PPG INDUSTRIES OHIO, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Stephen Pincus, Esq.,
for the General Counsel.

Stuart Shoup, Esq.,
for the Charging Party.

David R. Broderdorf and Richard J. Marks, Esqs. (Morgan, Lewis & Bockius, LLP),
for the Respondent.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in mid-December 2021. The complaint alleged that PPG Industries Ohio, Inc. (PPG) violated §8(a)(5) of the National Labor Relations Act (the Act) by unilaterally changing its employees’ work schedules. As will be discussed, the complaint has merit. On the record, I make the following

FINDINGS OF FACT

I. JURISDICTION

PPG, which produces automotive paints, annually sells and ships goods exceeding $50,000 from its Cleveland, Ohio plant (the plant) directly to points outside of Ohio, where it engages in commerce under §2(2), (6) and (7) of the Act. The International Union, United Automobile,

1 Most of the relevant facts in this case are undisputed. Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.
Aerospace and Agricultural Implement Workers of America, UAW (the Union) is a §2(5) labor organization.

II. UNFAIR LABOR PRACTICE

A. Record Evidence

1. Background

PPG produces 40% of the paints and coatings used by U.S. and Canadian automakers. On December 26, 2019, the Union was certified as the exclusive representative of PPG’s employees at the plant in this appropriate collective-bargaining unit (the Unit):

All full-time hourly production and maintenance employees, including operators, environmental, blenders, maintenance, distribution, manufacturing, forklift/tow motor drivers, fillers, mechanics, washers, grinders, mixers, laborers, and warehouse employees, but excluding all lab employees, engineers, salaried employees, technical employees, contractors, temporary employees, office clerical employees, guards, management, and supervisors as defined in the Act.

(JT Exh. 1).

Given that this case involves a unilateral scheduling change, a brief review of the varied schedules that the Unit worked before unionizing is useful. This chart offers their various shifts:

<table>
<thead>
<tr>
<th>SHIFT</th>
<th>START</th>
<th>END</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Shift, 8-hours (Mon. – Fri.)</td>
<td>5:00 a.m.</td>
<td>1:30 p.m.</td>
</tr>
<tr>
<td>2nd Shift, 8-hours (Mon. – Fri.)</td>
<td>1:30 p.m.</td>
<td>10:00 p.m.</td>
</tr>
<tr>
<td>3rd Shift, 8-hours (Mon. – Fri.)</td>
<td>10:00 p.m.</td>
<td>6:30 a.m.</td>
</tr>
<tr>
<td>AM Weekday Shift, 10-hours (Mon. – Thur.)</td>
<td>6:30 a.m.</td>
<td>5:00 p.m.</td>
</tr>
<tr>
<td>PM Weekday Shift, 10 hours (Mon – Thur.)</td>
<td>6:30 p.m.</td>
<td>5:00 a.m.</td>
</tr>
<tr>
<td>Weekend AM</td>
<td>5:00 a.m.</td>
<td>5:30 p.m.</td>
</tr>
<tr>
<td>Weekend PM</td>
<td>5:00 p.m.</td>
<td>5:30 a.m.</td>
</tr>
<tr>
<td>7-Day AM</td>
<td>5:00 a.m.</td>
<td>5:30 p.m.</td>
</tr>
<tr>
<td>7-Day PM</td>
<td>5:00 p.m.</td>
<td>5:30 a.m.</td>
</tr>
</tbody>
</table>

(R. Exh. 6). This chart lists the periodic changes made to Unit schedules before unionization:

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>WORK SCHEDULES</th>
<th>REASONING FOR CHANGE</th>
<th>RECORD EVIDENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-2012</td>
<td>Unit employees worked 8-hour shifts (Monday to Friday) on the 1st, 2nd and 3rd shifts. They were not assigned 10-hour or 12-hour shifts at this time.</td>
<td>N/A</td>
<td>Tr. 43–194 (employee Edward Callahan); tr. 203–216 (employee David Thorn); tr. 217–224 (employee Scott McArthur; tr. 259 (Production Manager Robert Kiser).</td>
</tr>
</tbody>
</table>

2 Its clients include Nissan Motor Co., Mazda Motor Corp., Toyota Motor Corp., General Motors and Stellantis NV.
PPG assigned plant employees a mixture of 8-hour shifts (Monday to Friday) on the 1st, 2nd and 3rd shifts; 10-hour shifts (Monday to Thursday); limited 4-hour shifts; and 12-hour shifts (weekend and 7-day). 3

PPG changed schedules in this way as a result of an increase in orders, which prompted it to transition from a Monday to Friday to a Monday to Sunday production model. Id.; 4 GC Exh. 2; R. Exhs. 1-2.

PPG returned most of its Unit employees to 8-hour shifts (Monday to Friday) on the 1st, 2nd and 3rd shifts. It also eliminated almost all of the 10-hour and 12-hour shifts.

PPG changed schedules in this way as a result of a decrease in orders, which prompted it to mainly resume its Monday to Friday production model. Id.; 5 R Exhs. 3-5.

2. 2020 – An Increase in Orders at the Plant

In 2020, 6 PPG experienced a sharp increase in paint orders. By way of example, from 2020 to 2021, production volume rose from 13.04-million to 14.44-million gallons, while paint batches similarly rose from 9,992 to 10,912. (R. Exh. 13). In addition, between June and November, paint sales were 41% higher than expected. 7 (R. Exh. 15). This rise in sales affected PPG’s benchmarks in the following way:

<table>
<thead>
<tr>
<th>PRODUCTION BENCHMARK</th>
<th>JULY 2020</th>
<th>NOVEMBER 2020</th>
<th>TARGET</th>
</tr>
</thead>
<tbody>
<tr>
<td>Days Inventory Total</td>
<td>95</td>
<td>56</td>
<td>70</td>
</tr>
<tr>
<td>Service to Customers</td>
<td>85%</td>
<td>89%</td>
<td>96%</td>
</tr>
</tbody>
</table>

(Id. at p. 2). PPG did not, however, present evidence showing that it: lost, or risked losing, customers as a result of the increased demand for its paint; experienced a delay in fulfilling orders; 8 or lost revenue as a result of the production crunch. 9 It decided, nevertheless, that preemptive action had to be taken in order to ease the demands of its newly increased workload.

PPG determined that the best way to increase production, proactively control future delays and ease employee burden was to phase out its 5-day (Monday to Friday) production model and return to a 7-day (Monday to Sunday) model. (R. Exh. 15 at pp. 4–5). It concluded that this transition offered several benefits: reduced productivity losses from weekly shutdowns and start-ups; decreased staff burnout; lessened plant congestion; enhanced handling of customer requests and process improvements; and lowered production costs. (Id. at p. 4). PPG decided that it could transition to a 7-day operation in 2 ways, i.e., model 1 or 2. (R. Exh. 15 at pp. 5–7). Model 1 used a mix of schedules, including 8-hour (Monday to Friday) and 12-hour

Kiser stated that, in 2015, PPG eliminated the 4-hour, 10-hour and hybrid weekend shifts. See also (R. Exh. 3).

Kiser estimated that, during this period, 30% of the extant shifts were 8-hour and 50% were 12-hour.

Kiser said that, in 2019, due to decreased customer orders, another shift change was enacted, which returned almost all Unit employees to Monday to Friday, 8-hour shifts. See (R. Exhs. 4–5).

All dates that follow are in 2020, unless otherwise stated.

PPG calculated this number as the difference between monthly forecasted sales (i.e., based upon customer communicated demand) and actual monthly sales. (R. Exh. 15 at p. 2).

On the contrary, its service to customers benchmark actually increased from 85% to 89% during this period.

It would appear that increased orders logically generated greater revenues.
(weekend) shifts; it resembled the staffing plan used from 2012 to 2019. Model 2 used rotating 7-day, 12-hour shifts and eliminated all 8-hour (Monday to Friday) shifts; it was unique and controversial, inasmuch as the plant never previously operated without 8-hour shifts. (Id. at pp 5–7). Model 2 (i.e., the production road never previously traveled) was eventually adopted, which prompted the instant ULP charge. (Id. at p. 7).

3. First Contract Bargaining Mixed With Piecemeal Scheduling Talks

On November 4, the parties began first contract bargaining; their negotiations on an overall agreement are unresolved and continuing. (JT Exhs. 2–3; GC Exh. 20). PPG, however, abruptly decided that first contract negotiations might be protracted and it could not wait to resolve its production shortfall during such bargaining. It, therefore, decided to bifurcate first contract bargaining for an overall agreement from shift schedule bargaining designed to address its increased production needs. The Union entertained this bifurcated approach, which resulted in piecemeal bargaining over shift scheduling. Between November 4 and February 12, 2021, the parties met to negotiate a resolution on shift scheduling for a total of 9 days. (JT Exhs. 4–23). These negotiations failed to produce an agreement and PPG, thereafter, declared impasse.

On February 23, 2021, PPG’s counsel sent this email to the Union, which formally announced the parties’ alleged impasse on the shift scheduling issue:

[T]he parties are at impasse on the 12-hour, 7-day schedule …. [T]he Company is facing an exigent circumstance … from … increased customer demand - which the Company has repeatedly been unable to meet under the current 5-day schedule and mandatory/voluntary weekend overtime …. [We] must make the change to … meet demand …. [and] will … implement … the 12-hour, 7-day schedule ….

(JT Exh. 24).

On March 5, 2021, PPG advised Unit employees about its decision to unilaterally change their schedules and told them that they would be divided into day and night groups, who perform 7, 12-hour shifts over a 2-week period. (JT Exhs. 25-26). This change represented the complete elimination of 8-hour shifts, which was a first time event at the plant. At this time, the parties had not reached a good faith impasse in overall first contract bargaining.

B. Analysis

PPG violated §8(a)(5), when it transferred the entire Unit to 12-hour shifts. PPG made this change without bargaining with the Union to an overall good faith impasse in their first

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10 This model was “preferred,” although it was surprisingly not ultimately chosen by PPG. (R. Exh. 15 at p. 5).

11 As noted, although schedules sporadically changed over the years, PPG always assigned some 8-hour shifts. These assignments ranged from a height of almost everyone to a floor of 30% of the Unit.

12 This allegation is pled under complaint ¶¶7 and 8.
contract negotiations, and effectively reassigned the entire Unit from 8-hour (Monday to Friday) schedules to 12-hour (Monday to Sunday) schedules.

1. Legal Precedent

   a. General Bargaining and Unilateral Change Rules

   Under §§8(a)(5) and 8(d), the duty to bargain collectively requires an employer “to meet … and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” NLRB v. Katz, 369 U.S. 736, 742–743 (1962). In order to trigger a bargaining obligation, a change must be material, substantial and significant. Crittenton Hospital, 342 NLRB 686 (2004). The GC can establish a prima facie unilateral change violation, if it shows that an employer made a material and substantial change in a term of employment without negotiating. The burden then shifts to the employer to show that the change was permissible (e.g., consistent with established past practice). See, e.g., Fresno Bee, 339 NLRB 1214 (2003).

   An employer’s regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even if those practices are not required by a collective-bargaining agreement. Id; see also Palm Beach Metro Transportation, LLC, 357 NLRB 180, 183 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enf'd. 459 Fed. Appx. 874 (11th Cir. 2012).

   b. Special Rule – Unilateral Changes During Contract Bargaining

   Where parties are negotiating a collective-bargaining agreement, an employer’s obligation to refrain from making unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain. RBE Electronics of S.D., 320 NLRB 80, 81 (1995); Mike O’Connor Chevrolet, 209 NLRB 701 (1974). During collective bargaining, an employer must also refrain from implementing unilateral changes, absent overall impasse on bargaining for an agreement as a whole. Id. There are, however, some limited exceptions to the general prohibition against piecemeal unilateral changes during contract bargaining; they are described below.

   c. Narrow Exception - Piecemeal Unilateral Changes During Contract Bargaining

   The Board recognizes limited exceptions to its general bar against piecemeal unilateral changes during contract bargaining. In Pleasantview Nursing Home, 335 NLRB 961 (2001), enf’d. 351 F.3d 747 (6th Cir. 2003), the Board summarized its precedent:

   [T]he Board recognized only two exceptions to that general rule: [1] when a union engages in bargaining delay tactics and [2] when economic exigencies compel prompt action …. The Board has limited the economic considerations which would trigger the … exception to “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” …. Absent a dire financial emergency, economic
events such as... operation at a competitive disadvantage...do not justify unilateral action ....

However, … the Board also found that there may be other economic exigencies that, although not sufficiently compelling to excuse bargaining altogether, should be encompassed within the exigency exception. In those cases, the employer will “satisfy its statutory obligation by providing [the union] with adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted.” ....

In defining the less compelling type of economic exigency, the Board … made clear that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. The Board will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were “compelled,” the employer must also show that exigency was caused by external events, was beyond its control, or was not reasonably foreseeable.

335 NLRB at 962 (citations omitted). The Board has “characterized the economic exigency exception as requiring a heavy burden.” Sartorius Inc., 323 NLRB 1275, 1284 (1997).

2. **Synthesis**

    a. **Prima Facie Case**

    The GC demonstrated that PPG made a material and substantial change in the Unit’s terms and conditions of employment, when it changed their work schedules from 8-hour (Monday to Friday) shifts to 12-hour (Monday to Sunday) shifts. See, e.g., Mi Pueblo Foods, 260 NLRB 1096, 1097 (2014); 88 Transit Lines, 300 NLRB 177, 184 (1990). This change in the Unit’s schedule occurred in the middle of first-contract negotiations, in the absence of an overall impasse or the Union’s consent.

    b. **Past Practice**

    PPG failed to show that its unilateral scheduling change was based upon a permissible past practice. As said, an employer’s practices, which are regular and long-standing, become terms and conditions of employment. Sunoco, Inc., 340 NLRB 239, 240, 244 (2007); DMI

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13 See also Intermountain Rural Electric Assn., 305 NLRB 783 (1991), enfd. 984 F.2d 1562 (10th Cir. (1993).

14 As noted, on March 5, 2021, PPG changed the Unit’s work schedules from a Monday to Friday, 8-hour shift, 40-hours per week schedules with overtime eligibility for weekend hours to a Monday to Sunday, 12-hour shift schedule, where employees alternated working 36- and 48-hour workweeks.
A past practice must, however, occur with such regularity and frequency that employees would reasonably expect it to reoccur on a regular and consistent basis. Eugene Iovine, Inc., 328 NLRB 294, 297 (1999). In Raytheon Network Centric Systems, 365 NLRB No. 161, slip op. at 22–24 (2017), the Board explained that, in order to rise to the level of a past practice, an employment policy must have: (1) duration (i.e., the Raytheon practice ran from 2001 to 2012); and (2) consistency (i.e., the Raytheon practice occurred annually every fall and was dictated by a constant formula). See also Consolidated Communication Holding, Inc., 366 NLRB No. 152 (2018); Hospital San Cristobal, 358 NLRB 769, 772 (2012), reaff’d. 363 NLRB 1610 (2016).

In this case, the record reveals that, excluding the unilateral scheduling change at issue herein, over the course of the last several decades at the plant, PPG has only changed the Unit’s work schedule 3 times (i.e., in 2012, 2015 and 2019). For several reasons, these discrete events are too sporadic to constitute a past practice. First, they lack sufficient duration, inasmuch as past schedule changes only occurred 3 times over multiple decades, i.e., with no scheduling changes at all during most years. See, e.g., Wendt Corp., 369 NLRB No. 135, slip op. at 7 (2020) (“While a past-practice defense under Raytheon is not susceptible to mathematical specificity, the evidence adduced by the Respondent of two temporary layoffs in 17 years comes nowhere near meeting its burden of proving an established past practice that would have justified unilateral action.”). Cf. Mike-Sell’s Potato Chip Co., 368 NLRB No. 145, slip op. at 3 (2019) (past practice established where employer sold 51 company driver routes between 1998 and 2016). Second, they lack consistency, inasmuch as past schedule changes randomly occurred at different times in sporadic years and were not controlled by a predictable formula. In sum, PPG’s history of Unit schedule changes was insufficient to leave Unit employees with the reasonable expectation of when, and if, it would change their schedules. Eugene Iovine, Inc., supra (reduced hours was not based on a past practice because prior changes in hours were discretionary and based upon unique business circumstances); Garment Workers Local 512 v. NLRB (Felbro, Inc.), 795 F.2d 705, 711 (9th Cir. 1986) (employer must bargain over economic layoff, which is “inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work”); NLRB v. Allis-Chalmers Corp., 601 F.2d 870, 875–876 (5th Cir. 1979) (employer must bargain over wage increase which did not result from “purely automatic” policy and was not pursuant to “definite guidelines”).

c. Exceptions to Bar against Piecemeal Unilateral Changes during Contract Bargaining

Although the Board recognizes limited exceptions to its general prohibition against piecemeal unilateral changes during contract bargaining, PPG failed to show that these exceptions are applicable. As an initial matter, there is no contention that the Union improperly delayed bargaining. PPG’s sole contention is that economic exigencies caused by a backlog in orders compelled prompt action, which excused its bargaining obligation altogether as an

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15 In 2012, PPG changed the Unit’s schedules from 8-hour shifts to a mix of 4-hour 8-hour, 10-hour, and 12-hour shifts as a result of a business upturn. In 2015, PPG eliminated the 4-hour, 10-hour and hybrid weekend crew shifts as a result of downturn. In 2019, PPG returned to 8-hour shifts from Monday to Friday on the 1st, 2nd and 3rd shifts, while eliminating most remaining 10-hour and 12-hour shifts.
“economic exigency” or, in the alternative, allowed it to “carve-out” scheduling bargaining from overall contract bargaining as an “other economic exigency” and negotiate with the Union to a good faith impasse. As said, the party asserting these economic exigency exceptions bears a “heavy burden.” *Wendt Corp.*, supra, slip op. at 7.

**i Exigent Circumstances - Bargaining Excused in its Entirety**

Although PPG asserts that its 2020 production shortfall was a compelling exigency, which completely excused scheduling bargaining, this assertion is invalid. The Board has held that economic exigencies do not include the loss of accounts or contracts, operating at a competitive disadvantage or supply shortages, as was the case herein. *RBE Enterprises of S.D., Inc.*, supra, 320 NLRB at 81–82. An economic exigency is also limited to an unforeseen event, which has a major economic effect that requires “immediate action.” *Id.* The Board has stated that there is a significant distinction between an economic exigency, which excuses bargaining, and a simple business necessity, which does not:

> [B]usiness necessity is not the equivalent of compelling considerations which excuse bargaining. Were that the case, a respondent faced with a gloomy economic outlook could take any unilateral action it wished or violate any of the terms of a contract which it had signed simply because it was being squeezed financially.


In the instant case, PPG failed to adduce an economic exigency. It sought to change schedules in order to, “minimize productivity losses,” better “handle customer requests” and become “more cost effective.” (R. Exh. 15 at p. 4). It also wished to improve its inventory and service target benchmarks. It logically concluded that these valid business goals would be advanced by altering schedules and transitioning to a 7-day production model. For several reasons, these circumstances and desires fail to meet the Board’s lofty “exigent circumstances” standard, which would wholly excuse schedule bargaining. *First*, PPG unilaterally implemented its scheduling proposal in March 2021, even though it knew about its sales increase since at least June 2020 (i.e., for 9 months). (R. Exh. 15 at p. 2). Over 9 months of lead time hardly suggests an unforeseen event that meets the “exigent circumstances” test. *Second*, PPG’s rise in sales did not require “immediate action.” On the contrary, PPG’s records demonstrate that, even if it retained the status quo, it still had inventory ranging from 95 to 56 days between July and November 2020. (R. Exh. 15 at p.2). Roughly 2 to 3 months of inventory falls short of a dire economic calamity, which requires “immediate attention.” *Third*, PPG had other potential venues to address increased sales. Although it had 7 other plants that could have temporarily pitched in, it offered no explanation why it did not temporarily ramp up production at these sites, until such time as it reached an overall contract resolution with the Union. (GC Exh. 21 at p. 3). *In sum*, PPG failed to show that its temporary increase in customer orders was an

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16 PPG runs the following 8 manufacturing facilities: PPG Cleveland; PPG Delaware; PPG Adrian; PPG Euclid; PPG Circleville; PPG Oak-Creek; PPG San Juan Del Rio; and PPG Springdale. Given that PPG held the burden of proof on the exigency issue, it seems plausible that the temporary backlog in orders could have also been
economic exigency that excused bargaining; at best, it was attempting to avoid operating at a competitive disadvantage, which is not an economic exigency. RBE Enterprises of S.D., Inc., supra, 320 NLRB at 81–82 (economic exigencies do not include the loss of accounts or contracts, operating at a competitive disadvantage or supply shortages). Cf. Tylertown Wood Prods., 251 NLRB 515, 521 (1980) (an equipment failure making an entire plant inoperable is an exigency excusing unilateral layoffs).

**ii. Exigent Circumstances - Unilateral Action After Bargaining to Good Faith Impasse**

PPG also contends that, under RBE Electronics, its order backlog amounted to “other economic exigencies,” which while insufficient to wholly excuse bargaining, permitted unilateral action after it reached a good faith impasse with the Union on the scheduling issue. RBE Electronics, supra, 320 NLRB at 81-82. As noted, the “other economic exigency” exception requires that “an employer … show a need that the particular action proposed be implemented promptly,” and that the “exigency was caused by external events, was beyond its control, or was not reasonably foreseeable.” Pleasantview Nursing Home, supra, 335 NLRB at 962. PPG’s position on this issue is also invalid.

**Time of the Essence**

PPG failed to show that it faced “other economic exigencies” because time was simply not sufficiently of the essence. Its business records stated that it had 2 to 3 months of inventory; a surplus of this size is simply not a time crunch. See, e.g., Wendt Corp., supra, slip op. at 8 (“long gap between the time when the Respondent first raised the issue of the layoffs and the time it implemented them refutes that the Respondent faced an economic exigency in which time was of the essence.”); Naperville Ready Mix Inc., 329 NLRB 174, 182–183 (1999), enf'd 242 F.3d 744 (7th Cir. 2001) (sale of trucks not justified under RBE Electronics’ economic exigency exception, although employer could save some money if scheme was implemented before July 1); Sartorius Inc., supra, 323 NLRB at 1284–1286 (unilateral implantation of incentive bonus program not justified by alleged economic exigency of increases in scrap rate on machine and unexpected high orders).

**Foreseeability**

PPG also failed to show that it faced “other economic exigencies” because its increase in orders was somewhat unforeseeable. The record establishes that, over the last decade (i.e., from 2012 to the present), PPG has experienced 3 significant contractions and expansions in orders, which prompted major schedule changes (i.e., 2012, 2015 and 2019). One would be hard-pressed to label an event occurring three times in the last 10 years as unforeseeable.  

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curtailed without resort to a unilateral scheduling change at the PPG Cleveland plant, if PPG temporarily increased production at some of its other facilities. PPG wholly failed to offer any proof on this issue, which deeply undercuts its argument that the scheduling change was the only way that it could address its need to increase production.

This is not to suggest that the COVID-19 pandemic was a foreseeable event; it was obviously not. Economic contractions and expansions in the auto industry are, however, foreseeable to an auto paint supplier;
e.g., Harmon Auto Glass, 352 NLRB 152, 154 (2008) (substantial deadline in sales revenues, resulting in substantial net loss, plus placement into receivership, found not to be unforeseen economic emergencies excusing unilateral action); Toma Metals, Inc., 342 NLRB 787, 801 (2004) (employer’s 50% decline in revenue over 6 months not unforeseen emergency, justifying unilateral lay off); Hartford Head Start Agency, 354 NLRB 164, 185–188 (2009) (funding decrease not “unforeseen” and did not justify unilateral wages and schedule cuts).

Dire Financial Situation

PPG similarly failed to show that it faced “other economic exigencies” because it was unable to demonstrate a sufficiently dire financial situation. PPG sought to change the Unit’s schedule because: it was operating below its 70-day inventory and 96% service target goals; and it forecasted a 3% increase in gallons-ordered from 2019 to 2021. (R. Exh. 15 at pp. 2–3). Although PPG had valid business purposes for wanting to ramp up to a 7-day production model, its rationale was not based upon a dire financial emergency warranting immediate attention. It has not asserted that it was losing money, losing key customers or suffering other irreparable harm. On the contrary, it mostly wanted to streamline its operations, provide more efficient deliveries, and save money. These motivations, while sound, were just not dire. See, e.g., Wendt Corp., supra, slip op. at 8 (“The … desire to save money in its shop operations, however understandable, does not constitute an economic exigency where its economic health is not even asserted to be in question …. [and it] is not threatened in any manner by straitened financial circumstances but simply seeks some monetary savings.”); United States Testing Co., 324 NLRB 854 (1997) (respondent failed to offer evidence that its financial situation was so dire that it either had to implement its final offer when it did or suffer financial ruin); Beverly Health & Rehabilitation Services, 335 NLRB 635, 637 (2001) (9.5% increase in healthcare premiums does not warrant unilateral change in increasing employees’ premium costs); Brannan Sand & Gravel, 314 NLRB 282 (1994); Circuit Wise Inc., 308 NLRB 1091 (1992).

iii. Synthesis

In sum, PPG has not met its heavy burden of showing that bargaining was excused entirely or that its rise in orders constituted “other economic exigencies” under RBE Electronics, which permitted unilateral action, after the parties reached a good faith bargaining impasse on the scheduling issue.18 RBE Electronics, supra, 320 NLRB at 81–82.

Conclusions of Law

1. PPG is an employer engaged in commerce under §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization and the designated exclusive collective bargaining representative of PPG’s employees at its Cleveland, Ohio plant in the following appropriate collective bargaining unit:

PPG’s recent history demonstrates this point.

18 It is unnecessary to pass on whether the parties reached a good-faith impasse in scheduling negotiations, given that PPG failed to show that, under RBE Electronics, economics exigencies validated piecemeal bargaining.
All full-time hourly production and maintenance employees, including operators, environmental, blenders, maintenance, distribution, manufacturing, forklift/tow motor drivers, fillers, mechanics, washers, grinders, mixers, laborers, and warehouse employees, but excluding all lab employees, engineers, salaried employees, technical employees, contractors, temporary employees, office clerical employees, guards, management, and supervisors as defined in the Act.

3. PPG violated §8(a)(5) by unilaterally transferring Unit employees to 12-hour (Monday to Sunday) shifts, without bargaining to a lawful overall impasse with the Union during their first contract negotiations.

4. These unfair labor practices affect commerce under §2(6) and (7).

Remedy

The appropriate remedy for the violations found herein is an order requiring PPG to cease and desist from its unlawful conduct and to take certain affirmative action. Having found that it unlawfully unilaterally changed Unit employees’ work schedules, PPG is directed to reinstate the terms and conditions of employment that existed before its unlawful changes, upon request from the Union. It shall also make employees whole for any loss of earnings and other benefits resulting from its unlawful unilateral changes as prescribed in Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus 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). Under Don Chavas, LLC d/b/a Tortillas Don Chavas, 361 NLRB 101 (2014), it shall compensate Unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award. Under AdvoServ of New Jersey, Inc., 363 NLRB 1324 (2016), and Cascades Containerboard Packaging–Niagara, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), it shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order (or such additional time as the Regional Director may allow for good cause shown), file with the Regional Director for Region 8: a report allocating backpay to the appropriate calendar year(s); and a copy of each backpay recipient’s corresponding W–2 form(s) reflecting the backpay award. The Regional Director will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner. Finally, it shall post the attached notice in accordance with J. Picini Flooring, 356 NLRB 11 (2010).

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

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

PPG Industries Ohio, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Failing and refusing to bargain collectively with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) as the exclusive collective bargaining representative of the following appropriate collective-bargaining unit of employees employed at its Cleveland, Ohio plant (the Unit) by unilaterally their changing their scheduled hours and days of work during collective bargaining in the absence of an overall lawful bargaining impasse with the Union during their first contract negotiations:

      All full-time hourly production and maintenance employees, including operators, environmental, blenders, maintenance, distribution, manufacturing, forklift/tow motor drivers, fillers, mechanics, washers, grinders, mixers, laborers, and warehouse employees, but excluding all lab employees, engineers, salaried employees, technical employees, contractors, temporary employees, office clerical employees, guards, management, and supervisors as defined in the Act.

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

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

   a. Upon request by the Union, rescind the unilateral changes made to the Unit’s work schedules on March 5, 2021.

   b. Make affected Unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral change, in the manner set forth in the remedy section.

   c. Compensate affected Unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar year for each employee and a copy of the corresponding W–2 forms reflecting the backpay award.

   d. Preserve and, within 14 days of request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the
e. Within 14 days after service by the Region, post at its Cleveland, Ohio facility the attached notice marked “Appendix”. Copies of the notice, on forms provided by the Regional Director for Region 8, 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 the 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. Reasonable steps shall be taken by the Respondent 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 March 5, 2021.

f. Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. April 8, 2022

Robert A. Ringler
Administrative Law Judge

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.”
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 and refuse to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (the Union) as your exclusive collective bargaining representative at the Cleveland, Ohio plant by unilaterally changing your scheduled hours and days of work during collective bargaining in the absence of an overall lawful bargaining impasse with the Union during our first contract negotiations. The appropriate collective bargaining unit at the Cleveland, Ohio plant is:

All full-time hourly production and maintenance employees, including operators, environmental, blenders, maintenance, distribution, manufacturing, forklift/tow motor drivers, fillers, mechanics, washers, grinders, mixers, laborers, and warehouse employees, but excluding all lab employees, engineers, salaried employees, technical employees, contractors, temporary employees, office clerical employees, guards, management, and supervisors as defined in the Act.

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, upon request by the Union, rescind the unilateral changes that we made to your work schedules on March 5, 2021.

WE WILL make you whole for any loss of earnings and other benefits that you suffered as a result of our unlawful unilateral change to your scheduled hours and days of work, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating
the backpay awards to the appropriate calendar year for each employee and a copy of the corresponding W–2 forms reflecting the backpay award.

PPG INDUSTRIES OHIO, 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.nlrb.gov.

1240 East 9th Street, Rm. 1695, Cleveland, OH 44199-2086
(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m. ET

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/08-CA-279834 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN Posted for 60 Consecutive DAYS FROM the DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER (216) 303-7399.