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Triumfo, Inc. and International Brotherhood of Teamsters, Local 631, affiliated with the International Brotherhood of Teamsters. Case 28–CA–222740

December 21, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On January 17, 2020, Administrative Law Judge Maralouise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge’s rulings, findings, and conclusions¹ and to adopt the recommended Order as modified and set forth in full below.²

¹ In the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) of the Act by unlawfully interrogating employee Orvidas about her union activities and giving Orvidas the impression that her union activities were under surveillance. We also adopt, in the absence of exceptions, the judge’s conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unlawfully repudiating the 2017 master contract since May 30, 2018. Further, because the Respondent did not except to the judge’s recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001).

In adopting the judge’s determination that the management-rights clause did not privilege the Respondent to cease utilizing the Union’s hiring hall, we do not rely on the judge’s citation to *Walt Disney World Co.*, 359 NLRB 648, 653 (2013), a recess-Board decision. See *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

We agree with the judge that the Respondent unlawfully modified the master contract under the “sound arguable basis” standard of *Bath Iron Works Corp.*, 345 NLRB 499 (2005), *affd. sub nom. Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), but we note that the judge misstated the standard somewhat. She wrote that “[u]pon a showing that an employer has modified a contract provision without the union’s consent, the employer may justify the modification by demonstrating that it had a ‘sound arguable basis’ for interpreting the language of the contract to permit its modification.” This is incorrect: if the employer had a sound arguable basis for interpreting the contract to permit the challenged action, then it did not modify the contract in the first place. See *Transportation Services of St. John, Inc.*, 369 NLRB No. 15, slip op. at 1 fn. 2 (2020).

² We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68

ORDER

The National Labor Relations Board orders that the Respondent, Triumfo, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect all the terms and conditions of its June 1, 2017 to May 31, 2021 collective-bargaining agreement with International Brotherhood of Teamsters, Local 631 (the Union) without the Union’s consent by refusing to comply with the agreement’s jurisdiction, subcontracting, hiring hall, and benefit-contribution provisions.

(b) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees employed by Respondent who perform any work of the nature included in the craft jurisdiction of the Union, which is defined by the 2017 master agreement, in part, as erection, touch-up painting, dismantling and repair of all exhibits. This work is to include wall coverings, floor coverings, pipe and drape, painting, aisle coverings, hanging of signs and decorative materials from the ceiling, placement of all signs, erection of platforms and placement and care of furniture as well as wiping down exhibits. The Employer further recognizes within this scope the loading and unloading of all trucks of common and contract carriers as well as individual company vehicles and the movement of freight, crates, and rigging within its facilities, including all work in the Company’s warehouse facilities will be bargaining unit work. In the area of rigging, packing and crating, the work performed includes, but is not limited to, unloading, uncrating, unskidding, painting, and assembly of machinery and equipment as well as the reverse process. It should be noted that cleaning does not include mobile washing. . .

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s unit employees.

(d) Creating the impression that it is engaged in surveillance of its employees’ union or other protected concerted activities.

(e) Coercively interrogating employees about their union activities.

(2020). We shall substitute a new notice to conform to the Order as modified.

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

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

(a) Restore the status quo ante as it existed prior to October 15, 2017, and continue in effect all the terms and conditions of employment contained in the June 1, 2017 to May 31, 2021 collective-bargaining agreement and any automatic renewal or extension of it.

(c) Restore the status quo ante by transferring any unit work the Respondent subcontracted back to unit employees.

(d) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions in the manner set forth in the remedy section of the decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 28, 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) Recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above.

(g) Furnish to the Union in a timely manner the information requested by the Union on March 12, 2018, as narrowed by the judge's decision.

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

(i) Post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."³ Copies of the no-

³ 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. 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

tice, on forms provided by the Regional Director for Region 28, 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 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 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, 2017.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

"Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect all the terms and conditions of our June 1, 2017 to May 31, 2021 collective-bargaining agreement with International Brotherhood of Teamsters, Local 631 (the Union) without the Union's consent by refusing to comply with the agreement's jurisdiction, subcontracting, hiring hall, and benefit-contribution provisions.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees employed by Respondent who perform any work of the nature included in the craft jurisdiction of the Union, which is defined by the 2017 master agreement, in part, as erection, touch-up painting, dismantling and repair of all exhibits. This work is to include wall coverings, floor coverings, pipe and drape, painting, aisle coverings, hanging of signs and decorative materials from the ceiling, placement of all signs, erection of platforms and placement and care of furniture as well as wiping down exhibits. The Employer further recognizes within this scope the loading and unloading of all trucks of common and contract carriers as well as individual company vehicles and the movement of freight, crates, and rigging within its facilities, including all work in the Company's warehouse facilities will be bargaining unit work. In the area of rigging, packing and crating, the work performed includes, but is not limited to, unloading, uncrating, unskidding, painting, and assembly of machinery and equipment as well as the reverse process. It should be noted that cleaning does not include mobile washing . . .

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT coercively question you about your union activities.

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

WE WILL restore the status quo as it existed prior to October 15, 2017, and continue in effect all the terms and conditions of employment contained in the June 1, 2017 to May 31, 2021 collective-bargaining agreement and any automatic renewal or extension of it.

WE WILL transfer the unit work that we subcontracted back to unit employees.

WE WILL make affected employees whole for any loss of earnings and other benefits suffered as a result of our unlawful actions, 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 28, 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.

WE WILL recognize and bargain with the Union as the exclusive representative of our employees in the above-described unit.

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 12, 2018.

TRUIMFO, INC.

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-222740> 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.



Stefanie J. Parker and Nathan A. Higley, Esqs., for the General Counsel.

Patricia A. Marr, Esq. (Patricia A. Marr, LTD), for the Respondent.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case in Las Vegas, Nevada, on February 5–7, 22 (telephonically) and 27, 2019. This case was tried following the issuance of a complaint and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board on October 9, 2018. The complaint was based on an original and an amended unfair labor practice charge filed by Charging Party International Brotherhood of Teamsters, Local 631 (the Union) on June 25 and October 3, 2018, respectively, against Respondent Triumfo, Inc. (Respondent).

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs, which I have carefully considered.¹ Accordingly, based upon the entire record herein, including the post-hearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Las Vegas, Nevada, where it is engaged in the business of providing services for trade shows, expositions, conventions and conferences. During the 12 months prior to issuance of the complaint, Respondent received gross revenues in excess of \$250,000. During that same time period, Respondent purchased and received goods valued in excess of \$50,000 from outside the State of Nevada. At hearing, the parties stipulated that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent repudiated its obligations under an existing collective-bargaining agreement by subcontracting unit work, refusing to utilize the Union's hiring hall, and failing to remit required contributions to various pension and welfare funds on behalf of its employees, in

¹ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "J. Exh." for Joint Exhibit; "GC Br." for the General Counsel's post-hearing brief; and "R. Br." for Respondent's post-hearing brief. For good cause shown, the unopposed joint motion by the General Counsel and Charging Party to accept the former's late-filed brief is hereby granted.

each case in violation of that agreement and without the consent of the Union, in violation of Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). The General Counsel contends that each of actions constitutes a unilateral change, as well as an unlawful modification of the parties' contract.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with certain requested information. Finally, the General Counsel alleges that one of Respondent's supervisors engaged in unlawful interrogation and gave the impression of surveillance of union activities in violation of Section 8(a)(1) of the Act.² Respondent denies committing any wrongdoing.

As set forth below, I find, with limited exceptions, that Respondent, violated the Act as alleged.

III. ALLEGED CONTRACT MODIFICATIONS/UNILATERAL CHANGES

A. Factual Background

Respondent's senior management team consists of Director and Treasurer Sanjay Choubey, President and Secretary Manish Kumar (Kumar) and Senior Manager-Client Servicing Esha Khare (Khare), none of whom testified at the hearing.³

On March 14, 2016, Khare executed a "Short Form Collective Bargaining Agreement" with the Union's business agent, James Harmer (Harmer). This document bound Respondent to a master agreement between the Union and Global Experience Specialists, Inc. and Freeman Expositions, Inc. (the 2014 master contract), as well as to any successor master agreements. That master agreement was effective from June 1, 2014 to May 31, 2017; it was succeeded by the current master agreement, which is effective from June 1, 2017 to May 31, 2021 (the 2017 master contract). The parties' short-form agreement provides for termination upon written notice by either party during a designated window period not more than 120 days nor fewer than 90 days prior to the expiration date of the master contract (i.e., January 31 through March 2, 2017). (Jt. Exhs. 1(a), 1(b).) It is undisputed that Respondent failed to provide written notice of termination during this window period.

1. Jurisdictional coverage of the 2017 master contract

Pursuant to the parties' short-form agreement, Respondent recognized the Union as the exclusive bargaining representative for individuals employed by Respondent "who perform any work of the nature included in the craft jurisdiction of the Union," which is defined by the 2017 master contract, in part, as:

...erection, touch-up painting, dismantling and repair of all

² At hearing, I granted Counsel for the General Counsel's unopposed motions to amend the complaint to allege the information request and independent Section 8(a)(1) allegations. On February 22, 2019, Respondent filed an answer denying each of these new allegations. (Tr. 138–139, 213–214, 290; GC Exh. 9(n); 9(a), (b).)

³ On December 26, 2018, the General Counsel served Kumar with a subpoena ad testificandum at Respondent's Las Vegas business address. (GC Exh. 2.) While Respondent's counsel represented that Kumar was unable to travel to the United States from India due to "visa issues," no proof of this (in the form of affidavit or otherwise) was offered and, accordingly, I denied Respondent's motion to present his testimony via video. (Tr. 244–248, 250–251.)

exhibits. This work is to include wall coverings, floor coverings, pipe and drape, painting, aisle coverings, hanging of signs and decorative materials from the ceiling, placement of all signs, erection of platforms and placement and care of furniture as well as wiping down exhibits. The Employer further recognizes within this scope the loading and unloading of all trucks of common and contract carriers as well as individual company vehicles and the movement of freight, crates, and rigging within its facilities, including all work in the Company's warehouse facilities will be bargaining unit work. In the area of rigging, packing and crating, the work performed includes, but is not limited to, unloading, uncrating, unskidding, painting, and assembly of machinery and equipment as well as the reverse process. It should be noted that cleaning does not include mobile washing . . .

(Jt. Exh. 1(d) at 6.)

2. Respondent's work force

Respondent's business—the construction and assembly of exhibit booths for conventions and trade shows—is seasonal, and its work force fluctuates accordingly. At hearing, the General Counsel introduced credible testimony as well as photographic evidence that Respondent currently employs individuals in its Las Vegas operation who are engaged in the construction and assembly (i.e., “erecting”) of exhibit booths, as well as their cleaning, dismantling and unskidding, as described within the unit description contained in the 2017 master contract. (GC Exhs. 3(b) through (e), 3(h)–(l); Tr. 52–53, 152–164.)

3. Relevant collective-bargaining agreement provisions

Article 7 of the 2017 master contract contains a detailed process for requesting dispatch of employees from the Union's hiring hall. According to its article 8, however, Respondent is entitled to reject any worker referred by the hall if it finds the worker's performance unsatisfactory. Per the contract, Respondent may effectuate such a rejection by sending “no dispatch” letter to the Union. (Jt. Exh. 1(d) at 8–10.)

The 2017 master contract also requires Respondent to make contributions on behalf of unit employees to various pension, health and welfare, vacation and training funds. (Id. at 52–61.) The agreement also provides (with limited exceptions) that, to the extent Respondent subcontracts work covered by the agreement, it must require the subcontractor in question to observe contractual wage rates, hours, and working conditions. (Id. at 7–8.)

The agreement also contains a management rights clause which reserves to Respondent the exclusive right “to determine its policies and to manage its business,” including, inter alia, the right to determine the method and scheduling of its operations, the size of its work force and whether to shut down all or part of its operations. (Id. at 4.)

4. Respondent's subcontracting

Prior to the fall of 2017, Respondent requisitioned its labor from the Union's hiring hall and made contributions to its various pension, health and welfare and training funds on behalf of referred employees. Since approximately October 15, 2017, however, Respondent has used a nonunion signatory subcontractor to perform bargaining unit work. The parties stipulated

at hearing that, beginning in November 2017, Respondent stopped requisitioning employees through the Union's hiring hall and additionally ceased making fund contributions. The record evidence also establishes that, beginning in October 2017, Respondent began using a nonunion signatory subcontractor to perform bargaining unit work. As of the hearing, all of Respondent's work performed at conventions (setting up and breaking down exhibits at show sites) was being performed by three subcontractors, two of which were not signatory to the 2017 master contract. (Jt. Exh. 2(i); Tr. 54–55, 58–59, 62, 117, 124.)

Following Respondent's shift to using nonunion labor, it also began ordering prefabricated exhibit booths from outside suppliers (see Tr. 55); while the record is unclear as to how this impacted the volume of bargaining unit work, as I have found, the credible evidence establishes that Respondent did nonetheless continue to employ individuals to perform work covered by the 2017 master contract.

Respondent's first notice to the Union that it did not intend to abide by its contractual obligations took place on May 30, 2018, when Kumar emailed Harmer that “[d]ue to our internal and planning changes, we would like to surrender our Union license.” He attached a letter stating:

This is to inform you that, we would like to terminate the agreement with Teamster Local Union #631 dated 14th Day of March 2016, with immediate effect.

The same day, Harmer responded that Respondent's request was “wholly inappropriate and denied.” Nonetheless, Respondent continued its nonunion subcontracting and failure to make monthly fund contributions to the Union benefit funds. (Id. at ¶¶ 13, 14.)

According to Respondent's business development manager Immanuel Garcia (Garcia), the decision to subcontract was made by Kumar in March 2018 (several months after which subcontracting was actually underway, according to the documentary evidence). Garcia testified that he believed that Kumar decided to subcontract Respondent's work because workers referred by the Union's hiring hall would report for work “unprepared.” As he explained, certain workers reported to the show site without tools and it was necessary to train them out to put together the exhibit booths. Garcia admitted, however, that this was merely his own conjecture based on comments made to him by a prior manager. Because Kumar failed to appear at the hearing, Garcia's speculation, along with his questionable timeline regarding the subcontracting decision, was never confirmed. In any event, no evidence shows that Respondent exercised its right to reject any specific employee referred by the hall by issuing a “no dispatch” letter to the Union. (Tr. 47, 56–58, 60–62.)

According to Garcia, the decision to subcontract was undertaken to save money and in fact resulted in a cost savings for Respondent; thus, it does not appear that Respondent required its nonunion subcontractors to observe the wage rates set forth in the 2017 master contract. (Tr. 57–58.) At hearing, Respondent stipulated that its subcontracting and failure to remit benefit fund contributions constituted mandatory subjects of collective bargaining. (Jt. Exh. 1 ¶ 15, ¶ 16.)

A. Analysis

1. Unilateral change versus contract modification theory

It is well-settled law that a party to a collective-bargaining agreement may not modify a clear and unambiguous term or condition of employment set forth in that agreement without the consent of the other party. An employer who modifies the contract regarding mandatory subjects of bargaining without the union's consent violates Section 8(a)(5) and (1) of the Act. See *C&S Industries, Inc.*, 158 NLRB 454, 456–459 (1966). Upon a showing that an employer has modified a contract provision without the union's consent, the employer may justify the modification by demonstrating that it had a “sound arguable basis” for interpreting the language of the contract to permit its modification. *Bath Iron Works Corp.*, 345 NLRB 499, 501–502 (2005), enforced sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

Of course, even in the absence of a collective-bargaining agreement, Sections 8(a)(5) and (d) require an employer to bargain with the union representing its employees “with respect to wages, hours, and other terms and conditions of employment,” commonly referred to as “mandatory” subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The duty to bargain continues during the term of a collective-bargaining agreement with respect to mandatory subjects of bargaining not covered by that agreement. See *Jacobs Mfg. Co.*, 94 NLRB 1214, 1217–1218 (1951), *enfd.* 196 F.2d 680 (2d Cir. 1952). An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

The Board has made clear that its unilateral change and contract modification theories are mutually exclusive and that an employer's alleged wrongful conduct should be analyzed under only one of them. See *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 6–7 (2019); see also *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (dismissing unilateral change allegation under the “sound arguable basis” standard where the employer acted pursuant to a reasonable interpretation of the parties' contract); *San Juan Bautista Medical Center*, 356 NLRB 736, 738 & fn. 10 (2011) (analyzing employer's failure to pay bonus as unlawful contract modification, even though complaint alleged unilateral change).

In this case, the General Counsel contends that Respondent's subcontracting, failure to use the Union's hiring hall and failure to remit contributions to trust funds on behalf of unit employees, constituted unlawful modification of provisions contained within the 2017 master contract, and, alternatively, amounted to impermissible unilateral changes. As detailed, *supra*, the 2017 master contract contains clear and unambiguous language directly obligating Respondent to use the Union's hiring hall and make contributions to the various funds in question; it also details the circumstances under which Respondent may subcontract to nonunion entities. Accordingly, because these provi-

sions address the very conduct of which Respondent is accused, I find that Respondent's actions must be analyzed based on the Board's contract modification framework, and that the General Counsel's unilateral change theories must be dismissed.

2. The contract modification standard

As noted, Sections 8(a)(5) and (1) and 8(d) of the Act prohibit an employer who is a party to an existing collective-bargaining agreement from altering or modifying the terms and conditions of employment covered by that agreement without the consent of the union. In a contract modification case, “the General Counsel must show a contractual provision, and that the employer has modified the provision” without the union's consent. *Bath Iron Works Corp.*, 345 NLRB at 501; *C&S Industries*, 158 NLRB 454, 457 (1966). In interpreting a collective-bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 3 (2017); *Mining Specialists, Inc.*, 314 NLRB 268, 268–269 (1994).

It is well established that failure to make contractually required benefit fund contributions amounts to a modification of the contract in midterm and thereby violates Section 8(a)(5) and (1) and Section 8(d) of the Act. *M&C Vending Co.*, 278 NLRB 320, 324 (1986) (citing *Inland Cities*, 241 NLRB 374, 379 (1979), *enfd.* 618 F.2d 117 (9th Cir. 1980); *American Needle & Novelty Co.*, 206 NLRB 534, 545 (1973)). An employer that fails to make contractually required contributions not only breaches the contract; such an action constitutes “a failure in derogation of the existing contract which unilaterally changes the wages of the employee-beneficiaries” and therefore violates Section 8(a)(5). *Id.* (citing *George E. Light Boat Storage*, 153 NLRB 1209 fn. 1 (1965), *enfd.* 373 F.2d 762 (5th Cir. 1967)). Likewise, because the Board has recognized the use of a hiring hall as a mandatory subject of bargaining, an employer's failure to adhere to a contractually negotiated hiring hall provision amounts to a violation of Section 8(a)(5). See *Houston Chapter, Associated General Contractors of America, Inc.*, 143 NLRB 409 (1963), *enfd.* 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966). Finally, an employer that subcontracts work inconsistent with its contractual obligations will be found to have violated the Act where, as the parties have here stipulated, that subcontracting constitutes a mandatory subject of bargaining.⁴

Respondent's conduct constituted unlawful contract modification

The evidentiary record shows that, by executing the parties' original short-form agreement, Respondent became bound to

⁴ Because Respondent stipulated that its subcontracting amounted to a mandatory subject of bargaining, I consider any argument that it was privileged to do so pursuant to *First National Maintenance*, to have been waived. See 452 U.S. 666 (1981).

then-existing 2014 master contract; because it subsequently failed to terminate this agreement within the designated window period, Respondent then became bound by the 2017 master contract, which by its terms is effective through May 31, 2021. As detailed above, clear and unequivocal provisions of the 2017 master contract obligate Respondent to obtain labor from the Union hiring hall, to make various trust fund contributions and to refrain from nonunion subcontracting. At hearing, the parties stipulated that each of these actions constitutes a mandatory subject of bargaining. The record evidence establishes that, in November 2017, Respondent ceased its use of the Union's hiring hall and additionally ceased remitting fund contributions. The record evidence also establishes that, beginning in October 2017, Respondent began using a nonunion signatory subcontractor to perform bargaining unit work and thereafter expanded this two an additional nonunion subcontractor.

Respondent has offered no cogent argument that it was privileged to repudiate its obligations under the 2017 master contract. In this regard, I note that, although Respondent appears to argue that certain of its supervisors are not properly considered part of the bargaining unit, it does not argue that it was privileged to withdraw recognition from the Union based on lack of majority status or the inappropriateness of bargaining unit as set forth in the 2017 master contract. Such a contention would, as the General Counsel properly notes, be time barred in any event. See *North Bros. Ford, Inc.*, 220 NLRB 1021 (1975) (citing *Local Lodge 1424 IAM (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960)).

Accordingly, I find that the General Counsel has proven that Respondent modified the contract in violation of Section 8(a)(5) and (1) of the Act, within the meaning of Section 8(d) of the Act. Specifically, by on or about October 15, 2017, without the Union's consent, Respondent failed to continue in effect all the terms and conditions of the 2017 master agreement by refusing to abide by its jurisdictional, hiring hall, benefit fund contribution and subcontracting provisions.

4. Respondent has failed to assert a "sound arguable basis" for its failure to adhere to its contractual obligations

As noted, when an employer defends against a midterm contract modification allegation by asserting that the contract did not prohibit its conduct, the Board will not find a violation of the Act if, in undertaking its modification, the employer relied in good faith on a sound and arguable interpretation of the contract. *Bath Iron Works*, supra at 502. As the Board recently explained:

Where the dispute is solely one of contract interpretation and there is no evidence of animus, bad faith, or intent to undermine the union, the Board does not seek to determine which of two equally plausible contract interpretations is correct.

Metalcraft of Mayville, Inc., 367 NLRB No. 116, slip op. at 6–7 (2019) (citing *Phelps Dodge Magnet Wire Corp.*, 346 NLRB 949, 951 (2006); *NCR Corp.*, 271 NLRB 1212, 1213 (1984)).

In defense of its conduct, Respondent argues that Section 8 of the 2017 master contract—which provides that Respondent may place individuals on a "do not dispatch" list based on inadequate performance—privileged it to "decline" to use the Un-

ion's hiring hall. Respondent, however, failed to provide a factual predicate for this theory; there is no evidence that Respondent ever exercised its right to reject an individual referral pursuant to Section 8. Instead, a single witness offered anecdotal hearsay to the effect that certain workers requisitioned from the hall required training to perform tasks and were therefore unqualified. As such, I find that Respondent failed to demonstrate a sound arguable basis for its belief that Section 8 of the 2017 master agreement operated to condone its subcontracting.

Respondent also appears to argue that its conduct was privileged by the 2017 master contract's management rights clause. I disagree. By its terms, the clause may not operate "...in derogation of any of the terms and conditions" set forth in the contract and therefore cannot provide a sound arguable basis for Respondent's ceasing to abide by its contractual obligation to utilize the Union's hiring hall, as the contract specifically requires. See *Walt Disney World Co.*, 359 NLRB 648, 653 (2013) (finding management rights clause failed to provide sound, arguable basis for employer's interpretation of contract where it expressly applied "[e]xcept as expressly and clearly limited by the terms of this Agreement"). In any event, to the extent that Respondent changed its business model to focus on prefabricated exhibit booths, this change was implemented in 2018, months after Respondent had already repudiated its agreement with the Union by abandoning the Union's hiring hall in favor of nonunion subcontracting. As such, any reliance by Respondent on the clause would operate, at best, as an argument for tolling backpay, which is not properly presented at this stage in the proceeding.

Accordingly, I find that there is no evidence that, at the time Respondent stopped requisitioning labor from the Union's hall, stopped remitting contributions and began subcontracting to nonunion entities, that it had any sound arguable basis for its belief that the 2017 master contract authorized it to do so.

5. Respondent's remaining defenses lack merit

By its post-hearing brief, Respondent argues that it should not be held liable for damages in this case, because the General Counsel has failed to present "with reasonable specificity the alleged amounts of wages owing" and "which individuals on the payroll were covered under the CBA." (R. Br. at 8.) This argument is without merit, as such issues are typically left to be resolved in compliance; the General Counsel was not obligated, at this stage in the proceedings, to identify all affected employees or prove up the amounts of backpay and/or benefits contributions to which they are entitled. See, e.g., *Remington Lodging & Hospitality, LLC*, 363 NLRB 53, 53 (2015).

Respondent's answer to the complaint also contains a Section 10(b) statute of limitations defense. It is well-settled that the 10(b) period begins only when a party has clear and unequivocal notice of a violation of the Act, and the burden of showing clear and unequivocal notice is on the party raising the affirmative defense of Section 10(b). *Gulf Coast Rebar, Inc.*, 365 NLRB No. 128, slip op. at 2; *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). At hearing, however, Respondent's counsel explicitly stated that its Section 10(b) defense was pro-forma and that Respondent did not take the position that the Union had "sat on its rights" in any man-

ner. Moreover, Respondent's post-hearing brief makes no mention of Section 10(b). (See Tr. 27–28; R. Br.) Under the circumstances, I hold Respondent to its counsel's representation and find that Respondent effectively withdrew and/or waived any Section 10(b) affirmative defense to the General Counsel's contract modification allegations. See *Public Service Co.*, 312 NLRB 459, 461 (1983); *DTR Industries*, 311 NLRB 833, 833 fn. 1 (1993).

IV. ALLEGED FAILURE TO PROVIDE REQUESTED INFORMATION

The General Counsel alleges that, since March 12, 2018, Respondent has failed and refused to provide certain information requested by Local 631 relating to a grievance it filed over Respondent's subcontracting. Respondent offered no witness testimony or written evidence in defense of this allegation and additionally failed to address it in its post-hearing brief.

B. Factual Background

On March 12, 2018, the Union filed a grievance against Respondent alleging that it was violating its contractual obligations by employing nonbargaining unit employees in its warehouse and on trade show floors. The grievance, which was e-mailed to Kumar, contained a request for the following information:

... as it pertains to Triumpho, Eye Catchers, Warehouse address 2782 ABELS LN, Las VEGAS NV 89115 or any other related or interested party(ies) or entity(ies) from January 2018 through present:

1. Attendance records for all employees
2. Copies of all correspondence letters, email, and text messages) between management and supervisors regarding the warehouse, or work to be performed
3. Job assignment records for all employees
4. Job Descriptions for all employees
5. Overtime records for all employees
6. Payroll records for all employees
7. Personnel files for all employees
8. Seniority lists for all employees
9. Any and all rollover forms and Bullpen forms

Please provide the information delineated above immediately. If any part of the request is denied or if any material is unavailable, please state so in writing and provide the remaining within 5 business days, which the Union will accept without prejudice to its position that it is entitled to all documents and information sought in the request. This letter is submitted without prejudice to the Union's right to file subsequent requests.

(GC Exh. 6.) Business Agent Harmer testified about the information request but failed to explain the meaning of certain of its wording. Thus, while "2782 ABELS LN" obviously refers to the address of Respondent's warehouse, neither the identity of the entity, "Eye Catchers" or the meaning of the terms, "rollover forms and Bullpen forms" is discernable from the record.

On May 30, 2018, Harmer renewed his information request. (Jt. Exh. 1(g).) It is undisputed that, as of the hearing in this matter, the requested information had not been provided. (Tr. 125 and R. Exh. 2.) As noted, Respondent's witnesses offered

no explanation for this conduct.

C. Analysis

An employer has a duty to furnish relevant information when requested by a union under Section 8(a)(5) and (1) of the Act, and this encompasses information necessary for the performance of its duties. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956). Information concerning terms and conditions of employment of employees represented by a union is generally presumed relevant to the union in its role as a bargaining representative. Thus, information requested will be considered relevant when it would assist the Union in evaluating the merits of a grievance and the propriety of pursuing that grievance to arbitration. *Acme Industrial Co.*, 385 U.S. 432, 437–438 (1967) (employer's duty to furnish requested information constitutes obligation standing "in aid of the arbitral process," in that it permits union to evaluate grievances and sift out unmeritorious claims). The Board, in determining that information is producible, does not pass on the merits of a grievance underlying an information request. See *id.*

Information pertaining to nonunit employees may also be necessary for a union to fulfill its representative duty. See *Curtis-Wright Corp.* 145 NLRB 152 (1963), *enfd.* 347 F.2d 61 (3d Cir. 1965), *supra*; see also *General Electric Co.*, 199 NLRB 286 (1972). However, where an information request seeks such extra-unit information, the relevance of the request is not presumed but must be shown. *Disneyland Park*, 350 NLRB 1256, 1258 (2007). This means that the General Counsel must present evidence that either: (a) the union demonstrated relevance of the information, or (2) its relevance should have been apparent to the respondent under the circumstances. *Id.* (footnote omitted); see also *Teachers College, Columbia University v. NLRB*, 902 F.3d 296 (D.C. Cir. 2018), *enfg.* 365 NLRB No. 86 (2017).

Application of these principles yields a finding that, for the most part, the Charging Party is entitled to the information it requested. First, to the extent that items 1 through 8 of the Union's request sought documents relating terms and conditions of unit employees, such information is presumptively relevant and must be provided. That said, the General Counsel did not demonstrate at hearing that either "rollover forms" or "Bullpen forms" have any bearing on unit employees' terms or conditions, nor is there any basis on which to conclude that Respondent should have been aware of the relevance of such documents. Therefore, documents responsive to this item have not been shown to be relevant, presumptively or otherwise, and as such, they are not required to be produced.

Second, to the extent that items 1 through 8 sought information regarding nonunit employees performing work for Respondent, the Union's inclusion of its request in its subcontracting grievance more than amply put Respondent on notice of its relevance, i.e., it would enable the Union to evaluate whether and to what extent Respondent was subcontracting work to any "related" or "interested" parties. See *SBC Midwest*, 346 NLRB 62 (2005) (union entitled to information reflecting extent of subcontracting); *Island Creek Coal Co.*, 292 NLRB 480 (1989) (same). That said, I find that the General Counsel failed to demonstrate the relevance of either "rollover forms and Bullpen

forms” to the Union’s subcontracting grievance; accordingly, Respondent is not obligated to turn over these documents with respect to any nonunit employees. Likewise, because the record is silent as to the entity, “Eye Catchers,” documents pertaining to it have not been shown relevant and Respondent is not obligated to provide them.

Accordingly, I find that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide Charging Party with documents responsive to items 1 through 8 of its March 12, 2019 information request (except to the extent such documents pertain to the entity known as “Eye Catchers”) and/or failing to inform the Union that this information did not exist.

V. ALLEGED INTERROGATION AND IMPRESSION OF SURVEILLANCE

The General Counsel alleges that Respondent, by its Production and Show Site Manager, Allen Alexander (Alexander), unlawfully interrogated warehouse worker Kimberly Orvidas (Orvidas) and additionally created the impression that her union activities were under surveillance.⁵ The facts underlying these allegations are not in dispute.

D. Factual Background

On the morning of February 6, 2019 (the second day of hearing in this matter), Orvidas photographed workers assembling exhibit booths at Respondent’s warehouse. She provided these photographs to Business Representative Harmer, who in turn provided them to Counsel for the General Counsel. Several of Orvidas’ photographs were offered as evidence in the General Counsel’s case in chief. (See GC Exhs. 3(b) through (e), 3(h)–(l); Tr. 109–110, 154.)

As she left work on the 6th, Orvidas received a call from Alexander, who is her supervisor. During this call, he admittedly confronted her about her workplace photography. As he testified:

I called her up and questioned her because I heard that someone by the name of James from the Union had contacted her and she was sending him photos yesterday. So I called her up and I asked her that question. She first acted like she didn’t know what I was talking about, and then she said that she was checking out and she’ll call me back. And I never heard from her again.

(Tr. 203.) There is no evidence that, prior to February 6, 2019, Orvidas had been an open supporter of the Union.

E. Analysis

The General Counsel alleges that Alexander’s statements to Orvidas violated Section 8(a)(1) of the Act. First, it is alleged that, by informing her that he had “heard” that she had taken photographs of Respondent’s warehouse and provided those images to a union representative, Alexander gave Orvidas the impression that her union activities were under surveillance.

⁵ At hearing, I granted Counsel for the General Counsel’s unopposed motion to allege Alexander as a supervisor under Sec. 2(11) of the Act. (Tr. 237–238.) Respondent failed to timely answer this allegation. Insofar as Alexander himself admitted that he has the authority to hire and issue discipline, I find Alexander has been shown to be a supervisor as alleged. (Tr. 204–205.)

I agree.

It is well settled that an employer creates an impression of surveillance by indicating to employees that it is aware of their union activity without disclosing the source of that information, “because employees are left to speculate as to how the employer obtained the information causing them reasonably to conclude that the information was obtained through employer monitoring.” *Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. at 26 (2018) (citing *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007)). By stating that he had “heard” that Orvidas had documented workplace conditions on behalf of the Union, Alexander indicated that he knew of her protected conduct but did not explain the source of his information. As such, I find that this statement violated the Act insofar as it gave Orvidas the impression that her union activities were under surveillance.⁶

Second, the General Counsel contends that, by asking Orvidas to confirm whether, in fact, she had engaged in the pro-union conduct of which he suspected her, Alexander unlawfully interrogated her in violation of the Act. I agree.

Questioning employees about their union activities or those of others has long been found to be unlawful “because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained.” *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). In determining whether an employer’s questioning of employees about union activity violates Section 8(a)(1) of the Act, the Board considers whether, in all the circumstances, the questioning would reasonably tend to restrain, coerce or interfere with the Section 7 rights of employees. *Hard Hat Services, LLC*, 366 NLRB No. 106, slip op. 6–7 (2018), and cases cited therein. Factors to be considered include:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g. did the interrogation appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss’s office? Was there an atmosphere of “unnatural formality?”
- (5) Truthfulness of the employee’s reply.

Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964); see also *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), *enfd.* 760 F.2d 1006 (9th Cir. 1985).

Applied here, these factors support a finding that Alexander

⁶ In this regard, I find *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1275 (2005), cited by Respondent, to be inapposite. In that case, the Board found that a reasonable employee would understand that his supervisor had obtained information about union activity from a website where the supervisor disclosed that this was, in fact, the case.

unlawfully interrogated Orvides. While he appears to be a relatively low-level supervisor, this factor is outweighed by the highly coercive and heavy handed nature of his inquiry. Notably, Alexander's questioning took place on the second day of hearing in which the General Counsel accuses Respondent of illegally utilizing nonunion labor. Against this backdrop, Alexander's query whether Orvides had provided photos to a Union representative amounted to an effort to ascertain her role in gathering evidence in support of the government's unfair labor practice case. As such, his questioning went to the core of Orvides' Section 7 rights. *Far West Fibres, Inc.*, 331 NLRB 950, 951 (2000) (questioning aimed at determining individual employee's role in union conduct constitutes unlawful interrogation). Moreover, it appears that his phone call took place as she was still on the clock and attempting to leave work. Finally, Orvides' refusal to answer his question is highly indicative of coercive questioning. See *Grill Concepts Services, Inc.*, 364 NLRB No. 36, slip op. 16 (2016); *Chipotle Services LLC*, 363 NLRB 336, 346-347 (2015).

Accordingly, I find that Alexander's query as to whether Orvides had assisted the Union by providing it photographs to constitute an unlawful interrogation as alleged.

CONCLUSIONS OF LAW

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

2. International Brotherhood of Teamsters, Local 631 (the Union) is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

3. At all material times, the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent's employees:

All employees employed by Respondent who perform any work of the nature included in the craft jurisdiction of the Union, which is defined by the 2017 master agreement, in part, as erection, touch-up painting, dismantling and repair of all exhibits. This work is to include wall coverings, floor coverings, pipe and drape, painting, aisle coverings, hanging of signs and decorative materials from the ceiling, placement of all signs, erection of platforms and placement and care of furniture as well as wiping down exhibits. The Employer further recognizes within this scope the loading and unloading of all trucks of common and contract carriers as well as individual company vehicles and the movement of freight, crates, and rigging within its facilities, including all work in the Company's warehouse facilities will be bargaining unit work. In the area of rigging, packing and crating, the work performed includes, but is not limited to, unloading, uncrating, unskidding, painting, and assembly of machinery and equipment as well as the reverse process. It should be noted that cleaning does not include mobile washing . . .

4. By, since about October 15, 2017, unlawfully modifying the 2017 master contract without the Union's consent by refusing to adhere to its subcontracting provisions, Respondent has violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

5. By, since about November 1, 2017, unlawfully modifying the 2017 master contract without the Union's consent by failing to pay contractually mandated contributions to the Union's Health and Welfare Fund, Pension Fund, Vacation Fund and the Teamsters Convention Industry Training Fund, and by bypassing, since about the same date, the contractually mandated exclusive hiring hall and obtaining employees from sources outside the hiring hall to perform work covered by that agreement, Respondent has violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

6. By, since about May 30, 2018, refusing to adhere to and thereby repudiating the 2017 master contract, Respondent has violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) of the Act.

7. By, since March 12, 2018, failing and refusing to supply the following information, so as to enable the Union to discharge its function as statutory representative of the unit employees or, to the extent such information did not exist, failing to so inform the Union, Respondent has violated Section 8(a)(5) and (1) of the Act:

. . . as it pertains to Triumfo, Warehouse address 2782 ABELS LN, Las VEGAS NV 89115 or any other related or interested party(ies) or entity(ies) from January 2018 through present:

- (a) Attendance records for all employees;
- (b) Copies of all correspondence letters, email, and text messages) between management and supervisors regarding the warehouse, or work to be performed;
- (c) Job assignment records for all employees;
- (d) Job Descriptions for all employees;
- (e) Overtime records for all employees;
- (f) Payroll records for all employees;
- (g) Personnel files for all employees; and
- (h) Seniority lists for all employees.

8. By its Production and Show Site Manager Allen Alexander (Alexander) on February 6, 2019, unlawfully interrogating employee Kimberly Oravides (Oravides) about her union and other protected conduct, Respondent has violated Section 8(a)(1) of the Act.

9. By Alexander on February 6, 2019, giving Oravides the impression that her union activities were under surveillance, Respondent has violated Section 8(a)(1) of the Act.

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

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, 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. Therefore, I shall recommend that Respondent, having repudiated its obligations under its collective-bargaining agreement with the Union, be ordered to rescind its actions and make whole employees affected by its failure to abide by that agreement. Respondent should be ordered to cease and desist from those actions that have been found to constitute unlawful contractual modifications and give full force and effect to the

current agreement that is effective from June 1, 2017 to May 31, 2021, and any automatic extensions thereof.

Specifically, Respondent should be ordered to comply with the exclusive hiring hall provisions of the parties' contract, to offer full and immediate employment to those work applicants who would have been referred to the Respondent for employment through the Union's hiring hall were it not for the Respondent's unlawful conduct, and to make them whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's failure to hire them. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal law.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall be required to compensate the affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016).

In addition, having found that Respondent failed to comply with the terms and conditions of the parties' collective-bargaining agreement by failing to make health, welfare and pension benefit contributions on behalf of unit employees, I find that it must now comply with the agreement, and make all the required benefits contributions since around November 1, 2017 on behalf of unit employees, including those individuals who would have been referred to work were it not for the Respondent's unlawful failure to use the Union's hiring hall, including any additional amounts due the benefit funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).⁷ Respondent should be ordered to reimburse such individuals for any expenses ensuring from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed above.⁸

I further recommend that Respondent, having unlawfully failed and refused to provide relevant information to the Union that is relevant and necessary to its performance of its duties as exclusive collective-bargaining representative and/or failed to

⁷ To the extent that any employees made personal contributions to any of the union funds that were accepted by the funds in lieu of the Respondent's delinquent contributions during the period of the delinquency, Respondent will reimburse those employees, but the amount of such reimbursement will constitute a setoff to the amount that it otherwise owes the funds. See, e.g., *Oliva Supermarkets LLC*, 363 NLRB 1614, 1614 fn. 5 (2016).

⁸ As current Board precedent does not authorize consequential damages, I decline the General Counsel's request to recommend their award in this case. See *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016) (not reported in Board volume).

inform the Union that certain requested information did not exist, should be ordered to supply the requested information, set forth above, to the Union, or to the extent such information does not exist, make such representation to the Union. In addition, Respondent shall post an appropriate informational notice, as described in the attached appendix.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

Respondent Triumfo, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Modifying its collective-bargaining agreement with International Brotherhood of Teamsters, Local 631 (the Union) effective June 1, 2017, to May 31, 2021 (the CBA) by failing and/or refusing to comply with its jurisdiction, hiring hall, sub-contracting and benefit contribution provisions.

(b) Refusing to adhere to and repudiating its collective-bargaining relationship or the CBA, and any automatic extensions thereof, with the Union.

(c) Failing to provide information to the Union that is relevant and necessary to its performance of its duties as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All employees employed by Respondent who perform any work of the nature included in the craft jurisdiction of the Union, which is defined by the 2017 master agreement, in part, as erection, touch-up painting, dismantling and repair of all exhibits. This work is to include wall coverings, floor coverings, pipe and drape, painting, aisle coverings, hanging of signs and decorative materials from the ceiling, placement of all signs, erection of platforms and placement and care of furniture as well as wiping down exhibits. The Employer further recognizes within this scope the loading and unloading of all trucks of common and contract carriers as well as individual company vehicles and the movement of freight, crates, and rigging within its facilities, including all work in the Company's warehouse facilities will be bargaining unit work. In the area of rigging, packing and crating, the work performed includes, but is not limited to, unloading, uncrating, unskidding, painting, and assembly of machinery and equipment as well as the reverse process. It should be noted that cleaning does not include mobile washing...

(d) Creating the impression that employees' union or other protected activities are under surveillance.

(e) Interrogating employees about their union or other protected activities.

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

2. Take the following affirmative action necessary to effec-

⁹ 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.

tuate the policies of the Act.

(a) Abide by the terms of the CBA, including its jurisdiction, hiring hall, subcontracting and benefit contribution provisions.

(b) Within 14 days of the date of this Order, offer reinstatement to qualified applicants who would have been referred to Respondent for employment through the Union's hiring hall to perform unit work were it not for Respondent's unlawful conduct without prejudice to their seniority or any other rights or privileges to which they would have been entitled.

(c) Make unit employees and applicants whole in the manner set forth in the remedy section of this decision, for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful contract modifications, in the manner set forth in the remedy section of this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, 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.

(e) Give full force and effect to the terms and conditions of employment provided in the CBA effective from June 1, 2017 to May 31, 2021, and any automatic extensions thereof, by making all required payments to the Union's health, welfare, pension, vacation and training funds that have not been made since about November 1, 2017, including any additional amounts due the funds, in the manner set forth in the remedy section of this decision.

(f) Recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the unit identified in the CBA during the term of the agreement, and any automatic extensions thereof.

(g) Rescind its repudiation of the CBA and give full force and effect to the terms and conditions of employment provided in the agreement during the terms of the agreement, and any automatic extensions thereof.

(h) Furnish to the Union, in a timely and complete manner, the following information, or, to the extent such information does not exist, so inform the Union:

... as it pertains to Triumfo, Warehouse address 2782 ABELS LN, Las VEGAS NV 89115 or any other related or interested party(ies) or entity(ies) from January 2018 through present:

- (i) Attendance records for all employees;
- (ii) Copies of all correspondence letters, email, and text messages) between management and supervisors regarding the warehouse, or work to be performed;
- (iii) Job assignment records for all employees;
- (iv) Job Descriptions for all employees;
- (v) Overtime records for all employees;
- (vi) Payroll records for all employees;
- (vii) Personnel files for all employees; and
- (viii) Seniority lists for all employees.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board

or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under this Order.

(j) Within 14 days after service by the Region, post at Respondent's Las Vegas, Nevada facility copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed its operations in Las Vegas, Nevada, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at its Las Vegas, Nevada facility at any time since October 15, 2017; and

(k) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, D.C. January 17, 2020

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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically,

We are bound to an existing collective-bargaining agreement with The International Brotherhood of Teamsters, Local 631, affiliated with the International Brotherhood of Teamsters (the Union). This agreement is titled:

Collective Bargaining Agreement Between

**TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS,
LOCAL 631, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

AND

**Global Experience Specialists, Inc. and
Freeman Expositions, Inc.**

The agreement (the CBA) is effective from June 1, 2017 to May 31, 2021 and sets forth specific terms and conditions of employment for our employees who perform work performed included in the Union's craft jurisdiction, as set forth in the CBA (the Unit). The Union is the exclusive representative of the Unit employees, for purposes of bargaining with us.

WE WILL NOT withdraw recognition from the Union or refuse to recognize and bargain with the Union as your bargaining representative.

WE WILL NOT, without the Union's written consent, modify the jurisdiction, hiring hall, benefit fund contributions or subcontracting provisions contained within the CBA.

WE WILL NOT fail and refuse to continue in effect the terms and conditions of employment contained in the CBA, and any automatic extensions thereof, by failing and/or refusing to comply with its jurisdiction, hiring hall, benefit fund contributions or subcontracting provisions.

WE WILL NOT repudiate our collective-bargaining relationship with the Union, or the CBA and any automatic extensions thereof.

WE WILL NOT fail to provide information to the Union that is relevant and necessary to its performance of its duties as your exclusive collective-bargaining representative.

WE WILL NOT make it appear to you that we are watching out for your union activities.

WE WILL NOT ask you about your union activities, including your providing assistance to the Union in connection with a National Labor Relations Board proceeding.

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

WE WILL abide by the CBA, specifically including those provisions regarding the Union's jurisdiction, our use of the Union's hiring hall, remittance of contributions to benefit and training funds and subcontracting; WE WILL rescind any actions we have taken in contravention of these provisions; and WE WILL bargain with the Union before implementing any changes to any of these contractual terms and conditions of your employment.

WE WILL, within 14 days from the date of the Board's Order, offer reinstatement to qualified applicants who would have been referred to us for employment through the Union's hiring hall to perform unit work were it not for our unlawful conduct, without prejudice to their seniority or any other rights or privileges to which they would have been entitled.

WE WILL make unit employees and applicants offered reinstatement whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest.

WE WILL make all required contributions to the Union's health, welfare, pension, vacation and training funds that have not been made since about November 1, 2017, and will make

unit employees and applicants offered reinstatement whole for any losses they may have suffered as a result of the failure to make such payments, with 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 28, 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.

WE WILL furnish to the Union, in a timely and complete manner, the following information:

... as it pertains to Triumfo, Warehouse address 2782 ABELS LN, Las VEGAS NV 89115 or any other related or interested party(ies) or entity(ies) from January 2018 through present:

- (1) Attendance records for all employees;
- (2) Copies of all correspondence (letters, email, and text messages) between management and supervisors regarding the warehouse, or work to be performed;
- (3) Job assignment records for all employees;
- (4) Job Descriptions for all employees;
- (5) Overtime records for all employees;
- (6) Payroll records for all employees;
- (7) Personnel files for all employees; and
- (8) Seniority lists for all employees.

To the extent such information does not exist, WE WILL timely inform the Union of that fact.

TRUIMFO, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-222740 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.

