

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

LONGO EN-TECH PUERTO RICO, LLC

and

Cases 12-CA-248406  
12-CA-252309

UNITED STEELWORKERS, LOCAL 6871,  
AFL-CIO, CLC

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*(O'Neill & Borges, LLC),*  
for the Respondent.

**DECISION**

**INTRODUCTION**

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On September 16, 2019, United Steelworkers, Local 6871, AFL-CIO, CLC (Union) filed Case 12-CA-248406 and subsequently filed Case 12-CA-252309 with Region 12 (Region) of the National Labor Relations Board (Board). The charges allege that Longo En-Tech Puerto Rico, LLC (Respondent) failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by: failing and refusing to meet and bargain at reasonable times; informing the Union that Respondent would select the Union's shop steward as a condition of reaching a collective-bargaining agreement; informing the Union that as a condition of continued bargaining the Union must accept Respondent's proposed drug policy; and unilaterally laying off an employee, who is also a shop steward, in violation of seniority and superseniority provisions in the expired collective-bargaining agreement. On February 7, 2020, the Region issued the consolidated complaint in this matter and on February 14, 2020, Respondent filed an answer thereto.<sup>1</sup>

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<sup>1</sup> At the outset of the hearing, I granted General Counsel's motion to orally amend the consolidated complaint by amending par. 4 to allege that Eugene Camali, member, and Jose Saavedra, controller, are agents and supervisors within the meaning of Sec. 2(11) and (13) of the Act and to remove the word "successive" from par. 5(b). (Tr. 7-9.) Respondent admitted to each of these allegations as amended. (Tr. 8-9.)

(GC Exh. 1(j) and (n).)<sup>2</sup>

I heard this matter on March 10 and 11, 2020, in San Juan, Puerto Rico, and I afforded all parties a full opportunity to appear, introduce evidence, examine and cross-examine witnesses, and argue orally on the record. General Counsel and Respondent filed posttrial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witnesses and the parties' briefs and the totality of the circumstances, Respondent violated Section 8(a)(5) and (1) by: (1) failing and refusing to bargain in good faith with the Union at reasonable times and intervals for the purpose of negotiating a collective-bargaining agreement; (2) unilaterally changing the application of superseniority in layoffs; and (3) unilaterally changing the application of seniority in extended layoffs.

### FINDINGS OF FACT<sup>3</sup>

Respondent, Longo En-Tech Puerto Rico, LLC, a limited liability corporation with an office and a place of business in Cataña, Puerto Rico, engages in sewer line repair, lining, and installation. In conducting its operations during the calendar year prior to the issuance of the complaint, Respondent purchased and received goods valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico. The parties stipulate, and I find, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that United Steelworkers, Local 6871, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(j) and (n).)

Based on the foregoing, I find that this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

## I. THE FACTS

### A. Background

Respondent is owned by the Roberto Longo, Jr and Eugene Camali families. The Longo family owned various related predecessor employers of Respondent. The Longo family and the

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<sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for joint exhibits, "GC Exh." for the General Counsel's exhibits, "GC Brief" for General Counsel's posthearing brief, "R. Exh." for Respondent's exhibits, and "R. Brief" for Respondent's posthearing brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

<sup>3</sup> My findings of fact encompass the credible testimony, evidence presented, and logical inferences from the evidence. *Double D Construction Group*, 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

Eugene Camali family have run other unionized companies and have homes in Puerto Rico and in the continental United States. (Tr. 140-141, 148.) Respondent's work in Puerto Rico mainly consists of repairing sewer lines by installing a liner in the existing line. This work is performed by utilizing robots, cameras, and a vactor, a large vacuum machine, to clean existing sewer lines, install a flexible plastic liner, and pump in heated water to convert the flexible liner to a solid plastic pipe liner. (Tr. 119-120, 139.) Occasionally, Respondent is awarded additional sewer line replacement work that requires the installation of new or replacement lines or manholes. (Tr. 142-144.)

The Union has represented the production and maintenance employees of Respondent and predecessor employers for approximately 30 years. (Tr. 26; 140-141.) Respondent started operating the business in 2013 and reached its first collective-bargaining agreement with the Union in 2014, which was effective by its terms from October 17, 2014 to October 16, 2017 (CBA).<sup>4</sup> (Jt. Exh. 1.)

On August 23, 2017, the Union's International Representative Yaphet Torres (Torres) sent Respondent's president and owner, Robert Longo, Jr. (Longo), a letter requesting dates and a location for a negotiation meeting for a subsequent collective-bargaining agreement. The letter stated that the Union would present its proposed bargaining agreement at that first meeting. (Tr. 27; Jt. Exh. 2.) Thereafter, on several occasions, Torres communicated with Respondent's controller, Jose Saavedra (Saavedra), about possible dates but was told that no owner was available to meet with the Union.<sup>5</sup>

In September 2017, two devastating hurricanes hit Puerto Rico causing extensive power outages that affected numerous people for months. (Tr. 81, 141-142.) Despite these difficulties, Torres negotiated collective-bargaining agreements with two other employers in the months after the hurricane. (Tr. 82.)

In November, Torres sent Saavedra a proposal to extend the CBA for 3 months, and the parties executed it on December 1, 2017. The agreement extended the CBA until a subsequent agreement was reached or February 16, 2018, whichever occurred first. Respondent did not offer any dates for negotiations during this period. The Union proposed another 3-month extension of the CBA, but Respondent never agreed. (Tr. 27-28; Jt. Exh. 3.)

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<sup>4</sup> Art. 2 of the CBA sets forth bargaining unit (the unit) as:  
 consist[ing] of production and maintenance employees that were included in the bargaining unit, voluntarily recognized by the Company and employed by the employer in its business operations in Puerto, Rico. Executive, administrative, confidential and professional personnel, office clerks, guards, supervisors and salespersons as defined in the National Labor Relations Act are excluded from the appropriate unit.

<sup>5</sup> Saavedra did not contradict Torres' testimony in this regard.

In the fall of 2017, Respondent was awarded jobs to replace sewer lines destroyed by hurricane Maria and subsequent storms. On December 6, 2017, Respondent hired Ernesto Fernandez (Ernesto)<sup>6</sup> to assist with these jobs. Saavedra described Ernesto as a long-term employee of Respondent's predecessors which performed sewer line work but not the sewer-lining work that Respondent performs. Ernesto started in the 1980s and continued with predecessor companies until that operation shut down in 2012. Ernesto originally started with a predecessor employer as a "laborer," worked as a "mechanic helper," and eventually became a "very good operator." (Tr. 142; 158-159.)

On August 17, 2018, Torres sent an email to Saavedra noting that Respondent had not agreed to any of the negotiating dates offered by the Union over the last 9 months. Torres offered multiple bargaining dates in September and October 2018 and set a deadline for response to the offered dates. Torres also requested information,<sup>7</sup> and informed Respondent that the Union had selected P. Fernandez and Ernesto as stewards and negotiating committee members. (Tr. 29, 31; Jt. Exh. 4.)

### ***B. The Parties Initiate Bargaining***

On October 4, 2018, the parties finally held a meeting to discuss the parameters of bargaining. The meeting was held at Longo En-Tech's Guaynabo offices from about 10:00 a.m. to 1:00 p.m. Present for the Union were Local 6871 President Carlos Arocho and Torres. Respondent was represented by Saavedra and Longo. (Tr. 30.) Respondent asked the Union for the initial meeting to occur without members of the Union's negotiating committee. The parties discussed the rules of negotiation, and the Union identified articles to which they were not seeking modification. The parties spent approximately an hour discussing an ongoing grievance dispute over vacation time/pay which became an issue in contract negotiations. (Tr. 86; GC Exh. 2.) Respondent stated that it wanted language changes in some of the existing articles and changes to the security guards and vacation provisions. The Union's priority was health insurance benefits for unit employees. Respondent requested the Union's proposal for health insurance benefits. The Union responded that it would discuss the issues with the bargaining committee members. (Tr. 31-32.)

On October 31, 2018, Torres emailed Respondent the Union's proposed changes to the CBA language. (Tr. 33; Jt. Exhs. 5 and 6.) On December 18, 2018, Respondent emailed the Union its counter proposal. (Tr. 34; Jt. Exhs. 7 and 8.) Respondent's first proposal included proposed medical benefit plans and an expanded table of job classifications and starting salaries. (Tr. 85, 87-88; Jt. Exh. 26.) In the expired CBA, the only listed job classification was laborer, starting at \$8 per hour. (Jt. Exhs. 1(a) and (b), p. 28.) Along with the expanded list of job classifications,

<sup>6</sup> I use Ernesto's first name instead of his surname, because of the number of Respondent's employees with the same surname, including one with the same first initial. To promote privacy for employees who did not testify, I refer to them by their first initial and surname.

<sup>7</sup> The consolidated complaint contains no allegation that Respondent failed to provide the requested information.

Respondent's proposal included a list of employees' seniority dates and certifications and training. The list does not include any categorization of current job classifications and some employees had no certifications or training listed. The list also noted the percent at which each employee's wage exceeded the \$8 initial hourly wage for laborers in the CBA. (Tr. 88; Jt. Exh. 5 26, pp. 5, 9-10.)

Thereafter, Torres spoke with Saavedra about scheduling bargaining sessions. They were not able to agree upon any date. On January 22, 2019, Saavedra emailed Torres offering to meet on January 24, 2019, to discuss an ongoing grievance concerning vacation pay. Torres responded by email and agreed to the grievance meeting date and suggesting that they also "take advantage and set dates for the bargaining." (Tr. 35-36; Jt. Exhs. 9 and 27.) 10

On February 20, 2019, Saavedra emailed Torres offering March 12 or 13, 2019, as possible dates to meet with only Torres and Arocho without the bargaining committee. The second meeting concerning bargaining was held March 12 or 13 and Torres, Arocho, Saavedra, Longo, and Camali attended. Longo introduced Camali and apologized for not being able to stay and left. (Tr. 37; Jt. Exh. 10.) Camali wanted to bargain, but Torres declined and reminded him that it was at Respondent's request that the bargaining committee was not there. Torres agreed to listen to Respondent's proposal. As Camali went through the written proposal, he made oral amendments to it. After Camali finished, Torres requested a written proposal with the changes Camali articulated to share with the bargaining committee, and Camali agreed to provide the Union with an updated copy. (Tr. 37-38.) 15 20

On April 24, 2019, Torres emailed Saavedra requesting Respondent's revised proposal. On April 25, Saavedra provided it by email.

### ***C. Bargaining Conduct After June 12, 2019***

On June 12, 2019, Torres submitted the Union's counterproposal to Respondent's April 25 proposal and requested dates to continue bargaining and to sign provisions for which they had no controversy. (Tr. 53-54; Jt. Exhs. 11 and 12.) In response to Torres' request, the parties discussed meeting in July when Camali was scheduled to be in Puerto Rico. Despite Camali's presence at Respondent's Puerto Rican facility for at least one day in July, Respondent did not offer to meet. (Tr. 55; Jt. Exh. 13.) 25

On July 31, 2019, Torres sent Saavedra an email expressing the Union's concern about not meeting in July and offering to bargain on 11 dates in August. Saavedra only agreed to bargain on the last date offered. (Tr. 56; Jt. Exh. 13.) 30

On August 23, 2019, nearly 2 years after the contract expired, the first negotiation meeting with the Union's negotiating committee was finally held. Torres, his assistant Nancy Arizmendi, Arocho, and Ernesto were present for the Union, and Camali and Saavedra were present for Respondent. At the outset of the meeting starting around 10 a.m. Saavedra told the Union that 35

the meeting had to be quick because Camali had a flight later that day. (Tr. 126.) A portion of the meeting was spent discussing an ongoing arbitration over the vacation pay rate.<sup>8</sup> The vacation pay provision continued to be at issue in negotiations. The Union presented a counterproposal at 10:28 a.m. and Respondent presented a counterproposal at 10:49 a.m. (Tr. 56, 57, 125; Jt. Exhs. 14 and 15; GC Exh. 2.)

Significant issues discussed at the meeting were Respondent's proposed drug and alcohol policy and the superseniority provision. (Tr. 57-59, 99-100.) Camali raised the issue of the drug and alcohol policy and said that there "was not going to be any signature of<sup>9</sup> negotiation of any proposal unless we signed a policy of drugs and alcohol that they needed to be signed." (Tr. 57, 126; GC Exh. 2.) The Union responded that it was reviewing it.

The parties moved forward and tentatively agreed on contract provisions from the expired CBA to which neither parties sought changes and a few changes to provisions to which both parties agreed.<sup>10</sup> Negotiations then turned to the superseniority clause. The Union offered to limit the number of shop stewards with superseniority to two employees. The Union requested two such stewards arguing that the nature of the work often requires employees to be at jobsites

<sup>8</sup> The Union grieved Respondent's payment of all employees despite their regular hourly rate, the base contractual rate of \$8 per hour for laborers, the only classification of employees listed in the CBA. (Tr. 152-153; Jt. Exhs. 1(a) and (b).)

<sup>9</sup> I note that this is the accurate quote as translated. While not likely the way a person who speaks English as their primary language would have stated this, from the context I find that the testimony is that Camali refused to sign any tentative proposal agreements unless the Union signed the drug and alcohol policy proposal.

<sup>10</sup> As a result of neither party proposing changes to several provisions and the agreement on some other changes by both parties, by the end of the August 23 meeting, the parties agreed to the following provisions:

1. Collective Agreement
2. Statement of Purpose
3. Article 1 – Recognition and Contracting Unit
4. Article 2 – Appropriate Unit
5. Article 3 – Union Workshop
6. Article 4 – Deduction of Dues-Check Off
7. Article 7 – Complaints, Grievances, and Arbitration
8. Article 10 – Licenses
9. Article 11 – Safety and First Aid
10. Article 12 – General Provisions
11. Article 13 – Union Representatives
12. Article 14 – Holidays
13. Article 17 – Salaries  
(portions setting starting salaries for 11 job classifications and minimum wage increases)
14. Article 20 – Christmas Bonus
15. Article 21 – "No Strikes" and "No Lock-Outs"
16. Article 22 – Benefits and Privileges
17. Article 23 – Handicap Employees (Reasonable Accommodations)
18. Article 26 – Officials of the Local Union
19. Article 27 – Exception
20. Article 28 – Successor Clause
21. Article (illegible) – Additional Payment by Shifts

(Tr. 60, 129-130; Jt. Exh. 16.)

that are a significant distance from each other. (Tr. 59, 61.) Camali responded that Respondent wants the contract limited to one shop steward with superseniority and that Respondent would have to select the employee who is granted superseniority based upon job qualifications. (Tr. 58-60, 125-126, 154.) The Union representatives told him that he did not have the authority to select the Union's stewards. Camali expressed "that he was not obligated to negotiate with [the Union]" and questioned "who is forcing him to negotiate." (Tr. 59.) Torres responded that he was obliged to negotiate under the Act. (Tr. 59.) The meeting ended shortly thereafter at approximately 1 p.m. (Tr. 59, 126, 129; GC Exh. 2.)

On September 9, 2019, as discussed more below, Respondent laid off<sup>11</sup> shop steward Ernesto, one of two shop stewards and bargaining committee members, for a lack of work. (Tr. 62.) On September 12, Torres sent Respondent an email objecting to Ernesto's layoff and noting that the other shop steward was in New York, New York, at that time. Torres' September 12 email also offered 7 dates in September and 8 dates in October for contract negotiations. (Tr. 62-63; Jt. Exh. 18.)

On September 16, 2019, the Union filed the original charge in this matter alleging that Respondent had been bargaining in bad faith and had unilaterally changed seniority rights of employees by laying off Ernesto. (GC Exh. 1(a).)

Receiving no response to his September 12 request for negotiation dates on October 29, 2019, Torres sent Respondent another email offering 11 dates in November for negotiation meetings. Saavedra responded by offering to meet only on either November 19 or 20, the last two dates offered. Torres agreed to November 20.

Present on November 20 at the second meeting in which the Union's full negotiation committee was invited, were Torres, Arocho, Ernesto, Saavedra, and Respondent's attorney. During that meeting Torres told Respondent's attorney in a sidebar that the Union was willing to agree to the drug and alcohol policy but hoped for a concession in exchange for agreeing to that provision. (Tr. 69.) Respondent agreed to bring a response to the Union's medical benefits plan at the next bargaining meeting. The parties agreed to meet on December 11, 2019, the first date that Respondent was available.<sup>12</sup> (Tr. 69.)

At the third negotiation session on December 11, 2019, Saavedra and Respondent's attorney met with Torres, Arocho, Ernesto, and shop steward and committee member P. Fernandez. (Tr.

<sup>11</sup> Several times in the record, the direct translation of the Spanish term used by a witness is suspension. The totality of the record reflects that the witnesses were referring to what is commonly referred to as a layoff and not a discipline suspension.

<sup>12</sup> At the November 29, 2019 meeting, the parties agreed to the following provisions:

Article 24 – Working Alone

Article ? – Direct Deposit

Article 24 – Hiring Outside Personnel

(Jt. Exhs. 32(a) and (b).)

69-70; Jt. Exh. 18.) The Union presented a counterproposal, Respondent explained that the proposed medical benefit plan was too expensive because the unit is small.<sup>13</sup> (Tr. 70; Jt Exhs. 30 and 35.) The meeting lasted about 2-1/2 hours, and the next meeting was scheduled for January 21, 2020. (Tr. 71.)

5 The fourth negotiation session occurred on January 21, 2020. The same participants, absent P. Fernandez, met for negotiations. The Union presented a proposal and informed Respondent that it would agree to article 4, management rights as a separate provision without the drug and alcohol policy. Respondent did not have future negotiation dates. (Tr. 71-72.)

10 On February 27, 2020, Torres offered to meet for negotiations on nine dates in March. On March 7, Respondent's attorney responded that he was available on March 30, but no meeting was confirmed by Respondent's negotiation team. (Tr. 72-73; Jt. Exh. 20.)

At the time of the hearing the outstanding contract issues were:

1. Whether one or two stewards will have superseniority;
2. The drug and alcohol policy portion of the management rights provision;
- 15 3. The vacation policy which is also related to the grievance at issue over the vacation policy;
4. Wages, including overtime distribution and annual increases;
5. Medical benefit plan;
6. The effective dates of the new contract.

20 (Tr. 96-98.) The outstanding contract proposals have been discussed in bargaining during at least some of the negotiation meetings. Many of these disputes were evident from the outset of negotiations. (Tr. 98-99.)

#### ***D. The Layoff of Ernesto***

25 Ernesto worked for Respondent for about 2 years as a heavy equipment operator and truck driver on jobs awarded to Respondent after hurricane Maria. (Tr. 112-113.) Some of these jobs required more use of heavy equipment than its typical sewer cleaning and relining work. (Tr. 142-143.) Ernesto worked at this jobsite and several others in various municipalities in Puerto Rico. (Tr. 114.) Ernesto and several of his relatives have a long history of working in this industry for Respondent and its predecessors. (Tr. 117-118.)

30 On September 11, 2019, Ernesto's supervisor called and informed him that he had little work for him and would call to let him know when he had additional work. (Tr. 62, 115.) Ernesto was called back to work the next week and worked 3 days before being laid off again. (Tr. 115.) On

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<sup>13</sup> At the December 11, 2019 meeting, the parties agreed to the following provision:  
Article 16 – Sick Leave  
(Jt. Exhs. 30(a) and (b).)

September 12, Torres sent Respondent an email objecting to Ernesto’s layoff and noting that the other shop steward was in New York, New York at that time. On September 13, Saavedra responded by email that Ernesto was laid off due to lack of work in his job classification and that shop steward P. Fernandez would return on September 16. (Tr. 62–63; Jt. Exh. 18.)

5 On September 17, 2019, the Union also filed a written grievance over the layoff of Ernesto with Respondent. (Jt. Exh. 21.)

Ernesto returned to work the next Monday, likely September 23, 2019, and worked until October 24, 2019, before being laid off again. (Tr. 116.) On November 1, 2019, Respondent sent Ernesto a letter informing him “that due to a Lack of Work, we find ourselves forced to forego of  
 10 your services. . . . If a new employment opportunity arises for you, we will be in communication.” (Tr. 117; Jt. Exh. 23.) At the time he testified Ernesto had not been recalled by Respondent.

On September 24, 2019, Respondent denied the grievance by letter. The letter reiterates Respondent’s position that Ernesto’s lay off was appropriate because of a lack of work in his job  
 15 classification of operator and that P. Fernandez returned on September 16 to represent the unit employees.

Ernesto’s layoff grievance was submitted to arbitration, raising the question of whether under the CBA Ernesto, an operator, should have been first in line for a layoff due to a lack of operator work. Respondent is defending the grievance on procedural defenses and contends, in part, that  
 20 the grievance is not appropriate for arbitration because the CBA has expired. (Tr. 80; Jt. Exh. 33.)

L. Fernandez and H. Fernandez worked for Respondent as carpenters and assistants and were laid off in December 2019 for lack of work. (Tr. 119.) Assistants deliver materials to carpenters and help them with work as needed. (Tr. 120.) E. Fernandez, who is trained to operate the vactor  
 25 and much of the other heavy equipment that Ernesto had operated, continued to work. Ernesto understood that E. Fernandez had been operating an excavator at the time of the hearing.<sup>14</sup> (Tr. 119–121.) Ernesto was not trained to operate the vactor. (Tr. 119–120.) P. Fernandez, the other union steward, assisted with the operation of heavy equipment but did not have the training of Ernesto or E. Fernandez. (Tr. 121.) Respondent attached the following list of employees’  
 30 seniority dates and certifications and skills to a proposal presented to the Union in the current contract negotiations, which included a proposal for an expanded list of job classifications.

<b>Employee</b>	<b>Seniority Date</b>	<b>Certification/training</b>
Ernesto	12/06/2017	Heavy equipment operator
P. Carrillo	01/10/2018	Mechanic assistant

<sup>14</sup> The basis of Ernesto’s knowledge in this regard is not in the record. Respondent did not assert that Ernesto’s testimony about the work being performed by E. Fernandez was hearsay, nor did Respondent provide contradictory evidence. Based thereon, I credit the testimony.

	L. Fernandez	02/05/2018	None listed
	H. Fernandez	03/12/2018	None listed
	H. Alicea	03/19/2018	None listed
5	F. Ortiz	05/17/2018	In house vactor & boiler training; category 9 driver's license
	E. Fernandez	06/11/2018	In house vactor & boiler training; heavy equipment operator; category 9 driver's license
10	D. Nieves (Jt. Exhs. 17, 24, and 26.)	08/14/2019	None listed

### ***E. Relevant CBA Provisions***

15 While I considered the entire CBA in my analysis of whether Ernesto's layoffs constituted unilateral changes in violation of Section 8(a)(5) and (1), I reproduce the most relevant portions of the CBA here for ease of reference:

#### ARTICLE 9, SENIORITY:

20 Section 1: The Company recognizes the principle of employment seniority, which shall be respected for all purposes, as defined in the following clauses:

a. Seniority is defined as a worker's service from the date that he or she started as a Company employee.

25 b. Any worker shall lose seniority right for the following reasons:  
iii. Suspension ("Layoff") for a period of more than six (6) months.<sup>15</sup>

30 d. In the event of a layoff and recall of personnel, efficiency factors and skills shall be taken into consideration, but in equal circumstances, the most senior employee at work shall prevail. If it is an extended layoff, seniority shall be predominant.

35 e. Once every three (3) months, the Company shall prepare, revise and post seniority lists by departments and then plant-wide.

j. Shop stewards and the Local President shall enjoy super-seniority within their respective classifications for purposes of employment layoff and recall during the

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<sup>15</sup> Respondent relies on this provision to support its contention that the term "extended layoff" refers to a layoff of 6 months or more. At hearing Respondent's counsel asked Torres whether a "standard" layoff is more than 6 months, and Torres agreed. (Tr. 78.) I find that this question and answer exchange does very little to define an "extended layoff" as used in sec. 1(d) below. I agree with General Counsel's assertion that Respondent's interpretation would cause the bizarre result of a more senior employee being laid off for 6 months then being brought back to replace another employee who would then be laid off.

term of this Collective Bargaining Agreement.<sup>16</sup> The Company accepts that the Union cannot be without union representation within the Company and shall ensure that this does not occur.

5 ARTICLE 13, UNION REPRESENTATIVES

Section 3: It is agreed between the parties that there shall be a Union shop steward that shall ensure compliance of all the clauses of this Collective Bargaining Agreement. . . .

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Section 4: The Union shall be entitled to designate assistant shop stewards on each project. . . .

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ARTICLE 17, SALARIES

Section 1: The bargaining parties have agreed on the salary rates that are set forth below for the different classifications during the term of this Collective Bargaining Agreement.

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Table 1:  
 Classifications: Laborers\*<sup>17</sup>  
 Classification Starting Salary: \$8.00<sup>18</sup>

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<sup>16</sup> For ease of reference, I include the other provisions of the CBA containing the phrase “during the term of this Collective Bargaining Agreement:”

Article 2.3, Appropriate Unit, Section 3

The Company recognizes that any new employment or employment change that is set forth within the appropriate unit within this Article, not specifically mentioned in it, shall immediately become part of it, during the term of this Collective Bargaining Agreement.

Article 17, Salaries, Section 1 – listed below

Article 19, Medical Plan and Life Insurance, Section 1

During the term of this collective bargaining agreement, the Company shall pay for an individual coverage from the Medical Plan to each employee. The employee shall have the option of choosing a family coverage which shall be administered by the Company, but the employee shall assume the costs of the difference between the individual coverage and the family coverage.

Article 20, Christmas Bonus

The Christmas bonus shall be paid on or before December 15th and so on during the term of this Collective Bargaining Agreement.

Article 21, No Strikes and No Lock-outs, Section 1

During the term of this Collective Bargaining Agreement, neither the Union nor any of its members, Company employees, shall declare nor call for stoppages, strikes, pickets, work delays or interruptions, [“no strikes”].

Section 2:

The Company shall not order lockouts [“no lock-outs”] during the term of this Collective Bargaining Agreement.

Article 29, Validity, Section 3 uses similar language:

During its term, this Collective Bargaining Agreement shall bind the parties' successors and assignees.

<sup>17</sup> The CBA lists only the classification of laborers. Saavedra testified that the parties included the asterisk after the laborers’ classification, because the parties discussed revisiting the classifications of employees after the company was more established, if necessary. This is corroborated by the language of art. 17, sec. 5. Ultimately, the parties never revisited the issue while the CBA was still in effect. (Tr. 147–148.)

<sup>18</sup> The CBA requires a minimum hourly wage for employees of \$8. A review of Respondent’s employees’ hourly wages shows that 14 employees earn between \$8 and \$15 and eight employees earn between \$15 and \$33 per hour. This same document lists certifications, specialty driver’s licenses, and skills that some of the employees possess. (Jt. Exh. 32.)

Section 5: . . . Upon completing a year and a half of the contract, the Company and the Union shall discuss the need to create new classifications and salary scales and if there is such need, the parties agree that these new classifications shall become part of the appropriate unit.

Section 6: Employees may voluntarily do work in any occupational classifications that they are skilled and trained to perform in, as long as there is a vacancy, and he or she shall be paid the salary scale applicable to the work that he or she is performing.

## ANALYSIS

### A. *Duty to Meet and Bargain in Good Faith*

Whether a party has bargained in bad faith depends on the totality of its conduct. *Richfield Hospital, Inc.*, 368 NLRB No. 44, fn. 4 (2019), citing *West Coast Casket Co.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972). Various conduct may evidence bad faith in the course of contract negotiations. See, e.g., *Richard Mellow Electric Contractors Corp.*, 327 NLRB 1112, 1018 (1999) (failure to meet and bargain with regularity); *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 485 (1960) (attitude of “take it or leave it”); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992) (seeking to retain sole discretion over important terms and conditions of employment); *Houston County Electric Cooperative*, 285 NLRB 1213 (1987) (“unilateral changes in mandatory subjects of bargaining, efforts to bypass the union,” making unreasonable bargaining demands); *Charlie's Oil Co.*, 267 NLRB 764, 769 (1983) (making proposals that lack “the slightest chance of acceptance by a self-respecting union”); *Teamsters Local 122*, 334 NLRB 1190, 1254 (2001) (making regressive proposals to frustrate bargaining); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996) (refusal to promptly provide information requested by the Union and necessary to bargaining); *Whitesell Corp.*, 357 NLRB 1119, 1179 (2011) (citing various conduct evidencing bad faith in bargaining).

#### i. *Duty to meet and bargain*

The basis for finding a violation of Section 8(a)(5) by failing to meet and bargain with regularity is found in Section 8(d) of the Act, which mandates that parties meet at “reasonable times.” Although “reasonable times” is not defined in the Act, it is interpreted to require parties to meet for bargaining at reasonable intervals, and without unreasonable delays. *Richard Mellow Electric*, supra, at 1018; *Fern Terrace Lodge of Bowling Green*, 297 NLRB 8 (1989); *Teamsters Local 122 (Busch & Co.)*, 334 NLRB 1190 (2001); *Sparks Nugget, Inc. d/b/a John Acuaga's Nugget v. NLRB*, 968 F.2d 991, 995 (9th Cir. 1992). “There are no rigid or precise rules setting forth the number, frequency, or duration of bargaining meetings necessary to satisfy the parties’ obligations under Section 8(d), but the Board looks at factors, such as, inter alia, the number of meetings, whether a party engaged in dilatory tactics or placed other limits on bargaining, and whether the other party requested more frequent meetings.” *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998); *People Care, Inc.*, 327 NLRB 814 (1999) (respondent’s unreasonable refusal to accede to union’s requests for more frequent meetings was evidence of bad-faith bargaining).

In *Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), the Board held that the statutory duty to bargain “surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring.” The Board in *Rutter-Rex* found a “prima facie” case that the employer failed to satisfy its duty to bargain, because it “offered no explanation at the hearing for having been able to meet with the [u]nion on only 3 days in more than 5 months.” *Id.* A claim of unavailability or a busy schedule does not excuse the failure to meet this duty. *Richard Mellow Elec. Contractors Corp.*, 327 NLRB 1112, 1116 (1999). See also, *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995) (finding, inter alia, respondent’s cancelling of bargaining sessions, limiting the duration of meetings, and delaying the scheduling of future meetings indicative of bad-faith bargaining); *Barclay Caterers*, 308 NLRB 1025, 1037 (1992) (although union pressed for meetings, employer only agreed to meet four times in 9 months); and *Storer Communications*, 294 NLRB 1056, 1095 (1989) (employer only available to meet on three dates in more than 5 months; union satisfied burden to seek meetings by telling mediator it was available any time).

In the instant case, the Union repeatedly offered numerous dates for bargaining, and on each occasion Respondent either did not respond or agreed to only one of the latest dates offered. The complaint alleges a violation starting in June 2019, therefore I address Respondent’s actions from that date forward, but note that Respondent’s conduct before that date was not substantially different. In June 2019, the Union offered to meet in July. Respondent stated that it would arrange a meeting when Camali visited but failed to do so. The Union offered 11 dates in August, and Respondent agreed to only the last date. The Union offered 15 dates in September and October and received no response. The Union offered 11 dates in November and Respondent agree to only one. Throughout this entire period Respondent never offered dates for negotiations and only negotiated for a few hours each time it met with the Union. Only after the Union filed the charge alleging bad-faith bargaining did Respondent agree to one bargaining date in November, December, and January and bargained for only a few hours on each of these days. As of the March 11, 2020 hearing, Respondent had not confirmed another bargaining date despite the Union’s offer of dates in March and Respondent’s attorney noting his availability on March 30, again the last date offered.

Respondent contends that the number of provisions on which the parties have reached tentative agreements refutes the argument that it has breached its duty to meet and bargain. I note that many of those agreements required no current bargaining because neither party sought to change them from the expired CBA. Only a small portion of the provisions to which the parties have agreed are new or substantially revised provisions. Furthermore, Respondent’s argument belies the real possibility that the parties could have reached the same point in bargaining months earlier if it had agreed to bargain even a couple of days per month for longer periods of time for any of the months between June 2019 and the hearing. Respondent also points to what it contends were unacceptable delays by the Union as evidence that the delays in bargaining were at least equally caused by the Union. For example, Respondent contends that the Union failed to provide a counteroffer to its March 2019 proposal until June 12. Respondent fails to recognize that it did not provide the Union with its proposal as orally modified at the March meeting until April 25, and only after the Union requested it again. Based upon the

totality of the circumstances,<sup>19</sup> the number of dates offered by the Union, and Respondent's practice of agreeing to only one of the latest dates and bargaining only for a partial day each time, I find no merit to Respondent's arguments that its failure to meet and bargain with the Union with more regularity and for extended periods of time should be excused. Nor do I find that by meeting for bargaining 1 day per month in November, December, and January cured Respondent's overall failure to meet and bargain expeditiously. Respondent's failure to agree to a meeting after January further evidences its lack of good faith.

Therefore, I find that Respondent's refusal to meet and confer with the Union at reasonable times and intervals for the purpose of negotiating a collective-bargaining agreement evidences bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act.

*ii. Statements made during the August 23 meeting*

General Counsel contends that Camali's statements at the August 23 meeting evidence bad faith and constitute violations of Section 8(a)(5) and (1) of the Act. At the meeting, Camali first insisted upon trying to resolve the ongoing grievance over vacation pay before moving forward with contract negotiations. Eventually he relented and moved on with negotiations by discussing Respondent's long sought-after drug and alcohol policy that Respondent first pursued during negotiations for the expired CBA. Respondent raised the drug and alcohol policy again in the initial meeting between the parties in preparation for the current negotiations. After expressing frustration and saying that he was not going to sign off on any tentative contract proposals unless they had a signed drug and alcohol policy, Camali went forward with negotiations and signed several tentative agreements to which there was no dispute. Once the parties started negotiating the superseniority clause, Camali insisted that superseniority would be limited to one employee that he selected. When Torres told him that the Act precluded him from selecting the Union's representative, Camali stated that he was "not obligated to negotiate" and questioned who had the authority to require him to negotiate before ending the approximately 3-hour meeting because he had a scheduled airline flight.

While Section 8(d) makes it clear that the Act "does not compel either party to agree to a proposal or require the making of a concession," bad-faith bargaining is often characterized by a "take it or leave it attitude." "Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, it will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining." *Altura Communication Solutions, LLC.*, 369 NLRB No. 85 (2020). In the instant case, by the time that the parties case reached the August 23 meeting, the Union had more than once noted its frustration with Respondent's failure to meet and bargain. This meeting was the first meeting where contentious proposals were bargained by the parties. During the meeting, Camali informed the Union that he needed to leave early, insisted on devoting some of his limited time to discuss an ongoing grievance, threatened to discontinue bargaining each time the

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<sup>19</sup> In assessing the totality of the circumstances, the Board also looks to other actions of an employer such as unlawful unilateral changes during bargaining to evidence bad faith. *Entertech*, 309 NLRB 896, 899 (1992) (unilateral changes in conditions of employment evidence of bad faith); *Houston County Electric Cooperative*, 285 NLRB 1213 (1987). As discussed more below, Respondent also implemented unilateral changes to employees' seniority and superseniority rights during this same period.

parties did not agree on a proposal, and ended the session with no commitment as to the next bargaining date.

5 Camali's insistence on a drug and alcohol policy agreement before he would agree to other provisions must be considered under the totality of the circumstances. Despite prior numerous requests for meeting dates, this was the first actual bargaining session with the full bargaining committee present, because Respondent had requested their absence at the two prior meetings that occurred during more than 1-1/2 years since the CBA expired. Camali failed to meet and bargain the prior month despite his presence at the facility, he agreed to only one date in August, and he started that meeting by telling the Union that he had to leave by 1 p.m. that afternoon. Camali's willingness to sign tentative agreements on provisions to which he had no opposition does not evidence a give and take attitude, when each time that he was confronted with a disagreement on a contract provision, he expressed a take it or leave it attitude. After that meeting, Respondent did not agree to another bargaining date until November 20, after the charges in this matter were filed. Furthermore, as discussed below, Respondent unilaterally changed the superseniority and seniority provisions, which resulted in the layoff of a Union steward who was also one of only two bargaining committee members. Thus, considering this statement not in isolation but in the context of all of Respondent's conduct, I find that it evidences Respondent's bad faith.

20 Camali's insistence on selecting the employee union steward with superseniority is also problematic. The Board has long recognized that "[t]he right of employees to designate and to be represented by representatives of their own choosing" is a basic statutory policy set forth in Section 7 of the Act and a fundamental right guaranteed employees by Section 7 of the Act. When it is alleged, as here, that an employer is refusing to recognize a designated representative of its employees, especially for a matter of such obvious importance to employees as processing grievances, it is not simply a matter of contract interpretation but rather an alleged interference with a basic statutory right of employees that this Board is entrusted with protecting." *Native Textiles*, 246 NLRB 228, 229 (1979). In *Oates Bros., Inc.*, 135 NLRB 1295, 1296-1297 (1962), the employer insisted in contract negotiations on having veto power over the selection of a union steward in response to the union's proposal that the steward be granted superseniority. The Board in *Oates Bros.* found insufficient the employer's argument that its selection of the steward was "necessary to ensure that an adequate work force was available in the event of a layoff." *Id.* In finding no special circumstances or valid business justification considering a totality of the circumstances to warrant the employer's stance, the Board found that the employer violated Section 8(a)(5) and (1) by its insistence on its proposed contract provision. *Id.*

40 Here, I find that Respondent failed to provide evidence of a special circumstance or valid business justification to necessitate its insistence on selecting the Union's steward(s) who would have superseniority. As the Board found in *Native Textiles*, the selection of union stewards that assist in the processing of grievances, as in this case, is a basic statutory right of employees. An argument that in a future layoff Respondent may prefer or even eventually need to retain certain employees is insufficient to establish special circumstances or valid business justification for impinging on that fundamental right now. The impetus for seniority provisions in contracts is to reward employees for years of service and to prevent employers for selecting individuals for layoff or other advantages based upon personal preference factors. Superseniority provisions go

one step further to ensure that the union steward selected by the employees remains to represent them. The general preference of employers to select which employees they retain in a layoff is not a special circumstance. Respondent contends that it must retain all employees with vector training, but its crews consist of unskilled and skilled employees. As the Board found in *Oates Bros.*, an employer's argument that it must select the stewards granted superseniority "to ensure that an adequate work force was available in the event of a layoff," does not constitute a special circumstance. *Supra*, at 1296-1297. Furthermore, Respondent's argument that it correctly discharged Ernesto based upon his job classification is inconsistent with its argument that it must maintain employees in certain job classifications regardless of the work left to be performed.

Considering the totality of the circumstances, I find that Respondent evidenced its failure to bargain in good faith during the August 23 meeting, by Camali telling the bargaining committee that he would not sign any tentative agreements without first reaching an agreement on a drug and alcohol policy, and by insisting that the appointment of a shop steward be subject to its approval.

Accordingly, I find that Respondent's overall bad faith negotiation conduct from June 12 through the date of the hearing violated Section 8(a)(5) and (1) of the Act.

### ***B. The Layoffs of Ernesto Fernandez***

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally changes the wages, hours, or other terms and conditions of employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873-874 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1164-1165 (1990). This is a requirement even if at the time of the change the collective-bargaining agreement between management and the union has expired and a new agreement has not been completed. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991).

#### ***i. Superseniority provision***

The complaint alleges and General Counsel asserted at hearing that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the status quo of employees' superseniority rights under the expired CBA by laying off Ernesto before other less-senior employees. Respondent contends that it complied with the seniority and superseniority provision's requirement that layoffs be done by least seniority based upon job classifications, and therefore, did not engage in a unilateral change without giving the Union notice and an opportunity to bargain. The Union contends that there is only one job classification under the contract and that E. Fernando was not the least senior.

General Counsel agrees with the Union's position with regards to the seniority provision, but General Counsel in posthearing briefing reversed positions on the allegation that Respondent unlawfully unilaterally changed the stewards' superseniority. General Counsel asserts that the Board should overrule its application on the contract waiver standard in *Finley Hospital*, 362 NLRB 915 (2015) to determine the post-contract expiration status quo that an employer must maintain. General Counsel contends that the plain language of the CBA's superseniority clause

establishes that the clause terminated with the CBA, privileging Respondent to unilaterally discontinue granting superseniority. (GC Br. at p. 30–35.) Six days after General Counsel submitted its brief, the Board held in *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 3 (2020) that provisions in an expired collective-bargaining agreement, allowing employers to make certain unilateral changes during the term of a contract, do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration. *Id.* The Board explained further that “[a]lthough the parties may agree that a particular provision survives the contract's expiration, any such agreement must be stated ‘in explicit terms.’” *Id.* Because of recent changes in the applicable standards, I provide a brief overview of the relevant case history below.

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that when an employer, without first bargaining to impasse, unilaterally changes a term or condition of employment constituting a mandatory subject of bargaining it violates Section 8(a)(5) of the Act. *Id.* at 743. The prohibition against unilateral changes applies during the term of a collective-bargaining agreement and after the agreement expires. See *Litton*, 501 U.S. at 198. Even when a contractual right does not survive contract expiration, the statutory right typically does. The contractual rights “are no longer agreed-upon terms; they are terms imposed by law, [under Section 8(a)(5)], at least so far as there is no unilateral right to change them.” *Id.* at 206. Thus, “an expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied.” *Id.* Although the parties may agree that a particular provision survives the contract's expiration, any such agreement must be stated “in explicit terms.” *Id.* at 207.

Superseniority is a mandatory subject of bargaining that cannot generally be changed without giving a union notice and an opportunity to bargain. See *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), enf. denied on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963); *Proof Co.*, 115 NLRB 309 (1956), enf. 242 F.2d 560 (7th Cir. 1957). Except for a few special subjects of bargaining of which superseniority is not included, the requirement to bargain before unilaterally changing mandatory subjects remains applicable after contract expiration. *Frankline, Inc.*, 287 NLRB 263, 264 (1987); *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987).

The Board has long recognized that a union can waive or contractually relinquish the right to bargain about a mandatory subject post-contract expiration. What has recently changed is the evidence needed to establish that a union waived or relinquished its right to receive notice and opportunity to bargain. *Finley Hospital*, supra at 918; *Nexstar*, supra at slip op. at 2. In *Finley Hospital*, the union alleged that the employer unlawfully discontinued yearly pay raises after the 1-year collective-bargaining agreement expired. The contract provision entitled, “Base Rate Increases During Term of Agreement,” stated that “[f]or the duration of this Agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date.” *Id.* at 918. The Board reasoned that “[i]t follows that language in a collective-bargaining agreement may intentionally preclude a provision from having any contractual force after expiration of the contract. But given the employer’s statutory duty to maintain the status quo postexpiration, such language will not permit a unilateral change of a term established by the same contract unless it also amounts to a clear and un-mistakable waiver of the union’s separate statutory right to maintenance of the

status quo.” Id. at 918. Because the contractual language did not mention post-contract expiration conduct, the Board found that it could not “be read as a clear and unmistakable waiver of a statutory right elementally different from the contractual right to which the language does refer.” Id. The Board found that the contract language “limits the effective period of the contractual obligation but does not address the employer’s postexpiration conduct or obligations or authorize unilateral employer action of any kind.” Id. Thus, the employer failed to prove a waiver of its obligation to maintain the status quo established by the expired contract.<sup>20</sup> Id.

Recently, the Board adopted the contract coverage standard with its emphasis on assessing the plain language when analyzing parties’ collective-bargaining agreements. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). In *Nexstar*, the Board applied the contract coverage standard’s plain language analysis and not the clear and unmistakable waiver standard used by the Board in *Finley Hospital* to assess the lawfulness of unilateral changes made post-contract expiration. The Board summarized the application of that standard by stating that “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.’ In conducting that inquiry, the Board will apply ‘ordinary principles of contract interpretation.’ ‘Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).’” Id., slip op. at 2, quoting *MV Transportation*, supra (internal citations omitted).

The issue in *Nexstar* was whether the expired contract’s management-rights clause privileged the employer to make post-contract expiration unilateral changes to driver-background checks and posting of work schedules. The Board held that “[a]lthough the status quo is ascertained by looking to the substantive terms of the expired contract, the *obligation* to maintain the status quo arises out of the Act, not the parties’ contract.<sup>21</sup> 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.” Id. (emphasis in the original, internal citation omitted). The Board explained “that provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration.” Id. The Board also noted that “duration is an important limit to any contractual right or obligation” and that the contract coverage standard “respects the agreement reached by the parties as expressed in the plain

<sup>20</sup> The Board noted in *Finley Hospital* that specific evidence in a contract will signal the parties intent for certain terms of employment to cease with the contract. Supra at 918. For example, in *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), enf. granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982), the Board found that the following contractual language privileged the employer to discontinue payments to the union’s pension trust fund on behalf of employees: “at the expiration of any particular collective bargaining agreement . . . any Company’s obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.”

<sup>21</sup> In *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019), the Board noted that It is well established that “the status quo is . . . defined by reference to the substantive terms of the expired contract.” Relying upon the expired contract’s language requiring the employer to cover health benefit premium increases up to 5% starting on two specific dates during the term of the contract, the Board found that the employer did not have to cover additional increases post-contract expiration to maintain the status quo.

language of the contract, including ‘the limits—or absence of limits—upon which the parties themselves have agreed.’” *Id.* at slip op. at 3, citing, *MV Transportation*, *supra*, slip op. at 10.

5 In *Nexstar*, the management’s rights provision of the expired collective-bargaining agreement did “not contain language extending the rights of unilateral action to post-expiration conduct or otherwise beyond the term of the contract. Indeed, they do not mention post-expiration conduct at all.” *Id.* at slip op. at 4. Therefore, “under *Katz*, the Union has a *statutory* claim to  
10 continuance of the status quo with respect to those practices.” (Emphasis in the original.) *Id.* I note that despite using the contract coverage standard plain language analysis discussed by the Board in *Nexstar*, it like the Board in *Finley Hospital*, specifically considered whether the language of the contract mentioned post-contract conduct.

15 In the instant case, the superseniority clause states that stewards “shall enjoy super-seniority within their respective classifications for purposes of employment layoff and recall during the term of this Collective Bargaining Agreement. The Company accepts that the Union cannot be without union representation within the Company and shall ensure that this does not occur.” *Jt. Exh. 1*, article 9—seniority, section 1(j).) The provision plainly establishes that the contractual right is limited to the “term of this Collective Bargaining Agreement” (the phrase). Thus, the question here is whether the phrase, “during the term of this Collective Bargaining Agreement,”  
20 constitutes an “explicit” agreement to adjust post-expiration conduct, and therefore, the status quo required by the Act.

25 General Counsel contends that the plain language of the provision establishes that superseniority rights ended with the contract allowing Respondent to unilaterally discontinue superseniority rights without unlawfully adjusting the post-contract status quo. General Counsel in brief adds qualifying language, such as “only” and “limited to,” to the phrased “during the term of this Collective Bargaining Agreement,” that is not contained in the language of the expired CBA. (GC Br. at p. 31.) Such qualifiers have no place in assessing the meaning of the language of the CBA.  
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35 While the management-rights clause in *Nexstar* contained no language referencing a time period, the superseniority clause here states that the stewards “shall enjoy superseniority . . . during the term of this [CBA].” The phrase, “term of this Collective Bargaining Agreement,” speaks of what happens during the term of the agreement, which establishes the status quo at the time of the contract’s expiration. The following sentence explicitly states that Respondent recognizes the Union need for “union representation within the Company” without giving any time restrictions. CBA article 13, union representation, sections 3 and 4, contains similar language stating Respondent’s commitment to allow the Union to maintain representatives at the company, including at each project. I find that the superseniority provision of the CBA does not  
40 contain explicit language plainly evidencing the discontinuance of status quo superseniority rights post-contract expiration.

45 I found no other provision directly relevant to the determination of whether superseniority provision became part of the post-contract expiration status quo. The CBA contains the same phrase, “during the term of this Collective Bargaining Agreement,” in six other provisions and a similar phrase in a seventh provision. A couple of these provisions, such as the no-strike and no-

lockout provisions, are constructs of the CBA and without an explicit agreement to the contrary, expire with the contract. *Frankline*, supra at 264; *Indiana & Michigan Electric*, supra at 53. Other provisions containing the phrase provide employee terms and conditions of employment, such as medical and life insurance, holiday pay, and salary rates, that absent an explicit  
 5 agreement for them to terminate become part of the status quo terms and conditions of employment post-contract expiration. *Id.* The record contains no evidence that either of the parties have asserted that these benefits have not continued as part of the status quo, evidencing that the plain meaning of the phrase does not affect the post-contract status quo.

10 Based upon the plain language of the superseniority clause and of the entire CBA, I find that the language of the CBA does not privilege Respondent to unilaterally change the status quo of superseniority rights established by the CBA post-contract expiration.

15 Instead of contending that superseniority expired with the contract, Respondent relies upon the portion of the super-seniority clause that states that stewards “shall enjoy super-seniority within their respective classifications for purposes of employment layoff and recall” to support its argument that it complied with the status quo created by the CBA. When drafting the CBA, the parties agreed to a single classification of laborers with an agreement to revisit the issue later, if necessary. Other provisions of the CBA refer to classifications and skills of employees.  
 20 Ultimately the parties never revisited the issue during the term or the extension of the CBA. The record contains no evidence of other layoffs or other actions taken by the Employer that established a past practice of recognizing other distinct job classifications. To the contrary, Respondent paid all employees for vacation time based upon the starting salary rate for a laborer, giving rise to the ongoing grievance concerning employees’ vacation pay. At the same time, no  
 25 party disputes that Respondent tended to assign work to employees based upon skills they have obtained. For example, Ernesto is a skilled machine operator and mostly worked in that capacity for Respondent. Employee wages varied significantly apparently based upon their skills.

30 Notwithstanding that it might be reasonable in other circumstances to consider everyday operations and refer to job classifications in a CBA when making layoff decisions, here the Respondent’s reasoning is inconsistent with the facts and is premised upon the unilateral implementation of job classifications. The plain language of the CBA lists only one classification and contains an agreement to revisit the issue of job classifications before  
 35 implementing any delineation, but the parties never did. The fact that the parties contemplated taking such action does not negate Respondent’s duty to give the Union notice and opportunity to bargain to an agreement or impasse before implementing any additional classifications and/or taking actions based thereon.<sup>22</sup>

40 Therefore, I find that the plain language of the contract establishes superseniority as a part of the post-contract expiration status quo and that the plain language of the contract lists only one job classification. Any implementation of additional classifications and actions taken based upon those classifications by Respondent, including the layoff of Ernesto by job classification

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<sup>22</sup> Respondent submitted evidence of negotiating and a tentative agreement for additional classifications in a successor collective-bargaining agreement, but possible changes as a result of the current contract negotiations is not relevant to determining the status quo established by the CBA.

before other less senior employees, constitutes an unlawful unilateral change in violation of Section 8(a)(5) and (1).

*ii. The general seniority provision*

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The complaint also alleged that Respondent unlawfully changed employees' general seniority rights established by article 9 of the expired CBA by laying off Ernesto, while retaining less-senior employees. Respondent again asserts that it appropriately laid off Ernesto based upon his job classification of machine operator. As discussed above, the superseniority provision refers to job classifications, but the general layoff provisions in article 9, Section 1(d) states that "efficiency factors and skills shall be taken into consideration, but in equal circumstances, the most senior employee at work shall prevail. If it is an extended layoff, seniority shall be predominant." Respondent paid Ernesto a significantly higher hourly wage to operate machinery than most of the less senior employees received. Although in a different context, article 17, section 6 of the CBA contemplates the possibility of a more skilled employee performing less skilled work and being "paid the salary scale applicable to the work that he or she is performing."

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As discussed above, Respondent cannot rely upon any delineation of job classifications that it unilaterally established to justify its layoff of Ernesto, nor is there any evidence of a past practice concerning layoffs or the use of job classifications other than laborer. Therefore, the question is whether Respondent violated the status quo established by the layoff provision of the CBA. The plain language of the CBA's article 9, Section 1(d) grants Respondent some discretion to consider efficiency factors and skills in determining who to layoff in the case of temporary work shortages, but in cases of extended layoff then "seniority shall be predominant."

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Addressing the two short layoffs of Ernesto, I find that the status quo established by the CBA allowed Respondent some flexibility to consider efficiency and skills in determining who to lay off for short periods. For the most part, Ernesto worked as a machine operator for Respondent. Ernesto was a long-term employee of Respondent's predecessors and Respondent is aware of his extensive training in the industry from laborer, to mechanic helper, to a skilled machine operator. The only skill Ernesto had not acquired was operating the vactor and four other less senior employees had no vactor training. One of the four worked as a mechanic's assistant, which Ernesto has experience performing. The record contains no evidence that these less-senior employees had skills that Ernesto does not possess.

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Ernesto's first two layoffs were short in duration, and in each case, Respondent was able to assign machine operator work to him within a few days. The record does not contain evidence of other less senior employees performing significant machine operator work during the two short layoffs. Retaining Ernesto would have caused Respondent to shift him to another type of work and lay off the employee doing that work, only to reverse course a few days later. Based on the CBA language affording Respondent the right to consider efficiency factors and the skills of employees in making short-term layoff decisions, I find that the two short layoffs of Ernesto were lawful.

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The initial consideration in evaluating whether Ernesto's third layoff constituted an unlawful unilateral change requires an analysis of the term "extended layoff." Contrary to Respondent's assertion that the CBA defines an "extended layoff" as a layoff of more than 6 months, I find no support for that contention in the CBA. In the absence of a specific definition of extended layoff, I must rely upon the common meaning of that term and the facts in this case. By the date of the hearing, Ernesto had been continuously laid off from October 24, 2019 through the date of the hearing, with no expectation of being recalled. While I decline to determine the minimal time period that constitutes an extended layoff, I find Ernesto's layoff exceeded the time necessary to fulfill the plain meaning of an extended layoff, especially when there was no plan to recall him after more than 4-1/2 months. Also, Respondent made clear in its November 1, 2019 letter that Ernesto was being laid off for an extended time period, if not permanently. I find no other reasonable interpretation of the statement in his layoff letter "that due to a Lack of Work, we find ourselves forced to forego of your services. . . . If a new employment opportunity arises for you, we will be in communication." Accordingly, I find that his third layoff was an extended layoff and Respondent was required to make employees' seniority the predominant<sup>23</sup> factor in determining who to retain or layoff.

Ernesto's seniority should have predominated over considerations of efficiency and skills in determining whether he would be laid off for an extended period, but the term predominate does not fully preclude all other considerations. Even giving some deference to the various skills of employees, Respondent has not established that considerations of skills and efficiencies required the retention of other less senior employees that outweighs Ernesto's priority as a more senior employee. Respondent contends that it should be allowed to retain less-senior employees who were trained to operate the vactor. At least three employees more senior than Ernesto possessed that skill, and other employees less senior than Ernesto that were not trained to operate the vactor but remained employed after Ernesto was laid off. While the record only contains hearsay evidence that machine operator work was available after Ernesto's extended layoff, even if such work was not always available, his seniority should have predominated. Furthermore, the CBA contemplates Respondent offering employees lower paid work, which it did not offer to Ernesto.

Based upon the status quo established by the CBA as a whole and specifically the language of article 9, section 1(d), I find that the layoff of Ernesto on October 24, 2019, constituted an unlawful unilateral change in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSIONS OF LAW

1. Longo En-Tech Puerto Rico, LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steelworkers, Local 6871, AFL-CIO, CLC (Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. Since about June 12, 2019, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the collective-bargaining representative of the unit employees.

<sup>23</sup> The *Merriam-Webster Dictionary* defines predominant as "having superior strength, influence, or authority: prevailing." <https://www.merriam-webster.com/dictionary/predominant> (June 2020).

4. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for unit employees with regard to their superseniority rights.
- 5 5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for unit employees with regard to their seniority rights.
6. The aforementioned unfair labor practices by the Respondent affected commerce within the meaning of Section 2(6) and (7) of the Act.
7. Respondent has not violated the Act except as set forth above.

## REMEDY

Having found that the Respondent 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.

- 15 The Respondent, having failed to bargain collectively and in good faith with the Union shall be ordered, on request, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed collective-bargaining agreement.
- 20 The Respondent, having unilaterally implemented changes in the terms and conditions for its unit employees' seniority and superseniority rights as they apply to layoffs, shall, upon the Union's request, rescind the changes and restore the status quo ante, and shall maintain the status quo ante in effect until the parties have bargained to agreement or a valid impasse.  
  
The Respondent having made unlawful unilateral changes to unit employees' seniority and superseniority rights as they apply to layoffs, shall offer affected employees, including but not limited to Ernesto Fernandez, full reinstatement to their former job or, if that job no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- 25 The Respondent shall make unit employees whole, including but not limited to Ernesto Fernandez, for any loss of earnings or other benefits suffered as a result of the unlawful unilateral implementation of changed terms and conditions of employment.
- 30 The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), or *F. W. Woolworth Co.*, 90 NLRB 289 (1950), as appropriate, 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).
- 35 In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate affected unit employees wrongfully laid off pursuant to its unilateral changes for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate
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affected employees for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 12 a report allocating backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent shall be ordered, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, to notify and, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit, which:

consists of production and maintenance employees that were included in the bargaining unit, voluntarily recognized by the Company and employed by the employer in its business operations in Puerto Rico. Executive, administrative, confidential and professional personnel, office clerks, guards, supervisors and salespersons as defined in the National Labor Relations Act are excluded from the appropriate unit.

In the conclusion to her brief counsel for the General Counsel requests that as part of the remedy for the violations found, Respondent should be ordered to commit to a bargaining schedule with the Union of 15 hours per week. (GC Br. at 35-38.) I agree that the Respondent's violations of the Act are serious, but I am unconvinced that the requested extraordinary remedy is warranted. The cases where the Board has imposed a bargaining schedule remedy involve egregious misconduct by the employer that is substantially different than the misconduct confronted here.<sup>24</sup> The record contains no evidence that Respondent is a recidivist. Although not nearly frequently enough, Respondent did meet and bargain on a few occasions, reached some tentative agreements on a few provisions to which changes or disputes existed between the parties, and provided information requested by the Union. While Respondent violated the Act by its dilatory bargaining practices and in other manners, as set forth herein, its conduct does not warrant

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<sup>24</sup> *Gimrock Construction*, 356 NLRB 529, 529 (2011) (bargaining schedule remedy imposed where employer had refused to meet and bargain with union for over 11 years including over four years after enforcement of the Board's order by the Court of Appeals), enforcement denied in relevant part on other grounds, 695 F.3d 1188 (11th Cir. 2012); *Profession Transportation, Inc.*, 362 NLRB 534, 535 (2015) (bargaining schedule imposed where employer cancelled seven consecutive bargaining sessions and insisted to impasse that any collective-bargaining agreement reached would be nullified and the employer would no longer have to recognize the union if the Supreme Court affirmed the D.C. Circuit's decision in *NLRB v. Noel Canning*); *Thermico Inc.*, 364 NLRB No. 135, slip op. at 3 fn. 4 (2016) (bargaining schedule imposed because 11 months passed since the union's first bargaining request, the respondent refused or did not respond to the union's bargaining requests, and the respondent abrogated its obligation to bargain pursuant to a bilateral settlement); *Camelot Terrace*, 357 NLRB 1934, 2005 (2011) (bargaining schedule imposed because where respondent engaged in flagrant and "aggravated unlawful" behavior and failed to comply with the bargaining schedules in two settlement agreements), enforcement granted in relevant part, 824 F.3d 1085 (D.C. Cir. 2016); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn. 2, 733 (2011) (bargaining schedule imposed due to egregious misconduct that included the respondent soliciting and encouraging petitions to decertify the union, withdrawing recognition from the union based on one of the petitions that the respondent solicited, and failing to provide information that the union requested), enfd. 540 Fed. Appx. 484 (6th Cir. 2013).

extraordinary remedies. A traditional bargaining order will put Respondent on notice that it must meet for bargaining in good faith at reasonable intervals, and without unreasonable delays.

5 The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted<sup>25</sup> at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2019. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 12 of the Board what action it will take with respect to this decision.

15 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

### ORDER

The Respondent, Longo En-Tech Puerto Rico, LLC, Cataña, Puerto, Rico, its officers, agents, successors, and assigns, shall

- 20 1. Cease and desist from
- (a) Failing and refusing to bargain in good faith with United Steelworkers, Local 6871, AFL-CIO, CLC (Union) as the exclusive-bargaining representative of the employees in the bargaining unit.
  - 25 (b) Unilaterally changing the terms and conditions of employment of its unit employees by changing the application of seniority and superseniority as applied to layoffs, without first bargaining with the Union to a good-faith impasse.
  - (c) 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.
- 30 2. Take the following affirmative action necessary to effectuate the policies of the Act
- (a) On request, bargain in good-faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
- 35           the unit consists of production and maintenance employees that were included in the bargaining unit, voluntarily recognized by the Company and employed by the employer in its business operations in Puerto, Rico. Executive, administrative, confidential and professional personnel, office

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<sup>25</sup> See the below order for adjustments to the posting requirements as a result of temporary closures caused by Covid-19.

<sup>26</sup> If no exceptions are filed as provided by Sec. 102.48 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.

clerks, guards, supervisors and salespersons as defined in the National Labor Relations Act are excluded from the appropriate unit.

5 (b) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees to their seniority and superseniority rights with regard layoff order that were unilaterally implemented on September 11 and October 24, 2019.

(c) Within 14 days from the date of this Order, offer employees affected by the unilateral changes, including but not limited to Ernesto Fernandez, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without  
10 prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make affected unit employees, including but not limited to Ernesto Fernandez, whole for any loss of earnings and other benefits and search for work expenses suffered as a result of their layoffs, in the manner set forth in the remedy section of this decision.

(e) Compensate affected employees, including but not limited to Ernesto Fernandez, for  
15 the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, 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.

(f) Preserve and, within 14 days of a request or such additional time as the Regional  
20 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.

(g) Post at its Cataña, Puerto Rico facility<sup>27</sup> copies of the attached notice marked  
25 “Appendix.”<sup>28</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to  
30 physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed  
35 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2019.

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<sup>27</sup> 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 posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means.

<sup>28</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Dated, Washington, D.C. August 7, 2020

*Kimberly Sorg - Graves*

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Kimberly Sorg-Graves  
Administrative Law Judge

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## APPENDIX

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT  
FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

**WE WILL NOT** fail and refuse to bargain in good faith with the United Steelworkers, Local 6871, AFL-CIO, CLC (Union) as the exclusive collective-bargaining representative of our unit employees.

**WE WILL NOT** unilaterally change your terms and conditions of employment by implementing changes to our employees' seniority and superseniority rights in the case of a layoff without first bargaining to a good-faith impasse.

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

**WE WILL** on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

production and maintenance employees that were included in the bargaining unit, voluntarily recognized by the Company and employed by the employer in its business operations in Puerto, Rico. Executive, administrative, confidential and professional personnel, office clerks, guards, supervisors and salespersons as defined in the National Labor Relations Act are excluded from the appropriate unit.

**WE WILL** on the Union's request, rescind the changes in the terms and conditions of employment for our unit employees regarding their seniority and superseniority rights in the case of a layoff.

**WE WILL**, within 14 days from the date of the Board's Order, offer employees affected by our unilateral changes, including but not limited to Ernesto Fernandez, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL** make Ernesto Fernandez, and any other unit employee affected by our unilateral changes, whole for any loss of earnings and other benefits resulting from their unlawful layoff, less any net interim earnings, plus interest, and **WE WILL** also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

**WE WILL** compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file with the Regional Director for Region 12, 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.

Longo En-Tech Puerto Rico, LLC  
(Employer)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)

South Trust Plaza, 201 East Kennedy Boulevard, Suite 300, Tampa, FL 33602-5824  
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/12-CA-248406> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (813) 228-2641.