

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

Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park and Cemetery Workers, Golf Courses and Green Attendants, SEIU Local 265. Cases 20–CA–227245 and 20–CA–229015

July 30, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On August 23, 2019, Administrative Law Judge Sharon Levinson Steckler issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings,¹ findings, and conclusions only to the extent consistent with this Decision and Order.²

The Respondent has been engaged in the operation of a funeral home, cemetery, and memorialization business in San Mateo, California, and employs a unit of groundskeepers to maintain the cemetery. The judge found, among other things, that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally changing its groundskeepers’ work schedules on two occasions. The judge also found that the Respondent violated Section 8(a)(1) when its grounds superintendent, Lorenzo Molina, asked employee Joel Strube to remove a prounion sign from his motorcycle and, subsequently, when Molina parked his truck in a way that blocked the sign so it could not be seen by mourners attending a burial service.

¹ Despite the Respondent’s arguments to the contrary, we find that the judge did not abuse her discretion in determining what sanctions to impose for the Union’s noncompliance with the Respondent’s subpoenas. Accordingly, we affirm the judge’s decision to exclude only GC Exh. 14.

Further, we agree with the judge that the General Counsel did not violate the Respondent’s due process rights by arguing that the Respondent’s unilateral changes were unlawful because its collective-bargaining agreement with the Union had expired. In agreeing with the judge, however, we find it unnecessary to rely on the General Counsel’s questions at the hearing regarding *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

² We have amended the judge’s conclusions of law consistent with our findings herein, and we have modified the judge’s recommended Order consistent with our legal conclusions herein and in accordance with

For the reasons discussed below, we agree with the judge that the Respondent violated the Act when it unilaterally changed employees’ work schedules. We disagree, however, with the judge’s finding that the Respondent violated the Act when, after receiving a complaint from a mourner, it took actions to prevent Strube’s sign from disturbing those attending a burial service.

I. UNILATERAL CHANGES

The essential facts are not in dispute. Since at least 2011, the Respondent scheduled bargaining-unit employees to work Monday through Friday. The parties included language in their most recent collective-bargaining agreement (2013–2017) that gave the Respondent the flexibility to schedule employees for five consecutive days within a Sunday through Saturday time period.³ Despite this flexibility, the Respondent continued its longstanding practice of scheduling employees for a Monday through Friday work week. The parties’ collective-bargaining agreement expired December 31, 2017.

In February 2018,⁴ the parties entered negotiations for a successor agreement. On August 16, as negotiations continued, General Manager Rich McCown announced at a regular morning meeting with groundskeepers that the Respondent was changing employees’ schedules. Under the new schedule, three employees would work Monday to Friday, three employees would work Tuesday to Saturday, and three employees would work Wednesday to Sunday.

Later that morning, McCown emailed Union President Gregorio Rodriguez about the change, stating:

I wanted to inform you that due to needs of our business, we are adjusting our schedule slightly to a split shift, effective this Sunday. This will ensure we have the appropriate staffing every day of the week. If you have any concerns, or would like to discuss, I am available anytime. If you would like to meet today, tomorrow, Saturday, or Sunday, I can arrange that as well. The guys selected their shifts this morning.

our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

³ The relevant contract language was as follows:

11.2 Regular Work Week. The regular work week at straight-time shall consist of any five (5) consecutive eight (8) hour working days, Sunday through Saturday. Employees may volunteer for assignment to a regular work week which includes Saturday or Sunday or both. If an insufficient number of qualified employees volunteer for such assignment, assignment of qualified employees to a regular work week which includes Saturday or Sunday or both shall be made by inverse seniority where the qualifications required to perform the work are approximately equal in the reasonable judgment of the employer.

⁴ Unless otherwise stated, all dates refer to 2018.

The Union objected to the schedule change and demanded to bargain. McCown responded that he was available to discuss the change but explained that the contractual language permitted the Respondent to change the schedule in this way. The Union replied that it disagreed with McCown's interpretation of the contract and again demanded to bargain. The parties exchanged several emails in an unsuccessful attempt to select a date on which to meet to discuss the schedule change. Thereafter, on September 9, the Respondent unilaterally implemented the new schedule. Two weeks later, the Respondent reverted to the original Monday through Friday schedule, again unilaterally.

As mentioned above, the judge found that the Respondent's unilateral implementation of the scheduling changes violated the Act. On exceptions, the Respondent argues that the expired collective-bargaining agreement authorized it to make these changes. In support of its position, the Respondent cites the Board's decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), which issued after the judge's decision in this case. In *MV Transportation*, the Board adopted the contract coverage standard for determining whether a collective-bargaining agreement permits an employer's unilateral action and decided to apply it retroactively to all pending cases. *Id.*, slip op. at 2, 12. Under the contract coverage standard, the Board will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Id.*, slip op. at 2. Where the action at issue is covered by contract language, the Board will conclude that "the agreement . . . authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5)." *Id.*, slip op. at 11.

After *MV Transportation* issued, however, we addressed whether the contract coverage standard applies to changes made, as in this case, after a collective-bargaining agreement expires. See *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61 (2020). In *Nexstar*, the respondent changed unit employees' terms and conditions of employment—including its work schedule posting procedure—following expiration of its collective-bargaining agreement with the union. It argued that, because the

language in the expired contract covered the changes at issue, those changes were lawful under *MV Transportation*. The Board rejected the respondent's contention, holding that "provisions in an expired collective-bargaining agreement do not cover postexpiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." *Id.*, slip op. at 2. Because the parties' contract did not contain any such language, the Board found that the respondent had a statutory duty to maintain the status quo under *NLRB v. Katz*, 369 U.S. 736 (1962), and *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991).⁵ It ultimately found that the respondent failed to do so and that the unilateral changes violated Section 8(a)(5) and (1).

In the present case, although Section 11.2 of the expired contract gave the Respondent the flexibility to change the employees' schedules, the contract does not expressly provide that this section would survive the expiration of the contract. Therefore, as in *Nexstar*, we find that the expired agreement does not cover the changes at issue. Further, we find, as the judge did, that the Monday-to-Friday work schedules were a past practice and, as such, an established term and condition of employment: the Respondent maintained this schedule for a total of seven years. We also agree with the judge that the Respondent's changes to that past practice were material, substantial, and significant, and that the Respondent deprived the Union of its right to bargain over the changes before they were implemented by the Respondent.⁶ Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act twice by unilaterally changing the work schedules of its groundskeepers.⁷

II. PRONOUN SIGN

The second unfair labor practice issue this case presents is whether the judge correctly found that the Respondent violated Section 8(a)(1) of the Act when Grounds Superintendent Lorenzo Molina asked employee Joel Strube to remove a pronoun sign from his motorcycle while it was parked on cemetery grounds and, subsequently, moved his own truck so that the sign would not be visible to mourners attending a burial service. We disagree with the

⁵ Under *Katz*, an employer has a duty to maintain the status quo once a labor contract expires. This obligation arises out of the Act, rather than from the parties' contract. After a contract expires, "terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law." *Litton*, 501 U.S. at 206.

⁶ We agree with the judge that the Union did not waive its right to bargain by proposing to bargain about the schedule change at the parties' next contractual bargaining session, which was scheduled for approximately three weeks after the Respondent's August 16 email, rather than

insisting on bargaining immediately. We further note that the Board has found a fait accompli precluding a waiver finding under similar circumstances. See, e.g., *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 3 (2018).

⁷ Given our finding that the Respondent unlawfully failed to bargain over its decisions to change employees' schedules, we find it unnecessary to pass on the judge's additional finding that the Respondent unlawfully failed to bargain over the effects of those decisions. See *Grondorf, Field, Black & Co.*, 318 NLRB 996, 997 (1995), *enfd.* in part 107 F.3d 882 (D.C. Cir. 1997).

judge’s finding that Molina’s actions violated the Act and, accordingly, dismiss these allegations.

Groundskeepers usually park their personal vehicles in “yard parking,” which is adjacent to their storage facility, break room, and lockers. On May 3, Strube parked his motorcycle in the first space in yard parking, directly across from an area called “Vets X,” where a burial service was taking place. On his motorcycle, Strube displayed a sign that read: “Unfair wage proposals for senior employees.” Mourners attending the service were troubled by the sign and complained to the Respondent’s family service advisor, who then called Molina, requesting his presence at the burial site. At some point thereafter, Molina drove his truck to yard parking and parked in a way that blocked the mourners’ view of the sign.⁸ Once Molina arrived at the burial site, he spoke directly with a family member who reiterated the family’s concerns about the sign, and he informed the family that he would address the issue. At some point after becoming aware of the family’s concerns, Molina asked Strube to remove the sign from his motorcycle, but Strube declined to do so. Leaving his truck where it was, Molina assisted with the staging of the casket and attended the service. When the service ended, Molina moved his truck so that it was no longer blocking the sign.

On May 7 and 11, Molina again temporarily parked his vehicle in front of Strube’s motorcycle so that the sign was not visible to mourners attending burial services. However, the record does not contain any additional details surrounding these later incidents. Aside from these three limited occasions, Strube openly displayed his sign in yard parking without incident.

The judge held that the Respondent’s request for Strube to remove the sign on May 3 was unlawfully coercive. The judge also held that, by parking in front of Strube’s motorcycle on May 3, 7, and 11, the Respondent unlawfully prevented Strube from soliciting support from the Respondent’s patrons and other employees. We disagree.

No Board precedent directly addresses the circumstances presented here. In analyzing this issue, therefore, we are guided by cases dealing with analogous circumstances: solicitation in immediate patient care areas of hospitals. The Supreme Court has long emphasized that hospitals have a special duty to maintain a peaceful and relaxed atmosphere in order to facilitate the healing process. In *NLRB v. Baptist Hospital, Inc.*, the Court observed that

[h]ospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed.

442 U.S. 773, 783 fn. 12 (1979), citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (Justice Blackmun, concurring).

The Board has similarly “recognize[d] that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.” *St. John’s Hospital*, 222 NLRB 1150, 1150 (1976), enfd. in relevant part 557 F.2d 1368 (10th Cir. 1977). For that reason, “hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted.” *Id.* For instance, prohibition of solicitation may be warranted, even on nonworking time, “in strictly patient care areas, such as the patients’ rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas,” because “[s]olicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind.” *Id.* Based on these considerations, the Board has found that restrictions on Section 7 activity in immediate patient care areas are presumptively valid. See, e.g., *Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children’s and Women’s Hospital Long Beach*, 366 NLRB No. 66, slip op. at 2 (2018), enfd. 774 Fed.Appx. 1 (D.C. Cir. 2019).

In our view, funeral homes and cemeteries, like hospitals, constitute environments where the need for “quiet and peace of mind” can justify more stringent prohibitions on solicitation. Mourners are often under emotional strain and worry, and providing comfort and support to those suffering a loss is a principal facet of mortuary services. As in the immediate patient care areas of a hospital, a tranquil atmosphere is essential to the carrying out of this function. And as in immediate patient care areas, solicitation of support in a labor dispute from mourners attending a burial service is an unsettling reminder of the tensions of

⁸ The judge recited both Strube’s and Molina’s versions of these events in her decision. In doing so, the judge stated that Molina testified that he knew the family was upset by the sign before he went to the burial site and parked his truck. In fact, Molina testified that he did not know the family was upset by the sign until after he had parked and spoken

with the family member face-to-face. As the Respondent points out, this factual issue goes to whether Molina intentionally blocked the sign when he parked his truck. We need not resolve this question, however, because even if Molina intentionally blocked the sign, it does not affect our resolution of this issue.

the marketplace. This feeling was clearly evidenced by the request of a grieving family for Strube's sign to be removed from view during the burial ceremony of their loved one. Consistent with these principles, we find that the Respondent could lawfully prohibit Strube from soliciting such support during a burial service attended by mourners at a burial site from which Strube's sign was plainly visible. We note that there was no showing that the Respondent allowed the display of other insignia or signs in similar circumstances or otherwise selectively banned Section 7-related material. Accordingly, the May 3 request that he remove his sign, and the instances in which the Respondent blocked mourners' view of the sign, were lawful as well.

In dismissing these allegations, we additionally rely on the limited scope of the restrictions imposed by the Respondent on Strube's Section 7 activity. As discussed above, the Respondent allowed Strube to display his sign before and after the three burial services and at other times as well. Cf. *Baptist Hospital*, supra at 785 (observing that "the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility" (internal quotations omitted)). Thus, the impact on Section 7 activity of the Respondent's challenged conduct was relatively minimal, and the Act does not require employers to afford employees "the most convenient or most effective means" of conveying their message, particularly when the means chosen trench on the rights and interests of others. *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op. at 4 (2019) (internal quotation omitted); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945) (holding that the Board must "work[] out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee").⁹ Therefore, we conclude that the Respondent did not violate the Act by requesting that its employee remove a pro-union sign or by blocking the view of that sign from mourners at a burial site.

⁹ *International Business Machines Corp.*, 333 NLRB 215 (2001), enf.d. 31 Fed.Appx. 744 (2d Cir. 2002), *Advance Auto Parts Distribution Center*, 322 NLRB 910, 912 (1997), and *Schwan's Sales Enterprises, Inc.*, 257 NLRB 1244, 1247-1249 (1981), enf.d. 687 F.2d 163 (6th Cir.

AMENDED CONCLUSIONS OF LAW

Delete paragraphs (6) and (7) and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park, San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing terms and condition of employment of its unit employees, including shift schedules, without first notifying the Union and giving it an opportunity to bargain.

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

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

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

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

(b) Upon request by the Union, and to the extent, if any, it has not already done so, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in September 2018.

(c) Make affected employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unilateral changes, in the manner set forth in the remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the

1982), cited by the judge, all involved outright prohibitions on the display of union insignia or messages on the employer's premises and are thus readily distinguishable.

backpay awards to the appropriate calendar year for each employee.

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

(f) Post at its San Mateo, California facility copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 9, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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

Dated, Washington, D.C. July 30, 2020

John F. Ring,

Chairman

¹⁰ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment, including your shift schedules, without first notifying the Union and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park

posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

WE WILL, on request by the Union, and to the extent we have not already done so, rescind the schedule changes for our bargaining unit employees that were unilaterally implemented in September 2018 and restore the status quo ante that existed prior to the change until such time as we have bargaining with the Union to an agreement or impasse.

WE WILL make affected employees whole for any loss of earnings and other benefits suffered as the result of our unlawful unilateral changes to your work schedule, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

NORTHSTAR MEMORIAL GROUP, LLC
D/B/A SKYLAWN FUNERAL HOME,
CREMATORY AND MEMORIAL PARK

The Board's decision can be found at www.nlr.gov/case/20-CA-227245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



David Reeves, Esq., for the General Counsel.
Ronald J. Holland and Michael Giambona, Esqs., counsel for Respondent.

¹ All dates occur in 2018 unless otherwise specified.

² Respondent's initial posthearing brief contended that General Counsel changed its theory of the case regarding the 8(a)(5) allegations. In an abundance of caution, Respondent was offered the opportunity either to

DECISION

STATEMENT OF THE CASE

SHARON LEVINSON STECKLER, Administrative Law Judge. Charge 20-CA-227245 filed by Charging Party Cemetery Workers, Golf Courses and Green Attendants, SEIU Local 265 (the Union) against Respondent Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park (Respondent) on September 12, 2018.¹ On October 10, the Union filed charge 20-CA-229015 against Respondent. General counsel issued a complaint in 20-CA-227245 on December 31 and thereafter consolidated the Complaint with 20-CA-229015 on March 6, 2019 (consolidated complaint).

A trial was conducted on May 14 and 15, 2019, in San Francisco, California. Counsel for the General Counsel and the Respondent filed posttrial briefs² in support of their positions, which I have carefully considered.

On the entire record, I make the following findings, conclusions of law, and recommendations.

I. JURISDICTION

Respondent admits, and I find, it has been a limited liability company with an office and place of business in San Mateo, California (Respondent's facility) and has been engaged in the operation of funeral homes and cemeteries. In conducting its operations during the 12-month period ending December 31, 2018, Respondent derived gross revenues in excess of \$500,000. It also purchased and received at its San Mateo, California facility goods valued in excess of \$5000 directly from points outside the State of California. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. RESPONDENT'S FACILITIES AND OPERATIONS

Skylawn's cemetery (Respondent's facility or facility) covers approximately 505 acres, which include a funeral home, burial grounds, a crematorium, a mausoleum, and space for expansion. Respondent serves a diverse population, each with its own customs and traditions for burial and/or memorials. The facility operates 7 days a week. Need for its services is unpredictable, as some faiths require immediate burials. Some may have long vehicle processions snaking through the grounds of the facility. Burial areas are called gardens.

Visitors to the facility may park at funeral home, which houses 4 chapels, or park near the "garden" area of the burial of their loved one. The funeral home could have 4 or more services simultaneously. Each of two chapels hold over 150 persons.

Rich McCown has served as the facility's general manager since September 11, 2017. (Tr. 160.)³ He previously worked for

reopen the record or brief the issue. Respondent elected to brief the matter.

³ Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the

Northstar Memorial Group,⁴ the owner of the facility, as a construction manager for various projects, including one at Respondent's facility). McCown previously had dealings with the facility for construction work and became general manager approximately 1 year before hearing. As general manager, McCown manages the financial records and collective-bargaining relationship.

Reporting to McCown is Lorenzo Molina, the grounds superintendent, who has held the position for approximately 2 years. Molina manages the groundskeepers and their day to day schedules. Molina worked as acting superintendent and assistant superintendent before becoming the grounds superintendent. Each morning Molina conducts a morning meeting with the groundskeepers to make announcements; occasionally McCown also attends. Molina also contacts the groundskeepers by radio.

The groundskeepers maintain the grounds and install memorials and headstones. A few of the groundskeepers operate backhoes and dirt haulers, which are necessary for opening and closing graves. One employee also operates the crematorium. The size of the bargaining unit has been as high as 14 employees. As of the hearing, Respondent employed 8 groundskeepers.

III. THE PARTIES COLLECTIVE-BARGAINING RELATIONSHIP

Since 2011, the Union represents Respondent's groundskeeping employees in the following bargaining unit:

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

(GC Exh. 2, Sec. 2.)

Respondent and the Union entered into a collective-bargaining agreement, effective January 1, 2013, through December 31, 2017. The parties did not extend the contract. Since about February, the parties entered negotiations for a successor agreement. The last negotiation session took place in October. During negotiations for the 2013–2017 agreement and current negotiations, Respondent attorney Holland is the chief negotiator.⁵

Gregorio Rodriguez is the local union's president. Joel Strube serves as the bargaining unit's shop steward and member of the negotiating committee. Strube, a groundskeeping caretaker and backhoe operator, has worked for Respondent for 8 years. The Union has a business agent, John Martin, who was not called by either party to testify.

Respondent's Brief, and "R. Supp. Br" for Respondent's supplemental brief. Although I have included numerous citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

⁴ Northstar purchased the Skylawn property in 2012. A collective-bargaining agreement was in effect from

⁵ For the purposes of negotiations, Holland has actual authority to bind the principal and is Respondent's agent. *Long Island Day Care Services*, 303 NLRB 112, 128 (1991).

IV. SUBPOENA DUCES TECUM ISSUES

At hearing, I excluded three General Counsel Exhibits (GC Exhs. 14 through 16), from admission. I uphold my rulings on these exhibits.

A. The Union Fails to Produce Any Documents in Response to Respondent's Subpoena

Respondent issued two subpoenas duces tecum to the Union for pertinent documents. (R. Exhs. 1 and 2.) The subpoenas sought documents relevant to the matters at issue, such as bargaining notes and evidence regarding parking issues. At the beginning of the hearing, Respondent requested compliance with the subpoenas. The requested documents included bargaining notes related to the 8(a)(5) allegation and documents related to the allegations that Respondent promulgated new parking rules in response to Union activity and made threats to employees about the parking.

Union President Rodriguez admitted he received the subpoenas but did nothing to look for any documents requested.⁶ Nor did the Union or Rodriguez file any motion to quash.

Rodriguez testified he texted frequently with Strube, a General Counsel witness and shop steward, but the conversations were not related to the issues in the case. (Tr. 151.) He stated he probably had texts in his telephone but claimed they were not pertinent to the issues. Rodriguez then admitted some of the texts were relevant but did not print out for review or redact. (Tr. 152–153.) Rodriguez did not contact Strube about the subpoenas either.

Strube kept track of the events by writing notes in a notebook and through phone calls and text messages with Rodriguez. The relevant notes in the notebook were dated February 2 through October 8 in a single black notebook. Copies were presented to Respondent as part of the Jencks statements, and were ostensibly covered by Respondent's subpoena to the Union. Rodriguez, the recipient of the subpoenas, made no search whatsoever, believing no documents were responsive yet knowing he had text messages from Strube that potentially could be responsive.

B. General Counsel Exhibit 14 Is Excluded as Sanction for Union's Failure to Produce Documents

General Counsel offered Strube's transcribed texts as General Counsel Exhibit 14 when Rodriguez was not yet excused as a witness. Strube already completed his direct testimony and cross-examination. I offered to allow Strube to be a rebuttal witness about the document and General Counsel then rested. (Tr. 157–158.) During rebuttal, General Counsel offered General Counsel Exhibit 14 again. Respondent argued that it was not appropriate rebuttal testimony and was also hearsay. I rejected

⁶ General Counsel entered into evidence an email chain recovered by a computer expert, which Rodriguez provided it to the Board agent for his affidavit. This document was presented only during Rodriguez's testimony and not presented to Respondent upon request at the beginning of the hearing. Otherwise Rodriguez did not recheck his email folders for that document or other documents responsive to the subpoena. (Tr. 155–156.)

the document (GC Exh. 14) and asked the parties to brief the matter.⁷

The recipient of a subpoena duces tecum has an obligation to make a reasonable search for responsive documents, whether in paper or electronic form. *Starbucks Coffee Co.*, Case 01–CA–177856, 2017 WL 2241023 (NLRB), slip op. at 1 fn. 1 unpub. dec. (2017). Also see *Reinsdorf v. Skechers USA, Inc.*, 296 FRD 604, 614 (2013) (producing party is supposed to place reasonable construction and make reasonable and diligent searches for responsive documents). The requesting party, here Respondent, may request relevant documents in the responding party's control, so long as the request describes the desired items with "reasonable particularity." *Mailhoit v. Home Depot, U.S.A., Inc.*, 285 F.R.D. 566, 569 (C.D. Calif. 2012). Respondent, as the requesting party for the subpoenas, proved its burden to demonstrate noncompliance. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 8 (2015), citing *R.L. Polk & Co.*, 313 NLRB 1069, 1069–1070 (1994), affd. sub nom. *Auto Workers Local 174, Autoworkers v. NLRB*, 74 F.3d 1240 (6th Cir. 1996).

The administrative law judge has authority to sanction parties who fail to comply with the Board subpoena and is a matter of the judge's discretion. *Teamsters Local 917 (Peerless Importers, Inc.)*, 345 NLRB 1010, 1011–1012 (2005). I uphold my ruling to exclude General Counsel Exhibit 14⁸ as a sanction for the Union's failure to provide any documents in response to the subpoenas. *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB 1225, 1225 fn. 1 and 1229 (2014), enfd. 728 Fed. Appx. 2 (DC Cir. 2018). The Union did not file a motion to quash Respondent's subpoenas. The record amply demonstrates the Union failed to make any efforts to comply with Respondent's subpoena requests as required. *McAllister Towing*, 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005).⁹ The combination of the Union's failure to file a motion to quash and failure to conduct any search objectively rises to the level of a refusal to timely provide Respondent information it needed to conduct the hearing.

At hearing General Counsel defended the Union's failure to produce Union documents in General Counsel's case in chief as nonprejudicial. General Counsel does not get to pick and choose what the Union should supply in response to Respondent's subpoenas to the Union and parse it out as General Counsel desires. Had the roles been reversed, General Counsel and/or the Union would have maintained it was prejudiced in preparation of its case and demanded sanctions. *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 1 and slip op. at 15–16 fn. 29 (2018), enfd. ___ Fed. Appx. ___, slip op. at 2–3 (unpub.) (D.C. Cir. July 12, 2019) (sanctions against employer).

⁷ Despite my direction that the parties include their arguments in their respective posthearing briefs, General Counsel made an earlier, separate motion to accept the rejected exhibits. This ruling should be considered a denial of General Counsel's motion.

⁸ GC Exh. 14 also is incomplete. The texts also included a number of photographs Strube allegedly took of his motorcycle displaying signs, but the photographs are not shown in the transcribed texts or attached to the transcription.

⁹ I find that whatever documents were presented to Respondent during General Counsel's case do not substitute for the Union performing a diligent search. The Union failed to provide and is not considered a late

A variety of sanctions are available against a charging party who refuses to produce documents. *Teamsters Local 917 (Peerless)*, 345 NLRB at 1011.¹⁰ Respondent requested that Strube's testimony be stricken, which I find too severe. Consistent with *McAllister* and other Board decisions, I reject General Counsel Exhibit 14 as the information contained in the text messages held by the Union. The Union apparently had the complete document, including the photographs contained within the text messages, and could have corroborated Strube's testimony. See *Shamrock Foods Co.*, supra.¹¹

C. General Counsel Exhibits 15 and 16 Remain Rejected

Also offered during General Counsel's rebuttal were two additional exhibits, both of which were undated photographs of Strube's motorcycle with signs (GC Exh. 15 and 16). General Counsel offered that the photographs showed that Strube parked in certain areas with the signs on certain days. (GC Exhs. 15 and 16.) I rejected those as improper rebuttal evidence because Strube testified to what his signs said during his direct testimony and the photographs should have been presented at that time. *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 fn. 1 (2000) (ALJ did not abuse discretion by rejecting exhibits presented in rebuttal when the exhibits could have been presented earlier). Ironically, General Counsel presented one photograph in its direct examination of Strube. (GC Exh. 4.) I find it unnecessary to admit the pictures on those grounds.

Additionally, Strube's direct testimony demonstrated knowledge of certain facts—where he parked, when he parked there, what the signs said, when he could so recall. Therefore, Strube's testimony does not require the pictures, as they are not the best evidence. *Rodriguez v. Señor Frog de la Isla, Inc.*, 642 F.3d 28, 33–34 (2011); Fed. R. Evid. 1002 (advisory notes—event may be proved by nondocumentary evidence, even when written record exists). Also see 2 MCCORMICK ON EVID. §234 (7th ed.) (June 2016 update).

V. GROUNDKEEPERS' PARKING AND STRUBE'S SIGNS ON HIS MOTORCYCLE

The complaint alleges the following violation of Section 8(a)(1):

Complaint allegation ¶9: About May 2, 2018, Respondent, by Richard McCown and Lorenzo Molina, at Respondent's facility, orally promulgated and since then has maintained a rule requiring employees to park their personal vehicles in the grounds employees parking lot.

Complaint allegation ¶10(a): About May 3, 2018, Respondent, by Molina, in a phone conversation, told employees to

production. Compare *People's Transportation Service*, 276 NLRB 169, 225 (1985).

¹⁰ In *Teamsters*, supra, the charging party refused to provide a subpoenaed document without a protective agreement. The judge dismissed the complaint for charging party's failure to produce. The Board reversed, finding the administrative law judge abused his discretion by dismissing the complaint instead of taking less severe sanctions.

¹¹ On July 17, 2019, Respondent moved to strike all portions of General Counsel's brief that relied upon rejected GC Exh. 14. As I do not rely upon rejected GC Exh. 14 for any of my findings, the motion is moot.

remove the protest signs placed on their personal vehicles.

Complaint allegation ¶10(b): About May 3 and May 7, 2018, Respondent, by Molina, in the grounds' employee parking lot, parked his truck in front of employees' vehicles displaying protest signs.

Complaint allegation ¶11(a): About May 14, 2018, Respondent, by McCown, orally promulgated a rule prohibiting employees from parking during their lunch breaks in the upper section or middle section of the Funeral Home parking lot or at the Reflection circle nearby the Funeral Home.

Complaint allegation ¶11(b): About May 16, or May 17, 2018, Respondent, by McCown, orally promulgated and since then has maintained a rule prohibiting employees from parking their vehicles during breaks anywhere other than the grounds employee parking lot.

A. Facts

1. Parking at Respondent's facility

Respondent has no written rules for parking. During the workday, groundskeepers use smart motorized carts called "gators" to ride around the facilities, not their personal vehicles.¹² The groundskeeper parking and break facilities are almost at the opposite end of the property, away from the funeral home and sales offices.

Groundskeepers usually park their personal vehicles in yard parking, which is an area adjacent to their storage facility, break room and lockers. Strube testified that before the incidents in May 2018, he always parked in yard parking. (Tr. 40.) This location also is where the groundskeepers' clock in and out and hold morning meetings. Groundskeepers do not eat lunch in any of the garden areas because they would be eating in front of the families and visitors. (Tr. 192.) Yard parking has 11 spaces, but only 9 available for employee parking. On the facility map, it is located towards the end of Cypress Circle Drive across from burial area Vets X (an area dedicated for veterans), and close to Gan Hazikaron (an area dedicated for Jewish burials).

Groundskeepers' vehicles in yard parking were plagued with dirt, sap and pollen. Strube testified that everyone was parking in yard parking, but when groundskeepers drove new cars, they parked outside of the lots. (Tr. 89–90.) Strube frequently rode his motorcycle to work and usually parked it in the groundskeepers' lot. Strube testified that groundskeepers Alex Jara parked on the curb at Gan Hazikaron. Groundskeeper Candalario Ruiz parked or near Ridgeview Island every day for two years, including the Saturday before hearing. Strube contended that they parked there before May 1 as well. Strube denied that anyone was told not to park in certain areas until he parked in Serenity Circle; however, if a service was taking place, they automatically moved vehicles without being told to do so. (Tr. 91.) Strube did not testify whether Molina or McCown ever saw these vehicles parked in areas other than yard parking or ignored it when they did. (Tr. 196.)

¹² The facility has additional employee parking on a lower level near the funeral home, but that parking is limited to those who work within the funeral home.

¹³ Respondent characterizes Strube's sign, posted on his motorcycle, as an unmanned picket sign. However, the record reflects that

When Molina was hired, he learned that Respondent made a priority of keeping the roadways within the facility open and avoiding a backup. (Tr. 257.) Employees are not supposed to park in Reflection Circle or the upper parking lot at the funeral home. The upper lot is specifically designated "guest parking only." (Tr. 187.) Groundskeeping employees do not regularly park in these areas because parking is left open for visitors and they usually do not work or use the breakroom in the funeral home. McCown testified that groundskeeping employees did not park in the Crystal Springs parking because Respondent's vans and service vehicles park there. Respondent's vehicles are also in a garage lot, which also houses some non-groundskeeper employee parking and has access for deliveries. (Tr. 189.)

Molina testified that, even before McCown was hired, he corrected groundskeepers when they parked outside of yard parking. When he saw a groundskeeper's personal vehicle parked outside the yard parking, he called the offending groundskeeper to move the vehicle. (Tr. 263.) About 4 groundskeepers sometimes parked near yard parking on an adjacent road. However, Molina instructed those groundskeepers to move their vehicles back to yard parking. Molina cited a specific instance in which two groundskeepers' vehicles blocked a hearse, stopping the procession to the grave. (Tr. 260–261.) The following morning, Molina reminded the groundskeepers where they were supposed to park. (Tr. 262.) Molina did not report all instances of violations to McCown. (Tr. 264–265.)

2. Strube displays signs on his motorcycle in non-groundskeeping parking areas

On about May 1, Strube determined to display a sign on his motorcycle to publicize his frustration with ongoing collective-bargaining agreement negotiations. (Tr. 36–37.) The motorcycle, parked in yard parking, displayed the sign "Unfair wage proposals for senior employees." (Tr. 37–38; GC Exh. 4.) No one from management contacted Strube about his sign that day. (Tr. 39, 300.)¹³

On May 2, instead of parking in the usual yard parking, Strube parked his motorcycle on the curb of Serenity Circle, a large burial area towards the center of the facility, with the sign posted on the motorcycle. (Tr. 39–40; GC Exh. 5.) Strube testified that the motorcycle's back tire touched the curb, which made it "legally parked." (Tr. 40.) He decided that his sign would receive more visibility if parked in Serenity Circle. (Tr. 40–41.)

Strube and the other caretakers attended their morning meeting at 8 a.m. Shortly thereafter, Strube began working with another caretaker to open and close a grave. Molina received notification that Strube's motorcycle was parked at Serenity Circle. He drove to the site and observed that Strube's motorcycle, with a sign, was indeed parked at Serenity Circle. (Tr. 271.) At about 8:38 a.m., Molina radioed all groundskeepers to move their personal vehicles from the grounds and back to yard parking. (Tr. 41.) No one mentioned removal of the sign and no other vehicles displayed signs. (Tr. 108.) About 5 groundskeepers were

Respondent's counsel characterized his questions with phrases about picket signs, but none of the testimony reflects the sign was a picket sign. The sign was never used for picketing within the facility. Respondent does not explain how it reached this conclusion.

required to move their vehicles; of the 5 groundskeeping employees, only Strube displayed a sign. According to Molina, he did not tell McCown about this incident. (Tr. 273.)

According to Strube, however, about 5 minutes after he headed towards the yard, Molina, driving his white pickup, with McCown in the passenger seat, stopped him. Molina reiterated that all groundskeepers should move their vehicles into yard parking. (Tr. 42–43.) Strube asked why. Molina said the spaces were needed for patrons and everyone should move vehicles into yard parking or else the vehicles would be toward. McCown denied that he was in a vehicle while either he or Molina talked to Strube or any other employees. (Tr. 210–211.) Similarly, Molina testified that he and McCown did not stop to speak to Strube. (Tr. 276.)¹⁴

About lunch time on May 2, Strube clocked out for lunch and drove his motorcycle to Reflection Circle, across from the main funeral home. Reflection Circle is an area with gravesites and has parking around it for guests or mourners. After eating a sandwich, he rode back to yard parking and redisplayed his sign, then clocked back in. McCown testified he saw Strube's motorcycle at an unknown time at Reflection Circle but did not see a sign.¹⁵

Strube testified confusingly that, at a morning meeting sometime after May 2, either McCown or Molina told the bargaining unit employees that they could not park at Reflection Circle, the upper or lower parking lot at the funeral home, "but we could park in the [funeral home's] lower parking lot." (Tr. 53–54.)¹⁶ Molina testified that he told the groundskeepers to park in yard parking and they complained again about dust and pollen. (Tr. 276.)

On May 3, Strube parked his motorcycle in the first space in yard parking and displayed his sign on the motorcycle while he worked. In Vets X, across from yard parking, a burial service involving staging a casket, known as a preset, was taking place. According to Strube, Molina called Strube on the radio and requested that Strube call him back on his personal cell phone. Once on the personal cell call, Molina politely asked Strube to remove the sign from his motorcycle because a family was upset by it and the sign would disrupt the service. (Tr. 48.) Strube said the sign was on his personal vehicle and he would not remove it. (Tr. 48; GC Exh. 6.) Strube admitted that, other than this incident, no one asked him to remove his signs. (Tr. 118.)¹⁷ According to Strube, Molina then parked his truck in front of his motorcycle in yard parking, which blocked the view of Strube's motorcycle. (Tr. 50; GC Exh. 7.) Molina attended the service and once the patrons were gone, Molina moved his truck.

In Molina's version, Molina went to the burial site after receiving notification from the family service advisor that the sign was upsetting the family. He saw Strube at the burial site because Strube and Xavier Rodriguez were the setup crew. Molina parked near the service, on Cypress Circle Drive. He told Strube of the family's concerns. Strube told Molina it was his private

property. Molina did not move his truck and proceeded to assist with the preset. He then attended the service. (Tr. 283–284.) He denied telling or ordering Strube to remove the sign from his motorcycle. (Tr. 284.)

Strube testified that Molina parked his vehicle again in front of Strube's motorcycle on three occasions, blocking the sign from the view of services taking place in Vets X or IX and Gan Hazikaron between May 7 and 11. Strube never asked Molina to move his truck. (Tr. 119, 284.) For the subsequent two occasions, neither Strube nor Molina testified that Molina asked Strube to remove his sign and I must conclude that Molina did not repeat his request.

On May 4 for lunch, Strube drove his motorcycle to the funeral home parking at Reflection Circle. Strube maintained that other bargaining unit employees were with him in the parking lot. Strube testified that McCown walked out of the funeral home and by the group of employees, and then left.

Strube testified that he then began to park his motorcycle in the lower lot, in a spot closest to the funeral home's front door to ensure that his sign would be visible. (Tr. 55.) He parked there for 2 days. Then, in a morning meeting, Molina told the groundskeepers to park in yard parking. (Tr. 60–61.)

B. Credibility

General Counsel asked Strube a number of leading questions, even without attempting to exhaust his memory, and summarized his testimony before continuing his question.

Strube's testimony on cross-examination sometimes was evasive without asking for any clarification of the questions. For example, when Respondent asked about whether employees parked in the funeral home's upper level parking:

A. Today they can still park there.

Q. Funeral home employees can park in this lot, correct?

A. Today, they still park in the upper parking lot if they would like to.

Q. Funeral employees?

A. Yes.

Q. Right. Not grounds-keeping employees though?

A. Grounds-keeping employees, yes. They do too.

Q. Grounds-keeping employees never park in these lots other than the couple of occasions that you just mentioned; isn't that true?

A. No.

Q. It was a regular occurrence that grounds-keeping employees would park all the way over here in this lot? Is that a regular occurrence?

A. Regular? No.

Q. No. In fact, you already testified that up until about two years ago, all the grounds-keeping employees parked here [sic, yard parking], correct?

A. Yes.

¹⁴ Strube also admitted that he did not document any of the alleged threats.

¹⁵ Strube initially testified that he parked in Serenity Circle and said nothing of displaying his sign during his lunch. (Tr. 47.) Thus, Strube's

initial testimony corroborates McCown that he did not have a sign during that lunch period.

¹⁶ McCown denied making such an announcement to the groundskeepers or instructing Molina to do so. (Tr. 213.)

(Tr. 101–102.)

In another example about parking, Strube avoided the question and put his gloss on it:

Q. BY MR. HOLLAND: So we were talking about the mourners, I think, and I was asking you, in your experience, that's essentially what you've observed mourners do. They'll come in and they'll park their car near the gravesite. They'll go visit the gravesite. They'll go back to their car, correct?

A. They park on either side of the road, and there is still plenty of room for vehicles or equipment to pass through the middle.

(Tr. 114–115.)

Before the incidents described by Strube, no one had ever eaten lunch in these areas. (Tr. 192.) General Counsel's brief states that, beginning in 2016, the groundskeepers parked on nearby cemetery road without any objection from management. (GC Br. at 5, citing Tr. 89, 292–293.) I find this contention incorrect during Molina's tenure. Molina's testimony shows that he notified the groundskeepers to move their vehicles but gave no discipline. (Tr. 292–293.)¹⁸ I credit Strube's straightforward testimony, however, that he never parked anywhere but in yard parking before these incidents, which undermines other testimony about parking elsewhere.

Strube had trouble recalling whether Molina or McCown made statements to him regarding parking. (Tr. 58–60.) Strube's discussion of the May 2 conversation in which Respondent threatened to tow vehicles is not credited. Strube admittedly did not document this alleged threat in his papers (including rejected GC Exh. 14) and he seemed hesitant in his recollection.

Some of Respondent's questions to its witnesses were leading. However, most of the facts were straight-forward and the witnesses provided detailed information to many questions. For example, Molina described in detail an incident in which he called an employee to move his personal vehicle blocking a funeral procession and what he did, including discussing the incident with all employees the following morning. (Tr. 260–262.) Molina and McCown had minor differences in their testimonies, none of which are significant enough to cause concerns about their credibility.

C. Analysis

1. The rules allegations (Complaint ¶¶9, 11(a), 11(b))

General Counsel alleges Respondent promulgated parking rules on three occasions in response to Union activity. GC also alleges that Respondent told an employee to take down the sign and then blocked communication with the sign to the public. Respondent contends that what is missing from the complaint is significant. For example, Respondent states no evidence of animus exists or prior violations of the Act, nor are there any §8(a)(3) violations alleged. However, none of these are relevant to the inquiries here.

¹⁸ General Counsel contends that Respondent employed 14 groundskeepers at one time and having all 14 parked there at one time was a physical impossibility. This information pre-dates Molina's tenure and I find it irrelevant.

The general standard for rules was revised in *Lutheran Heritage Park-Livonia*, 343 NLRB 646 (2004):

[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In *Boeing Corp.*, 365 NLRB No. 154 (2017), the Board majority struck the first prong of *Lutheran Heritage Park*, supra. However, Prongs 2 and 3 survived. If General Counsel demonstrates that a rule, even if "dormant," is promulgated in response to union activity, Respondent then has a burden of proof to explain it. See generally *In re Dillion Companies, Inc.*, 340 NLRB 1260 (2003) (question of whether rule promulgated in response to organizing campaign).

General Counsel contends that the parking rules violate the second prong of *Livonia* because Respondent promulgated the parking rule in response to Strube's signs and never had parking rules before that time. He further advocates that the timing in promulgation supports a finding that the rules were against Strube's union activities. I find that no violation took place with Respondent's parking rules.¹⁹

I find that the parking rules existed before the incidents with Strube's signs attached to his motorcycle. Strube admitted that he did not park elsewhere before these incidents: This admission lends significant credence to Respondent's statements that groundskeepers were required to park in yard parking. Due to the nature of Respondent's business, the credited testimony from Molina and McCown demonstrate that, not only did Respondent have parking rules in place, but had good reason to do so given the clients they serve. Based upon where the groundskeepers usually parked and the credited testimonies of Strube, McCown and Molina, no new rule was promulgated.

I also find that, based upon Molina and McCown's credited testimonies, Respondent enforced its parking rules before the events involving Strube's signs. An employer might violate the Act if it enforces previously unenforced policies. *Wexler Meat Co.*, 331 NLRB 240, 242 (2000). Although Molina and McCown had knowledge of Strube's signs, they did not single

¹⁹ General Counsel does not argue that the third prong was violated and I make no findings on that point.

Strube out. Not only was Strube required to move his vehicle with the parking rules, but other employees as well. As for Molina picking up McCown to see Strube's sign, which General Counsel argues, the sign was open and not a secret.

At hearing, General Counsel made much of the lack of a written rule. However, no requirement exists for a rule to be written. Although Respondent maintained a verbal rule instead of a written rule, that alone does not prove that a rule does not exist.

Regarding timing, General Counsel contends that Molina's knowledge of Strube's union activities should be attributed to Respondent and take Respondent's failure to deny knowledge as a point against Respondent. As I have found that the parking rules existed before these events, timing does not warrant finding a violation.²⁰

I therefore recommend dismissal of the three allegations regarding the parking rules because the alleged rules were not promulgated in response to Union activities.

2. Did Respondent tell employees to remove the protest signs and did Respondent violate the Act by parking his truck in front of the protest sign during funeral set up, services and clean up?

a. Applicable law

General Counsel cites, inter alia, *IBM Corp.*, 333 NLRB 215 (2001), enfd. 31 Fed. Appx. 744 (2d Cir. 2002). The employees displayed large pro-union signs in their personal vehicles. The employer allegedly prohibited large signs, regardless of the message, and it violated its no solicitation rules. *Id.* at 215, 216–217. The judge found that the sign was protected concerted activity. However, no special circumstances existed for the employer to ask for removal of the signs. *Id.* at 220. A portion of that case identified obligations regarding employee signs on the employer's property.

In *Firestone Tire & Rubber Co.*, 238 NLRB 1323 (1978), an employee and shop steward was told that he could only continue to use the company parking lot if he removed from his car, several large signs, one stating "Don't Buy Firestone Products." This parking lot was used primarily by company employees but also was used by visitors. When the individual refused to remove the signs, he was disciplined. The Board, citing the Supreme Court's decisions in *Eastex, Inc., v. NLRB*, 434 U.S. 1045 (1978); *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976); *NLRB v. Babcock & Wilcox Co.*, supra; and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), stated inter alia,

In an unbroken line of decisions, this Board and the Supreme Court have stated that where an employee exercises his Section 7 rights while legally on an employer's property pursuant to the employment relationship, the balance to be struck is not vis a vis the employer's property rights, but only vis a vis the employer's managerial rights. The difference is "one of substance," since in the latter situation Respondent's managerial rights prevail only where it can show that the restriction is necessary to maintain production or discipline or otherwise

prevent the disruption of Respondent's operations....

The facts clearly reveal that but for the fact that the parking lot was located on Respondent's premises, Knight was clearly engaged in protected concerted activities. This Board has long held that actions taken in sympathy of other striking employees fall within the protection of Section 7 of the Act.

[T]he Administrative Law Judge cites *Cashway Lumber Inc.*, for the rule that an employee does not have a right to affix union posters on the employer's walls and property. However, this case is clearly distinguishable since *Cashway*, supra, stands only for the proposition that an employee is not engaged in protected activity if he defaces the employer's property. The mere presence of an automobile on which signs have been attached does not constitute the defacement of the property on which it has been parked. . . .

IBM Corp., 333 NLRB at 219-221.

b. The parties' positions

General Counsel states Respondent does not identify how Strube's sign would interfere with production or discipline. General Counsel also contends that a cemetery is different from a health care institution, such as a hospital in which special circumstances might be found. GC also points out that no cases show that a cemetery should be treated differently than most employers who have not demonstrated special circumstances. General Counsel contends that the family request is immaterial. General Counsel quotes that employees rights to display union insignia do not hang upon employee rights to participate in such protected activity and . . .

"does not turn upon the pleasure or displeasure of the employer's customers," a speculative factor which fails to demonstrate either an interference either "with the employees' job ... or the conduct of the employer's business." See *Howard Johnson Motor Lodge*, 261 NLRB 866, 868, and cases cited at fn. 6 (1982).

Roadway Package System, 299 NLRB 458, 459–460 (1990) (footnote omitted).

General Counsel contends that when Molina blocked Strube's sign, he precluded protected activity as well as public education about a labor dispute. General Counsel relies upon, e.g., *Schwan's Sales Enterprises*, 257 NLRB 1233, 1247–1248 (1981) (supervisor grabbed cap off employee's head to discourage wearing U insignia).

Respondent contend that the sign was an unmanned picketing sign, which an employee has no right to bring on the property, citing *Midway Ford Truck Center*, 272 NLRB 760, 762 (1984). According to Respondent, "[N]o section of the Act or Board decision gives an employee the right to unrestricted, 360 degree visibility of its unmanned picket sign on employer property." (R. Br at 17.) Respondent obtusely states that the family's request to remove the sign was "the type of legitimate business reason

²⁰ For its timing arguments, General Counsel cites cases such as *Flex-N-Gate Texas, LLC*, 358 NLRB 622, 630 (2012). The context for that case was knowledge of union activities as a part of an alleged 8(a)(3) violation. Counsel for the General Counsel there did not ask certain questions to a manager, who was an adverse witness, and the respondent

employer maintained the judge should take an adverse inference from the GC's failure to ask. Instead the judge took the adverse inference against respondent employer, which also failed to elicit a denial of knowledge. I therefore find this case unhelpful to General Counsel's proposed analysis.

that would permit Respondent to act to remove Strube's sign." (R. Br. at 19, *emphasis in original*).

c. Discussion

The analysis here consists of three steps: First, determining whether Strube's sign was protected activity; two, whether the employer sufficiently demonstrates that asking to remove was for production or disciplinary purposes; and three, whether blocking the sign with the truck was for production or disciplinary purposes.

Strube's display of the sign is not only an appeal to his fellow employees but is communication with the employer's customers about bargaining positions. See generally *PAE Applied Technologies*, 367 NLRB No. 105, slip op. at 4–5 (2019). However, the communication cannot be "disparagement or vilification of the employer's product or its reputation." *Id.*, citing *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 230 (1980), *enfd.* 636 F.2d 1210 (3d Cir. 1980) and *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990). Strube's signs encapsulated an employee-negotiator view of Respondent's offers in bargaining and was not offensive.

Strube admitted that no one told him to remove signs from his personal vehicle except when Molina relayed that a family requested that his protect sign be removed. Other than this incident, no Respondent manager or supervisor requested that Strube remove his sign. A threat of disciplinary action is unnecessary to finding the 8(a)(1) violation. *IBM*, *supra*, at 221. The politeness also does not stop the request from violating Section 8(a)(1). See generally: *United Artists Theatre*, 277 NLRB 114, 120 (1985) (polite interrogation); and, *Southern Household Products Co., Inc.* 280 NLRB 369, 373 (1969), *enfd.* 449 F.2d 749 (5th Cir. 1969) (politely asking direct question about union activity).

First, Respondent further fails to differentiate between employee union activity, particularly within the premises, and non-employee activity. Regarding its claimed right to block Strube's message, Respondent cites, *inter alia*, *Midway Ford Truck Center*, 272 NLRB 760. In that case, a nonemployee picketer was outside the facility and additionally placed a picket sign next to a customer entrance for another one day. The nonemployee picketer did get onto the employer's private property, but no employee was involved. The picket sign notified the public that the employer was a nonunionized facility. *Id.* at 760. As previously noted, the standard for determining whether Strube's sign should be removed or blocked, or whether Respondent could request its removal, is whether the sign was for production or disciplinary purposes.

Secondly, Respondent argues that it had a "legitimate business reason" to ask Strube to remove the sign displayed on his motorcycle in yard parking. "Special circumstances" are different animals from legitimate business reasons. Respondent does not point out any circumstances in which the sign, on a motorcycle parked in its required place, interferes with production or discipline. As Respondent misses its burden to prove special circumstances, I will not create an argument on its behalf. See, e.g.,

Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); *Cooper Health System*, 327 NLRB 1159 (1999) (hospital partially demonstrated special circumstances for patient care areas). The request to remove the sign is coercive and therefore unlawful. *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 350 (2002).²¹

In light of Respondent's failure to show special circumstances, I also find that Molina's truck coerced a reasonable employee by precluding his message to the public and other employees. Had this occurred only once, I might have concluded it was *de minimis*. However, it occurred three times. See generally *Advance Auto Distribution Center*, 322 NLRB 912, 917 (1997) (disparate removal of pro-union signs on equipment unlawful).

VI. RESPONDENT, BY MCCOWN, ALLEGEDLY TREATENED EMPLOYEE STRUBE IN VIOLATION OF SECTION 8(A)(1) OF THE ACT

The complaint alleges another violation of Section 8(a)(1):

Complaint allegation ¶12: About August 26, 2018, Respondent, by McCown, at Respondent's facility, made implied threats of termination and/or other unspecified reprisals to employees because they had engaged in union and/or protected concerted activities.

A. Facts

One of Strube's signs stated, "Exorbitant prices Low wages." Strube initially testified with some hesitation that McCown allegedly told him he did not like the sign and said he could terminate him but recalled little else about the conversation. After a break, still on direct testimony, Strube recalled some of his conversation with McCown. After General Counsel gave Strube his affidavit to refresh his recollection and Strube returned the affidavit, General Counsel proceeded:

Q. BY MR. REEVES: Having read those lines, does that refresh your recollection as to anything further that Mr. McCown may have stated during this conversation with him that you have testified?

A. Yes.

Q. And what would—don't read what it says, but what else do you recall him saying after discussing the sign?

A. He said that he had the perfect time to fire me, but he didn't use that perfect time to fire me, and that we should have—

Q. Mutual respect?

A. —yeah, mutual respect. I'm sorry.

MR. HOLLAND: Objection.

JUDGE STECKLER: Isn't that a little leading, sir?

MR. REEVES: It's irrelevant. And we could sit here for 10 minutes while he's trying to—I just thought I'd - it's not relevant to—

JUDGE STECKLER: You thought you'd lead the witness?

MR. REEVES: It's not—I'm going to—the relevant point, just to speed things along.

JUDGE STECKLER: We'll continue. You can argue it on credibility.

²¹ Respondent cites *Culley Mechanical Co.*, 316 NLRB 26, 32 (1995). The allegation there involved whether the employer interrogated former employees. The employer's statement in fact was asking the former

employees to withdraw an unfair labor practice charge because of financial difficulties. The judge found no interrogation or coercion about union activities, sympathies or sentiment. *Id.*

MR. HOLLAND: Yes, Your Honor.

MR. REEVES: Your Honor, as our brief will indicate, our argument goes to the preceding testimony, not in conclusion. I don't think mutual respect has anything to do with this.

MR. HOLLAND: Your Honor, if I may? The leading was one thing and thank you very much for correcting it. But Mr. Reeves is speaking about the theory of their case and their argument while the witness is on the stand, and he's testifying regarding the particular alleged statements that were made to him and the impact, I think, is inappropriate. He had his opportunity for opening arg—opening statement. He made that. But to argue his case at a critical juncture about testimony he believes is relevant and then to ask the witness follow-up questions I think is leading on steroids.

MR. REEVES: I was just trying to respond why I don't believe it's relevant. I mean, I could have him refresh—

JUDGE STECKLER: Well, then what do you need—

MR. REEVES: —his recollection again, and I could also then put in the statement if—

JUDGE STECKLER: Well, if it's not relevant, then let's move on, and I'll consider it in the transcript—

MR. REEVES: Exactly.

JUDGE STECKLER: — as not relevant. So continue your questioning, please, Mr. Reeves.

(Tr. 68–70.)²²

Strube could not recall where the conversation took place or a time of day. The conversation was not as bare bones as the original testimony indicated and revealed additional context during cross-examination. (Tr. 122–123.) On redirect General Counsel inquired:

Q. BY MR. REEVES: Okay. Does that refresh your recollection as to whether Mr. McCown said he could fire you for some alternative reason?

A. He said do we have mutual respect in regards to the signs, and I told him that, yes, we do have mutual respect.

Q. Okay. Well, that covers that issue.

But as to the reason he had for terminating you, does it refresh your recollection as to what he told you?

A. I believe he was referring to the painting of the sign or painting of the white line.

(Tr. 127.)

The “white line” was Strube spray painting a space labeled “motorcycle parking” in yard parking.²³ Respondent removed the spray painting and Strube repeated the action. Strube testified he understood McCown’s statement was about the parking spot because it was “a big deal” and he was sent home for it. (Tr. 128.) McCown denied making any threat and said he sent home Strube because Strube spray painted his motorcycle parking spot

²² General Counsel’s testimony, in which he completed the witness sentence and told him the answer, is not competent testimony.

²³ Strube also looked at General Counsel when asked about the spray-painting incident on cross examination. (Tr. 123.)

a second time. (Tr. 203.)

B. Analysis

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7, which protects the right of employees to engage in “concerted activity” for, inter alia, their “mutual aid or protection.” The Board assesses the objective tendency of a statement to interfere with the free exercise of employee rights rather than considering either the employer’s motive or employees’ actual subjective reactions regarding the statement. *Miller Electric Pump and Plumbing*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).

The issue, then, is how a “reasonable employee” would interpret the statement considering all surrounding circumstances. *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011). “The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” *Double D Construction Group*, 339 NLRB 303, 303 (2003) (citation omitted). While certain employer statements, taken alone, may be considered noncoercive, they will violate the Act where they “take on the character and quality of coercive comments which accompany them.” *Oak Mfg. Co.*, 141 NLRB 1323, 1325 (1963).

General Counsel’s version of the facts ignores any testimony past transcript page 69 and therefore the surrounding context. (GC Br. at 6). In context, a reasonable employee would find, as did Strube, that McCown’s statement regarding termination is about creating a motorcycle parking spot twice,²⁴ not the signs. The sign was open and McCown expressed his opinion, which is permissible per Section 8(c) of the Act. The implication is that McCown, if he intended to terminate Strube, would have terminated him for the parking spots and not the signs. I therefore recommend that the allegation be dismissed. See generally *Mid-State, Inc.*, 331 NLRB 1372, 1372 (2000) (context of supervisor’s statements did not reasonably tend to coerce employees and their Section 7 rights).

VII. ALLEGED UNILATERAL CHANGES IN GROUNDSKEEPER WORK SCHEDULES

The complaint alleges the following violations of Section 8(a)(5):

¶13(a): About September 9, 2018, Respondent changed the workweek schedule of its employees, to Tuesday through Saturday or Thursday through Sunday.

¶13(b): About September 20, 2018, Respondent changed the workweek schedule of the same employees . . . back to Monday through Friday, instead of Tuesday through Saturday or Thursday through Sunday.

¶13(c): The subjects set forth above in subparagraphs [13(a)] and [13(b)] related to wages, hours, and other terms and

²⁴ “An employee is not engaged in protected activity if he defaces the employer property.” *IBM Corp.*, 333 NLRB at 220, citing *Cashway Lumber, Inc.*, 202 NLRB 380 (1973). Repainting the parking spot is defacing the property.

conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

¶13(d): Respondent engaged in the conduct described above in subparagraphs 13(a) and 13 (b) without first bargaining with the Union to a good-faith impasse with respect to this conduct and the effects of this conduct.

A. Facts

The facts are essentially undisputed. Respondent scheduled the bargaining unit employees Monday through Friday, 8 a.m.—4:30 p.m. for at least 7 years before September 2018. Overtime for weekends would first go to volunteers by seniority. If no one volunteered, Respondent assigned overtime to groundskeepers by reverse seniority. In September 2018, Respondent changed the schedule to stagger employees through the week; however, each employee was scheduled for 5 consecutive days.

For burials, the necessary employees are one backhoe operator to dig the graves and two additional employees to open and close the grave and set up the burial sites. The number of groundskeepers decreased due to turnover and Respondent had only 3 backhoe operators among them. (Tr. 94.) Of the 3 backhoe operators at that time, Strube was still training on the backhoe.²⁵

With fewer groundskeepers, Respondent had difficulty covering weekends because many groundskeepers did not wish to volunteer for overtime.

1. Collective-bargaining agreement provision and negotiation history

Respondent maintained that the expired collective-bargaining agreement²⁶ Section 11, Straight Time Working Hours allowed it to change schedules. The applicable provision is:

11.2 Regular Work Week. The regular work week at straight-time shall consist of any five (5) consecutive eight (8) hour days, Sunday through Saturday. Employees may volunteer for assignment to a regular work week which includes Saturday or Sunday or both. If an insufficient number of qualified employees volunteer for such assignment, assignment of qualified employees to a regular work week which includes Saturday or Sunday or both shall be made by inverse seniority where the qualifications required to perform the work are approximately equal in the reasonable judgment of the employer.

(GC Exh. 2 at 7.)

The agreement also includes a “zipper clause”:

23. SCOPE OF AGREEMENT

This Agreement shall represent complete collective bargaining and full agreement by the parties in respect to rates

²⁵ Strube later testified he operated the backhoe competently by the time Respondent made the schedule change.

²⁶ Respondent does not argue that the collective-bargaining agreement’s management-rights clause controls the matter, as management rights do not survive the contract expiration. *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

²⁷ Much of Holland’s direct testimony was to leading questions and Holland did not always give the answer to the question that was asked

of pay, wages, hours of employment, or other conditions of employment which shall prevail **during the term of this Agreement**, and any matters or subjects not covered have been satisfactorily adjusted, compromised, or waived by the parties **for the life of this Agreement**.

(GC Exh. 2 at 15.) (**emphasis added**)

Respondent attorney Holland served as lead negotiator for Respondent for the 2013–2017 Agreement. The lead union negotiator was John Martin. Section 11.2 language, above, then allowed a regular workweek with any five continuous days during a Sunday through Saturday week. Holland testified Respondent told the Union it wanted more flexibility in scheduling. Holland further informed the Union it had “no imminent desire” to change the schedule. (Tr. 223.)²⁷

In 2018, General Manager McCown examined the language and believed it gave Respondent the power to make changes in the schedule. (Tr. 173–174.) Respondent planned to implement staggered shifts, starting on Sunday, Monday, or Tuesday, each running 5 consecutive days. (Tr. 171.)

2. Respondent develops the groundskeepers’ new schedule, then notifies the Union

On August 16, at a regular morning meeting with the groundskeepers, General Manager McCown, with Molina present, announced that he wanted to change the Monday through Friday schedule to stagger the employees on different 5 days: Three employees would work Monday through Friday; 3 other employees would work Tuesday through Saturday; and 3 employees would work Wednesday through Sunday. McCown asked for volunteers to change the schedules to cover the shifts. Strube said he wanted to talk to Union President Rodriguez and other bargaining unit employees first. (Tr. 96.)²⁸ Respondent continued to ask the groundskeepers which shift schedules they wanted, starting with the backhoe operators.

Later in the morning of August 16, McCown emailed Union President Rodriguez about the intended change:

I wanted to inform you that due to the needs of our business we are adjusting our schedule slightly to a split shift, effective this Sunday. This will ensure we have the appropriate staffing every day of the week. If you have any concerns, or would like to discuss, I am available anytime. If you would like to meet today, tomorrow, Saturday, or Sunday, I can arrange that as well. The guys selected their shifts this morning.

McCown testified that he was informing the Union but not offering to bargain, because the contractual language permitted him to make the desired change. (Tr. 179.)

Late that night, Rodriguez responded to McCown in an email,

or, in the alternative, he started a narrative. His testimony included parol evidence on the negotiation of Sec. 11.2 of the expired collective-bargaining agreement. I give significant weight to Holland’s testimony that Respondent had no imminent plans to make schedule changes when the contract language was negotiated and so informed the Union.

²⁸ Molina denied that Strube raised any concerns at that meeting. (Tr. 250.) However, another groundskeeper told Molina that the staggered days had been tried in the past and never worked.

stating that the Union objected to the schedule changes and demanded to bargain. He also stated that the time in which Respondent sought to implement was unreasonable and demanded that Respondent wait until the parties could bargain, probably during the first week of September based upon the schedule of Respondent's attorney. (GC Exh. 12.) Rodriguez maintained that the proposed change would cause the employees to miss overtime and double-time, which were part of the current contract negotiations. (Tr. 140.)

On August 18, McCown emailed to Rodriguez that he was available to meet on Monday August 20 or after Wednesday August 22 to discuss. McCown also explained Respondent's interpretation of Section 11.2 and how it permitted Respondent to schedule. (GC Exh. 12.) Respondent did not implement the schedule changes.

On August 20, Rodriguez, by email, told McCown that the Union did not agree with Respondent's reading of Section 11.2 or its belief that it had no obligation to bargain. As such, he again demanded to bargain, but wanted to wait until the next bargaining session for the successor collective bargaining agreement. (GC Exh. 12.)

On August 23, McCown emailed Rodriguez. He stated:

... I offered to meet with you to discuss whether the Company had any bargaining obligation over the decision or impact and, if so, to bargain with you; offered to delay implementation of the change until August 26th and offered multiple days to meet with you, but you have not accepted any of them. Our inability to meet has been caused by your refusal to meet and not by any action of our labor attorney; in fact, he would have been there at our meeting. It appears you are more interested in arguing via e-mail and delaying the schedule change than any constructive meeting.

McCown then offered dates on each day through Wednesday August 29 to discuss the schedule change. He also offered dates for meeting on the successor collective-bargaining agreement. Rodriguez then questioned McCown and Respondent attorney Holland whether the dates offered were not for contract negotiations. Holland replied that the September 10 date was for the contract, but the earlier dates were about the schedule change. Holland wrote, "You've asked to bargain over that change. We need that change to occur. If you want to discuss it please contact [McCown] and arrange to meet on one of the dates listed below."

Within 15 minutes, Rodriguez emailed them back. He again stated that the Union wanted to negotiate it with the next bargaining session for the contract, on September 10. Holland quickly responded:

If you refuse to meet Rich to discuss the schedule change and the issues raised by your multiple e-mails we will have no choice but to go forward with the schedule change.

At your request, we have offered 11 different dates to meet and discuss the schedule change. Your refusal to meet on any of those days is a refusal to bargain. Your refusal is ironic given the Union requested bargaining.

Please get in touch with Rich to meet to discuss the schedule change and any alleged impact on one of the days

he has offered. If you refuse to meet on any of those dates we will see you on September 10th but will proceed with the change effective August 26th.

(GC Exh. 12 at 4.)

Rodriguez then emailed back that he was not refusing to meet but Respondent was acting in bad faith "by offering piecemeal bargaining."

3. Respondent implements schedule change and two weeks later reverts to the original Monday through Friday schedule for all groundskeepers

On August 31, Respondent, by attorney Holland, emailed Rodriguez that the schedule change would be implemented on Sunday September 9. Holland also stated that the Union's failure to meet on the dates offered constituted a waiver. (GC Exh. 12 at 3.)

On September 9, Respondent implemented the schedule change. Although bargaining unit employees still worked 5 consecutive days, 6 employees no longer started their work week on Monday. Respondent scheduled the three bargaining unit employees Sunday through Thursday, and three for Tuesday through Saturday.

The schedule changes only lasted two weeks: Respondent returned to the previous Monday through Friday schedule for all groundskeepers. (Tr. 97-98.) Respondent found that the schedule changes were not helpful to its needs because it still needed employees to work outside their schedule and still resulted in overtime. The schedule also was unpopular with the employees. On about September 24, McCown told the employees that they all would return to a Monday through Friday schedule. Respondent did not notify the Union about changing the schedules. (Tr. 144-145.)

B. Respondent Maintains That General Counsel Changed Theories Posttrial and Was Not Afforded Due Process

Post-hearing briefs were filed on June 28, 2019. Within its brief, Respondent includes an exhibit with a post-hearing email exchange with General Counsel. According to Respondent, General Counsel, pre-hearing, apparently told Respondent that he did not intend to argue over contract expiration as a basis to find a unilateral change; however, on June 14, 2019, General Counsel told Respondent it would no longer exclude the contract expiration as a basis to argue Respondent's alleged unilateral actions violated the Act. (R. Br. at 13 and attached Exh. A; R. Supp. R. Br. at 2 and its attached exhibit). Respondent points out that General Counsel's opening statement only referred to past practice and not to the expiration of the contract.

Although Respondent did not move to include its post-hearing information in the record, I issued an Order to Show Cause, dated July 17, 2019, for Respondent to either file a motion to reopen the hearing to adduce additional evidence *or* file a supplemental brief to address General Counsel's alleged changed theory. If Respondent selected to re-open the hearing, it would have been required to make an offer of proof of the evidence it intended to present. In either case, Respondent was given until July 25, 2019, to respond to the Order to Show Cause and, if selected, the

supplemental brief would be due August 8, 2019.²⁹

In response to the Order to Show Cause, Respondent, on July 23, 2019, notified all parties that it intended to file a supplemental brief and requested an additional week, until August 15, 2019, to file its supplemental brief. On July 25, 2019, I granted to request for additional time to file the brief but extended only until August 14, 2019. Because Respondent chose not to present any additional evidence and therefore the evidence “remains unchanged.” *Enloe Medical Center*, 348 NLRB 991 (2006) (opinion after remand for a respondent to provide additional evidence and respondent objected instead).

Respondent filed a timely supplemental brief in which it spends about 75 percent on arguing that it still is denied due process³⁰ and about 25 percent on the actual issue.

Respondent argues General Counsel could not change theories and it had no notice of the idea that Section 11.2 expired with the collective-bargaining agreement and it should not have to respond now. It also contends that even had General Counsel moved to amend the complaint, it should have been rejected.³¹

Procedural due process requires notice and opportunity to be heard. *Earthgrains Co.*, 351 NLRB 733, 735 (2007). An agency cannot change theories in midstream without giving a respondent a reasonable notice of the change. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004). Procedural due process has flexible characteristics that are “unrestrained by bright line rules.” *Id.*, citing *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006).

Regarding Respondent’s notice, the complaint and the charge provide sufficient notice. The complaint allegations³² are sufficiently broad to encompass both past practice and contract expiration. The complaint comports with §102.15(b) of the Board’s Rules and Regulations: “A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent’s agents or representatives who committed the acts.”

Additionally, Charge 20–CA–227245, on which the complaint is based, alleges Respondent violated Section 8(a)(5) “by unilaterally changing and implementing new workweek

schedules for bargaining unit employees on an expired contract and during the course of contract negotiations without the consent of affected employees and the Union.” The record is devoid of any stipulation between the parties that only past practice controlled whether Respondent violated the Act or that contract expiration is unrelated to interpretation of the contractual provisions. The complaint and charge adequately express the unilateral changes alleged.³³ The remainder of Respondent’s argument about amending the complaint is purely speculative.

Respondent cites *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) because an employer was denied due process when “the underlying decision had not been fully litigated. Further, the court denied the NLRB’s request for a new hearing, stating ‘we see no good reason to permit the Board to start afresh.’” (R. Supp. Br. at 5–6, citing 355 F.2d at 862). The complaint there missed a significant fact, which is not the case here. 355 F.2d at 861–862. Further Respondent made a choice to respond to the Order to Show Cause and did not argue in its response that it should not be made to respond at all. This argument is a tardy attempt to have two (or three) bites of the proverbial apple.

Per *Enloe*, supra, I reject Respondent’s argument that it did not have to respond now. Respondent also argues that it would have approached the case differently had it know of General Counsel’s theory. However, despite given the opportunity to adduce additional evidence, it opted not to reopen the case.

Respondent cites no cases in its briefs to demonstrate that it could rely only upon General Counsel’s opening statement to show what theories General Counsel intends to pursue. It incorrectly contends that nothing in the record raises the possibility that General Counsel would rely upon a theory that Section 11.2 no longer applied after contract expiration: When Respondent attorney Holland testified, General Counsel asked on cross-examination whether Holland was familiar with a case called “Bottom Line.” *Bottom Line*, discussed in more detail below, deals with an employer’s bargaining obligations and the requirements to maintain status quo after contract expiration. Although Holland was not required to answer the question, Respondent should have seen the handwriting on the wall with this question.

The allegation presented also is closely related to the specific

²⁹ General Counsel, on July 18, 2019, contended that it did not change theories but was responding to Respondent’s anticipated defense of waiver. General Counsel’s argument regarding waiver is “(1) that Section 11.2 is not a clear and unmistakable waiver of the Union’s right to bargain over the schedule changes, and (2) Section 11.2 did not survive the expiration of the contract to the extent it is considered a negotiated waiver.”

³⁰ Respondent mis-cites *ILA, Local 28 (Ceres Gulf, Inc.)*, 367 NLRB No. 128 (2019) as ILWU. The case procedurally does not assist Respondent’s point as there the respondent union was granted a second hearing due to issues unrelated to due process, and then General Counsel raised the new argument at a de novo hearing. *Id.*, slip op. at 1, fn. 2.

Respondent also argues that it could have better prepared for litigation had it been provided subpoenaed documents from the Union. This stabs at the subpoena issue is well beyond the scope of the Order and irrelevant to its due process arguments.

³¹ Respondent also argues, without support, that General Counsel’s conduct, as a policy matter, encourages deprivation of due process.

³² To reiterate the complaint allegations:

¶13(a): About September 9, 2018, Respondent changed the workweek

schedule of its employees, to Tuesday through Saturday or Thursday through Sunday.

¶13(b): About September 20, 2018, Respondent changed the workweek schedule of the same employees . . . back to Monday through Friday, instead of Tuesday through Saturday or Thursday through Sunday.

¶13(c): The subjects set forth above in subparagraphs [13(a)] and [13(b)] related to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

¶13(d): Respondent engaged in the conduct described above in subparagraphs 13(a) and 13(b) without first bargaining with the Union to a good-faith impasse with respect to this conduct and the effects of this conduct.

³³ Respondent also is not assisted with *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962). The issue again was failure to make the pleading at all and was never fully litigated at hearing. As I have found the complaint was adequate with §102.15 of the Board’s Rules and Regulations and Respondent had been given the opportunity to reopen the record, Respondent has had fair notice and an opportunity to be heard on the matter.

allegations of the complaint (even if Respondent does not see it) and I will consider the theory that the Union no longer waived its rights under Section 11.2 of the expired collective-bargaining agreement. *Enloe*, 348 NLRB at 991–992. Even if the allegations and theories were not clear to Respondent before General Counsel’s email, procedural due process has been met. Because Respondent did not adduce any further evidence, I conclude that the matter was fully litigated. Respondent has had an opportunity to brief the matter and did so. Therefore, Respondent has had notice and the opportunity to be heard.

Respondent should have had a clue from General Counsel’s questioning of Holland where General Counsel’s case was headed. Even if it did not, Respondent now has been given opportunity to either reopen the record, which it did not select, or brief the legal theory without opening the record, which it chose. Respondent has not been deprived of procedural due process.³⁴

C. Parties’ Positions Regarding the Alleged Unilateral Changes

General Counsel argues that Respondent established a past practice of working staff Monday through Friday and deviated when it set in motion a different staggered 5 consecutive days. General Counsel also contends, in response to Respondent’s argument that the Union waived its rights, the negotiated language of Section 11.2 does not survive contract expiration.

Respondent contends that the language of Section 11.2 in the negotiated yet expired collective-bargaining agreement provides Respondent the right to make such changes and the Union waived its rights to protest. Respondent also contends that the change was not “material, substantial and significant,” as only six employees’ schedules were changed and only for 2 weeks.³⁵ Respondent further argues that the employees “voluntarily” changed their schedules. Respondent also contends that the Union failed to engage in timely effects bargaining when it refused opportunities over 24 days, but also contends its notification was merely a courtesy. (R. Br. at 7, 13.)

D. Credibility

Although the facts are essentially undisputed, one dispute arises with Respondent’s supplemental brief: whether the employees were told they had to pick their schedules or whether they “volunteered.” Respondent also admits that the employees would have been assigned to shifts had they not “volunteered.”³⁶ Here, I credit Strube’s discussion of what happened. Although Strube retained his Monday through Friday schedule, this schedule was unlike volunteering for overtime, which the employees had been declining. The choice described by Respondent is not a meaningful one: Although employees were given a choice of which schedule to work, they were not given a choice of not

accepting the schedule changes, particularly with the looming prospect of involuntary assignment to shifts.

E. Analysis

An employer must bargain over material and substantial changes in wages, hours, or terms and conditions of employer that are mandatory subjects of bargaining. *Fresno Bee*, 339 NLRB 1214 (2003). To establish a prima facie case for Section 8(a)(5) unilateral change, General Counsel must demonstrate “the employer made a material and substantial change in a term of employment without negotiating with the union.” *Id.* at 1214.) The employer defends by demonstrating that it was privileged to make the unilateral change. *Id.*

Despite negotiating the language into the collective-bargaining agreement, Respondent made no changes in schedules for well over 5 years after the collective-bargaining agreement went into effect. The schedule also existed in the Monday through Friday format for at least 2 years before the collective-bargaining agreement went into effect. In the meantime, the collective-bargaining agreement expired at the end of 2017. The tension between the negotiated contractual language and the past practice creates the primary issue in whether Respondent unlawfully unilaterally changed the start of the 5-work days per week for the groundskeepers.

1. Respondent’s change in work schedules are material, substantial and significant

Work schedules are mandatory subjects of bargaining. *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 22–23 (2018); *Paul Mueller Co.*, 332 NLRB 332, 334 (2000). Weekend work requirements are material and substantial changes to terms and conditions. *NLRB v. Bloomfield Health Care Center*, 372 Fed. Appx. 115, 121–122 (2d Cir. 2010), enfg. 352 NLRB 252 (2008).

An employer must notify the Union of changes to work schedules and provide the Union with a reasonable opportunity to negotiate the changes. *Indiana Hospital*, 315 NLRB 647, 657 (1994). Failure to do so results in a violation of Section 8(a)(5) and (1) of the Act. *Id.*, citing *Angelica Healthcare Services*, 284 NLRB 844, 853 (1987). Also see: *Keeler Brass Co. d/b/a Keeler Die Cast*, 327 NLRB 585, 589 (1999) (changes in schedules and any resulting reduction in overtime are mandatory subjects); *Tuskegee Area Transportation System*, 308 NLRB 251 (1992), affd. 5 F.3d 1499, reh’g denied (11th Cir. 1993), cert. denied 511 U.S. 1083 (1994). Despite Respondent’s additional defenses, discussed below, I find that Respondent did not negotiate the initial shift change with the Union, as required, and it did not notify or bargain with the Union at all regarding the shift change made two weeks later.

sometimes did not reflect what was answered. Significant, however, was Respondent’s admission against interest, testifying that no schedule change was imminent.

³⁶ Respondent contends that General Counsel “only quibbles with the days of the week for which employees were permitted to volunteer over a two week period or otherwise be scheduled by inverse seniority per section 11.2.” (R. Supp. Br. at 9.) In the same paragraph, Respondent states there is no dispute that Respondent had the right to set the weekly schedules.

³⁴ Respondent cites *Truck Drivers Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974). That case involved a bill of particulars and summary judgment; the procedural differences make it inapplicable to the present case.

³⁵ Respondent also contends that the history of the negotiations for this collective-bargaining agreement provision shows that Respondent wanted more flexibility for scheduling and received it. To that end, Respondent provided testimony from attorney Holland. Holland’s direct testimony, to primarily leading questions, resulted in narratives that

Respondent claims that the change in scheduling was not material or substantial. *McClatchy Newspapers, Inc.*, 339 NLRB 1214, 1216 (2003), cited by Respondent, gives it no quarter. The portion cited by Respondent discusses a ministerial and *de minimis* effect of an employer's change to a different pay roll period. The Board found the employer did not need to bargain that change with the newly formed bargaining unit. (Id. at 1215–1216.) Closer to the present case, the Board also found that the employer was required to bargain with the union about a change in the lunch periods and schedules, which were “permanent and systemic” and therefore material and substantial. (Id. at 1215.) When Respondent made the initial change, it had no indication that the change would be temporary, so it was permanent and systemic, as was the second change.

Respondent also cites *Crittenton Hospital*, 342 NLRB 686 (2004), in which the Board determined a change in dress code prohibiting nurses from wearing fake nails was not proven to be material, substantial and significant. Because previous hospital policies “strongly” discouraged wearing them, the Board reasoned that nurses did not use them, so the change “would not be significant to them.” (Id. at 686–687.) Schedules requiring weekend work when none was required before are a horse of a different color. The schedule changes disrupted a well-settled routine. *Bloomfield Health Care*, supra.

Respondent claims the schedule changes were *de minimis* because they were temporary. The record contradicts this conclusion: When Respondent made the initial change, it never informed the Union or the employees of its intention of making the change “temporary.” Nothing in the record reflects Respondent telling the employees the change in scheduling was temporary and had it been successful in relieving scheduling issues, it would not have been temporary. Its stated reasons for changing back to the previous schedule were that it still was not sufficiently staffed with groundskeepers, which is “post hoc rationalization for its conduct.” See *Graymont PA, Inc.*, 364 NLRB No. 37 (2016). Respondent's changes in schedules therefore are material, substantial and significant.

2. The zipper clause in the expired collective-bargaining agreement demonstrates that the Union only waived its rights on scheduling until contract expiration

Respondent claims that Section 11.2 in the expired collective-bargaining agreement remains active and controls the situation, giving it the “express right” to make changes. (R. Br. at 10.) It also contends that the Board does not have the power to resolve the contractual disputes. I find that Section 11.2, in which the Union waived its rights to bargain over schedules, only remained in effect during the term of the contract. Let's deal first with the contention that the Board does not have the power to resolve this disputed contractual area, then Respondent's claimed rights to change the schedule in an expired collective-bargaining agreement.

a. *The Board's power to resolve contractual disputes*

The Board has the power to resolve contractual disputes when

the disputes are related to determination of an unfair labor practice. See generally *Hallmark Phoenix 3, LLC v. NLRB*, 820 F.3d 696, 705 (5th Cir. 2016).

I find no support for Respondent's argument that the Board cannot interpret the contract because Respondent has “a sound arguable basis for ascribing a particular meaning to [the] the contract and [the] action is in accordance with the terms of the contract as he construes it.” R.Br., citing *NCR Corp.*, 271 NLRB 1212 (1984), citing *Vicker's, Inc.*, 153 NLRB 561, 570 (1965). Examples provided by Respondent point to mid-term contract changes, not the expired collective-bargaining agreement. In *NCR*, the Board said it would not serve as the arbitrator to interpret the disputed contract language and that the employer's actions were based upon “a substantial claim of contractual privilege.” (Id. at 1213.) This situation arose during the term of the contract, during which arbitration was an option. Id. at 1214–1215. Similarly, “sound arguable basis” was applied to a mid-term contract change in *Bath Marine Draftsmen's Assn v. NLRB*, 475 F.3d 14, 20–21 (1st Cir. 2007), affg. 345 NLRB 499 (2005).

b. *The Union only waived its rights during the term of the Agreement, not after its expiration*

The issue is determining whether the Union has waived its rights to bargain about scheduling after the contract expired. Assessment of the collective-bargaining agreement requires reasonable construction; interpretation is not a piecemeal effort but requires examination of the contract in its entirety. *Healthbridge Management, LLC*, 365 NLRB No. 37, slip op. fn. 25 (2017), enf. 902 F.3d 37 (2d Cir. 2018). To do otherwise violates the long-standing principles of “accepted rules of contract interpretation.” *Textron Puerto Rico*, 107 NLRB 583, 587–588 and fn. 5 (1953). Also see: *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279 (1956); *Knollwood Country Club*, 365 NLRB No. 22, fn. 8 (2017); *Capitol Trucking, Inc.*, 246 NLRB 135, 140 (1979); *Alliance Mfg. Co.*, 200 NLRB 697, 700 (1972). In applying these principles of contractual interpretation, the interpretation here cannot be limited to Section 11.2, but also must be interpreted in conjunction with the zipper clause.

The zipper clause explicitly limits both parties from reopening the terms of the Agreement during the life of the agreement. The Union waived its rights to bargain scheduling for the term of the Agreement only and no longer. *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 377 (D.C. Cir. 2017), enf. 362 NLRB 1212 (2015).³⁷

Respondent does not identify any other reason why this contractual term survives expiration. Like the employer in *Wilkes-Barre*, Respondent contends that the Union waived its rights, presumably for all eternity or until the parties entered a new contract, whichever came first. However, as with many cases, waiver must be clear and unmistakable. Id., citing *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001).

Respondent is required to show that the Union clearly and unmistakably waived its rights post-expiration. During the term of the contract, then, the Union clearly waived its rights to bargain

³⁷ Respondent cites a number of cases claiming that the contract provided a clear and unmistakable waiver. However, cases cited support that finding in unexpired contracts. See, e.g.: *Baptist Hospital of East*

Tennessee, 351 NLRB 71 (2007); *Continental Tel. Co. of California*, 274 NLRB 1452 (1985).

over the schedule cases.³⁸ Not so after contract expiration. Respondent relies upon the bargaining history as its intent was clear to have flexibility to schedule 5-day workweeks, starting on any day of the week. (R. Br. 11–12.) No additional language in the Agreement shows what will happen with the Union’s waiver after the contract expired. Bargaining history does not demonstrate such an intent. *Wilkes-Barre*, 857 F.3d at 378–379. Respondent therefore cannot rely upon the contract language to state the Union had no right to demand bargaining over Respondent’s planned schedule changes. The Union had a right to demand bargaining over Respondent’s planned schedule changes and Respondent was obliged to do so.³⁹ *Wilkes-Barre*, supra.

Because the collective-bargaining agreement expired and the waiver was no longer in effect, the situation is controlled by past practice and *Bottom Line*, infra.⁴⁰

3. Respondent’s past practice is the status quo

“To avoid running afoul of the unilateral change doctrine, an employer must maintain the status quo as to terms and conditions of employment after the expiration of a collective bargaining agreement.” *Prime Healthcare Services-Encino LLC v. NLRB*, 890 F.3d 286, 293 (D.C. Cir. 2018), citing *Wilkes-Barre*, 857 F.3d at 372. Here the status quo is established by a past practice that continued over a year and a half after the collective-bargaining agreement expired.

A past practice must occur with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999). The party asserting the existence of a past practice, here the General Counsel, must establish the regularity and frequency specific to its circumstances. *General Die Casters, Inc.*, 359 NLRB 89, 90 (2012); *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). Because a past practice becomes a term and condition of employment, the past practice cannot be changed without offering the collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977).

During the period in which parties are negotiating a new collective-bargaining agreement and expiration of the old one, the status quo controls whether an employer may implement a unilateral change and is controlled by the substantive terms of the expired collective-bargaining agreement. *Wilkes-Barre*, 857 F.3d at 374, citing, inter alia, *Intermountain Rural Elec. Ass’n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993), enfg. 305 NLRB 783 (1991).

However, Respondent admits that, during bargaining before the 2013 contract, it advised the Union it sought no imminent

changes. Not only were changes not “imminent,” Respondent made no changes for at least 7 years, during which time the most recent collective-bargaining agreement came and went. This practice solidified over this lengthy period. General Counsel therefore demonstrated this past practice existed for years, including well after the collective-bargaining agreement expired.

Respondent maintains that it had a “continuing right to decide on the weekly start day for schedules under Section 11.2 of the CBA and per continuing practice.” (R. Br. 10, citing *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).) Respondent implies that the schedule changes were “minor variations” from past actions or mere particularizations or delineations of carrying out “an establish[ed] rule or practice.” (R. Supp. Br. at 9.)

Like *Raytheon*, the alleged unilateral changes occurred after the collective-bargaining agreement expired. Under the terms of the collective-bargaining agreement, the employer negotiated language that allowed it to change benefits for bargaining unit employees. At this point, *Raytheon* and this matter diverge because the past practice here and in *Raytheon* are inapposite. The employer in *Raytheon* made changes annually over a period of years during the term of the contract. The Board discussed a “dynamic past practice” in which the employer regularly changed terms and conditions of employment as permitted in the contract. *Raytheon*, 365 NLRB No. 161, slip op. at 6, fn. 24.

Here, Respondent admitted in negotiations that it had no imminent intent to change the Monday through Friday schedules, which existed at the time the expired collective-bargaining agreement was negotiated. Respondent did not make any changes until over 18 months after the collective-bargaining agreement expired. In other words, Respondent failed to take advantage of the negotiated language from at least January 2013 until September 2018, past expiration, well over 5 years. The change from Respondent’s failure to change schedules for well over 7 years to a postexpiration requirement is not a minor variation of an established practice at all. For this Respondent, no pre-expiration dynamic past practice existed to warrant its failure to negotiate before implementing the post-expiration schedule changes.

4. Respondent was obligated to bargain before implementation

While the parties are negotiating a collective-bargaining agreement, an employer must refrain from any implementing changes “‘unless and until an overall impasse has been reached on bargaining for an agreement as a whole,’ subject to certain exceptions.” *Oberthur Technologies of America Corp.*, 368 NLRB No. 5, slip op. at 2 fn. 7, citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995). The expired collective-bargaining agreement, with limited exceptions, remains the status quo, which an employer must maintain. *Intermountain Rural Electrical Assn. v. NLRB*, 984 F.2d at 1568.

³⁸ Unlike General Counsel, I find the language clear and unmistakable.

³⁹ In *Wilkes-Barre Hospital*, supra, the expired contract did not limit the pay raises to the term of the contract. Here, the zipper clause makes clear that the terms of the waiver last only as long the duration of the contract.

⁴⁰ Respondent’s situation is distinguishable from *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116 (2019). The employer stopped dues checkoff, which was intertwined with interpretation of the state’s shift to right to work. Because the employer relied upon a change in state law to interpret the contract, it is inapplicable here.

Respondent fails to demonstrate that the status quo, the same schedule in effect for at least 7 years, required an immediate change beyond its control or requiring rapid change. Even when not included in the collective-bargaining agreement, longstanding and regular practice or custom may become terms and conditions of employment. See *Hotel Texas*, 138 NLRB 706, 712–713 (1962), *enfd.* 326 F.2d 501 (5th Cir. 1964); *Frontier Homes Corp.*, 153 NLRB 1070, 1072–1073; *Central Illinois Public Service Co.*, 139 NLRB 1407, 1415 (1962), *enfd.* 324 F.2d 916 (7th Cir. 1963). If the unilateral change of the past practice is material, substantial, and significant, the employer may violate Section 8(a)(5) of the Act if it changes it without notice and negotiation to the Union. *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Flambeau Airmold Corp.*, 334 NLRB 165, 171 (2001).

The outcome here is controlled by *Intermountain Rural Ec. Ass'n.*, 305 NLRB 783, 787–788 (1991), *enfd.* 984 F.2d 1562, *reh'g denied* (10th Cir. 1993). The parties were negotiating a successor contract after the previous contract expired. At issue was employer's alleged unilateral change of overtime premium pay calculation. The previous contract's language had changed, yet since that time—over 7 years—the employer retained the same overtime pay calculation. As in the current situation, “[t]his uninterrupted and accepted custom had thus become an implied term and condition of employment by mutual consent of the parties.” *Id.*

Respondent also fails to demonstrate that it was privileged to make unilateral changes under *Bottom Line*, *supra*, and *RBE*, *supra*. The *Bottom Line* exceptions that permit an employer to implement changes are: when the union delays bargaining; and, when economic exigencies compel prompt action. *Bottom Line*, 302 NLRB at 374. An economic exigency occurs under compelling economic consideration, which is “an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), citing *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987). Business necessity is not the same condition and does not excuse a failure to bargain. *Hankins Lumber*, 316 NLRB at 838, citing *Farina Corp.*, 310 NLRB 318, 321 (1993). Nor do losses of significant accounts or contracts, operating at a competitive disadvantage provide adequate excuses. *RBE Electronics of S.D., Inc.*, 320 NLRB at 81. An employer must demonstrate that its unilateral change was compelled and that external events, beyond the employer's control, or not reasonably foreseeable required a rapid change. *RBE Electronics*, 320 NLRB at 82. This Respondent did not do.

Other cases cited by Respondent are inapplicable because they arose before the collective bargaining agreement expired, e.g.: *Continental Telephone Co. of Calif.*, 274 NLRB 1452, 1452–1453 (1985) (attendance policy changes during term of collective-bargaining agreement); *Baptist Hospital of East Tennessee*, 351 NLRB 71 (2007) (broadly worded management rights clause in unexpired agreement permitted hospital to determine shift starting; hospital changed holiday scheduling policy before the contract expired).

5. Respondent demonstrates neither exigent circumstances nor delays in Union's bargaining to warrant implementation without negotiation

Despite Respondent's averments that it needed to adapt quickly to its business demands, Respondent does not demonstrate any economic exigency requiring implementation before the parties could negotiate a complete successor collective-bargaining agreement. In *Hankins Lumber*, 316 NLRB at 837–838, the employer determined to permanently lay off employees because of a chronic shortage of raw materials. The chronic shortage was not compelling economic circumstances that required immediate action such as lay off. *Id.*

Similarly, the problem with staffing weekends with groundskeepers was not new. Respondent proves no exigency requiring the scheduling change, which ultimately failed. *McClatchy*, *supra* at 1214–1215, does not support Respondent's need for a rapid change with limited bargaining time. The schedule changes in *McClatchy* resulted from the employer's shift to a new printing system, which was not a bargainable decision, so the employer was required to bargain the bargainable effects. Here, the shift changes were not related to any management decision that was not bargainable but required effects bargaining; as recognized above, the change directly impacted a term and condition of employment.

Respondent also contends that the Union failed to bargain over a period of 24 days. The Union made a timely request to bargain—the same day as notified—once Respondent notified it of its intent to make a change in schedules. The case is differentiated from *Citizens National Bank of Wilmar*, 245 NLRB 389, 389–390 (1979), *petitions for rev. denied* 644 F.2d 39 and 644 F.2d 40 (D.C. Cir. 1981) (no violation when union did not demand bargaining but only protested the action of the employer).

The parties were scheduled to bargain about the successor contract on September 10, the day before Respondent implemented the staggered week schedules. Respondent already delayed implementation for a short time. However, the 24-day period includes the period in which Respondent first notified the Union. Given no exigent circumstances, Respondent could have waited at least 1 more week to negotiate at the session on September 10, instead of implementing the day before contract negotiations. Additionally, the Union was within its rights to demand bargaining during the contract negotiations.

6. Respondent also was obligated to bargain regarding the effects of its decision

Even if found to have waived its rights to bargain over Respondent's decision on the schedule, Respondent still had an obligation to bargain the effects of the change. *Natomi Hospitals of California, Inc., d/b/a Good Samaritan Hospital*, 335 NLRB 901, 902–903 (2001) (change in staffing grid caused changes); *Bridon Cordage, Inc.*, 329 NLRB 258, 258–259 (1999) (layoffs caused by business decision of inventory reduction were bargainable effects). The effects here included how employees were paid for overtime on the weekend. Respondent failed to bargain with the Union at all regarding the effects of the schedule change and reversion.

F. Conclusions Regarding Unilateral Changes in Shift Schedules

Respondent's changes to the past practice of shift scheduling, particularly affecting weekend work, are material and substantial. The changes occurred after the collective-bargaining agreement expired, which required Respondent to notify and bargain with the Union. Respondent never took advantage of the contractual language during the term of the contract and the zipper clause limited Respondent's rights to change schedules to the term of the contract. Although Respondent notified the Union about the initial change, it did not engage in bargaining. Regarding the reversion to the prior schedule two weeks after implementation, Respondent provided no notification whatsoever to the Union. I therefore find that Respondent violated Section 8(a)(5) and (1) by unilaterally changing the groundskeepers' schedules on the two occasions alleged.

VIII. RESPONDENT'S OTHER AFFIRMATIVE DEFENSES AND DEMAND FOR ATTORNEY'S FEES

The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Sec. 10(b) of the Act), enf. 483 F.3d 628 (9th Cir. 2007). Respondent's answer included several defenses that were not addressed at hearing or in its brief.

For example, Respondent's answer defends that the allegations should be deferred to arbitration. The collective-bargaining agreement contains a grievance-arbitration provision, which does not survive the expiration of the collective-bargaining agreement unless the grievance arose before the expiration of the collective bargaining agreement. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198–199, 205–206 (1991). Because these events occurred after the collective-bargaining agreement expired on December 31, 2017, deferral is inappropriate. Another example was that the charges were filed outside the 6-month statute of limitations, which Respondent did not address at hearing or in its brief. Therefore, the affirmative defenses, other than those to the allegations above, are dismissed.

Respondent also demands attorneys' fees from General Counsel. Its brief contains no evidence of bad faith to support this demand, which is denied.

CONCLUSIONS OF LAW

1. Respondent Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The following are Respondent's supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13):

Richard McCown	General Manager
Lorenzo Molina	Superintendent

3. During the parties' collective-bargaining agreement negotiations, Ronald J. Holland was Respondent's agent with the meaning of Section 2(13).

4. The Charging Party Cemetery Workers, Golf Courses and Green Attendants, SEIU Local 265 is a labor organization within

the meaning of Section 2(5) of the Act representing:

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

5. The above unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. On about May 3, 2018, Respondent violated Section 8(a)(1) of the Act by telling or requesting that an employee remove a pro-union sign from the employee's personal vehicle while the vehicle was parked in yard parking.

7. On about May 3 and two further incidents in May 2018, Respondent violated Section 8(a)(1) of the Act by blocking the view of a pro-union sign on an employee's personal vehicle while the vehicle was parked in yard parking.

8. On September 9, 2018, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the scheduling for bargaining unit employees without affording the Union an opportunity to bargain with Respondent about those changes, and without bargaining with the Union to a good-faith impasse.

9. About September 23, 2018, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the scheduling for bargaining unit employees without notifying the Union or affording the Union an opportunity to bargain with the Respondent about those changes and its effects, and without bargaining with the Union to a good-faith impasse.

10. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of its unit employees without giving the Union an opportunity to bargain, I shall order Respondent to rescind the unlawful unilateral changes it made, upon request from the Union. The Respondent also must make unit employees whole for any loss of earnings and other benefits attributable to its unlawful unilateral changes. In this regard, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent must compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

AdvoServ of New Jersey, Inc., 363 NLRB No. 143, slip op. at 1–2 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴¹

ORDER

Respondent Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory and Memorial Park, San Mateo, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Telling or asking employees to remove pro-union signs from your personal vehicle while the vehicle is parked in yard parking.

(b) Blocking view of pronoun signs on employees' personal vehicles while the vehicles are parked in yard parking.

(c) Changing terms and condition of employment of its unit employees, including changing shift schedules, without first notifying the Union and giving it an opportunity to bargain.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

(b) Upon request by the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in September 2018.

(c) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in the manner set forth in the Remedy section of the decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Preserve and, within 14 days of request, or such additional

⁴¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes due under the terms of this Order.

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

(f) Within 14 days after service by the Region, post at its San Mateo, California facility copies of the attached notice marked "Appendix."⁴² Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 1, 2018.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C. August 23, 2019

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT ask or tell you to remove pro-union signage from your vehicle or block the sign while parked in yard parking.

WE WILL NOT unilaterally change terms and conditions of employment, including your work schedule, without giving the

⁴² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours or other terms and conditions of employment of bargaining unit employees, notify and on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

Full-time and regular part-time cemetery employees, including grounds maintenance employees, mechanics, mausoleum workers, and crematorium workers employed by the Employer at its Skylawn Memorial Park California facility, excluding all managerial employees, salespersons, morticians, embalmers, office clerical employees, all other employees, guards and supervisors, as defined in the National Labor Relations Act, as amended.

WE WILL, on request by the Union, rescind the schedule changes for our bargaining unit employees that were unilaterally implemented in September 2018 and restore the status quo ante that existed prior to the change until such time as we have bargaining with the Union to an agreement or impasse.

WE WILL make you whole for any losses suffered as the result of our unlawful unilateral changes to your work schedule, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

NORTHSTAR MEMORIAL GROUP, LLC D/B/A
SKYLAWN FUNERAL HOME, CREMATORY
AND MEMORIAL PARK

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-227245 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

