Respectfully submitted:

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I. INTRODUCTION

Central States Joint Board (“Respondent” or “Employer”) made a unilateral decision to change its salaried employees’ flex start time schedule without first bargaining with the salaried employees’ representative, Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters (“the Union”), about its decision to make this change and further without bargaining over the effects of this change. Respondent acted in complete disregard for its obligations under the Act. As such, Respondent clearly violated Section 8(a)(1) and (5) of the Act.

II. STATEMENT OF ISSUES

(1) Whether Respondent violated Section 8(a)(1) and (5) of the Act by making unilateral changes to the salaried employees’ flex start time schedule without first bargaining with the Union about its decision to make this change.

(2) Whether Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain over the effects of the above change.

III. FACTUAL SUMMARY, ANALYSIS AND ARGUMENT

Respondent is engaged in the business of administering health, welfare, and pension plans for various employers located throughout the United States. (GC 1(h) ¶ II (a), Tr. 19). Respondent has approximately 700 bargaining and non-bargaining unit employees. (Tr. 19). The represented employees are divided into two separate bargaining units, and are covered by two separate collective-bargaining agreements. One unit consisting of about 370 employees is referred to as the hourly unit because those employees are paid on an hourly basis. The second unit and the one at issue in the present case, is comprised of about 100 employees and is referred to as the salaried unit, similarly because those employees are paid a salary. (Tr. 19-20) The Union has represented

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1 Hereinafter the National Labor Relations Act will be referred to as the “Act”; the National Labor Relations Board as the “Board”, Counsel for the General Counsel’s Exhibits as “GC_”; Respondent’s Exhibits as “R_”; Joint Exhibit as “J_”; and citations to the transcript are designated as “Tr._”.
the salaried unit employees as described in the parties’ collective-bargaining agreement since at least 1997. (J 1, Tr. 86-87) At all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the salaried unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from July 1, 2018, to June 30, 2024. (GC 1(h) ¶ V(b)).

A. THE UNION MADE A DEMAND TO BARGAIN OVER RESPONDENT’S DECISION TO CHANGE THE FLEXIBLE SCHEDULE WORK SCHEDULE OF THE SALARIED UNIT

The record shows that on December 7, 2020, manager Jeff Heppe sent an email to salaried bargaining unit employees. In the email, Heppe states:

“Effective 1/1/21 the hours of work for all Funds’ employees will be changing such that the flexible starting times are rolling by 30 minutes to 6:30 a.m. -9:30 a.m. from the current 6:00 a.m. – 10:00 a.m. start. This means that the earliest anyone can stop working would be 2:00 p.m. instead of 1:30.”

(GC 2 and 4, Tr. 28-30, 94, GC 1(h) ¶ VI(a)).

Upon receiving this email, Leads Systems Engineer, George Micholson testified that he forwarded this email to Union Representatives and others who had also served on the Union’s bargaining team, including but not limited to Union Staff Attorney Brendan Crowley. Micholson testified that he forwarded this email because he did not recall the flex time schedule being part of the most recent negotiated collective-bargaining agreement and he wanted to give them a heads up about being forced to change their start times. (GC 2, Tr. 29-30) After receiving Micholson’s email, Attorney Crowley testified that he made a demand requesting that Respondent bargain collectively about the changes to the schedules of salaried unit employees and the effects of those changes. Crowley sent the Director of Human Resources Scott Robbins a letter on December 8, 2020, stating as follows:

“The Union has become aware of proposed changes to employee schedules within the Salaried Bargaining Unit. We are dismayed to have heard of such changes through our membership and hope that in the future the Respondent will give the exclusive representative notice prior to changing wages, terms and conditions of employment.
The Union is still reviewing the Parties' Collective Bargaining Agreement and bargaining history to determine if such change is even allowed by the Parties' Agreement. However, in an abundance of caution and to assure the union does not lose its right to bargain over the decision or effects of these changes, and without surrendering any arguments as a result of this letter, please accept this letter as our Union's demand to bargain over the Respondent's recently announced schedule changes for salaried bargaining unit employees. As with any mandatory subject, please cease and desist from implementing this policy prior to bargaining with the affected employee's exclusive bargaining agent, until such time as the parties reach agreement or impasse.”

(JX 2, Tr. 49, 78, 103, 120-122).

Respondent’s Attorney, Charles Lee, responded to Crowley in an email dated December 14 stating that under the management rights clause of the parties collective-bargaining agreement (set forth below), they believed Respondent had a unilateral right to change the work hours of the Salaried Unit. (JX 3, Tr. 49-51, 113).

6.1 Management Rights Defined

The management of the Employer’s operations and the direction of the work force, including, but not limited to: the right to plan, direct and control office operations; to hire, schedule and assign work to the employees; to determine what employee qualifications are necessary for the job; to determine the means, methods, process and schedules of work; to introduce new or improved equipment, facilities or methods; to add or discontinue services or processes; to determine the location of operations, the establishment of new operations or locations, and the continuance of the operations and the various operating departments; to discontinue jobs; to establish reasonable production standards and to maintain and improve efficiency, to transfer employees or to relieve employees from duties for justifiable reasons; to maintain order and to suspend, demote, discipline and discharge for proper cause, are the sole rights of the Employer, provided, however, that said powers shall be exercised in accordance with this Agreement.

(J 1).

Both Lee and Crowley testified that on December 15, they engaged in a telephone conversation wherein they discussed the Union’s demand to bargain and the Respondent’s position that Respondent had the right to make this unilateral change pursuant to the management rights clause. (Tr. 50-52, 114-115). Crowley testified that in this call, he asked whether the change applied to the entire salaried unit or merely the department Micholson was in as Crowley believed Respondent’s response affected whether or not Respondent had a right to make the change. Lee agreed to get back to Crowley. (Tr. 52-53).
The next day, in a phone call, Lee reiterated what he had stated in his email: that Respondent had a right to change the flex schedule for the salaried employees under the management rights clause. (Tr. 50). Lee stated that under the new decision from the Board, MV Transportation, the employer read this clause to allow them to implement a change to start times.

Crowley testified it was not clear what the word “schedule” was referring to. (Tr. 51) Crowley went on to explain that it could mean start times and/or it could mean specific departments schedules since it did have separate schedules for certain departments, like the legal department. Crowley argued that even if the contract allowed Respondent to make a change based upon a management rights clause, that Respondent still had an obligation to bargain over the effects of that change. Crowley asked Lee whether or not this change applied only to the department where Micholson worked or the entire salaried unit. (Tr. 51) Lee responded he would get back to Crowley about whether or not this change applied only to the department where Micholson worked or the entire salaried unit. (Tr. 51) Lee responded he would get back to Crowley about whether or not this change applied to the entire salaried unit or not. (Tr. 52). Crowley again told Lee that, at the very least, the Respondent had an obligation to bargaining over the effects of the change. (Tr. 51, 70). Lee responded by stating that the contract coverage standard did not require Respondent to bargain over the effects of the rights contained in the management’s rights clause.

The record shows that as a result of this call, still on December 15, Respondent confirmed that the unilateral change applied to the entire salaried unit. (JX 4, Tr. 54, 64, 123). The record further shows that the parties did not engage in further discussions since then and the Respondent unilaterally changed the salaried unit’s flexible work schedule within a month of its announcement, on the first working day in January, January 4, 2021. (Tr. 53).

**B. RESPONDENT HAD AN OBLIGATION TO BARGAIN**

Respondent through Robbins’ testimony admits that it announced its decision to change all salaried employees’ flex start times without notifying and bargaining with the Union. (Tr. 95-96). Micholson testified that salaried employees are now required to start 30 minutes later from the
current 6:00 am to 10:00 am to 6:30 am to 9:30 am and can no longer end their days as early as 1:30 pm but rather the earliest they can end their days is at 2:00 pm. (Tr. 27) This change in the flex start time is a significant material change as it changes the salaried employees’ work schedules, in particular their flex start and end times.

Well established Board law is clear that changes such as those implemented by Respondent in this matter constitute a material change to working conditions and must first be bargained with the Union prior to implementation. See Northstar Memorial Group, LLC d/b/a Skylawn Funeral Home, Crematory & Memorial Park, 369 NLRB No. 145, slip op. at 2 (2020); Indiana Hospital, 315 NLRB 647, 657 (1994) (change in work schedules significant material change); United Parcel Service, 336 NLRB 1134 (2001) (unilateral change from onsite to distant offsite parking was unlawful). In the United Parcel Service case, the Board held that it was clear that the relocation of the parking lot had a substantial impact upon the terms and conditions of employment, requiring employees to spend an additional 20 minutes getting between the parking lot and the workplace, increasing their commuting time by at least 40 minutes per day. The Board went on to explain that where employees had previously been able to park their cars and walk to the Respondent's facility, they now had to adjust their arrival time to conform to the schedule of the shuttle bus that runs only at fixed intervals. Those changes affected the employees' ability to arrive at work on time and related matters such as additional expenses for such things as childcare.

Similarly, in this case, Crowley and Micholson both testified that the earlier flexible start time was a benefit to employees. (Tr. 71). Crowley testified that in speaking with members, this unilateral change affected their childcare, elder care, and/or care of other family members that may have been ill. Members explained that the flex time they previously had afforded them the opportunity to take care of these individuals. (Tr. 71). Micholson also testified that the change in the 30 minute later start and end times has affected several employees by as much as 20 to 30 minutes of a longer commute. (Tr. 35-36). Micholson explained that traffic wise, it seemed like every time
he got out later, he would get stuck by freight trains and it would take him an additional half hour to
45 minutes to get home. Thus, the earlier he could get in, the better it was for him. Micholson went
on to add that for him the flex schedule provided him more time at home with his family. (Tr. 34-36)

In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the Board departed from the “clear
and unmistakable waiver” standard\(^2\) and adopted the “contract coverage” standard for determining
whether an employer’s unilateral change of a term and condition of employment violates Section
8(a)(5) of the Act or whether the change is covered by the agreement.

Under the “contract coverage” standard, the Board will examine the plain language of the
collective-bargaining agreement to determine whether action taken by an employer was within the
scope of contractual language granting the employer the right to act unilaterally.\(^3\) The contract
language at issue in a particular case does not need to specifically address the decision at issue, as
“a collective-bargaining agreement establishes principles to govern a myriad of fact
patterns...[Instead,] [w]here contract language covers the act in question, the agreement will have
authorized the employer to make the disputed change unilaterally, and the employer will not have
violated Section 8(a)(5).\(^4\) If the “contract coverage” defense is not met, then the Board will
determine whether the Union waived its right to bargain about the challenged unilateral change by
applying its traditional “clear and unmistakable waiver” standard.\(^5\)

Here, the record shows that not only is there currently no provision in the salaried
employees’ contract regarding flex time schedules, but there never has been. (J 1, Tr. 21, 88, 91, 94,
101). Thus, by applying its traditional “clear and unmistakable waiver” standard, there is no
evidence that the Union waived its right to bargain about the challenged unilateral change. The


\(^3\) *MV Transportation, Inc.*, supra at slip op. 2.

\(^4\) *Apex Linen Service, Inc.*, 370 NLRB No. 75 (2021), citing *MV Transportation, Inc.*, supra at slip op. 11.
record shows that after Respondent received Crowley’s email, on December 14, Lee responded via email to Crowley by pointing out that the CBA contained a management rights clause which allows management the unilateral right to change the work hours under the terms of the salaried unit CBA. (J 3, Tr. 49, 113). Yet, the management rights clause has no provision in the contract specifically addressing the flex start and end time schedules. Thus, the plain language of this collective-bargaining agreement does not allow the action taken by Respondent as it was not within the scope of the contractual language granting the employer the right to act unilaterally as described under the “contract coverage” standard.

C. RESPONDENT HAD AN OBLIGATION TO BARGAIN OVER THE EFFECTS OF RESPONDENT’S DECISION TO MAKE THE UNILATERAL CHANGE

With respect to effects-bargaining obligations, in adopting the “contract coverage” test, the Board did not hold that the obligation to bargain over effects should be analyzed under that framework, and the Board has historically applied a waiver analysis. See MV Transportation, Inc., 368 NLRB No. 66; Columbia College Chicago, 368 NLRB No. 86, slip op. at 1 n.7 (2019) (acknowledging that the Board would need to consider the applicability of the contract coverage standard to effects bargaining in a future appropriate case); Columbia College Chicago, 363 NLRB No. 154, slip op. at 3-4 (2016) (rejecting contract coverage standard and finding no waiver as to effects bargaining), enforcement denied, 847 F.3d 57 (7th Cir. 2017). Thus, under extant law, the “clear and unmistakable waiver” standard—and not the “contract coverage” standard—is the appropriate analytical framework for assessing whether there has been an 8(a)(5) violation for failure to engage in effects bargaining.

Under extant law, the Respondent also violated the Act by failing and refusing to bargain over the effects of its changes to the flex time schedule. As will be more fully discussed below, the evidence fails to establish that the Union clearly and unmistakably waived its right to bargain about the effects of such changes.

In Good Samaritan Hospital, 335 NLRB 901 (2001), the Board held that even if a
collective-bargaining agreement gives an Respondent the right to make a decision on a particular issue, if the agreement is silent as to the effects of that decision, the Respondent must agree to bargain with its union over those effects. *Id.* at 902. In the present case, it is clear that there is no language regarding the decision to change much less the effects of this decision to change the salaried employees flex time schedule.

Likewise, the Board announced that the union must have waived its right to bargain over the effects in the same clear and unmistakable terms it requires for a waiver to bargain over the decision itself. See *Id.* The Board developed this approach to contract interpretation by analogy from a case in a different context. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–82, 101 S. Ct. 2573, 69 L.Ed.2d 318 (1981), the Supreme Court held that when an Respondent is authorized by the National Labor Relations Act to make a certain decision without bargaining with its union, it still may be obligated to bargain over the effects of that decision. Here, the record shows that not only did the Respondent fail to bargain over the decision but there was no evidence presented to show that the union waived its right to bargain over the effects either. Rather, after learning from unit members that the Respondent was changing the flex start times, in its letter dated December 8th, the Union promptly informed the Respondent that it wanted an opportunity to bargain over the decision and effects of that decision. Here, the Union did not waive its right to bargain, and immediately and clearly objected to the Respondent’s decision to make the change and its failure to bargain over the effects of this decision. It was the Respondent who refused to engage in any bargaining over their decision and/or effects of its decision to change the flex time schedule. See, e.g., *Rochester Gas & Electric*, 355 NLRB 507 (2010) (full citation omitted) (finding the Respondent unlawfully refused to bargain over the effects of its decision to allow employees to take company vehicles home from work); *Long Island Day Care Services*, 303 NLRB 112, 117 (1991) (union did not waive right to bargain over discretionary aspects of COLA where the Employer failed to provide timely notice and presented decision as a fait accompli).
D. IT IS APPROPRIATE TO OVERRULE MV TRANSPORTATION, INC. AND RETURN TO THE “CLEAR AND UNMISTAKABLE WAIVER” STANDARD

Counsel for the General Counsel respectfully maintains that *MV Transportation* should appropriately be overruled and the standard under which analysis of an employer’s bargaining obligation regarding anticipated changes to mandatory subjects of bargaining return to the long-established “clear and unmistakable waiver” standard. Abandoning the 70-year-old, familiar, and well-entrenched “clear and unmistakable waiver” doctrine in favor of the contract-coverage standard set forth in *MV Transportation* arguably has given employers wide berth to make unilateral changes in represented employees’ terms and conditions of employment without first bargaining with the union in an essentially unrestricted manner. Since, under the contract-coverage standard, there is no requirement that the agreement specifically mention, refer to, or otherwise address an employer’s proposed action, employers may well gain broad power to act unilaterally to change employees’ terms and conditions of employment based on unspecific language in the collective-bargaining agreement. Such unilateral changes would result in a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as would a flat refusal. In that regard, in charging the Board to administer the Act, Congress did not intend to discourage collective bargaining. Rather, explicit in the Act is Congress’ understanding that fostering the practice and procedure of collective bargaining is essential to the goal of industrial stability. Because adoption of the “contract coverage” standard set forth in *MV Transportation* actually discourages negotiation, it must properly be overruled.

E. NO EVIDENCE THAT THE UNION CLEARLY AND UNMISTAKABLY WAIVED ITS RIGHT TO BARGAIN EITHER RESPONDENT’S DECISION OR EFFECTS OF THE DECISION TO CHANGE SALARIED UNIT FLEX TIME SCHEDULES

In the instant case, the evidence fails to demonstrate that the Union clearly and unmistakably waived its right to bargain either the decision or effects of the Respondent’s decision to change the salaried unit’s flex schedules. A “clear and unmistakable” waiver must be specific,
“or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.” Allison Corp., 330 NLRB 1363, 1365 (2000). That is not the case here. As Respondent through Robbins testified, the Union was never informed of the Respondent’s decision to make the change in the salaried employees flex time schedule. (Tr. 95) In Weyerhauser NR Co., 366 NLRB No. 169, slip op. at 3 (2018), the Board explained the clear and unmistakable waiver doctrine as follows: Waiver is not lightly inferred and must be “clear and unmistakable.” See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983); Georgia Power Co., 325 NLRB 420, 420-421 (1998), enfd. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061 (1999). The party asserting waiver must establish that the parties “unequivocally and specifically express[ed] their mutual intention to permit unilateral Respondent action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” Provena St. Joseph Medical Center, 350 NLRB 808, 811 (2007). Such a showing may be based on an express provision in the contract, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two. See, e.g., American Diamond Tool, 306 NLRB 570, 570 (1992); Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (2d Cir. 1982), enfg. 259 NLRB 225 (1981). In addition, the party asserting waiver bears the burden of proof. See TCI of New York, 301 NLRB 822, 824 (1991).

i. Provision in the Contract

In Graymont PA, Inc., 364 NLRB No. 37 (2016), the Board found that despite management-rights clause granting the Respondent the “sole and exclusive rights to manage; to direct its employees; . . . to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees,” that the union did not waive bargaining over the Respondent's changes to certain work rules and to its attendance and progressive discipline policies.
Further, in *Tramont Mfg., LLC* 365 NLRB No. 59 (2017), the Board, adhered to the “clear and unmistakable” waiver standard and held that the Employer had not demonstrated clear and unmistakable waiver because its employee handbook was not sufficiently specific about the effects of any layoffs. Similarly, in the present case the management rights clause the Respondent relies upon is not sufficiently specific about the flex start and end times. The present case fails to meet this standard, as the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and the party alleged to have waived its rights consciously yielded its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000). The Board looks to the exact wording of the contract provision at issue to determine whether waiver exists. *Id.* at 1364. The Board held in the *Allison* case that the handbook provisions did not address the effects on employees when a layoff occurs. The handbook provisions only identified how employees are selected for layoff. It was silent about notification regarding layoffs and the effects of the layoffs. For example, the layoff provisions did not address what were the effects of the layoff upon the remaining employees. See generally *KGTV*, 355 NLRB 1283, 1286-1287 (2010). Nothing reflects that the Union waived its right to be notified or bargain effects before Respondent laid off employees.

Again, in the present case, there is no provision in the parties’ contract that specifically covers changes to the flex time schedule for the salaried employees. In fact, there is no evidence that the flex time schedule for the salaried employees was ever discussed much less that any changes to such a provision would be waived by the Union. (Tr. 102) While the management rights clause states that the Respondent determines the schedules of work, the contract is silent as it relates to the Respondent’s decision to changes in the salaried employees flex start and end time schedule. Similarly, nothing in the contract reflects that the Union waived its right to be notified or bargain over the effects of this change in start and end times.

Further while the Board in *The Academy of Magical Arts, Inc.*, 365 NLRB No. 101, slip op.
at 1, fn. 2 (2017), adopted the judge's finding that the union waived its right to bargain over the shortening of shifts and the creation of new shifts with the remaining hours, by agreeing to contract language authorizing the Employer “to schedule and change working hours, shifts and days off”, that case is distinguishable from this case. In the Academy case, the parties’ Master Agreement, entitled “Scheduling and Reporting,” which read: “changes to Shifts: The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer-at any time, so long as it has notified the Musicians at least 24 hours prior to the change” allowed the Employer to make the changes in shortening employees shifts. In the present case, no such language exists. Rather, the contract is silent on the Respondent’s decision to make changes in the salaried employees flex time schedules. Hence, there is no evidence in any provisions to the contract that the Union waived its right to bargain over the Respondent’s decision to make these changes.

   ii. **Conduct of the parties**

   a. Bargaining history

   In Graymont, the Board held that while “[w]aiver of a statutory right may be evidenced by bargaining history, the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.” Johnson-Bateman Co., 295 NLRB 180, 185 (1989). Here, the record shows that there is no evidence that the parties discussed the flex time schedule for salaried employees during negotiations. While it appears that a different collective-bargaining agreement for a different bargaining unit comprised of the Respondent’s Hourly employees included provision addressing flex start times between the hours of 6:00 am to 10:00 am for that distinct unit, similar language was never included in the Salaried employees’ contract and the contract was silent on the flex time schedule for the salaried employees. (Tr. 93-94). In addition, during the negotiations for the salaried employees’ contract, flex times for the salaried employees
did not come up between the parties. (Tr. 21, 32, 62, 102).

The *Graymont* Board further cited *Provena St. Joseph Medical Center*, 350 NLRB 808, 813 (2007), which held that the waiver standard ... effectively requires the parties to focus on particular subjects over which the Employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won--in clear and unmistakable language--the Employer's right to take future unilateral action should be apparent to all concerned.

In this case, Respondent knew how to draft the flex time schedule language for the hourly employees but failed to address this in the salaried employees’ contract. (Tr. 73, 88, 90). In effect, the only language addressing scheduling appears to be covered in the contract management’s right’s clause which remained unchanged. Here, the record shows that just prior to negotiating the salaried employees’ contract, the parties had just come out of a strike for the same issue regarding changes to the flex start times for the hourly employees. (Tr. 20, 76). Yet, the Respondent gave no indication this was a concern they had for the salaried employees. Here, there is no evidence that the parties discussed these subjects during negotiations, let alone “fully discussed and consciously explored” them during bargaining over the current contract language.

b. Action or inaction

In the present case, the Union’s response to the Respondent’s unlawful unilateral action clearly demonstrated there was no waiver by inaction on the part of the Union. As noted, immediately upon learning from a bargaining unit member that Respondent had decided to change the salaried employees flex time schedule, Crowley contacted the Respondent and demanded bargaining over the decision to make the change and the effects of that change. (J 2, Tr. 40, 48, 98). This case is similar to the *Graymont* case, in which the Board found that the Union did make an effective demand to bargain when the Union was presented for the first time with news of a rule
changes and asked to meet to discuss the work rules. Likewise, in Armour & Co., 280 NLRB 824, 828 (1986), the same day that the work rules were presented to the Union (after months of secret preparation by the Respondent), the Union told the Respondent that it wanted to meet to discuss the work rules (“want to discuss your position” is a request to bargain). The Board found that this was a request for bargaining.

The record shows that in a December 15 email, Lee responded to Crowley’s question about whether the work hours change applied to all salaried employees and confirmed that it did in fact apply to all employees. Hence, Crowley’s request for additional clarification as to whom the change applied to coupled with Lee’s December 15 email response further supports the theory that the Union did not waive any rights to bargain the Respondent’s decision to change the salaried employees flex time schedule or the effects of this change. The record shows that in the parties last conversation, they were still attempting to get clarification as to who would be affected by the Respondent’s unilateral change.

Additionally, Respondent’s email announcing it would be implementing the change to the salaried employees flex time schedule in less than a month, on January 1, 2021, is an example of a fait accompli, a finding that would preclude a finding that the Union waived its right to bargain because a “Union cannot be held to have waived bargaining by failing to pursue negotiations over changes that were presented as a fait accompli.” Tesoro Refining & Marketing Co., 360 NLRB No. 46, slip op. at 3 fn. 10 (2014) (“the Employer repeatedly told the Union that it did not have to bargain concerning the benefit changes, that it had the right to make those changes unilaterally, and that the changes would be implemented on a date certain. In this case, while the Union did make their demand to bargain over the decision to make the change and effects of the change through the December 7 letter and in Crowley’s discussions with Lee, Respondent’s decision to make these changes were presented as a fait accompli to the Union. (Tr. 53).

c. Past practice
In *Weyerhaeuser NR Co.*, 366 NLRB No. 169 (2018) citing to *Prime Healthcare Services*, 357 NLRB 653, 660 (2011) the Board held that an Employer cannot change established past practices without notifying and offering to bargain with the union. The record shows that Respondent had never placed any restrictions in the salaried employees flex time schedules in the past. Crowley and Robbins testified that the salaried employees had been given leeway in terms of their hours due to the nature of their job starting in 2000. (Tr. 73, 90, 94).

The *Prime* Board further held that an Employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). As such, these past practices cannot be changed without offering the unit employees' collective-bargaining representative notice and an opportunity to bargain. Id. See also *Granite City Steele Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distrib. of Delaware*, 334 NLRB 409, 411 (2001). Similarly, in this case there is no evidence in the record that the Respondent had ever deviated from its flex time schedule as it applied to the salaried employees. Thus, based on the parties’ past practice, there is no evidence that the Union could have waived their right to bargain over the change in flex time schedules for the salaried employees.

IV. CONCLUSION AND REQUESTED REMEDY

The record evidence as set forth and argued above amply supports all the allegations of the First Amended Complaint, as amended, and requires a finding that Respondent violated Sections 8(a)(1) and (5) of the Act in the manner alleged. Respondent should be ordered to remedy the unfair labor practices alleged, and a recommended order\(^6\) should issue requiring Respondent to

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\(^6\) A draft recommended Order is attached as Appendix A.
cease and desist from engaging in the conduct alleged in paragraphs VI (c) and (e) of the First Amended Complaint, as amended, or in any other manner failing and refusing to bargain collectively and in good faith with the Union as the exclusive bargaining representative of the Unit. Further, as discussed above, since the Respondent was not privileged to make the change without first bargaining with the Union, the facts and circumstances presented in this case make it appropriate to argue for the return to the clear and unmistakable waiver standard and the Board should overrule MV Transportation.

Dated at Chicago, Illinois, this 6th day of June, 2022.

Respectfully submitted,

/s/ Elizabeth S. Cortez
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**Appendix A**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

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

**WE WILL NOT**, upon request, refuse to bargain in good faith with the Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters (Teamsters, Local 743), as the exclusive collective-bargaining representative of our employees in the following appropriate unit:


**WE WILL NOT** refuse to meet and bargain in good faith with your Union regarding our decision to change the flexible starting times for salaried unit employees or other changes in wages, hours and working conditions before putting such changes into effect.

**WE WILL NOT** refuse to meet and bargain in good faith with your Union regarding the effects of any proposed changes to flexible starting times for salaried unit employees or other changes in wages, hours and working conditions before putting such changes into effect.

**WE WILL**, upon request, bargain in good faith with Teamsters, Local 743 as the exclusive collective-bargaining representative of our unit employees regarding our decision to make any
changes and further bargain over the effects of any proposed changes to flexible starting times for salaried unit employees.

**WE WILL**, if requested by the Union, rescind any or all changes to flexible starting times for employees in the salaried bargaining unit that we made without bargaining with the Union.

**WE WILL** pay you for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining with the Union.

Central States, Southeast and Southwest Areas
Pension Fund

(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. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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 or you may call the Board’s toll-free number 1-844-762-NLRB (1-844-762-6572). Hearing impaired callers who wish to speak to an Agency representative should contact the Federal Relay Service (link is external) by visiting its website at https://www.federalrelay.us/tty (link is external), calling one of its toll free numbers and asking its Communications Assistant to call our toll free number at 1-844-762-NLRB.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Counsel for the General Counsel’s Brief to the Administrative Law Judge was electronically filed with the Division of Judges of the National Labor Relations Board on this 6th day of June 2022, and true and correct copies of the document have been served on the parties in the manner indicated below on the same date.

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