

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

**NOAH'S ARK PROCESSORS, LLC d/b/a
WR RESERVE**

and

**Cases 14-CA-217400
14-CA-224183
14-CA-226096
14-CA-231643
14-CA-235111**

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL NO. 293**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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Counsel for the General Counsel William LeMaster and Julie Covell respectfully file this brief with the Honorable Andrew S. Gollin, Administrative Law Judge (ALJ). This case is before the ALJ based upon a Second Consolidated Complaint and Notice of Hearing alleging that Noah's Ark Processors, LLC d/b/a WR Reserve (Respondent) violated Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act (Act). The issues in this matter were heard by the ALJ in Hastings, Nebraska on March 18-22, 2019, and are addressed below.

I. Background

In or about 2011, Respondent's predecessor, Nebraska Prime Group, voluntarily recognized United Food and Commercial Workers Union Local 293 (Union) as the collective-bargaining representative of all production, maintenance, shag drivers and distribution employees, herein called the Unit, at the facility located at 1009 West M Street, Hastings, Nebraska. Nebraska Prime Group and the Union negotiated a collective-bargaining agreement effective January 28, 2013 to January 28, 2018. Effective January 1, 2015, Respondent acquired Nebraska Prime Group's operation in Hastings and since that date has continued to operate the business of Nebraska Prime Group in basically unchanged form, has employed as a majority of its employees who were previously employees of Nebraska Prime Group, and adopted the collective-bargaining agreement between Nebraska Prime Group and the Union. Since approximately January 1, 2015, Respondent has acted as a successor to Nebraska Prime Group. GC 1-EEE, p. 3, 7-8; GC 1-GGG, p. 4, 5; JT 26.¹

The evidence set forth at hearing established that Respondent started to ignore its obligations under the Act in mid-2017, when it took the position that Union Business

¹ References will be denoted using the following abbreviations followed by page numbers: Trial Transcript (T.); General Counsel's exhibits (GC); Respondent's exhibits (R); and Joint exhibits (JT).

Representative Terry Mostek solicited Respondent's employees to seek employment elsewhere. T. 324, 331. The record established that at that time, Respondent's CEO Fischel Ziegelheim and his business partner Michael Koenig instructed Human Resources Manager Lidia Acosta not to provide the Union with any information about employees going forward. T. 591. Ziegelheim and Koenig also banned all Union representatives from accessing Respondent's facility and as of the hearing in this matter, Respondent has not allowed any Union representatives to access the facility since around the end of June 2017. T. 331-332, 335, 590, 734, 749-750. The unfair labor practices identified in the General Counsel's Second Consolidated Complaint are a continuation of Respondent's complete disregard for its obligations under the Act that originated in mid-2017 and continue to the present.

II. Respondent's violations of Section 8(a)(1) of the Act

A. About March 2018, Respondent made coercive statements to employees regarding the Union²

1. Facts

During the month of March 2018, Respondent conducted a meeting with employees in the cafeteria at its facility. During this meeting, an employee requested a pay raise. In response, Respondent's Operations Manager Paul (Pablo) Hernandez told employees present for the meeting that there was no union at the facility, Respondent did not allow a union at the facility, Respondent was going to get rid of the Union, and when Respondent removed the Union employees could get a raise. T. 389-392, 459-461.

2. Legal analysis

"The test for evaluating whether an employer's conduct or statements violate Section

² Complaint Paragraph 5(a).

8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities.” *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 14 (2015); *Park ‘N Fly, Inc.*, 349 NLRB 132, 140 (2007). The Board has historically found similar employer statements to employees to have a reasonable tendency to interfere with employees’ protected activities. See *Spectrum Health*, 353 NLRB 996, 1005 (2009) (two-member decision)(“to tell employees that there was no union when, in fact, there was, undermined the Union’s representative role’ and, therefore, constituted an independent violation of Section 8(a)(1)”), adopted 355 NLRB No. 101 (2010), citing *Windsor Convalescent Ctr.*, 351 NLRB 975, 987-88 (2007), *enfd. in relevant part* 570 F.3d 354 (D.C. Cir. 2009); *Berland Paint City*, 199 NLRB 927 (1973)(employer violated Section 8(a)(1) by threatening to “get rid” of the union); *Royal Himmel Distilling Co.*, 203 NLRB 370, 375 (1973)(supervisor’s comments to employees that the employer’s benefit programs would continue in force and that their wages might thereafter be raised if they rid themselves of union representation contributed to employer’s overall program of unlawful solicitation and encouragement); *see also, e.g., Hi-Tech Cable*, 318 NLRB 280, 283 (1995), *enfd. in pertinent part*, 128 F.3d 271 (5th Cir. 1997)

As set forth above, Board law establishes that Paul Hernandez’s statements to employees in March 2018 violated Section 8(a)(1) of the Act

B. About March 27, 2018, Respondent, by Paul Hernandez and Mike Helzer, made coercive statements to employees regarding their protected, concerted activities and terminated ten employees for engaging in a protected work stoppage.³

1. Facts

In the weeks leading up to March 27, 2018, employees in Respondent’s packing (or

³ Complaint Paragraphs 5(b) and 6.

packaging) department talked to supervision and human resources about their wages and their desire for a raise. T. 477-478; R 10. Packaging employees had also learned that a less senior employee in a different department was making more money. This issue had been raised with their supervisor, Joel Murillo. T. 257, 493-494, 808-809. Murillo testified that packaging employee Sandra Diaz had complained to him a couple of times about the issue and that she had told him “there is a lot of people getting mad because (another employee) get a raise and we don’t.” T. 809-810. On March 26, 2018, a group of packaging employees discussed the matter and decided to gather in the cafeteria the following morning in order to talk to Respondent’s management. T. 257-260, 470, 494. As packaging employee Kyle Anzualdo testified, the employees decided to go to the cafeteria, “Because if we are on the floor, then (management) won’t pay attention.” T. 462. Guadalupe Ortiz testified that the cafeteria is “where (the employees) would be heard the best.” T. 257. Sandra Diaz testified that after getting so much of a run-around from human resources and packaging supervisor Joel Murillo, employees wanted to follow-up with a higher-level manager. T. 479-480. Murillo overheard the group’s plan and advised against it. T. 258-259. Because the issue was so important, the group did not heed Murillo’s warning and gathered in the cafeteria the next day to address their concerns with management.

First thing on the morning of March 27, 2018, a group of approximately 20-30 employees, primarily from packaging, gathered in the cafeteria with the goal of addressing these issues with management. Union steward Guadalupe Ortiz was the only employee in the group who spoke English and she acted as the group’s spokesperson and translator. T. 264-265, 471, 495-496. The first supervisor to engage the group was Fabrication Superintendent Chris Kitch. T. 262, 496. Kitch does not speak fluent Spanish and as a result, communicated directly with Ortiz.

T. 263-264, 496. Kitch asked Ortiz why employees were in the cafeteria and not on the floor working. T. 264. Ortiz responded that the employees wanted to know why raises had not been given and why there were employees making more than others. T. 265. Kitch's response was that was determined by the Union contract. T. 265. Ortiz would translate for the group as she interacted with any English-speaking supervisor. T. 265-266. Ortiz told Kitch that she tried explaining to her coworkers but they wanted an explanation from Kitch. T. 266. Even though Ortiz had served as a Union steward for five months, she did not have the authority to file grievances on behalf of employees. If any issues were brought to her attention, she would notify Union Representative Terry Mostek. T. 267. After notifying Kitch that the employees wanted an explanation directly from him, he responded that he was going to try and find the plant owner. T. 267. Once Kitch departed the cafeteria, the employees talked amongst each other. It was determined that if the company fired one of the employees, the entire group would leave. T. 269. There was no discussion of quitting. T. 268. The group had gathered in the cafeteria after they had first acquired their equipment necessary for work that day – helmet, frock, gloves, boots, etc – with the intent to report to their work areas. T. 263.

Approximately fifteen minutes later, Chris Kitch returned with Operations Manager Paul (Pablo) Hernandez. T. 268. Hernandez speaks Spanish and was able to communicate with the group without a translator. T. 269. Ortiz told Hernandez that the group needed a raise. T. 471. Hernandez responded that he could not do anything because he was not in charge of raises. T. 471. Hernandez testified that he told the employees that what they were doing was not the way to do things and that what they were doing would just cause them to lose their jobs. T. 213. Hernandez told the employees that those who did not want to work could go home. T. 269, 471, 498. Hernandez confirmed on the stand that he told employees, “they needed to go to work or

they could lose their jobs.” T. 213-214. Hernandez was angry and yelled at the employees when they asked about wages. T. 481. Hernandez confirmed that when the protesting employees started talking to employees from the kill floor about what was going on, he asked them to leave the property. T. 214; GC 16. Hernandez told the employees they had to leave the facility or else he would call the police. T. 463, 472-473. A group of approximately ten employees got up and started to walk toward the door. T. 269, 471. In response, Hernandez instructed his supervisors to write down the employees’ names because they would not be permitted to return. T. 269-270, 481, 501. Two groups of employees departed the cafeteria that morning with both groups walking down the same hallway to get to their destination. One group departed the building while the other group returned to the work floor. T. 270-271. As the employees walked down the hallway, Hernandez told the employees, “You guys either go to work, leave now, or you’re terminated.” T. 271. The employees who went outside returned their frocks, gloves, and equipment to the supply room because they are not permitted to be taken outside. T. 272, 471, 482, 498.

Once the employees were outside in the parking lot, Plant Manager Mike Helzer joined Paul Hernandez to address the employees. T. 272, 483. Helzer does not speak Spanish and talked directly to Ortiz as the group’s spokesperson/translator. T. 273. Helzer told the employees that what they were doing violated the collective-bargaining agreement.⁴ T. 273. Ortiz did not know what Helzer meant but responded that might be but if the group left, she would leave with them. T. 273-274. Helzer replied that there was a solution to the problem and that was to go to work and discuss the problem later in the day. T. 274. The employees rejected Helzer’s proposal because they were fearful that if they returned to the building, Respondent would forget about

⁴ The collective-bargaining agreement had expired on January 28, 2018.

their issues and there would be no solution to their concerns. T. 274. Once Helzer was informed of this response, Helzer and Hernandez instructed the employees to leave the parking lot because the police would be there shortly. T. 275, 464, 483. On direct questioning by Respondent's attorney, Helzer confirmed that he threatened to call the police if the employees did not leave the premises. T. 738. At that point, Paul Hernandez instructed employees to return their work ID's. T. 215, 275, 464, 473, 483. Employees need their work ID's to enter the gate at the guard shack in order to access Respondent's facility and they need them to clock in for work once inside. T. 215, 275-276. As instructed, the employees turned in their ID's and then left the Respondent's premises. T. 276, 464, 484, 501. The employees asked Hernandez if they could wait for Human Resources Manager Lidia Acosta to arrive. T. 484. Hernandez denied the request and instructed employees to leave or he would call the police. T. 484, 502.

A couple of hours later, at 8:49 a.m., Hernandez emailed a summary of the events to Lidia Acosta. T. 216; GC 16. In his summary, Hernandez wrote that the employees had gathered in the cafeteria "because they had an issue with needing a raise." GC 16. Hernandez wrote that what they were doing was not the way to address their issue and that a grievance should be filed. GC 16. When the employees did not agree to return to work, Hernandez told the employees they would be considered terminated for quitting or terminated for not following a supervisor's instruction. GC 16. When those employees started talking to other team members "asking them to walk off with them" is when Hernandez asked the packing employees to leave the property. GC 16. Hernandez confirmed that he requested the employees return their work ID's once they reached the parking lot. GC 16.

On March 30, 2018, supervisor Joel Murillo completed separation forms for ten employees involved in the work stoppage on March 27, 2018. T. 297; JT 16. For each employee,

Murillo marked “Voluntary Resignation – Job Abandonment” and “Involuntary Termination – Violation of company policy.” JT 16. Murillo explained that he marked “Involuntary Termination – Violation of company policy” because the employees refused to go back to work on March 27, 2018. T. 299. Murillo also marked that each employee was not to be rehired. Murillo marked “No” in response to the question, “Expect to recall person to work?” JT 16. In explaining why, Murillo testified, “Because they do that one time, they can do it again. Acting like that, they can act again the same way.” T. 300.

Several weeks later, a few of the employees instructed to leave Respondent’s facility, turn in their ID’s and depart the premises contacted Lidia Acosta about returning to work. Those employees included Sandra Diaz, Maria Diaz and Brittney Spratt. T. 484-485, 502-504, 569-570. The employees turned in a statement summarizing what took place on March 27, 2018. T. 485; JT 17. In the statement written by Sandra Diaz, Diaz confirmed that the employees wanted an explanation for why employees with less seniority were making more money than those in packing. JT 17, p. 4. While the employees were gathered in the cafeteria, management engaged employees in a rude tone even though the employees only wanted an explanation. JT 17, p. 4. Management gave the employees ten minutes to leave and Paul Hernandez ordered supervisor Joel Murillo to write down the employees’ names who left and they would not be permitted to return. JT 17, p. 4. The employees were confused and turned in their equipment so that there would be no further problems. After they gathered in the parking lot, the employees wanted to talk to Lidia Acosta. However, Mike Helzer told the employees they had two minutes to leave and Paul Hernandez rudely requested employees turn in their work ID’s. JT 17, p. 4.

2. Legal analysis

(a) Employees were engaged in protected, concerted activity

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009). An employer violates the Act if it takes an adverse employment action that is “motivated by the employee's protected concerted activity.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Meyers Industries (Meyers II)*, 281 NLRB 882(1986). In order for employee conduct to fall within the protection of Section 7, it must be both concerted and engaged in for the purpose of “mutual aid or protection.” *Holling Press, Inc.*, 343 NLRB 301, 302 (2004). To be "concerted," an employee's actions must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. The Board's definition has also presented an inclusive interpretation of concerted activity that covers individual activities that “seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries*, 281 NLRB 882, 887 (1986). Here, the evidence is overwhelming that the packing employees were engaged in protected and concerted activity on March 27, 2018. The underlying issue they were raising, employees' wages, is clearly a term and condition of employment. *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds 8 F.3d 209, 214 (D.C. Cir. 1996). The concerted nature of the employees' conduct and Respondent's knowledge of the concerted conduct is apparent and undisputed. The employees were engaged in a protected work stoppage over issues related to their pay – the desire to have an explanation for why a newly

hired employee was being paid a higher wage rate than more senior employees and to request a raise. It is well established that work stoppages are protected by Section 7, as are activities engaged in for the purpose of applying economic pressure on employers. See *Atlantic Scaffolding, Co.*, 356 NLRB 835, 836-837 (2011); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962); The Board has long held that this protection includes the right to remain on an employer's property for a reasonable period of time “in a sincere effort to meet with management” over workplace grievances. *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (quoting *Crenlo, Div. of GF Business Equipment, Inc. v. NLRB*, 529 F.2d 201, 204 (8th Cir. 1975)). There is a balance between employees’ Section 7 rights and an employer’s private property rights. The Board has established factors that it will review in balancing which party’s rights should prevail in the context of an on-site work stoppage:(1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged. *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

(b) Respondent threatened employees for engaging in protected, concerted activity

In the process of converting the employees’ protected work stoppage into an unlawful termination, Respondent’s managers committed independent Section 8(a)(1) violations in the statements they made to employees engaged in protected, concerted activity. The Board has held

that an employer's threat to terminate employees if they engage in a strike or other protected work stoppage violates Section 8(a)(1) of the Act. Paul Hernandez's (1) threats to employees that they must go to work or leave, (2) threats to employees that employees who do not go to work or leave the facility will be terminated, (3) statements that employees' names will be written down and that they will not be permitted to return to work, and (4) Hernandez and Helzer's statements to employees that Respondent will call the police on employees if they do not leave the facility and/or property while engaged in protected activity constitute coercive statements in response to employees engaged in a protected work stoppage. See *Benesight, Inc.*, 337 NLRB 282, 283 (2001)(unlawful threat of termination in response to employees engaged in a protected work stoppage); *Robertson Industries*, 216 NLRB 361, 361-362 (1975); *Sands Hotel and Casino*, 306 NLRB 172, 184 (1992)(employer statement to employees that their termination was a result of their protected activity violative of Section 8(a)(1)).

For these reasons, on March 27, 2018, Respondent, by Paul Hernandez and Mike Helzer, made unlawful threats and coercive statements to employees in violation of Section 8(a)(1) of the Act.

(c) Respondent terminated employees for engaging in protected, concerted activity

Regarding the separation of employment for those employees involved in the protected work stoppage on March 27, 2018, Respondent may point to the no-strike provision that existed in Article 16 of the parties' 2013-2018 collective-bargaining agreement. JT 1, p. 9. Such an argument lacks merit. While the collective-bargaining agreement contained a no-strike provision, the contract had expired on January 28, 2018 without an extension. It is well-settled that a no-strike clause does not survive an expired contract. See *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1657-1658 (2015); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991).

While Respondent may also argue that the employees abandoned their jobs, the record evidence contradicts this position. Respondent was faced with an escalating situation it sought to rid itself of as quickly as possible. Plant Manager Mike Helzer testified to learning that employees in Respondent's shipping department wanted a raise. T. 735. Fabrication Superintendent Chris Kitch brought it to Helzer's attention that there were shipping employees who would not go to work because they wanted more money. T. 750-752. Helzer went to the shipping dock and addressed the employees, advising that he could not give a raise because, "We are under a contract. I cannot give out any raises to anybody." T. 752. Helzer then had to address a larger group of employees primarily from packaging that were also demanding a wage increase where, in Helzer's words, "it got more serious." T. 735-736. On March 27, 2018, Respondent was faced with a scenario where employees from multiple departments were complaining about their wages and Respondent sought to quash those complaints as quickly as possible by any means necessary. The group that "got more serious" were the same employees who Paul Hernandez admittedly ordered out of the building once the employees started communicating with other employees from the kill floor as to why they were present in the cafeteria. T. 214; GC 16. Respondent sought to rid itself of these "pot stirrers." By Respondent's coercive statements and actions, any employee would reasonably understand that their employment had been ended by Respondent. The employees had reported to work with the intention of addressing a wrong they believed existed with their wages, yet they were fully prepared to report to their work area. Each employee had acquired their equipment necessary for work and were set to report to their department. It was Respondent who ordered them to do otherwise. Specifically, Operations Manager Paul Hernandez instructed employees to leave the facility, informed them that their protected activity would cost them their jobs and that if they did

not go to work they could lose their jobs, instructed a supervisor to written down those employees' names to ensure they could not come back, and confiscated employee IDs necessary to go through security to access the facility. Both Hernandez and Helzer also threatened to call the police on the employees as they continued to engage in protected conduct. The employees were engaged in a protected work stoppage when they gathered in the cafeteria and that work stoppage continued as the employees gathered in the parking lot at the direction of the Respondent. When the employees left Respondent's premises on March 27, 2018, no reasonable employees would understand that their jobs continued to exist. The accusation of job abandonment is not supported by the record. Respondent ordered the employees to leave the facility, threatened them with police action and ordered them to turn in the one item that is necessary for them to gain access to the facility.

Lastly, the balancing of the *Quietflex* factors overwhelmingly supports the protected activity of the employees. The employees met in the cafeteria before work in order to address their wages. The work stoppage was peaceful. The work stoppage did not interfere with production or deprive the employer of access to its property (whether in the cafeteria or the parking lot). Employees were not provided ample opportunity to address their issues with management as they were immediately warned about their actions with threats of removal, termination and the police. The duration of the work stoppage was minimal. Employees did not remain on the premises beyond their shift. Employees did not attempt to seize Respondent's property. Ultimately, employees were separated from their employment because they engaged in the protected work stoppage in question.

Based on the foregoing, the record established that Respondent violated Section 8(a)(1) of the Act by terminating ten employees in retaliation for their protected concerted activities on

March 27, 2018.

C. About September 2018, Respondent, by Lidia Acosta, solicited employees to resign from the Union and interrogated employees about their support for the Union⁵

1. Facts

About September 2018, current employee and Union steward Celeste Sanchez observed Human Resources Manager Lidia Acosta approach employees on the work room floor with documents to resign from the Union.⁶ T. 380-387. Sanchez observed Acosta approach two employees, Richard and Veronica (last names unknown), as they worked. T. 381-382. Acosta approached the two employees with documents for them to sign. T. 383. Although Sanchez could not overhear their conversation, she asked Supervisor Karen Mendoza about the interaction and Mendoza responded that the employees were resigning from the Union. T. 383. Sanchez observed Richard and Veronica sign the documents presented to them to resign from the Union. T. 386. Later that same day, Sanchez observed Acosta approach a second set of employees on the work room floor, Gina and Torres (last and first names unknown). T. 384-385. Acosta had the same booklet and document she had in her possession when she had approached Richard and Veronica. T. 386. Contrary to Richard and Veronica, Acosta was not successful in assisting or convincing those employees to resign from the Union as Sanchez observed Acosta walk away from the employees without them signing. T. 386-387.

2. Legal analysis

Celeste Sanchez's testimony was un rebutted by Respondent. Although it had ample opportunities, Respondent offered no testimony denying that Lidia Acosta solicited employees to

⁵ Complaint Paragraphs 5(c)(1) and (3)

⁶ Celeste Sanchez testified that she could not remember when she observed Acosta but estimated it had been about six months prior to the hearing. T. 385.

resign from the Union. The Board has consistently found that a Respondent violates Section 8(a)(1) of the Act if it solicits employees to resign from the Union. *Wilson Tree Co., Inc.*, 312 NLRB 883, 895 (1993)(employer repeatedly asked employees to resign from the union); *Loudon Steel, Inc.*, 340 NLRB 307, 307 n.2 and 311 (2003); *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001) (“employer tactics which are reasonably calculated to elicit such a response [indication of support or rejection of employer’s position] constitute unlawful interrogation, or polling, of employees”), enfd. 301 F.3d 167 (3d Cir. 2002); *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995); see also *Adair Standish Corp.*, 290 NLRB 317, 317–318 (1988)(employer violated Section 8(a)(1) where notice to employees soliciting revocation of their union authorization cards went beyond simple statement of employee rights and occurred in context of other contemporaneous unfair labor practices), enfd. in relevant part 912 F.2d 854, 860 (6th Cir. 1990); *County Window Cleaning Co.*, 328 NLRB 190, 197 (1999) (violation where supervisor put employees on the spot by stopping two, offering them a prepared letter revoking their union card, and making other contemporaneous unlawful statements).

Additionally, the Board has found that placing employees in a position “in which they reasonably would feel pressured to ‘make an observable choice that demonstrates their support for or rejection of the union’” is coercive. See *Allegheny Ludlum Corp.*, supra at 739-740; accord: *Hatteras Yachts, AMF Inc.*, 207 NLRB 1043, 1043 fn. 3 (1973)(maintenance of letters revoking dues authorization cards in personnel office where employer could observe which employees withdrew support unlawful). Here, Respondent placed employees in a situation where they had to make an “observable choice” demonstrating their support or rejection of the Union when Acosta approached employees on the work floor soliciting their resignations from the Union. In doing so, Acosta was asking employees about their Union support simply by making

them choose whether to discontinue their membership and dues deduction authorization. Those employees Acosta approached were required to make an “observable choice” in her presence – were they choosing to support the Union or not.

For these reasons, Acosta’s actions constituted unlawful solicitation of employees to resign from the Union and unlawful coercive interrogations of employees’ Union support in violation of Section 8(a)(1) of the Act.

D. On various dates since January 23, 2018, Respondent, by Lidia Acosta and Dinora Murillo, provided employees with preprinted forms to resign from the Union and to revoke their dues check-off authorizations.⁷

1. Facts

Joint Exhibit 12 consists of fifty (50) forms signed by bargaining unit employees resigning from the Union and requesting that dues are no longer deducted from their paychecks. Forty-eight (48) of the fifty (50) forms are typed and read, “I _____ no longer wish to participate on (sic) the union. Please stop withdrawing my dues effective immediately.” T. 552. The forms were created by Human Resources Manager Lidia Acosta. T. 552. The bargaining unit is over 300 employees and approximately 80 percent of those are Spanish speaking employees who do not speak, read or write English. T. 553.⁸ Although a very high percentage of Respondent’s employees do not understand English, over half of the executed forms are only in English. T. 553-554. Forty-eight of the fifty forms were executed on dates between January

⁷ Complaint Paragraph 5(c)(2).

⁸ The General Counsel respectfully requests that the ALJ take notice of an error on page 553, lines 18-19 of the transcript. The General Counsel’s question was, “my recollection also is about eighty percent of the hourly employees *do not* speak, read, or write English?” Mary Junker confirmed this percentage of Spanish speaking employees on page 147 of the transcript. The overwhelming percentage of Spanish speaking employees is confirmed by the twelve witnesses the General Counsel called to the stand. Of the twelve current and former employees, only one could speak, read and write English. Respondent has supervisors who were more comfortable speaking Spanish than English. A translator was used at the hearing for this very reason.

8, 2018 and July 20, 2018.⁹

General Counsel Exhibit 20 consists of an additional fourteen (14) forms relied upon by Respondent to cease its deduction and remittance of dues to the Union. Eleven (11) of the forms were typed by Lidia Acosta and of those 11 forms, seven (7) do not have a Spanish translation.

Acosta testified that when she would obtain a signed Union resignation/revocation form, she would scan the document and e-mail it to Respondent's corporate office. T. 555. It would then be Respondent's corporate office's obligation to stop dues deduction for that employee. T. 555-556. Acosta would maintain the original signed form in the employee's personnel file in her office. T. 555.

2. Legal analysis

An employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere "wherein employees would tend to feel peril in refraining from [withdrawing]." *Mohawk Industries*, 334 NLRB 1170, 1170-1171 (2001), quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999); *Erickson's Sentry of Bend*, 273 NLRB 63 (1984)(unlawful solicitation of union resignation where employer assisted in gathering signatures on petition to withdraw union membership); *Manhattan Hospital*, 280 NLRB 113, 115 (1986)(employer which solicited resignations from the union; evidenced a continuing interest in knowing if employees intended to resign their union

⁹ January 8, 2018; January 11, 2018; January 25, 2018; February 4, 2018; February 15, 2018; February 16, 2018; February 21, 2018; March 8, 2018; March 28, 2018; March 29, 2018; April 4, 2018; April 5, 2019; April 7, 2018; April 27, 2018; June 11, 2018; July 3, 2018; July 4, 2018; July 5, 2018; July 8, 2018; July 20, 2018. *JT 12*.

membership; and, in some instances offered assistance, was engaging in conduct aimed at causing disaffection from the union and unlawfully interfered with employees' free exercise of their Sec. 7 rights); *Narricot Industries*, 353 NLRB 775, 776 (2009)(employer provided more than permissible ““ministerial aid” where an employee asked his HR director “how to oust the union” and the director prepared a petition for the inquiring employee, as well as, two other employees, telling them the number of signatures needed and directing them to return the petitions to him daily); *Winn-Dixie Stores, Inc.*, 128 NLRB 574, 588 (1960)(finding a violation of the Act where the employer prepared a form “resignation from the union” letter, addressed the envelopes to send the letters, and, saw to the mailing of the resignation letters to the union. An employer may not lawfully encourage or solicit employees to withdraw or resign from a union. *Erickson's Sentry of Bend*, 273 NLRB 63, 64 (1984)(employer conduct, found to impair employee free choice in violation of the Act, where store manager, upon request of an employee, provided language for a petition to resign from the union, which the employee copied, signed and gave to the manager in the manager's office; and, the manager discussed with the employee which other employees the manager might approach about resigning from the union, calling those employees' to his office; thereby, gave the appearance the employer favored the petition, and, encouraged the employees to sign the petition). An employer may not lawfully give advice to employees on how to resign from the union. *Florida Wire & Cable*, 333 NLRB 378, 381 (2001)(unlawful solicitation of employees to resign from the union was found where the employer gave employees advice on how to resign from the union, displayed sample resignation letters at a meeting with employees, and, mailed sample letters to employees); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997)(finding a violation of the Act where the employer prepared and distributed union resignation forms, obtained

signatures of several employees, completed and dated forms, and forwarded the forms to the union's business manager). An employer may not actively encourage employees to revoke their dues check-off authorizations. *Rock-Tenn. Co.*, 238 NLRB 403, 403-404 (1978); *Roslyn Gardens Tenants Corp.*, 294 NLRB 506, 516 (1989).

The record established that Respondent provided more than ministerial aid to employees through its creation and distribution of printed forms, often in a language that employees did not understand, to assist those employees in resigning from the Union and stopping dues deduction and remittance to the Union. Not only did Acosta create a mechanism to assist employees in resigning from the Union and revoking their dues deduction authorizations, but she approached employees on the work floor to assist them in doing so. Respondent's admitted conduct crossed the line from providing neutral information to employees about their rights to providing unlawful assistance in violation of Section 8(a)(1) of the Act.

E. On various dates since January 23, 2018, Respondent, by Lidia Acosta and Dinora Murillo, coerced employees into signing preprinted forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent.¹⁰

1. Facts

On November 6, 2017, Union Local President Mike Marty mailed a letter to Respondent's CEO Fischel Ziegelheim for two reasons. One was to schedule negotiations for a successor collective-bargaining agreement and the other was to request presumptively relevant information concerning bargaining unit employees' terms and conditions of employment. T. 658; GC 9; JT 2. In his letter, Marty requested basic information concerning Unit employees' terms and conditions of employment including but not limited to information on employees'

¹⁰ Complaint Paragraph 5(c)(4).

departments, job groups, wages, seniority, hours worked, and benefits. JT 2. It is undisputed that Respondent has failed to provide all of the information originally requested by the Union on November 6, 2017. At the hearing, Respondent did not provide any explanation for its failure to do so through any of its witnesses. However, Human Resources Manager Lidia Acosta's testimony provided an inside look at Respondent's angle at avoiding its legal obligations. Joint Exhibit 13 consists of fifty (50) printed forms in English titled "REQUEST FOR NONDISCLOSURE OF CONFIDENTIAL EMPLOYMENT INFORMATION." Each form is identical and identifies examples of confidential information possessed by Respondent for each employee including Personal (social security number, address, date of birth, marital status); Hiring (job application, resume, interview notes, employment history, employment assessments, background checks, reference checks, I-9 forms); New-Hire Paperwork (offer letters, employment contracts, handbook and policy acknowledgments); Performance (performance reviews, performance documentation, document recognition, warnings and disciplinary notices, job descriptions, documented job changes/promotions); Compensation and Benefits (salary or hourly pay rates, merit increases and bonuses, other forms of pay, pay changes, benefit information); Payroll (time card sheets, work schedules, pay stubs, direct deposit forms, authorization for deducting or withholding pay, tax forms, status change forms); Termination (termination or layoff records, resignation letter, unemployment insurance claims); and Attendance (dates and reasons for absence, time off, and leaves). The form requests that Respondent not disclose confidential information concerning the employee's employment without the employee's written consent. Lidia Acosta identified Joint Exhibit 13 as a document she received from Respondent's counsel Jerry Pigsley two or three days before she solicited the

earliest dated form signed by an employee.¹¹ T. 558-559. Beginning in early January 2018, Lidia Acosta and Human Resources Assistant Dinora Murillo started approaching employees on the work floor and ask employees if they gave Respondent permission to share their “personal information” with others. T. 560. If the employees did not give Respondent permission, Acosta or Murillo would have the employees execute the form. T. 562. Between early January 2018 and early July 2018, Acosta and Murillo successfully solicited 50 signed forms from employees.¹² The last signed form was obtained on July 5, 2018. JT 13, p. 4. Once Acosta and Murillo obtained the signed confidentiality forms, they did nothing with them. The forms were not placed in employees’ respective personnel files. When questioned why she was keeping the forms separate, Acosta did not have an answer (“I don’t know”). T. 563.

Respondent did not stop at simply soliciting employees to sign confidentiality forms in what appears to be an attempt to fabricate a confidentiality argument in not providing the Union with the presumptively relevant information it has sought since November 6, 2017. The evidence at hearing established that Respondent did not explain the form to employees and went as far as deceiving employees of the meaning of the confidentiality forms. Respondent took advantage of the language barrier that existed with 80% of the hourly employees in order to obtain signatures and Respondent provided no contradictory testimony to rebut the credible testimony of current employees. Current employee Marcial Torres Santiago went to the human resources office to resign from the Union. T. 448-449. Lidia Acosta presented Torres with a pre-printed form that he signed. After that, Acosta provided Torres a copy of Joint Exhibit 13 for his execution with the instruction that he “had to sign.” T. 450. Torres does not read English

¹¹ The earliest signed form is dated January 8, 2018. JT 13, p. 36.

¹² The forms identified in Joint Exhibit 13 are dated January 8, 2018; January 11, 2018; January 19, 2018; 2018; January 25, 2018; February 16, 2018; March 28, 2018; March 29, 2018; April 4, 2018; April 5, 2018; April 7, 2018; April 27, 2018; June 11, 2018; July 3, 2018; July 4, 2018; and July 5, 2018.

and he was bothered by signing a document he could not read. T. 450. Torres ultimately signed the detailed form in a language he could not understand. JT 13, p. 38. Current employee Aramis Hernandez Acosta testified that on February 21, 2018, he went to the human resources office in order to resign from the Union. T. 360-362. After he made his intention known, Lidia Acosta provided him with a pre-printed resignation form and he signed it. T. 360-362; JT 12, p. 1. Hernandez further testified his supervisor, Jose Madrigal, later asked him to go to the office because Acosta wanted Hernandez to sign a document. T. 362-363. When Hernandez arrived in the office, Acosta told him that “somebody wants to know about (his) information.” T. 363. Acosta presented one of the confidentiality forms to Hernandez. JT 13, p. 1. She did not explain who wanted his information. T. 363. Hernandez does not read English and Acosta did not read the document to him or explain the purpose of the document. T. 363-364. When Acosta informed Hernandez that someone wanted his information, he did not prohibit Respondent from providing it. Hernandez responded, “Okay. I am not a criminal. I haven’t committed robbery or stolen. I haven’t committed any crime in this country.” T. 363. He also told Acosta that he was fine with her sharing his information. T. 364. Acosta, taking advantage of the language barrier, told Hernandez that if he did not sign the form, the company could not disclose his information. T. 376. As he did not object, Hernandez was under the impression that by signing the form, he was authorizing the company to give away his information. Hernandez signed the form and departed. T. 363-364.

Current employee Juvencio Ramirez de la Cruz is another good example of the lengths Respondent went to deceive employees to avoid its responsibilities under the Act. On July 5, 2018, Ramirez went to human resources to stop Union dues from being deducted from his paycheck. T. 397-398. He talked to Lidia Acosta and in response to his request, Acosta

presented him with a pre-printed Union resignation form. T. 398; JT 12, p. 31. Two days later, Ramirez was punching in for the day and Dinora Murillo called him into the office.¹³ Dinora Murillo had two documents in her hand. One was the Union resignation form Ramirez had signed two days prior and the other was a blank confidentiality form. T. 402; JT 12, p. 31; JT 13, p. 32. Murillo told Ramirez that because he signed the form to resign from the Union, he needed to sign the confidentiality form. T. 403. Murillo did not explain what one form had to do with the other, other than the confidentiality form was necessary “in order to complete this transaction.” T. 403. Ramirez does not speak or read English. T. 397. Murillo did not explain the document to him and she did not read it to him. T. 403, 408. Although Ramirez signed the document two days after he resigned from the Union, Murillo instructed him to back date the confidentiality form to match the same date that he had resigned from the Union. T. 406. She did not give him a reason. T. 406. Murillo engaged in this deception even though she was aware that Ramirez had previously authorized Respondent to provide his “personal information.” Two or three months prior, Murillo called a group of employees together in Ramirez’s work area and informed them that the Union was asking for their “personal information” and she asked if they authorized it. T. 407. At that time, Ramirez told Murillo that he did authorize Respondent to provide his information. T. 406-407.

Respondent provided no rebuttal testimony to contradict the credible testimony set forth by current employees Torres, Hernandez and Ramirez.

2. Legal analysis

As detailed below under Section III (A), on November 6, 2017, and multiple subsequent

¹³ Ramirez could not recall Murillo’s name but he testified that it was the other woman who worked in the office with Acosta. T. 401-402. Acosta testified that the other woman who works in her office is Human Resources Assistant Dinora Murillo. T. 537.

dates to follow, the Union requested information concerning bargaining unit employees and Respondent violated Section 8(a)(5) of the Act when it failed to provide the Union with all of the presumptively relevant information. The Union, as the Unit's collective-bargaining representative, is entitled to information that is relevant and necessary to fulfill its statutory duties and responsibilities. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-436 (1967).

Information related to employees' terms and conditions of employment is deemed to be presumptively relevant and necessary to the Union's performance of its duties. See, e.g., *W.B. Skinner, Inc.*, 283 NLRB 989, 990 (1987), citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965)(explaining that such data "concerns the core of the employer-employee relationship"). Presumptively relevant information not only includes employees' wages but also information related to benefit plans and other information impacting employees' general working conditions. See, e.g. *Washington Beef, Inc.*, 328 NLRB 612, 618 (2000)(requiring employer to furnish information related to 401(k) plan and health and welfare benefits); *Retlaw Broadcasting*, 324 NLRB 138, 141 (1997)(personal service contracts); *Maple View Manor*, 320 NLRB 1149, 1150-51 (1996), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997)(wages and benefit plans).

Respondent attempted to bypass its obligations under the Act to provide the Union with presumptively relevant information it is owed to represent its employees by coercing employees into signing confidentiality forms. Respondent's interference is analogous to an employer taking any other steps to prevent information from being given to the Union that it otherwise is owed under the Act. See *Miron & Sons, Inc.*, 358 NLRB 647, 661 (2012)(employer violated Section 8(a)(1) by telling a steward not to give the union information about employees or employees information about the union).

Several current employees gave credible testimony concerning their interactions with Respondent on this subject and Respondent failed to deny any of the deceit that the employees described. The employees had no reason to distort the truth. The Board has long recognized that the testimony of current employees is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979), citing, e.g., *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961); *Gateway Transportation Co, Inc.*, 193 NLRB 47, 48 (1971).

For these reasons, Respondent violated Section 8(a)(1) of the Act by deceiving and coercing employees into signing preprinted confidentiality forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent.

F. About early November 2018, Respondent, by Paul Hernandez, Joel Murillo, Jose Madrigal, Karen Mendoza, and Josue Guerrero interrogated employees about their Board activities and interrogated employees about their Union and/or Board activities without providing employees appropriate *Johnnie's Poultry* assurances.¹⁴

1. Facts

Around October 2018, employee Otis Simmons notified Respondent's Administrative Assistant Mary (Chmelka) Junker that he had received a subpoena. T. 139-140. Junker asked that Simmons bring in his subpoena the following day so that she could look at it. T. 140. Simmons brought Junker his subpoena along with a corresponding cover letter showing that he was required to appear before a Board agent on November 7, 2018. T. 141; GC 7. Junker then faxed the Board's cover letter outlining the reasons for Simmons receiving an investigatory subpoena to Respondent's attorney Jerry Pigsley, CEO Fischel Ziegelheim and Michael

¹⁴ Complaint Paragraph 5(e).

Koenig.¹⁵ T. 140-141. When Respondent learned that its employees had received subpoenas from the Board for sworn affidavits, it made the decision to retain (and pay for) outside attorneys to represent employees during their interviews with the Board. T. 142-143, 325; JT 15. On November 6, 2018, Respondent placed the retained attorneys in several management offices at Respondent's facility so that they could meet with employees. T. 146. The attorneys were placed in a conference room as well as the offices of Plant Manager Mike Helzer and Fabrication Superintendent Chris Kitch. T. 146-147. Respondent posted a notice advising employees of their right to have an attorney, noting that Respondent had retained attorneys for the employees, and provided employees with the attorneys' contact information. T. 143-145; JT 15. The record established that when employees did not make contact with those attorneys, Respondent's supervisors and managers approached employees in order to ascertain whether they had received communications from the Board to provide sworn testimony. Both employees and managers testified concerning employees being approached and questioned about whether they had received correspondence from the Board, including a subpoena. On November 6, 2018, Supervisor Jose Madrigal called employee Juvencio Ramirez de la Cruz while he was at home and asked if he had received a subpoena in a yellow envelope. When Ramirez responded that he had not, Madrigal advised that if he had not, he would get one soon. T. 413-416. Madrigal informed Ramirez that Respondent had an attorney and he could have a meeting with the attorney if he wanted. T. 413. After speaking with Madrigal, Ramirez understood the attorney to be Respondent's attorney. T. 417. On November 6, 2018, Supervisor Joel Murillo approached employee Marcial Torres Santiago while he was working and asked if he had received a letter to meet with a Board agent at a church in Hastings. T. 451-455. Murillo

¹⁵ Ziegelheim described Koenig as one of his consultants. T. 332. Other supervisors and managers for Respondent, including Junker, understood Koenig to be one of Respondent's owners. T. 64.

informed Torres that there was somebody who needed to talk to him in the office. T. 451. It was not until Torres arrived at the office and met the attorney that he learned who he was meeting with. T. 451. Former supervisor Josue Guerrero supervised approximately 21-23 employees on Respondent's rib line. T. 162-163. Guerrero testified that in October 2018, Fabrication Superintendent Chris Kitch told him that employees had received letters concerning the Union. T. 163, 168-169. Although he initially denied asking employees if they had received any correspondence, once confronted with his Board affidavit dated December 17, 2018, Guerrero confirmed that following receiving instruction from Kitch, Guerrero "went and asked every employee one by one if they received a letter from the union." T. 166. Guerrero clarified on re-direct that Kitch had informed him that the employees were receiving letters that had "something to do with the Union." T. 168-169.

Respondent's unlawful questioning of employees was not limited to asking employees about their receipt of Board subpoenas. Respondent also questioned employees about the substance of their discussions with Board agents once employees returned to work. Operations Manager Paul Hernandez is second in command at Respondent's facility under General Manager Mike Helzer. T. 70, 207. The following day, November 8, 2018, Paul Hernandez approached Aramis Hernandez Acosta at his work station and asked what the Board agents had asked Aramis. T. 371. Aramis minimized the encounter by responding, "A bunch of dumb stuff." T. 372. Paul Hernandez laughed and walked away. T. 372. However, Paul returned to Aramis' work station the next day, November 9, 2018, and again asked Aramis what had had been asked. Aramis responded with a similar line, "A bunch of stupid stuff." T. 372.

2. Legal analysis

To determine if management has unlawfully interrogated employees in violation of Section 8(a)(1) of the Act, the Board applies the test established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). See *Field Family Associates, LP d/b/a Holiday Inn-JFK Airport*, 348 NLRB 16 (2006); *Smithfield Foods*, 347 NLRB 1225 (2006). Under the *Bourne* test, the Board considers the following factors: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, it must be determined whether the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Temecula Mechanical, Inc.*, 358 NLRB 1225 (2012). Here, the record established that within an environment filled with unremedied unfair labor practices, several admitted supervisors approached employees as they worked and questioned those employees about their receipt of correspondence, including subpoenas, concerning the Union and/or Board affidavits. Each of the *Bourne* factors weighs in favor of finding a violation with the exception of the truthfulness of the employees' responses as each employee was honest about their receipt of documentation concerning Board subpoenas. However, Aramis Hernandez Acosta was not honest with Operations Manager Paul Hernandez when he was twice asked about the content of his discussion with Board agents on November 7, 2018. A balancing of the factors in their totality weighs in favor of finding a violation of Section 8(a)(1) of the Act. Respondent admittedly did not know which employees had been subpoenaed to give sworn testimony to Board agents. T. 143. The individuals who were subpoenaed were bargaining unit employees who did not constitute managers, supervisors or agents of Respondent. Respondent had no legal right to be involved in the subpoena process absent the subpoenaed employees bringing the

subpoena and the need to be absent if the designated appointment time conflicted with the employees' work schedule. Many employees would not have had a conflict between their work schedule and their scheduled affidavit time. As a result, those employees could have confidentially talked with a Board agent without the need of disclosing their participation to Respondent. "It is well established that an employee has the right to seek access to the Board's processes and that any interrogation of an employee concerning his having engaged in this protected conduct is a violation of Section 8(a)(1) of the Act." *Sea-Land Service*, 280 NLRB 720, 729 (1986), citing *Buffalo Neighborhood Housing Services*, 267 NLRB 514, 522 (1983) and *Steinerfilm, Inc.*, 255 NLRB 769, 778 (1981).

Additionally, the evidence established that when Respondent approached employees about receipt of their Board subpoenas and in giving instructions to meet with outside counsel present at Respondent's facility, Respondent failed to give employees the most basic of assurances set forth in *Johnnie's Poultry*, 146 NLRB 770 (1964). In that case, the Board set forth a framework that employers must follow to lawfully question employees during the investigation of complaints made within unfair labor practices. In questioning employees and sending them to meet with attorneys retained by Respondent, Respondent was required to (1) communicate to the employee the purpose of the questioning, (2) assure him or her that no reprisal will take place, and (3) obtain his or her participation on a voluntary basis. *Id. at 775*. "The questioning must occur in a context free from employer hostility to union organization; must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees." *Id.* The consistent testimony by

employees at hearing confirmed that Respondent did not use the safety mechanisms set forth in *Johnnie's Poultry* that exist to protect employees from coercive questioning by their employer.

When Supervisor Jose Madrigal called employee Juvencio Ramirez de la Cruz while he was off work and at home, he only asked Ramirez if he had received a subpoena, informed him he would get one soon, and told him he could have a meeting with Respondent's attorney. T.

413-416. When Supervisor Joel Murillo approached employee Marcial Torres Santiago while he was working, he only asked if Torres had received a letter to meet with a Board agent and told him there was somebody who needed to talk to him in the office. T. 451-455. Murillo did not tell Torres (1) who he was meeting with, (2) what the meeting was about, (3) that he did not have to go to the meeting, (3) or that he would not get in trouble for anything he told that individual. T. 452.

Employees' testimony revealed that Respondent's supervisors, as they questioned employees about their receipt of subpoenas and instructing them to meet with attorneys retained by Respondent for the purpose of meeting with Board agents, consistently failed to provide the employees with the most basic of assurances as set forth by *Johnnie's Poultry*. Many employees did not understand who they were meeting with, why, that it was voluntary or that there would be no repercussions regardless of what they told the attorney. For these reasons, in early November 2018, Respondent, by Paul Hernandez, Joel Murillo, Jose Madrigal, Karen Mendoza, and Josue Guerrero interrogated employees about their Board activities and interrogated employees about their Union and/or Board activities without providing employees appropriate *Johnnie's Poultry* assurances in violation of Section 8(a)(1) of the Act.

G. About early November 2018, Respondent required employees to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents, thereby interfering with the

Board's processes.¹⁶

1. Facts

As set forth above, Respondent learned that employees had received investigative subpoenas from the Board after a single employee, Otis Simmons, notified Administrative Assistant Mary Junker. T. 140. Once Simmons brought Junker a copy of his subpoena/cover letter, she faxed a copy to Respondent's attorney Jerry Pigsley, CEO Fischel Ziegelheim and Michael Koenig. T. 140-141; GC 7. Respondent then made the decision to intervene in the Board's processes by retaining outside counsel to represent employees during their interviews with the Board. T. 142-143; JT 15. Respondent posted a notice intended to inform employees of the free benefit Respondent was providing of legal counsel. T. 143-145; JT 15. Mary Junker and Lidia Acosta also kept copies of the notice at their desks in case any employee wanted to contact the attorneys. T. 145. In a unit of over 300 employees, only one employee asked Junker for a copy of the notice after hearing about it from Otis Simmons. T. 145.

The attorneys retained by Respondent were physically present at Respondent's facility on November 6, 2018, the day before the scheduled Board affidavits. T. 146. The attorneys were placed in a conference room and the offices of Plant Manager Mike Helzer and Fabrication Superintendent Chris Kitch. T. 146-147. As of the arrival of the attorneys, Respondent had only heard from two employees concerning their interest in talking to the attorneys – Otis Simmons and Robert Mavligiano. T. 145, 147-148. Upon the arrival of the attorneys between 8 and 8:30 a.m.¹⁷, Mary Junker attempted to determine which employees might have received Board subpoenas. T. 148. She did so by reviewing a list of employees who had resigned from the

¹⁶ Complaint Paragraph 5(f).

¹⁷ Junker estimated the attorneys arrived during this time period on November 6, 2018. T. 151.

Union. T. 148; GC 8. The list was one that had been created by Human Resources Manager Lidia Acosta. T. 148. Junker talked to Operations Manager Paul Hernandez and told him “that possibly some of these people might have gotten the same correspondence that Otis (Simmons) received. And so that we should let them know that there are lawyers here, and if they want to come up and talk to them, to come up and talk to them.” T. 150. Junker had that conversation with Hernandez because “there wasn’t too many people coming in to talk to the attorneys.” T. 151. Junker knew that because of the location of her desk in relationship to the rooms where the attorneys were set up. Employees would have to walk by her to get to those rooms. T. 151-152. Both Hernandez and Fabrication Superintendent Chris Kitch reviewed Junker’s list and would leave her work area, presumably to “see if they can find anybody that wants to talk to the lawyers.” T. 152-153.

Several employees testified to their respective experiences regarding the circumstances that led them to meeting with the Respondent paid-for attorneys. On November 6, 2018, Operations Manager Paul Hernandez (Paul) approached Aramis Hernandez Acosta (Aramis) at his work station and told Aramis that he needed a company attorney to counsel him. T. 365. Aramis had not yet received his subpoena but Paul told him he had been subpoenaed. T. 365. Paul told Aramis that he “had to go to the office to talk to the company attorney.” Aramis told Paul that he did not have to go and Paul responded by telling Aramis it was mandatory. T. 366. Paul escorted Aramis to meet with the attorney in one of Respondent’s offices. T. 366-367. Aramis did not feel like he had a choice to go to the office and meet with the attorney. T. 371. Once in the meeting, Aramis also did not feel like he could leave the meeting with the attorney because he was afraid of being fired. T. 370-371. Supervisor Jose Madrigal called employee Juvencio Ramirez de la Cruz while he was at home, asked if he had received a subpoena and told

him about an attorney he could meet with. T. 413-416. Ramirez understood the attorney to be Respondent's attorney. T. 417-419. Employee Steve Catalan testified to Paul Hernandez (Paul) contacting him at his work station and telling him that he was needed in the office. T. 440. Paul did not tell Catalan why he was needed in the office or that it was voluntary for him to go. T. 440-441. The only thing Paul told Catalan was, "You need to go to the office. They want to talk to you." T. 441. Supervisor Joel Murillo approached employee Marcial Torres Santiago and told him there was "somebody who needed to talk with (him) in the office." T. 451. Torres did not learn who he was meeting with until he arrived at the office and the attorney explained who she was. T. 451. When Murillo approached Torres at his work station, Murillo did not explain who Torres was meeting with, what it was about or that it was a voluntary meeting. T. 452. Current employee Alejandro Torres testified that his supervisor, Joel Murillo, approached him and told him to go to the office to see the attorney. T. 508. Although Torres testified that he recalled Murillo telling him it was voluntary, twice Torres testified unsolicited that Murillo told him that he had to talk with the attorney and nothing else was discussed between the two about it. T. 508-509. Former employee Luz Esther Ledezma Duran testified that her supervisor at the time, Joel Murillo, told her to go to the office to talk to the attorney. T. 517. Murillo approached Ledezma while she was working and told her she should go see the attorney. T. 518. Ledezma "didn't have any idea" why she was meeting with the attorney. T. 520. On direct, when Ledezma was asked if she thought she could continue working and not talk to the attorney, she testified that she did not consider that "because of fear" and she had fear because she "didn't want to get into trouble." T. 518.

2. Legal analysis

Respondent's efforts at interfering with the Board's investigation could not be more

transparent and blatant. The Board has found similar and much less intrusive actions by an employer to be violative of the Act. In *KFMB Stations*, 349 NLRB 373 (2007), an employee received an investigative subpoena and was instructed by his employer to report to work early to meet with the employer's attorney. *Id.* at 387. In that meeting, the employer's attorney informed the employee that he was representing other employees who had been subpoenaed by the Board and asked if the employee would like the attorney to represent him. *Id.* The attorney noted that the employer was making his services available to the employees. *Id.* The Board affirmed the ALJ's finding that by "offering the benefit of free legal advice, the employer attempted to interfere with the Board's investigation, its processes and ultimately employees' rights under Section 7 of the Act." *Id.* See also, *S.E. Nichols, Inc.*, 284 NLRB 556 (1987)(8(a)(1) where the employer offered the assistance of its attorney during interviews with Board agents). *Florida Steel Corp.*, 233 NLRB 491, 494 (1977) is another case where the employer engaged in less intrusive actions, yet still was found to have violated Section 8(a)(1) of the Act. In *Florida Steel*, while objections to a recently held Board election were pending, the employer sent letters to employees about their right to counsel during the Board's processes. In relevant part, the letters read:

"...In addition, if a National Labor Relations Board agent should drop in on you, you may ask for an opportunity to obtain legal counsel before you talk to him.

If you should want some legal counsel, or just help in handling any of the situations described above, all you need to do is let your supervisor know. He will put you in touch with someone who can help you." *Id.*

The Board upheld the ALJ's finding that the employer's letter was "a patent attempt to obstruct the investigations of the Board by discouraging employees from supplying information to Board agents." *Id.* Respondent's actions go above and beyond the violations found in *KFMB*

Stations, S.E. Nichols and Florida Steel. Not only did Respondent seek to interfere with the Board's investigation by offering employees the benefit of free legal counsel, it took the additional steps of requiring employees to meet with the attorneys retained by the company. When Respondent did not see the participation it had hoped for after posting notices informing employees of their free benefit, Respondent took additional coercive actions by approaching employees and directing them to the plant manager's offices and other management offices to meet with the attorneys. Employees consistently testified to being instructed to meet with attorneys, some being told the employees were "company attorneys," understanding it to be mandatory. Aramis Hernandez Acosta testified that he did not want to meet with the attorney and only did so because Operations Manager Paul Hernandez told him it was mandatory. He was also fearful to leave the meeting with the attorney because he was afraid of being terminated. Similar testimony came from Luz Esther Ledezma who testified that she had a fear that if she did not meet with the attorney she would get in trouble.

Respondent had one goal here and it was interference with the Board's investigation. Respondent required employees to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents, thereby interfering with the Board's processes in violation of Section 8(a)(1) of the Act.

H. About November 6, 2018, Respondent, by Paul Hernandez, told employees they were required to use Respondent's paid attorneys and told employees Respondent did not want employees speaking to the Board about matters they should not be talking about

1. Facts

As detailed above, on November 6, 2018, Operations Manager Paul Hernandez (Paul) approached Aramis Hernandez Acosta (Aramis) at his work station and told him that he "needed a company attorney to counsel" him. T. 365. Paul told Aramis that he had been subpoenaed.

Aramis responded that he was not a criminal and not committed any crimes. T. 366. Paul then told Aramis that he was required to go to the office and talk to “the company attorney.” T. 366. When Aramis declined, Paul responded, “Yes, it is mandatory.” T. 366. Paul told Aramis that he had to talk to the attorney because he did not want Aramis to get confused when talking to the Board agents and he did not want him using a word that he did not know how to properly respond to. T. 366. Contrary to other employees who testified that they were not escorted to the office when instructed to attend, Aramis testified that Paul Hernandez walked Aramis to the meeting with the attorney. T. 367. Although Aramis did not want to meet with the attorney, he did so because Paul insisted that it was mandatory that he did so. T. 367. Aramis also did not feel he could leave the meeting with the attorney without risking being fired. T. 370-371.

2. Legal analysis

Respondent, by Paul Hernandez, made coercive statements to Aramis Hernandez Acosta concerning Aramis’s obligations to meet with attorneys retained by Respondent and Respondent’s underlying desire to control employees’ testimony to the Board. In *Certain-Teed Products Corporation*, 147 NLRB 1517 (1964), the Board reversed the ALJ and found that Respondent violated Section 8(a)(1) of the Act by making statements that were designed to discourage employees from supplying information to a Board agent and hinder the Board’s investigation of charges against the employer. *Id.* at 1520. The Board held:

“In reaching this conclusion, we rely on the facts that Respondent advised virtually all of its approximately 100 employees that they need not cooperate in the Board investigation; that it told several of these employees that their cooperation would result in their being subpoenaed and forced to testify at a hearing, thus indicating that their cooperation would involve them more deeply in the litigation; that Respondent’s opinion regarding the investigation was not solicited by employees, and the language it utilized was in many instances intemperate; and that Respondent made other coercive statements to employees which we have previously found violated Section 8(a)(1), including statements expressing disbelief and annoyance at employees who testified at the first hearing. We find, therefore, that the above-described conduct by Respondent interfered with the rights

of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act.” *Id.* at 1520-1521.

“Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 14 (2015), citing *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). “The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities”. *Id.*; see also *Park 'N Fly, Inc.*, 349 NLRB 132, 140 (2007). The Supreme Court has stated that...”Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). This freedom is necessary, “to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.” *John Hancock Mutual Life Insurance Co. v. N.L.R.B.*, 191 F.2d 483, 485 (D.C. Cir. 1951). Similarly, the Board has held that the purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who initiate unfair labor practice charges or assist the Board in proceedings under the Act. *General Services, Inc.*, 229 NLRB 940, 941 (1977). Through Paul Hernandez’s coercive directives and statements to Aramis Hernandez Acosta, Respondent sought to coerce an employee in advance of his meetings with Board agents for the purpose of providing sworn testimony by (1) mandating that the employee meet with attorneys retained by Respondent and (2) advising the employee that Respondent sought to curb the freedom the employee otherwise would have to speak freely to the Board. In doing so,

Respondent violated Section 8(a)(1) of the Act because Hernandez's statements would have a reasonable tendency to interfere with, restrain, or coerce employees' protected activities.

III. Respondent's Violations of Section 8(a)(1), 8(a)(5), and 8(d) of the Act

A. Since November 6, 2017, Respondent has failed to furnish information to the Union¹⁸

1. Facts

On November 6, 2017, Union President Mike Marty sent a letter to Respondent's CEO Fischel Ziegelheim seeking to schedule negotiations for a successor collective-bargaining agreement. Within his letter, Marty also requested information concerning all bargaining unit employees. T. 657; JT 2. For each bargaining unit employee, Marty requested information including their department, job classification, hourly rate, full-time or part-time status, hire/seniority date, termination date, regular hours worked, overtime hours worked, premium hours worked, vacation hours paid, personal day hours paid, health and welfare contributions made, and pension contributions made. JT 2. Respondent's Administrative Assistant Mary Junker confirmed that she received the letter by certified mail on November 9, 2017 and she forwarded it to Ziegelheim and Respondent's attorney Jerry Pigsley. T. 157-158; GC 9. Despite Respondent receiving the letter within three days, the Union received no response from Respondent. T. 657. On December 27, 2017, Mike Marty sent an email to Fischel Ziegelheim renewing the Union's request to open negotiations and its request for information. T. 658; JT 3, p. 1. When the Union received no response from Respondent, on January 5, 2019, Marty renewed his request a second time by email and regular mail to Zieglheim, Pigsley and Michael Koenig. T. 658-659; JT 3, p. 2-4. Again, the Union received no response. T. 659. On January

¹⁸ Complaint Paragraph 8.

15, 2018, Union attorney Eric Zarate emailed Pigsley advising that the Union had not received any response to the Union's prior requests for bargaining and information. JT 3, p. 5. By email dated January 17, 2018, Pigsley replied that he was working on getting the Union the information it requested. JT 3, p. 6. On January 24, 2018, Zarate replied to Pigsley advising that the Union will need the information to prepare a proposal for a successor contract. JT 3, p. 6. Hearing nothing further, by letter dated February 12, 2018, Zarate renewed the Union's requests for bargaining information. JT 3, p. 8-11. On February 19, 2018, Pigsley replied to Zarate by email (1) advising he had been authorized by his client to commence contract negotiations, (2) proposing multiple bargaining dates, and (3) noting that his client would seek to provide the Union's requested information within the next 30 days. JT 3, p. 8. Later that day, Zarate replied that Respondent's proposed bargaining dates all worked for the Union "provided that the Company provides the requested information in the near future as indicated." JT 3, p. 8. By email dated March 6, 2018, Zarate asked Pigsley if Respondent could provide any portion of the information prior to the parties first scheduled negotiation session, noting that Respondent had four months to provide the information in question. JT 3, p. 13-14. On the same date, Pigsley replied that he had no update on the Union's information request and he would seek from his client that some of the information be provided ahead of the parties' first scheduled bargaining session on March 22, 2018. JT 3, p. 13.

The parties met on March 22, 2018. Jerry Pigsley was present as the sole representative for Respondent. T. 659-660; JT 25 p. 1. Respondent did not provide the Union with any of its requested information prior to the meeting or during the meeting. T. 662-663. Mike Marty asked Pigsley about the Union's information. T. 662-663. Pigsley's response was, "We're working on it. I'll get back to you." T. 663. By email dated March 28, 2018, Zarate informed

Pigsley that the Union was prepared to file an unfair labor practice charge against Respondent if the company failed to provide the requested information or schedule additional dates by the end of the day. JT 3, p. 17-18. Later that day, Pigsley replied that Respondent was prepared to meet again on April 25, 2018 for negotiations, but it was still gathering the information requested by the Union. JT 3, p. 17. On March 29, 2018, the Union filed Case 14-CA-217400 alleging Respondent (1) failed and refused to bargain in good faith with the Union and (2) failed to furnish information requested by the Union. T. 663; GC 1-A.

The parties met a second time for negotiations on May 15, 2018. JT 25, p. 1. Although Respondent provided the Union with its initial contract proposal, it did not provide the Union with any of its requested information. Following the Region's investigation of Case 14-CA-217400, the parties entered into an informal Board settlement agreement that was approved by Regional Director Leonard Perez on June 20, 2018. T. 664; JT 11. Part of the terms of that settlement required Respondent to "provide the Union with the information it requested in writing on November 6, 2017, December 27, 2017, January 5, 2018, January 24, 2018, February 12, 2018, February 21, 2018, March 6, 2018, and March 28, 2018." JT 11, p. 5. Following the parties entering in the Board settlement, Respondent provided the Union with a fraction of the information it had requested. On July 13, 2018, Jerry Pigsley emailed Mike Marty information he had received from his client responsive to the Union's original information request. JT 19. Pigsley's email included partial information for only fifteen employees. JT 19. On July 16, 2018, Eric Zarate emailed Pigsley advising of the substantial deficiencies that existed with the information Respondent provided and that it was indicative of Respondent's lack of good faith to comply with the Board settlement identified as Joint Exhibit 11. JT 20. Zarate noted that for a unit that the Union understood constituted approximately 250 employees, Respondent provided

partial information for only 15 of those individuals. JT 20. As of the hearing, Respondent had provided no additional documents responsive to the Union's information request beyond the limited information it provided to the Union on July 13, 2018. T. 666.

2. Legal analysis

A collective-bargaining representative is entitled to information that is relevant and necessary to fulfill its statutory duties and responsibilities. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-436 (1967). The Board applies a liberal, discovery-type standard to evaluate whether information is relevant. *Id.* at 437. The Board will require the disclosure of information even if it is merely of "probable or potential relevance" to a union for, among other things, negotiating mandatory subjects of bargaining or policing a collective-bargaining agreement. See, e.g. *Associated General Contractors of California*, 242 NLRB 891, 891 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980). "[A]ny information which is relevant and, therefore, reasonably necessary to the union's discharge of its statutory obligations falls within the sphere of the union's entitlement." *Boyers Const. Co.*, 267 NLRB 227, 229 (1983).

The Board deems information related to employees' terms and conditions of employment to be presumptively relevant and necessary to the union's performance of its duties. See, e.g., *W.B. Skinner, Inc.*, 283 NLRB 989, 990 (1987), citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) (explaining that such data "concerns the core of the employer-employee relationship"). Presumptively relevant information not only includes employees' wages but also information related to benefit plans and other information impacting employees' general working conditions. See, e.g. *Washington Beef, Inc.*, 328 NLRB 612, 618 (2000)(requiring employer to furnish information related to 401(k) plan and health and welfare benefits); *Retlaw Broadcasting*, 324 NLRB 138, 141 (1997)(personal service contracts); *Maple View Manor*, 320 NLRB 1149, 1150-

51 (1996), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997)(wages and benefit plans).

Where a union requests presumptively relevant information, the employer must provide it. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). A union need not establish that presumptively relevant information is immediately relevant to a current issue in negotiations or contract administration. See, e.g., *Jano Graphics*, 339 NLRB 251, 260 (2003). Rather, “wage and related information pertaining to employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective-bargaining agreement.” *Whitin Machine Works*, 108 NLRB 1537, 1541 (1954), enfd. 217 F.2d 593 (4th Cir. 1954). See also, *U.S. Abatement, Inc.*, 303 NLRB 451, 459 (1991)(explaining that a union “need not demonstrate that the collective-bargaining agreement has been violated before it is entitled to the information it requested”).

The information requested by the Union on November 6, 2017, and renewed on multiple occasions, constitutes presumptively relevant information that Respondent was required to provide. To date, Respondent has failed to provide more than the de minimis information attached to Jerry Pigsley’s July 13, 2018 email to Mike Marty and Respondent has provided no defense, let alone a valid defense, for its failure to do so. Other than Respondent’s attempt to coerce employees into signing confidentiality forms, the only other explanation for Respondent’s inactivity is Fischel Ziegelheim’s directive that was issued after Respondent took the position that the Union had encouraged employees to seek employment elsewhere in mid-2017. T. 324, 331. Human Resources Manager Lidia Acosta confirmed that at that time, Ziegelheim and his business partner Michael Koenig instructed Acosta not to provide the Union with any information about employees going forward. T. 591.

Respondent has no valid defense for its failure to provide the Union with the information

it originally requested by letter dated November 6, 2017, and for the reasons set forth above, Respondent has violated Section 8(a)(1) and (5) of the Act.

B. About late June 2018, Respondent bypassed the Union and dealt directly with employees by soliciting employees' preferences about moving the observance of the Independence Day holiday to July 6, 2018.¹⁹

1. Facts

July 4, 2018 fell on a Wednesday. T. 98. To determine whether employees wanted to observe the Independence Day holiday on Friday, July 6, 2018, in order to have a three-day weekend, in the days leading up to the holiday, Respondent's supervisors and managers approached employees on the work floor and surveyed them as to their preference. T. 98-99. Those supervisors and managers identified by Respondent's Administrative Assistant Mary Junker included Mike Helzer, Paul Hernandez, Chris Kitch, Clay Irish, Karen Mendoza, Marulys Castillo Cisneros, Joel Murillo, Luis Prado, and Jose Madrigal. T. 99; JT 18.²⁰ As a result of Respondent's polling employees as to their preference, Respondent observed the Independence Holiday on Friday, July 6, 2018. T. 99-100.

2. Legal Analysis

Direct dealing involves dealing with employees (bypassing the Union) about a mandatory subject of bargaining. *Mercy Health Partners*, 358 NLRB 566, 567 (2012), citing *Champion International Corp.*, 339 NLRB 672, 673 (2003). "The Board will therefore find a direct dealing violation when (1) the employer communicated 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

¹⁹ Complaint Paragraph 9.

²⁰ Although Mike Helzer denied directly talking to employees, he admitted that management did ask employees if they would like to switch holidays. T. 739.

communication was made to the exclusion of the union.” *Mercy Health*, supra, citing *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000). Direct dealing need not take the form of actual bargaining. *Allied Signal, Inc.*, 307 NLRB 752, 753 (1992). The inquiry “must concern whether the employer’s direct solicitation is likely to erode the union’s position as exclusive representative.” *Modern Merchandizing*, 284 NLRB 1377, 1379 (1987).

The Board has historically held that employees’ holidays are a mandatory subject of bargaining. See *E.I. du Pont & Co.*, 259 NLRB 1210, 1211 (1982)(employer unilaterally established an additional paid holiday); *United Cerebral Palsy of New York City*, 347 NLRB , 607 (2006)(employer unilaterally eliminated Presidential Election Day as a paid floating holiday.

Here, although Article 9 – Holidays in the parties’ collective-bargaining agreement contains language giving Respondent the discretion to work employees on one of six designated holidays in the contract, once Respondent undertook the steps of engaging others over whether it should move the observance of Independence Day in 2018, Respondent had an obligation to bargain with the Union as the Unit employees’ bargaining representative. Instead, Respondent chose to bypass the Union and directly poll Union-represented employees. Respondent sought to communicate to employees the possibility of a benefit that Respondent was willing to provide in moving the holiday for the purpose of giving employees a three-day weekend, with the complete exclusion of the Union. In doing so, Respondent directly dealt with employees concerning a mandatory subject of bargaining in violation of Section 8(a)(5) of the Act.

C. Since January 23, 2018, Respondent changed Unit employees’ hourly wage rates and paid wages rates contrary to the parties’ collective bargaining agreement²¹

1. Facts

²¹ Complaint Paragraph 10(a).

The parties' collective-bargaining agreement sets forth negotiated wage rates for all bargaining unit employees. JT 1, p. 7-8, 13-16. The parties negotiated base wage rates for employees by groups. Job classifications were negotiated into one of several groups. Groups 1-5 had hourly base rates of \$9.00, \$9.50, \$10.00, \$10.50, and \$11.00. JT 1, p. 13-16. Maintenance crew and electricians had separate base rates. JT 1, p. 16. Under Article 1 – Rates of Pay Provision, the parties negotiated wage increases that went into effect on the effective date of the collective-bargaining agreement (January 28, 2013). JT 1, p. 7. Employee who had passed their probationary period²² as of the effective date of the collective-bargaining agreement received an additional 30 cents on that date. JT 1, p. 7. Going forward, approximately every six months at the end of July and January, eligible bargaining unit employees received a 15 cent increase to their hourly wages. JT 1, p. 7-8. The only exception to the gradual increases were a group of approximately 28 job classifications identified on page 8 of Joint Exhibit 1. In lieu of gradual increases every six months, the parties negotiated a \$2.00/hour increase for each job classification effective January 28, 2013. JT, 1, p. 8.

The last wage increase negotiated by the parties was a 15 cent increase for all bargaining unit employees who had passed their probationary period as of July 31, 2017. JT 1, p. 8. The evidence presented at the hearing clearly established that during the relevant time period, Respondent (1) paid wages contrary to the wages negotiated by the parties and set forth in the collective-bargaining agreement without approval by the Union and (2) gave employees wage increases not set forth in the collective-bargaining agreement without the approval of the Union. Joint Exhibit 21 was identified by Respondent's Human Resources Manager Lidia Acosta as the base wage scale that Respondent used from at least January 25, 2017 until approximately

²² Article 17 – Seniority defines probationary period as sixty (60) days. JT 1, p. 9.

August 23, 2018. T. 583, 587, 592-593; JT 21. The wage scale set forth in Joint Exhibit 21 breaks down each hourly job classification into six groups with hourly base wage rates of \$9.00, \$9.50, \$10.00, \$10.50, \$12.00, and \$13.00. JT 21, p. 1-2. Acosta testified that during the time period that Joint Exhibit 21 was used all employees were hired on at \$9/hour and they remained at that wage rate until their supervisor determined that they had become proficient enough in their position to be deemed qualified. At that time, the supervisor submitted a written request to human resources for the employee to receive the base rate for their job classification. Approval of the pay increase then rested with CEO Fischel Ziegelheim. T. 583-587, 838-839; GC 6, p. 2, 4, 6, 8, 10, 13, 15.

Joint Exhibit 21 establishes that during the relevant time period, Respondent paid bargaining unit employees wages that were inconsistent with the negotiated rates in the contract. The wage scale set forth in Joint Exhibit 21 differs from those rates set forth in the CBA for several job classifications. The following table identifies examples of job classifications for which Respondent unilaterally paid rates different than the CBA:

Job Classification	CBA Rate	Rate effective 1/25/17 (JT 21)
Janitor	\$9.50	\$9.00
Pallet Jack	\$9.50	\$9.00
Trim Conveyor	\$10.00	\$9.50
Circle Pen	\$11.00	\$10.50
Forklift	\$10.50	\$10.00
Grinder Operator	\$10.50	\$10.00
Dehorner	\$11.00	\$10.50

In addition to paying employees wages that contradict the collective-bargaining agreement, Respondent has implemented wage increases for employees that were not set forth in the CBA or negotiated with or approved by the Union in any manner. Lidia Acosta testified that in addition to the 15 cent increases identified on pages 12 and 13 of Joint Exhibit 1, Respondent continued to give 15 cent increases to employees in January and July 2018 as well. T. 579. Acosta would receive a list from Respondent's corporate office with the names of all hourly employees and she would note on the list those individuals who were eligible to receive a 15 cent increase based on whether the employees had completed their 60-day probationary period. T. 580-581; GC 23. Acosta would then return the list of noted eligible employees to corporate for the increases to be implemented. GC 23. General Counsel Exhibits 22 and 23 show the implementation of the 15 cent increase effective in at least February 2018. GC 23 is the payroll register for pay period February 4-10, 2018. The first hourly employee identified is Clark Cook with an hourly wage rate of \$10.95/hour. T. 827; GC 23, p. 1. GC 22 identifies all of Respondent's hourly employees as of January 19, 2018. T. 827-828. As of January 19, 2018, Cook was making \$10.80/hour and with the 15 cent increase, Cook was set to receive \$10.95/hour. T. 827-828; GC 22, p. 1. General Counsel Exhibits 24 and 25 show the implementation of the 15 cent increase effective in at least July 2018. GC 24 is the payroll register for pay period July 22-28, 2018. As of that pay period, Clark Cook earned \$11.10/hour. GC 24, p. 1. GC 25 identifies all of Respondent's hourly employees as of June 22, 2018. T. 831. Cook is identified as earning \$10.95/hour at that point. T. 831; GC 25, p. 1. The parties' collective-bargaining agreement does not identify any additional increases for employees following July 31, 2017. JT 1, p. 12-13.

Although Respondent unilaterally continued giving Unit employees 15-cent wage

increases every six months following January and July 2018, it then unilaterally made the decision to discontinue giving employees the 15-cent increase in January 2019, without notice to or bargaining with the Union. General Counsel Exhibits 28 and 29 are the Pay Registers for hourly employees at Respondent’s facility for December 16-22, 2018 and February 10-16, 2019. These records show, and Lidia Acosta confirmed on the stand, that Respondent did not implement a 15 cent increase for eligible employees in January or February 2019. T. 833-835; GC 28; GC 29.

Additionally, in August 2018, Respondent engaged in a complete overhaul of Respondent’s wage system by unilaterally implementing increases to all bargaining unit job classifications. General Counsel Exhibit 4 constitutes a new wage scale created by Respondent for all hourly job classifications, including all bargaining unit job classifications covered by the CBA. General Counsel Exhibit 4 reads that it was effective August 23, 2018 and identifies five groups of job classifications as light, medium, medium/heavy, heavy and super/heavy.²³ For each group, the new wage scale identifies the old and new wage rate as follows:

Group Name	Light	Medium	Medium/Heavy	Heavy	Super/Heavy
Old Rate	\$9/\$9.50	\$10.00	\$10.50	\$13.00	\$13.00
New Rate	\$12.00	\$13.00	\$14.00	\$15.00	\$16.00

Operations Manager Paul Hernandez testified that he assisted Plant Manager Mike Helzer

²³ Respondent’s implementation of the new wage rates is confirmed in General Counsel Exhibits 26 and 27. GC Exhibit 26 is the Pay Register for August 12-18, 2018 and GC Exhibit 27 is the payroll register for August 19-25, 2018. Lidia Acosta confirmed that GC 27 shows the pay period that Respondent implemented its wide scale wage increases in August 2018. T. 831; GC 27. A side by side comparison of the two exhibits confirms Acosta’s testimony and the implementation date set forth on GC 4. For example, Department 11 employee Jessie Collado earned \$13/hour during the pay period of August 12-18, 2018 and earned \$16/hour during the pay period August 19-25, 2018. GC 26, p. 5/129; GC 27, p. 8/132.

and other managers in creating the new wage scale set forth in General Counsel Exhibit 4. T. 235-236. Hernandez was approached by Helzer two weeks to one month prior to the effective date of the new wage scale about putting together new wage rates for employees. T. 239. The new wage rates for the various job classifications were a collaborative effort involving several of Respondent's managers. T. 241. As set forth above, Respondent and the Union had been at the bargaining table for the purpose of negotiating a successor collective-bargaining agreement since March 22, 2018. As of August 23, 2018, Respondent had only made one contract proposal to the Union and that was done on May 15, 2018. For Article 12 – Rates of Pay Provision, Respondent had proposed 15 cent increases every six months for employees with no increases in base wage rates. JT 5, p. 1. Respondent's May 15, 2018 proposal was the only wage proposal Respondent made during the course of negotiations with the Union. JT 5; JT 7. Respondent admittedly did not involve the Union in creating the new wage scale nor did it have any communications with the Union about changing employees' wage rates. T. 241. Local President Mike Marty testified that the Union never agreed to the new rates set forth in General Counsel 4. T. 688.

The impact of Respondent's failure to follow the contractual wage rates and unilateral implementation of wage increases can be seen simply by looking at the wage progression of three employees identified at hearing. GC 30-33. Long Ta was hired on July 7, 2016 at a pay rate of \$9.00/hour as a janitor. GC 30, p. 1-2. General Counsel Exhibit 33 is a document generated by Respondent's corporate office titled "Employee Pay Rate History for January 1, 2018 to December 31, 2018." General Counsel Exhibit 33 shows employees' wages and all increases received dating back to calendar year 2017. Ta received a 15 cent increases on August 10, 2017, February 22, 2018, and August 16, 2018 resulting in increases from \$9/hour to

\$9.15/hour to \$9.30/hour to \$9.45/hour. GC 33, p. 50. Effective August 13, 2018, Ta received a wage increase to \$12.00/hour following Respondent's unilateral implementation of its wage increases for all bargaining unit employees. GC 30, p. 2. As a janitor, under the collective-bargaining agreement, after she became qualified, Ta should have earned \$9.50/hour as a Group 2 job classification. JT 1, p. 13. Pursuant to the CBA, once she passed her 60-day probationary period, Ta was only eligible for two additional 15 cent wage increases effective January 30, 2017 and July 31, 2017. JT 1, p. 8. Under the contract, TA should have earned \$9.50/hour once qualified, \$9.65/hour effective January 30, 2017, and \$9.80/hour effective July 31, 2017. JT 1, p. 8, 13. Respondent concedes this point. T. 844. Until Respondent unilaterally increased Ta's wages to \$12/hour in August 2018, it was paying Ta wages under those required by the CBA and that is taking into account a 15 cent wage increase Respondent gave Ta effective February 22, 2018, when no such increase is accounted for by the CBA. JT 1, p. 7-8.

Another good example is Christopher Balles. Balles was hired on January 25, 2017, at \$9/hour. GC 31, p. 1. On May 3, 2017, Balles became qualified as a Salter and received a wage increase to \$10.50/hour. GC 31, p. 2. Balles then received two 15-cent increases on August 10, 2017 (\$10.65/hour) and February 15, 2018 (\$10.80/hour). GC 33, p. 4. Balles received his next wage increase effective August 30, 2018, when he received an additional \$2.20/hour following Respondent's across the board increases. GC 31, p. 3; GC 33, p. 4. Under the CBA, once Balles became qualified as a Salter, he should have earned \$9.50/hour as a Group 2 job classification. JT 1, p. 13. Based on Balles' hire date of January 25, 2017, after he passed his probationary period, he was eligible for one additional pay increase of 15 cents effective July 31, 2017, taking him to \$9.65/hour. JT 1, p. 8. Under the CBA, \$9.65/hour is the wage rate that Balles should currently be receiving. Instead, Respondent paid Balles wages that contradicted the CBA

and gave him wage increases in February and August 2018 that are not authorized by the CBA or separately by the Union.

Lastly, Respondent hired Martin Pineiro Ortiz on March 29, 2017. GC 32, p. 1. Similar to Balles, Respondent deemed Pineiro qualified as a Salter on April 26, 2017, and gave him a pay increase from \$9/hour to \$10.50/hour. GC 32, p. 2. Pineiro then received two 15-cent increases effective August 10, 2017 (\$10.65/hour), and February 15, 2018 (\$10.80/hour). GC 33, p. 39. Pineiro received his last wage increase on August 30, 2018 when he jumped from \$10.80/hour to \$13/hour. GC 33, p. 39. Under the CBA, just like Balles, once Pineiro became qualified as a Salter, he should have earned \$9.50/hour as a Group 2 job classification. GC 31, p. 2. Because he was hired on March 29, 2017, Pineiro would have been eligible for one additional 15 cent increase effective July 31, 2017, taking him to \$9.65/hour.

The examples set forth above with employees Ta, Balles and Pineiro shine a light on Respondent's actions as they relate to employees' wages. Not only did Respondent pay employees wages contrary to the contract, it unilaterally implemented wage increases without contractual or Union authorization to do so. Ta, Balles and Pineiro confirm that Respondent gave out increases at its discretion. All three employees held Group 2 positions under the contract. However, of the three only Ta received a 15 cent increase in February and August 2018.

2. Legal analysis

It is undisputed that employee wages are a mandatory subject of bargaining under the Act. Under Board law, it is well settled that, as a general rule, an employer may not make unilateral changes in mandatory subjects of bargaining without agreement by the Union or first bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Unilateral changes to a mandatory

subject is a per se breach of the Section 8(a)(5) duty to bargain and no showing of a bad-faith motive is required. *Id.* at 743. The parties' 2013-2018 contract contained wage rates and designated dates for all wage increases for Unit employees. JT 1, p. 7-8, 13-16. Although the contract expired on January 28, 2018, it is well-settled that, even though a collective bargaining agreement has expired, an employer is obligated to adhere to the terms and conditions of employment of its employees established by the contract and may not make any changes in these terms, absent a new agreement or good faith bargaining to an impasse. *E.I. DuPont De Nemours*, 355 NLRB 1084 (2010); *Cibao Meat Products*, 349 NLRB 471, 475 (2007), *enforced* 547 F.3d 336 (2nd Cir. 2008); *Made 4 Film*, 337 NLRB 1152 (2002); *REC Corp.*, 296 NLRB 1293 (1989).

The facts set forth above are uncontroverted. Respondent has stipulated that it adopted the terms of the 2013-2018 collective-bargaining agreement and it "will not present a defense that it had no legal obligation to abide by the terms of the collective-bargaining agreement..." JT 1, 26. Respondent has provided no explanation, let alone a legal defense, for its blatant unilateral actions. During the 10(b) period, Respondent unilaterally paid Unit employees wages that contradict those set forth in the collective-bargaining agreement without notice to or agreement by the Union. Respondent unilaterally gave Unit employees 15 cent raises in 2018 without authorization by the contract or notice to and authorization by the Union. Lastly, Respondent unilaterally gave widespread wage increases to Unit employees in August 2018 without authorization by the contract or notice to and approval by the Union while the parties were in the midst of contract negotiations. There is no justification in the record for Respondent's actions. The Union could not have reasonably known that Respondent was engaging in this unilateral action. Respondent admittedly has banned the Union from its facility

since late June 2017. For almost two years, the Union has not been permitted the access to Respondent's facility and Unit employees that was afforded under Article 21 of the collective-bargaining agreement. Additionally, as set forth above, Respondent has gone out of its way to keep Unit employees' wage information away from the Union by failing to provide the Union with employees' wages since November 6, 2017.

For these reasons, in making the unilateral changes to employees' wages as set forth above, Respondent has violated Section 8(a)(5) of the Act and for the time period that Respondent engaged in this conduct during the life of the collective-bargaining agreement, it also violated Section 8(d) of the Act.²⁴

D. Since January 23, 2018, Respondent failed to deduct and remit employee dues to the Union pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations²⁵

1. Facts

Article 2 – Maintenance of Membership/Dues Checkoff of the parties' collective-bargaining agreement reads, in relevant part, "The company will withhold from the employee's pay such amounts for union dues and initiation fees as the *employee has authorized in writing*. Such amounts shall be withheld weekly and be remitted to the office of the Local Union on a monthly basis." (emphasis included). JT 1, p. 1. Carmen Perez has served as the Union's secretary in its Grand Island, Nebraska office for over 20 years. T. 170-171. For the past three and a half years, Perez has attended new employee orientation classes with Union representative Terry Mostek as his interpreter due to the large percentage of Spanish speaking employees.²⁶

²⁴ Under Section 8(a)(5) and 8(d), an employer is prohibited from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. *Southern Container, Inc.*, 330 NLRB 400, 400 fn.3 (1999); *Amoco Chemical Company*, 328 NLRB 1220, 1221 (1999).

²⁵ Complaint Paragraphs 5(d) and 10(b).

²⁶ The record established that Respondent has not allowed any Union representatives inside its facility since the end of June 2017. Perez confirmed that was the last time she was attended new employee orientation at Respondent's

During the Union's meetings with new employees, Perez and Mostek would distribute new member applications and dues deduction authorization forms. T. 172-175; GC 10. At the conclusion of each orientation, Perez would verbally notify Human Resources Manager Lidia Acosta of the names of new members. T. 175-176, 544. Next, Perez would generate a cover letter identifying the names of the new members and she would attach the employees' signed dues deduction authorization forms. T. 178. Perez would then hand deliver the cover letter and executed forms at the next scheduled orientation class. T. 178, 544-545. After delivering copies of employees' written dues deduction authorization to Respondent, Perez maintained copies of the authorizations in the Union's office. T. 179; GC 12.

Perez followed this process of notifying Respondent of new Union members and dues deduction authorizations until Respondent banned the Union from its facility. T. 184-185. In June 2018, the Union obtained new memberships/dues deduction forms. Because Perez could not hand deliver the documents, on June 20, 2018, Perez emailed Lidia Acosta the new member forms. T. 185; GC 13. Perez did not receive a response from Acosta. T. 185.

On a monthly basis, Respondent has provided the Union with a list of employees for whom Respondent deducted dues from their paychecks and remitted to the Union. T. 193; GC 21; JT 14. The lists for July to December 2018 do not show that Respondent deducted and remitted dues for those employees identified in General Counsel Exhibit 13. GC 21, p. 1-5, JT 14, p. 18-20.²⁷ Additionally, the record established that Respondent stopped deducting and remitting dues when it had no right to do so. Human Resources Manager Lidia Acosta provided detailed testimony concerning Respondent's procedure it followed in starting initial dues

facility. T. 184 Until Respondent banned the Union from its facility, Perez and Mostek attended orientation classes at Respondent's facility once or twice a week. T. 178.

²⁷ Employees Aramis Hernandez Acosta, Blake Judd, Maria Cantu, Tyrone Copeland, Sara Garcia Ramirez, Lee Hendriksen, and Darren Page do not appear on the Union dues list identified in GC 21, p. 1-5 or JT 14, p. 18-20.

deductions for employees as well as the procedure Acosta followed when assisting employees in resigning from the Union and discontinuing dues deduction/remittance. When the Union, through Carmen Perez, would verbally notify Acosta of new Union members following each orientation, Acosta would mark whether the new employee was “union” or “non-union” on each employee’s new hire form. T. 545; GC 6, p. 1, 3, 5, 7, 9, 12, 14. Acosta would then send the form to Respondent’s corporate office located in New Jersey. T. 539, 545-547. Acosta would store the written authorization later provided by the Union in each employee’s personnel file. T. 547. Corporate would utilize the new hire form to start deducting and remitting Union dues from the new employees’ wages. T. 549-550.

Acosta created the printed forms identified in Joint Exhibit 12 and General Counsel Exhibit 20. T. 552. When Acosta would obtain one of these signed forms from an employee, she would scan it and email it to Respondent’s corporate office. T. 555. She would place the original signed form in the employee’s personnel file. T. 555. She provided no notification to the Union. T. 555. Once Acosta emailed the forms to corporate, it was then the corporate office’s responsibility to stop the deduction of dues for the employee. T. 556. The dues deduction reports identified in General Counsel Exhibit 21 and Joint Exhibit 14 establish that once the corporate office obtained the resignation/revocation of dues deduction forms set forth in General Counsel Exhibit 20 and Joint Exhibit 12, Respondent then moved quickly to stop deduction and remittance of those employees’ Union dues often no later than the next month. See Appendix A. For each employee Respondent discontinued deducting and remitting dues to the Union during the 10(b) period, Appendix A identifies (a) the employee’s name, (b) the date each employee authorized dues deduction (if known), (c) the date each employee signed a document to revoke dues deduction authorization, (d) the month Respondent discontinued dues

deduction and remittance, and (e) whether the employee's revocation was made within the 30-45 day window set forth on their dues deduction authorization forms.

2. Legal analysis

Respondent's failure to continue deducting and remitting dues pursuant to valid written authorizations violated Section 8(a)(1) and 8(a)(5) for several reasons. First, as set forth above in Section II(D), Respondent interjected itself into the process in a manner that went beyond merely providing ministerial aid to employees with respect to their interest in resigning from the Union and/or stopping their payment of dues. Respondent, by Lidia Acosta, generated pre-printed forms for employees to execute in order to resign from the Union and revoke their dues deduction authorizations and Acosta went as far as approaching employees on the work room floor in order to solicit their signatures for the forms. Acosta never denied engaging in any of these actions while on the stand, nor did Respondent recall Acosta for her to directly respond to these allegations.

Additionally, Respondent's ceasing dues deduction and remittance to the Union was unlawful because the revocations were procedurally deficient. The dues deduction authorizations identified in General Counsel Exhibits 10 and 12 set forth a requirement that the employee give Respondent and the Union written notice of revocation being the employee's signature. Both Lidia Acosta and Carmen Perez testified that the written revocations were not provided to the Union. Acosta simply faxed the forms to Respondent's corporate office and placed them in the employee's personnel file. T. 555. Perez, the only individual for the Union who handles Respondent employees' dues related documents, confirmed that she had never seen the revocation forms set forth in Joint Exhibit 12. T.197. The Board has repeatedly held that an authorization that requires notice to be given to both the employer and the union is

lawful. *Rock-Tenn Company*, 238 NLRB 403, 408 (1978), enfd. 594 F.2d 862 (5th Cir. 1979). See also *American Commercial Lines*, 296 NLRB 622, 656 (1996), overruled with respect to remedy for other violations, *J.E. Brown Electric*, 315 NLRB 620, 623 (1994); *Boston Gas Co.*, 130 NLRB 1230, 1231 (1961)(contract clause requiring written notice of revocation of dues-checkoff authorizations to both employer and union not so unduly burdensome as to effectively preclude employees from revoking dues assignment). Where notice is required to be given to both the employer and the union, an employer is not entitled to give effect to any revocations in the absence of valid timely notice to the union. *Rock-Tenn Company*, 238 NLRB at 408; *American Commercial Lines*, 296 NLRB at 656.

Furthermore, the employees' revocations were untimely. Each dues check-off authorization form reads, in relevant part,

“This authorization shall be irrevocable for a period of one year from the date of execution thereof or until the termination of the collective bargaining agreement between the company I work for and my Union, whichever occurs sooner, and from year to year thereafter, unless not fewer than thirty days and not more than forty-five days prior to the end of any subsequent yearly period or to the termination of the collective bargaining agreement, respectively...” (GC 10, 12).

Lidia Acosta confirmed at the hearing that in Respondent's processing of each employee's dues revocation request, she did not look to the employee's dues deduction authorizations to determine whether the request was timely. T. 556. Appendix A is a spreadsheet that identifies the following for each employee whom Respondent has failed to deduct and remit dues for during the 10(b) period: employee name, date each employee authorized dues deduction (if known), date each employee executed written revocations, and month Respondent stopped deducting/remitting dues to the Union. As detailed in Appendix A, Respondent stopped deducting and remitting dues for employees based on untimely requests in that the requests were not made 30-45 days prior to (1) employees' dues deduction

authorization anniversary dates or (2) the expiration of the parties' collective-bargaining agreement on January 28, 2018. Appendix A more clearly outlines what is established by the authorization and revocation forms executed by Unit employees. Specifically, only three employees executed revocation forms that were within the designated window period defined by the employee's authorization forms. Board law holds that when an employee is obligated to pay dues, that employee's union resignation does not privilege the employee to untimely revoke his checkoff authorization. See *Auto Workers Local 1752 (Schweizer Aircraft)*, 320 NLRB 528, 531 (1995) enfd. sub nom *Williams v. NLRB*, 105 F.3d 787 (2nd Cir. 1996); *Steelworkers Local 4671 (National Oil Well)*, 302 NLRB 367, 368 (1991).

Lastly, Article 2 of the parties' collective-bargaining agreement specifically authorizes Respondent to deduct and remit dues pursuant to employees' written authorizations. JT 1, p. 1. The 10(b) period in this matter dates back to January 23, 2018, as the original charge filed by the Union was on July 23, 2018. The parties' collective bargaining agreement did not expire until January 28, 2018. The record established that Respondent unilaterally failed to abide by Article 2 while the CBA was still in effect. Under Section 8(a)(5) and 8(d), an employer is prohibited from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. *Southern Container, Inc.*, 330 NLRB 400, 400 fn.3 (1999); *Amoco Chemical Company*, 328 NLRB 1220, 1221 (1999). Under the Section 8(d) mid-term modification doctrine, where "wages, hours, and other terms and conditions of employment" are identified in the CBA, no party to that contract is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886-887 (7th Cir.

1968), cert. denied 393 U.S. 980 (1968).

For these reasons, Respondent violated Sections 8(a)(1) and (5) of the Act when it ceased (1) deducting dues pursuant to valid written authorizations from bargaining unit employees and (2) remitting those dues to the Union. For the time period that Respondent engaged in said misconduct during the life of the parties' collective-bargaining agreement, Respondent committed a mid-term modification in violation of Section 8(d) of the Act.

E. Since about March 2018, Respondent has failed and refused to bargain in good faith with the Union for a successor collective-bargaining agreement.²⁸

1. Facts

The parties' CBA expired on January 28, 2018. JT 1, p. 12. As set forth above under Section III (A), it took over two months, multiple letters from the Union and a threat from the Union's legal counsel before Respondent even responded to the Union's simple request to begin negotiations for a new contract. Respondent's unexplained delay in providing its first acknowledgment of the Union's request was just the start of its bad faith efforts in seeking a successor agreement. By email dated January 17, 2018, Respondent's attorney Jerry Pigsley informed Union attorney Eric Zarate that he had heard back from his client and requested two or three dates to commence negotiations. JT 3, p. 6. On January 24, 2018, Zarate responded to Pigsley that the Union will first need to receive the information it had been requesting since November 6, 2017 in order to prepare a proposal. JT 3, p. 6. Zarate advised that assuming the information is received in the near future, the Union planned to begin negotiations around February 20, 2018. JT 3, p. 6. By letter dated February 12, 2018, Zarate renewed the Union's requests for bargaining information, Respondent's willingness to engage in negotiations at the

²⁸ Complaint Paragraph 11.

Union's hall, and Respondent's willingness to enter into a contract extension. JT 3, p. 8-11. On February 19, 2018, Pigsley replied to Zarate by email (1) advising he had been authorized by his client to commence contract negotiations, (2) proposing bargaining dates on March 14, 16, 19, 21, 22, 23, and 26-30, and (3) that his client would seek to provide the Union's requested information within the next 30 days. JT 3, p. 8. Later that day, Zarate informed Pigsley that each date Respondent proposed was acceptable to the Union "provided that the Company provides the requested information in the near future as indicated." JT 3, p. 8. On February 21, 2018, Pigsley informed Zarate that Respondent was not available for negotiations on all of the dates he had previously proposed and suggested the Union select one date that worked best. JT 3, p. 15. On February 22, 2018, Zarate informed Pigsley that the Union preferred scheduling more than one date as past negotiations between the parties have taken more than a single session. JT 3, p. 14-15. Zarate proposed meeting briefly on March 22, 2018 to exchange proposals while meeting again March 26-28 for negotiations. JT 3, p. 15. Six days passed without a response from Pigsley. On February 28, 2018, Zarate sought an update. JT 3, p. 14. Pigsley advised on the same date that he did not have a response from his client. JT 3, p. 14. Another six days passed without a response from Pigsley. On March 6, 2018, Zarate sought another update from Pigsley. JT 3, p. 13-14. Zarate proposed, as a bare minimum, that the parties meet on March 22, 2018 to exchange contract proposals while Pigsley waited for his client's answer on other dates. JT 3, p. 13-14. Zarate also asked if Respondent could provide any portion of the Union's requested information prior to the parties first scheduled negotiation session, noting that Respondent had four months to provide the information in question. JT 3, p. 13-14. On the same date, Pigsley replied that the parties should plan on the first negotiation meeting to take place on March 22, 2018. JT 3, p. 13. Pigsley had no update on the Union's information request and he would seek from his client that

some of the information be provided ahead of the parties' first scheduled bargaining session on March 22, 2018. JT 3, p. 13.

The parties met on March 22, 2018 at the Union hall in Grand Island, Nebraska.²⁹ Jerry Pigsley was present as the sole representative for Respondent. T. 659-660; JT 25 p. 1. The Union provided Respondent with its first contract proposal. JT 4; JT 25, p. 1. Respondent did not have a proposal to give the Union. Respondent did not provide the Union with any of its requested information prior to the meeting or during the meeting. T. 662-663. Mike Marty served as the Union primary spokesperson and asked Pigsley about the Union's request. T. 662-663. Pigsley's response was, "We're working on it. I'll get back to you." T. 663. At the conclusion of the meeting, Marty asked Pigsley about dates for future negotiations. T. 661-662. Pigsley responded with only one date in April 2018. Marty reminded Pigsley that he did not see how that date would work as the parties already had an arbitration scheduled for the date in question. T. 662. Pigsley did not offer any additional dates and the parties departed the meeting without a second negotiation scheduled. T. 662.

By email dated March 28, 2018, Zarate memorialized a phone call he had with Pigsley earlier in the day. JT 3, p. 17-18. Zarate wrote that the Union had requested another bargaining session with Respondent and had proposed meeting any time prior to April 22, 2018. Zarate further wrote that Pigsley had promised to confer with his client and get back to Zarate by the end of the day if possible. JT 3, p. 17-18. Lastly, Zarate reminded Pigsley that he promised to provide the Union's requested information by the end of the day, if possible. JT 3, p. 17-18. Zarate advised Pigsley that the Union was prepared to file an unfair labor practice charge against Respondent if the company failed to provide the requested information or schedule

²⁹ All contract negotiations between the parties took place at the Union hall in Grand Island, Nebraska.

additional dates by the end of the day. JT 3, p. 17-18. Later that day, Pigsley replied that Respondent was prepared to meet again on April 25, 2018 for negotiations, or alternatively May 9, 2018, but it was still gathering the information requested by the Union. JT 3, p. 17. Zarate responded to Pigsley admonishing Respondent for its lack of availability without any explanation. JT 3, p. 17. Zarate noted Respondent had only met with the Union once to exchange proposals and even then, Respondent failed to provide the Union with any proposal. Respondent merely received the Union's proposal and that was the parties' one brief meeting in almost five months. JT 3, p. 17. Zarate reminded Pigsley that the Union had proposed to meet with Respondent for negotiations almost every day between March 22 and April 22, 2018 and the company was now only willing to meet on one day and only as early as April 25, 2018, a date that Pigsley was aware that the parties already had reserved for an arbitration. JT 3, p. 17. Zarate agreed to forward the company's request to meet on May 9, 2018 to the Union, but noted the Union was unwilling to tolerate additional delays. JT 3, p. 17.

On March 29, 2018, the Union filed Case 14-CA-217400 alleging Respondent (1) failed and refused to bargain in good faith with the Union and (2) failed to furnish information requested by the Union. T. 663; GC 1-A.

On May 7, 2018, Zarate confirmed by email that the Union stood ready to negotiate on May 9, 2018. JT 3, p. 20. On May 8, 2018, Pigsley informed Zarate that he was notified that morning that his client needed to postpone the negotiation scheduled for May 9, because Respondent's CEO Fischel Ziegelheim was expected back for negotiations but was now not able to return by then. JT 3, p. 19-20. Zarate replied, "Though not entirely surprised at this point, the Union is disappointed by Company's failure to meet for contract negotiations that were scheduled well in advanced (sic)." Zarate proposed rescheduling to May 15, 2018 and

requested that Respondent schedule additional meetings beyond that date. JT 3, p. 19. Two days pass without hearing back from Pigsley when Zarate emailed to confirm the new date. JT 3, p. 19. Pigsley did not respond until May 14, 2018 confirming that his client was agreeable to meet again for negotiations *the following day*. JT 3, p. 19.

The parties met for a second time on May 15, 2018. JT 25, p. 1. Jerry Pigsley participated for Respondent and Terry Mostek and Union Secretary/Treasurer Brian Schwisow were present for the Union. T. 62; JT 25, p. 1. Although Respondent provided the Union with its initial contract proposal, it did not provide the Union with any of its requested information. T. 62; JT 5; JT 25, p. 1. On May 24, 2018, Pigsley emailed Zarate advising that Union Representative Terry Mostek had told Pigsley that he would provide dates when the Union was available to meet again and as of his email, Pigsley had not received any dates. JT 3, p. 22. Pigsley also noted a conversation with Zarate concerning the potential of the Union withdrawing Case 14-CA-217400 if the parties could arrive at a bargaining schedule acceptable to the Union. Pigsley proposed meeting for negotiations no less than twelve hours per month (6-hour sessions on two separate or consecutive days). At this time, the Region had concluded its investigation of Case 14-CA-217400. This is evident from Zarate's reply email to Pigsley on May 25, 2018. JT 3, p. 21. In his email, Zarate rejected Respondent's proposed settlement terms as being inadequate "especially in light of the settlement terms being proposed by the NLRB which requires 24 hours of bargaining per month, production of the information requested by the Union, and posting of NLRB notices." JT 3, p. 21. Zarate advised that he would provide blackout dates shortly and requested any preferred dates Respondent had in mind. JT 3, p. 21. Pigsley asked if 24 hours was the minimum the Union would agree to. Zarate answered that he would forward any settlement offer to his client, but it would be considered in the context of the settlement

terms proposed by the NLRB. JT 3, p. 21.

On June 20, 2018, Regional Director Leonard Perez approved the parties' executed informal Board settlement agreement in Case 14-CA-217400. T. 664; JT 11. The terms of that settlement required Respondent to "provide the Union with the information it requested in writing on November 6, 2017, December 27, 2017, January 5, 2018, January 24, 2018, February 12, 2018, February 21, 2018, March 6, 2018, and March 28, 2018." JT 11, p. 5. It also required a bargaining schedule of "no less than 24 hours per month for at least six hours per session, or in the alternative, on any another (sic) schedule to which the Union agrees." JT 11, p. 1. The terms of the settlement also required Respondent bargain in good faith with the Union "in good faith with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached..." JT 11, p. 5.

By letter dated June 26, 2018, Zarate renewed the Union's request for bargaining. JT 3, p. 27-28. Zarate reiterated what he had previously told Pigsley – that the Union was available to meet throughout the months of June, July and August for negotiations with the exception of certain dates. JT 3, p. 27. As June was nearly over, Zarate confirmed the Union was available to meet throughout July and August with the exception of nine days. JT 3, p. 27. In his same letter, Zarate raises an arbitration decision that sustained the Union's grievance concerning Union access to Respondent's facility. JT 3, p. 28; JT 23. Respondent confirmed at the hearing that it had banned the Union from access its facility since the end of June 2017. T. 331-332, 335, 590, 734, 749-750. Zarate noted that the arbitrator directed Respondent to permit the Union to send representatives of its choosing to the plant and also required make up sessions to be allowed for all employees who did not attend orientation meetings because of Respondent's decision to ban Union representatives. JT 3, p. 28. Pigsley replied a week and a half later on July 5, 2018 with

four dates Respondent was available for negotiations (July 13, 20, 30, and 31) from 10 a.m. to 4 p.m. JT 3, p. 25. Zarate replied that the Union was available July 13, 30 and 31, and alternatively proposed July 17 or 27 in lieu of July 20. Zarate also reminded Pigsley that the Union had not yet received the information Respondent was required to provide. “In order to make contract negotiations more productive, the Union reminds the Company of its obligation to produce that information and renews its request that the Company fulfill that obligation as soon as possible.” JT 3, p. 24-25. Zarate also inquired, again, about Union access to Respondent’s facility pursuant to the arbitrator’s decision. JT 3, p. 25. On July 10, 2018, Pigsley confirmed that Respondent agreed to meet on July 27, 2018 from 10 a.m. to 4 p.m. JT 3, p. 24. Pigsley also informed Zarate that any attempt to implement the arbitrator’s decision regarding Union access would be contested by Respondent. JT 3, p. 24.

On July 13, 2018, the parties met again. JT 25, p. 1. Mike Marty, Terry Mostek and Brian Schwisow participated for the Union. Administrative Clerk Mary Junker was the sole representative for Respondent. JT 25, p.1. The Union did not know that Junker was going to be present as the Union’s negotiator until she arrived that day. T. 667. Union President, and lead negotiator, Mike Marty knew Junker because she was previously the human resources manager at the JBS plant in Grand Island, Nebraska, which is another Union facility. T. 667. Marty was not aware of Junker’s role with Respondent. T. 667. Before discussions began on July 13, 2018, Junker told the Union, “I don’t know why I am here. I don’t know why they sent me. I can’t make any decisions.” T. 668. Junker confirmed this at the hearing. T. 66-67 Junker did not learn she was going to serve as Respondent’s negotiator at the table until a couple of days prior to July 13, 2018. T. 63. Beginning with the bargaining session that was held on July 13, 2018, Junker served as Respondent’s primary spokesperson at the table. T. 62, 669. With the

exception of one session on July 27, 2018, Junker was the sole representative for Respondent at the table. JT 25. Junker was not authorized to agree to any proposals. T. 66. She was required to bring all proposals back to CEO Fischel Ziegelheim and his business partner Michael Koenig. T. 66. Ziegelheim and Koenig were the only two individuals authorized to accept or reject the Union's proposals. T. 66-67. At the July 13 session, Mike Marty provided the Union's responses to Respondent's May 15 proposal. T. 68. Junker, however, did not have answers for the Union in response to its proposal from March 22, 2018 because she had only recently received the proposal from Jerry Pigsley. T. 68-69.

On the same date (July 13, 2018), Jerry Pigsley emailed Mike Marty information he had received from his client responsive to the Union's original information request on November 6, 2017. JT 19. Pigsley's email included partial information for only fifteen employees. JT 19. On July 16, 2018, Eric Zarate emailed Pigsley advising of the substantial deficiencies that existed with the information Respondent provided and that it was indicative of Respondent's lack of good faith to comply with the Board settlement identified as Joint Exhibit 11. JT 20. Zarate noted that for a unit that the Union understood constituted approximately 250 employees, Respondent provided partial information for only fifteen of those individuals. JT 20. As of the hearing, Respondent had provided no additional documents responsive to the Union's information request beyond the limited information it provided to the Union on July 13, 2018. T. 666.

On July 16, 2018, Zarate provided Pigsley two weeks' notice that the Union was no longer available to meet on July 30 and 31, 2018 "due to an unforeseen last minute conflict." JT 3, p. 24. Zarate confirmed the Union's intent to negotiate on July 27, 2018, and sought dates for August. Zarate advised that the Union was available all of August except for August 6-10 and

August 16. JT 3, p. 24. Pigsley did not provide an immediate response.

On July 27, 2018, the parties met for their next bargaining session. T. 69; JT 25, p. 1. Mike Marty, Terry Mostek and International Representative Oscar Saenz participated for the Union. Mary Junker and Operations Manager Paul Hernandez were present for Respondent. JT 25. Junker confirmed at the hearing that Hernandez was present because the Union had complained that Respondent was not acting in good faith by using Junker as Respondent's negotiator at the table. T. 71-72. However, all Hernandez did at the session was observe. T. 669. At the July 27 session, Junker informed the Union that if she needed to, she could reach out to Ziegelheim and Koenig ("the owners"). T. 670. Junker had answers from the owners to the Union's March 22, 2018 proposal and the owners had denied the entire proposal. T. 74. After Junker notified the Union that the owners had rejected the Union's proposal, the parties caucused and the Union put together a modified proposal. T. 75, 672; JT 6, p. 1-2; JT 25. The Union proposed modifications to its original March 22 proposal in addition to dropping certain proposals in exchange for Respondent doing the same. JT 6, p. 1-2. Because Junker had no authority to agree to the proposals, she had to take time to contact the owners. T. 76. Junker was unsuccessful because the owner she reached was traveling and he "didn't have anything in front of him or anything like that. So he just asked that I bring both proposals back and go over with him what was presented to me by the Union." T. 78-79. The meeting ended without answers for that reason. T. 79. The only resolution reached during this meeting was the Union's acceptance of Respondent's proposal to change the name of the company from Nebraska Prime Group to Noah's Ark Processors, LLC t/a WR Reserve. T. 74; JT 5; JT 25, p.1.

Zarate's next communication with Pigsley was his email on July 16 seeking dates in August 2018. When Zarate had not heard back from Pigsley, on August 10, 2018, Zarate

emailed Pigsley again advising that Respondent had not provided additional contract negotiation dates or any additional information responsive to the Union's November 6, 2017 request, particularly where Zarate had detailed all of the ways that Respondent's production was deficient on July 16, 2018. JT 3, p. 23-24. Zarate questioned whether Respondent intended to bargain in good faith and furnish the information as required by the settlement agreement in Case 14-CA-217400. JT 3, p. 23. Pigsley responded later that day with four dates in August to resume negotiations, with the earliest being August 17, 2018. He made no reference to providing additional documents to the Union. JT 3, p. 23.

The parties met again on August 17, 2018. T. 79; JT 25, p. 1. Junker informed the Union that the owners had accepted certain minor proposals made by the Union in its original March 22, 2018 proposal, specifically Union proposals 2, 3, 18 and 19. T. 79-80, 681-682; JT 4, p. 3, p. 7. In the 2013-2018 collective-bargaining agreement, under Article 3 – Management Rights, it read “Employees must pass probation to enjoy benefits.” JT 1, p. 3. Through Union proposals 2 and 3, the Union sought to (1) move that language from Article 3 – Management Rights to Article 17 – Seniority and (2) add the word “health” in front of “benefits” to clarify the benefits the provision was referring to. T. 80, 682-683. Article 17 – Seniority defines employees’ probationary periods as 60-days. JT 1, p. 9. The Union’s proposals numbered 18 and 19 both involved an update to Article 15 – Non-Discrimination. JT 1, p. 15; JT 4, p. 7. Union proposal 18 sought to delete the current language and Union proposal 19 sought to replace the old language with an updated version with additional protected classes. T. 80, 681-682; JT 4, p. 7. Those limited tentative agreements, along with the agreement to change Respondent’s name, were the only agreements reached between the parties during the entire negotiation session process. T. 80-81; JT 6, p. 1-10; JT 25.

Although Junker communicated the owners' acceptance of the minor tentative agreements concerning the Union's proposals clarifying benefits meant health benefits, moving that language to the appropriate article, and updating protected classes under anti-discrimination, Junker did not have any response from the owners to the Union's most recent proposal made on July 27, 2018. T. 81, 673-674. The parties met again on August 22, 2018. T. 673-674; JT 25, p. 1. Again, Junker did not have a response from the owners to the Union's July 27, 2018 proposal because the owners were unavailable. T. 673-674. At no time during those sessions did Junker attempt to contact the owners; she simply informed the Union that they had been unavailable to provide answers to her. T. 674.

The parties had agreed to meet again for negotiations on August 28, 2018. On August 27, 2018, Pigsley notified Zarate that Respondent's "negotiating team cannot meet tomorrow." No reason was provided. JT 3, p. 29. Ten minutes later, Zarate replied asking for Respondent's availability in September, asking if Respondent would be willing to schedule five dates instead of four due to Respondent's cancellation of the August 28 session. JT 3, p. 29.

The parties met again for negotiations on August 30, 2018. JT 25, p. 2. At this session, Junker informed the Union that the owners had rejected the Union's entire July 27, 2018 modified proposal.³⁰ T. 81, 675. Junker did not provide any details or explanations. T. 675. Junker did not provide any counter proposals on behalf of the owners. T. 81-82, 675. At that point, the negotiation session essentially stopped and the Union was then required to come up with a different proposal. T. 675. Mike Marty testified that typically the parties' bargaining sessions started at 10 a.m. and although the sign out/stop sheets executed by the parties may show a later time, most of the time spent together involved talking about non-work related

³⁰ Marty testified that on most of the Unions' proposals identified in Joint Exhibit 6, he wrote the date the Union made the proposal and the date Respondent rejected each proposal. T. 672.

topics. T. 675-676; JT 9.

The parties met again for negotiations on September 12, 2018. JT 25, p. 2. Consistent with each and every time the Union made a written proposal to Respondent, the Union showed up at the bargaining session with a proposal already prepared to read and distribute.³¹ T. 82, 676-677; JT. 6, p. 3; JT 25, p. 2. Contrary to Respondent, the Union prepared for its bargaining sessions with Respondent. Mike Marty testified to the process he would follow in advance of each meeting. Marty's primary office is located in Fremont, Nebraska approximately 120 miles one direction from the Union hall in Grand Island, Nebraska. T. 660. For each scheduled bargaining session, Marty would travel to Grand Island the night before, review his notes and prepare for the following day's meeting. T. 660. The parties' meeting on September 12 was no different. When Marty provided the proposal to Junker and read it to her, Junker's sole response was, "I'll get back to you." T. 677. Contrary to Junker's statement to the Union on July 27 that she could contact the owners if necessary, other than her phone call to the owners during the July 27 bargaining session, Junker never attempted to contact the owners while the parties were at the table. T. 677. Junker never asked any questions about the Union's proposal. T. 676-677. Junker would receive the Union's proposal and simply state, "I'll get back to you." Junker provided no other details. T. 678. The parties would then engage in casual conversation as there was nothing more the Union could do until Junker took the time to take the Union's proposal to the owners for their acceptance or rejection. T. 677.

The parties had agreed to meet again on September 19, 2018. On September 14, 2018, Jerry Pigsley emailed Eric Zarate to inform him that Respondent needed to cancel that bargaining session because the owners were not available on account of their observation of a

³¹ The only exception was the modified proposal the Union made while the parties caucused on July 27, 2018.

Jewish holiday. JT 3, p. 30. In his email, Pigsley wrote that he understood the Union cancelled the September 14 and September 28 bargaining sessions. JT 3, p. 30. On September 17, 2018, Zarate responded to Pigsley. Zarate wrote:

“I have informed the Union that the Company is unable to meet for negotiations on the 19th. The Union notes the fact that the Company finds it necessary to cancel negotiations because of Mr. Koenig and Mr. Ziegelheim’s lack of availability even though neither have attended any contract negotiations, frankly demonstrates that Ms. Chmelka,³² the person who the Company has been sending to negotiation sessions as its representative, lacks any real authority to negotiate with the Union.” JT 3, p. 30.

Zarate also disputed that the Union cancelled the September 14 or 28 meetings. Zarate wrote that Mary Chmelka (Junker) informed the Union that the owners were in Israel and that she “could not respond to contract negotiation matters on which the Union is currently awaiting a response from the Company without them, and that she needed to wait for them to return.” Zarate advised that the Union views Respondent as the party who cancelled the September 14 session. Zarate noted that no bargaining session was ever scheduled for September 28. JT 3, p. 30. Zarate requested Respondent’s availability for the remainder of September as well as October 2018. JT 3, p. 30. Pigsley responded on October 5, 2018 with proposed bargaining dates of October 11, 18, 25, and 31, 2018. JT 3, p. 32. Zarate accepted those dates and Respondent’s proposed start time of 10 a.m. on the same date. JT 3, p. 32.

The parties met again for contract negotiations on October 11, 2018. JT 25, p. 1. At this meeting, Junker informed the Union that the owners rejected the Union’s September 12, 2018 proposal. T. 85; JT 6, p. 3; JT 25, p. 2. No reasons were given. No explanation was provided. No counter proposal was made. T. 85, 674-678. Negotiations came to a halt, the parties engaged in non-work discussions and signed off at the end of each session with the Union tasked with

³² Mary Junker’s maiden name is Chmelka. T. 66.

putting together a new proposal for Respondent to ultimately reject. Both Marty and Junker testified that this was the process that was followed for each and every proposal made by the Union. T. 86, 674-678. The progression of the Union’s proposals and Respondent’s rejections is set forth below:

Bargaining Date	Proposal Activity	Exhibit
July 27, 2018	New Union Proposal	JT 6, p. 1-2
August 17, 2018	No Answer (owners unavailable)	
August 22, 2018	No Answer (owners unavailable)	
August 30, 2018	Respondent rejects 7/27/18 proposal	
September 12, 2018	New Union Proposal	JT 6, p. 3
October 11, 2018	Respondent rejects 9/12/18 proposal	
October 18, 2018	New Union Proposal	JT 6, p. 4
October 25, 2018	Respondent rejects 10/18/18 proposal	
October 31, 2018	New Union Proposal	JT 6, p. 7
November 7, 2018	Respondent rejects 10/31/18 proposal	
November 13, 2018	New Union proposal	JT 6, p. 8
November 30, 2018	Respondent rejects 11/13/18 proposal	
December 7, 2018	New Union proposal	JT 6, p. 9
December 12, 2018	Respondent rejects 12/7/18 proposal	
December 19, 2018	New Union proposal	JT 6, p. 10

This process continued through the parties’ negotiation session on December 19, 2018. December 19, 2018 was the last bargaining session where the Union made a bargaining proposal. T. 678. The parties next met on January 2, 2019. T. 88, 679; JT 25, p. 3. At this meeting, Mary Junker presented Mike Marty with Respondent’s last, best and final offer. T. 88,

679; JT 7; JT 25, p. 3. No discussion occurred at this meeting other than Junker informing Marty that the proposal was Respondent's last, best and final offer (LBFO). T. 679-680. Junker did not give Marty a deadline to respond. T. 685. After Marty had a chance to review the LBFO, there were aspects of the proposal that jumped out at him. Marty noticed that the tentative agreements that had been reached on August 17, 2018, were not indicated in the proposal. T. 680. He also noticed that the LBFO did not include any proposal for employees' wages under Article 12. T. 680; JT 7. Respondent's original proposal on May 15, 2018 included a wage proposal that included 15 cent increases for employees every six months. JT. 5, p. 1. Respondent's LBFO was silent with respect to wages. JT 7, p. 1. The only time wages came up during contract negotiations was during a bargaining session sometime between May 15, 2018 and January 2, 2019, when Marty questioned Junker about whether Respondent was proposing a wage decrease in its May 15, 2018 proposal. T. 683-684. Junker's response was, "Oh, I don't know. I'll get back to you." T. 684. Junker confirmed in her testimony that she did not know what Respondent was proposing for wages in its May 15, 2018 proposal. T. 94; JT 5. Lastly, Respondent's LBFO included a one-year term of agreement. T. 685; JT 7. The parties never discussed duration at the table and Respondent's LBFO was the first time duration was included in any proposal made by either party. T. 96, 685; JT 4; JT 5, p. 2; JT 6; JT 7, p. 2.

Marty contacted Junker and requested another meeting because he had questions concerning the LBFO. T. 685-686. Marty, Terry Mostek and Junker met on Friday, January 25, 2019. T. 92-93, 685; JT 25, p. 3. At this meeting, Junker confirmed that the tentative agreements reached by the parties on August 17, 2018 were part of the LBFO. T. 93, 686. When Marty asked Junker about the absence of a wage proposal, Junker responded, "Well, we already did wage increases." T. 686. Junker testified to telling Marty that Respondent removed its wage

proposal because the proposal “didn’t relate to the wages we were paying at the time, presently when I was speaking to him.” T. 95. Junker testified that the wages Respondent was paying as of her January 25, 2019 meeting with Marty and Mostek were the wages in effect following Respondent’s wage increases in August 2018. T. 95. Lastly, Marty asked Junker about Respondent’s insertion of a one-year term of agreement. T. 687. Junker did not provide a response. T. 687. The meeting ended on that note without Junker giving the Union a deadline for response. T. 687, 689.

On Monday, January 28, 2019, the Union received a favorable decision in its lawsuit seeking to enforce the arbitration award that issued on June 25, 2018 concerning Respondent’s failure to allow Union representatives access to Respondent’s facility as required by Article 21 of the parties’ collective-bargaining agreement. T. 690-692; JT 23; JT 24. On January 28, 2019, the District of Nebraska granted the Union’s Motion for Summary Judgment and confirmed the arbitration award. JT 24. On Wednesday, January 30, 2019, Mike Marty sent two Union representatives to Respondent’s facility to gain access consistent with the arbitration award. T. 692. However, Respondent denied the Union’s request. T. 692. On that same day, Jerry Pigsley emailed Eric Zarate informing him that because the Union had not accepted Respondent’s LBFO, Respondent was declaring impasse and implementing the LBFO. JT. 8. Respondent has confirmed that effective January 30, 2019, it implemented each and every aspect of its LBFO. JT 10. Subsequent to Respondent notifying the Union that it was declaring impasse and implementing the LBFO, Union attorney Eric Zarate sought to have Respondent rescind its decision to implement the LBFO. T. 711-713. Respondent did not rescind the LBFO and the terms of that proposal are still in effect today. T. 713.

2. Legal analysis

The evidence set forth at hearing revealed that Respondent did not engage in good faith bargaining with the Union. It simply went through the motions. Its efforts to bargain in good faith for a new collective-bargaining agreement were a sham and every aspect of its participation in the bargaining process was in bad faith.

Section 8(d) of the Act requires that unions and employers are obligated

[T]o bargain collectively . . . in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .”

In interpreting the “good faith” standard during bargaining, the Board will examine the totality of a party’s conduct, both at and away from the table, to determine if the negotiations have been used to frustrate or avoid mutual agreement, i.e. surface bargaining. See *Regency Service Carts, Inc.*, 345 NLRB 671 (2005); *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB, 1600, 1603. (1984). For “if the Board is not to be blinded by empty talk and by the mere surface notions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employers in the course of bargaining negotiations.” *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953).

The Board will look at several factors to determine whether a party is simply going through the motions including the nature of the bargaining demands, delay tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and

arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, supra at 1603. These factors are present in this case in spades. Initially, Respondent only agreed to meet with the Union two times in the course of six months, and then only after the Union threatened legal action. When the parties did initially meet on March 22, 2018, contrary to the agreement reached between the parties' attorneys via email in advance of that date, Respondent did not offer any proposals and did not give the Union any requested information so that it could formulate its own proposals. Respondent also then proposed to meet again on a date that it knew was reserved for an arbitration between the parties. Following the settlement agreement in Case 14-CA-217400, Respondent began meeting with the Union two or three times a month, but the sessions were usually short due to the inability of the Respondent's negotiator to meaningfully discuss the proposals. *See Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993)(finding employer engaged in dilatory tactics). Mary Junker admitted that she did not have authority to agree to any of the terms of a proposal and that she had to discuss everything with the owners before commenting at the table. She was unable to discuss the Union's proposals without first discussing them with unavailable owners, or even answer basic questions about Respondent's own proposal such as whether Respondent was proposing a wage decrease for employees. When questioned about Respondent's May 15, 2018 proposal, the following exchange took place between Counsel for the General Counsel and Junker:

LeMaster: Okay. Now, the proposal here only references group 1 and group 2, but there are additional groups that are identified in the contract?

Junker: Yes.

LeMaster: Okay. So this just lists a partial -- -

Junker: Yes.

LeMaster: --a portion of those groups?

Junker: Yes.

LeMaster: Was that to be as, hey, here's sort of the progression?

Junker: I don't know. I didn't write these. So I don't know.

LeMaster: Okay. So you don't know what the wage proposal means in Joint Exhibit 5?

Junker: That's correct. T. 94-95; JT 5.

Respondent's argument that Junker could call the owners during bargaining turned out to be false, since the one time she tried to do so, the owners did not have the necessary documents to entertain bargaining discussions. That one meeting, on July 27, 2018, was the only time Junker attempted to contact the owners during the parties' bargaining. Respondent utilized a negotiator who acted as a mere conduit, rejected all the Union's proposals without explanation, and offered no proposals of its own between Respondent's initial proposal on May 15, 2018 and its last best final offer on January 2, 2019. *See Lloyd A. Fry Roofing Company v. NLRB*, 216 F.2d 273, 275 (9th Cir. 1954); *S-B Manufacturing Co.*, 270 NLRB 485, 492 (1984); *Standard Generator Service Company of Missouri, Inc.*, 90 NLRB 790, 791 (finding bad faith bargaining due, in part, to failure to invest sufficient authority in negotiator), *enforced*, 186 F.2d 606 (8th Cir. 1951).

Although the parties would schedule negotiations weeks ahead of time, the record established that Respondent cancelled bargaining sessions at the last second with no given reasons or with reasons that did not support cancellation under the circumstances. On May 8, 2018, Respondent cancelled the session scheduled for May 9, 2018 because Fischel Ziegelheim was unavailable. JT 3, p. 19-20. On August 27, 2018, Respondent cancelled the session

scheduled for August 28, 2018, without providing a reason. JT 3, p. 29. On September 14, 2018, Respondent cancelled the session scheduled for September 19, 2018, because the owners were unavailable. JT 3, p. 30. Not only did Respondent cancel sessions literally the day before they were scheduled to occur, it would do so without any explanation or by citing conflicts for representatives who were (1) never physically present for negotiations and (2) never contacted for the purpose of participating in negotiations other than one time on July 27, 2018.

Between March 22, 2018 and January 2, 2019, Respondent only made two contract proposals. The first was on May 15, 2018 and the last was its last, best and final offer (LBFO) on January 2, 2019. Respondent's LBFO was practically identical to its original offer almost eight months prior with the exception of (1) the removal of its wage proposal and (2) the inclusion of a one-year term of agreement that had never been discussed between the parties. The Union, on the other hand, made eight separate proposals. The Union's proposals were a combination of modified offers and quid pro quo proposals that rescinded certain Union requests in exchange for Respondent doing the same. At the table, Respondent failed to ask questions about the Union's proposals and Mary Junker simply informed the Union she would get back to them with a response from the owners. At the next session, Junker would notify the Union that the most recent proposal was rejected without any details, explanation or counter proposal. Respondent's conduct was the same for each and every Union proposal made once Junker started to serve as Respondent's negotiator at the table. The limited exception was on July 27, 2018, when Junker attempted to contact the owners when the Union caucused and offered a modified proposal. However, that effort was a waste in that the owner reached was not prepared for such a call and the meeting ended at that point.

The culmination of Respondent's bad faith efforts at the table was Respondent's

premature declaration of impasse on January 30, 2019, and its implementation of its LBFO on the same date. As detailed in the next session, Respondent implemented changes to mandatory subjects of bargaining within its LBFO, including dues checkoff, the parties' grievance procedure, safety, holidays, union access and term of agreement.

During the course of bargaining, as detailed throughout this brief, Respondent engaged in unfair labor practices away from the table. It committed blatant unilateral changes in mandatory subjects of bargaining, specifically unilaterally changing Unit employees' wages rates and ceasing deduction and remittance of dues owed to the Union pursuant to valid unrevoked written authorizations. Taking advantage of the Union's absence from the facility because Respondent had banned any representatives from accessing it since the end of June 2017, Respondent has done what it wants, when it wants with respect to employees' wages. The record, as detailed above, establishes that Respondent paid Unit employees wages contrary to the parties' collective bargaining agreement and gave wage increases to Unit employees that were not authorized by the collective-bargaining agreement or with notice to and agreement from the Union. The record did not establish that the Union had any knowledge of the different wages or increases, including the 15 cent increases in January/February and July/August 2018 or the wide spread increases given to most of the Unit during the pay period of August 19-25, 2018. The ALJ in *Advanced Metal Technologies of Indiana, Inc.*, 2013 WL 4922325 (Sept. 11, 2013) summarized similar blatant misconduct away-from-the-table in that case as follows:

“Further away-from-the-table support for a finding of overall bad-faith bargaining is found in the multitude of unilateral changes implemented by the Respondent. These were carried out with impunity, without regard for its bargaining obligations. As discussed above, from before negotiations began and throughout the period of negotiations, the Respondent made numerous unilateral changes without consulting the Union: it discontinued providing free coffee, transferred work out of the bargaining unit, unilaterally implemented an attendance policy, removed the union's bulletin board, implemented additional optional insurance, and implemented a blatantly unlawful no-

solicitation no-posting work rule. All of this should have been done with notice to and in consultation with the Union. None of it was. The only unlawful unilateral change it consulted with the union on before implementing was the substantively unlawful no-solicitation no-posting work rule which was implemented over the objections of the Union. In a very real sense the record demonstrates that the Respondent operated the facility as if the Union did not exist--as if it did not recognize the Union. It is well-settled that such actions are indicia of a lack of good-faith bargaining. *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5 (2011); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (unilateral changes may reflect on the Respondent's intent not to bargain in good faith).

Respondent knew what it was doing. It was hiding the ball from the Union, as evidenced by its refusal to provide the Union with information it has been requesting since November 6, 2017. Respondent has attempted to hide its unlawful changes by unlawfully refusing to provide such basic information such as Unit employees' wages from the Union. *Id.* (failure to provide information may be an indicium of bad-faith bargaining);

In late June 2018, Respondent bypassed the Union and dealt directly with Unit employees when it polled employees about their interest in moving the observance of the Independence Day holiday to July 6, 2018, which permitted the employees to have a three-day weekend. *Thill, Inc.*, 298 NLRB 669, 672 (1990) (“direct dealing support finding of overall bad-faith bargaining, as “conduct was calculated to undermine the Union in the eyes of the employees and unfairly weaken its bargaining strength”); *enfd.* in part, 980 F.2d 1137 (7th Cir. 1992). This was just one example of how Respondent sought to denigrate the Union in the eyes of employees and take the Union's legs out from underneath itself as far as its status as Unit employees' bargaining representative. As set forth above, Respondent engaged in numerous unfair labor practices away from the table where Respondent violated Section 8(a)(1) of the Act by (1) Paul Hernandez's coercive statements to employees in March 2018, concerning Unit employees' current and future Union representation, (2) Lidia Acosta and Dinora Murillo's providing more than ministerial aid in assisting employees to resign from the Union and revoke their dues checkoff authorizations on

dates between January 8, 2018 and July 20, 2018; (3) Lidia Acosta interrogating employees about their support for the Union in about October 2018, by approaching employees with forms to resign from the Union and revoke their dues checkoff authorizations, requiring employees to declare their support for the Union; and (4) Lidia Acosta and Dinora Murillo coercing employees into signing pre-printed forms prohibiting Respondent's disclosure of employees' employment information without employees written consent on dates between January 8, 2018 and July 5, 2018.

Respondent's unlawful conduct both at and away from the table is lengthy and provides a clear picture of Respondent's intent not to bargain in good faith for a successor agreement with the Union. Presently, Respondent continues to engage in unremedied unfair labor practices that mostly originated while the parties were in the midst of negotiations. Respondent has benefited from its bad faith bargaining and will continue to benefit to the detriment of Unit employees and their collective-bargaining representative until Respondent is directed to stop its unlawful conduct.

For these reasons, Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit in violation of Section 8(a)(5) of the Act.

F. About January 30, 2019, Respondent implemented its last, best and final collective-bargaining proposal without first bargaining with the Union to an overall good-faith impasse for a successor agreement.³³

As set forth above, between March 22, 2018 and January 2, 2019, Respondent made two proposals to the Union. The first was made on May 15, 2018 and the second was made on January 2, 2019. On January 2, 2019, Respondent declared that its latest proposal was its last,

³³ Complaint Paragraph 13.

best and final offer (LBFO). The parties met again on January 25, 2019, and at that time the Union asked questions about Respondent's LBFO. No deadline was established for response. However, only days later, and on the very same day that the Union sought to enforce the District of Nebraska's order granting the Union's Motion for Summary Judgment by seeking access to Respondent's facility, Respondent then declared impasse and implemented its LBFO. When an employer prematurely declares impasse and subsequently implements its proposals, it violates Section 8(a)(1) and (5) of the Act. *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993). The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979). "Both parties must believe that they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987). The Board requires "that the parties have reached that point...in negotiations when the parties are warranted in assuming that further bargaining would be futile." Futility is what must appear, not some lesser level of frustration, discouragement or apparent gamesmanship." *Powell Electrical Manufacturing Company*, 287 NLRB 969, 973 (1987). An impasse is reached "after good faith negotiations have exhausted the prospects of concluding an agreement" and there is no realistic possibility that continuation of discussion at that time would be fruitful. *AFTRA v. NLRB*, 395 F.2d 622, 624, 628 (D.C. Cir. 1968). Respondent has no valid claim of impasse in this case for several reasons. First and most important, as set forth above, Respondent has engaged in bad faith bargaining based on its conduct at and away from the table. "In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) (internal citations omitted), *enfd.* 318 F.3d 1173 (10th Cir. 2003). Respondent has engaged in

dilatory tactics by using a negotiator without authority to bind Respondent or answer the most basic of questions. Not only did Junker simply serve as a conduit passing proposals back and forth between the parties, she could not answer simple, direct questions such as whether Respondent was proposing a wage decrease for Unit employees. Junker responded by advising that she would have to get back to the Union and she never did. Even at the hearing, after months of representing Respondent at the table, Junker could not explain Respondent's wage proposal set forth in its May 15, 2018 proposal. T. 94-95.

Respondent has also declared impasse while simultaneously refusing to provide the Union with presumptively relevant information it has requested concerning Unit employees' terms and conditions of employment that would allow the Union to put together a complete contract proposal, including an appropriate economic package. T. 663-664. The Union was never able to make an economic proposal which addressed wages because, in relevant part, Respondent had refused to provide the Union with the information it was owed on the subject. T. 663-664; JT 4; JT 6. *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 326 (2001)(implementation of final offer was unlawful because the employer's failure to furnish information precluded the parties from reaching a valid impasse); See *Monmouth Care Center v. NLRB*, 672 F.3d 1085, 1093 (D.C. Cir. 2012) ("It was . . . reasonable for the Board to conclude that the [employers'] failure to provide information concerning a central point of contention between the parties-- indeed, regarding an issue that the [employers] themselves characterize as a 'key bargaining issue' [citation omitted]--frustrated the parties' efforts to reach an agreement and precluded a finding of genuine impasse."). Instead, Respondent chose to (1) hide that information from the Union, (2) take steps to coerce employees into executing confidentiality forms in an attempt to shield itself from providing that information, and (3) propose its last, best and final offer that

was completely silent on wages because Respondent admittedly instituted unilateral changes in employees' wages five months into bargaining. Respondent has engaged in a long list of unremedied unfair labor practices tied to bargaining. The Board has held that "a finding of impasse presupposes that the parties prior to the impasse have acted in good faith." *Circuit Wise, Inc.*, 309 NLRB 905, 918 (1992). "Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Id.* An impasse is unlawful if it is partially based on the employer's unremedied unfair labor practices. *Laborer's Fund Adm. Office of Northern California, Inc.*, 302 NLRB 1031, 1033 (1991); *Wayne's Dairy*, 223 NLRB 260 (1976) ("A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes.").

For these reasons, the parties were not at an impasse and Respondent's declaration of such and implementation of its last, best and final offer covering mandatory subjects of bargaining was violative of Section 8(a)(5) of the Act.³⁴ *Day Automotive Group*, 348 NLRB 1257, 1263 (2006); *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994).

G. Since at least January 23, 2018, Respondent has attempted to undermine the Union as the exclusive collective-bargaining representative of the Unit.³⁵

By the conduct described above under Sections II(A)³⁶ and III (F),³⁷ Respondent has attempted to undermine the Union as the collective-bargaining representative of the Unit.

Respondent's conduct since the end of June 2017 is that of an employer who has essentially

³⁴ Respondent's LBFO also included a proposal rejected by the Union wherein Respondent sought to change the scope of the bargaining unit by excluding maintenance employees. *JT 7*. In doing so, Respondent insisted to impasse on a proposal that included a permissive subject of bargaining. *Bozzuto's, Inc.*, 277 NLR 977 (1985). A party may propose to bargain over the scope of the unit, but may not insist to impasse on that subject. *Id.*; *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

³⁵ Complaint Paragraph 12.

³⁶ Paul Hernandez's coercive statements made to employees during a meeting in March 2018.

³⁷ Respondent's failure to bargain in good faith with the Union for a successor collective-bargaining agreement, as established by Respondent's conduct at and away from the table.

withdrawn recognition of the Union without actually uttering the words. A review of the record shows that Respondent cannot point to any evidence to show that it has continued to lawfully recognize the Union. Respondent might argue that it (1) met with the Union at the table for negotiations for a successor collective-bargaining agreement and (2) continued to deduct and remit dues for bargaining unit employees. As set forth above, Respondent violated the Act in the manner it handled both of those obligations. Although Respondent met with the Union at the table between March 2018 and January 2019, it did so while only going through the motions. Respondent used a negotiator that simply served as a conduit passing proposals between the parties. Respondent made one proposal in May 2018 and declared impasse with its second and almost identical proposal in January 2019. In between, Respondent added no substance to negotiations other than taking Union proposals and rejecting them without details, explanations or counter proposals. Respondent was simply running out the clock until it determined that the parties were at “impasse” and unilaterally changed mandatory subjects of bargaining through its implementation of its LBFO. In making this decision, Respondent disregarded the numerous unremedied unfair labor practices committed along the way, including but not limited to Respondent’s complete failure to provide the Union with presumptively relevant information concerning bargaining unit employees that would have been necessary for the Union to formulate a collective-bargaining proposal. Respondent declared impasse and implemented its LBFO without the Union having necessary information to make an economic proposal, while unfair labor practices were pending, and a Board Complaint and Notice of Hearing had been issued. While Respondent may also argue that it has continued to deduct and remit dues to the Union, such an argument lacks validity. The record has established that through Respondent’s unlawful conduct, it has failed to deduct and remit all dues owed to the Union in violation of

Section 8(a)(1) and (5) of the Act. In January 2018, there were over 100 Unit employees from whom Respondent deducted dues and then remitted to the Union. With the assistance of Respondent, by August 2018, that number had dwindled to 26. JT 14, p. 1-4, 20.

The same conduct Respondent engaged in at and away from the table that established bad faith bargaining is the same conduct that is evidence that Respondent has attempted to undermine the Union as the collective-bargaining representative of the Unit employees. The violations set forth above, individually and collectively, are the types of violations that tend to undermine the Union's status in the employees' eyes. Respondent has engaged in efforts affecting Unit employees that have done nothing but take the legs out from underneath the Union. Dues deductions decreased 75% while the bargaining unit size did not fluctuate. Respondent has made coercive statements to employees regarding future representation. Respondent has interfered with employees in their attempt to provide testimony to the Board in response to unfair labor practice charges filed by the Union. Respondent has bypassed the Union and dealt directly with employees over mandatory subjects of bargaining. Respondent has unilaterally changed mandatory subjects of bargaining, including but not limited to Unit employees' wages. See *NLRB v. Hardesty Co.*, 308 F.3d 859, 865 (8th Cir. 2002)(Unilateral changes undermine unions by signaling to employees that their union is "ineffectual, impotent, and unable to effectively represent them."). Respondent has an obligation under the Act to recognize the Union as the collective-bargaining agent of the employees in the bargaining unit and conduct which undermines the status of the Union independently violates Section 8(a)(5). *Safeway Trails*, 233 NLRB 1078, 1082 (1977) enfd. 641 F.2d 930 (D.C. Cir. 1979). That is exactly what Respondent has done through the numerous violations set forth above and for these reasons, Respondent has violated Section 8(a)(5) of the Act by attempting to undermine the Union as the collective-

bargaining representative of Unit employees.

IV. Enhanced Remedies

Respondent's unfair labor practices in violation of Section 8(a)(1), 8(a)(5) and 8(d) of the Act are wide spread, ongoing and strike at the heart of employees' Section 7 rights. Respondent has methodically engaged in conduct designed to undercut the Union as the collective-bargaining representative of Unit employees at Respondent's facility. What started with Respondent's banning of all Union representatives around the end of June 2017, has culminated into a series of unfair labor practices wherein Respondent has completely disregarded its obligations under the Act. As set forth by the record, Respondent has (1) made coercive statements to employees concerning continued Union representation, (2) threatened employees for engaging in protected, concerted activities related to their terms and conditions of employment, (3) terminated employees for engaging in protected, concerted activities related to their terms and conditions of employment, (4) solicited employees to resign from the Union, interrogated employees about their Union support, (5) provided more than ministerial aid in assisting employees with resigning from the Union, (6) coerced employees into signing preprinted forms prohibiting disclosure of employees' confidential information without employees' written consent, (7) failed to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, (8) interrogated employees about their Board activities, (9) interrogated employees about their Union and/or Board activities without providing *Johnnie's Poultry* assurances, (10) restrained, coerced and interfered with employees by requiring them to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents, (11) made coercive statements to employees while requiring employees meet with Respondent's paid attorneys, (12) refused to provide presumptively relevant information to

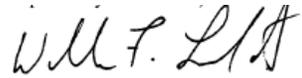
the Union regarding Unit employees' terms and conditions of employment, (13) directly dealt with Unit employees over mandatory subjects of bargaining, (14) unilaterally changed employees' hourly wage rates and paid Unit employees' wages contrary to the parties' collective-bargaining agreement, (15) engaged in bad faith bargaining with the Union while negotiating a successor collective-bargaining agreement, (16) undermined the Union as the collective-bargaining representative of the Unit, and (17) implemented a last, best and final offer changing mandatory and permissive subjects of bargaining without first bargaining with the Union to an overall good-faith impasse. Respondent has acted no differently than an employer who has effectively withdrawn recognition of the Union. Because of Respondent's pervasive unfair labor practices, the General Counsel respectfully requests that Respondent also be ordered to (1) hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of Respondent will read the Notice in English and Spanish in the presence of a Board agent, and (2) provide the Union with (a) reasonable access to non-work areas in Respondent's facility during employees' non-work time; (b) reasonable access to bulletin boards and all places where notices to employees are customarily posted at Respondent's facility; and (c) the names and addresses of current Unit employees. These enhanced remedies are necessary to prevent further corrosion of Unit support due to Respondent's long-lasting misconduct.

V. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent violated Sections 8(a)(1), 8(a)(5) and 8(d) as detailed in the General Counsel's Second Consolidated Complaint. The General Counsel's proposed Conclusions of Law, Remedy and Notice to Employees are attached as Appendix B.

Dated: April 29, 2019

Respectfully Submitted,



William F. LeMaster and
Julie Covell
Counsel for the General Counsel



APPENDIX A

Name	Auth. Date	Ex. #	Revocation Date	Ex. #	Month Dues Ceased	Ex. #	30-45 days
Aramis Hernandez Acosta	2/22/17	GC 12, p. 19	2/21/18	JT 12, p. 1	May 2018	JT 14, p. 14	No
Luis Alcorta	1/28/13	GC 12, p. 22	4/27/18	JT 12, p. 2	May 2018	JT 14, p. 14	No
James W. Berck, Jr.	3/22/16	GC 12, p. 29	7/20/18	JT 12, p. 3	Aug. 2018	JT 14, p. 20	No
Monique A. Gabaldon	5/17/16	GC 12, p. 31	4/4/18	JT 12, p. 4	May 2018	JT 14, p. 14	Yes
Virginia Campos	6/29/17	GC 12, p. 42	7/5/18	JT 12, p. 5	Aug. 2018	JT 14, p. 20	No
Veronica Castillo	3/26/14	GC 12, p. 24	7/4/18	JT 12, p. 6	Aug. 2018	JT 14, p. 20	No
Steve Catalan	10/18/16	GC 12, p. 16	7/4/18	JT 12, p. 7	Aug. 2018	JT 14, p. 20	No
Uriel Cervantes	7/21/15	GC 12, p. 6	7/5/18	JT 12, p. 8	Aug. 2018	JT 14, p. 20	No
Honeill Cruz Pagan	7/12/16	GC 12, p. 37	7/4/18	JT 12, p. 9	Aug. 2018	JT 14, p. 20	No
Daniela Diaz	9/29/16	GC 12, p. 50	1/19/18	JT 12, p. 10	Feb. 2018	JT 14, p. 5	No
Jose Figueroa	1/28/15	GC 12, p. 27	7/5/18	JT 12, p. 11	Aug. 2018	JT 14, p. 20	No
Victor I. Gallegos	4/5/17	GC 12, p. 17	3/29/18	JT 12, p. 12	Apr. 2018	JT 14, p. 11	No
Luis D. Godinez	6/24/16	GC 12, p. 40	3/29/18	JT 12, p. 13	Apr. 2018	JT 14, p. 11	No
Nestor Gomez Gerena	3/24/15	GC 12, p. 34	7/4/18	JT 12, p. 14	Aug. 2018	JT 14, p. 20	No

Name	Auth. Date	Ex. #	Revocation	Ex. #	Month Dues Ceased	Ex. #	30-45 days
Cristal M. Guevara	9/1/16	GC 12, p. 41	4/5/18	JT 12, p. 15	May 2018	JT 14, p. 14	No
Fernando Hernandez	11/30/16	GC 12, p. 20	3/29/18	JT 12, p. 16	Apr. 2018	JT 14, p. 11	No
Janilette Hernandez Ortiz	5/27/15	GC 12, p. 39	7/4/18	JT 12, p. 17	Aug. 2018	JT 14, p. 20	No
Luz E. Ledezma Duran	7/3/13	GC 12, p. 28	6/11/18	JT 12, p. 18	July 2018	JT 14, p. 18	No
Jose Lopez Perez	Unknown ¹		7/3/18	JT 12, p. 19	Aug. 2018	JT 14, p. 20	Unknown
Joel Maldonado Parilla	Unknown		7/3/18	JT 12, p. 20	Aug. 2018	JT 14, p. 20	Unknown
Natalie G. Martinez	11/10/16	GC 12, p. 15	3/29/18	JT 12, p. 21	Apr. 2018	JT 14, p. 12	No
Robert Mavigliano	3/9/17	GC 12, p. 51	11/17/17	JT 12, p. 22	Jan. 2018	JT 14, p. 2	No
Melvin Melendez	7/18/13	GC 12, p. 11	7/5/18	JT 12, p. 23	Aug. 2018	JT 14, p. 20	No
Martin Milstead	12/11/13	GC 12, p. 9	7/4/18	JT 12, p. 24	Aug. 2018	JT 14, p. 20	No
Jimmy Morales	1/18/17	GC 12, p. 18	7/4/18	JT 12, p. 25	Aug. 2018	JT 14, p. 20	No

¹ For those employees with “Unknown” authorization dates, Respondent failed to provide the General Counsel (GC) with each employee’s executed dues deduction authorization forms. Human resources manager Lidia Acosta testified that Respondent maintained copies of each employee’s executed dues deduction authorization forms. T. 547-548, 556. The authorization forms for the employees identified in this Appendix were requested pursuant to GC Subpoena B-1-142365F, paragraph 17. GC 2, p. 5-6. The GC respectfully requests that the ALJ draw an adverse inference that the authorization forms Respondent failed to produce would have supported the GC’s position that the employees’ revocations were untimely. *Shamrock Foods Co.*, 366 NLRB No. 117 (2018); *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 9-10 (2018); *Metro-West Ambulance Service*, 360 NLRB 1029, 1030 (2014)

Name	Auth. Date	Ex. #	Revocation Date	Ex. #	Month Dues Ceased	Ex. #	30-45 days
Richardo A. Najera	6/15/17	GC 12, p. 14	3/29/18	JT 12, p. 26	Apr. 2018	JT 14, p. 12	No
Sol G. Olivas	3/4/16	GC 12, p. 38	3/29/18	JT 12, p. 27	Apr. 2018	JT 14, p. 12	No
Reyna Paz	Unknown		3/8/18	JT 12, p. 28	Apr. 2018	JT 14, p. 12	Unknown
Antonio Peredo	12/20/13	GC 12, p. 36	3/29/18	JT 12, p. 29	Apr. 2018	JT 14, p. 12	No
Richard Perez Rosado	8/28/14	GC 12, p. 35	7/5/18	JT 12, p. 30	Aug. 2018	JT 14, p. 20	No
Juvencio E. Ramirez de la Cruz	5/11/17	GC 12, p.12	7/5/18	JT 12, p. 31	Aug. 2018	JT 14, p. 20	No
Laura Rios	2/13/13	GC 12, p. 47	1/8/18	JT 12, p. 32	Feb. 2018	JT 14, p. 7	Yes
Robert Martin Rios	5/8/14	GC 12, p.11	7/5/18	JT 12, p. 33	Aug. 2018	JT 14, p. 20	No
Yolada Rivera Rosado	Unknown		7/4/18	JT 12, p. 34	Dec. 2018	GC 25, p. 5	Unknown
Wisdaly Rojas Navarro	9/16/14	GC 12, p. 33	1/25/18	JT 12, p. 35	Feb. 2018	JT 14, p. 7	No
Angel Santana Laureano	11/3/16	GC 12, p.13	3/28/18	JT 12, p. 36	Apr. 2018	JT 14, p. 12	No
Christopher Sena	Unknown		4/7/18	JT 12, p. 37	Aug. 2018	JT 14, p. 20	Unknown
Otis Simmons	3/15/16	GC 12, p. 25	2/15/18	JT 12, p. 38	Mar. 2018	JT 14, p. 10	No
Orlaida Simon	Not legible	GC 12, p. 48	2/16/18	JT 12, p. 39	Mar. 2018	JT 14, p. 10	Unknown

Name	Auth. Date	Ex. #	Revocation Date	Ex. #	Month Dues Ceased	Ex. #	30-45 days
Georgina De La Torre	9/16/14	GC 12, p.4	1/25/18	JT 12, p. 40	Feb. 2018	JT 14, p. 5	No
Alejandro Torres	9/4/14	GC 12, p. 23	1/11/18	JT 12, p. 41	Feb. 2018	JT 14, p. 7	No
Marcial Torres Santiago	Unknown		7/4/18	JT 12, p. 42	Aug. 2018	JT 14, p. 20	Unknown
Steven Durate	1/28/13	GC 12, p. 21	7/4/18	JT 12, p. 43	Aug. 2018	JT 14, p. 20	No
Omar Valdes	11/13/13	GC 12, p. 28	9/29/17	JT 12, p. 44	Jan. 2018	JT 14, p. 3	Yes
Maria Vargas	2/26/16	GC 12, p. 44	7/5/18	JT 12, p. 45	Aug. 2018	JT 14, p. 20	No
Carlos Velez Rodriguez	9/4/15	GC 12, p. 45	7/8/18	JT 12, p. 46	Aug. 2018	JT 14, p. 20	No
Iris Velez Velez	9/1/15	GC 12, p. 46	3/28/18	JT 12, p. 47	Apr. 2018	JT 14, p. 12	No
Emevelin Villalobos Tejedo	Unknown		7/4/18	JT 12, p. 48	Aug. 2018	JT 14, p. 20	Unknown
Mario Uribe	Unknown		7/4/18	JT 12, p. 49	Aug. 2018	JT 14, p. 20	Unknown
Denise Vaca	4/14/15	GC 12, p. 43	7/5/18	JT 12, p. 50	Aug. 2018	JT 14, p. 20	No
Rosa Lopez	Unknown		4/5/18	GC 20, p 1	May 2018	JT 14, p. 14	Unknown
Clifford Norden	10/18/16	GC 12, p. 1	4/25/18	GC 20, p. 2	May 2018	JT 14, p. 15	No
Narcisca Garcia Portillo	11/17/16	GC 12, p. 5	1/15/18	GC 20, p. 3	Feb. 2018	JT 14, p. 5	No

Name	Auth. Date	Ex. #	Revocation Date	Ex. #	Month Dues Ceased	Ex. #	30-45 days
Jenny Garcia	4/5/17	GC 12, p. 8	3/29/18	GC 20, p. 4	Apr. 2018	JT 14, p. 11	No
Luz Lao Maurant	Unknown		1/4/18	GC 20, p. 5	Feb. 2018	JT 14, p. 6	Unknown
Maria L. Vallecillo	Unknown		7/5/18	GC 20, p. 6	Aug. 2018	JT 14, p. 20	Unknown
Rosalba Hinojos Cortes	3/26/14	GC 12, p. 10	8/28/17	GC 20, p. 7	Jan. 2018	JT 14, p. 1	No
Luis R. Felix	Unknown		10/10/17	GC 20, p. 9	Jan. 2018	JT 14, p. 1	Unknown
Viviana Hernandez Esquilin	7/22/?	GC 12, p. 49	1/4/18	GC 20, p. 10	Feb. 2018	JT 14, p. 6	No
Yulien Ledea Gonzalez	Unknown		10/27/17	GC 20, p. 11	Jan. 2018	JT 14, p. 2	Unknown
Rose Mary Villarreal	4/30/14	GC 12, p. 26	7/4/18	GC 20, p. 12	Aug. 2018	JT 14, p. 20	No
Alejandro Garcia	Unknown		10/26/18	GC 20, p. 13	Nov. 2018	GC 25, p. 4	Unknown

APPENDIX B

I. Proposed Conclusions of Law

1. Respondent, Noah's Ark Processors, LLC d/b/a WR Reserve, is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7) of the Act.
2. The Union, United Food and Commercial Workers Local Union No. 293, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times since about 2011, the Union has been the certified exclusive collective-bargaining representative, within the meaning of the Section 9(a) of the Act, of an appropriate unit of employees consisting of the following:

All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

4. At all material times, the following individuals have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:
 - a. Mike Helzer
 - b. Paul Hernandez
 - c. Chris Kitch
 - d. Lidia Acosta
 - e. Joel Murillo
 - f. Jose Madrigal
 - g. Karen Mendoza
 - h. Josue Guerrero
 - i. Clay Irish
 - j. Maruylys Castillo Cisnero
 - k. Luis Prado
5. At all material times, Dinora Murillo and Mary Junker were agents of Respondent within the meaning of Section 2(13) of the Act.
6. By, about March 2018, telling employees they were not represented by a union at the facility; telling employees Respondent was going to remove the Union from the facility; telling employees that moving forward there would be no union at the facility; and telling employees they would not receive a raise in wages because of the Union, Respondent, through Paul Hernandez, has violated Section 8(a)(1) of the Act.
7. By, about March 27, 2018, threatening employees with termination for engaging in protected, concerted activities; telling employees they were terminated for engaging in protected, concerted activities; and threatening to call the police because the employees

engaged in protected, concerted activities, Respondent, through Paul Hernandez and Mike Helzer, has violated Section 8(a)(1) of the Act.

8. By, about September 2018, soliciting employees to resign from the Union, Respondent, through Lidia Acosta, has violated Section 8(a)(1) of the Act.
9. By, about September 2018, interrogated employees about their support for the Union, Respondent, through Lidia Acosta, has violated Section 8(a)(1) of the Act.
10. By, on various dates since January 23, 2018, providing employees with preprinted forms to resign from the Union and to revoke their dues check-off authorizations, Respondent, through Lidia Acosta and Dinora Murillo, has violated Section 8(a)(1) of the Act.
11. By, on various dates since January 23, 2018, coercing employees into signing preprinted forms prohibiting Respondent's disclosure of employees' employment information without employees' written consent, Respondent, through Lidia Acosta and Dinora Murillo, has violated Section 8(a)(1) of the Act.
12. By, since January 23, 2018, failing to remit employee dues to the Union pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, Respondent has violated Section 8(a)(1) of the Act.
13. By, about early November 2018, interrogating employees about their Board activities; and interrogating employees about their Union and/or Board activities without providing employees appropriate Johnnie's Poultry, 146 NLRB 770 (1964) assurances, Respondent, through Paul Hernandez, Joel Murillo, Jose Madrigal, Karen Mendoza, and Josue Guerrero, has violated Section 8(a)(1) of the Act.
14. By, about early November 2018, requiring employees to meet with and/or use attorneys retained and compensated by Respondent prior to and when meeting with Board agents, Respondent, through Paul Hernandez, Joel Murillo, Jose Madrigal, and Karen Mendoza, has violated Section 8(a)(1) of the Act.
15. By, about early November 2018, telling employees that they were required to use Respondent's paid attorneys when meeting with the Board's agents; and telling employees that they were required to use the Respondent's paid attorneys to meet with the Board's agents because Respondent didn't want employees speaking to the Board agents about matters they should not be talking about, Respondent, through Paul Hernandez, has violated Section 8(a)(1) of the Act.
16. By, about March 27, 2018, terminating employees Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, because the named employees engaged in concerted activities with other employees and each other for the purpose of mutual aid and protection, by concertedly requesting from Respondent explanations of wage discrepancies and demanding a wage increase, Respondent has violated Section 8(a)(1) of the Act.

17. By failing and refusing to fully provide relevant information related to Unit employees' terms and conditions of employment requested by the Union in writing on November 6, 2017 and subsequent dates, Respondent has violated Section 8(a)(1) and (5) of the Act.
18. By, about late June 2018, bypassing the Union and directly dealing with its employees by soliciting employees' preferences about moving the observance of the Independence Day holiday to July 6, 2018, Respondent, through Mike Helzer, Paul Hernandez, Chris Kitch, Clay Irish, Karen Mendoza, Marulys Castillo Cisneros, Joel Murillo, Luis Prado and Jose Madrigal, has violated Section 8(a)(1) and (5) of the Act.
19. By, since about January 23, 2018, changing Unit employees' hourly wage rates and paying Unit employees' wages contrary to the parties' collective-bargaining agreement, Respondent has violated Section 8(a)(1) and (5) and 8(d) of the Act.
20. By, since about January 23, 2018, failing and refusing to deduct and remit to the Union dues pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, Respondent has violated Section 8(a)(1) and (5) and 8(d) of the Act.
21. By, since about January 23, 2018, attempting to undermine the Union by making coercive statements to employees concerning continued Union representation; failing to provide the Union with presumptively relevant information related to Unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements; canceling bargaining sessions at the last moment without explanation; failing to make bargaining proposals; failing to provide explanations for rejections of the Union's bargaining proposals; denigrating the Union in the eyes of Unit employees; soliciting employees to resign from the Union and to cease paying dues; providing preprinted forms to employees seeking to resign from the Union; coercing employees into signing nondisclosure of confidential employment information forms; directly dealing with employees about mandatory terms of conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best and final offer, Respondent has violated Section 8(a)(1) and (5) of the Act.
22. By, since about January 23, 2018, failing and refusing to bargain in good faith with the Union, as the bargaining agent of its employees in the appropriate unit described above, by failing to provide the Union with the presumptively relevant information related to bargaining unit employees' terms and conditions of employment; failing to cloak its bargaining representatives with the authority to enter into binding agreements, cancelling bargaining sessions at the last moment without explanation; failing to make bargaining proposals; failing to provide explanations for rejection of the Union's bargaining proposals; denigrating the Union in the eyes of Unit employees; soliciting employees to resign from the Union and ceasing deducting and remitting dues to the Union; providing preprinted forms to employees seeking to resign from the Union; coercing employees into

signing preprinted non-disclosure of confidential employment information forms; directly dealing with employees about mandatory terms of conditions of employment; unilaterally changing employees' terms and conditions of employment without notice and bargaining with the Union and changing the terms of the parties' collective-bargaining agreement without the Union's consent, including those prematurely implemented pursuant to Respondent's last, best and final offer, Respondent has violated Section 8(a)(1) and (5) of the Act.

23. By, about January 30, 2019, implementing its last, best and final collective-bargaining proposal regarding changes to the parties' collective-bargaining agreement, including articles addressing mandatory subjects dues checkoff, grievance procedure, safety, holidays, union access and term of agreement without first bargaining with the Union to an overall good-faith impasse for a successor collective, bargaining agreement, Respondent has violated Section 8(a)(1) and (5) of the Act.
24. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. Proposed Remedy

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

The Respondent, having discriminatorily terminated Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, must offer each of them reinstatement and make each of them whole for any loss of earnings and benefits they suffered and reasonable consequential damages they incurred as a result of the discrimination against them from the date of the discrimination to the date of their reinstatement. The Respondent will also make each of them whole for all search-for-work and work related expenses in excess of whether the employees received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent, having directly dealt with bargaining unit employees over mandatory subjects of bargaining, must cease and desist from engaging in such behavior in the future.

The Respondent, having changed bargaining unit employees' hourly wage rates and paid bargaining unit employees' wages contrary to the collective-bargaining agreement, must rescind, upon request, the changes it made to employees' wages and make employees whole for any losses they suffered as a result of the changes unilaterally implemented by Respondent.

The Respondent, having failed to deduct and remit dues to the Union pursuant to valid, unexpired, and unrevoked employee dues check-off authorizations, must (a) Honor contract

checkoff provisions and valid dues-checkoff authorizations filed with it, and remit to the Union dues it should have checked off pursuant to the collective-bargaining agreement in effect between the parties together with interest and (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze the amount due under the terms of this Order.

The Respondent must also bargain in good faith with the Union over the aforementioned mandatory subjects of bargaining.

The Respondent, having failed to bargain in good faith with the Union for the purpose of negotiating a successor collective-bargaining agreement, shall utilize a negotiator at the table with authority to bind the Respondent and bargain with the Union in sessions to be held for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining.

The Respondent, having implemented its last, best and final collective-bargaining proposal regarding changes to the parties' collective-bargaining agreement, including mandatory subjects of bargaining, without first bargaining with the Union to an overall good-faith impasse, must rescind all changes in terms and conditions of employment implemented on January 30, 2019 and restore all terms and conditions of employment as they existed prior to the January 30, 2019 implementation, and make whole employees adversely affected by the January 30, 2019 implementation, with interest.

The Respondent, having failed to provide the Union with presumptively relevant information related to bargaining unit employees' terms and conditions of employment since November 6, 2017, shall provide the Union with all information it requested in writing on November 6, 2017, and subsequent dates.

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright, for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than a year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The Respondent will post the attached Notice to Employees in English and Spanish in all places where Respondent normally posts notices and keep all Notices posted for 60 consecutive days.

The Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of Respondent will read the Notice in English and Spanish in the presence of a Board agent.

The Respondent will provide the Union with (1) reasonable access to non-work areas in Respondent's facility during employees' non-work time; (2) reasonable access to bulletin boards and all places where notices to employees are customarily posted at Respondent's facility; and (3) the names and addresses of current Unit employees.

III. Proposed Notice to Employees

PROPOSED NOTICE TO EMPLOYEES

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 a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT, upon request, refuse to bargain in good faith with the United Food and Commercial Workers Union Local 293 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production, maintenance, shag drivers and distribution employees, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL NOT tell you that there will be no union in the facility.

WE WILL NOT tell you we are going to remove the Union from the facility.

WE WILL NOT tell you that going forward there will not be a union at the facility.

WE WILL NOT tell you there will be no raise because of the Union.

WE WILL NOT ask you to resign from the Union and cease paying Union dues.

WE WILL NOT proactively take steps to help you resign from the Union.

WE WILL NOT ask you about your support for the Union.

WE WILL NOT coerce you into signing confidentiality forms.

WE WILL NOT threaten you with termination or threaten to call the police on you if you engage in protected concerted activities such as asking for a pay raise.

WE WILL NOT tell you we are terminating you for engaging in protected concerted activities such as asking for a pay raise.

WE WILL NOT ask you about whether you received subpoenas from the National Labor Relations Board (Board).

WE WILL NOT require that you meet with attorneys paid for by us related to Board investigations.

WE WILL NOT tell you that you are required to use the attorneys we paid for when you meet with Board agents.

WE WILL NOT make coercive statements to you about your potential testimony to Board agents.

WE WILL NOT fire you because you engage in protected concerted activities such as asking for a pay raise.

WE WILL NOT deal directly with you over mandatory terms and conditions of employment, including the observance of a holiday.

WE WILL NOT refuse to provide the Union with presumptively relevant information

WE WILL NOT fail to deduct and remit Union dues pursuant to valid dues deduction authorizations.

WE WILL NOT unilaterally change your wage rates and/or pay you wage rates contrary to the collective-bargaining agreement.

WE WILL NOT try and undermine the Union's role as your bargaining representative.

WE WILL NOT in any manner interfere with your rights under Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of our unit employees.

WE WILL offer Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any rights or privileges previously enjoyed.

WE WILL make Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya

Keana Wright whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from their files any reference to the unlawful termination of Guadalupe Ortiz, Viviana Hernandez, Brittney Spratt, Jimmy Deleon, Luz Maurant Lao, Jacinto Gomez, Maria Diaz, Sandra Diaz, Kyle Anzualdo, and Maya Keana Wright and within 3 days thereafter notify those individuals in writing that this has been completed and their discharges will not be used against them in any way.

WE WILL, upon request by the Union, rescind unilateral changes made to employees' wage rates and **WE WILL** notify the Union in writing that this has been done.

WE WILL, upon request of the Union, rescind all changes in terms and conditions of employment implemented on January 30, 2019 and restore all terms and conditions of employment as they existed prior to the January 30, 2019 implementation, and **WE WILL** make whole employees adversely affected by the January 30, 2019 implementation, with interest.

WE WILL provide the Union with (1) reasonable access to non-work areas in Respondent's facility during employees' non-work time; (2) reasonable access to bulletin boards and all places where notices to employees are customarily posted at Respondent's facility; (3) the names and addresses of current Unit employees.

WE WILL, beginning with the next scheduled bargaining session for the purpose of negotiating a successor collective-bargaining agreement with the Union, utilize a negotiator at the table with authority to bind the Respondent.

WE WILL bargain with the Union in sessions to be held for a minimum of 24 hours per month, each session to last a minimum of six hours, until an agreement or lawful impasse is reached or until the parties agree to a respite in bargaining.

WE WILL reimburse the Union for the losses resulting from our failure to deduct and remit dues since January 23, 2018.

WE WILL resume deducting and remitting dues to the Union unless and until such time as employees revoke their authorization for automatic dues deduction pursuant to the terms set forth in the employees' dues checkoff authorizations.