

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

J.G. KERN ENTERPRISES, INC.

and

Cases 07-CA-231802
07-CA-245744
07-CA-252759

LOCAL 228, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO

Kelly Temple, Esq.,
for the General Counsel.

Christopher M. McHale, Esq.,
Potomac Falls, Virginia,
for the Respondent.

Stuart Shoup, Esq.,
Detroit, Michigan,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried on August 3, 2020.¹ Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, (the Charging Party or Local 228) filed the charges on November 27, 2018, July 29, 2019, and December 3, 2019. The Regional Director for Region 7 of the National Labor Relations Board (NLRB or Board) issued the initial complaint on February 21, 2019, the first consolidated complaint on October 8, 2019, the second consolidated complaint on May 8, 2020, and the second consolidated amended complaint (the Complaint) on June 22, 2020.

¹ Due to the compelling circumstances created by the Coronavirus Disease pandemic, the hearing in this case was conducted remotely by videoconference using Zoom technology and under appropriate safeguards. See *William Beaumont Hospital*, 370 NLRB No. 9 (2020).

On October 3, 2018, the Board certified the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Union or International Union) as the bargaining representative of a unit of the Respondent's production and maintenance employees. The Complaint alleges that, after certification, the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act or NLRA): from October 15, 2018 to January 9, 2019, by refusing to meet with the Charging Party and/or the International Union and by cancelling previously agreed upon bargaining on November 5-7, 26-28, and 30, 2019; on April 10, 2019, by telling the Charging Party that there was no need to make a proposal on benefit plans because the Respondent was keeping its current benefit plans; failing and refusing to provide information about employee benefits that the International Union and Charging Party sought in written requests on about April 17 and July 9, 2019; and on November 25, 2019, by withdrawing recognition from the Charging Party. The Respondent filed a timely Answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT AND ANALYSIS

I. JURISDICTION

The Respondent, a corporation, operates an office and place of business in Sterling Heights, Michigan, where it is engaged in the manufacture, machining, and non-retail sale of automotive parts. In conducting these business operations, the Respondent purchases and receives at its Sterling Heights facility goods valued in excess of \$50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find that the Charging Party and the International Union are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. BACKGROUND FACTS

1. Respondent Agrees to Dates to Start Contract Negotiations, then Cancels

On October 3, 2018, after a representation election, the Board certified the International Union as the bargaining representative of a unit composed of production and maintenance employees at the Respondent's automotive parts manufacturing facility in Sterling Heights, Michigan.² At about the same time, the International Union

² The bargaining unit is described as:

designated its local union, Local 228, as the servicing representative for the bargaining unit employees. The Respondent did not have collective bargaining relationships with any other unit of employees.

5 In an email on October 15, Paul Torrente, the president of Local 228, contacted Jonathan Sutton, an attorney who the Respondent had retained to represent it in contract negotiations.³ Torrente offered to begin negotiations “anytime” at Sutton’s “earliest convenience.” Sutton responded by email on October 17 and stated that he was available to meet with Local 228 on November 5 to 7 or 26 to 28, although “things are subject to change rather quickly sometimes.” The next day, October 18, Torrente responded to schedule negotiations on November 5, 6 and 7 – the earliest dates that the Respondent had offered. Torrente further stated that Local 228 was prepared to negotiate on the second set of dates referenced by Sutton – November 26 to 28. Torrente asked Sutton where he wanted the meeting to take place.

15 On November 2, Torrente followed-up with Sutton by email, stating that he had not heard from the Respondent since October 17 about the location where the Respondent wished to meet for the November negotiations. There is no written response to this in the record, and the Respondent has not claimed that Sutton responded to either this communication or Local 228’s earlier communication of October 20 18 regarding the specifics of where the previously scheduled bargaining would take place.

25 On November 5 – the first day of the scheduled negotiations – Sutton sent an email to Local 228’s financial secretary, stating that he was not available to meet that day as previously agreed. He stated that, in fact, he would not meet with the Union on any of the 6 dates in November when he had previously said he was available. Sutton explained that other matters – specifically, labor negotiations with another employer and involvement in the sale of a property – required his presence and attention in 30 November. Sutton’s communication to the Union did not provide an explanation for: his decision to give the other matters priority over the negotiations with Local 228; why he had agreed to bargain in November if he could not do so; why he did not notify Local 228 that there was problem with the November bargaining dates prior to the day when that bargaining was scheduled to begin; or why he had not responded to the intervening 35 communications from Local 228 about the negotiations. There is no record evidence, or

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

³ At trial, on August 3, 2020, Sutton was asked what his specialty was, and he testified that he had “been doing labor work” for the last 3 years. Transcript at Page(s) (Tr.) 64. That would mean that in October 2018 when Sutton began representing the Respondent regarding bargaining for a first contract, he had been “doing” labor work for approximately 14 to 15 months.

even an assertion, that, prior to November 5 (the day when negotiations were scheduled to begin), the Respondent had communicated to Local 228 about any problem with the parties beginning negotiations on that date.

5 In his November 5 email cancelling the session, Sutton stated that he could “ask
 someone else to step in and fill my spot, in an effort to get things started.” That same
 day, Torrente emailed Sutton, and took him up on the offer to have someone else “step
 in.” Torrente’s stated that “it ma[de] no difference to” Local 228 whether it was Sutton
 “or someone else” who represented the Respondent in the negotiations. Torrente
 10 requested that someone representing the Respondent contact him by November 8 to
 set a new date to begin negotiations. At trial, Sutton claimed that Torrente had never
 asked to bargain with someone else despite this documentation of Torrente’s request.
 General Counsel Exhibit Number (GC Exh.) 16.⁴ Later in November, Torrente had
 communications with James Teague, a labor law consultant for the Respondent.
 15 According to Torrente, Teague agreed to negotiate on November 26 and 27, but then
 texted to cancel those dates. Torrente testified that Teague then agreed to negotiate on
 November 30, but that Teague cancelled that date as well, citing, as had Sutton,
 scheduling conflicts. Teague testified that, to the contrary, he only had a single
 conversation with Torrente in November, and that this conversation did not involve
 20 scheduling of negotiations.⁵

After the Respondent cancelled the November bargaining dates, the Union
 attempted to arrange bargaining in December. By certified letter dated November 27,
 2018, Diane Virelli – an international representative for the Union who was assisting
 25 Torrente – proposed 15 bargaining dates between December 4 and 20. Sutton testified
 that he refused to meet at any time in December because he had sold a property in
 Houston “and so I was unable to be there.” Transcript at Page(s) (Tr). 66.

On January 10 and 11, 2019 – after Local 228 filed an unfair labor practices
 30 charge accusing the Respondent of continually postponing negotiations – the
 Respondent came to the bargaining table for the first time. The record shows that
 Torrente was lead negotiator for Local 228, and that Virelli was present to assist him.
 Sutton was lead negotiator for the Respondent, and was assisted by the Respondent’s

⁴ Sutton’s willingness to testify that the Union had not asked to bargain with someone else if Sutton was unavailable reflects poorly on Sutton’s credibility as a witness. Based on Sutton’s testimony, demeanor, and the record as a whole I find that he was an unusually biased and unreliable witness regarding disputed matters.

⁵ I do not find a basis in the record, or the demeanor of the witnesses, to resolve the factual dispute regarding whether Teague cancelled scheduled bargaining on November 26, 27 and 30. Torrente’s testimony was that Teague had communicated that he was cancelling those dates, but Torrente was uncertain regarding the manner of some of the relevant communications and there is no documentation in the record of Teague’s supposed agreement to, or cancellation of, negotiation on those dates. Teague’s contrary testimony was also vague, in that he said he communicated with Torrente in November, but did not state what those communications were about, except to say that they were *not* about the ongoing attempts to schedule negotiations. Although I do not find that Teague did (or did not) cancel agreed-upon meetings in November, I do find, as discussed above, that Sutton did so.

human resources director, Susan Allen. Teague testified that he attended “maybe two sessions” as “second chair,” but the record does not make clear which sessions those were.

5 2. Local 228 Requests Cost Information for Existing Employee Benefit Plan;
Respondent States that It Will Not Consider Proposal for Union-Administered
Benefits Plan and Refuses to Provide Cost Information on Existing Plan

10 At the time of the first bargaining session in January 2019, Local 228 orally
requested information about the insurance and other benefits the Respondent was
providing to unit employees in order to, in Torrente’s words, “cost the agreement, to
figure out . . . our proposals and put a whole contract together.”⁶ Local 228 was
15 considering proposing that the Respondent replace the health insurance it was currently
providing with insurance through a union benefit plan. In response to the information
request, the company provided Local 228 with a section of its 2018 employee welcome
package in which the Respondent described the employee benefits the company
provided.⁷ Later, the Respondent provided Local 228 with a copy of a health insurance
20 option selection form that the company circulated in 2019 for employees to use in
selecting from among the choices being offered. These documents showed the cost to
employees of various plan options – including co-pays, deductibles, and employee
share of premiums. Sutton conceded that Local 228 had asked for not just this
information regarding employees’ costs, but also for the Respondent’s “specific cost
25 structure and exactly what we were paying for benefits.” Tr. 74. My review of the
welcome package and options form show that those documents do not disclose the
Respondent’s costs for the health insurance or other benefits.

30 On April 2, Torrente followed up the earlier oral requests with an email to Sutton
stating that the benefits information the Respondent had provided was insufficient and
that other requested “information [was] needed to cost the package for negotiations and
provide the company with an option.” On April 10, Sutton responded as follows:

Dear Mr. Torrente,

35 I have reviewed the requested information, but will not be providing same.
I have stated previously there is a limit to the information we will be providing,
and in this you ask for more than we will share.

⁶ Virelli stated that, during negotiations, Local 228 was seeking information both about “what the Employer was actually paying in the benefits package, what their percentage would be” and about employees’ costs so that Local 228 could make a proposal. Tr. 56 and 58-59.

⁷ Local 228 requested the 2019 welcome package describing benefits to employees, but the Respondent only provided the 2018 version. Susan Allen, the Respondent’s human resources director, testified that the 2018 welcome package was still current in 2019 because the benefits had not changed.

In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan.

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Regards,
Jonathan M. Sutton

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At the time of the above email, the Respondent had not provided any of the information that Local 228 had requested regarding the Respondent's costs for the benefits package.

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On April 17, 2019, Virelli sent an email to Sutton in which she requested that the Respondent provide, inter alia, the following information by May 1, 2019:

A. General

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1. Copies of the Summary Plan Descriptions for all benefit programs.
2. Plan documents for all benefit programs.
3. Eligibility criteria and duration of benefit continuation during period of leave, layoff and termination.
4. Cost information on each benefit program (to the employee)
5. A complete census of the entire bargaining unit showing the following for each employee:
 - a. Date of birth

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* * *

B. Health Care

For each plan (medical, prescription drug, dental, vision and hearing):

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1. By plan, the number of persons participating in each plan by family status (single, couple, family, or however else categorized) separately.
2. The full premium charge or premium equivalent by category.

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4. COBRA premium rates listed by family status for each health plan offered to the members.

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5. Projected 2017, 2018, 2019 and 2020 cost increases, if any.

C. Life Insurance, Accidental Death & Dismemberment and Optional Dependent Insurance

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2. List the cost/\$1000. List the total cost to the Employer.

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On May 2, 2019, Sutton responded to Virelli's April 14 information request in an email to Torrente. In response to five of the specific requests – items A.4.(employees' costs under benefit programs), B.2.(full premiums for health plans), B.4.(COBRA premium rates for health plans), B.5.(projected health plan cost increases), and C.2. (employer cost for, inter alia, life insurance) – Sutton stated that “Cost information will not be shared.” Sutton's email did not set forth any justification for the refusal to share this cost information. With respect to several of the other specific requests, the Respondent indicated that the information had already been provided in whole or in part – for example, items A.1., A.2., A.3., and A.5.

On July 9, 2019, Torrente sent an email to Christopher McHale, another attorney representing the Respondent,⁸ requesting essentially the same information that Virelli requested on April 14. In addition to repeating the language from Virelli's request, Torrente's request stated that the copy of the employee handbook that the Union had been provided was “not up to date,” and asked for “updated” complete census information for the unit. McHale responded to Torrente 3 days later, on July 12, stating that his understanding was that Sutton had already provided the information, but that he would respond once he heard back from Sutton. About an hour later, Torrente responded “[t]he information I have requested was never provided by Mr. Sutton,” and that Sutton had “stated he was not going to provide it.”

At first it seemed that Local 228 might have better luck obtaining the cost information from McHale than it had from Sutton. On July 17, McHale told Torrente by email that he would gather the information from the Respondent and provide it. However, McHale did not provide additional information and, instead, stated in a July 25 email that “[i]t is the company's position that all of the information that the union is entitled to has been disclosed.” Torrente responded on July 25 by demanding that the Respondent provide the information by July 30 – the date of the next scheduled bargaining session. The Respondent never provided Local 228 with a number of the types of requested information, including information showing the Respondent's costs for unit employees' healthcare insurance and other benefits.

Sutton provided the only testimony explaining the Respondent's refusal to provide Local 228 with cost information for the benefits. Specifically, Sutton stated that Local 228 wanted to know “our specific cost structure and exactly what we were paying for benefits,” Tr. 74, but that he refused to provide that information because:

[T]hat's like going to a car dealership and saying, well, I'll pay you 80 grand for a car, and then where do you negotiate? They're going to sell you a car for \$79,999. You're not going to get a better deal that you otherwise might.

Tr. 75.

⁸ McHale is trial counsel for the Respondent in the instant proceeding.

3. State of Bargaining at Time of Petition and Withdrawal of Recognition

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A. Course of Bargaining

10 As noted above, the Respondent cancelled the negotiations that the parties had agreed to conduct in November 2018 and then refused Local 228's request to bargain in December 2018. On November 27, 2018, Local 228 filed the first of the unfair labor practices charges in this case. The charge alleged that the Respondent was failing and refusing to bargain in good faith by, inter alia, the "[c]ontinued postponement of negotiations"

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After Local 228 filed the unfair labor practices charge, the Respondent met for contract negotiations in January and February. The Respondent did not bring a single proposal to the bargaining table during the sessions in January and February. Tr. 89-90. Local 228 made multiple proposals on individual contract issues during those sessions.⁹ As discussed, supra, at the start of the January session, Torrente asked the Respondent to provide information on the Respondent's costs for the existing employee benefits in order to guide Local 228 in developing a comprehensive contract proposal. During the January sessions the parties reached tentative agreements on some of Local 228's proposals, but Sutton told Torrente that the Respondent would refuse to "dive into anything of real consequence" until Local 228 submitted a comprehensive contract proposal. Prior to the January bargaining session, Sutton had not informed Local 228 that the Respondent was insisting that Local 228 submit a comprehensive contract proposal. While he eschewed negotiations over matters of consequence without a comprehensive proposal, Sutton did not make a comprehensive proposal of his own on behalf of the Respondent. The Respondent did not show, or even claim, that Local 228 indicated that it would not consider employer proposals – comprehensive or otherwise -- or that Local 228 expressed that it would be unwilling to make a comprehensive proposal of its own once the Respondent provided the benefits information that Local 228 requested for use in crafting such a proposal.

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Negotiations continued in March 2020 and during those sessions Local 228 provided the Respondent with what Sutton characterizes as "a bunch of" of additional proposals. The parties reached tentative agreement on some of those proposals. In April 2019, the parties reached additional tentative agreements. As discussed, supra, on April 10, Sutton told Torrente, in writing, that the Respondent "will stick with the present [employee benefits] plan" so there was "no need for [Local 228] to put further effort into working up a proposal for union provided benefits."

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⁹ During his testimony, Sutton repeatedly characterized this circumstance – in which the Respondent did not present a single proposal and Local 228 presented multiple proposals – as Local 228 being utterly unprepared for bargaining. Tr. 66, 76-77.

In May, the parties had a 2-day bargaining session scheduled. On the first day Torrente and Sutton met privately about the negotiations. The following day Torrente and Virelli asked to meet privately with Sutton. Sutton testified that, during that meeting, the parties tried to “fine-tune some details on things that had already been reached.”¹⁰

5 The parties had a 2-day session in June as well. They met for 8 hours on the first day, but they ended negotiations early on the second day at Local 228’s request.

As is discussed below, the Respondent withdrew recognition from the International Union on November 25, 2019, after receiving a petition signed by employees. As of that time, the parties had reached 35 tentative agreements. They had not reached agreement on any of the economic issues – including insurance benefits, wages, and profit sharing. The International Union filed the final charge at-issue in this case on December 3, 2019. That charge alleges that the Respondent violated the Act when it withdrew recognition on November 25, 2019.

15 B. Petition and Withdrawal of Recognition

Employees at the Respondent circulated a petition in November 2019 which had the heading: “We the undersigned no longer wish to be represented by UAW local 228 for any purposes.”¹¹ The petition was signed approximately 205 times, and each signature is dated on either November 18, 19, or 20. There was no testimony showing how many of the persons who signed the petition were in the bargaining unit or what was the total number of employees in the bargaining unit at the time of the petition. Nor was there testimony that each of the signatures represented a discrete employee. To the contrary, my own cursory review showed that at least one individual (Oasiur J. Hegel) signed twice. There was also no testimony from a witness, or witnesses, who claimed to be able to authenticate the signatures. Allen testified that the petition was signed by “over 80 percent.” The parties entered into a stipulation that there was no allegation that the “Respondent did . . . overtly solicit, assist, or otherwise interfere with the formulation, preparation, or promulgation,” of the petition.¹²

¹⁰ Sutton confirmed that these meetings between the Respondent and Local 228 occurred during the time that the parties were scheduled to meet in May, and that the parties fine-tuned agreements at that time. However, the Respondent’s brief describes this as Local 228 “refus[ing] to bargain and cancel[ing] the May 2019 session on the spot.” This is a mischaracterization of the evidence.

¹¹ The petition also has a heading written in a foreign language and alphabet that were not identified or translated on the record. The placement of this second heading suggests that it has the same meaning as the English language heading quoted above, but there was no testimony to that effect.

¹² The Respondent presented the testimony of one employee, Damien Williams. He was the only bargaining unit employee called by any party in this case. Williams was not eligible to vote at the time the employees elected the Union as their bargaining representative, but by the time of the hearing in this matter he had become a bargaining unit employee. He stated that he circulated the petition, but he did not claim that he was instrumental in its creation or that he was a leader of the petition effort. Williams testified that he supported the petition for two reasons. First, he stated that when he worked for a previous employer there was a different union present and that the union at the previous employer always “tried to . . . get money.” He conceded, however, that to his knowledge the Respondent’s employees had not been required to pay dues

The parties were scheduled to negotiate on November 25, 2019. Before the negotiations could get underway that day, McHale and Teague presented Torrente and Virelli with a letter, signed by McHale, stating that the Respondent was withdrawing recognition from the Union based on an employee petition showing that a majority of employees no longer wished to be represented by the Union.¹³ Teague orally stated that the Respondent was “no longer going to bargain because the employees had decided to not continue to be part of the Union.” Torrente replied that the Respondent had an obligation to negotiate and Teague told him to “just file a ULP charge.”

When Torrente returned to his office on November 25, he sent an email to McHale in which he stated:

Putting aside the accuracy of your claim that an uncoerced majority of employees no longer wish to be represented by the Union – which we dispute – be advised that, as a matter of law, the various unfair labor practices committed by the Company prohibit it from withdrawing recognition. We demand that you rescind this decision immediately.

McHale responded by email on November 26, stating:

Unfortunately J.G. Kern’s hands are tied and must respect the employees’ Section 7 rights. J.G. Kern can not unilaterally decide to ignore their decision. To do so would result in multiple ULPs from employees.

After November 25, 2019, there were no further contract negotiations between Local 228 and/or the International Union and the Respondent.

to the Union. Second, Williams stated that he went to a picnic that the Union advertised, but that he had trouble finding the union representatives at the picnic site and felt “kind of disrespected as a result.” Williams did not claim to have any knowledge regarding why anyone else signed the petition.

¹³ The letter stated in relevant part:

On Friday, November 22, 2019, at approximately 10:00 am, J.G. Kern Enterprises, Inc. (“J.G. Kern”) was presented with a Petition signed by a majority of employees stating unequivocally that they do not wish to be represented by the United Auto Workers (“UAW”) and Local 228. The National Labor Relations Act prohibits an employer from bargaining with a union where the employer has a good faith certainty that the union does not enjoy majority status. As a result, J.G. Kern has no choice but to withdraw recognition from the UAW and Local 288.

III. ANALYSIS AND DISCUSSION

A. RESPONDENT'S ALLEGED FAILURE TO BARGAIN FROM OCTOBER 2018 UNTIL JANUARY 9, 2019 BY REFUSING TO MEET AND CANCELLING MEETINGS

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The National Labor Relations Act (the Act) states that it is “the policy of the United States,” to “encourag[e] the practice and procedure of collective bargaining.” Section 1, 29 U.S.C. Section 151. To implement this policy, the Act imposes various obligations, including the obligation on unions and employers to “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Section 8(d), 29 U.S.C. Section 158(d); see also *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958) and *Burns Sec. Services*, 300 NLRB 1143, 1144 (1990). This obligation means that the parties are legally required to make “expeditious and prompt arrangements” to meet and confer, *Professional Transportation, Inc.*, 362 NLRB 534, 540 (2015), quoting *J.H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), and to do so with the same “degree of diligence” as they “would display in . . . other business affairs of importance,” *Quality Motels of Colorado*. 189 NLRB 332, 336-337 (1971) (quoting *J. H. Rutter-Rex*, supra), enf. 462 F.2d 1375 (10th Cir. 1972).

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In the instant case, the General Counsel alleges that the Respondent failed to meet these obligations, and violated Section 8(a)(5) and (1) of the Act, by failing and refusing to meet with Local 228 from October 15, 2018, until January 9, 2019. It is undisputed that as of October 3, 2018, when the Board certified the Union, the Respondent’s bargaining obligations commenced. See *Beird Industries, Inc.*, 313 NLRB 735, 736 (1994) (obligation to bargain commences, at the latest, upon certification of bargaining representative). On October 15, Local 228 contacted the Respondent and offered to meet “anytime” that was convenient for the Respondent. The Respondent delayed meeting with the Local 228 for over 3 months from the date of certification by declining to offer any dates prior to November, cancelling the November dates, and then refusing Local 228’s request to schedule meetings during December. There is no evidence in the record, or any claim by the Respondent, that during this same 3-month period, Local 228 ever declined to meet on any date and, in fact, the undisputed facts show that Local 228 repeatedly sought to meet. The Board has long recognized that bargaining delays such as the one engaged in by the Respondent here, have the effect, and sometimes the purpose, of undermining the union’s support among employees. *Fruehauf Trailer Services, Inc.*, 335 NLRB 393, 394-395 (2001); *Quality Motels of Colorado*, 189 NLRB at 336-337; *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 45-46 (1966), enf. 402 F.2d 84 (5th Cir. 1968). “[A] delay in commencing collective bargaining entails more than mere postponement of an ordinary business transaction, for the passage of time itself, while employees grow disaffected and impatient with their designated collective bargaining agents’ failure to report progress, weakens the unity and economic power of the group, and impairs the union’s ability to secure a beneficial contact.” *Northeastern Indiana Broadcasting Co.*, 88 NLRB 1381, 1390-1391 and fn.9 (1950), quoting *Burgie Vinegar Co.*, 71 NLRB 829, 830 (1946). “It is scarcely conducive to bargaining in good faith for an employer to know that, if he dillydallies or subtly

undermines, union strength may erode and thereby relieve him of his statutory duties.” *Brooks v. NLRB*, 348 U.S. 96, 99-100 (1954)).

5 After reviewing the record and applicable law, I find that the General Counsel has established that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying bargaining during a period of almost 3 months from October 15, 2018, to January 9, 2019. It did this, most notably, by cancelling bargaining dates in November and then making a blanket refusal to bargain at all in December. The Board has found delays of similar lengths of time to be unreasonable in other cases. In *Northeastern*
 10 *Indiana Broadcasting Co., Inc.*, the Board held that an employer violated its obligation to bargain in good faith where it delayed meeting for 5 weeks from the date when the union asked the employer for negotiation dates. 88 NLRB at 1381-1382 and 1390-1391 (1950). In *Quality Motels of Colorado, Inc.*, the Board affirmed that the Respondent had violated its duty to meet at reasonable times when it delayed meeting for almost 2
 15 months after the first negotiation meeting, 189 NLRB at 336-337. In *Fruehauf Trailer Services, Inc.*, the Board found that the employer had violated Section 8(a)(5) and (1) based on conduct that included the employer delaying bargaining for almost 3 months after the union’s request for an initial bargaining session. 335 NLRB 393, 393 and fn.5 (2001). The Board has been particularly inclined to rule that a party violated its duty to
 20 meet at reasonable times when that party cancels previously agreed upon bargaining dates, as the Respondent did here. See, e.g., *Professional Transportation, Inc.*, 362 NLRB at 534-535 (cancellation of bargaining sessions “clearly established an impermissible pattern of dilatory conduct by the [employer]”), *Lancaster Nissan*, 344 NLRB 225, 227-228 (2005) (employer violated its duty to bargain at reasonable times where it cancelled several meetings, often at the last minute), enfd. 233 Fed.Appx. 100
 25 (3d Cir. 2007) *Calex Corp.*, 322 NLRB 977, 978 (1997) (employer engaged in a pattern of delay where it cancelled at least three scheduled meetings), enfd. 144 F.3d 904 (6th Cir. 1998); see also *Camelot Terrace* 357 NLRB 1934, 1935 and 1937 (2011) (employer required to pay union’s bargaining expenses where it demonstrated overt bad-faith
 30 conduct by, inter alia, canceling meetings the day before they were scheduled to occur), enf. granted in relevant part 824 F.3d 1085 (D.C. Cir. 2016).

The Respondent attempts to escape liability by arguing that Sutton, it’s negotiator, had other obligations that prevented him from meeting sooner. This defense fails as a matter of law and is also untenable as a factual matter given the record here.
 35 Regarding the law, the Board has repeatedly and consistently rejected the “busy negotiator” defense forwarded by the Respondent, without regard to whether the negotiator’s scheduling conflicts are legitimate. See, e.g., *Kitsap Tenant Support Services*, 366 NLRB No. 98, slip op. at 6 fn. 14 (2018); *Fruehauf Trailer*, 335 NLRB at 393; *Barclay Caterers*, 308 NLRB 1025, 1035-1037 (1992); *O & F Machine Products Co.*, 239 NLRB 1013, 1018-1019 (1978); *Sarasota Coca-Cola Bottling Co.*, 162 NLRB 38, 45-46 (1966); *Radiator Specialty Company*, 143 NLRB 350, 369 (1963), enforcement of bargaining order denied on other grounds 336 F.2d 495 (4th Cir. 1964); *Northeastern Indiana Broadcasting Co., Inc.*, 88 NLRB at 1390-1391. “[T]o the extent
 40 that” Sutton “may have been busy, this is no answer to the Respondent’s obligation to furnish a representative to meet with [the union] at reasonable intervals. The Act does
 45 not permit a party to hide behind the crowded calendar of the negotiator whom it

selects.” *Sarasota Coca-Cola*, 162 NLRB at 46; see also *Calex Corp.*, 322 NLRB at 978 (“[A]n employer’s chosen negotiator is its agent for purposes of collective bargaining, and . . . if the negotiator causes delays in the negotiating process, the employer must bear the consequences.”).

5 Given the Board’s rejection of the “busy negotiator” defense, the Respondent’s
reliance on it would fail even if the facts showed that Sutton was diligently trying to meet
at reasonable times and was not using delays in an effort to undermine the Union’s
support among employees. Here, however, the Respondent has not only failed to show
that Sutton was exhibiting the requisite diligence, but rather shows that he was not
10 doing so. During the parties’ exchange on October 16 and 17, the Respondent stated it
was available to bargain on six dates in November and Local 228 confirmed that it
would bargain on the first three of those dates and would, if appropriate, bargain on the
other three. The record indicates that between that October 16-17 exchange and the
scheduled start of negotiations on November 5, the Respondent did not communicate to
15 Local 228 that a problem of any kind had developed with respect to the November
bargaining dates, did not suggest other dates, did not respond to Local 228’s October
17 and November 2 queries about a specific location for the November 5 meeting, and
did not contact Local 228 to clarify or modify anything else about any of the November
dates. It was not until November 5 – the very day when the negotiations were
20 scheduled to begin – that the Respondent announced that it would not bargain either on
that day or on any of the other dates it had previously stated it was available in
November. Neither in its November 5 announcement, nor at trial, did anyone from the
Respondent explain why the negotiator’s other matters took priority over the previously
offered and scheduled bargaining dates with Local 228 or why the negotiator waited
25 until the day of the scheduled session to inform Local 228 of the purported scheduling
conflicts. Moreover, when the Respondent stated that it could have a different
negotiator commence bargaining, and Local 228 responded that it would bargain with
any negotiator representing the Respondent, the Respondent – according to the
testimony of the substitute negotiator himself (Teague) – did not schedule him to step in
30 and meet with Local 228 on any of the previously offered and scheduled dates in
November or, for that matter, on any date in November. Worse, rather than attempting
to make up for this delay by moving forward diligently with new dates, the Respondent
then refused to bargain at all for the entire month of December even after Local 228
offered 15 bargaining dates that month. It was not until after the Union filed an unfair
35 labor practices charge regarding the Respondent’s postponement of bargaining that the
Respondent came to the bargaining table for the first time. Cf. *Northeastern Indiana
Broadcasting*, 88 NLRB at 1391 (“Further proof of the Respondent’s lack of good faith is
that it made no effort to schedule a meeting until the Union threatened to file unfair labor
practice charges.”).

40 It is clear under these facts that, during the 3 months following certification, the
Respondent failed to meet its obligation to make “expeditious and prompt
arrangements” to meet and confer, *Professional Transportation*, 362 NLRB at 540, with
the degree of diligence it would accord to other business matters of importance, *Quality
Motels*, 189 NLRB at 336-337. I make no finding as to whether the Respondent’s
45 delays were part of an intentional effort to undermine union support, but the

Respondent's efforts to meet were so strangely feeble that the specter of intentional delay cannot be wholly discounted.

As discussed above, the Respondent unreasonably delayed meeting with Local 228 for a period of almost 3 months at the start of the certification year. The Respondent's "busy negotiator" defense fails as a matter of law and, even if that were not the case, that defense would fail under the facts here because the Respondent did not exert the requisite effort to meet at reasonable times as required by the Act. I find that the Respondent failed to bargain in good faith and violated Section 8(a)(5) and (1) of the Act during the period from October 15, 2018, to January 9, 2019.

B. RESPONDENT'S ALLEGED FAILURE TO BARGAIN
BY STATING THAT THERE WAS NO NEED FOR LOCAL 228
TO MAKE A PROPOSAL ON BENEFITS, BECAUSE THE
RESPONDENT WAS KEEPING ITS CURRENT PLAN

The General Counsel alleges that the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act when, on April 10, 2019, Sutton told Torrente that there was "no need for you to put further effort into working up a proposal for union provided benefits" because the Respondent had decided to "stick with the present plan." The Respondent announced its decision not to consider union proposals on a benefit plan, including health insurance, before engaging in any substantive negotiations on the subject. The General Counsel is correct that this is a clear violation of the Act. Health insurance and other employee benefit plans are terms and conditions of employment and a mandatory subject of bargaining. *Allied Chemical and Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159-160 (1971); *Larry Geweke Ford*, 344 NLRB 628, 628 n.1 (2005); *Royal Motor Sales*, 329 NLRB 760, 770 (1999), *enfd.* 2 Fed.Appx. 1 (D.C. Cir. 2001); *Borden, Inc.*, 196 NLRB 1170, 1174-1175 (1972). An employer violates the Act where, as here, the employer states that during contract negotiations it will refuse to even consider union proposals on a mandatory subject of bargaining. *E.I. Dupont De Nemours & Co.*, 304 NLRB 792, 792 fn.1 and 802 (1991).

The Respondent states that good faith bargaining does not require a party to yield and accept the other party's proposals. Brief of Respondent at Page 10. That point is not controversial, but entirely beside the point here. The Respondent violated the Act because it foreclosed negotiation on the subject before Local 228 even had an opportunity to make a proposal, not because it refused to yield and accept a proposal put forth by Local 228.

The Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits.

C. RESPONDENT'S REFUSAL TO PROVIDE INFORMATION

5 An employer's obligation to bargain in good faith under Section 8(a)(5) and (1) of
 the Act, includes the obligation to furnish the employees' bargaining representative,
 upon request, with relevant information that the union needs to perform its statutory duty
 as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S.
 432, 435-436 (1967). Union requests for information regarding bargaining unit
 10 employees' terms and conditions of employment are "presumptively relevant" and such
 information must be provided upon request. *Richfield Hospitality, Inc.*, 368 NLRB No.
 44, slip op. at 2 n.4 and 26 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

15 The General Counsel alleges that the Respondent violated Section 8(a)(5) and
 (1) when it refused the April 17 and July 9, 2019, requests for cost information about the
 existing employee benefit plans. As noted in the previous section, health insurance and
 other employee benefit plans are a term and condition of employment for the unit
 employees and, therefore, Local 228's request for information was presumptively
 20 relevant. The record shows that the Respondent answered the Union's April
 information request by stating that it was refusing to provide cost information in
 response to the following specific requests: cost information on each benefit program
 (to the employee); the full premium charge or premium equivalent by category for each
 health care plan; COBRA premium rates listed by family status for each health plan
 25 offered to the members; the projected health care plan cost increases for 2017, 2018,
 2019, 2020; total cost to the employer for the life insurance benefit, accidental death
 and dismemberment and optional dependent insurance. In response to the July 9
 follow-up request for this information, the Respondent refused to provide any new
 information.

30 The evidence shows that the Respondent did withhold much of the presumptively
 relevant information at issue here.¹⁴ In particular the Respondent failed and refused to
 provide Local 228 with: the "full premium" for health care insurance, which would
 include the employer's share; COBRA rates; projected health care plan increases; and
 the employer's cost for the life insurance and related benefits. All of this information
 35 regarding unit employees' benefits was presumptively relevant.

The Respondent did not offer the Union any substantive basis for withholding the
 information sought in the April and July requests. Even at trial the Respondent's
 witnesses provided no explanation at all for refusing to provide most of this
 40 presumptively relevant cost information. The only information that the Respondent's
 witnesses provided any rationale for withholding was the information relating to the

¹⁴ The Respondent had actually provided some of the cost information that it stated it was refusing to provide. For example, the Respondent had already provided Local 228 with some employee cost information for the insurance plan – including the weekly cost to employees and the amounts of co-pays and deductibles.

Respondent's own costs for its health insurance plan. That rationale, testified to by Sutton, was that he was not required to provide the information because:

5 [T]hat's like going to a car dealership and saying, well, I'll pay you 80 grand for a car, and then where do you negotiate? They're going to sell you a car for \$79,999. You're not going to get a better deal that you otherwise might.

10 This explanation demonstrates either a fundamental ignorance of, or disregard for, the Respondent's duties and obligations during collective bargaining. An employer is required by the Act to engage in good faith bargaining with employees' bargaining representative. As the Supreme Court has long held, this includes the duty to provide the bargaining representative with requested information relevant to bargaining. See *NLRB v. Acme Industrial Co.*, supra. Neither a car buyer nor a dealership is subject to the strict requirements of federal labor law with respect to a car purchase negotiation. 15 Indeed, I can think of few negotiating models less germane here (or more often bemoaned) than the one of car sales. I note that even that unacceptable explanation only goes to a small portion of the presumptively relevant information that the Respondent withheld here. For most of the withheld information the Respondent provided no explanation other than its own obstinacy.

20 The Respondent cites *Armstrong World Industries, Inc.*, for the proposition that the presumption of relevance is rebuttable. 254 NLRB 1239 (1981). That is true as far as it goes, however, in this case the Respondent did nothing to rebut the presumption of relevance. Indeed, as noted immediately above, the only rationale offered by the Respondent's negotiators was Sutton's entirely meritless suggestion that collective bargaining should follow the model of car sale negotiations and, in any case, that rationale only addresses one of the types of requested information that the Respondent refused to provide. In its brief, the Respondent cites no authority to support its bald assertion that the cost information was not relevant. This is not surprising since the Board has repeatedly affirmed that information regarding the costs of employee benefit plans, including the employer's costs, is relevant to bargaining. See, e.g., *B & B Trucking, Inc.*, 345 NLRB 1 at fn1 (2005); *Pontiac Nursing Home, LLC*, 344 NLRB No. 31 (2005), enfd. 173 Fed.Appx. 846 (D.C. Cir. 2006); *Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004); *The Nestle Company*, 238 NLRB 92, 94 (1978); *Borden Inc.*, 235 NLRB 982, 983 (1978), affirmed following remand by 248 NLRB 387 (1980). Even if the cost information for unit employees' benefits was not presumptively relevant, and even if the Board had not repeatedly recognized the relevance of exactly this type of information, I would find that such information was clearly relevant in this case because I credit Torrente's testimony that Local 228 needed the information to "cost the agreement, to figure out . . . our proposals and put a whole contract together." Indeed, 40 without such information it would difficult for Local 228 to know if it could even make a benefits proposal that might be economically attractive to the Respondent.

45 The Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees.

D. WITHDRAWAL OF RECOGNITION ON NOVEMBER 25, 2019

5 A union certified by the Board enjoys a presumption of majority support for a period of 1 year. *Brooks v. NLRB*, 348 U.S. at 104; *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), enfd. 156 Fed. Appx. 331 (D.C. Cir. 2005). The disaffection petition at-issue in this case was signed by employees approximately 6 to 7 weeks after that 1-year period. On November 25, 2019, the Respondent withdrew recognition from the Union citing the petition which it states was signed by a majority of the bargaining unit employees.¹⁵ The General Counsel alleges that the Respondent's withdrawal of recognition was unlawful because the Respondent committed unremedied violations of its bargaining obligations under the Act during the period between certification and the petition, and that this unlawful activity tended to cause the employee disaffection and poor morale that gave rise to the petition. For the reasons discussed below, I agree that the Respondent violated the Act by withdrawing recognition since the disaffection petition it relies on was tainted by the Respondent's unremedied violations of its bargaining obligations.

20 "The Board has held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the Union." *United Site Services of California, Inc.*, 369 NLRB No. 137, at 15 (2020). Where, as here, the Respondent's unlawful activity did not directly advance the antiunion petition, the Board decides whether the petition is impermissibly tainted by consideration of four factors.

- 25 (1) The length of time between the unfair labor practices and the withdrawal of recognition;
- (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
- 30 (3) any possible tendency to cause employee disaffection from the union; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

¹⁵ For purposes of this analysis I assume, without deciding, that the disaffection petition was signed by a majority of bargaining unit employees. "[W]here an employer relies on an employee petition for evidence of the union's loss of majority support, it is the Respondent's obligation to authenticate the petition signatures on which it relies." *Latino Express, Inc.*, 360 NLRB 911, 925 (2014). I note that the record does not include such authentication, nor does it establish how many total bargaining unit members there were in November 2018, how many of the signatures on the petition were those of bargaining unit employees, or how many were repeat signatures. Allen, the Respondent's human resources director, testified that the signatures represented over "80 percent," but she did not specify 80 percent of *what*. However, neither the General Counsel nor the Charging Party have argued that the petition was not signed by a majority of the unit employees. Since, for the reasons discussed in this decision, I find that the petition was tainted by the Respondent's unfair labor practices, and therefore could not in any case be relied upon as a basis for withdrawing recognition, I do not reach the question of whether the Respondent met its burden of authenticating the signatures of a majority of unit employees.

ibid.; *Master Slack*, 271 NLRB 78, 84 (1984).¹⁶

In this case, as found above, the Respondent committed multiple unfair labor practices during the period between certification and the withdrawal of recognition. Those unfair labor practices were unremedied when the Respondent withdrew recognition and I find that, under the four-factor analysis, they would be expected to cause employee disaffection with the Union. Regarding the first factor, in this case the Respondent's unlawful refusal to provide requested cost information regarding benefits were ongoing at the time of withdrawal. Thus the "length of time" weighs in favor of finding the petition impermissibly tainted. This is true regardless of any of the Respondent's other unlawful activity, however, I note that the Respondent never reversed its unlawful refusal to negotiate over union-administered employee benefits. Because of this, and since the refusal to negotiate over benefits was linked to its ongoing refusal to provide cost information regarding benefits, this conduct provides additional support for finding that the length of time factor weighs in favor of finding the petition tainted.

The second factor – the nature of the illegal acts and the possibility of detrimental effects on employees – also favors finding that the petition was unlawfully tainted. The Respondent unlawfully delayed bargaining for approximately 3 months out of the 1-year period during which there was an irrebuttable presumption of majority status. This deprived the employees' union of the ability to bargain during a significant portion of the period when a union is generally at its greatest strength. See *Northwest Graphics, Inc.*, 342 NLRB at 1289 (refusal to bargain during part of the certification year has taken from the union the opportunity to bargain during the period when unions generally have the greatest strength). Therefore, the nature of this violation had a detrimental effect on employees who had voted to have the charging party represent them and who were entitled to a period of negotiation free from a potential, or actual, withdrawal of recognition by their employer. In addition, the Respondent's unlawful refusal to consider any proposal for union-administered benefits and to provide benefit cost information impeded the Charging Party from seeking to improve employees' terms and conditions of employment in the important area of employee benefits.

Regarding the third factor – any possible tendency to cause employee disaffection from the union – the record supports finding that that the Respondent's unlawful conduct tainted the petition. This factor does not require a showing that the Respondent's misconduct actually caused the disaffection, but only that the misconduct had a *possible tendency* to adversely affect the Charging Party's relationship with unit

¹⁶ The Respondent makes no mention of *Master Slack*, supra, or the longstanding, and frequently affirmed, standard forth in that case, but rather cites *Johnson Control Inc.*, 368 NLRB No. 20 (2019), which the Respondent says "updated [the Board's] legal test for the withdrawal of recognition." Brief of Respondent at Page 11. *Johnson Control* primarily addressed timing issues relating to anticipatory withdrawal near the time of contract expiration, and in no way addressed, or modified, the standards set forth in *Master Slack* for determining whether an antiunion petition was tainted by the employer's unremedied unfair labor practices. Any doubt about this is eliminated by the Board's application of *Master Slack* in a case, *United Site Services of California*, 369 NLRB No. 137 at 15, that it decided subsequent to *Johnson Control*.

employees. It is fair to assume that employees who elect a union as their representative do so because they hope they will see improvements to their terms and conditions of employment. The Respondent's unlawful actions delayed and impeded progress towards such improvements during most of the certification year and would reasonably make the bargaining representative appear ineffectual and further bargaining appear futile. This lack of progress would have not just the *possible tendency*, but the *likely tendency*, to cause employees to lose faith with the Charging Party's ability to bring about positive changes in the workplace. In *Fruehauf Trailer Services*, the Board stated that it "has long recognized that dilatory bargaining tactics . . . have a tendency to invite and prolong employee unrest and disaffection from a union." 335 NLRB at 394. Similarly, in *Westgate Corp.*, the Board affirmed that when an employer unlawfully delays bargaining, as the Respondent did here, "unrest and suspicion are generated . . . and the status of the bargaining representative is disparaged." 196 NLRB 306, 313 (1972).

The fourth and final factor – the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union – also supports finding that the Respondent's unlawful conduct tainted the petition. There was no evidence of disaffection during the period between certification and the start of any of the three unremedied unfair labor practices found above. The signing of the anti-union petition did not occur until *after* the Respondent's unfair labor practices. The Board recently stated that, under such circumstances, "[t]he lack of prior disaffection is strong evidence of a causal connection between subsequent disaffection and the Respondent's unfair labor practices." *United Site Services*, 369 NLRB slip op. at 16, citing *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007).

For the reasons discussed above, I find that the disaffection petition was tainted by the Respondent's multiple, unremedied, unfair labor practices, and therefore that the Respondent could not lawfully rely on that petition to withdraw recognition, and violated Section 8(a)(5) and (1) by doing so.

CONCLUSIONS OF LAW

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

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment from October 15, 2018, to January 9, 2019.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act since April 10, 2019, by stating that it would not consider any proposal for a union-administered benefits plan.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, by refusing to provide the International Union and the Charging Party with requested cost information regarding the existing benefit plans for bargaining unit employees.

6. The Respondent has violated Section 8(a)(5) and (1) since November 25, 2019, by withdrawing recognition from the Charging Party as the exclusive collective-bargaining representative of the bargaining unit employees.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel asks that, as a remedy for the Respondent's violations of its bargaining obligation, I order a 6-month extension of the certification year under *Mar-Jac Poultry*, 136 NLRB 785 (1962). I find that the requested 6-month extension is appropriate here. "The Board has long held that where there is a finding that an employer, after a union's certification, has failed or refused to bargain in good faith with that union, the Board's remedy therefore ensures that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned." *Mar-Jac Poultry*, supra. The extension of the certification year is not an extraordinary remedy, but rather "is a standard remedy where an employer's unlawful conduct precludes appropriate bargaining with the union." *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992), enfd. 9 F.3d 113 (7th Cir. 1993); see also *Accurate Auditors*, 295 NLRB 1163, 1167 (1989) ("The law is settled that when an employer's unfair labor practices intervene and prevents the employees' certified bargaining agent from enjoying a free period of a year after certification to establish a bargaining relationship, it is entitled to resume its free period after the termination of the litigation involving the employer's unfair labor practices."). The Board's remedy usually takes the form of an extension of certification for one year, although it may be for a shorter period of time, or even for a "reasonable" time." *G.J. Aigner Co.*, 257 NLRB 669 fn. 4 (1981); *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985); see also *Bemis Company*, 370 NLRB No. 7, slip op. at 4 (2020) (Board grants the full 12-month extension in accordance with *Mar-Jac*). Under the circumstances present here I find that the 6-month extension requested by the General Counsel is appropriate. Various factors are considered in determining what is a reasonable time period in which the parties can resume negotiations without unduly burdening employees with a bargaining representative from which they may have reasons for disaffection other than the Respondent's unfair labor practices. These factors include the nature of the violations found, the number, extent, and dates of the collective-bargaining sessions held, the impact of the unfair labor practices on the bargaining process, and the conduct of the Union during negotiations. *Wells Fargo*

Armored Services Corp., 322 NLRB 616, 617 (1996). In this case, not only did the Respondent's unlawful refusal to meet at reasonable times mean that there was no bargaining for the first 3 months of the certification year, but even during the later period when the parties met for bargaining the Respondent's unlawful refusal to bargain over union-administered benefits and its unlawful refusal to provide relevant information¹⁷ about employee benefits seriously marred bargaining over those centrally important terms and conditions of employment. Indeed, while the parties were able to reach agreement on many of the non-economic subjects – a fact that in this case weighs against granting the full 1-year *Mar-Jac* extension – the parties did not reach any agreements at all regarding employee benefits.

In addition, the General Counsel asks that the remedy include a requirement that the Respondent bargain with the Charging Party in accordance with a schedule of at least 40 hours per calendar month for at least 8 hours per session, until a complete collective-bargaining agreement or good-faith impasse in negotiations is reached. This is an extraordinary type of remedy, but one which the Board has found it necessary to impose in numerous cases. See, e.g., *Camelot Terrace*, 357 NLRB 1934, 1942 (2011) (Board order requires employer to meet with the union not less than 24 hours per month for at least 6 hours per session), *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 fn.2 (2011) (requiring employer to bargain with union for a minimum of 15 hours per week), *enf.* 540 Fed. Appx. 484 (6th Cir. 2013), *Gimrock Construction, Inc.*, 356 NLRB 529 (2011) (Board orders the employer to bargain with the union for 16 hours a week), *enf.* of bargaining schedule denied on procedural grounds 695 F.3d 1188 (11th Cir. 2012). In *Camelot Terrace*, *supra*, the Board imposed a bargaining schedule where, *inter alia*, the employer had restricted the dates and length of bargaining sessions, repeatedly canceled bargaining sessions, and refused to bargain over economic subjects. In *All Seasons Climate Control*, *supra*, the Board agreed with the administrative law judge that ordering a bargaining schedule was appropriate given the employer's "egregious misconduct," which included withdrawing recognition from the union and refusing to supply necessary and relevant information. I conclude that under the circumstances present here it is appropriate to order the Respondents to adhere to the bargaining schedule that has been suggested by the General Counsel. The Respondent unacceptably delayed bargaining by, *inter alia*, refusing to bargain for a period of almost 3 months during the certification year and cancelling bargaining sessions. In addition, the bargaining sessions that subsequently occurred were seriously marred by the Respondent's completely unjustified refusal to bargain over union-administered benefits and to provide Local 228 with relevant information that it needed for negotiations over employee benefits. Under these circumstances, I believe it is necessary to have a bargaining schedule that provides some objective indication of whether the Respondent is complying with its bargaining obligations under the Act. The schedule sought by the General Counsel is not, on its face, unduly burdensome.

¹⁷ See *Accurate Auditors*, 295 NLRB at 1167 (failure to provide information relied on as a basis for extending the certification period).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹⁸

ORDER

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The Respondent, J.G. Kern Enterprises, Inc., Sterling Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing and refusing to recognize and bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (International Union), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (Local 228), the International Union's designated servicing representative, for employees in the bargaining unit.

15

(b) Withdrawing recognition from the International Union and/or Local 228 and failing and refusing to bargain with the International Union and/or Local 228 as the exclusive collective bargaining representative of unit employees.

20

(c) Refusing to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish requested information that is relevant and necessary to the performance of their respective functions as bargaining representative and designated servicing representative for the Respondent's unit employees.

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(d) Informing the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because the Respondent will not change its current benefit plans, or otherwise refusing to bargain with the employees' collective bargaining representative regarding unit employees' terms and conditions of employment.

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(e) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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(f) In any like or related matter fail and refuse to bargain collectively and in good faith with the International Union and/or Local 228.

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

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Act.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Upon request, bargain with the International Union and/or Local 228 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:

5

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

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15 The Respondent will recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

(b) Meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

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(c) Upon request from the International Union and/or Local 228: rescind the Respondent's withdrawal of recognition of the International Union and Local 228 in writing, as well as any and all changes to terms and conditions of employment of unit employees that the Respondent made as a result of the withdrawal of recognition; restore the status quo ante for unit employees; make unit employees whole for any loss of wages and benefits, with interest and compensation for excess tax liability, in accordance with Board policy; and rescind any discipline issued to unit employees as a result of the Respondent's unlawful withdrawal of recognition and notify employees in writing that it has done so.

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(d) Furnish to the International Union and/or Local 228 in a timely manner all the information requested in the union information requests of April 17, 2019, and July 9, 2019.

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(e) Within 14 days after service by the Region, post at its facility in Sterling Heights, Michigan, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region Seven, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper

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¹⁹ 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."

5 notices, the notices shall be distributed electronically, such as by email, posting on an
intranet or an internet site, and/or other electronic means, if the Respondent customarily
communicates with its employees by such means. Reasonable steps shall be taken by
the Respondent to ensure that the notices are not altered, defaced, or covered by any
10 other material. In the event that, during the pendency of these proceedings, the
Respondent has gone out of business or closed the facility involved in these
proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the
notice to all current employees and former employees employed by the Respondent at
any time since October 15, 2018.

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

20 Dated, Washington, D.C. October 6, 2020.



25 PAUL BOGAS
U.S. Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail and refuse to recognize and bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO ("International Union"), the exclusive certified representative, and/or Local 228, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO ("Local 228"), the International Union's designated servicing representative, for employees in the bargaining unit.

WE WILL NOT withdraw recognition from the International Union and/or Local 228 or fail and refuse to bargain with the International Union and/or Local 228 as the exclusive collective bargaining representative and designated servicing representative of unit employees.

WE WILL NOT refuse to bargain collectively with the International Union and/or Local 228 by failing and refusing to furnish them with requested information that is relevant and necessary to the performance of their respective functions as bargaining representative and designated servicing representative for the Respondent's unit employees.

WE WILL NOT inform the International Union and/or Local 228 that there is no need to make a proposal on union-administered benefit plans because the Respondent will not agree to change its current benefit plans, or otherwise refuse to bargain regarding any of the unit employees' terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the

exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT in any like or related matter fail and/or refuse to bargain collectively and in good faith with the International Union and/or Local 228.

WE WILL, upon request, bargain with the International Union and/or Local 228 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:

All full-time and regular part-time production and maintenance employees, including quality inspectors, shipping and receiving employees, material handler employees, leaders, environmental assistants, and tool room employees employed by Respondent at its facility located at 44044 Merrill Road, Sterling Heights, Michigan; but excluding office clerical employees, professional employees, managers, temporary staffing agency employees, time study engineers, confidential employees, salaried employees, and guards and supervisors as defined by the Act.

WE WILL recognize that the certification year is extended for an additional 6 months from the date that good faith bargaining resumes.

WE WILL meet and bargain collectively and in good faith with the International Union and/or Local 228 in accordance with a bargaining schedule of at least 40 hours per calendar month for at least 8 hours per session until the parties reach a complete collective-bargaining agreement or good-faith impasse in negotiations.

WE WILL, upon request from the International Union and/or Local 228: rescind our withdrawal of recognition of the International Union and Local 228 in writing, as well as any and all changes to terms and conditions of employment of unit employees that we made as a result of our withdrawal of recognition; return to the status quo ante for unit employees; make unit employees whole for any loss of wages and benefits with interest and excess tax liability in accordance with National Labor Relations Board policy; and rescind any discipline issued to unit employees as a result of our unlawful withdrawal of recognition, and notify unit employees in writing that we have done so.

WE WILL furnish to the International Union and/or Local 228 in a timely manner with all the information requested in the union information requests of April 17, 2019, and July 9, 2019.

J.G. KERN ENTERPRISES, INC.

(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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
 (313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/07-CA-231802 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.



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 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
 DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY
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 COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE
 REGIONAL OFFICE'S COMPLIANCE OFFICER (616) 930-9165