yes.
8 Q. You were present at a meeting on April 10th, 2015 where you
9 were already planning the turbine outage that's going to happen
10 in March of 2016; right?
11 A. Absolutely, yes.
12 Q. So if the union had any meaningful opportunity to bargain
13 with you about what tasks they were going to do because of the
14 large volume of this outage, shouldn't they have been part of
15 the party early on? How did you expect them to meaningfully
16 bargain with you about what they could do in the turbine outage
17 if you didn't tell them about it until February 10th, 2016?
18 A. Can you repeat that?
19 Q. You told Mr. Shepley in response to his questions that you
20 never told the union about the turbine outage tasks until
21 February 10th, 2016 at the weekly Wednesday meeting; correct?
22 A. Correct.
23 Q. Yet you were meeting about the extent of this outage you
24 said in 2014; correct? You said that?
25 A. Just general work scopes, yes.

1 Q. And you had a planning meeting, General Counsel Exhibit 13
2 that you're looking at, on April 10th, 2015 about how big this
3 turbine outage was going to be and what was going to go on; do
4 you agree with that?
5 A. Can I read what was the discussion of this meeting real
6 quick?
7 Q. Sure.
8 A. Yes. We were discussing the GE labor bids that they had
9 provided us in this meeting.
10 Q. So how could have the union meaningfully bargained with you
11 about doing their bargaining unit tasks in the turbine when you
12 had already signed a contract with GE in November of 2015, and
13 you didn't tell the union until February 10th of 2016 that you
14 were doing that?
15 A. Historically when we went into outage work, historically
16 outage work wasn't provided to the union. So with where we were
17 at discussing it going into the outage, it was just a general
18 notification of that work prior to the 2016 outage. So we were
19 using our past practices of how we were performing and executing
20 contractor work.
21 Q. Were you in the hearing room yesterday when Mr. Cowher
22 testified that bargaining people did the tasks on M116?
23 A. What?
24 Q. That your employer in the past had done the tasks that are
25 listed for the turbine there 234 through tasks 390. Were you

1 present? Do you agree with him?
2 A. Absolutely.
3 Q. That the bargaining unit people had done those before?
4 A. Absolutely. The bargaining unit employees have completed
5 our turbine generator open and clean and inspect for all of the
6 years that I have been at the facility they have completed that
7 work.
8 Q. And you didn't let the union know up front in April when you
9 went to your planning meeting in April of 2015 you didn't let
10 the union in on all that was going on, and you didn't tell them
11 about the contract with GE in November of 2015; correct?
12 A. Correct. We did not inform the union that we were
13 considering using GE.
14 THE HEARING OFFICER: You informed them that you were
15 contemplating subcontracting the work of dismantling, cleaning,
16 repairing, reassembling the turbine Unit 1 during these
17 meetings?
18 THE WITNESS: No, we did not.
19 MS. OLIVER: No other questions, Your Honor.
20 THE HEARING OFFICER: Redirect?
21 MR. EASLEY: None, Your Honor.
22 THE HEARING OFFICER: You're excused. Thanks very much for
23 your time. The next witness?
24 MR. EASLEY: The Respondent calls Devin Miller.
25 THE HEARING OFFICER: All right. Ms. Oliver, let's go off

1 the record for a moment please.
2 (Discussion off the record.)
3 THE HEARING OFFICER: Back on the record.
4 DEVIN MILLER
5 called as a witness by the Respondent, having been first duly
6 sworn, was examined and testified as follows:
7 THE HEARING OFFICER: Please have a seat and state and spell
8 and you name for the record please.
9 THE WITNESS: Devin Miller, D-e-v-i-n, M-i-l-l-e-r.
10 DIRECT EXAMINATION
11 BY MR. EASLEY:
12 Q. Mr. Miller, who do you work for?
13 A. FirstEnergy.
14 Q. How long have you worked for FirstEnergy, sir?
15 A. 15 years.
16 Q. And what's your current position with the company?
17 A. I'm a senior consultant engineer.
18 Q. And what job responsibilities are encompassed by a senior
19 engineer?
20 A. Handle major projects, major overhauls in the outside areas
21 of the plant.
22 Q. Have you held other positions with FirstEnergy?
23 A. Yeah. I was the maintenance superintendent at the plant for
24 eight years, and I worked at our WH Sammis plant in Stratton. I
25 was there for six or seven years.

1 Q. Let's focus on the time period when you worked in the
2 maintenance department. What was your position there?
3 A. Maintenance superintendent.
4 Q. During what time period did you hold that position, sir?
5 A. It would be July of 2007 until August 2015.
6 Q. Okay. During the time period that you held that position,
7 do you recall any meetings with the maintenance department where
8 the 2016 outage was discussed?
9 A. Yes.
10 Q. Can you describe that?
11 A. Yes. We had what we called all hands meetings, and it would
12 be with the maintenance department, which includes the
13 instrument and test group, electricians and our mechanics, and
14 we did these about twice a year. We would have lunch. We would
15 discuss any major projects that were going on and safety, human
16 performance. There was always an outage team piece in those
17 presentations.
18 We would get them all out in one day. So we could
19 catch the most people, we would have one at 5:30 in the morning
20 to get the night shift guys and then some time around lunchtime
21 for the daylight people and then sometime around dinner time in
22 the evening to catch the afternoon shift.
23 Q. Was there one of these all hands meetings where the
24 specifically the 2016 outage was discussed?
25 A. Yes.

1 Q. When did that occur?
2 A. June 15th, 2015.
3 Q. Was that a presentation made to employees at that meeting?
4 A. Yes.
5 MR. EASLEY: Permission to approach, Your Honor?
6 THE HEARING OFFICER: Yes.
7 (Respondent Exhibit No. 16 was marked for identification.)
8 Q. Mr. Miller, I've handed you what's been marked for
9 identification purposes as Respondent's Exhibit 16. Can you
10 identify this document?
11 A. Yeah. This would have been the power point presentation for
12 our meeting.
13 Q. Did you have any involvement in the preparation of this
14 document?
15 A. Yes. Yes.
16 Q. In fact, were you one of the presenters?
17 A. Yes.
18 MR. EASLEY: The Employer moves for the admission of
19 Respondent's Exhibit 16.
20 THE HEARING OFFICER: As I stated before, when I'm given a
21 voluminous document, I want to you point me to why you're giving
22 me voluminous document. What is this relevant for? I'm not
23 doing an evidentiary issue. I'm just I want to know what you
24 want me to focus my attention on.
25 MR. EASLEY: There's a section of this that deals

1 specifically with the outage, Your Honor. It starts on slide
2 No. 13, and it goes through slide No. 21.
3 MS. OLIVER: I don't think that we have those numbers.
4 THE HEARING OFFICER: 13 is not numbered. There's a 12 and
5 then there's a page that says "Outage Team Update - Jim Rhodes,"
6 and pages 14, 15.
7 THE WITNESS: The page number is on the left-hand side.
8 MR. EASLEY: Yeah. It looks like it got cut off on page 13.
9 THE HEARING OFFICER: You said 13 through what page?
10 MR. EASLEY: 13 through page 21.
11 THE HEARING OFFICER: All right. Objections, Mr. Shepley?
12 MR. SHEPLEY: I would object on relevance. Unless I'm
13 missing something page 13 through 21 has something to do with
14 somebody other than this witness.
15 THE HEARING OFFICER: Well, this witness was involved in
16 preparing it. He was also involved in presenting it. He
17 testified that this was the document -- was this packet handed
18 out to employees, or is this the print version of the
19 power points that were shown to the employees?
20 THE WITNESS: It's a print version of the power points
21 shown.
22 MR. SHEPLEY: Voir dire, Your Honor?
23 THE HEARING OFFICER: Well, let me ask one question. It
24 says at the bottom of this BMP 2014 Communication Presentation.
25 You're saying this was June 15, 2015. Why does it say BMP 2014?

THE WITNESS: They must not have changed the slide, because you can see some of the bottom slides says January 2013.

THE HEARING OFFICER: But you're testifying today -- and I'm going to allow Mr. Shepley to do voir dire, but you're testifying today this is the print version of the power point presentation that was presented to all bargaining unit employees on June 15th, 2015?

THE WITNESS: Correct.

THE HEARING OFFICER: Go ahead.

MR. SHEPLEY: Based upon your comments there, Your Honor, I have no voir dire. So I do not object.

THE HEARING OFFICER: All right. Ms. Oliver?

VOIR DIRE

BY MS. OLIVER:

Q. Did you prepare this document?

A. Not all of it. My piece. I would have a portion of this document that I would forward to AJ --

Q. I can't hear you.

A. I have a portion of this document, which is mine. It's pages 37 through 43. That was my portion of the document -- portion of the presentation. I made those slides. I forward those the AJ VonAhn and he puts all the slides together for the communication meeting.

Q. And this document is not given to the people; is that correct?

A. No. It's put up on a screen and reviewed with everybody.

THE HEARING OFFICER: So, Ms. Oliver, do you have an objection?

MS. OLIVER: Yeah. I object to relevance.

THE HEARING OFFICER: Well, I'm going to overrule the objection and receive the document. Mr. Easley, are you introducing the entire document because it's the entire print of the presentation, but your argument is the relevant portions are page 13 through 21?

MR. EASLEY: That's correct, Your Honor.

THE HEARING OFFICER: You're not contending that any other portion of the document is relevant?

MR. EASLEY: Not to this issue, no, sir.

THE HEARING OFFICER: Is it relevant to some other issue that I have to decide?

MR. EASLEY: No, not to the issues in this proceeding.

THE HEARING OFFICER: All right. I mean, it is a print of the power point presented. You want to -- you'll have the opportunity to question the witness about exactly what was said and how much detail was given. Respondent's argument is that this provided notification of the outage and the significance of it. So I'll receive it for that purpose.

(Respondent Exhibit No. 16 was admitted into evidence.)

THE HEARING OFFICER: Go ahead, Mr. Easley.

BY MR. EASLEY:

1 Q. So if you look, Mr. Miller, to slide 14 --
2 A. Okay.
3 Q. -- do you see where it says "Weekly Contractor Forecast
4 Review"?
5 MS. OLIVER: Excuse me. We don't have that.
6 THE HEARING OFFICER: Are you referring to page 14; correct?
7 MR. EASLEY: Correct, Your Honor.
8 THE HEARING OFFICER: It also slide on the right 14, January
9 2014. The witness has testified that the dates on these are
10 incorrect and should not be relied upon as being accurate, but
11 as far as the question of the witness, the witness is being
12 directed page 14 of the exhibit. If you're missing a page 14
13 from your copy of the Exhibit, let me know.
14 MS. OLIVER: I thought you said slide 14.
15 MR. EASLEY: It says slide No. 14 on it.
16 THE HEARING OFFICER: Which is also on page 14.
17 MR. EASLEY: Right there, 14.
18 MR. SHEPLEY: Oh, you have to read it -- you have to read it
19 vertically.
20 THE HEARING OFFICER: Does Charging Party also have the same
21 page?
22 MR. SHEPLEY: I do, Your Honor.
23 THE HEARING OFFICER: Do you have the same page that he's
24 referring to?
25 MS. OLIVER: It's an up and down 14?

1 THE HEARING OFFICER: Yes. So we're all in agreement that
2 all of the parties have a copy of the exhibit and on the page
3 that the witness is being asked about? Go ahead, Mr. Easley.
4 MS. OLIVER: Yes. Thank you.
5 BY MR. EASLEY:
6 Q. Mr. Miller, the question on the table was: Do you see where
7 it says "Weekly Contractor Forecast Review"?
8 A. Yes.
9 Q. Can you tell us what was discussed about the weekly
10 contractor forecast review?
11 A. That would have just been a bullet point that he discussed.
12 I don't think that there was any detail that I recall about that
13 bullet point.
14 Q. The slide is titled "Outage Communications Plan;" right?
15 A. Uh-huh.
16 Q. So was there discussion about -- notification about the
17 contractor review?
18 A. No.
19 Q. And then on slide 15 --
20 A. Yes.
21 Q. -- that covers the scope of work?
22 A. That's correct.
23 Q. And was that the scope of all of the work that was going to
24 be done during 2016 outage review? This was with the entire
25 maintenance department?

1 A. Yes. This slide here discussed all of the capital projects.
2 Q. If you turn your attention to slide 16, is this just a
3 continuation of the prior list?
4 A. Yes. This is a separate discussion of the MATS on capital
5 projects.
6 Q. And then the next slide says O&M Worklist. What does O&M
7 stand for?
8 A. I can't remember now. I think it's -- yeah. I think it's
9 operations and maintenance.
10 THE HEARING OFFICER: People in the back of the room should
11 not be responding. Counsel, if you want to give him a lead to
12 see if he agrees with you, you can do that.
13 Q. Does FirstEnergy use the term O&M to refer to operations and
14 maintenance service?
15 A. Yes.
16 THE HEARING OFFICER: Thank you.
17 Q. If you look down on that side where it says "Area
18 Description," what are those?
19 A. Those are just the areas that we worked during outage. We
20 have a boiler internal, external boiler, the turbine, the
21 electrical work, the SO2 that was referred to earlier and then
22 general.
23 Q. All right. So at the meeting management was explaining the
24 full scope of what was going to happen during the outage to the
25 maintenance department?

1 A. That's correct.
2 Q. And you said that there was more than one of these meetings?
3 A. Yes. We held three in the same day.
4 Q. What was the purpose of having three meetings?
5 A. That's so we could reach to most people, because we have
6 people on midnight shift, and if we just held it at lunchtime on
7 that day, we would miss those people and we would miss the
8 afternoon people.
9 Q. Was attendance at the meeting compulsory for the those in
10 maintenance department?
11 A. Yes.
12 THE HEARING OFFICER: Let me just be clear because it hasn't
13 been established. I'm assuming this operation runs 24 hour a
14 day?
15 THE WITNESS: That's correct.
16 THE HEARING OFFICER: How many shifts are there with the
17 production?
18 THE WITNESS: There's two shifts with operations. They work
19 12-hour shifts, and then with maintenance, I&T and electrical,
20 we're all on an eight hour shift.
21 THE HEARING OFFICER: And when do the shifts begin and end?
22 THE WITNESS: They start at 07:00 to 15:00 and the second
23 shift starts 15:00 and works until 23:00, and then the third
24 shift is 23:00 to 07:00 the next day.
25 THE HEARING OFFICER: Thanks.

1 Q. When you held the position as maintenance superintendent,
2 did you have a responsibility for weekly subcontracting meetings
3 with representatives of IBEW Local 272?
4 A. Yes.
5 Q. And during what time period did you have that
6 responsibility?
7 A. The entire time that I was maintenance superintendent. So
8 2007 through 2015.
9 Q. So that would have included all of 2015 up until the time
10 when you switched positions?
11 A. That's correct, and we actually had some overlap. So I
12 attended the meetings in September -- the three meetings in
13 September, and then I stopped attending them.
14 Q. And what was your understanding of the purpose of these
15 meetings, Mr. Miller?
16 A. We discussed any work that we were thinking about
17 contracting out or any emergency work that had already been
18 contracted out.
19 Q. During the time period that you were attending these
20 meetings in 2015 up until you switched positions, was there any
21 discussion in any of these meetings about outage work?
22 A. Not scheduled outage work, no.
23 Q. Was there any request to negotiate from union
24 representatives in attendance at those meetings to bargain about
25 any outage work?

1 A. No.
2 MR. EASLEY: Nothing further for this witness.
3 THE HEARING OFFICER: All right. Cross?
4 MR. SHEPLEY: Just a little, Your Honor.
5 CROSS EXAMINATION
6 BY MR. SHEPLEY:
7 Q. Mr. Miller, looking at Respondent's Exhibit 16, would it be
8 fair to say that the people who attended these meetings would
9 have found out that there was an outage coming up but not who
10 was going to do any of the particular work on the outage?
11 A. That's correct.
12 Q. And this document doesn't say when the outage will occur;
13 does it?
14 A. Only that it will occur on Unit 1 in 2016.
15 Q. Just a calendar year; that's the extent of it?
16 A. Yeah.
17 Q. At these three meetings, do you know if anybody was there in
18 the capacity as an the official for Local 272, or were they all
19 just employees there in the status of an employee?
20 A. They would have been in the status of an employee. We
21 didn't have an attendance sheet.
22 Q. Were you at the Wednesday meetings -- Wednesday
23 subcontracting meetings in the later part of October of 2015 and
24 November and December of '15?
25 A. No.

1 Q. Any part of that time period that I just mentioned?
2 A. No.
3 Q. So you don't know what was said at those meetings in late
4 October, November and December to the union representatives?
5 You don't know; do you?
6 A. No.
7 Q. Because you weren't there?
8 A. No.
9 Q. Who was there, if you know?
10 A. I don't know.
11 THE HEARING OFFICER: You testify that had the employees
12 were informed that the outage was going to occur on Unit 1 in
13 2016.
14 Where in this document does it say that?
15 THE WITNESS: I was referring to where we use M116.
16 THE HEARING OFFICER: Where is that on here? I may have
17 missed it.
18 THE WITNESS: It might not be here.
19 MR. EASLEY: It's on slide 2.
20 THE WITNESS: Oh, yeah. In the meeting agenda.
21 THE HEARING OFFICER: I see.
22 Okay. Thank you. All right.
23 Did you have a question?
24 MR. SHEPLEY: I have no further questions.
25 THE HEARING OFFICER: Ms. Oliver?

1 CROSS EXAMINATION
2 BY MS. OLIVER:
3 Q. Just going to refer you to page 14 of Respondent Exhibit 16.
4 There's a notation there on the far right corner that says
5 January of 2013. Do you see that there?
6 A. Uh-huh.
7 Q. And there's also a similar notation on page 18 and on page
8 19 --
9 A. Uh-huh.
10 Q. -- and on 20 and 21. Do you see those there?
11 A. Yes.
12 Q. And if we leaf through the rest of this, sometimes the
13 document will say January of 2013 and other times it says June
14 2015, for example, on page 23.
15 A. Okay.
16 Q. Do you have any explanation for that?
17 A. My opinion, it would be cut and paste errors, because we do
18 these communication meetings twice a year. So they probably use
19 the same file and plug in the information for the most current
20 meeting.
21 Q. So do you have any explanation for why these pages say "BMP
22 2014 Communication Presentation"?
23 A. Probably the same explanation; probably cut and paste,
24 because it's a template.
25 THE HEARING OFFICER: Let me ask you this.

THE WITNESS: It's a master template.

THE HEARING OFFICER: What I want to understand is when you talk about capital project list and MATS capital project list on 16 and 17, are these the identical slides that were used in fire meetings when fire outages occurred so someone cut and paste because it's the same thing that happened in the prior ones?

THE WITNESS: I'm saying that the template -- in power point you have a template, and it's a master template, and the master template probably used the BMP 2014 master template and went in and plugged in the information for this communication meeting. I --

THE HEARING OFFICER: So the contents -- I apologize. Go ahead.

THE WITNESS: I was just saying that contents that are in there are for 2015. They probably just used the template from the previous years.

THE HEARING OFFICER: So the project description in this, to your knowledge, is specific to 2015 and different than prior projects?

THE WITNESS: Yeah, because it has like 1 Alpha boiler feed pump turbine bucket replacement which wouldn't have been happening in 2014.

THE HEARING OFFICER: That's what I wanted to know. Go ahead, Ms. Oliver.

BY MS. OLIVER:

1 Q. Why is page 23 slide changed but the other ones were not?
2 A. The only thing that I can think of is that the person that
3 supplied -- as I said previously, we each would do our own
4 pieces, and save it and turn it in to AJ who put it all
5 together. He must have known how to change the master slide
6 where others didn't.
7 Q. But you did not do any presentation on pages 14 through 21?
8 That wasn't your pages?
9 A. No. I was present at the meeting, but I did not give the
10 presentation.
11 THE HEARING OFFICER: Anything further?
12 MS. OLIVER: That's all I have.
13 THE HEARING OFFICER: Anything further.
14 MR. EASLEY: Nothing further, Your Honor.
15 THE HEARING OFFICER: The witness is excused. I received --
16 you moved 16; correct?
17 MR. EASLEY: Yes.
18 THE HEARING OFFICER: And I believe I received it over
19 objection. Correct. Who's is next?
20 MR. EASLEY: The employer calls Paul Rundt.
21 THE HEARING OFFICER: All right.
22 PAUL RUNDT
23 called as a witness by the Respondent, having been first duly
24 sworn, was examined and testified as follows:
25 THE HEARING OFFICER: Please be seated and state and spell

1 your name.
2 THE WITNESS: My name is Edward Paul Rundt, R-u-n-d-t.
3 DIRECT EXAMINATION
4 BY MR. EASLEY:
5 Q. Mr. Rundt, who do you work for?
6 A. I work for FirstEnergy at Bruce Mansfield facility?
7 Q. How long have you been employed by FirstEnergy?
8 A. 26 years.
9 Q. And what's your current position with the company?
10 A. Maintenance superintendent.
11 Q. As maintenance superintendent, what are your job
12 responsibilities?
13 A. My job responsibilities is I ensure that we process the work
14 and handle mechanical maintenance activities and that includes
15 the -- we have five crews that we run, and we work through the
16 planning department and initiate the jobs, execute the jobs and
17 get them done in a safe and timely manner.
18 Q. How long have you been in this specific position?
19 A. Approximate a year; a little bit longer than a year.
20 Q. So roughly sometime in the fall of 2015?
21 A. Correct.
22 Q. Was your predecessor Devin Miller?
23 A. Yes.
24 Q. As part of your job responsibilities were you required
25 attend subcontracting meetings with representatives of IBEW

1 Local 272?
2 A. Yes, sir.
3 Q. When did you begin attending those meetings?
4 A. I attended them as superintendent of operations when I first
5 started at the plant, and then just changed roles, and then
6 became a maintenance superintendent and actually began
7 conducting the meetings.
8 Q. So you were responsible for conducting the meetings once you
9 assumed your current position?
10 A. Yes, sir.
11 Q. And that would have been sometime in the fall of 2015?
12 A. Correct.
13 Q. And during any of those meetings prior to February 11th of
14 2016 was there any discussion of any subcontracted work that was
15 going to occur during the 2016 maintenance outage at the Bruce
16 Mansfield plant on Unit 1?
17 A. No, sir.
18 Q. There was no request to bargain with the company about
19 anything related to the outage?
20 A. No, sir, not at that time.
21 Q. But there was a discussion as it relates to turbine work in
22 a meeting on February 11th?
23 A. Yes, sir.
24 Q. Can you tell us what happened at that meeting, sir?
25 A. Pretty much said that -- when initiated it, I informed the

union that we were looking at contracting the turbine outage entirely out to a subcontractor.

Q. Did you identify the subcontractor?

A. General Electric.

Q. What was the union's response?

A. They asked if there was any portion -- well, not any portion. They asked if they was going to do everything, such as the turbine and the feed pump, and at that time that's what we figured yes, they were going to do that.

Q. Later turned out that way?

A. That's correct.

Q. So let's just back up just a little bit. Who was present at the meeting representing FirstEnergy other than yourself, if anyone?

A. Myself, George Mitch. I'm not sure if Ron Pugh was there from the yard. There were several departments. Typically at that meeting, all of the departments are represented if they have work to be contracted out.

Q. So there were several representatives?

A. Yes.

Q. Who was there representing IBEW Local 272?

A. I believe it was Dennis Bloom and Frank Snyder.

Q. What was your understanding of the purpose of these meetings?

A. The purpose of the meeting is to discuss work that could

1 potentially be contracted out and what portion of the work that
2 we could do and mainly on what's out there in the future if
3 possible. If there's emergency work, we usually go over
4 emergency work that has to be done, because it's something
5 failed, and we have to do it.
6 Q. Is information provided to the union about contracting work
7 for purpose of the meeting?
8 A. Specify that.
9 Q. Did you provide a list of jobs to the union that are going
10 to be subcontracted or have already been subcontracted?
11 A. Yes, sir.
12 Q. How is that done?
13 A. Generally we'll start out, and we go over the work that
14 we're looking at. If there was work that was done like over the
15 weekend time period and wasn't able to contact Dennis or whoever
16 the union representative was at the time and can't get ahold of
17 one, then we will discuss that afterwards in the Wednesday
18 meeting. Sometimes you'll get a coal pipe might burn up, and we
19 have to get somebody in there right away to scaffold.
20 Q. How long do those meetings typically last?
21 A. Generally 30 to 45 minute.
22 Q. And how long did the meeting on February 11th 2016 last?
23 A. I don't recall that. I don't know.
24 MR. SHEPLEY: Your Honor, I believe the date is being
25 mischaracterized.

1 THE HEARING OFFICER: You used February 10th and I believe
2 you've used the 11th.
3 MR. EASLEY: My mistake. February 10th.
4 THE HEARING OFFICER: And all of your testimony to this
5 point, you're confirming and you're aware that you were
6 testifying about February 10th? There was no meeting on
7 February 11th?
8 THE WITNESS: Correct.
9 THE HEARING OFFICER: That was a compound of questions. So
10 your testimony right now is as it relates to February 10th only;
11 correct?
12 THE WITNESS: Correct.
13 THE HEARING OFFICER: There is no meeting on February 11th?
14 THE WITNESS: No.
15 MR. EASLEY: Thank you. We have no further questions of
16 this witness, Your Honor.
17 THE HEARING OFFICER: Cross?
18 CROSS EXAMINATION
19 BY MR. SHEPLEY:
20 Q. Mr. Rundt, you attended these meetings on Wednesday that
21 were the subcontracting meetings?
22 A. Correct.
23 Q. And what period of time did you attend these meetings; over
24 what period of time?
25 A. Off and on since I started working at Bruce Mansfield.

1 Q. So does that mean that you could have attended one, two,
2 three, four meetings in December, or you just don't know if the
3 number, or you don't know the number for October or November?
4 I'm not being critical, but you just don't know or do you?
5 A. I can't answer that for sure, because I don't know what days
6 I might have been off and not been there. So I can't say for
7 sure.
8 Q. Well, do you have an impression or idea during period of
9 October, November and December of '15 that you attended most of
10 the meetings, half of the meetings, a couple of meetings?
11 A. I would have to say that I attended most of them. I know
12 that I was on vacation in November and again in December.
13 Q. Would it be correct to say that you attended at least
14 several meetings in the three month period of October through
15 December of 2015?
16 A. Yes, sir.
17 Q. Isn't it true that at none of the meetings you never told
18 any of the union representatives that there was subcontracting
19 work that may be done as opposed to it will be done?
20 A. There was --
21 Q. Did I confuse you?
22 A. Say that again.
23 Q. I'll put it this way. Did you ever, during any of those
24 meetings in this time period, say to the union representatives,
25 "Here are some subcontracting work on whatever. It might be

1 done. We need to talk about it. We need to bargain over it.
2 We need to do something," or as opposed to, "Here's what we're
3 going to do"?
4 A. I did say that there was contracting work that may be done
5 during that time period.
6 Q. Can you recall what instance or what example that was?
7 A. Yes, sir. We had a mill overhaul on Unit No. 3, and we were
8 looking at doing some -- we had an improvement project to go on
9 there for reliability for the mill, a single lube oil pump, and
10 we looked at contracting that out or us performing that work,
11 and we worked on finding a way that we could do that. We
12 subsequently during the outage on Unit No. 1 did all eight mills
13 and put the second lube oil pump in with the fixtures and
14 everything, and we looked at contracting that out.
15 Q. With reference to that work, did you or do you not tell any
16 of the union representatives that this work might be done, and
17 we need to talk about it?
18 A. I did tell the union that this work might be contracted out,
19 and we'd look at it. We never had a discussion with the union
20 though -- they never offered up, "Well, can we do that work? Is
21 there a way we can look at it?"
22 Q. Do you remember the response of any of the union
23 representatives telling them that that work might be done or
24 might be subcontracted? Do you remember their response, if you
25 do?

1 A. No.
2 Q. You don't remember what they said?
3 A. Not really, no.
4 Q. Do you remember that they said something, or you don't
5 remember the content?
6 A. I don't really recall.
7 Q. And in this time period, October through December of '15 I
8 want to make clear if we can, at no time did you say to the
9 union representatives that there's some work on the outage in
10 '16 on Unit 1?
11 A. I never discussed the outage to my knowledge in the time
12 period prior to that.
13 Q. As of November you knew that GE was subcontracted out for
14 the turbine work; did you not?
15 A. No, sir.
16 Q. Why would you not be informed by the members of management
17 of that fact?
18 A. I wasn't.
19 Q. Were you privy to that information?
20 A. Not really.
21 Q. When did you find out that GE would be doing this turbine
22 work on the outage in '16?
23 A. In February of 2016.
24 Q. Now, the meeting was February 10th. Do you know when in
25 February you would have learned it?

A. I would have been just prior to the meeting, and I don't know what date, but I know that's when we brought it up to the union.

Q. Who told you about the outage that GE would do the work on the turbine in February?

A. Chris Cox; Mr. Cox.

Q. Did it come as a surprise when you heard that?

A. Kind of.

MR. SHEPLEY: I have no further questions.

THE HEARING OFFICER: Ms. Oliver?

CROSS EXAMINATION

BY MS. OLIVER:

Q. When you were discussing the mill overhaul No. 3, that has nothing to do with the turbine outage that occurred in 2016?

A. No, ma'am. That's a different unit, different mill.

Q. Okay. And when you told the union on February 10th that the company was going to sub out all of the turbine work to GE, the union told you that they would like to do the work; didn't they?

A. They said that it was normally their work; correct.

Q. And they asked you --

A. They didn't ask me anymore than that that I can recall. They said that was normally work that they performed.

Q. You wouldn't have had any authority to undo the GE contract that was executed on November 2015; would you?

A. No. That's not part of my job.

1 Q. Okay. So I just want to make sure that I understand your
2 testimony. On February 10th you told the union that that work
3 was going to go to GE?
4 A. Yes, ma'am.
5 Q. I think that you testified on direct examination from
6 Mr. Easley that you informed the union that they're looking at
7 contacting out to GE. You didn't say looking at; did you? You
8 told them, "Hey, this is going to GE." There was no debate
9 about that at that point.
10 A. I have to recall what I said, but I do know that we were
11 looking at contracting out to GE, the entire turbine and the
12 auxiliaries which would have included the boiler feed pump.
13 Q. Is that what Cox told you, or did Cox tell you that they
14 gave it to GE?
15 A. There was discussion afterwards that we thought that we
16 would go and maybe do the entire turbine, and that was back and
17 forth, and the reason was because we're trying to layout what
18 jobs we can perform, and that's when we decided that we knew we
19 could do the feed pump. So we decided to do that portion of the
20 work of the feed pump. I informed the union afterwards, after
21 the meeting, which would have been the following meeting that we
22 were going to do the boiler feed pump turbine.
23 Q. Okay. But as far as the turbine work in the 2016 outage,
24 the company had already signed a contract in November of 2015?
25 A. But I didn't know about that, ma'am.

1 Q. You didn't know about that, but in fact, that happened that
2 they signed a contract with GE to do that work?
3 THE HEARING OFFICER: He just said that he doesn't know
4 that.
5 THE WITNESS: I don't know that. I wasn't part of that.
6 THE HEARING OFFICER: You've answered the question. What's
7 your next question?
8 MS. OLIVER: I have nothing else.
9 MR. EASLEY: Nothing further, Your Honor.
10 THE HEARING OFFICER: Thank you, sir. You're excused.
11 MR. EASLEY: Respondent rests, Your Honor.
12 THE HEARING OFFICER: Rebuttal?
13 MR. SHEPLEY: I believe that we have one witness on
14 rebuttal. Your Honor, can we have five minutes to figure out
15 who that will be?
16 THE HEARING OFFICER: You have ten minutes. Let's go off
17 the record.
18 (Recess taken.)
19 THE HEARING OFFICER: Let's go back on the record. We're
20 back on the record. I broke to give Charging Party and counsel
21 for General Counsel an opportunity to determine whether or not
22 they wanted to present any rebuttal or redirect witnesses.
23 Mr. Shepley?
24 MR. SHEPLEY: Your Honor, General Counsel has no rebuttal
25 witnesses.

1 THE HEARING OFFICER: Ms. Oliver?
2 MS. OLIVER: No. We have no rebuttal.
3 THE HEARING OFFICER: Am I correct, Mr. Easley, you stated
4 that you rested; correct?
5 MR. EASLEY: That's correct, Your Honor.
6 THE HEARING OFFICER: We have the outstanding issues of
7 Respondent Exhibit 1 and Respondent Exhibit 15. 1 is the
8 September 25th, 2015 comprehensive offer of settlement.
9 Charging Party indicated that she objected because she did not
10 have an opportunity to confirm whether or not it was an accurate
11 set of the -- accurate and complete document. Ms. Oliver, do
12 you maintain that position, or have you had an opportunity to
13 confirm one way or another?
14 MS. OLIVER: I have, Your Honor, and I will withdraw that
15 objection.
16 THE HEARING OFFICER: Respondent Exhibit 1 is received into
17 evidence.
18 (Respondent Exhibit No. 1 was admitted into evidence.)
19 THE HEARING OFFICER: Respondent Exhibit 15 is the overtime
20 call out statistics document which is a summary document
21 compiled by Respondent based on underlying documentation. Under
22 the rules of evidence, summaries can be introduced but the
23 party -- the opposing party has the opportunity to review the
24 underlying documents, and it's my understanding that Charging
25 Party has indicated that she would like those underlying

1 documents and maintains an objection to the summary's admission
2 without having an opportunity to review those; is that correct,
3 Ms. Oliver?
4 MS. OLIVER: Yes.
5 MR. SHEPLEY: Your Honor, I would like to change my position
6 on that exhibit and concur with Charging Party counsel.
7 THE HEARING OFFICER: Okay. All right. So, Mr. Easley, we
8 are at a situation where you can continue seeking to introduce
9 the document, which would require that you produce the
10 underlying document relied upon which would require me to hold
11 the record open for that to happen and/or you can indicate that
12 you do not want to move forward with introduction of the
13 document whether because you're going to rely upon your witness'
14 testimony or something else. What is your position as it
15 relates to that?
16 MR. EASLEY: Can I have a moment to confer with my client?
17 THE HEARING OFFICER: Yes. We can go off the record so you
18 can do that.
19 (Recess taken.)
20 THE HEARING OFFICER: Let's go back on the record.
21 Mr. Easley, did you have an opportunity to speak with your
22 client about the issue and what's your position?
23 MR. EASLEY: Given the witness' testimony that there was
24 ample overtime opportunities available and difficulty getting
25 people to volunteer for it, we think that the exhibit is not

1 required, and we will withdraw it.
2 THE HEARING OFFICER: All right. Respondent Exhibit No. 15
3 is withdrawn.
4 (Respondent Exhibit No. 15 was withdrawn from evidence.)
5 THE HEARING OFFICER: Anything further? Evidentiary issues?
6 Everybody is shaking their head. So I'm going to assume no.
7 MR. SHEPLEY: Nothing further from General Counsel.
8 MS. OLIVER: No.
9 MR. EASLEY: Nothing from Respondent, Your Honor.
10 THE HEARING OFFICER: Just to be -- I said this to all of
11 the parties yesterday off the record, but make sure that the
12 court reporter leaves here today with two complete sets of
13 exhibits. General Counsel exhibits are 1 through 17. There
14 Joint exhibits 1 through 10, Respondent Exhibits 1 through 14
15 and 16. All have been received into evidence. Please make sure
16 that she has two copies of each of those before you leave here
17 today.
18 All right. Now that all of the evidence is in, you have a
19 better opportunity to assess your chances regarding the outcome
20 of the issues that you had at the outset of the trial. All
21 parties should carefully weigh the risks entailed and decide
22 whether an amicable settlement on the issues might not offer a
23 more satisfactory solution. Settlement may be arranged now at
24 any time before I issue my decision.
25 I will allow until 35 days from today -- so that is

1 January 6th -- someone can certainly check my math -- for the
2 filing of briefs and any proposed findings and conclusions. I
3 will also request that General Counsel and Charging Party submit
4 a proposed notice including proposed remedy that you believe to
5 be appropriate along with your briefs. I'm guessing Respondent
6 would argue no remedy is appropriate. So I don't expect the
7 same from you.
8 Briefs should be filed directly with the Judge's Division
9 Office in Washington D.C. I believe it's 1015 Half Street South
10 East, Washington, D.C. You'll have to look for the ZIP code. I
11 don't have that. Regardless of whether they are mailed or
12 emailed, they need to be sent directly to Judges Division.
13 Any request for extension of time for the filing of briefs
14 must be made in writing to the chief judge or deputy or
15 associate chief judge in the Washington Office and served on the
16 other parties. The positions of the other parties regarding the
17 extension should be obtained and set forth in the request. It
18 is the policy of the Division of Judges to grant discretionary
19 extensions only when they are clearly justified. Request for
20 extensions must contain specific reasons and show that the
21 requesting party cannot reasonably meet the current deadline.
22 All right. Any issues that you anticipate at the outset
23 regarding that due date?
24 MR. EASLEY: None from Respondent, Your Honor.
25 THE HEARING OFFICER: Charging Party, you're fine with it?

1 MR. SHEPLEY: Quite frankly, Your Honor, I anticipate some
2 problems for myself in that I have two weeks of use or lose
3 leave to take between now and January 6th, and there's the
4 holidays, and I'm off another day then. I have a very limited
5 number of days to complete the brief and also do my other work
6 for the agency.
7 THE HEARING OFFICER: All right. Well, if you anticipate
8 that's going to be an issue, please spend the time while you're
9 all here today to propose a make a joint motion if such a motion
10 can be jointly made for a request for an extension of time.
11 I'll not -- I'll be consulted, and I don't think that you're
12 going to need a whole lot more time, but you certainly should
13 talk with each other and come together and submit a joint motion
14 unless you can do so right now.
15 MR. EASLEY: How much time do you want?
16 MR. SHEPLEY: 14 days beyond January 6th.
17 MR. EASLEY: Fine. We would agree to that.
18 MR. SHEPLEY: I'm on annual leave the week of January 6th.
19 MR. EASLEY: Understood.
20 THE HEARING OFFICER: All right. Ms. Oliver, do you have
21 any opposition to it?
22 MS. OLIVER: No, not at all.
23 THE HEARING OFFICER: So I'll take this oral joint motion to
24 request an extension of time based upon counsel for General
25 Counsel's scheduled leave and other issues and grant the request

for 14 days, which would put the due date at January 20th, 2017. Anything else?

MR. SHEPLEY: Nothing from General Counsel.

MS. OLIVER: No.

MR. EASLEY: Nothing from Respondent, Your Honor.

THE HEARING OFFICER: All right. I look forward to reading your briefs, and I appreciate everyone's time and efforts today. With nothing further, we can go off the record. Thank you.

- - -

(Thereupon, at 12:20 o'clock p.m., the hearing was concluded.)

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1 C-E-R-T-I-F-I-C-A-T-E

2 This is to certify that the attached proceedings before the
National Labor Relations Board, Region Six, held in Room 904,
3 William S. Moorhead Federal Building, 1000 Liberty Avenue,
Pittsburgh, Pennsylvania 15219, on Friday, December 2, 2016,
4 were held according to the record, and that this is the
original, complete, true and accurate transcript which has been
5 compared to the reporting accomplished at the hearing; that the
exhibit files have been checked for completeness and no exhibits
6 received in evidence or in the rejected exhibit files are
missing.
7

8 _____
Jill A. Oliver, Official Reporter
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