UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE RUPRECHT COMPANY.	:	
Petitioner,	:	Case No. **18-1297**
vs.	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent.	:	

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

The Ruprecht Company hereby petitions the United States Court of Appeals for the District of Columbia, pursuant to 29 U.S.C. § 160(f), for review of the Decision and Order entered by the National Labor Relations Board on August 27, 2018, in Case 13-CA-155048 et al. The NLRB's decision is not supported by the law or statutory interpretation and enforcement should be denied. A copy of the Decision and Order, which are reported at 366 NLRB No. 179 is attached as Exhibit A.

The Ruprecht Company is a meat processor and food manufacturer serving both domestic and international customers in the foodservice and retail sectors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby that on October 29, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that on October 29, 2018, a true and correct copy of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board was served via e-mail upon the following:

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The Ruprecht Company *and* UNITE HERE Local 1. Cases 13–CA–155048, 13–CA–155049, 13–CA–156198, and 13–CA–158317

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On May 13, 2016, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief, cross-exceptions, and a supporting brief. The Respondent filed reply briefs.

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

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

I.

The Respondent is a meat processing company with a facility in Mundelein, Illinois. At all relevant times, the Union represented certain of the Respondent's production line employees at that facility for purposes of collective bargaining. The present case concerns the Respondent's alleged violations of Section 8(a)(5) and (1) of the National Labor Relations Act. Specifically, the judge found, and we agree, that the Respondent violated the Act by unilaterally transferring bargaining unit work to temporary employment agency employees, unilaterally enrolling in E-Verify,[3] dealing directly with bargaining-unit employees over severance pay and a general release of claims against the Respondent, and refusing to provide the Union with unredacted copies of letters from the U.S. Immigration and Custom Enforcement Agency, Homeland Security Investigations (HSI) identifying individual bargaining-unit employees with suspect employment documents.

Our colleague dissents from those findings in two respects. First, although he agrees that the Respondent violated the Act by unilaterally enrolling in E-Verify, he disagrees that the appropriate remedy for that violation is to require the Respondent, at the Union's request, to rescind its participation in E-Verify. Second, he disagrees that the Respondent unlawfully refused to provide the Union with unredacted copies of HSI letters concerning bargaining unit employees. We address each of these points below.

II.

Having found that the Respondent violated the Act by unilaterally enrolling in E-Verify, the judge ordered the Respondent to rescind its participation in that program at the Union's request. This recommended Order is fully consistent with Section 10(c) of the Act,[4] as well as Supreme Court precedent.[5]

Our dissenting colleague nevertheless maintains that a rescission remedy is unwarranted in this case because the Union subsequently executed a collective-bargaining agreement that included enrollment in E-Verify for new hires.[6] But the simple fact that the Union later agreed to E-Verify for new hires does not mean the Respondent's prior unilateral action caused no harm to the Union in negotiating this issue or to the collective-bargaining process overall. To the contrary, the Board has consistently recognized that an employer's unilateral action can seriously undermine a union's position with respect to the relevant issue, and that restoration of the status quo is necessary to ensure meaningful bargaining.[7] More spe-

[1] In adopting the judge's finding that the Respondent's unilateral transfer of bargaining unit work to seven temporary employees was a "material, substantial, and significant" change, we rely on *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), rather than *North Star Steel Co.*, 347 NLRB 1364 (2006). In adopting the judge's finding that enrollment in E-Verify is a mandatory subject of bargaining, we do not rely on *Aramark Educational Services, Inc.*, 355 NLRB 60 (2010), a decision issued by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Because we adopt the judge's finding that E-Verify affects the terms and conditions of employment, we need not pass on the Union's contention that the judge should have taken notice of a government report about the effects of the E-Verify system on immigrant employees.

[2] We shall modify the judge's remedy and recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to the judge's findings and the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

[3] E-Verify is a web-based system run by the Department of Homeland Security that allows enrolled employers to confirm the eligibility of their employees to work in the United States. See www.e-verify.gov.

[4] Under Sec.10(c), the Board, upon finding that any person has engaged or is engaging in an unfair labor practice, "shall issue" an order requiring that person to cease and desist from the unfair labor practice and to take affirmative action to effectuate the purposes of the Act.

[5] See generally *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215–216 (1964) (emphasizing the Board's broad discretionary authority to remedy violations of the Act).

[6] The Respondent made its E-Verify proposal two months after it had already enrolled in E-Verify.

[7] See *Porta-King Bldg. Systems*, 310 NLRB 539, 539–540 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1366 fn. 5 (1987) (employer "seriously undermined the

Exhibit A

cifically, the Board has recognized that, in the give-and-take of bargaining, a party presumably will make concessions in certain terms and conditions to achieve its objectives with respect to others, and that unilateral action can undermine that dynamic by disrupting the parties' natural incentives.[8]

The present case illustrates the point. The Respondent's unilateral action compromised the Union's ability, and the Respondent's incentive, to engage in that give-and-take process with respect to E-Verify by changing the starting point for bargaining. Once the Respondent enrolled in the program, it had the greater leverage. The Union was placed in the position of offering concessions to persuade the Respondent to restore the status quo and quit the program. The Union thus had far less bargaining leverage than it would have enjoyed had the Respondent sought the Union's agreement to enroll initially. Accordingly, we find it appropriate to exercise our remedial discretion to afford the Union an opportunity to revisit this issue, if it so desires.

Contrary to our dissenting colleague, we do not find that *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817 (2004), enfd. 14 F.3d 1258 (8th Cir. 1994), warrants a different result. In *Essex Valley*, the employer notified the union, approximately one month beforehand, that it was planning to transfer several registered nurses from in-house administrative positions to field nurse positions. Id. at 817. The parties bargained over the transfers, but the employer implemented them unilaterally, as planned. Id. at 817–818. Two months later, the union again requested to bargain over the transfers but the employer refused. Id. at 818–819. The Board found that the employer violated Section 8(a)(5) and (1) by unilaterally transferring the affected nurses. The Board acknowledged that the standard remedy for that violation would be to order the employer to rescind the unlawful transfers. Id. at 821. But the Board did not order rescission in "the particular circumstances" of the case—explaining that the parties had bargained over the matter and subsequently entered into a collective-bargaining agreement containing a management rights clause, privileging the employer to make the nurse transfers. Id.

The present case stands in marked contrast to *Essex Valley*. First, the Respondent here did not notify the Union about E-Verify or provide an opportunity to bargain until months after it had already enrolled in the program. Second, in *Essex Valley* the unlawful transfers were the only unfair labor practice found by the Board. By contrast, the Respondent here committed a series of Section 8(a)(5) violations that sidelined the Union and undermined its ability to represent employees during a critical time for all concerned—the inquiries from HSI and the prospect (ultimately realized) that many of the Respondent's workers would be discharged or forced to resign. In these circumstances, we are convinced that the policies of the Act are better served by requiring the Respondent to rescind its enrollment in E-Verify and bargain over that subject, if the Union so desires.

III.

Nor are we persuaded by our dissenting colleague's argument that the Respondent was entitled to withhold from the Union unredacted versions of correspondence from HSI regarding the employment status of unit employees. Instead, we find the Respondent's refusal to provide the Union with the unredacted correspondence was not justified under Board law, and further, directly prevented the Union from assisting unit employees.

The Respondent received a subpoena from HSI in January 2015,[9] requesting documents from its employment eligibility verification process. In May, the Respondent, without any notice to the Union, unilaterally started using temporary employees to do bargaining unit work and enrolled in E-Verify. After hearing concerns from unit employees about a potential HSI audit, the Union in June contacted the Respondent to discuss the issue. The Respondent later confirmed the HSI audit to the Union during a telephone call in early June.

On July 10, the Respondent received a letter from HSI that Immigration and Customs Enforcement (ICE) had apprehended eight of its employees whom it deemed unauthorized to work in the United States. When the Respondent notified the Union of the letter on July 13, the Union requested an unredacted copy, but the Respondent replied that it would discuss the Union's request at a previously scheduled July 16 bargaining session. In that same conversation, the Respondent informed the Union that discharges were imminent.[10]

During the July 16 bargaining session, the Respondent provided a copy of the July 10 letter with employees' names redacted. The Union again requested unredacted copies of the HSI correspondence, but the Respondent refused at least until it conferred with counsel. On July

[u]nion's bargaining position by unlawfully implementing its proposals and maintaining the terms and conditions in those proposals during subsequent bargaining").

[8] See *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978) (recognizing "the kind of 'horsetrading' or 'give-and-take' that characterizes good-faith bargaining").

[9] All subsequent dates are in 2015 unless otherwise noted.

[10] On July 14, the Respondent received a second letter from HSI notifying it that another of its employees had been apprehended and deemed unauthorized to work in the United States. It is unclear when, or if, the Respondent notified the Union about the July 14 letter.

17, the Respondent received another letter from HSI informing it that 194 of its employees did not appear to be authorized to work in the United States.

On July 21, the Union reiterated its demand for unredacted copies of letters from HSI. The Respondent informed the Union that the names of unit employees affected by the audit were confidential, and that it "need[ed] some assurances that this information w[ould] be treated with such confidentiality." On July 22, before the Union had even replied to the Respondent's confidentiality request, the Respondent began discharging bargaining unit employees.

On July 23, the Union asked the Respondent what kind of confidentiality assurances it sought; on July 27, the Respondent requested that the Union sign a confidentiality agreement. However, it was not until August 5, two weeks after it began discharging employees, that the Respondent drafted a confidentiality agreement for the Union to review. The Union did not sign the confidentiality agreement and, to date, the Respondent has not provided the Union with unredacted copies of the letters.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with unredacted copies of the requested correspondence from HSI. An employer has a statutory obligation to provide requested information that is potentially relevant to a union's fulfillment of its responsibilities as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Here, we agree with the judge that the names of those employees affected by the HSI investigation were relevant to the Union's representative duties. See, e.g., *Mission Foods*, 345 NLRB 788, 790 & 790 fn. 5 (2005) (finding presumptively relevant and ordering production of a list of employees disciplined, discharged, or laid off due to immigration status, among other things, to the extent not covered by the union's other requests).[11] Thus, the Respondent's refusal to provide the information requested by the Union was unlawful, unless the Respondent has established a valid defense.

The Respondent, now joined by our dissenting colleague, argues that confidentiality concerns privileged its redaction of employee names in the HSI letters, and that it met its statutory obligations by presenting the Union with a proposed confidentiality agreement. We disagree.

A party asserting confidentiality as a reason for withholding information bears the initial burden of establishing that the requested information is confidential. *Menorah Medical Center*, 362 NLRB No. 193 (2015), enfd. in relevant part 867 F.3d 1288, 1300 (D.C. Cir. 2017). Information will not be found "confidential" merely because a party has labeled it as such. *Bud Antle Inc.*, 359 NLRB 1257, 1265 (2013) (claim of confidentiality rejected when no evidence offered in support), reaffirmed and incorporated by reference, 361 NLRB 873 (2014). Rather, the Board has limited "confidential information" to a few general categories. See generally *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995) (e.g., highly personal information, such as individual medical records; proprietary information, such as trade secrets; information that traditionally is privileged, such as attorney work product).

In the present case, we assume without deciding that the Respondent had a legitimate interest in keeping the names of individual employees with suspect employment documents confidential.[12] In the particular circumstances

[11] In asserting that the information requested here was not presumptively relevant, the Respondent erroneously relies on an administrative law judge's finding in *Washington Beef, Inc.*, 328 NLRB 612 (1999), that similar correspondence between an employer and the Immigration and Naturalization Service was not relevant to the union's representational duties. The judge's finding was not challenged before the Board on exceptions and thus has no precedential value. See id. at 612 fn. 1.

[12] Member Pearce would find that the information is not confidential and notes that the logic behind the Respondent's claim of confidentiality simply does not withstand scrutiny, as it ignores the reality of the workplace. The identities of employees impacted by the HSI audit were not, as a practical matter, confidential because they would have been readily apparent to other employees through mere observation, based on who no longer worked for the Respondent. Member Pearce would further find that even if the Respondent had raised a valid confidentiality interest in the employee names, it would still have been required to produce the information as the Union's need for the information outweighed the Respondent's confidentiality interest. See *Kaleida Health, Inc.*, 356 NLRB 1373 (2011), citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318–319 (1979) (where an employer raises a valid confidentiality interest in response to an information request, the Board balances that interest against the union's need for the information, in order to determine whether disclosure is required.) Here, the Union had a compelling need to quickly identify employees listed in the HSI letters. The letters presented an imminent threat to the employment security of many of the bargaining unit employees. Indeed, within days of receiving the July 17 notification from HSI that 194 of its employees did not appear to be authorized to work in the United States, the Respondent notified employees that would it would begin discharging affected employees, and actually discharged them. As a result of these discharges, two-thirds of the bargaining-unit (62 employees) lost their jobs. In those circumstances, the Union plainly had a compelling need to quickly learn which employees were under investigation by HSI so that it could assist them (where possible) in providing documentation of their authorization to work in the Unites States.

The Respondent's interest in not disclosing the identity of at-risk employees was considerably weaker. As noted, the Respondent was not asserting an interest in maintaining the confidentiality of its own information, but was preemptively asserting an interest belonging to its employees, against their bargaining representative. This significantly weakens the Respondent's position, as "[t]he Board is … entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union." *Anciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996). Therefore, contrary to the dissent,

here, however, we find that the Respondent waived its confidentiality defense because it did not timely assert a confidentiality interest or propose a reasonable accommodation and engage in accommodation bargaining. *Postal Service*, 364 NLRB No. 27, slip op. at 2 (2016).

The sequence and timing of events demonstrate that the Respondent's assertion of confidentiality and proposal for a confidentiality agreement were too little, too late. The Respondent received HSI letters on July 10, 14, and 17, but did not assert that the information was confidential until July 21, despite the Union's multiple intervening requests for unredacted copies of the letters. The very next day—only one day after first demanding assurances of confidentiality from the Union—the Respondent began informing affected employees that they were being discharged. The Respondent thereby frustrated any opportunity the Union may have had to assist affected employees *before* the Respondent discharged them. Further, the Respondent did not deliver its actual confidentiality proposal to the Union until two weeks *after* it had discharged those employees. This delay only further hampered any ability the Union may have had to timely assist adversely affected employees. That sequence of events highlights both the time-sensitive nature of the Union's request and the untimeliness of the Respondent's actions. See, e.g., *The Finley Hospital*, 362 NLRB No. 102, slip op. at 8 (2015) (where union requested information bearing on employee's discharge, observing that "Time was of the essence," and finding that employer's proposed accommodation was untimely where it was offered months after union's initial request and when union already was in midst of trying to assist employee achieve a resolution of her discharge), summarily enforced in relevant part 827 F.3d 720 (8th Cir. 2016).

Finally, we observe that the Board has long held that the party asserting confidentiality has the burden of proposing the accommodation. *Postal Service*, 364 NLRB No. 27, slip op. at 2 (2016), citing *Borgess Medical Center*, 342 NLRB 1105, 1106 (2014). Therefore, our dissenting colleague improperly shifts this burden by suggesting that the Union, if it really wanted the unredacted letters, "could have offered a confidentiality agreement to the Respondent any time after July 21, 2015." As the party asserting the confidentiality interest, the Respondent had the responsibility to timely propose an accommodation, which it failed to do.

AMENDED REMEDY

In addition to the remedies recommended by the judge, we shall order the Respondent to take the following affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally transferring bargaining unit work to temporary employment agency employees on May 15, 2015, without prior notice to the Union or affording it an opportunity to bargain, we shall order the Respondent to make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral transfer. Backpay shall be computed as in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 13 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees about the terms of the discharge and the severance pay to be paid to terminated employees, we shall order that, at the request of the Union, the Respondent negotiate over the terms of severance from employment.

Finally, in ordering the Respondent to provide the Union with unredacted copies of the letters the Respondent received from HSI, we observe that the Respondent does not contend in its exceptions or reply briefs that the Union has no present need for those unredacted letters.

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which suggests that the Respondent's actions "appear to be taken on behalf of employees' privacy rather than self-interest or obstruction of the Union's bargaining duties." *Auciello* indicates that any doubts should be resolved in favor of the union. This is particularly true where, as here, the Respondent has engaged in a course of unlawful conduct, including unilateral changes and direct dealing that effectively sidelined its employees' union. In addition, the Respondent has not established, nor even suggested, that it had any basis for believing that the Union would misuse the names of unit employees identified in the HSI letters. See *Metropolitan Edison Co.*, 330 NLRB 107, 108 (1999) (finding that mere "possibility" that union would retaliate against informants was insufficient to justify nondisclosure). For these reasons, Member Pearce finds that the balance of interests strongly favored full disclosure to the Union of the relevant HSI letters so that the Union could identify and assist affected unit employees. See, e.g., *AT&T Services, Inc.*, 366 NLRB No. 48 (2018) (finding that union's need for employees' individual results on an employer-administered technical test outweighed employer's asserted confidentiality interest and, thus, ordering production).

ORDER

The National Labor Relations Board orders that the Respondent, The Ruprecht Company, Mundelein, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to bargain with the Union, UNITE HERE Local 1, over its use of temporary employment agency employees without first notifying the Union and giving it an opportunity to bargain.

(b) Unilaterally changing the terms and conditions of its employees by enrolling in the E-Verify program without first notifying the Union and giving it an opportunity to bargain.

(c) Bypassing the Union and dealing directly with its employees over the terms of severance from employment.

(d) Failing and refusing to furnish the Union with requested information that is relevant to it as the collective-bargaining representative of certain of Respondent's employees.

(e) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed 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 following bargaining unit:

> All full-time and regular part-time Foreman, Head Processors, LineMen 1, LineMen 2, and Housemen but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Make whole unit employees for any lost wages they may have suffered as a result of the Respondent's use of temporary employment agency employees, with interest, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

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

(d) Compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Upon request of the Union, rescind its participation in the E-Verify program and bargain in good faith with the Union regarding its participation in the program.

(f) Upon request of the Union, bargain in good faith with the Union regarding severance pay to be paid to terminated employees and any corresponding release of claims or confidentiality requirements.

(g) In a timely manner, furnish the Union with copies of the letters it received from United States Immigration and Customs Enforcement, Homeland Security Investigations (HSI), containing the names of unit employees whom HSI identified as having suspect employment documents or not being authorized to work in the United States, requested on July 13, 16, and 21, 2015.

(h) Within 14 days after service by the Region, post at its facility in Mundelein, Illinois, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 13, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 2015.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 13 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. August 27, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

MEMBER EMANUEL, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by transferring bargaining-unit work to temporary employees without giving the Union notice and an opportunity to request bargaining[1] and by dealing directly with employees regarding severance pay. I also agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally enrolling in E-Verify. However, for the reasons stated below, I disagree with the remedies my colleagues order for that violation. Finally, I disagree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing, absent a confidentiality agreement, to provide the Union with unredacted copies of letters that the Respondent received from U.S. Immigration and Customs Enforcement, Homeland Security Investigations (HSI) listing the names of employees who "appear, at the present time, not to be authorized to work in the United States."

1. *E-Verify*. My colleagues require the Respondent to "rescind its participation in the E-Verify program and bargain in good faith with the Union regarding its participation in the program." However, after the Respondent unilaterally enrolled in E-Verify, it bargained with the Union regarding E-Verify during negotiations for a new collective-bargaining agreement. On October 22, 2015, the Union agreed to the Respondent's proposal giving the Respondent the right to use E-Verify for new hires, and the collective-bargaining agreement that the Union ratified on February 24, 2016, gives the Respondent this right. Although rescission and bargaining are typical remedies when an employer has changed an employment term without giving the union notice and opportunity to request bargaining, these are not appropriate remedies when the parties subsequently bargain over and come to an agreement regarding the subject of the unilateral change. See *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 821, 843–844 (2004) (finding that the standard remedies of rescission and bargaining were inappropriate where, after the employer unilaterally transferred nurses in violation of Section 8(a)(5), the parties entered into a collective-bargaining agreement containing a management-rights clause that privileged the employer to transfer nurses unilaterally), enfd. 14 F.3d 1258 (8th Cir. 1994).[2]

2. *Redacted HSI Letters*. I also disagree that the Respondent violated the Act by failing to provide the Union with unredacted letters from HSI. In mid-July 2015, the Respondent received letters from HSI listing employees who had suspect work-authorization documents, informing the Respondent that HSI will consider the listed employees to be unauthorized to work in the United States unless the employees present valid documents, and warning the Respondent that continuing to employ "unauthorized aliens" would result in fines and other penalties. The Union requested copies of the letters, and the Respondent provided them with employees' names redacted. The Union objected to the redaction. In response, the Respondent agreed to provide the unredacted letters if the Union signed a confidentiality agreement. At the Union's request, the Respondent drafted a confidentiality agreement and gave it to the Union for its review. The Union never signed a confidentiality agreement.

Contrary to my colleagues, I believe that the Respondent acted lawfully when it refused to furnish unredacted copies of the letters unless the Union signed a confidentiality agreement. The HSI letters named employees who "appear, at the present time, not to be authorized to work in the United States." The Respondent's interest in protecting the confidentiality of such sensitive information is apparent, and its actions appear to be taken on behalf of employees' privacy rather than self-interest or obstruction of the Union's bargaining duties.

Nor did the Respondent waive its confidentiality defense, as my colleagues assert. The Respondent's assertion of confidentiality came only 8 days after the Union's initial request for the names of affected employees in the first HSI letter the Respondent received. In the meantime, the Respondent informed the Union that it wanted an opportunity to confer with its counsel, and it received two more HSI letters naming almost 200 additional employees. Given the seriousness and scope of the issue and the extremely condensed timeframe in this case, the Respondent's assertion of confidentiality was timely.

[1] I join my colleagues in ordering a make-whole remedy for affected employees for any loss of earnings and other benefits caused by the unlawful unilateral transfer of work. I note, however, that a U.S. Immigration and Customs Enforcement, Homeland Security Investigations audit raised questions about whether many of the Respondent's employees were authorized to work in the United States. I further note that the Board lacks authority to award backpay to "undocumented aliens." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Mezonos Maven Bakery*, 357 NLRB 376 (2011), enfd. in relevant part and remanded sub nom. *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013), on remand 362 NLRB No. 41 (2015). Employees' immigration status is properly addressed in the compliance stage of these proceedings. See *Tuv Taam Corp.*, 340 NLRB 756, 760–761 (2003).

[2] In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), a Board majority overruled *Essex Valley*, but only to the extent *Essex Valley* can be read to suggest "that a discipline or discharge [must] be 'solely' the result of a unilateral change to violate Sec. 8(a)(5)." Id., slip op. at 15 fn. 40. Thus, *Essex Valley* remains good law for the proposition for which I cite it.

Furthermore, the Respondent timely proposed a reasonable accommodation by requesting that the Union sign a confidentiality agreement. The agreement would have resulted in the Union obtaining the information while also fully addressing the Respondent's confidentiality concerns. Although the Respondent did not deliver its confidentiality agreement until 2 weeks after discharging the affected employees, I disagree with my colleagues' finding that the Respondent's offer was untimely. In my view, a 2-week delay is not so great that it would have prevented the Union from assisting employees who were eligible for official work authorization documents. Further, once the Respondent supplied the draft confidentiality agreement, the Union never signed it, and the stipulated record does not indicate that the Union ever engaged in further bargaining regarding the proposed agreement. Finally, although not required by Board law, if the Union wanted the unredacted letters sooner, it could have offered a confidentiality agreement to the Respondent any time after July 21, 2015, when the Respondent first asked for assurances of confidentiality.[3] Accordingly, I would reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by declining to furnish the Union the unredacted letters absent an executed confidentiality agreement.

Accordingly, as set forth above, I respectfully concur in part and dissent in part.

Dated, Washington, D.C. August 27, 2018

William J. Emanuel, Member

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 or refuse to bargain with the Union, UNITE HERE Local 1, over our use of temporary employment agency employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally change the terms and conditions of our employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT bypass the Union or deal directly with our employees over the terms of severance from employment.

WE WILL NOT fail or refuse to furnish the Union with requested information that is relevant to it 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 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 following bargaining unit:

All full-time and regular part-time Foreman, Head Processors, LineMen 1, LineMen 2, and Housemen but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL make you whole for any lost wages you may have suffered as a result of our use of temporary employment agency employees, with interest.

WE WILL compensate you, with interest, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of you.

WE WILL, upon the request of the Union, withdraw from participating in E-Verify and WE WILL bargain in good faith with the Union about participating in this program.

WE WILL, upon the request of the Union, bargain in good faith with the Union over severance pay to be paid to terminated employees.

[3] To the extent the majority suggest that the Respondent's insistence on a confidentiality agreement directly prevented the Union from assisting unit employees, I disagree. As the Respondent had legitimate concerns about confidentiality, the Union could have acquired unredacted copies of the HSI letters simply by signing the agreement.

WE WILL, in a timely manner, furnish the Union with copies of the letters we received from United States Immigration and Customs Enforcement, Homeland Security Investigations (HSI), containing the names of unit employees whom HSI identified as having suspect employment documents or not being authorized to work in the United States, requested on July 13, 16, and 21, 2015.

THE RUPRECHT COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-155048 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.

Daniel Murphy, Esq. and *Timothy Koch, Esq.*, for the General Counsel.
Ronald Mason, Esq. (Mason Law Firm Co., L.P.A.), counsel for the Respondent.
Kristin Martin, Esq. (Davis, Cowell & Bowe, LLP), counsel for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. The parties herein waived a hearing and submitted this case directly to me by way of a joint motion and stipulation of facts and exhibits dated March 7 and 9, 2016. The order consolidating cases and the first amended consolidated complaint, which issued on September 30, 2015 and February 11, 2016, were based upon unfair labor practice charges filed by UNITE HERE Local 1, herein called the Union, on June 26, 29, July 17, and August 18, 2015. The first amended complaint alleges that The Ruprecht Company, herein called the Respondent

(1) Unilaterally transferred bargaining unit work to temporary employment agency employees on May 15, 2015, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct;

(2) Unilaterally enrolled and implemented the E-Verify employment eligibility verification program on May 13, 2015, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct

(3) Bypassed the Union and dealt directly with its employees in the Unit on July 16 and 20, 2015, by discussing with them Respondent's intention to provide (a) specific amounts of severance pay to those employees who it would discharging in the near future, in exchange for each of them signing a separation agreement and general release, and (b) rehire rights for those same employees.

(4) Has failed to furnish the Union since July 16, 2015, with unredacted versions of the documents the Union requested on July 14, 2015, when it requested that Respondent furnish the Union with U.S. Immigration and Customs Enforcement (ICE) correspondence that includes the names of employees with suspect employment documents or who are specifically not authorized to work in the United States.

The Joint Motion and Stipulation of Facts and Exhibits provides as follows:

(1) The Charge in 13-CA-155048 was filed by the Union on June 26, 2015, and a copy was served by regular mail on Respondent on June 29, 2015. Pt. Ex. 1(a) and (b)

(2) The Charge in 13-CA-155049 was filed by the Union on June 26, 2015, and a copy was served by regular mail on Respondent on June 29, 2015. [Jt. Ex. 2(a) and (b)]

(3) The Charge in 13-CA-156198 was filed by the Union on July 17, 2015, and a copy was served by regular mail on Respondent on July 17, 2015. [Jt. Ex. 3(a) and (b)]

(4) The Charge in 13-CA-158317 was filed by the Union on August 18, 2015, and a copy was served by regular mail on the Respondent on August 20, 2015. Pt. Ex. 4(a) and (b)]

(5) An Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued September 30, 2015, and were served by certified mail on Respondent on September 30, 2015. Pt. Ex. 5(a) and (b)] (6) Respondent's Answer to the September 30, 2015, Consolidated Complaint was received on October 14, 2015. [Jt. Ex. 6]

(7) The First Amended Consolidated Complaint issued February 11, 2016, and was served by certified mail on Respondent on February 11, 2016. Pt. Ex. 7(a) and (b)]

(8) Respondent's Answer to the February 11, 2016, First Amended Consolidated Complaint was received on February 25, 2016. [Jt. Ex. 8]

(9) The Ruprecht Company ("Ruprecht," "Company," or "Respondent"), established in 1860, is a privately-held meat processor and food manufacturer serving both domestic and international customers in the foodservice and retail sectors. Ruprecht provides center of the plate protein items to the country's finest food service and retail establishments.

(10) Ruprecht has expanded its focus to fully cooked meal solutions, side dishes, and other value-add raw items. As a result

of said expansion, current customers include well-known independent restaurants, local and national chains, national and international distributors, and retail supermarkets.

(11) At all material times, Respondent, a corporation with an office and place of business 1301 Allanson Rd, Mundelein, IL 60060, herein called Respondent's facility [sic].

(12) During the past calendar year, a representative period, Respondent sold and shipped from its Mundelein, Illinois, facility goods valued in excess of $50,000 directly to points outside the State of Illinois.

(13) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(14) At all material times, UNITE HERE Local 1 ("Union") has been a labor organization within the meaning of Section 2(5) of the Act.

(15) At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Ruprecht within the meaning of Section 2(11) of the Act and agents of the Employer within the meaning of Section 2(13) of the Act:

Mr. Walter Sommers ("Sommers") holds the position of President.
Mr. Todd Perry ("Perry") holds the position of Chief Financial Officer.
Ms. Staci Foss ("Foss") holds the position of Human Resources Manager
Mr. Jaimie Jiminez ("Jiminez") holds the position of Supervisor.

(16) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Foremen, Head Processors, LineMen 1, LineMen 2, and Housemen, but excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(17) At all material times, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Unit described above, and has been recognized as such by the Employer. The Union and Ruprecht have been parties to various successor collective-bargaining agreements, the most recent of which was effective September 1, 2010, through August 31, 2013. [Jt. Ex. 9]

(18) Ruprecht and the Union have a longstanding collective-bargaining relationship. The parties have agreed to all material terms and conditions of a successor agreement, and the Union ratified the agreement on February 24, 2016.

(19) On January 27, 2015, Ruprecht received correspondence from United States Immigration and Customs Enforcement Agency, Homeland Security Investigations ("HSI"), informing Ruprecht of an impending inspection of Ruprecht's Forms I-9. HSI also informed Ruprecht that any documents copied as part of the employment eligibility verification process would also require inspection. Attached to the correspondence was a subpoena requiring Ruprecht to make said documents available for inspection no later than February 3, 2015. Failure to comply with the subpoena could have resulted in an order of contempt by a federal District Court as provided by 8 U.S.C. § 1225(d)(4)(B). [Jt. Ex. 10]

(20) Accordingly, Ruprecht complied with the aforementioned subpoena and HSI inspected Form I-9's for 262 employees.

(21) During the HSI audit, and in order to avoid a catastrophic loss to its workforce should another audit occur in the future, Ruprecht enrolled in the E-Verify system on May 13, 2015. "U.S. law requires companies to employ only individuals who may legally work in the United States — either U.S. citizens, or foreign citizens who have the necessary authorization. This diverse workforce contributes greatly to the vibrancy and strength of our economy, but that same strength also attracts unauthorized employment. E-Verify is an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States." [The current E-Verify User Manual is attached as Jt. Ex. 11, and a copy the current E-Verify Memorandum of Understanding for Employers is attached as Jt. Ex. 12]

(22) Since May 13, 2015, Ruprecht has utilized E-Verify to verify the eligibility of over 40 new bargaining-unit employees to work in the United States.

(23) Ruprecht was neither statutorily mandated nor required by the federal government to enroll in the E-Verify system.

(24) Ruprecht uses the E-Verify system only for new hires. Accordingly, all existing Union members who were then Ruprecht employees at the time of its implementation in May 2015 were/are not affected, and none of those employees were terminated for failing to be authorized under the E-Verify system.

(25) During the first week of June 2015, Union Organizing Director Dan Abraham ("Abraham") called Ruprecht President Sommers stating that unit members had been expressing concerns to Abraham about a possible immigration audit taking place at Ruprecht. In that call, Sommers stated that Ruprecht was also very concerned about an HSI audit that it was in the midst of, and that Ruprecht had contacted the National Immigrant Justice Center ("NIJC") to come to the Company's facility on June 10, 2015, to make a presentation to employees. Abraham requested to meet with Sommers that day and to attend the NIJC's presentation, and Sommers con-

sented.

(26) On June 9, 2015, Ruprecht's attorney contacted Abraham to request that the June 10, 2015, meeting between Abraham and Sommers would not be for the purpose of bargaining; Abraham agreed.

(27) Also on June 9, 2015, Abraham sent an email to Sommers, to which he attached language designed to protect immigrant employees that the Union had previously used with other employers going through immigration audits.

(28) On June 10, 2015, Union Organizing Director Dan Abraham ("Abraham") met with Ruprecht President Sommers to discuss the HSI audit. Abraham discussed the language it had provided Sommers in the previous day's email regarding the protection of immigrant workers affected by investigations such as the HSI audit and the use of E-Verify in workplaces, and Abraham requested the ability to return to the Company's facilities in the future to assist affected employees.

(29) Abraham informed Sommers at that June 10, 2015, meeting, that the Union has previously entered into collective-bargaining agreements with other employers regarding protections and provisions for immigrant workers, and that other employers had agreed not to participate in voluntary programs that verify the immigration status of employees, including E-Verify. The Charging Party, over the objection of the Respondent, wishes to present documentary evidence it believes to be relevant to paragraph 29, consisting of collective-bargaining agreement with the Ritz Carlton Hotel. By Agreement of the Parties and by no later than the close of business on March 16, 2016, Counsel for the Charging Party will submit to Judge Biblowitz an Offer of Proof on the admissibility and relevance of the disputed exhibit.

(30) Local 1 requests the Board to take Judicial Notice of a Wonkblog written by Timothy R. Lee and published online by the *Washington Post* on June 3, 2013, entitled "E-verify is supposed to stop undocumented employment. It could also harm legal workers," found at http://wapo.st/1dmgFV1 . Notwithstanding, this Wonkblog and accompanying web address were never raised or discussed during bargaining between the parties. [copy attached as Jt. Ex. 13]

(31) On May 15, 2015, Ruprecht began using temporary employees to perform and/or assist with bargaining unit work. In total Ruprecht used a total of seven (7) temporary employees to perform union bargaining work.

(32) Ruprecht did not notify or offer to bargain with the Union over this decision or the effects of this decision prior to its implementation. Ruprecht began using temporary employees because of the HSI audit and instructed Local 1 of its reasoning during bargaining on June 24, 2015, and subsequent bargaining meetings.

(33) On May 16, 2015, Ruprecht emailed the Union, stating that it understood the Union wished to bargain over the Company's use of temporary employees, and proposed June 4 and/or June 5, 2015, to discuss the matter.

(34) On May 19, 2015, the Union responded to the May 16, 2015, email by asking who requested this meeting. Later that same day, Ruprecht responded, stating that the Company wanted this meeting, indicating that the meeting could not be held until June 12 or the week of June 15, 2015, because of an NLRB trial in an unrelated matter.

(35) On May 20, 2015, the Union responded that they were not available to meet on any of the dates provided by the Company.

(36) That same day, Ruprecht notified the Union that it was available for meetings anytime from June 15 through June 26, 2015.

(37) On May 26, 2015, the Union filed a grievance with Ruprecht over its use of temporary employees to perform unit work. [Jt. Ex. 14]

(38) On May 28, 2015, the Union informed Ruprecht that it was available to meet on June 24 and 26, 2015 to discuss Respondent's use of temporary employees.

(39) On June 2, 2015 Ruprecht informed the Union that it would accept both dates.

(40) On the same day, the Union sent correspondence to the Company indicating that it was only offering to meet on one of the aforementioned dates. The parties agreed to meet on June 24, 2015.

(41) Ruprecht and the Union met on June 24, 2015, and Ruprecht made proposals related to the Company's right to use to temporary workers. The parties did not reach any agreements but set another bargaining session for July 16, 2015.

(42) On June 29, 2015, Ruprecht provided the Union with a copy of the January 27, 2015, Notice of Inspection from HSI and the Department of Homeland Security's Immigration Enforcement Subpoena duces tecum, also dated January 27, 2015.

(43) About July 10, 2015, Ruprecht received correspondence from HSI alerting Ruprecht that U.S. Immigration and Customs Enforcement ("ICE") apprehended eight (8) Ruprecht employees over July 8 and 9, 2015.

The named employees were deemed by ICE to be unauthorized to work in the United States. The correspondence states in relevant part:

The above noted employees of Ruprecht Company have been deemed by ICE to be unauthorized to work in the United

States.

Unless these employees present valid identification and employment eligibility documentation acceptable for completing the Employment Eligibility Verification Form I-9, other than the documents previously presented, they are considered by ICE to be unauthorized to work in the United States. Continued employment of employees not authorized to work in the United States may result in civil penalties ranging from $375 to $3,200 per unauthorized alien for a first violation. Higher penalties can be imposed for a second or subsequent violation. Further, criminal charges may be brought against any person or entity that engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens.

(44) About July 13, 2015, Ruprecht notified Union Organizing Director Abraham that it received correspondence from ICE that included names of specific employees identified in its investigation as having suspect documents. Abraham requested a copy of that correspondence, including the list of specific employees who were deemed to have invalid documents by ICE. Ruprecht stated that it would discuss the request at a negotiating meeting scheduled for July 16, 2015.

(45) In that same July 13, 2015, phone conversation, Ruprecht also stated that terminations were imminent and that it would be letting employees go in groups: non-unit employees would be terminated before unit employees. Ruprecht also stated its intention to provide terminated employees with some severance pay. The Union responded that it would prepare a proposal for severance packages to present at the negotiating meeting scheduled for July 16, 2015.

(46) About July 14, 2015, Ruprecht received correspondence from HSI alerting Ruprecht that ICE apprehended one (1) additional Ruprecht employee on July 13, 2015. The named employee was deemed by ICE to be unauthorized to work in the United States. The correspondence states in relevant part:

The above noted employee of Ruprecht Company has been deemed by ICE to be unauthorized to work in the United States.

Unless the employee presents valid identification and employment eligibility documentation acceptable for completing the Employment Eligibility Verification Form I-9, other than the documents previously presented, the employee is considered by ICE to be unauthorized to work in the United States. Continued employment of employees not authorized to work in the United States may result in civil penalties ranging from $375 to $3,200 per unauthorized alien for a first violation. Higher penalties can be imposed for a second or subsequent violation. Further, criminal charges may be brought against any person or entity that engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens.

(47) On July 15, 2015, Ruprecht management notified employee members of the Union's bargaining committee that it wanted to meet with employees at 9:00 a.m. on the morning of July 16, 2015. The meeting was not exclusive to employee members of the Union's bargaining committee, as Ruprecht invited other employees to attend. One of these employees notified the Union of this meeting called by Ruprecht.

(48) On the morning of July 16, 2015, Union Organizing Director Abraham and Union Vice-President Lou Weeks arrived at the Company's facility just before the 9:00 a.m. meeting was scheduled to take place. Abraham and Weeks sought to be included in that meeting. Chief Financial Officer Perry turned Abraham and Weeks away, stating that the meeting was restricted to management and employees, and that he would see Abraham and Weeks later that morning at the previously scheduled bargaining meeting.

(49) At this 9:00 am meeting on July 16, 2015, Ruprecht updated the employees on the ongoing HSI investigation. The only employees who attended the meeting were employee members of the Union's bargaining committee. No representatives from the Union were present. During the meeting, Ruprecht presented its viewpoint with respect to the HSI investigation and the Company's plans related to the pending termination of employees who were found to be unauthorized to work in the United States. Ruprecht stated that many of the employees who were facing termination had been with the Company for a number of years and Ruprecht valued and appreciated their service. Accordingly, Ruprecht stated that it was going to offer some amount of payment to any employee who was found to be unauthorized to work and subsequently terminated. Ruprecht said that it was contemplating offering between $250 and $1000, depending upon the affected employee's length of service, In addition, Ruprecht stated that any employee receiving a payment would be presented with a release agreement to sign, the content of which was not specified at that meeting. [Footnote 3 of the Stipulation of Facts states: "Ruprecht held a handful of meetings with employee members of the bargaining unit regarding the HIS investigation. The precise number of meetings and specific dates of said meetings are unknown.]

(50) Later the morning of July 16, 2015, (after the 9:00 am meeting with employees had concluded) Ruprecht and the Union met for bargaining. At the beginning of the meeting, Union Organizing Director Abraham asked Ruprecht what the content of the morning meeting between management and employees on the Union's bargaining committee was. Ruprecht did not respond to Abraham directly, instead stating that it had been strictly an internal meeting, and directed Abraham to ask the employees who attended if he desired any further information.

(51) During the bargaining session, Ruprecht provided a proposal related to the Company's right to use temporary workers ("Management Rights") and reiterated that the use of temporary workers was on an as-needed basis. Ruprecht further stated that because of the ongoing HSI audit/investigation, it

was in a precarious situation and needed to take actions to maintain its operations. [Jt. Ex. 15]

Ruprecht held a handful of meetings with employee members of the bargaining Unit regarding the HSI investigation. The precise number of meetings and specific dates of said meetings are unknown.

(52) During this meeting Ruprecht also made a proposal to the Union regarding Ruprecht's use of E-Verify ("New Homeland Security Issue") for new hires only, and informed the Union, for the first time, that it had already enrolled in E-Verify. [Jt. Ex. 16]

(53) At this meeting, Ruprecht also announced verbally its intention to provide severance pay to employees who would sign a general release.

(54) The Union, in turn, made written proposals to Ruprecht during the July 16, 2015, meeting regarding severance pay for employees affected by HSI audit and regarding Ruprecht's use of temporary workers. On the topic of severance pay, the Union proposed that terminated employees be provided one month's salary for each year of service to Ruprecht. Ruprecht neither accepted the Union's proposal regarding severance pay nor offered any counter-proposals to the Union at this meeting.

(55) Lastly, during the July 16, 2015, meeting Ruprecht provided the Union with copies of the July 10, 2015, correspondence it had received from HSI that Abraham had requested on about July 13, 2015. Ruprecht redacted the employees' names, citing the sensitive nature of the ongoing HSI investigation/audit. The Union requested non-redacted copies of the HSI correspondence and Ruprecht demurred until it first conferred with counsel. [The documents provided to the Union at that time are attached as Jt. Ex. 17 and 18]

(56) On July 17, 2015, Ruprecht received further correspondence from HSI. In said letter, HSI noted that as a result of the February 3 audit, 194 employees did not appear to be authorized to work in the United States. The letter states in relevant part:

This letter is to inform you that, according to the records checked by HSI, the following employees appear, at the present time, not to be authorized to work in the United States. The documents submitted to you were found to pertain to other individuals, or there was no record of the documents being issued, or the documents pertain to the individuals, but the individuals are not employment authorized, or their employment authorization has expired. Accordingly, the documentation previously provided to you for these employees does not satisfy the Form 1-9 employment eligibility verification requirements of the INA. Unless these employees present valid identification and employment eligibility
documentation acceptable for completing the Form I-9, other than the documentation previously submitted to you, they are considered by HSI to be unauthorized to work in the United States. Continued employment of employees not authorized to work in the United States may result in civil penalties ranging from $375 to $3,200 per unauthorized alien for a first violation. Higher penalties can be imposed for a second or subsequent violation. Further, criminal charges may be brought against any person or entity that engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens. This is a very serious matter that requires your immediate attention.

Section 274A(2) of the INA makes it unlawful for a person or other entity, after hiring an alien for employment, to continue to employ the alien knowing that the alien is, or has become, unauthorized for employment. By regulation, knowingly includes not only actual knowledge, but also knowledge which may be fairly inferred through a notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about an individual's unlawful employment status.

Once HSI notifies an employer that employees have presented documents that appear to be suspect or invalid as proof of employment eligibility, it is incumbent on the employer to take reasonable actions to verify the employment eligibility of the employees. Verification of employment eligibility must be conducted in the time reasonably necessary to determine the employment eligibility status of the employees concerned. The law does not allow for any period of continued employment of unlawful employees, nor authorizes any delay in the verification of the employment status of employees for the purpose of replacing terminated employees.

HSI presumes that employers who, within 10 business days of receiving a Notice of Suspect Documents letter, verify the work authorization of suspect employees or take other appropriate actions to resolve the apparent employment of unauthorized workers have demonstrated reasonable care under the INA. In all cases, reasonable care will depend upon the specific facts present and how the facts affect an employer's ability to verify the status of suspect employees. An employer who fails to exercise reasonable care in verifying employees' work authorization after being issued a Notice of Suspect Documents letter may be subject to civil penalties under the INA.

(57) On July 17, 2015, Ruprecht notified the Union by email that it was rejecting the Union's proposal regarding severance pay and in turn proposed: $250 for those workers employed less than one year; $500 for those employed between one and five years; and $1,000 for those employed over five years. [Jt. Ex. 19]

(58) In addition, Ruprecht stated in this email that receiving that money would be contingent upon those employees working through their last scheduled day and signing a "Confidential Separation Agreement and General Release." Ruprecht attached two versions of the Separation Agreement to this

email, differentiated only by whether or not the employee to be terminated was under 40 years of age. [Jt. Ex. 19]

(59) On July 20, 2015, Ruprecht called a general meeting of its employees at its facility and informed them that it had received the names of those employees identified through the HSI audit, and that it would begin terminating a first group of employees within a matter of days. Ruprecht detailed the severance packages it would be offering employees: $250 for those workers employed less than one year; $500 for those employed between one and five years; and $1,000 for those employed over five years. In addition, Ruprecht stated the severance money would be contingent upon these employees working through their last scheduled day and signing a "Confidential Separation Agreement and General Release."

(60) On July 21, 2015, the Union responded to Ruprecht's severance proposal, inquired as to its applicability to the employees, and requested to bargain over the amount of the severance package. The Union reiterated its request for the unredacted versions of communication that Ruprecht had received from ICE, asking "if and when those would be provided." [Jt. Ex. 20]

(61) Ruprecht responded on the same day. Ruprecht noted that its proposal was subject to bargaining but had to be resolved by July 23, 2015, because of the impending terminations directly caused by the HSI audit/investigation. Ruprecht further wrote, "We will agree that in concept that you [the Union] can obtain a list of the bargaining unit employees of Local 1 that are on the list [of those with suspect documents/those to be terminated]. However, such information is confidential and we need some assurances this information will be treated with such confidentiality." [Jt. Ex. 20]

(62) On July 22, 2015, Ruprecht began directly notifying employees it intended to terminate as a result of the Department of Homeland Security audit, including providing them letters dated July 22, 2015, that were signed by its Director of Human Resources, Staci Foss. [A copy of one such letter to an employee is attached as Jt. Ex. 21]

(63) On July 23, 2015, Ruprecht sent a letter to the Union declaring an impasse with respect to the Company's severance proposal because the Union failed to provide the Company with any further proposal for the Ruprecht's consideration. [A copy of the letter, without attachments is attached as Jt. Ex. 22]

(64) On July 23, 2015, the Union sent correspondence to Ruprecht inquiring what type of assurance of confidentiality Ruprecht was seeking in order to provide un-redacted versions of the July 2015 HSI letters. [Jt. Ex. 23]

(65) On July 27, 2015, Ruprecht sent correspondence to the Union requesting that the Union provide the Company with a confidentiality agreement with respect to the release of names listed in the July 2015 HSI correspondence. [Jt. Ex. 23]

(66) The parties next met on August 5, 2015. Ruprecht repeated that it was awaiting a confidentiality agreement from the Union and would not release the names on the HSI list until the parties agreed to a confidentiality agreement.

(67) Per the Union's request, Ruprecht drafted a confidentiality agreement during the August 5, 2015, meeting and gave it to the Union for its review.

(68) To date, Ruprecht has not received a signed confidentiality agreement from the Union and, in turn, has not provided the Union with an unredacted list of employees identified through the HSI audit.

(69) The parties next met on September 24, 2015. Ruprecht made additional proposals with respect to the use of temporary employees and the use of the E-Verify for new hires.

(70) The parties next met on October 22, 2015. During that meeting, the Union agreed to Ruprecht's proposal regarding the use of temporary employees and the use of the E-Verify process for new hires.

(71) As a direct result of the HSI audit, Ruprecht lost 62 of its 92 employees who were members of the Unit through resignation or termination.

While participating in the joint motion and stipulation of facts, counsel for the Union filed an offer of proof separate from the stipulation, and not supported by either counsel for the General Counsel or counsel for the Respondent. Attached to this offer of Proof is a declaration of the Union's organizing director Abraham, which states, inter alia, that the Union represents employees at approximately 35 hotels in Chicago and, of these, about thirty contain provisions regarding the use of E-Verify. Attached to his declaration is the agreement between the Union and the Sheraton Chicago Hotel and Towers. Section 15(e) of the contract states: "The Employer agrees not to participate in any voluntary programs to verify the immigration status of its employees, such as E-Verify, and will only participate in those required by state, federal or other applicable law." One of the issues herein is whether the Respondent unilaterally enrolled and implemented the E-Verify program without prior notice to, and bargaining with, the Union with respect to the conduct and the effect of the conduct. That issue is totally different from whether one employer, or 30 employers in the area, agreed not to participate in E-Verify as part of its contract with the Union. As I find it irrelevant to the issues herein, the Union's Offer of Proof will therefore not be considered.

ANALYSIS

The initial allegation in the Joint Motion is that on about May 15 the Respondent unilaterally transferred bargaining unit work to temporary employment agency employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and its effects. The stipulated facts state that on about

May 15, the Respondent began using temporary employees to perform and assist with bargaining unit work and used seven employees for this purpose, and did so because of an audit by United States Immigration and Custom Enforcement Agency, Homeland Security Investigations (HSI), and did not notify the Union over this decision, or the effects of the decision, prior to implementation. On May 16, the Respondent sent an email to the Union stating it understood that the Union wished to bargain about this subject and proposed June 4 and/or June 5 for a meeting to discuss the issue. The Union responded on May 19 by email asking who requested the meeting and the Respondent replied that same day saying that it wanted the meeting, but that it could not be held until June 12 or the week of June 15 due to a NLRB hearing in an unrelated matter. The Union responded the following day saying that they were not available to meet on any of the dates proposed by the Respondent and later that same day the Respondent notified the Union that it was available to meet anytime from June 15 through 26, and the parties agreed to meet June 24. At this meeting the Respondent made proposals related to its use of temporary workers, but the parties did not reach any agreement on the subject, although they scheduled another bargaining session for July 16. On May 26 the Union filed a grievance over the Respondent's use of temporary employees to perform unit work. On July 15, Respondent notified employee members of the Union's bargaining committee that it wanted to meet with employees the following morning and on the morning of July 16 Abraham and its Weeks arrived at the Respondent's facility and asked to attend the meeting, but they were turned away and told that the meeting was restricted to management and employees. Later that morning the Union and Respondent met for bargaining; Abraham asked what the content of the morning meeting was, but Respondent did not respond directly, stating that it was strictly an internal meeting and that he could ask the employees who attended if he desired further information. At this meeting with the Union, the Respondent made a proposal related to its right to use temporary workers and reiterated that it was on an as-needed basis. Respondent also stated that due to the ongoing HSI audit/investigation, it was in a precarious situation and needed to take actions in order to maintain its operations.

An employer has a duty to bargain with the representative of its employees prior to making any changes in wages, hours or other working conditions if the change is a "material, substantial and a significant" one affecting the bargaining unit's terms and conditions of employment, and the General Counsel bears the burden of establishing that the change was material, substantial and significant. *Central Telephone Co. of Texas*, 343 NLRB 987, 1000 (2004). Further, the Board has found a violation where an employer transfers bargaining unit work to supervisors, or other nonbargaining unit employees without first giving the union an opportunity to bargain about the subject. *St. George Warehouse, Inc.*, 341 NLRB 904, 924 (2004). In determining whether counsel for the General Counsel has sustained his burden of establishing that the unilateral change was material, substantial and significant, I note that the number of temporary employment agency employees used by the Respondent was seven. The Stipulation of Facts states (at Par. 71) that as a result of the HSI audit, Respondent lost 62 of its 92 employees who were members of the unit through resignation or termination. Based upon the above, I find that counsel for the General Counsel has satisfied its burden of establishing that the use of 7 temporary employees out of a total complement of about 92 employees was a material, substantial, and significant. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006).

However, the Board also recognizes an exception in these Section 8(a)(1)(5) cases where the employer can establish a "compelling business justification," for the action taken. *Winn-Dixie Stores, Inc.*, 243 NLRB 972 fn. 9 (1979), or where "economic exigencies compelled prompt action." *Master Window Cleaning, Inc.*, 302 NLRB 373, 374 (1991). The Board recognizes as "compelling economic considerations" only those "extraordinary events" which are "an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Angelica Healthcare Services,* 284 NLRB 844, 852-853 (1987); *Hankins Lumber Co.,* 316 NLRB 837, 838 (1995), and the employer carries a heavy burden of demonstrating that this particular action had to be implemented promptly. *Triple A Fire Protection, Inc.,* 315 NLRB 409, 414 (1994); *Our Lady of Lourdes Health Center,* 306 NLRB 337, 340 fn. 6 (1992). Even where the employer has satisfied these requirements, it must also demonstrate that the exigency was caused by external events, was beyond its control or was not reasonably foreseen. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995). Although the evidence establishes that the Respondent was concerned with, and affected by the loss of numerous employees resulting from the HSI audit and findings, I find that inadequate to support this economic exigencies defense, and find that this unilateral change by the Respondent violated Section 8(a)(1)(5) of the Act.

It is also alleged that the Respondent bypassed the Union and dealt directly with the unit employees on July 16 and 20 by discussing with them its intention to provide (a) specific amounts of severance pay to those employees it would be discharging in the near future, in exchange for them signing a separation agreement and general release, and (b) rehire rights for those same employees. This also relates to, and resulted from the HSI audit of the Respondent's employees. On about July 10, HSI notified the Respondent that U.S. Immigration and Customs Enforcement (ICE) apprehended eight of its employees and found that they were unauthorized to work in the U.S. On about July 13, Respondent notified Abraham that it had received correspondence from ICE with the names of the employees being charged. Abraham asked for a copy of the ICE correspondence including the named employees who were deemed to have invalid documents and Respondent replied that it would discuss the issue with the Union at the July 16 scheduled negotiating meeting. In that same July 13 conversation, Respondent also told Abraham that terminations were imminent and that it would be letting employees go in groups: nonunit employees would be terminated before unit employees, and that it intended to provide terminated employees were severance pay. The Union responded that it would prepare a proposal for severance packages to be presented at the scheduled July 16 negotiating meeting. At a meeting on July 16, 2015, which Abraham and Weeks were not permitted to attend, Respondent updated the employee members of the Union's bargaining

committee about the ongoing HSI investigation. During the meeting with these employees, Respondent presented its viewpoint with respect to the HSI investigation and the Company's plans related to the pending termination of employees who were found to be unauthorized to work in the United States and stated that many of the employees who were facing termination had been with the Company for a number of years and they valued and appreciated their service. Accordingly, it was going to offer some amount of payment to any employee who was found to be unauthorized to work and subsequently terminated; it was contemplating offering between $250 and $1000, depending upon the affected employee's length of service. In addition, the Respondent stated that any employee receiving a payment would be presented with a release agreement to sign, the content of which was not specified at that meeting. At the negotiating meeting with the Union later that morning, Abraham asked what the content was of the meeting that was held with the employees, but he was told only that it was strictly an internal meeting. At this meeting the Union proposed that terminated employees be provided one month's salary for each year of service. Respondent neither accepted this proposal nor offered any counterproposals to the Union at this meeting.

On July 17, Respondent notified the Union by email that it was rejecting the Union's severance proposal and in turn proposed: $250 for those workers employed less than one year; $500 for those employed between one and five years; and $1000 for those employed over five years. In addition, Respondent stated in this email that receiving that money would be contingent upon those employees working through their last scheduled day and signing a "Confidential Separation Agreement and General Release." On July 20, Respondent called a general meeting of its employees at its facility and informed them that it had received the names of those employees identified through the HSI audit, and that it would begin terminating the first group of employees within a matter of days. They detailed the severance packages it would be offering employees: $250 for those workers employed less than one year; $500 for those employed between one and five years; and $1000 for those employed over five years, and that the severance money would be contingent upon these employees working through their last scheduled day and signing a "Confidential Separation Agreement and General Release." On July 21, the Union responded to Respondent's severance proposal, inquired as to its applicability to the employees, and requested to bargain over the amount of the severance package. On that same day, Respondent noted that its proposal was subject to bargaining but had to be resolved by July 23 because of the impending terminations directly caused by the HSI audit/investigation. On July 22, Respondent began directly notifying employees it intended to terminate as a result of the Department of Homeland Security audit, including providing them letters dated July 22, 2015, that were signed by its director of human resources, Staci Foss. On July 23, Respondent sent a letter to the Union declaring an impasse with respect to the Company's severance proposal because the Union failed to provide it with any further proposal for the Respondent's consideration.

In *Champion International Corp.,* 339 NLRB 672, 673 (2003), the Board discussed the difference between a unilateral change violation and a direct dealing violation: "The former involves a change in terms and conditions of employment. It does not depend on whether there was a communication to employees. The latter involves dealing with employees (bypassing the Union) about a mandatory subject of bargaining. It does not depend on whether there has been a change." *Southern California Gas Co.*, 316 NLRB 979 (1995) ,enumerated the criteria for determining whether an employer has engaged in direct dealing under Section 8(a)(5) of the Act: (1) the employer was communicating directly with union represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication was made to the exclusion of the union. *The Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000). In *NLRB v. General Electric Co.*, 418 F.2d 736, 759 (2d Cir. 1969), the court stated that direct dealing will be found where the employer has chosen "to deal with the Union through the employees, rather than with the employees through the Union."

Although the Respondent told the Union on July 13 of the imminent terminations and that it intended to give the terminated employees severance pay, they did not tell the Union the amount of the severance pay that it was considering. Yet, at the meeting with the employees on July 16 they told the employees of their intent to give the terminated employees severance pay, as well as they amount of the severance pay. It wasn't until the following day that the Respondent told the Union the amount of the severance pay it was considering and, at that point, offered to bargain about the amount. Although the Respondent told the Union on July 13 of their intention to give the terminated employees severance pay, and bargained with the Union about the amount to be paid on and after July 16, I find that by telling the employees of the amount of severance pay that it was considering before telling the Union, the Respondent attempted to influence the Union's position by bypassing it and dealing directly with the employees, in violation of Section 8(a)(1)(5) of the Act. *Allied Signal, Inc.*, 307 NLRB 752 (1992).

It is also alleged that since about July 16 the Respondent has failed to furnish the Union with unredacted versions of the HSI correspondence containing the names of employees who were not authorized to work in the United States, information requested by the Union on July 14. The Stipulation of Facts establish that on January 27 the Respondent received a subpoena from HSI requiring Respondent to produce its I-9 forms and the Respondent complied and HSI inspected its I-9 Forms for 262 employees. During the first week of June, Abraham told Respondent that the employees were concerned about an immigration audit taking place at its facility and on about July 10 and 14 the Respondent received letters from HSI stating that they apprehended nine named employees of the Respondent who were found not to be authorized to work in the United States and on July 13 the Respondent notified the Union that it had received these letters and Abraham requested a copy of the letters including the named employees. Respondent stated that it would discuss this request at the next bargaining session. During the July 16 negotiating session, Respondent gave Abraham copies of the letter, but with the employees' names redact-

ed, citing the sensitive nature of the ongoing HSI audit. One of the letters dated July 10, states, inter alia, "This letter is to inform you that, according to the records checked by HSI, the following employees appear, *at the present time* [emphasis added], not to be authorized to work in the United States." On July 22, Respondent wrote to an employee who was among those who was among those who HSI determined to lack the proper documentation: "You must provide the necessary documentation demonstrating that you are eligible to work in the United States by August 5, 2015." The Union requested an unredacted copy of the July 10 and 14 letters and repeated this request on July 21. By letter dated July 23, the Union asked Respondent what type of assurance of confidentiality it was seeking in order to provide it with the unredacted letters and by letter dated July 27, Respondent stated that the Union must provide it with a confidentiality agreement with respect to the release of the names of the employees listed in the HSI letters. At a meeting on August 5, Respondent repeated that it would not release the names of the employees in the letters until the parties agreed to a confidentiality agreement and, at the Union's request, drafted such an agreement and gave it to the Union, but the Union has not executed the agreement and the Respondent has not furnished the Union with unredacted versions of the letters.

In *APRA Fuel Oil Buyers Group, Inc.*, 320 NLRB 408 (1995), the Board, confronted with the issue of whether it should grant its traditional make whole remedy, including reinstatement and backpay, to undocumented workers, stated: "we find that IRCA [Immigration Reform and Control Act of 1986] and the NLRA can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace." In addition (at p. 410), the Board stated:

> In exercising our broad authority to remedy violations of the Act, however, we are fully cognizant of our obligation to consider with care Congressional mandates in other areas of public policy. As the Court pointed out in *Southern Steamship v. NLRB, 316 U.S. 31 (1942),* the Board may not "apply the policies of its statute so single-mindedly as to ignore other equally important Congressional objectives."

I note that while the July 10 and 14 letters from HSI state that the named employees "were deemed by ICE to be unauthorized to work in the United States," the July 17 letter begins by stating that the named employees "…did not appear to be authorized to work in the United States" and "…at the present time" were not authorized to work in the Unites States. The letters also state that the employees can remain employed if they present valid identification and employment eligibility documentation acceptable for completing I-9s. In other words, the ICE determination was a preliminary one that was capable of being corrected and reversed. Regardless, on July 16, Respondent notified its employees that it intended to give severance pay to the affected employees, and on July 22 notified the nine employees that due to the audit, they were being terminated. The Union requested the unredacted letters, but was never given them.

In *Aramark Facility Services v. SEIU, Local 1877*, 530 F.3d 817 (9th Cir. 2008), SSA sent the employer "no-match letters stating that the Social Security information provided by the employer for forty eight did not match the SSA Database. Upon receiving this letter, the employer notified the listed employees that they had 3 days to correct the situation. Seven to 10 days later it fired 33 employee who did not comply in the timely manner. The union filed a grievance over the discharge and at an arbitration, the arbitrator ruled in favor of the union and awarded the employees reinstatement and backpay finding that there was no convincing evidence that the employees were undocumented. The Court refused to overturn the arbitration stating, "…mismatches could generate a no-match letter for many reasons, including typographical errors, name changes, compound last names prevalent in immigration communities, and inaccurate or incomplete employer records. By SSA's own estimates, approximately 17.8 million of the 430 million entries in its database contain errors…, As a result an SSN discrepancy does not *automatically* [emphasis supplied] mean that an employee is undocumented or lacks proper work authorization." The court further stated:

> To the same effect are statements from the Office of Special Counsel of Immigration- Related Practices, which is an agency of the Department of Justice authorized to investigate unfair immigration-related employment practices. The Office of Special Counsel states that "[a] no match does not mean that an individual is undocumented" and that employers "should not use the mismatch letter by itself as a reason for taking any adverse employment action against any employee."

The court, in enforcing the arbitrator's award, found: "In sum, the letters Aramark received are not intended by the SSA to contain 'positive information' of immigration status and could be triggered by numerous reasons other than fraudulent documents."

The E-Verify Memorandum of Understanding For Employers, ("MOU") at article II, paragraph 13, states inter alia:

> The employer agrees not to take any adverse action against an employee based upon the employee's perceived employment eligibility status while SSA or DHS is processing the verification request unless the Employer obtains knowledge that the employee is not work authorized. The Employer understands that an initial inability of the SSA or DHS automated verification system to verify work authorization, a tentative nonconfirmation, a case of continuance (indicating the need for additional time for the government to resolve a case), or a finding of a photo mismatch, does not establish, and should not be interpreted as, evidence that the employee is not work authorized. In any of such cases, the employee must be provided a full and fair opportunity to contest the finding, and if he or she does so, the employee may not be terminated or suffer any adverse employment consequences based upon the employee's perceived employment eligibility status…until and unless secondary verification by SSA or DHS has been completed and a final nonconfirmation has been issued.

The July 10, 13, and 17 letters from HSI were not a fait accompli and these unredacted letters were relevant to the Union in their representation status for the affected employees. If the Union had the names of these employees it might have been able to assist them with their immigration problem by directing them how to obtain the required documents to maintain their employment with the Respondent. By not furnishing the Union with the letters, with the employees names, the Respondent has violated Section 8(a) (1)(5) of the Act.

The final issue is whether the Respondent unilaterally enrolled and implemented the E-Verify employment eligibility verification program on May 13, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the conduct and the effects of the conduct, in violation of Section 8(a)(1)(5) of the Act. The Union has been the collective-bargaining representative of certain employees of the Respondent and the parties have had a longstanding collective-bargaining relationship. The most recent contract was ratified by the Union on February 24, 2016. On January 27 Respondent received a letter from HSI informing them of an impending inspection of their I-9 Forms, together with a subpoena requiring the Respondent to make the documents available for inspection. During this HSI audit, "and in order to avoid a catastrophic loss to its workforce should another audit occur in the future, Ruprecht enrolled in the E-Verify system on May 13, 2015," and since that date it has utilized E-Verify to verify the eligibility of over 40 new bargaining unit employees to work in the United States, although it was neither statutorily mandated nor required by the federal government to enroll in E-Verify. The Respondent employs E-Verify only for new employees; existing employees prior to May 15 were not affected by its implementation.

MOU article II, paragraphs 9 and 10 state, inter alia:

> The Employer is strictly prohibited from creating an E-Verify case before the employee has been hired, meaning that a firm offer of employment was extended and accepted and Form I-9 was completed. The Employer agrees to create an E-Verify case for new employees within three Employer business days after each employee has been hired…
>
> The Employer agrees not to use E-Verify for pre-employment screening of job applicants, in support of any unlawful employment practice, or for any other use that this MOU or the E-Verify User Manual does not authorize.

Briefly stated, when an employer enrolls in the program, it agrees to forward Form I-9 to DHS within three business days after the employee is hired. This information is then checked against SSA, DHS, and DOS records with three possible results: 1. Employment Authorized. The information submitted matched SSA and/or DHS records; 2. SSA or DHS Tentative Nonconfirmation (TNC). The information submitted does not initially match SSA or DHS records. Additional action is required; or 3. DHS Verification in Process. The case is referred to DHS for further verification. Under number 2, TNC, the employee has ten days after notification of TNC to decide whether to contest, or not to contest, the decision. If the employees decides to contest the determination, he/she must visit an SSA office within 8 business days to attempt to correct the situation. If the employee does not contest the determination, the employer may terminate the employment without criminal or civil liability. The MOU at page 31 states: "You may not terminate, suspend, delay training, withhold pay, lower pay or take any other adverse action against an employee based on the employees decision to contest an SSA TNC or while his or her case is still pending with SSA."

As the Respondent enrolled in the E-Verify system without notice to, or bargaining with, the Union, the initial issue is whether it is a term and condition of employment requiring prior bargaining, and I find that it is. In *Aramark Educational Services, Inc.*, 355 NLRB 60 (2010), the employer, without prior notice to the union representing some of its employees, changed its policy regarding verification of social security numbers for employees with discrepancies in these numbers, as a result of no-match lists sent by the Social Security Administration, by disciplining employees who failed to correct the discrepancies. As this change affected the employees' terms and conditions of employment, it was found to be a mandatory subject of bargaining and that the unilateral change violated Section 8(a)(1)(5) of the Act. In *Washington Beef, Inc.*, 328 NLRB 612, 620 (1999), one of the issues involved the employer refusing to bargain with the union over the amount of time given to a bargaining unit employees to establish that they had valid authentic work documents. The judge, as affirmed by the Board, stated: "On this point, there can be no question that the length of time given to aliens in which to establish they possess genuine work documents constitutes a term and condition of employment over which Respondent must bargain upon request." Counsel for the Respondent, citing *Star Tribune*, 295 NLRB 543, 546 (1989), defends that since E-Verify is only applied to new hires, not existing employees, it does not violate the Act, while counsel for the General Counsel and counsel for the Charging Parties, in their briefs, stress that E-Verify requires that employees must be hired before being eligible for E-Verify scrutiny.

In *Star Tribune*, supra, the judge found that unilateral preemployment medical screening, including drug and alcohol screening for prospective employees, violated Section 8(a)(1)(5) of the Act. In reversing the judge, the Board found that the obligation to bargain extends only to terms and conditions of employment of the employer's "employees," and that applicants are not employees within the meaning of the Act:

> We conclude that applicants for employment are not "employees" within the meaning of the collective-bargaining obligations of the Act. Applicants for employment do not fall within the ordinary meaning of an employer's "employees." Applicants perform no services for the employer, are paid no wages, and are under no restrictions as to other employment or activities.

The Board reached a similar conclusion in *United States Postal Service*, 308 NLRB 1305, 1308 (1992). However, as the

E-Verify MOU states repeatedly, these are not job applicants, who are not eligible for this program. The individuals must have been tendered an offer that they accepted, and the employer has three business days to submit the I-9. Even though they are newly hired employees with three days or less of employment with the employer, they are "employees" within the meaning of the Act. I therefore find that by unilaterally implementing E-Verify, the Respondent violated Section 8(a)(1)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. As stated in the Statement of Issues Presented in the joint motion and stipulations of facts, I find (1) the Respondent unilaterally transferred bargaining unit work to temporary employment agency employees on May 15, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, in violation of Section 8(a)(1)(5) of the Act; (2) the Respondent unilaterally enrolled and implemented the E-Verify employment eligibility verification program on May 13 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, in violation of Section 8(a)(1)(5) of the Act; (3) the Respondent bypassed the Union and dealt directly with its employees about severance pay to be paid to terminated employees, in violation of Section 8(a)(1)(5) of the Act; and (4) the Respondent failed to furnish the Union with the unredacted documents containing the names of employees with suspect employment documents that it requested on about July 14, also in violation of Section 8(a)(1)(5) of the Act.

REMEDY

As for violation (1), I recommend that the Respondent be ordered to negotiate with the Union prior to employing temporary employment agency employees and restore the status quo *ante* by restoring the unit to where it would have been without the use of these temporary employees, if they are still employed by the Respondent. Further, I would leave for the compliance stage the determination of whether any backpay is due because of the employment of these temporary employees. As to violation (2), I recommend that, at the request of the Union, the Respondent be ordered to withdraw from the E-Verify system and to bargain in good faith with the Union about its participation in the E-Verify system and re-enroll in the system only pursuant to agreement with the Union or as a result of a valid impasse in its negotiations with the Union. As for violation (4), within 10 days of this decision, furnish the Union with unredacted copies of the letters stating the names of the employees with suspect employment documents that it had requested on about July 14, 2015.

Upon the foregoing joint motion and stipulation of facts and exhibits, the conclusions of law and the entire record, I hereby issue the following recommended[1]

ORDER

The Respondent, The Ruprecht Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union over its use of temporary employment agency employees without prior notice to the Union.

(b) Unilaterally changing the terms and conditions of its employees by enrolling in the E-Verify program without prior notice to the Union and without affording the Union an opportunity to bargain about the conduct and the effects of the conduct.

(c) Dealing directly with its employees and bypassing the Union on the subject of severance pay to be paid to terminated employees.

(d) Failing and refusing to furnish the Union with information that is relevant to it as the collective-bargaining representative of certain of Respondent's employees.

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

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

(a) Within 10 days from the date of this Decision, furnish to the Union copies of all the letters received from HSI containing the names of employees apprehended by U.S. Immigration and Custom Enforcement.

(b) Upon request of the Union rescind its participation in the E-Verify program and bargain in good faith with the Union regarding its participation in the program.

(c) Within 14 days after service by the Region, post at its facility in Mundelein, Illinois, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 13, 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. 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 May 13, 2015.

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[1] 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.

[2] 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."

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

Dated, Washington, D.C. May 13, 2016

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain with UNITE HERE Local 1 (the Union) over our use of temporary employment agency employees without prior notice to the Union.

WE WILL NOT unilaterally change your terms and conditions of its employees without prior notice to the Union and without affording the Union an opportunity to bargain about the conduct and the effects of the conduct.

WE WILL NOT bypass the Union and deal directly with you on the subject of severance pay or any other term or condition of employment.

WE WILL NOT refuse to furnish the Union with information that is relevant to it 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 guaranteed you by Section 7 of the Act.

WE WILL, upon the request of the Union, withdraw from participating in E-Verify and WE WILL bargain in good faith with the Union about participating in this program.

WE WILL furnish the Union with the letters we received from U.S. Immigration and Customs Enforcement containing the names of employees with suspect employment documents.

WE WILL bargain in good faith with the Union over the terms and conditions of employment of our employees represented by the Union.

RUPRECHT COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-155048 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 DISTRICT OF COLUMBIA CIRCUIT

THE RUPRECHT COMPANY	:	
Petitioner,	:	Case No. _____
vs.	:	
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent.	:	

PETITIONER'S RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal rule of Appellate Procedure 26.1 and Circuit Rule 26.1 and to enable the Judges of the Court to evaluate possible disqualifications or recusal, the undersigned counsel for Petitioner The Ruprecht Company ("Ruprecht") states that Ruprecht has a Delaware parent company (Bonvivant, LLC) which owns 100% of Ruprecht Company shares. BonVivant, LLC in turn is owned 100% by Macret, a Cayman Islands Holding Company. Further, Ruprecht is not owned by any publically traded organization. Lastly, Ruprecht is a meat processor and food manufacturer serving both domestic and international customers in the foodservice and retail sectors.

Respectfully submitted,

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Counsel for Petitioner, The Ruprecht Company

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018 a true and correct copy of the foregoing Rule 26.1 disclosure was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that on October 29, 2018, a true and correct copy of the foregoing was served via e-mail upon the following:

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/s/ Aaron T. Tulencik
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