

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

EL PASO DISPOSAL, L.P.

and

**Cases 28-CA-21654
28-CA-21666
28-CA-21672
28-CA-21677
28-CA-21681
28-CA-21817**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 351, AFL-CIO**

PAUL URBINA

Petitioner

and

Case 28-RD-969

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 351, AFL-CIO**

Union

GENERAL COUNSEL'S ANSWERING BRIEF

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TABLE OF CONTENTS

I.	PROCEDURAL HISTORY.....	2
II.	QUESTIONS INVOLVED.....	3
III.	BACKGROUND	4
	A. Respondent’s Operations	4
	B. The Union’s Organizing Drive and its Request to Bargain.....	4
IV.	ARGUMENT.....	6
	A. The Facts Found by the ALJ and Established by the Record	6
	1. Respondent’s Bargaining Team and Scheduling of Meetings	8
	2. The Parties’ Bargaining Sessions.....	9
	3. The Last, Best, and Final Offer.....	16
	4. Union’s Reply to the Last, Best, and Final Offer	17
	5. The Parties’ Position on Dues Check-off.....	18
	B. Legal Analysis and Argument.	19
	1. General Principals.....	19
	2. Respondent’s Failure to Designate an Agent with Authority to Bargain is Evidence of Bad Faith.....	20
	3. Respondent’s Refusal To Bargain And Accede To A Dues Check-Off Provision.....	23
	Evidences Bad Faith	
	4. Respondent’s Acted in Bad Faith by Prematurely Announcing and Presenting its Last, Best, and Final Offer.....	24
	5. Respondent’s Delay, Dilatory and Evasive Tactics, and its Failure to Bargain at Reasonable Times Violated the Act.....	25
	6. Conduct Away from the Table.....	33
	C. The ALJ Properly Held the Strike was Over Unfair Labor Practices and Respondent Violated Section 8(a)(3) by not recalling the Strikers.....	34
	1. Facts	34
	2. Legal Analysis and Argument	38
	D. The ALJ Properly Found Respondent’s Requirement that Employees Sign a Preferential Rehire List Violated Section 8(a)(3).....	41
	E. The ALJ Properly Found that Respondent’s Change in the Manner in Which it Tendered Wages to Employees Violated Section 8(a)(3).....	42

F.	The ALJ Properly Concluded that Respondent Violated Section 8(a)(3) by Preventing Jose Macias from Returning to Work.....	43
G.	The ALJ Properly Concluded that Respondent’s Actions Towards Employee Juan Castillo Violated Section 8(a)(1) and (3).	45
H.	The ALJ Properly Found Multiple Section 8(a)(1) Violations.	46
1.	The ALJ Properly Found that Dupreau’s Statement at the October 11 Meeting Violated Section 8(a)(1) of the Act.	46
2.	The ALJ Properly Found that Respondent’s Statements at the November 14 Drivers Meeting Violated Section 8(a)(1).	51
3.	Respondent Violated Section 8(a)(1) by Blaming the Union for Employees Not Receiving Their Annual Wage Increase	56
4.	Olivas’ Threats to Employees that They Would be Fired if They Went on Strike Violated Section 8(a)(1) of the Act.....	58
5.	Respondent Violated Section 8(a)(1) of the Act by Photographing Picketing Employees	59
6.	Respondent Violated Section 8(a)(1) by Calling the Police on Employees Engaged in Peaceful Picketing.....	59
I.	The ALJ Properly Found that Respondent Made Unilateral Changes.....	60
1.	Unilateral Changes Regarding an Employee’s Job Duties and Method of Pay Violated Section 8(a)(5).	61
2.	Unilateral Change of Sick Leave Rules Violated Section 8(a)(5).	63
3.	Unilateral Change of Longevity Bonus Violated Section 8(a)(5).	64
J.	Respondent Failed to Provide the Union With Relevant Information.	65
1.	November 13 Information Request For Employee Names.....	65
2.	November 21 Request for Names of Strike Replacements.....	67
VI.	CONCLUSION.....	68

TABLE OF AUTHORITIES

<i>"M" System, Inc.</i> , 129 NLRB 527 (1960)	25
<i>Allentown Mack v. NLRB</i> , 522 US 359 (1998)	30
<i>Aluminum Casting & Engineering Co., Inc.</i> , 328 NLRB 8 (1999), enfd. in pertinent part 230 F.3d 286 (7th Cir. 2000)	57
<i>Armored Transport, Inc.</i> , 339 NLRB 374 (2003)	56
<i>Barkus Bakery</i> , 282 NLRB 351 (1986)	59
<i>Beverly California Corp.</i> , 326 NLRB 153 (1998)	50
<i>Brownsville Garment Co.</i> 298 NLRB 507 (1990)	61
<i>Calex Corp.</i> , 322 NLRB 977 (1977)	26, 29
<i>California Gas Transport Inc.</i> , 347 NLRB 1314 (2006)	61
<i>Carpenters Local 1780</i> , 244 NLRB 277 (1979)	19, 20
<i>Celtic General Contractors, Inc.</i> , 341 NLRB 862 (2004)	43
<i>Champ Corp.</i> , 291 NLRB 803 (1988)	41
<i>Chartwells, Compass Group, USA, Inc.</i> , 342 NLRB 1155 (2004)	50
<i>Child Development Council of Northeastern Pennsylvania</i> , 316 NLRB 1145 n. 5 (1995)	37
<i>CJC Holdings</i> , 320 NLRB 1041 (1996)	22
<i>Domsey Trading Corp.</i> , 310 NLRB 777 (1993)	38
<i>East Side Shopper, Inc.</i> , 204 NLRB 841 (1973)	23, 29
<i>Enertech Elec.</i> , 309 NLRB 896 (1992)	32
<i>Enloe Medical Center</i> , 346 NLRB 854 (2006)	20
<i>Exelon Generation Co.</i> , 347 NLRB 815 (2006)	55
<i>Flambeau Airmold Corp.</i> , 334 NLRB 165 (2001)	63
<i>Flexsteel Industries</i> , 316 NLRB 745 (1995)	57, 58
<i>Frauehauf Trailer Services, Inc.</i> , 335 NLRB 393 (2001)	25
<i>Goya Foods of Florida</i> , 347 NLRB 1118 (2006)	61
<i>Great American</i> , 322 NLRB 17 (1996)	60
<i>Grinnell Fire Protection Systems v. NLRB</i> , 272 f.3D 1028 (8th Cir. 2001)	67
<i>Grinnell Fire Protection Systems Co.</i> , 332 NLRB at 1257	64
<i>Grosvenor Orlando Assoc.</i> , 336 NLRB 613 (2001)	32
<i>Hardesty Co., Inc.</i> , 336 NLRB 258 (2001)	18, 19, 30, 32
<i>Hercules Drawn Steel Corp.</i> , 352 NLRB 53 (2008)	58
<i>Insta-Print, Inc.</i> , 343 NLRB 368 (2004)	58
<i>J. H. Rutter Rex Manufacturing Company, Inc.</i> , 86 NLRB 470 (1949)	25
<i>J.P. Stevens & Co., Inc.</i> , 239 NLRB 738 (1978)	27
<i>John S. Applegate Witness Preparation</i> , 68 Tex. L. Rev. 277 (1989)	54, 57
<i>Kendall College of Art & Design</i> , 288 NLRB 1205 (1988)	63
<i>Kentucky Fried Chicken</i> , 341 NLRB 69 (1979)	57
<i>Laidlaw Corporation</i> , 171 NLRB 1366 (1968)	40
<i>Langston Cos.</i> , 304 NLRB 1022 (1991)	22
<i>Larand Leisureslies, Inc. v. NLRB</i> , 523 F.2d 814 (6th Cir. 1975)	37
<i>Laser Tool, Inc.</i> , 320 NLRB 105 (1995)	55
<i>Laurel Baye</i> , 352 NLRB 179 (2008)	60
<i>Lee Lumber & Building Material</i> , 334 NLRB 407 n. 7 (2001)	26
<i>Loehmann's Plaza</i> , 316 NLRB 109 (1995)	59

<i>Long Island Day Care Services</i> , 303 NLRB 112 (1991)	65
<i>Longhorn Machine Works</i> , 205 NLRB 685 (1973)	64
<i>Maple Grove Health Care Center</i> , 330 NLRB 775 (2000)	50
<i>Mastro Plastics Corp. v. NLRB</i> , 350 U.S. 270 (1956)	37
<i>McCormick on Evidence</i> § 272 (3d ed. 1984)	31
<i>Metropolitan Edison Co. v. NLRB</i> , 460 US 693 (1983)	48
<i>Milgo Indus., Inc.</i> , 229 NLRB 25 (1977)	25, 26
<i>Mississippi Steel Corp.</i> , 169 NLRB 647 (1968)	24
<i>Monroe Feed Store</i> , 112 NLRB 1336 (1955)	20, 24, 29, 61
<i>NLRB v. Cast Optics Corp.</i> , 458 F.2d 398 (3d Cir. 1972)	37
<i>NLRB v. J.P. Stevens & Co.</i> , 538 F.2d 1152 (4th Cir. 1976)	22, 27
<i>NLRB v. Massachusetts Mach. & Stamping, Inc.</i> , 578 F.2d 15	37
<i>NLRB v. McKay Radio & Telegraph Co.</i> , 304 U.S. 333 (1938)	57
<i>NLRB v. Otis Hosp.</i> , 545 F.2d 252, 256 (1st Cir. 1979)	54, 58
<i>Noel Corp.</i> , 315 NLRB 905 (1994)	57
<i>North Hills Office Services, Inc.</i> , 344 NLRB 1093 (2005)	55
<i>Orit Corp.</i> , 294 NLRB 695 (1989)	38
<i>Ormet Aluminum Mill Products</i> , 335 NLRB 788 (2001)	64
<i>Owens-Corning Fiberglass v. NLRB</i> , 407 F.2d 1357 (4 th Cir. 1969)	20, 21
<i>Page Litho, Inc.</i> , 311 NLRB 881(1993)	38, 66
<i>Peerless Pump Co.</i> , 345 NLRB 371 (2005)	40
<i>People Care, Inc.</i> , 327 NLRB 814 (1999)	26, 29, 30, 65
<i>Peter Vitalie Co.</i> , 310 NLRB 865 (1993)	55
<i>Pirelli Cable Corp.</i> , 331 NLRB 1538 (2000)	41
<i>Post Tension of Nevada</i> , 352 NLRB 1153 (2008)	38, 39
<i>Prudential Insurance Co.</i> , 275 NLRB 208 (1985)	48
<i>Quality Motels of Colorado, Inc.</i> , 189 NLRB 332 (1971)	25
<i>R & H Coal Co.</i> , 309 NLRB 28 (1992)	37, 38
<i>Reed & Prince Mfg. Co.</i> , 96 NLRB 850 (1951)	24
<i>Regency Service Carts</i> , 345 NLRB at 671 (2005)	18, 19, 25
<i>S & I Transp., Inc.</i> 311 NLRB 1388 n. 1 (1993)	62
<i>Sivalls, Inc.</i> , 307 NLRB 986 at n. 46 (1992)	22, 41
<i>Sivalls, Inc.</i> , 307 NLRB at 1004	41
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)	54, 57, 58
<i>The Singer Co.</i> , 199 NLRB 1195 n. 1 (1972) enfd. 480 F.2d 269 (10th Cir. 1973)	49
<i>Underwriters Laboratories, Inc. v. NLRB</i> , 147 F.3d 1048 (9 th Cir. 1998)	30, 31
<i>Unifirst Corp.</i> , 335 NLRB 707 (2001)	54
<i>US v. Hines</i> , 470 F.2d 225 (3d Cir. 1972)	31
<i>Viracon</i> , 256 NLRB 245 (1981)	49
<i>West Maul Resorts</i> , 340 NLRB 846 (2003)	43

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GENERAL COUNSEL'S ANSWERING BRIEF

In this first-contract bargaining case, Respondent's Exceptions to the Decision of Administrative Law Judge Burton Litvak (ALJD) are without merit and not supported by the evidence.¹ The ALJ's factual and legal conclusions that Respondent violated by engaged in bad-faith bargaining in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act) are fully supported by the record. Similarly, the record supports the ALJ's conclusion that Respondent's employees engaged in an unfair labor practice strike on November 21, 2007, and

¹ El Paso Disposal, L.P. is referred to as Respondent. The International Union of Operating Engineers, Local 351, AFL-CIO is referred to as Union. References to the Transcript are designated as (Tr.) with the appropriate page citations. References to the General Counsel and Respondent Exhibits are referred to as (GC.) and (R.) respectively, with the appropriate number(s) for those exhibits. References to the ALJD show the applicable page number.

that Respondent violated Section 8(a)(1) and (3) by refusing to reinstate the strikers upon their unconditional offer to return to work two weeks later on December 5.² Finally, the record also supports the ALJ's remaining findings that Respondent further violated Sections 8(a)(1), (3), and (5) as set forth in the ALJD. Based upon these findings, the ALJ properly concluded that a causal connection existed between Respondent's unfair labor practices and the decertification petition filed by Paul Urbina on December 20, and correctly recommended that the decertification petition be dismissed. Accordingly, the Board should adopt the ALJ's findings of fact, conclusions of law, and recommended order as they relate to Respondent's Exceptions.

I. PROCEDURAL HISTORY

The hearing in this matter was conducted before ALJ Burton Litvak between May 28 and July 17, 2008, for a total of nine days, in El Paso, Texas, based upon the allegations contained in the Second Consolidated Complaint (Complaint) as amended at hearing. (GC. 112; ALJD at 2) The ALJ issued his decision on April 27, 2009, properly finding that rather than honoring its bargaining obligation with the Union over the newly-certified units, Respondent engaged in a campaign of unfair labor practices intended to thwart its employees' rights to organize, including: (a) engaging in bad-faith bargaining (ALJD at 19-26); (b) refusing to reinstate unfair labor practice strikers (ALJD at 57); (c) instructing former strikers to report to its offices to sign a preferential recall list (ALJD at 59-60 n. 92); (d) discharging an employee (ALJD at 63-64); (e) permanently replacing an employee who was on workers compensation during the strike (ALJD at 68-69); (f) mailing final pre-strike paychecks to strikers (ALJD at 67); (g) blaming the Union for the lack of a wage increase; (ALJD at 33-34); (h) interrogating employees (ALJD at 35-38); (i) soliciting grievances; (ALJD at 38-39); (j) telling employees support for the union was futile (ALJD at 44); (k) threatening employees with regressive bargaining (ALJD at 45); (l) threatening

² All dates are in 2007, unless otherwise noted.

employees with discharge (ALJD at 44-45, 47, 50); (m) calling the police on picketers; (ALJD at 65-66); taking photographs of picketers (ALJD at 65); (n) making unilateral changes (ALJD at 26-31); (o) dealing directly with employees (ALJD at 45); and (p) failing to provide the Union with information (ALJD at 32-33, 60-61). The ALJ also found a causal connection between Respondent's numerous unfair labor practices and the decertification petition filed on December 20, and recommended that the petition be dismissed. (ALJD at 69-71)

On June 30, 2009, Respondent filed with the Board 115 Exceptions to the ALJD and a supporting brief. In its Exceptions Respondent generally excepts to all of the findings of the ALJ enumerated above, along with some of his various credibility determinations.

II. QUESTIONS INVOLVED

Respondent's Exceptions ask the Board to determine whether ALJ erred in finding that

1. Respondent Violated Section 8(a)(1) of the Act by interrogating employees, soliciting grievances, blaming the Union for lack of a wage increase, threatening employees with discharge, telling employees that supporting the Union would be futile, photographing and calling the police on picketers;
2. Respondent violated Section 8(a)(3) of the Act by refusing to reinstate all the strikers, who were engaged in an unfair labor practice strike, upon their offer to return to work, requiring strikers to report to the plant to sign a preferential recall list, changing the manner in which it tendered wages to employees, discharging an employee and failing to reinstate another worker to employee status; and
3. Respondent violated Section 8(a)(1) and (5) of the Act by bargaining in bad faith, failing to provide the Union with information, making unilateral changes, and dealing directly with employees.

III. BACKGROUND

A. Respondent's Operations

Respondent is a garbage collection and disposal company based in El Paso, Texas, and is a wholly-owned subsidiary of Waste Connections, Inc., a publicly traded company. (Tr. 123,

245, 1068) Waste Connections owns between 120-150 garbage disposal companies throughout the country and manages them on a regional basis. (Tr. 1068; ALJD at 5)

George Wayne, Southern Division Vice President, was the Waste Connections official in charge of Respondent, overseeing the managers of other Waste Connection facilities in Texas, New Mexico, and Arizona. (Tr. 84, 235-36; ALJD at 5-6) Wayne reported directly to Gene Dupreau, Western Regional Vice President for Waste Connections, who oversaw operations in California, Texas, New Mexico and Wyoming. (Tr. 1041, 1068, 1072) Dupreau had complete responsibility for 32 facilities, including Respondent. (Tr. 1041; ALJD at 5-6)

Armando Lopez, Respondent's Operations Manager, oversees the day-to-day functions of the drivers, and the compactor and container maintenance departments. (Tr. 458-59) In late 2006, Lopez received the additional responsibilities of overseeing Respondent's welders, mechanics, and truck washers in the fleet maintenance department. (Tr. 1307-08) Mike Olivas is Respondent's maintenance manager, with front-line authority over the fleet maintenance department, and reports directly to either Lopez or Wayne. (Tr. 921, 1308) Respondent's head of Human Resources is Gracie Silva. (Tr. 450) Dupreau, Wayne, Lopez, Olivas, and Silva are all admitted supervisors and agents of Respondent. (GC. 1(af) ¶ 4(a); ALJD at 5-6)

B. The Union's Organizing Drive and its Request to Bargain.

The Union's Business Agent Victor Aguirre oversaw its organizing drive, having filed separate petitions for two units of Respondent's employees: a Maintenance Unit and a Drivers Unit. (Tr. 493; GC. 8-11) On September 19, 2006, the Union won the election for the Maintenance Unit, which included Respondent's mechanics, welders, and truck washers, and was certified on September 28, 2006. (GC. 8-9) After an election victory for the Drivers Unit on September 27, 2006, the Union was certified on October 12, 2006. (Tr. 10-11; ALJD at 6-7)

On October 2, 2006, the Union sent letters to George Wayne demanding Respondent bargain for the Maintenance Unit.³ (GC. 91). Notwithstanding the Union's request, bargaining did not commence until January 30. From January 30 until November 13, when Respondent presented the Union with its last, best, and final offer, the parties held 14 bargaining sessions of various lengths. (GC. 69) On November 21, the Union went out on what it called an unfair labor practice strike. (Tr. 536, 841) In all, 28 employees from the Drivers Unit, and 27 from the Maintenance Unit, joined the strike. (GC. 3-4; Tr. 917; ALJD at 6-7)

Respondent started hiring replacement employees on November 21, and also brought in temporary transfers from its sister companies. (Tr. 986-87) The strike was short-lived, and on December 4, the Union made an unconditional offer to return to work on behalf of the striking employees. (GC. 48) The next day, Respondent informed the Union that employees had engaged in an economic strike, that all of strikers had been permanently replaced, and that no vacancies existed. (GC. 49) As of the date of the hearing, only three drivers, two mechanics, and one truck washer had been recalled. (Tr. 473-74; ALJD at 55) On December 20, employee Paul Urbina filed a petition to decertify the Drivers Unit. (GC. 1(i); ALJD at 69)

IV. ARGUMENT

A. The Facts Found by the ALJ and Established by the Record

After the Union was certified in the Maintenance Unit, Aguirre sent two letters to Wayne: one demanding Respondent bargain for the Maintenance Unit, and another making various information requests. (GC. 90-91; Tr. 493-95; ALJD, at 6) The Union's requests were forwarded to Darrell Chambliss, Waste Connections' Chief Operating Officer, who replied on October 12, 2006, that Respondent's officials were reviewing their calendars to determine their

³ The Union did not make a bargaining demand for the Drivers Unit. However, in an initial meeting, Aguirre testified that Respondent requested the parties negotiate over the Maintenance Unit first, and then the Drivers Unit, and the bargaining proceeding accordingly. (Tr. 501-502)

availability for negotiations and asking about potential meeting locations, suggesting the Union's offices. (GC. 92; ALJD, at 6) Chambliss also stated that Respondent would provide the information requested by the Union as soon as practical. *Id.* On October 16, 2006, Aguirre replied, offering the Union's offices for bargaining. (GC. 93)

On November 1, 2006, having heard no reply from Respondent, Aguirre e-mailed Chambliss, inquiring about dates for negotiations and the status of the information request. (GC. 94) Chambliss replied on November 5, that Respondent was interviewing attorneys to represent it in bargaining, as its previous counsel had accepted a judicial appointment. (GC. 94; ALJD, at 6) Chambliss stated that the new attorney, once selected, would contact the Union to discuss bargaining and propose dates. (GC. 94) Finally, Chambliss professed surprise that the Union had not received the information requested, and stated that he would overnight it. (GC. 94)

The Union received the information from Respondent, but believed that some information was missing. (Tr. 633; GC. 100) On November 11, 2006, Aguirre sent Chambliss another e-mail, asking for further information and once again inquiring as to dates for collective bargaining. (GC. 100; ALJD, at 6-7) Chambliss replied that Respondent was still interviewing attorneys; once the process was completed, the new attorney would contact the Union and discuss possible meeting dates. *Id.*

Chambliss finally retained Austin-based attorney Mark Flora to serve as Respondent's counsel for purposes of bargaining. (Tr. 77-79, 207; ALJD, at 7) On November 28, 2006, Flora e-mailed Aguirre, introducing himself and asking Aguirre to contact him to discuss scheduling. (GC. 26; ALJD, at 7) The next day Aguirre replied, indicating that he was available to meet for bargaining on December 8, 11-15, and 18-21. (GC. 27) Aguirre also informed Flora that he would be in San Antonio during mid-December, and asked if Flora wanted to meet. (GC. 28;

ALJD, at 7) On December 1, 2006, Flora replied that he had a trial scheduled in December, and was planning to take a number of vacation days the last two weeks of the month. Flora proposed that the parties simply have an introductory meeting in mid-December, at which time they could compare calendars and select tentative negotiating dates in January 2007. (GC. 28; ALJD, at 7)

Flora met with Aguirre and Juan De La Torre, who also worked for the Union, on December 14, 2006, in San Antonio, where the parties introduced themselves and discussed their backgrounds. (Tr. 85, 500-501; ALJD, at p. 7) Aguirre testified that during this meeting, Flora stated that his client desired to bargain about the Maintenance Unit first, and the parties then went on to discuss their general availability. (Tr. 85, 501-502; ALJD, p. 7-8)

The first bargaining session occurred on January 30, at 1:00 p.m.⁴ (GC. 69 p.1; GC. 34; ALJD at p. 8) Before this meeting, on January 22, Flora e-mailed Aguirre advising him that he envisioned the first meeting would be a “meet and greet” where they would talk about format and scheduling. (GC. 34) Flora further told Aguirre that, if the Union had any bargaining proposals, they could begin discussing them if there was any time left. (GC. 34)

1. Respondent’s Bargaining Team and Scheduling of Meetings

Respondent’s bargaining committee consisted of Flora, Dupreau, and Wayne, with Flora serving as Respondent’s chief negotiator. (Tr. 77, 90, 149; ALJD, at 10) Unless he directed otherwise, only Flora spoke on behalf of Respondent during bargaining. (Tr. 149) However, despite being Respondent’s representative and chief negotiator, Flora did not have the authority to enter into final or tentative agreements with the Union. (Tr. 1071-73; ALJD at 8, 19-21) He could only do so after receiving permission from Dupreau or Wayne; in order to ratify any agreements reached by Flora, both Dupreau and Wayne needed to be present. (Tr. 1071-73;

⁴ The ALJ found that there was no record evidence as to why the parties were unable to schedule a negotiating meeting for earlier in January, and that the Union had attempted to schedule 10 days of bargaining in December 2006. *ALJD*, at p. 7-8, 8 n. 12.

ALJD at 8, 21) Dupreau specifically testified it was necessary for him to be at every bargaining session, and that Flora could not bargain without Dupreau present.⁵ (Tr. 1071)

Between January 30 and November 22, the date of the strike, the parties held 14 bargaining sessions. (GC. 5, 69; ALJD at 19) Dupreau testified that a typical session would start at 9:00 a.m., break for a 1 ½ hour lunch, and then end at about 3:00 or 4:00 p.m. (Tr. 1042-43; ALJD at 20) Because he lived in Fresno, California, Dupreau would fly to El Paso the day before a bargaining session, and the meetings needed to end in time for him to catch a 6:30 p.m. flight home. *Id.* Flora's schedule was also an issue, as he was flying back and forth from Austin. (Tr. 102; ALJD at 20) At most, the parties bargained 4 ½ to 5 ½ hours at each session.⁶

Frustrated with the inadequate number of bargaining sessions, and slow pace of bargaining, from the very first meeting, and on numerous occasions thereafter, the Union requested that Respondent set aside more dates for bargaining, work throughout the day, or schedule bargaining sessions on consecutive days. (GC. 38; 41, Tr. 508, 512, 519-20, 546-48; ALJD at 19) However, Respondent refused. (Tr. 508; ALJD at 19) Dupreau testified that the Union's "periodic" requests for more time were unreasonable because he had other obligations to live up to and "we're all busy folks." (Tr. 1071, 512; ALJD at 20) Similarly, Flora stated that, whenever the Union asked to schedule consecutive days of bargaining, he replied that this would be difficult because he, Wayne, and Dupreau had busy schedules. (Tr. 102, 143-44) As the Union expressed frustrations about the pace of bargaining at numerous meetings, and also informed Respondent that the workers were getting tired of the bargaining process, Respondent simply told the Union to "be patient" since bargaining for a first contract was a "difficult process." (Tr. 148, 519-20; ALJD 19-20)

⁵ Dupreau later testified that if it was very important that at least one other person (either himself or Wayne) be present with Flora to bargain with the Union. (Tr. 1073)

⁶ Aguirre testified that, of the various bargaining sessions with Respondent, only one lasted a full-day. (Tr. 511)

2. The Parties' Bargaining Sessions

January 30 Session. The first bargaining session on January 30 was short, starting at 1:15 p.m., and lasting only 2 hours. (GC. 69 p. 1-2; Tr. 94-95) The parties agreed to bargain over the non-economic proposals before discussing economics. (Tr. 94, 506-507) The Union had prepared a set of bargaining proposals, and presented them to Respondent after the initial introductions. (Tr. 506, 513; GC. 12) These consisted of 28 Articles, including a grievance clause without a backpay cap and a dues check-off clause. (GC. 12 p. 3-6) Respondent did not submit any bargaining proposals to the Union, nor did it offer any substantive response to the Union's initial proposals. (Tr. 100, 508, 512-13; GC. 5 p.1; GC. 69 p. 1-2)

February 13 Session. The parties next met again for bargaining on February 13, at 1:45 p.m. (GC. 69 p.3; Tr. 100) At this session, Respondent presented the Union with 10 proposed Articles.⁷ After the meeting had ended, Aguirre sent Flora an e-mail setting forth 35 days in March and April that the Union was available for bargaining. (GC. 36; ALJD at 8) Flora responded on February 19, asking Aguirre to be patient, telling him that he was trying to get everyone's schedules together. (GC. 36) That same day, Flora informed Aguirre that, of the 35 days the Union had suggested, Respondent was only available to bargain on two days: March 22 and April 10. (GC. 37; ALJD at 8) On February 22, Aguirre e-mailed Respondent asking they make plans to work all day during negotiations. (GC. 38; ALJD at 9) Flora replied that he would inform his people to be prepared to work from 9 to 5 on the scheduled days.⁸ Id.

March 22 Session. The parties met on March 22 at 9:00 a.m., and exchanged proposals. The Union presented Respondent with counter offers on Management Rights and Complete Agreement. (GC. 14-15, 69 p. 4) Respondent presented the Union with proposals on nine

⁷ These included: Preamble, Recognition, Complete Agreement, Management Rights, Non-Discrimination, Hours of Work, Merit Shop, Introductory Period, Alcohol/Substance Abuse, and Discipline/Discharge. (Tr. 101)

⁸ This did not occur as Dupreau and Flora's flight schedules precluded full days of bargaining. (ALJD at 9, 20)

Articles, including a Grievance/Arbitration proposal which included a 60-day cap on any backpay award.⁹ (GC. 15, p. 7) The Union offered to exchange a no-strike/no-lockout proposal, if the parties could agree on a grievance and arbitration language. (Tr. 116; ALJD at 10-11) The parties tentatively agreed (TA) to eight Articles at this meeting.¹⁰ (GC. 24; 1-89) The next meetings were scheduled for April 10 and 17. (Tr. 118; GC. 69 p. 9) In preparation for these sessions, and at Respondent's request, the Union e-mailed its initial economic proposal to Respondent on March 23. (Tr. 115; GC. 39; ALJD at 11) However, Respondent cancelled the April 17 meeting because Wayne was called for jury duty. (Tr. 118; GC. 39; ALJD at 9, 20)

April 10 Session. At this session, the parties exchanged proposals, and reviewed the Union's initial economic proposal. (GC. 16-17; ALJD at 11) Along with its plan for wage increases, the Union submitted a Severance Payment proposal, which was submitted in lieu of a retirement, pension, or 401(k) plan, and called on employees with more than 15 years of service to receive to one week pay for each year of continuous service when they severed their employment. (Tr. 516; GC. 16, p. 14; ALJD at 12) At the time, employees did not have a pension plan, but participated in Respondent's 401(k) plan, where Respondent made a matching contribution equal to a percentage of the employees' salary. (Tr. 664; GC. 7, p. 75; GC. 115) The Union told Respondent that the Severance Payment proposal was being made in lieu of a pension or 401(k) plan.¹¹ (Tr. 262, 516, 661, 666; GC. 5, p. 21, 25; GC. 89, p. 13; ALJD at 12)

The Union's April 10 Fringe Benefit proposal consisted of four pages, a one-page proposal, and a three-page appendix. (GC. 16, p. 10) The Union proposed that Respondent

⁹ The remaining proposals were: Discretionary Unpaid Leave of Absence, Department of Transportation, Job Posting, Shop Steward, Safety & Health, No Strike/No Lockout, Discipline & Discharge, and Work Rules. (GC. 15)

¹⁰ The eight TA'd Articles were: Preamble, Recognition, Non-Discrimination, Alcohol & Substance Abuse, Jury Duty, Union Visitation Rights, Separability & Savings Clause, and Duration of Agreement. (GC. 24, 1-8)

¹¹ Other proposals the Union submitted at this session included: Uniforms, Holidays, Funeral Leave, Longevity, Incentives, Sick Leave, Vacations, Fringe Benefits, and Severance Payments. (GC. 16)

contribute 90% of employees' total medical insurance, and then simply copied the appendix from Respondent's existing benefits and included it as part of its proposed package. (Tr. 666, GC. 16, p. 11-13) The appendix set forth the existing benefits employees currently received, including language on Respondent's existing 401(k) plan, which read in part as follows:

Waste Connections is proud to offer a 401(k) Profit Sharing Plan . . . You must be 21 years of age to contribute, and must not be a part of a collective bargaining agreement [to participate]. . . . Waste Connections will match 50% of your contribution up to the first 5% of your gross pay. (GC. 16, p. 12 underline added)

Although this language specifically excluded employees covered by a collective-bargaining agreement from participating in the 401(k) plan, the Union was unconcerned because it had submitted its Severance Payments proposal in lieu of a 401(k) or pension plan. (Tr. 669-70)

Respondent rejected the Union's Severance Payment proposal without explanation, and never made a counter-offer or proposed any alternative. (Tr. 266, 516, 661; ALJD at 12 n. 27) Furthermore, the parties never discussed the Union's Fringe Benefit proposal. As Flora testified, the parties had "very limited discussions about the benefits themselves," and instead focused on the amount of healthcare benefit costs covered by Respondent, with the Union demanding 90% and Respondent proposing between 68% and 72%. (Tr. 213; GC. 64; ALJD at 12 n. 27)

Respondent never submitted a written proposal on Fringe Benefits until it submitted its Last, Best, and Final offer on November 13. (Tr. 672) On April 10, Respondent presented the Union with one contract proposal: employee attendance. (GC. 17)

After the April 10 bargaining session, Respondent informed the Union that everyone on their bargaining team would be available to meet on May 22 and May 31. (GC. 40) With the scheduled April 17 session previously cancelled by Respondent, on May 3, an exasperated Aguirre sent Flora an e-mail reading, in part, as follows:

We need to speed things up. Let's plan to meet longer and have more days at once. Many of the members, both drivers and mechanics are getting impatient and want to start engaging in disruptive behavior. Some are suggesting strike and are putting pressure on me to get this done. (GC. 41; ALJD at 9)

In a May 7 e-mail, Flora replied that first contracts take time to negotiate "because of starting from scratch," and asked Aguirre to discourage disruptive behavior, noting they could discuss scheduling concerns at the next meeting. Id.

May 22 Session. At this session the parties TA'd seven contract articles.¹² (ALJD, at 12) Also, the Union offered to accept a Management Rights clause, if Respondent accepted the Union's Dues Check-off proposal. (GC. 69, p. 14; GC. 5, p. 9; ALJD at 12) From early on, the Union linked these two provisions, but no agreement was ever reached. (Tr. 116; ALJD at 12)

May 31 Session. The May 31 bargaining session began with the parties reviewing the status of the outstanding non-economic proposals. (ALJD at 13) The parties then took a break from 10:15 a.m. until 2:00 p.m. to review the open issues. (GC. 69, p. 15) Again, the Union offered to agree to Respondent's Management Rights proposal, if Respondent accepted the Union's Dues Check-off proposal, but Respondent rejected the offer. (GC. 5, p. 10; ALJD at 13) The parties TA'd one proposal on shop stewards at this meeting. (GC. 24, p. 16) Eager to schedule more bargain sessions, around this time Aguirre informed the parties he would be as flexible as possible regarding his schedule. (ALJD at 13)

June 28 Session. This bargaining session started at 9:25 a.m., with the parties discussing several proposals. No written proposals were exchanged at the meeting, and no provisions were agreed to. (GC. 69, p. 16; ALJD at 13) Once more, Aguirre complained to Flora about the slow pace of bargaining, and again Flora maintained that first contracts were difficult to bargain, and that people had busy schedules. (Tr. 148; ALJD at 13)

¹² The TA'd Articles were Merit Shop, Introductory Period, Safety & Health, Job Posting, Discretionary Unpaid Leave, Department of Transportation, and Layoffs. (GC. 24, p. 10-16; GC. 69, p. 13)

July 17 Session. The parties next met on July 17, at 9:30 a.m., for their eight day of bargaining, and Respondent submitted a written proposal on Grievance/Arbitration, which again contained a 60-day backpay cap, along with proposals on Discipline/Discharge, and Work Rules. (GC. 18 p. 3; GC. 69, p. 18-19; ALJD at 13) Although the Union advised Respondent it did not want any cap on backpay, it offered a counter-proposal of a 365-day cap, which Respondent rejected. (GC. 69, p. 19; GC. 5, p. 12; GC. 133-34; Tr. 251, 150-51, 569; ALJD at 13)

August 9 Session. At the August 9 bargaining session, which went from 9:00 a.m. until 3:15 p.m., Respondent presented another written Grievance/Arbitration proposal, which still contained a 60-day backpay cap, but included a clause for expedited discharge procedures. (GC. 19; GC. 69, p. 21; Tr. 154) Again, the Union countered with a 365-day backpay cap, but no agreement was reached.¹³ (Tr. 153, GC. 5, p. 15; GC. 69, p. 21; ALJD at 13)

August 29 Session. The next bargaining session occurred on August 29, and no written proposals were exchanged by the parties. (GC. 69, p. 24) In his bargaining notes, Flora wrote that Aguirre and the Union were “very frustrated.” (GC. 69, p. 24) Wayne’s notes reflected that Aguirre said he was “running out of patience.” (GC. 5, p. 19; ALJD at 14)

September 11 Session. At this bargaining session, Respondent submitted a written Grievance/Arbitration proposal which included a 90-day cap on backpay. (GC. 22; GC. 69, p. 25) The parties then reviewed all of the economic proposals the Union had previously submitted on April 10. (Tr. 157-58; GC. 69, p. 25; GC. 5, p. 21; ALJD at 14)

October 4 Session. At the October 4 session, a Federal Mediator joined the negotiations. (Tr. 159; GC. 69, p. 26; ALJD at 14) At this meeting the parties reviewed a number of proposals, and TA’d a clause on Bereavement Leave. However, Respondent again rejected the

¹³ At this session, the parties TA’d the following proposals: Hours of Work, Complete Agreement, Discipline/Discharge, and General Work Rules. (GC. 24, p. 18-26; ALJD at 13)

Union's Severance Payment proposal. (Tr. 266; GC. 5, p. 25; GC. 69, p. 26; GC. 24, p. 27; GC. 23; GC. 69, p. 26) Despite the fact employees were currently earning 5 days of sick leave per year, Respondent submitted a proposal for only 3 days of sick leave. (GC. 5, p. 23; ALJD at 14) At this meeting, Respondent presented its initial wage proposal, consisting only of a 1% across-the-board raise. (Tr. 266-67; GC. 5, p. 25; ALJD at 14)

At the time, Respondent's Mechanics, Painters, and Welders were making somewhere between \$9.00 and \$12.00 per hour, while the Truck Washers and General Helpers were making between \$6.00 to \$7.00 per hour. (GC. 44-45) Before the Union was certified, Respondent had a history of giving its employees an annual wage increase. (GC. 76; Tr. 641) In 2006, Respondent's employees received an increase in the range of 4.2%, and in 2005, received an increase in the range of 2.4%. (GC. 44, 45) However, Respondent's unionized employees did not receive a raise for 2007, while the non-union employees received raises averaging about 4.2%. (Tr. 857-58; GC. 105, p.2; ALJD at 14) In its 2008 Operations Budget, Respondent had budgeted for unit employees to receive a 3.6% wage increase. (GC. 107; ALJD at 14) Notwithstanding, Respondent's initial offer for a wage increase stood at 1%.

October 12 Session. Before the October 12 meeting, the Union submitted another wage proposal to Respondent. (GC. 44; ALJD at 14) Employees had endured a year without a raise, and the Union proposed bringing employees in certain classifications up to a similar wage rate on the basis of job-category and seniority. (Tr. 639-40, 857-58) The proposal included an initial "bump" to bring employees to a similar wage rate, and then annual increases thereafter. (Tr. 639-40; GC. 45) Respondent calculated the Union's proposed wage increase as averaging 20.6%. (Tr. 162-63) At the meeting, Respondent countered by proposing a wage increase of 1.25%, and also increased its proposed sick leave days from three to four. (Tr. 162-63; GC. 5 p.

26; ALJD at 14) After a break, the Union returned with a counter proposal, which Respondent estimated averaging an 18.2% increase. (GC. 5, p. 27; GC. 45; Tr. 165)

Regarding the Union's Severance Payment proposal, Wayne's bargaining notes indicate that the issue was on "hold until we settle wages." (GC. 5, p. 26; ALJD at 15) At the end of this meeting, Respondent unexpectedly announced that it would provide the Union with its Last, Best, and Final Offer (Final Offer) at the next meeting. (Tr. 531, 1234-35; ALJD at 15)

Although Flora insisted the Union asked for such an offer (Tr. 165-66), Wayne testified that it was Flora who told Aguirre that Respondent would put its proposals "into a last, best and final offer form." (Tr. 1234-35; ALJD at 15) This comports with Aguirre's testimony. (Tr. 531)

November 13 Session. Before this meeting, Aguirre sent Flora an e-mail asking for a copy of Respondent's Final Offer. (GC. 46) However, Flora refused, stating that Respondent wanted to present the offer at the actual bargaining session. (GC. 47) At the November 13 meeting, with the Federal Mediator present, Respondent presented the Union with its Final Offer, consisting of 32 contract articles. (Tr. 169; GC. 25; ALJD at 15) The parties had previously agreed to only 23 of these articles. (GC. 5, p. 29) Respondent's Final Offer included the following nine articles which were still outstanding: Management Rights, Holidays, Sick Leave, Uniforms, Fringe Benefits, Grievance/Arbitration, No Strike/No Lockout, Wages Increases, and Longevity Bonus. (GC. 5, p. 29; GC. 25) After receiving the Final Offer, the Union left to caucus, and reviewed the proposals amongst themselves and with the mediator. (Tr. 169, 616)

3. The Last, Best, and Final Offer.

Respondent's Final Offer included a broad Management Rights clause giving Respondent discretion in creating workplace rules, discipline, discharge, laying-offs, and subcontracting. (GC. 25, p. 5) Despite the fact the Union linked acceptance of a Management Rights clause with

a Dues Check-off, the Final Offer did not include a Dues Check-off provision. (ALJD at 15).

Respondent's Sick Leave proposal provided for four paid sick days, and precluded workers from carrying over sick days from year to year. At the time, employees received five days of sick leave and could carry over 15 days each year. (GC. 7, p. A-3; GC. 25, p. 29; ALJD at 15)

Respondent's Fringe Benefit proposal generally provided workers with the same benefits they were currently receiving. (GC. 25, p. 32) However, Respondent included the same appendix, previously submitted by the Union, which precluded employees covered by a collective-bargaining agreement from participating in Respondent's 401(k) plan.¹⁴ (GC. 25, p. 32 (b)) Respondent's Final Offer included no other pension or retirement provision. (GC. 25)

Respondent's Grievance/Arbitration proposal again included a backpay cap, which Respondent had raised to 120 days. (GC. 25, p. 36) At the same time, however, it also limited the power of an arbitrator to simply decide whether or not the employee committed the alleged offense, and precluded any modification of the penalty meted out by Respondent if the employee was culpable. (GC. 25, p. 36; ALJD at 16 n. 32) Respondent's No-Strike/No Lockout clause broadly precluded employees from engaging or aiding in any picketing or strike (GC. 25, p. 38)

As for wage increases, Respondent's Final Offer proposed a raise of 1.5% for 2007, 1.75% for 2008, and 2% for 2009. This proposal did not even allow workers to keep up with the rate of inflation.¹⁵ (GC. 25, p. 39; ALJD at 16) Finally, Respondent's longevity proposal

¹⁴ The General Counsel has filed exceptions to the ALJ's finding that this was a mistake and did not evidence bad faith, despite the ALJ's noting that Flora was "less than candid" in his testimony about discussing the 401(k) plan with Aguirre. (ALJD at 24)

¹⁵ According to the Department of Labor, Bureau of Labor Statistics, the Consumer Price Index for 2007 increased by 4.1%, as measured by the change in the CPI-U from December 2006 to December 2007, found at the Department of Labor's website at: <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>. Although the CPI figures were not entered into evidence, the ALJ properly took judicial notice of this data. See, *Hillensbeck v. US*, 74 Fed. Cl. 477, 483 (Fed. Cl. 2006) (courts take judicial notice of DOL-BLS data pursuant to Fed. R. Evid. 201); (ALJD at 17 n. 23).

mirrored the existing policy, but did away with awarding a company watch after 10 years of service.¹⁶ (GC. 25, p. 40; GC. 70; ALJD at 16)

4. Union's Reply to the Last, Best, and Final Offer

The Union reviewed Respondent's Final Offer, and through the Mediator made a counter-proposal, which included returning employees to their existing five days of sick leave, a 365 day cap on backpay, a \$1,000 ratification bonus for employees, a 5% increase for each year of the contract, and a Dues Check-off provision. (Tr. 169-170; GC. 69, p. 31-32; ALJD at 15) With the ratification bonus, the Union's wage increase amounted to about a 9% increase for the first year. (Tr. 170) Respondent informed the Mediator that it would allow employees to maintain their existing five days of sick leave, would increase the backpay cap to 150 days, but refused to make any move on wages, and also refused to include a Dues Check-off provision. (Tr. 171-72. GC. 69, p. 32; ALJD at 15) No agreement was reached, and, on November 21, Respondent's employees went out on strike. (Tr. 172) The parties met once more on December 4, again with the Mediator present, but nothing was accomplished. (Tr. 174, 677)

5. The Parties' Position on Dues Check-off

The Union proposed a Dues Check-off clause in its initial set of bargaining proposals on January 30. (GC. 12, p. 6) Despite this, throughout the entire course of bargaining, Respondent never submitted a written counter offer to the Union on Dues Check-off, or proposed any alternative, other than having the Union manually collect dues from its members. (Tr. 111-112, 135, 250, 510; ALJD at 17) Instead, Flora asked the Union whether it would allow employees to withdraw from the Union and cease their dues-paying obligation at any time. (Tr. 112, 135-36,

¹⁶ The Final Offer also contained a Holiday proposal with the same number of paid holidays employees were receiving, and a Uniform provision granting employees up to \$100 annually to buy steel-toed work boots, and paying up to 50% of the costs to clean Respondent's work uniforms. (GC. 25, p. 28, 31; GC. 7, p. A-3)

156) When asked why Respondent was concerned about this, since Texas was a right-to-work state and nobody could be forced to join the Union, Flora could not provide answer. (Tr. 136)

The Union's Dues Check-off proposal was discussed at virtually every bargaining session, but each time Respondent would either say "no" out-right, or tell the Union they were not prepared to agree to it "at this time." (Tr. 171-72, 249-50, 578; GC. 69, p. 31-32; ALJD at 17) Respondent continuously rejected the Union's Dues Check-off proposals without any explanation. (Tr. 515) Regarding Dues Check-off, Wayne testified that Respondent simply did not believe it should be the "collecting agent" for the Union, despite the fact that Respondent collects insurance and other premiums from employee paychecks.¹⁷ (Tr. 250; ALJD at 17)

B. Legal Analysis and Argument.

1. General Principles

Section 8(d) of the Act requires an employer and union to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." This obligation does not compel either party to agree to a proposal or require the making of a concession, but both have a duty to negotiate with a sincere purpose to find a basis of agreement. *Regency Service Carts, Inc.*, 345 NLRB 671, 671 (2005). An employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union. *Id.* The mere pretense at negotiations with a closed mind and without a spirit of cooperation does not satisfy the Act's requirements. A violation may be found where the employer will only reach an agreement on its own terms and none other. *Id.*; *Pease Co.*, 237 NLRB 1067, 1079 (1978).

In determining whether an employer bargained in good faith, the Board looks to the "totality of the Respondent's conduct, both at and away from the bargaining table." *Hardesty*

¹⁷ Although the Union was adamant about a having a Dues Check-off clause, if it was the only issue holding up an agreement, the Union would have considered a contract without one. (Tr. 580-581)

Co., Inc., 336 NLRB 258, 259 (2001). Relevant factors vary, and include: unreasonable bargaining demands, delaying tactics, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, failure to provide relevant information, and unlawful conduct away from the table. *Regency Service Carts, Inc.*, supra.; *Hardesty Co., Inc.*, supra. An employer does not have to engage in all of these activities to bargain in bad-faith. *Id.* Indeed, bad-faith bargaining can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, an employer violates the Act when its conduct reflects an intention on its part to avoid reaching an agreement. *Id.* Here, the record clearly demonstrates, and the ALJ properly found, that since the Union's certification, Respondent has endeavored to frustrate the possibility of arriving at an agreement and has violated Section 8(d) and Sections 8(a)(1) and (5) of the Act in the process.

2. Respondent's Failure to Designate an Agent with Authority to Bargain is Evidence of Bad Faith

Contrary to Respondent's Exceptions, the ALJ properly found that Respondent's failure to give Flora, its chief spokesperson, authority to enter into agreements with the Union demonstrated its bad faith. As the ALJ noted, while Respondent is not required to be represented by an individual with final authority to enter into an agreement, this privilege is subject to the proviso that such a limitation does not inhibit the progress of negotiations. *Carpenters Local 1780*, 244 NLRB 277, 280-81 (1979); (ALJD at 21 n. 36)

Here, because he lacked bargaining authority, Flora could only schedule negotiations when his, Wayne's, and Dupreau's schedules allowed all three to attend. (ALJD at 21) This precluded scheduling more frequent meetings, or scheduling meetings on consecutive days, and even caused the cancellation of one session because Wayne had jury duty. (ALJD at 9, 20-21) Requiring Flora, Wayne, and Dupreau to be present at each bargaining session created delays.

Meetings were truncated to accommodate Respondent's travel plans, and the parties were prohibited from scheduling additional meetings at times when all three of Respondent's negotiators could not attend. (ALJD at 21) Accordingly, the ALJ properly found that this conduct obstructed the bargaining process, created delays, slowed the pace of bargaining, all of which inhibited the progress of negotiations in violation the Act. *Carpenters Local 1780*, supra.

In support of its Exceptions, Respondent asserts that this allegation was neither alleged by the General Counsel, or fully litigated. *Resp't Br. Supp.*, at 25-26. However, this allegation is encompassed by paragraphs 10(q)(1), (2) and (3) of the Complaint, which alleges that Respondent delayed in responding to bargaining requests, setting dates for bargaining, and refused to meet at reasonable times or for reasonable durations. (GC. 112) While the Complaint does not specifically mention Flora's lack of adequate bargaining authority, that conduct standing alone would not be a violation. It is only when such conduct, as shown here, inhibits the progress of negotiations that a violation arises. *Carpenters Local 1780*, supra. Accordingly, this allegation is properly encompassed by paragraph 10(q) of the Complaint.

Even if the Board finds that this allegation was not alleged in the Complaint, the ALJ properly found that this matter was fully litigated. (ALJD at 26 n. 44) The Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices. *Monroe Feed Store*, 112 NLRB 1336, 1337 (1955); *Owens-Corning Fiberglass v. NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969). When an issue relating to the subject matter of a complaint is fully litigated, the ALJ and the Board are expected to pass upon it even though it was not specifically alleged to be an unfair labor practice in the complaint. *Id.* See also, *Enloe Medical Center*, 346 NLRB 854, 854 (2006). "All that is requisite in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute

an unfair labor practice that respondent may be put on his defense.” *Owens-Corning Fiberglass*, supra. Such a complaint need state only the manner by which the unfair labor practice has been or is being committed, the absence of specifics being tolerated where there has been no specific showing of detriment. *Id.*

Here, as set forth in the Complaint, Respondent plainly knew that the General Counsel alleged Respondent’s conduct caused delay in the negotiating process, which constituted bad-faith bargaining. The fact that Respondent did not vest Flora with final authority to enter into an agreement with the Union, and required Flora, Wayne, and Dupreau to all be present during negotiations, thereby delaying and impeding the negotiating process, was the subject of much testimony. Dupreau specifically testified that Flora did not have authority to enter into agreements with the Union without his and Wayne’s permission. (Tr. 1071) As to tentative agreements, Dupreau testified that Flora could enter into them only if Dupreau and Wayne were present and agreed. (Tr. 1072). In response to a follow-up question by the ALJ, Dupreau then backtracked, claiming that “if it was very important” then Flora could “carry on” with either himself or Wayne present. (Tr. 1073)

Moreover, Respondent initiated the questioning of Dupreau about his attending every bargaining session before the strike, his travel requirements to and from California to attend these meetings, and the obligation that meetings end at a certain time so he could catch a flight back to California. (Tr. 1041-1043) It was after Respondent’s questioning that, in response to a question from the ALJ, Dupreau testified that he needed to be at every bargaining session, that he had a very busy schedule with many obligations “to live up to,” and that Flora could not have continued bargaining without his presence at the bargaining table. (Tr. 1071) Clearly, Respondent’s failing to invest Flora with adequate bargaining authority, and how this inhibited

the bargaining process by requiring Wayne, Flora, and Dupreau to attend all of the bargaining sessions was fully litigated. Accordingly, the ALJ properly found a violation.

3. Respondent's Refusal To Bargain And Accede To A Dues Check-Off Provision Evidences Bad Faith

Contrary to Respondent's Exceptions, the ALJ properly found that Respondent's failure to bargain and accede to a Dues Check-off provision demonstrated bad faith. (ALJD at 24, 26) As noted by the ALJ, an employer is required to bargain in good faith over a union's request for a dues check-off provision, and any opposition must reflect a legitimate business purpose. (ALJD at 24) See, *NLRB v. J.P. Stevens & Co.*, 538 F.2d 1152, 1165 (4th Cir. 1976); *Sivalls, Inc.*, 307 NLRB 986, 1009 at n. 46 (1992) Here, Respondent continually and summarily rejected the Union's Dues Check-off proposals, and never provided the Union with a written counter-offer on the issue. ALJD at 17 n. 34. The only alternatives Respondent ever proposed was a suggestion that the Union manually collect the dues themselves, or that employees be allowed to withdraw from the Union at-will, with three days notice. (ALJD at 17) Moreover, Wayne testified that Respondent simply did not want to be the "collecting agent" for the Union. (ALJD at 24) Accordingly, the ALJ properly found that Respondent's refusal to agree to, or even bargain over, a Dues Check-off provision constituted of bad faith. *Langston Cos.*, 304 NLRB 1022, 1050 (1991); *CJC Holdings*, 320 NLRB 1041, 1046-1047, (1996); *Sivalls, Inc.*, supra.

Respondent's claim that the ALJ improperly found a violation because this claim was neither alleged nor fully litigated fails. *Resp't Br. Supp.*, at 25-27. The Complaint at paragraph 10(q) alleges that Respondent bargained in bad faith, in part, by failing to make timely proposals and counter proposals, and by making proposals that were unacceptable to the Union. (GC. 112 p. 17) As noted by the ALJ, there was extensive evidence and testimony about the parties' negotiating position regarding the Union's proposal for a Dues Check-off clause. (ALJD at 10-

18) Moreover, Respondent specifically defended against this claim, asserting that, at all times they were holding onto a dues check-off as a “bargaining chip”(ALJD at 24), and made this specific argument on page 38 of its brief to the ALJ, thereby negating its claim that this matter was not fully litigated. See, Exhibit A; *East Side Shopper, Inc.*, 204 NLRB 841, 845 (1973) (claim was fully litigated where it was argued in the briefs to the ALJ).

4. Respondent Acted in Bad Faith by Prematurely Announcing and Presenting its Last, Best, and Final Offer

Contrary to Respondent’s Exceptions, *Resp’t Br. Supp.* at 25-27, the ALJ properly found that Respondent’s abrupt and unexpected announcement of its intent to present a Final Offer on October 12, and the presentation of its Final Offer at the next session, demonstrated Respondent’s bad faith. (ALJD at 24-25) As noted by the ALJ, Respondent’s unexpected announcement came after only 12 completed bargaining sessions, and at a time when the parties had not yet commenced bargaining on some subjects, including a longevity bonus and the Union’s demand for a severance pay provision in lieu of the existing 401(k) plan. (ALJD at 25). Moreover, Respondent rejected the Union’s request to review Respondent’s Final Offer prior to its formal presentation, which would have allowed the Union time to prepare a reasoned and unhurried response. (GC. 46-47; ALJD at 25) Furthermore, Respondent announced its intent to present its Final Offer only one session after having presented its initial wage proposal. (Tr. 266-67; GC. 5, p. 25; ALJD at 14) Thus, the parties negotiated over wages at only two sessions before Respondent submitted its Final Offer. Accordingly, the ALJ properly found that Respondent acted in bad faith, with an intent to frustrate bargaining and force a strike, when it presented its premature Final Offer to the Union. See, *Park Inn Home for Adults* 293 NLRB 1082, 1086 (1989) (bad faith bargaining when a “final offer” is presented without intent to arrive at an agreement).

The ALJ also properly found that this matter, although not specifically alleged in the Complaint, was fully litigated. Both the General Counsel and Respondent presented extensive evidence as to the parties' bargaining history, including the various proposals exchanged, the circumstances leading up to the presentation of Respondent's Final Offer, and whether Respondent's conduct, both at and away from the table, constituted bad-faith bargaining, as alleged in the Complaint. Under these circumstances, the ALJ was entitled, if not affirmatively obligated, to make findings upon this fully litigated violation. *Monroe Feed Store*, supra.

5. Respondent's Delay, Dilatory and Evasive Tactics, and its Failure to Bargain at Reasonable Times Violated the Act

Contrary to Respondent's Exceptions, the ALJ properly found that Respondent failed to bargain in good-faith by purposefully delaying and truncating contract negotiations, and that its dilatory tactics violated the Act. (ALJD at 19-22) Respondent's dilatory strategy started just after the Union's certification. Despite the Union's request to meet and bargain over the Maintenance Unit on October 2, 2006, only two weeks after the certification, and its attempts to schedule an initial bargaining session, Respondent delayed the initial bargaining session for four months, until January 30. Instead of meeting with the Union, Respondent told the Union that it was searching for an attorney, and it was not until November 28, 2006, nearly two months after the Union's initial bargaining request, that Flora e-mailed Aguirre introducing himself as Respondent's attorney. While the Union was eager to start bargaining, and suggested 10 days it was available in December 2006, Flora would not schedule a bargaining session in December. As noted by the ALJ, such dilatory tactics in scheduling an initial bargaining session are, in themselves, evidence of bad faith. See, *Reed & Prince Mfg. Co.*, 96 NLRB 850, 858 (1951) (six-week delay in scheduling first bargaining session was evidence of bad faith). *Mississippi Steel Corp.*, 169 NLRB 647, 661 (1968) (delay and attenuation of the employer's chief negotiator and

attorney in bargaining with union shows bad faith); *Frauehauf Trailer Services, Inc.*, 335 NLRB 393, 393 (2001) (passage of almost three months before initial bargaining session evidence of bad faith; the Board has consistently rejected a ‘busy negotiator’ defense); *"M" System, Inc.*, 129 NLRB 527, 549 (1960) (employer has duty to turn negotiations over to someone who is available to bargain at reasonable times).

Further evidence of Respondent’s bad faith comes from Respondent’s refusal to schedule consecutive bargaining sessions, or to meet more frequently with the Union, despite the Union’s continuous requests for more meetings. *Regency Service Carts*, 345 NLRB at 672 (dilatory tactics and arbitrary scheduling of meetings show bad faith). While the Union was requesting Respondent set aside more dates for bargaining, work throughout the day, and schedule bargaining on consecutive days, Respondent replied that these requests were unreasonable because they were “busy folks” with other obligations to live up to. The “press of business of an employer has never been found by the Board to be a good excuse for the failure to meet at regular intervals and bargain in good faith.” *Milgo Indus., Inc.*, 229 NLRB 25, 31 (1977).

Insisting that Flora, Dupreau, and Wayne, all attend the bargaining sessions is additional evidence of Respondent’s dilatory tactics, as this precluded the parties from meeting more frequently, and caused the cancellation of one session because Wayne had jury duty. When the bargaining sessions did occur, they usually ended by 3:00 or 4:00 p.m., to accommodate the travel schedule of Respondent’s representatives. It is well settled “that an employer is required to attend to his bargaining obligation with the same degree of diligence as he would to important business matters.” *Quality Motels of Colorado, Inc.*, 189 NLRB 332, 336 (1971); See also, *J. H. Rutter Rex Manufacturing Company, Inc.*, 86 NLRB 470, 506 (1949). Here, Respondent showed no such diligence to meet with the Union. Respondent’s repeated refusal of the Union’s requests

for more frequent meetings is evidence of its bad faith. *Calex Corp.*, 322 NLRB 977 (1977); *People Care, Inc.*, 327 NLRB 814, 825 (1999) (employer's unreasonable refusal to accede to request for more frequent meetings was evidence of bad-faith).

Respondent cannot rely upon the fact the parties met 14 times in the 14 months, between the Union's certification and the strike, or that the parties had reached agreement on 23 proposed articles. The Board rejected these same arguments in *Calex Corp.*, where the employer suggested it bargained in good faith by meeting with the union on 20 occasions during 15 months, and reaching agreement on approximately 75% of the contract. The *Calex Corp.* Board noted that, had the employer agreed to meet more often, and accepted the union's request for more meetings, the parties may have reached agreement in less time. 322 NLRB at 978. Meeting an average of once per month hardly consists of bargaining at regular intervals. *Milgo Indus., Inc.*, supra. (six meetings in six months can scarcely be said to be regular intervals).

In its Brief, Respondent cites ten specific arguments supporting its claim that no violation occurred, all of which are meritless. *Resp't Br. Supp.* 28-35. First, Respondent claims there was no delay in bargaining, citing to a footnote in *Lee Lumber & Building Material*, 334 NLRB 407 n. 7 (2001). In *Lee Lumber*, the Board reconsidered its "reasonable period of time" standard for purposes of challenging the majority status of an incumbent Union, setting forth a multi-factor analysis, including whether the parties were bargaining for an initial, or a renewal contract.¹⁸ *Id.* at 401. The Board noted that initial bargaining may take longer than bargaining for a renewal contract, pointing to FMCS data showing that the average length of time for newly-certified unions to reach an initial contract, from the date of certification to the conclusion of the agreement, was 296 days in FY 1998, 313 days in FY 1999, and 347 days in FY 2000, almost twice the time required to conclude a renewal agreement. *Id.* at 408 (Appendix B), 403 n. 20.

¹⁸ Significantly, *Lee Lumber* was not a bad-faith bargaining case.

Here, Respondent's attempt to use this data to claim there was no unreasonable delay is unsupported by the evidence. The Union's certification for the Maintenance Unit issued on September 28, 2006. Respondent presented its bad-faith Final Offer on November 13, 411 days after the Union's certification, and at a time when the parties were nowhere near the conclusion of an agreement, having TA'd only 23 of the 32 articles contained in Respondent's Final Offer. By November 13, the parties had not even bargained over some topics, and had only bargained twice over wages, a subject to which there was still a great discrepancy over the parties' positions. Accordingly, the ALJ properly found that Respondent engaged in unreasonable delay and bargained in bad faith.

Second, Respondent's claim that the ALJ's finding that Respondent bargain in bad-faith, is unsupported because Respondent's negotiators were "courteous" to the Union's negotiators, simply mischaracterizes the ALJ's finding. *Resp't Br. Supp.*, at 28. The ALJ's finding of bad-faith is based upon Respondent's overall dilatory actions and conduct, as exhibited throughout the ALJD, and is not based upon whether either party may or may not have been polite during negotiations.¹⁹ In fact, being polite during negotiations has been used by employers as a tactic to engage in bad-faith bargaining. *J.P. Stevens & Co., Inc.*, 239 NLRB 738, 769 (1978) (bad-faith bargaining supported by circumstantial evidence including a bargaining table posture "of a polite, patient, and occasionally dissembling auditor rather than a vitally interested participant").

Third, Respondent complains that the ALJ properly noted that four months elapsed between the Union's certification and the first bargaining session. *Resp't Br. Supp.* 29. Respondent claims that this four-month delay should not have been considered by the ALJ because (1) the Union never complained; (2) Respondent's delay was for a legitimate reason; and

¹⁹ Respondent claims that "the Union thanked Respondent for being so reasonable." *Resp't Br. Supp.* at 28. However, the ALJ made no such finding, and Respondent did not take an exceptions regarding this matter.

(3) this time period is not mentioned in the Complaint. *Id.* However, the record shows that, at every opportunity, the Union attempted to start bargaining soon after its certification, but its efforts were ignored by Respondent. From October 2, 2006, until they were contacted by Flora on November 28, 2006, the Union made three separate requests for bargaining, only to be rebuffed by Respondent. (GC. 91, 94, 100). After being contact by Flora, on November 29, the Union proposed ten separate days for bargaining in December 2006, only to be rebuffed by Flora. (GC. 27, 28 ALJD at 7) Clearly, the Union was attempting to schedule bargain at every opportunity after the certification, each such attempt was rejected by Respondent, and the ALJ properly reviewed this conduct in finding that Respondent engaged in dilatory tactics.

As for Respondent's assertion that it had legitimate reason for this four-month delay, that its original counsel could no longer represent Respondent, the ALJ properly noted that "collective-bargaining negotiations are as important as any business transaction," and that "it is inconceivable that Respondent would have delayed negotiations, in a like manner, for . . . securing a bank line of credit" and, therefore, Respondent's delay for initial bargaining evidenced bad faith. (ALJD at 19) (citations omitted). Finally, while the four-month period of October 2006 through January is not specifically noted in the Complaint, the Complaint at paragraph 10(q) does allege that from January through November, Respondent delayed in responding to the Union's requests to schedule times for collective bargaining, delayed in setting dates for bargaining, and refused to meet at reasonable times and for reasonable durations. (GC. 112 p. 17). In its brief to the ALJ, Respondent addressed its initial four-month delay in scheduling bargaining sessions, and argued the same defense for this delay as it does in its Exceptions, that it had a legitimate reason based upon the unavailability of its counsel. See Exhibit B, p.2. Clearly, this issue was fully litigated, and the ALJ properly found that that

Respondent's four-month delay in meeting for initial contract bargaining is evidence of bad faith. *Monroe Feed Store*, 112 NLRB at 1337; *East Side Shopper, Inc.*, 204 NLRB at 845.

Fourth, Respondent asserts that the ALJ "erred in his negative characterization ('languid' and of 'short duration') of the number and pacing of the bargaining sessions." *Resp't Br. Supp.* at 29. However, the ALJ properly found that Respondent refused to meet regularly with the Union, that when meetings did occur they were of a "short duration," and that the pace of bargaining was "languid." Between January 30 and the November 22 strike, the parties held only 14 bargaining sessions, which typically included only 4 ½ to 5 ½ hours of actual bargaining. These sessions ended early, at around 3:00 or 4:00 p.m., in order to accommodate Dupreau and Flora's flight schedules. Moreover, Respondent, averring that its negotiators had "busy schedules," refused the Union's reasonable requests to set aside more bargaining dates, work throughout the day, or schedule bargaining on consecutive days. Under these circumstances, the ALJ properly found that Respondent's repeated refusal of the Union's requests for more frequent meetings, longer, and consecutive bargaining sessions is evidence of its bad faith. *Calex Corp.*, supra.; *People Care, Inc.*, supra.

Respondent's Fifth, Sixth, and Seventh arguments assert that the record contains no evidence that the Union objected about the number or length of the bargaining sessions, and that the meetings ended by the mutual agreement. *Resp't Br. Supp.*, at 30-31. Notwithstanding these assertions, the ALJ made specific findings that these meetings ended early, not based upon the parties' mutual agreement, but so Dupreau could make his 6:30 p.m. flight back to his home in California. (ALJD at 20) Moreover, Flora admitted that the duration of each meeting was dependent upon both his and Dupreau's flight schedule. *Id.*; (Tr. 102). Also, the record clearly shows that the Union did, in fact, complain about the length and number of bargaining sessions.

(Tr. 508, 511-512, 519-20, 546-48; GC. 38, 41) Each such request was rebuffed. (ALJD at 20.)

As Dupreau testified, Respondent believed that the Union's "periodic" requests for more time were unreasonable because Dupree had other obligations to live up to and "we're all busy folks."

(Tr. 1070-71) Accordingly, the ALJ properly found that Respondent bargained in bad faith.

Eighth, Respondent asserts that, because the bad-faith bargaining charge was not filed by Aguirre, that an inference is warranted that Aguirre did not believe that any bad-faith bargaining occurred. Interestingly, other than a general citation to *Allentown Mack v. NLRB*, 522 US 359 (1998), Respondent cites no authority for this proposition.

In determining whether an employer bargained in good faith, the Board looks to the "totality of the Respondent's conduct, both at and away from the bargaining table." *Hardesty Co., Inc.*, 336 NLRB at 259 (2001). It is the employer's conduct at issue, not which Union official filed a Board charge. Notwithstanding, Aguirre candidly testified that he did, in fact, believe that Respondent bargained in bad faith, and gave several examples of such conduct, including Respondent's unreasonable proposals, its failure to negotiate on Dues Check-off, and the length and duration of the bargaining sessions. Accordingly, the ALJ's findings were proper.

Ninth, Respondent asserts that the ALJ erred in declining to draw an adverse inference from the General Counsel's failure to call as a witness Union Representative Juan De La Torre, who was present throughout the entire hearing, to corroborate Aguirre's testimony as to what occurred "at all the bargaining sessions and at the strike vote meetings." This exception is specious, as no adverse inference is warranted.

Deciding whether to draw an adverse inference "lies within the sound discretion of the trier of fact," and may be drawn where a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party. *Underwriters Laboratories, Inc. v. NLRB*, 147

F.3d 1048, 1054 (9th Cir. 1998). However the rule does not create a conclusive presumption against the party failing to call a witness. *Id.* Where the witness's testimony would simply be cumulative of other evidence, an adverse inference is not available. *US v. Hines*, 470 F.2d 225, 230-231 (3d Cir. 1972) (adverse inference is not justified where testimony would only have been cumulative); *McCormick on Evidence* § 272 (3d ed. 1984) (where the testimony of the witness would merely be cumulative of other evidence, an adverse inference is not available).

With respect to what occurred at the individual bargaining sessions, the General Counsel called as witness Aguirre, Flora, Wayne, and Lopez, all of whom testified at length as to what transpired during negotiations. (Tr. 76, 235, 458, 492). There was simply no need to also call De La Torre as a witness, as his testimony would simply have been cumulative. Similarly, with respect to what occurred during the strike vote meetings, along with Aguirre, the General Counsel called as witnesses employees Mario Ortiz, Jesus Dominguez, and Adan Vasquez, all of whom testified as to what transpired during these meetings. (Tr. 776, 786, 808, 812, 816, 834, 839; ALJD at 52-55) Again, there was no need to call De La Torre to provide cumulative testimony. Moreover, the ALJ's decision to not draw an adverse inference is supported by the fact that Respondent was at liberty to call De La Torre itself, but did not do so. It "was actually possible for the ALJ to have drawn an inference adverse to [Respondent] for its failure to call [De La Torre] to the stand." *Underwriters Laboratories, Inc.*, supra. citing *NLRB v. Mass. Mach. & Stamping, Inc.*, 578 F.2d 15, 20 (1st Cir. 1978). Accordingly, this Exception must be denied.

Tenth, Respondent objects to the ALJ's analysis of Respondent's 10(b) defense, and claims that it "never contended that the complaint allegations regarding bad faith delay and bargaining were entirely barred by Section 10(b)." *Resp't Br. Supp.* at 34. However, in pages 31 and 32 of its brief to the ALJ, Respondent specifically states that evidence outside the 10(b)

cannot be used to form the basis of a bad-faith bargaining violation. See, Exhibit B. Despite its claim to the contrary, Respondent clearly made this argument in its brief to the ALJ, and the ALJ properly noted that Respondent never asserted a 10(b) defense to the bad-faith bargaining allegations in the Complaint, failed to plead it as an affirmative defense, first raised the issue in its post-hearing brief, and therefore waived this defense. (ALJD at 21-22) Accordingly, all of the ALJ's findings with respect to Respondent's bad-faith conduct were proper.

6. Conduct Away from the Table

Finally, Respondent's conduct away from the bargaining table, including its unilateral changes, direct dealing, and significant Section 8(a)(1) violations, as delineated in the ALJD are further evidence of its bad faith and scheme to avoid an agreement with the Union. *Hardesty Co., Inc.* 336 NLRB at 261 (2001) (employer's unilateral changes, direct dealings, and 8(a)(1) violations evidence its intent not to bargain in good faith); *Enertech Elec.*, 309 NLRB 896, 899 (1992); *Grosvenor Orlando Assoc.*, 336 NLRB 613, 617 (2001).

Even while Respondent was bargaining, it was undermining the Union by dealing directly with employees, making unilateral changes, and ignoring the Union's information requests (ALJD at 30, 32, 45). In addition, at the same time, Respondent threatened, coerced, and interfered with the Section 7 rights of its employees by: interrogating employees; soliciting grievances; threatening discharge; blaming the Union for the lack of a annual wage increase; telling employees continued support of the Union would be futile; and threatened that it would engage in regressive bargaining (ALJD at 33-39, 44-50). Even after employees did, in fact, exercise their right to strike, Respondent wasted no opportunity to punish and coerce them by firing Jose Macias; requiring the strikers to report to Respondent's plant to sign a preferential hiring list; cancelling the direct deposit of their wages; photographing employees while

peacefully picketing; and calling the police to harass the peaceful picketers (ALJD at 59-60, 63-67). In sum, Respondent refused to meet, confer, and bargain with the Union at reasonable times as required by Section 8(d) of the Act. The ALJ properly found that Respondent engaged in bad faith bargaining, and Respondent's Exceptions should be denied.

C. The ALJ Properly Held the Strike was Over Unfair Labor Practices and Respondent Violated Section 8(a)(1) and (3) by not recalling the Strikers

1. Facts

By May, over seven months after the Union's certification, Respondent had met with the Union only four times to bargain over the Maintenance Unit, with little progress.²⁰ After every bargaining session, Aguirre would meet with the workers who made it clear to him that they were very frustrated. (Tr. 517) In one of the May bargaining sessions, and several sessions thereafter, Aguirre informed Respondent that its employees were frustrated with the pace of bargaining. (Tr. 517) This frustration had become so severe that, by the summer, employees wanted to have a sick-out to show their irritation. (Tr. 521-22; ALJD at 51) Respondent learned of the employees' intentions, and Flora asked Aguirre to tell the workers that they would be fired for engaging in a sick-out. (Tr. 517-18; ALJD at 51) Aguirre spoke to the workers' bargaining committee and was able to curtail the planned protest. *Id.*

At the August 29 bargaining session, Aguirre again told Respondent that employees were getting restless at the pace of bargaining, did not feel that bargaining was progressing fast enough, had wanted to have sickout, but he was discouraging them from doing so. (Tr. 259; GC. 5, p. 19; ALJD at 51) Aguirre testified that he told Respondent that employees were frustrated with the snail's pace of bargaining in approximately 8 of the 14 bargaining sessions. (Tr. 519; *ALJD* at 51)

²⁰ The parties met for bargaining on January 30, February 13, March 22, and April 10. (ALJD at 8)

September Strike Meeting. On September 8, Aguirre had a general meeting with employees in both the Maintenance and Drivers Units.²¹ (Tr. 522-24; GC. 95) At the meeting, Aguirre discussed the status of negotiations, and employees again expressed concern about the slow pace of bargaining, their frustration with the length of time it was taking and wanted to know why, a year after voting to unionize, they had nothing to show for it. (Tr. 525) Aguirre also discussed with employees the different proposals that had been exchanged, how Respondent was not cooperating and was unwilling to move on some of the issues the Union felt were important. (Tr. 524-25, 812, 839) Employees also discussed workplace safety issues, such as Respondent's decision to ration water in the middle of the summer. (Tr. 525) Aguirre then discussed with employees the different options that were available. (Tr. 524) At some point, Aguirre told the members that they could continue with what they had been doing, just meeting with Respondent, or they could take action. (Tr. 524) There was a motion to give the negotiating committee the authority to decide whether or not to call a strike, and the employees authorized the committee to do so. (Tr. 524, 534, 786-87)

November Strike Meeting. In the evening of November 13, after the bargaining session where Respondent presented its Final Offer, the Union held another general meeting with employees in both the Maintenance and Drivers Units. (Tr. 528-29, 616-17; GC. 96-97) Aguirre told employees that he did not believe Respondent had any desire to reach an agreement, that the Union had made numerous concessions, had received nothing in return, and had seen no sign from Respondent that they were bargaining in good faith. (Tr. 529, 839-40) Aguirre told the workers that Respondent's Final Offer proposed to give employees even fewer benefits than what they currently enjoyed. (Tr. 529-30) In response to complaints about the amount of time

²¹ The ALJ's recitation of the facts surrounding the September 8 and November 13 strike meetings are found at pages 51-56 of the ALJD.

bargaining was taking, Aguirre again told employees that Respondent had been dragging its feet during bargaining, and that he believed this constituted bad faith. (Tr. 597) Aguirre also told employees that Respondent was not cooperating, and the Union felt Respondent had no intention to reach an agreement. (Tr. 601, 782, 813-14, 820-21, 839-43)

The level of employees' frustration was palpable, and was clear from some of their statements. (Tr. 782, 817, 845-46) One employee complained about how little pay he was receiving, and the fact he could not get a loan because his wages were so low. (Tr. 617-18) Another employee complained that Respondent paid low wages, had unsafe working conditions, and did not treat employees with dignity. (Tr. 619) A third said that it was time workers stood together in solidarity, and that Respondent needed to learn a lesson. (Tr. 618) Complaints also included the fact that trucks were not fully equipped or up to standards, that there was favoritism on the part of management, and about the inequity in the assignment of overtime. (Tr. 845-46)

Again, as with the September meeting, three options were presented to workers: (1) accept Respondent's Final Offer; (2) do nothing and continue bargaining; or (3) go out on strike. (Tr. 616) However, in this meeting Aguirre also told employees that the Union was going to be filing unfair labor practice charges against Respondent. (Tr. 535) Aguirre explained to employees the difference between an economic strike and an unfair labor practice strike. (Tr. 535) Workers were concerned and asked if they could be replaced. (Tr. 535, 817) Aguirre told them that if they went out on an economic strike they could be replaced, but if it was an unfair labor practice strike, they could not. (Tr. 535, 818) Aguirre further told them that, in his view, this would be an unfair labor practice strike, as opposed to an economic strike, and asked employees to vote. (Tr. 536, 841) Employees voted by a show of hands, and authorized the

strike. (Tr. 530-536) The next day Respondent held its 4:00 a.m. meeting with drivers to explain the Maintenance Unit contract. See, Section IV (H)(2) *infra*.

While the employees who testified at hearing all had their own personal reasons for going on strike, all consistently testified that the speed of contract negotiations played a role in their decisions to strike. One employee testified that the pace of negotiations played a role in his decision to strike, and that he wanted to “move things along quicker” in order to attain a contract. (Tr. 781-82) Another testified that he voted in favor of a strike because employees were not seeing any progress in the negotiations. (Tr. 740) A third testified that the fact negotiations were taking so long played also role in his decision to go on strike. (Tr. 821)

Strike & Post Strike Activities. The strike began at 12:01 a.m. on November 21, and Fifty-five workers in both bargaining units joined the strike.²² (GC. 3-4; Tr. 172, 917; ALJD at 55) Striking employees manned a picket line in front of Respondent’s facility, and carried signs which, among other things, stated “Please support our ULP strike against El Paso Disposal” and “On Strike over Unfair Labor Practices.” (GC. 75, p. 1, 3, 10-12; ALJD at 58 n. 91) On December 4, the Union made an unconditional offer to return to work on behalf of the strikers. (GC. 48; ALJD at 55) The next day, Respondent informed the Union that it believed that the employees were on an economic strike, that all of the strikers had been permanently replaced, and that no vacancies existed. (GC. 49; ALJD at 55) As of the hearing, only three drivers, two mechanics, and one truck washer had been recalled. (Tr. 473-74; ALJD at 55)

2. Legal Analysis and Argument

Contrary to Respondent’s claim that employees were engaged in an economic strike, *Resp’t Br. Supp.* at 36-40, the ALJ properly found they were engaged in an unfair labor practice strike. In deciding whether a strike is an unfair labor practice strike, the Board seeks to

²² This number includes Juan Castillo and Jose Macias.

determine whether the employer's unfair labor practices had "anything to do with" causing the strike. *C-Line Express*, 292 NLRB 638, 639 (1989). Stated otherwise, if the unfair labor practices were a "contributing cause" of the strike, or one of the causes of the strike, an unfair labor practice strike exists. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006); *R & H Coal Co.*, 309 NLRB 28 (1992) In *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001) the Board noted:

It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events.

In determining whether a causal connection between the strike and the preceding unfair labor practices exists, the Board looks to the strikers' state of mind. *C-Line Express*, 292 NLRB at 639 (lack of evidence of strikers motivated to prolong strike by coercive employer statements on the picket line). When it is reasonable to infer from the record that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike. *Child Dev. Council of Northeastern Penn.*, 316 NLRB 1145 n. 5 (1995), citing *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972) (if an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike). The burden is on the employer to show that the strike would have occurred even if it had not committed unfair labor practices. *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975).

Unfair labor practice strikers are entitled to reinstatement to their former jobs upon an unconditional offer to work. *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333 (1938). If a striker's former job no longer exists, then reinstatement must be to a substantially equivalent position, even if striker replacements must be terminated to make room for the returning striker. *Id.*; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). The unconditional offer to return to

work is an essential prerequisite to a finding of unlawful failure to reinstate. *Orit Corp.*, 294 NLRB 695 (1989); *Domsey Trading Corp.*, 310 NLRB 777 (1993).

Here, Respondent's Exception to the ALJ's finding that there was a causal connection between Respondent's illegal conduct and the strike is not supported by the evidence. *Resp't Br. Supp.* at 37. Viewing the record as a whole, the ALJ properly concluded that Respondent's unfair labor practices contributed to the strike. Several employees credibly testified that Respondent's delay in bargaining was a motivating factor for their decision to strike. *Post Tension of Nevada*, 352 NLRB 1153, 1162-63 (2008) (Board looks at strikers state of mind to establish a causal connection between the strike and preceding unfair labor practices). Before the strike, Aguirre held two strike authorization meetings in which he discussed with employees the slow pace of bargaining, and during which employees expressed their frustration and wanted to know why they had nothing to show for their efforts a year after voting to unionize. At the November 13 meeting, where employees voted to strike, Aguirre discussed with workers the slow progress in negotiations, explained to them that he believed Respondent's was "dragging their feet" in negotiations, and this constituted bad faith. Aguirre also discussed with workers the differences between an economic and unfair labor practice strike, and that he was going to be filing unfair labor practice charges against Respondent. The strikers' intent to protest Respondent's unfair labor practices is also confirmed by the Union's consistent statements that employees were on a ULP strike, and the picket signs carried by the strikers. *Page Litho, Inc.*, 311 NLRB 881, 891 (1993) (union's consistent position that strikers were unfair labor practice strikers supports such a finding). *R & H Coal Co.*, 309 NLRB 28, 28 (1992) (picket signs saying "unfair labor practice strike" is a factor supporting a finding that the strike was protesting employer's unfair labor practices).

Respondent's claim that employees would have struck regardless of its illegal conduct, *Resp't Br. Supp.* at 40, is specious, as the ALJ's findings are supported by the testimony of the strikers, who consistently stated that the delay in contract negotiations played a role in their decision to strike. Moreover, in the pre-strike meetings, where workers authorized a strike, Aguirre specifically discussed with employees the slow pace of bargaining, that he believed Respondent's foot-dragging constituted bad faith. Before voting to strike, employees complained that they had nothing to show for their efforts despite a year having passed since voting to unionize. Under these circumstances, Respondent cannot show the strike would have occurred absent its unfair labor practices. Accordingly, since Respondent's unlawful conduct played a part in the workers' decision to strike, the ALJ properly concluded that the strike was an unfair labor practice strike since its inception. *Post Tension of Nev.* supra.

On December 4, the Union presented Respondent with an unconditional offer to return to work on behalf of the strikers. Unlike the obligation to an economic striker, unfair labor practice strikers must be immediately reinstated upon an unconditional offer to return to work. *Id.* By failing to do so, Respondent violated Section 8(a)(1) and (3) of the Act. The record evidence and the law support the ALJ's findings and conclusions that employees engaged in an unfair labor practice strike, and that Respondent violated Section 8(a)(1) and (3) of the Act by failing to reinstate them upon their unconditional offer to return to work. Therefore, Respondent's Exceptions, claiming its workers were engaged in an economic strike, must be denied.

D. The ALJ Properly Found Respondent's Requirement that Employees Sign a Preferential Rehire List Violated Section 8(a)(3).

On December 4, on behalf of the strikers, the Union sent Respondent a letter making an unconditional offer to return to work. (GC. 49) The next day, Flora sent the Union a letter stating that Respondent believed employees were economic strikers, that Respondent had hired a

full complement of replacement workers, and that the strikers were only entitled to reinstatement upon the departure of the replacements. (GC. 49) Flora further directed the Union to instruct the strikers to report to Respondent's Human Resources department to sign a preferential hiring list indicating their desire to be reinstated should a vacancy occur. (GC. 49; ALJD at 59 n. 92) After receiving the letter, Aguirre instructed the strikers to report to Respondent's offices as directed by Flora, and the strikers did so accordingly. (Tr. 530-31, 847) On December 10, Flora sent a letter to the Union informing them of the individuals who had not signed the preferential hiring list. (GC. 51) In all, 52 strikers signed the list. (GC. 78)

In its Exceptions, Respondent claims that the ALJ improperly found a violation, and that the Union "implicitly" acquiesced in its directive that workers return to the plant and sign a recall list. *Resp't Br. Supp.* at 48. However, the principles governing the reinstatement rights of former strikers are well established. In *Laidlaw Corporation*, 171 NLRB 1366, 1369-1370 (1968), the Board held that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements, unless they have acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons. Accordingly, Respondent was required to place the former strikers on a nondiscriminatory recall list, without placing any obligation upon them.

Respondent's imposition of an affirmative duty on the former strikers to come to the plant to sign a recall list unlawfully infringed upon their *Laidlaw* rights, by requiring them to take steps beyond their unconditional offer to return to work. *Peerless Pump Co.*, 345 NLRB 371, 372, 375 (2005) (violation to instruct former strikers to report to the plant to sign a

preferential rehire list indicating their desire to be reinstated); *Pirelli Cable Corp.*, 331 NLRB 1538, 1539 (2000) (violation to condition the reinstatement of strikers on their submission of a letter advising employer of their desire and availability for reinstatement); *Champ Corp.*, 291 NLRB 803, 881 (1988) (violation to require workers sign a form stating they wished to be placed on a preferential hiring list). Contrary to Respondent's Exceptions, there is simply no evidence that the Union "implicitly" agreed with Respondent's illegal directive. Instead, the Union simply informed workers of Flora's illegal instruction. Accordingly, Respondent's actions interfered with employees' rights to be recalled to work upon the conclusion of the strike, the ALJ properly found an 8(a)(3) violation, and Respondent's Exceptions to the contrary must be denied.²³

E. The ALJ Properly Found that Respondent's Change in the Manner in Which it Tendered Wages to Employees Violated Section 8(a)(3).

Employees regularly received their paychecks by direct deposit. However, after the strike, the strikers received their last paycheck by mail. (Tr 776-77; ALJD at 66) The Board has found that an employer violates Section 8(a)(3) by changing the manner in which it distributes paychecks if made in retaliation for union activity. *Sivalls, Inc.*, 307 NLRB at 1004. Here, instead of using direct deposit, as it did before employees went on strike, Respondent mailed the strikers' pay checks to their homes. Thus, the strikers no longer had automatic access to their funds while they were manning the picket line. Instead, by mailing the checks, Respondent ensured that the strikers would have to take time off of their picket line activities to retrieve and cash their checks. Moreover, instead of having instant access to their funds, strikers would have to wait for the mail to arrive, and then proceed to a bank to cash their checks.

Respondent's Exceptions assert that the ALJ erred in finding that this change constituted an 8(a)(3) violation, as there was no intent to harass the strikers. *Resp't Br. Supp.* at 48.

²³ The ALJ neglected to include this violation in the Conclusion of Law Section of the ALJD. Compare, ALJD at pp. 59 n 92, 72-74. The General Counsel has taken Cross-Exceptions to this oversight.

However, as shown herein, Respondent harbored the requisite anti-union animus, and the change from direct deposit to mailed checks for the strikers occurred immediately after the unfair labor practice strike started. Accordingly, the ALJ properly concluded that Respondent acted in retaliation against its employees' Union activities, and violated Section 8(a)(3) of the Act.

F. The ALJ Properly Concluded that Respondent Violated Section 8(a)(3) by Preventing Jose Macias from Returning to Work.

Respondent asserts that the ALJ erred in finding that Jose Macias was discharged when he returned to work from a vacation, after the strike had started, claiming that the ALJ erred in crediting Macias' testimony over that of Respondent's representative Olivas. *Resp't Br. Supp.* at 47. However, the ALJ's findings are fully supported by the record.

Jose Macias worked as a painter in Respondent's body shop.²⁴ (Tr. 823; GC. 3-4) Macias was on vacation when the strike started, and didn't return back to work until after the strike had commenced.²⁵ (Tr. 825-26, R. 11) Respondent's payroll records show that Macias was on vacation from November 19 through November 23, and was scheduled to return to work on November 26, at 6:00 a.m. (R. 11) Despite the fact Macias was on vacation, Respondent's documentary evidence showed that Respondent hired a permanent replacement named "Enrique Herrera" to fill Macias' position on November 22. (GC. 60, p. 2; R. 5; Tr. 945-46)

When Macias returned to work on November 26, his coworkers were on strike. (Tr. 826) Macias did not know that his coworkers had gone out on strike until he arrived to work that day and saw them picketing outside. (Tr. 829;) Notwithstanding, Macias reported to work as scheduled.²⁶ (Tr. 826-27) When he reported to work inside Respondent's facility, Olivas asked him "why are you showing up here, because there is nobody here." (Tr. 826) Macias leaned in,

²⁴ The General Counsel alleged Macias was an unfair labor practice striker, and as an alternative theory alleged he was terminated upon returning from his vacation under the mistaken belief that he had engaged in a strike.

²⁵ The facts surrounding this violation are found at pages 61-63 of the ALJD.

²⁶ It is undisputed that other Maintenance Unit employees scheduled to start work as early as 4:00 a.m. (Tr. 282)

saw that nobody was inside working, and at some point during the strike joined the striking employees by standing with them and honoring the picket line. (Tr. 826-27, 830-31) On December 5, Macias spoke with Gracie Silva, who told him that he had been permanently replaced, and had Macias sign Respondent's preferential rehire list. (Tr. 827-28) After he spoke with Silva, Macias joined his coworkers on the picket line. (Tr. 830)

Notwithstanding Respondent's documents showing the contrary, at hearing Olivas testified that, when Macias arrived for work on November 26, Macias asked if he had been fired; that Olivas told him no; and Macias then started crying and praying, saying he did not know what to do. (Tr. 922-23) Olivas then claimed that he gave Macias the option of staying at work or going to speak with Silva at human resources. (Tr. 922-23) Olivas further testified that Macias left, and that Respondent waited "a good while" to hear back from him before deciding to hire a replacement. (Tr. 923-24, 945)

An employer violates Section 8(a)(3) and (1) of the Act for discharging an employee for known, or suspected union activity. *West Maul Resorts*, 340 NLRB 846, 846 (2003). Here, even though he was on vacation, Respondent suspected that Macias had joined, or would join, his coworkers on strike, and hired a permanent replacement for him on November 22. Surprised when he showed up for work as scheduled after vacation, and knowing a replacement had been hired, Olivas referred Macias to the other strikers and asked why he was still there instead of assigning him work. Olivas' claims that he told Macias he was not fired, and that Respondent waited "a good while" to hire a replacement, are contradicted by Respondent's own documents showing that Macias' replacement was hired on November 22. Therefore, the ALJ properly discredited Olivas. See, *Celtic General Contractors, Inc.*, 341 NLRB 862, 875 (2004) (in assessing the credibility of witnesses it is always helpful to have documentary evidence as a

The ALJ credibility resolutions are supported by the evidence, as is his finding that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Macias.

G. The ALJ Properly Concluded that Respondent's Actions Towards Employee Juan Castillo Violated Section 8(a)(1) and (3).

Contrary to Respondent's Exceptions, the ALJ properly found that Respondent violated the Act by neither reinstating Castillo to his welding job, nor immediately reinstating his employee status. *Resp't Br. Supp.* at 50. Juan Castillo, who was a member of the Union's bargaining committee, worked for Respondent as a welder/mechanic, and was on workers' compensation at the time of the strike.²⁷ (GC. 60, p. 2; Tr. 368, 520-21, 1195) In response to the Union's information request, Respondent identified Castillo as a striking employee, and even identified a specific replacement employee hired to fill his position. (GC. 60) At some point after the strike ended, Respondent decided Castillo could not be a striking employee because of his workers' compensation status, and held open a position for him that was created when a welder had been terminated on December 10. (Tr. 369, 1195; R. 7)

In early January 2008, Castillo came to Respondent's facility and spoke with Olivas, who told Castillo that he was permanently replaced. (GC. 87; Tr. 374-75) On January 8, 2008, Respondent then sent a letter to Castillo offering him a job as a welder. (GC. 83) Castillo never replied, and Respondent sent him a follow-up letter on February 5, 2008. (GC. 84)

On March 5, 2008, Castillo sent Respondent a letter declining the job offer. (GC. 85) In his letter, Castillo recounted his conversation with Olivas, and stated that he believed that he had been fired. (GC. 85) Moreover, Castillo informed Respondent that on January 7, Benito Beanes, Respondent's evening shift supervisor, told Castillo that he had been fired and Respondent would call the police and press charges against him if they saw him at Respondent's facility.

²⁷ The ALJ's recitation of facts regarding Castillo are found at pages 67-68 of the ALJD.

(GC. 85, 87; Tr. 768) On March 24, 2008, Respondent informed Castillo that, by declining the job offer, he had resigned his employment effective March 10, 2008 (GC. 86)

Rather than immediately offering to reinstate Castillo to his welding job, or immediately reinstating his status as an employee, Respondent permanently replaced him and terminated his status as an employee. The first time Respondent attempted to reinstate Castillo's employee status was on January 8, 2009, when Respondent offered Castillo a welding job. Given these circumstances, the ALJ properly found that Respondent violated Section 8(a)(1) and (3) by neither reinstating Castillo to his welding job, nor immediately reinstating his employee status. Accordingly, Respondent's Exceptions should be denied. specious

H. The ALJ Properly Found Multiple Section 8(a)(1) Violations.

1. The ALJ Properly Found that Dupreau's Statement at the October 11 Meeting Violated Section 8(a)(1) of the Act.

At the September 11 bargaining session, three days after the Union's strike meeting, Aguirre informed Respondent about the workers' frustration, which led to the strike vote. (Tr. 260; GC. 5, p. 20) The extent of employees' frustrations was again discussed at the October 4 bargaining session. (ALJD at 34) Aguirre viewed the circumstances as urgent, because the workers were very upset that nothing was getting accomplished at bargaining. (Tr. 519) Aguirre told Respondent that every time he meets with the workers he gets the impression that they were becoming increasingly frustrated. (Tr. 518-19) Dupreau responded that he did not believe Aguirre, because there was low turnover and many employees had worked for Respondent a number of years. (Tr. 518; ALJD at 34) Dupreau also said that if employees were frustrated, they would have quit a long time ago. *Id.* In an effort to show Dupreau he was wrong, Aguirre invited him to visit with the employees and see for himself their frustration. (Tr. 519, 1043-44;

ALJD at 34-35) Flora asked about potential direct dealing issues, and Aguirre said that he would not file a direct dealing charge. (Tr. 268, 519, 532)

Before meeting with workers, Dupreau drafted a list of questions to initiate discussions. (Tr. 1045; GC. 110; *ALJD* at 35) One of the questions was whether the Union had “done anything they promised to do.” (GC. 110; *ALJD* at 35 n. 55) Dupreau testified that he asked some of the workers this question, and noted their responses. (Tr. 1073; *ALJD* at 35)

Dupreau met with the mechanics, who work on two shifts, on October 11. These meetings were closed-door meetings with individual employees in a private conference room, across from the main office. (Tr. 1098; *ALJD* at 35) Dupreau met with the employees individually, and an employee named Jose Prado served as an interpreter for some of these sessions. *Id.* Dupreau met with the first shift mechanics first, and was then planning to meet with the second shift mechanics later in the day. (Tr. 795)

One of the employees Dupreau met with during the first-shift was Jose Duran. Duran had not previously known about the meeting, and Dupreau asked him what his reasons were for having gone to the Union. Duran replied that he was having problems with his supervisors, in that they would not pay attention to him, and it was only when employees organized with the Union did Respondent discuss a contract a contract with them. Duran asked Dupreau why, after so many years, he was only now coming to speak to employees? Dupreau replied that he was there in order to fix the problems between employees and Respondent. (Tr. 734-38, 746; *ALJD* at 35-36, 37-38)

Dupreau was taking notes during these meetings, and his notes show that he asked employees a variety of questions, and noted their answers. (GC. 111; *ALJD* at 35) He asked one employee what he expected from the Union, and whether the Union had done anything yet for

employees. (Tr. 1087; ALJD at 35 n. 55, 37) When the employee answered no, Dupreau asked whether he would be willing to try using Olivas as an advocate for employees, and the employee answered “yes.” (Tr. 1088-89, 1090-91) When speaking to another employee, Dupreau noted that he believed that Olivas could take the place of the Union, and speak for employees if they had problems. (Tr. 1097-98) Dupreau also asked employees such questions as why they have not left the company; what Respondent was doing wrong; what changes they wanted; and whether the Union could fix their problems. (Tr. 1084-85, 1092, 1094, 1094-95)

As for the second shift mechanics, about a week prior to Dupreau’s meeting, Olivas told the second shift mechanics that an important corporate official who had the authority to make changes was coming to speak with them individually, and to “listen to you guys.” (Tr. 794-95; ALJD at 36) Olivas told them to prepare for the meeting, and to make notes about their concerns to present to Dupreau. *Id.* When the second shift mechanics arrived to work on October 11, Olivas told them that, because Dupreau had already spoken to the first shift, he could not individually interview the second shift mechanics. (Tr. 795-96; ALJD at 36) Instead, Olivas told them to decide on one person who could speak with Dupreau. *Id.* The nine mechanics present elected Jesus Ramirez to be the individual to meet with Dupreau. (Tr. 798; ALJD at 36)

Dupreau asked Ramirez why employees decided to “bring the Union into the company.” (Tr. 797-98; ALJD at 36, 38) Speaking on behalf of the group, Ramirez stated that people were unhappy because of favoritism, nepotism, discrimination and unfair treatment. *Id.* Dupreau took notes, and told Ramirez that he had written everything down and was going to consult with his superiors. (Tr. 799; ALJD at 36, 38)

Respondent’s Waiver Claim. Respondent asserts in its Exceptions that the Union waived its right to file charges regarding this matter. *Resp’t Br. Supp.* at 43. However, the ALJ

properly found that the Union did not waive its right to file unfair labor practice charges regarding Dupreau's meeting with employees. (ALJD at 37) There is no question that Aguirre told Dupreau that he could meet with employees to determine their level of frustration, and that Aguirre agreed that he would not file a direct dealing charge.²⁸ However, the evidence shows that Dupreau's questions to employees exceeded any agreement Respondent had with the Union.

A labor union may waive an employee's individual statutory right, so long as it does not breach its duty of good faith representation. *Prudential Insurance Co.*, 275 NLRB 208, 209 (1985), citing *Metropolitan Edison Co. v. NLRB*, 460 US 693, 709 (1983). The test in deciding whether the waiver of a statutory right occurred is whether the waiver was "clear and unmistakable." *Id.* In applying this test, the Courts and the Board recognize that the "clarity" of a waiver requires consideration of the specific circumstances of each case. *Id.*

Here, Aguirre simply invited Dupreau to visit with employees to gauge their level of frustration, and agreed to not file a direct dealing charge. Aguirre did not invite Dupreau to interrogate employees about the reasons that caused them to support the Union, what they hoped the Union would accomplish, their overall satisfaction with the Union, or potential advocates that could take the Union's place. Other than the issue of direct dealing, there was simply no "clear and unmistakable" waiver of the Union's right to file charges over other perceived violations of the Act. Dupreau's questions exceeded the scope of Respondent's agreement with the Union, and ALJ properly found no merit to Respondent's asserted waiver defense.

Respondent Interrogated Employees. In its Exceptions, Respondent asserts that the ALJ erred in finding a violation because Dupreau's questioning of employees was not coercive.

²⁸ Regarding this incident, Flora testified as follows: "Immediately, I indicated over the table that I had concerns about direct dealing. This did not -- my antenna went up. And it was discussed, and I asked specifically are they going to file a charge, a direct dealing charge, if Gene Dupreau talks to these people. And they committed over the table, Randy was there, Victor was there, and Juan was there, and they committed over the table that they would not file a charge if Gene Dupreau met with these people." (Tr. 221-222)

Resp't Br. Supp. at 44. However, the ALJ properly found that Dupreau interrogated employees. Statements to employees engaged in union activities are unlawful if, in light of the totality of the circumstances, they reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Millard Refrigerated Services, Inc.*, 345 NLRB 1143, 1146 (2005), citing *Rossmore House*, 269 NLRB 1176, 1177 (1984). Relevant factors to consider include whether the employees in question were active and open union supporters, the background, timing, and nature of information sought, the identity of the questioner, the place and method of the questioning, whether a valid purpose for the questioning was communicated to employees, and whether employees were given assurances against reprisals. *Id.*

Here, other than one employee who was on the Union bargaining committee, there is no evidence that any of the employees who Dupreau met with were open or active supporters.²⁹ The questioning occurred in a closed-door conference room, across from the main office. No valid purpose was communicated to employees, and none were given any assurances against reprisals. Under the totality of the circumstances, the ALJ properly found that Dupreau's extensive questioning as to why employees supported the Union, what they expected from the Union, and whether the Union had done anything to date, violated Section 8(a)(1), and Respondent's Exceptions should be dismissed. *The Singer Co.*, 199 NLRB 1195, 1197 n. 1 (1972) *enfd.* 480 F.2d 269 (10th Cir. 1973) (foreman interrogated employees by: (1) asking a group of workers why they wanted the Union; and (2) inviting an employee to his sit at his desk and ask him "Why do you want a union? Why do you think you need a union?"); *Viracon*, 256 NLRB 245, 252 (1981) (employer interrogated employees by asking "why do you people want a union, why do you want this union, aren't you happy here").

²⁹ Dupreau met with Hector Hernandez, who was on the bargaining committee, and testified that he knew from the bargaining sessions that Dupreau would meet with him. (Tr. 753-62)

Respondent Solicited Grievances. Respondent's Exceptions claim that the ALJ erred in finding that Respondent solicited grievances, however the ALJ's finding is fully supported by the evidence. *Resp't Br. Supp.* at 43-44. The relevant principles regarding the solicitation of grievances are well established. Absent a previous practice of doing so, the solicitation of grievances during an organizing campaign, accompanied by a promise to remedy those grievances, whether express or implied, violates the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). Here, Respondent had no previous practice of meeting with employees, and employees specifically testified that Dupreau noted their responses and said he was there to fix problems between the employees and Respondent. Accordingly, the ALJ properly found that Respondent violated Section 8(a)(1) by soliciting grievances from workers, and Respondent's Exceptions should be dismissed. *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1168 (2004); *Beverly California Corp.*, 326 NLRB 153, 153 n. 2 (1998)

2. The ALJ Properly Found that Respondent's Statements at the November 14 Drivers Meeting Violated Section 8(a)(1).³⁰

Respondent scheduled a mandatory meeting for its drivers on November 14, at 4:00 a.m. (Tr. 778, 836; ALJD at 41) The day before the meeting, Respondent placed a sign next to the time clock informing drivers that this meeting was mandatory. (Tr. 778; ALJD at 41-44) All of Respondent's drivers, and some of the morning shift mechanics were present for this meeting, and Respondent was represented by Gene Dupreau, George Wayne, and Armando Lopez. (Tr. 777, 836; ALJD. (Tr. 777, 810, 837) Respondent's employees, all of whom are former strikers awaiting reinstatement, and did not discuss their testimony with others before testifying, and testified in a consistent manner about what occurred during this meeting.

³⁰ The direct-dealing violation found by the ALJ will also be addressed in this section.

Mario Ortiz. Ortiz testified that Dupreau discussed the progress of negotiations, telling the drivers that Respondent presented the Union with a Final Offer, and said that it was not going to change. (Tr. 778) Dupreau read through some of the proposals, and when one drivers asked why they were at this meeting, since this was the mechanic's contract, Dupreau replied that the contract was "for both of you." (Tr. 778) Dupreau then told the workers that if they walked out, Respondent would do whatever it takes to service its customers, and that employees would be permanently replaced. (Tr. 779) At some point, driver Mike Garza asked how the workers could get rid of the Union. (Tr. 779) Ortiz could not remember the exact reply, or who said it, but testified that someone from Respondent's management team said that there were ways of doing so. (Tr. 780, 789) Ortiz was resolute that, at no time during this meeting, did Respondent use the word "economic strike." (Tr. 781) Also, he insisted that neither Wayne nor Dupreau told the drivers the reason behind the meeting was because the Union said they would go out on strike, or that a strike would include both the Maintenance and Drivers units. (*ALJD* at 43-44)

Jesus Dominguez. Dominguez testified that Dupreau told the employees Respondent had finished negotiating with the Union, that the contract they negotiated was going to be the same for the drivers, and that if they did not like it "there was the door." (Tr. 810) Dupreau then reviewed some of the terms of Respondent's offer, including the sick leave, vacation, and wage provisions. (Tr. 811, 819-20) Both Wayne and Dupreau then told the workers that, if they went on strike, they would be permanently replaced. (Tr. 810-11, 819-20) Dominguez was firm that, at no time did either Wayne or Dupreau say anything about an "economic strike." (Tr. 810-811) While Dominguez remembers a driver named Mike asking how employees could get rid of the Union, he did not remember what reply, if any, was given. (Tr. 811) (*ALJD* at 41-44)

Adan Vasquez. Vasquez testified that, at this meeting, Dupreau reviewed the contract that Respondent offered the mechanics. (Tr. 837) Wayne then discussed the negotiations with the mechanics, saying that no agreement had been reached, or was going to be reached, with the Union. (Tr. 837) Further, Wayne said that if anybody was going to go on strike, they would be permanently replaced. (Tr. 837) Vasquez testified that drivers asked how employees could get rid of the Union, and Wayne replied that they had to sign a petition and try to vote them out. (Tr. 837-38) Vasquez also testified that no member of the management team ever used the term “economic strike” at this meeting. (Tr. 838) (*ALJD* at 41-44)

Respondent’s testimony about this meeting differed greatly from that of the employees.

Gene Dupreau. Dupreau testified that, at the meeting, he had a summary of Respondent’s Final offer, which he used to assist him in speaking to the workers. (Tr. 1055; R. 12) Dupreau reviewed the contract, and told the drivers he wanted them about Respondent’s offer the Maintenance Unit. (Tr. 1055-56, 1058) When an employee asked what would happen if they went out on strike, Dupreau claims that Wayne replied that anyone who participated in an economic strike would be permanently replaced. (Tr. 1060-61) (*ALJD* at 41-44)

George Wayne. Wayne testified that Dupreau told the drivers that Respondent had presented a Final offer to the Union, and reviewed a summary of the offer. (Tr. 282-83) Towards the end of the meeting, Respondent asked if the employees had any questions, and an employee asked how they could get rid of the Union. Wayne claims he replied by saying “the same way that you got them in.” (Tr. 324) At some point, Wayne testified he told employees that, if they went out on an “illegal or economic strike,” Respondent had the right to permanently replace them, and would do so. (Tr. 1218-19) When asked twice by the General Counsel if anybody at this meeting inquired as to why the drivers were present, since the contract only

involved the mechanics, Wayne clearly testified both times that he did not recall anybody asking this question. (Tr. 283-84) However, when asked this same question by Respondent’s counsel the next day, Wayne changed his testimony and provided a very detailed response, claiming he told the workers that the Union had told Respondent that it would take both units out on strike. (Tr. 443-44) Two months later, Wayne gave a similar, more detailed account, of what occurred. (Tr. 1217-19) In sum, Wayne claims that he told the assembled workers that, since Respondent believed that the only issues dividing the parties were primarily economic, and the drivers were being asked to strike, Respondent was reviewing the Final offer, because it thought the drivers “ought to understand what it was over.” (Tr. 443-44, 1217-18) (ALJD at 41-44)

Armando Lopez. Armando Lopez testified that Wayne told the drivers that Respondent believed any strike would be an economic strike and therefore employees would be permanently replaced. (Tr. 483) When one of the drivers asked why they were present, Wayne told them that Respondent was there to inform them that it made a Final Offer to the Union, and that this contract was relevant to the drivers also. (Tr. 484-85)

a. Respondent’s Exceptions

Credibility Resolutions. With respect to all of the violations found by the ALJ regarding what occurred at the November 14 meeting, Respondent asserts that the ALJ erred in crediting the testimony of the employee witnesses over the testimony of Respondent’s witnesses. *Resp’t Br. Supp.* at 45-46. However, the ALJ properly credited the testimony of Ortiz, Dominguez, and Vasquez, over that of Dupreau, Wayne, and Lopez. As noted by the ALJ, the employee witnesses were all direct, forthright, consistent in their answers, and did not change their testimony. In contrast, Wayne changed his testimony from one day to the next. Moreover, Wayne and Lopez participated in group meetings with Respondent’s attorneys, where the subject

matter of this case was discussed, just before they testified. (Tr. 453; *ALJD* at 44) See John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 351 (1989) (discussing that group preparation of witnesses poses extraordinary dangers of collusion, influence, and fabrication). Respondent cannot, and did not, show by a preponderance of all relevant evidence that the ALJ's credibility resolutions are incorrect. See, *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Accordingly, the ALJ's credibility resolutions should be upheld, and Respondent's Exceptions based upon credibility denied.

Threat Permanent Replacement. The ALJ properly credited the employee testimony that Respondent told the drivers they would be permanently replaced if they went out on a strike. Telling employees they will be permanently replaced if they "strike" is an unlawful threat of termination where such statements are made as part and parcel of a threat of retaliation for choosing representation. *Unifirst Corp.*, 335 NLRB 707, 707 (2001). Moreover, in such a context, any ambiguity surrounding comments about striker replacements is resolved against the employer. *Id.* Here, Respondent's statement to drivers that they would be permanently replaced if there was a "strike" was made in the context of other illegal threats to employees, and the ALJ properly found a violation. Cf. *Noel Corp.*, 315 NLRB 905, 908 (1994) (The terms "you will be permanently replaced" and "the company has hired permanent replacements" constitute an unlawful threat when made at a time when no replacements have actually been hired).³¹

Futility. The ALJ properly credited the employee testimony that Respondent told workers that its Final Offer was for both the Maintenance Unit and the Drivers Unit employees, even though no bargaining had occurred for the Drivers Unit. Even Lopez admitted that Respondent told workers that the Maintenance Unit contract was relevant to the drivers. By telling the drivers that the Maintenance Unit contract was for both units, at a time when no

³¹ It is undisputed that Respondent did not hire its first permanent replacements until November 21. (R. 6)

bargaining had occurred for the drivers, the ALJ properly found that Respondent's statements conveyed only one message – bargaining with the Union would be futile. *North Hills Office Services, Inc.*, 344 NLRB 1093, 1094 (2005) (telling workers that voting in the union “would be the same difference” regarding wages conveyed the message of futility); *Exelon Generation Co.*, 347 NLRB 815, 830, 832 (2006) (employer engaged in objectionable conduct by showing employees a recently negotiated contract at another division and telling workers they will only get a similar or worse contract).

Regressive Bargaining. The ALJ properly credited the employee testimony that, at the November 14 meeting with the Drivers Unit, Respondent specifically discussed the sick leave provision in the Final Offer, which contained fewer benefits than what drivers currently were receiving. Accordingly, the ALJ properly found that Respondent's conduct amounted to a threat of regressive bargaining. *Laser Tool, Inc.*, 320 NLRB 105, 110-111 (1995) (Employer implied that selection of the union was futile and that it would engage in regressive bargaining by telling workers it would “bargain from scratch”).

Threats of Discharge. The ALJ properly credited the employee testimony that, Respondent told the gathered employees that the drivers' contract was going to be the same as the mechanics' Final Offer, and that if they did not like it “there was the door.” By inviting employees to quit if they did not like Respondent's unfair labor practices, the ALJ properly found that Respondent threatened employees with discharge in violation of Section 8(a)(1) of the Act. *Peter Vitalie Co.*, 310 NLRB 865, 869 (1993) (while discussing the union, employer threatened employees with termination by telling them that if they did not like working at the company “there's the door”).

Direct Dealing. Finally, the ALJ properly credited the testimony of the employee witnesses, who testified that Respondent presented its Final Offer to the drivers, and told the drivers that the Final Offer would be the same for them. Since this occurred at a time when bargaining had not even started for the drivers, the ALJ properly found Respondent bypassed the Union and dealt directly with the drivers over their terms and conditions of employment in violation of Section 8(a)(1) and (5). *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003).

3. Respondent Violated Section 8(a)(1) by Blaming the Union for Employees Not Receiving Their Annual Wage Increase

Respondent had a history of providing its employees with an annual wage increase, before the Union was certified. (GC. 76; Tr. 641; *ALJD* at 14, 33) In 2006, Respondent's employees received a wage increase of about 4.2%, and in 2005 they received an increase of about 2.4%. (GC. 44, 45) However, since the Union's certification, Respondent's unionized employees have not received any wage increase, while Respondent's non-union employees received their annual raises for 2007. (Tr. 857-58; GC. 105; *ALJD* at 14) On several occasions in late August or early November, during the run-up to the strike, employees asked Olivas about not receiving raises for 2007. Three employees, Jose Castillo (Tr. 857-58, 861), Jesus Duran (Tr. 732), and Hector Hernandez (Tr. 755) separately testified that Olivas stated he could do nothing about their raises because of the Union. Olivas admits he discussed this topic with employees, but claims he only told them that their wage increases were subject to bargaining. (Tr. 924-25)

In its Exceptions, Respondent asserts that the ALJ erred in not crediting Olivas' testimony, over the testimony of the employee witnesses. *Resp't Br. Supp.* at 46. However, the ALJ, properly discredited Olivas, and found a violation. (*ALJD* at 34) Here, all the employees credibly testified that Olivas told them that they have not received their wage increases because of the Union, and the ALJ properly credited Castillo's testimony over Olivas'. Along with

reviewing Castillo's demeanor, Castillo was a current employee awaiting recall, testifying against his pecuniary interest, lending to his credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995). Moreover, Castillo had not discussed his potential testimony with anybody before testifying.³² In contrast, Olivas participating in a group preparatory session before testifying, together with George Wayne and Armando Lopez, which weighs against his credibility. See John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 351 (1989).³³

An employer who blames a newly-certified Union for its failure to grant annual wage increase violates Section 8(a)(1) of the Act. *Aluminum Casting & Engineering Co., Inc.*, 328 NLRB 8, 16 (1999); *NLRB v. Otis Hosp.*, 545 F.2d 252, 256 (1st Cir. 1979) *Kentucky Fried Chicken*, 341 NLRB 69, 78 (1979). Accordingly, the credible evidence shows that Olivas blamed the Union for the fact that employees had not received their annual wage increases, the ALJ properly found a violation, and Respondent's Exceptions should be dismissed.

4. Olivas' Threats to Employees that They Would be Fired if They Went on Strike Violated Section 8(a)(1) of the Act

On November 20, Olivas called a meeting for the second shift mechanics and told them that Respondent heard that employees were considering a strike. (Tr. 765, 793-94, 929; ALJD at 50) Three employees, Umberto Hernandez, Jesus Ramirez, and Jose Castillo, each testified that Olivas then told the mechanics that if they went out on strike they would be fired. (Tr. 771-72, 793-94, 856-57; ALJD at 50-51) Olivas admits meeting with the mechanics and telling them that they would be "permanently replaced" if they went out on strike, but denies telling them that they would be fired for striking. (Tr. 929-30) It is undisputed that Respondent did not start hiring any permanent replacements until November 21. (R. 6)

³² This is also true for Duran and Hernandez, who did not discuss their potential testimony with others before testifying, and like Castillo were awaiting recall and thus testified against their pecuniary interest.

³³ Respondent cannot show by a preponderance of all relevant evidence that the ALJ's credibility resolutions are incorrect. See, *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Again, Respondent objects the ALJ's finding a violation, based upon his credibility determination as to what was said at this meeting. *Resp't Br. Supp.* at 46. Three employees independently testified that Olivas told them they would be fired if they went on strike, and the ALJ properly credited their testimony over that of Olivas. Along with the ALJ's assessment of Olivas' demeanor while testifying (ALJD at 40, 50), all three employees were awaiting reinstatement, and therefore, testifying against their pecuniary interests, lending support to their credibility. *Flexsteel Industries*, supra. Respondent cannot, and did not, show by a preponderance of all relevant evidence that the ALJ's credibility resolutions are incorrect. *Standard Dry Wall Products*, supra. An employer violates Section 8(a)(1) by telling its workers that they would be fired if they engage in a strike. *Insta-Print, Inc.*, 343 NLRB 368, 376 (2004). Accordingly, the ALJ properly found a violation.³⁴

5. Respondent's Photographing Picketers Violated Section 8(a)(1)

On the first day of the strike, Wayne dispatched one of Respondent's salesmen to photograph the strikers, who took a series of photographs showing the identity of the individual picketers and gave them to Wayne. (Tr. 332; GC. 75; ALJD at 64) Employees recognized the photographer as someone from Respondent's office, and the evidence shows that the picketing that occurred was orderly and peaceful. (Tr. 539, 780-81, 814-15; ALJD at 63-64)

The Board has long held that, absent proper justification, it is unlawful to photograph employees engaged in Section 7 activity because such conduct has a tendency to intimidate employees and plant a fear of reprisal. *Hercules Drawn Steel Corp.*, 352 NLRB 53, 67 (2008). Here, the evidence clearly shows that the employee picketing was passive and organized.

³⁴ Even crediting Olivas that he said employees would be "permanently replaced," a violation is still warranted as Respondent had not hired any permanent replacements by November 20. *Noel Corp.*, 315 NLRB 905, 908 (1994).

Notwithstanding, Respondent photographed the picketers. Under these circumstances, the ALJ properly found a violation and Respondent's Exceptions should be denied.

6. Respondent's Calling the Police on Picketers Violated the Act.

Olivas called the police on the employees who were peacefully picketing in front of Respondent's facility. (Tr. 395) Olivas testified he called the police on the second day of the strike, claiming that he received reports that strikers were using signs to block the vision of Respondent's drivers and that this, in fact, happened to him when he was driving into the yard. (Tr. 931-33) When asked to describe the incident, Olivas testified that a striker was walking slowly across the right of way in front of his truck while he was pulling into Respondent's driveway. (Tr. 932-33, 951-52; GC. 113-114) Olivas asked the striker to let him through, and the individual complied. (Tr. 932-33) At no time did Olivas testify that he called the police because the strikers were trespassing. (Tr. 931-33) Two officers arrived at the scene and then Wayne instructed the strikers to not cross Respondent's property line. (Tr. 395-96) The evidence shows that the picketing was orderly and peaceful manner, and that none of the strikers were either arrested or ticketed. (Tr. 539, 780, 814-15; GC. 75)

Calling the police to eject individuals engaged in union activities, claiming they were trespassing when they are not, violates the Act. *Barkus Bakery*, 282 NLRB 351, 354 (1986); *Loehmann's Plaza*, 316 NLRB 109, 113 (1995). Here, there is no evidence that the strikers were doing anything but trying to cross the public right of way in front of Respondent's driveway, which was unmarked. Furthermore, there is no credible evidence that employees obstructed the view of Respondent's drivers, necessitating a call to the police. Olivas testified that the striker he encountered was walking slowly across the public right of way, and then moved when asked. Aside from this single incident, Respondent offered no admissible testimony that the picketers

were, in fact, impeding drivers. Under these circumstances, the ALJ properly found a violation and Respondent's Exceptions should be denied.³⁵ Compare *Great American*, 322 NLRB 17, 20 (1996) (no violation where handbillers were impeding the traffic from entering the parking lot).

I. The ALJ Properly Found that Respondent Made Unilateral Changes.

Contrary to Respondent's Exceptions, the ALJ properly found that Respondent made unlawful unilateral changes. An employer must notify and consult with the union before imposing changes in wages, hours, and conditions of employment, and it is not a defense that unilateral changes were made pursuant to established company policy, or without antiunion motivation. *Laurel Baye*, 352 NLRB 179, 182 (2008) To be found unlawful, the unilateral change must be "material, substantial, and significant," and must have a "real impact" on or be a "significant detriment to" the employees or their working conditions. *Id.* Each did here.

1. Unilateral Changes to an Employee's Job Duties and Method of Pay.

Francisco Gonzales worked for Respondent as a bulk driver, driving a truck a mechanical arm used to lift bulk items such as furniture. (GC. 72; Tr. 1109) Driving a bulk truck required only a Class B driver's license, whereas Gonzales had a Class A license allowing him to operate a different type of tractor-trailer truck used to deliver large storage containers. (GC. 72-74; Tr. 1009-1010) In about June, Respondent decided to use Gonzales as both a bulk driver and a tractor-trailer driver, and granted him a 75 cent per hour pay increase. (GC. 72-74; Tr. 303-04) Respondent then transferred employee Juan Vargas, who was driving the tractor-trailer, to a roll-off driver position and changed his pay rate from hourly to "incentive," which is comparable to being paid on a piece-work basis.³⁶ (Tr. 332, 1020-21) There is no question that Respondent did not bargain with the Union over these changes. (Tr. 304, 1020-21) With respect to the increase

³⁵ Respondent attempted to introduce hearsay testimony about this issue, but when the General Counsel objected Respondent specifically noted the testimony was not being offered for the truth of the matter asserted. (Tr. 932)

³⁶ The ALJ mistakenly refers to "Juan Vargas" as "Juan Vasquez." Compare ALJD at 29, 31 with GC. 72.

in Gonzalez' pay, Lopez testified that even before employees unionized, he would make similar adjustments in pay when an employees' job duties had been upgraded.³⁷ (Tr. 1010-1011)

An employer engages in direct dealing and makes illegal unilateral changes by altering driver route assignments and changing rates of pay without bargaining with the union.

California Gas Transport Inc., 347 NLRB 1314, 1327, 1360 (2006) (unilateral change in route assignments which inherently affected pay a violation); *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006). Moreover, unilaterally changing employee pay from an hourly to a piece-work rate system is also a violation. *Brownsville Garment Co.* 298 NLRB 507, 513 (1990) (unilateral change from hourly wage to a piece-work rate system violated the Act). Here, Respondent unilaterally changed Vargas' job duties by transferring him to a different type of truck, and changed his pay from hourly to an incentive/piece-rate system. Respondent presented no evidence that it had a past-practice of changing driver pay from hourly to piece-rate, depending upon they type of trucks they drive.

Regarding Respondent's Exceptions that there was no allegation it unlawfully transferred an employee or changed his method of pay, *Resp't Br. Supp.* at 40-41, Paragraph 10(d) of the Complaint alleges that, on or about June 7, Respondent granted a wage increase to a unit employee. (GC. 112 p. 14) Lopez testified specifically about Vargas' change in pay and duties, and documentary evidence regarding Vargas was received into evidence. (GC. 72) Accordingly, the issue surrounding Vargas' change in pay and duties on or about June 7, relates to the subject matter of the complaint, was fully litigated at the hearing, and the ALJ properly found a violation. See, *Monroe Feed Store*, 112 NLRB at 1337. As to Respondent's claim that the Union waived its right to bargain over these changes by not raising the issue at the August 29

³⁷ The ALJ found that there was no violation regarding any changes to Gonzalez' pay, and the General Counsel has not taken Exceptions to this finding. (ALJD at 31)

bargaining session, *Resp't Br. Supp.* at 41, the unilateral changes occurred on or about June 7, nearly three months before the August 29 meeting. Moreover, Lopez admitted he never negotiated with the Union before making these changes, but that he simply implemented them, thereby presenting the Union with a done deal, or *fait accompli*. Under these circumstances, there can be no waiver of a right to bargain. *S & I Transp., Inc.* 311 NLRB 1388, 1388 n. 1 (1993). Accordingly, the ALJ properly found that a violation.

2. Unilateral Change of Sick Leave Rules Violated Section 8(a)(5).

The sick leave provision in Respondent's employee handbook requires a doctor's note if employees are absent for two or more consecutive days, and employees can be subject to discipline for violations of this policy. (GC. 7, p. A-5 to A-6, Tr. 712) Before the Union's certification, Armando Lopez supervised the Operations, Container Maintenance, and Compactor Maintenance Departments but not the Fleet Maintenance employees. (Tr. 1307)

In 2004, Lopez issued a memorandum to the Operations, Container Maintenance, and Compactor Maintenance employees listing specific holidays, and modifying the sick leave policy for these employees by requiring a doctor's note employees used even one day of sick leave after an enumerated holiday. (R. 14) Although Lopez issued a memorandum listing Respondent's observed, and unobserved, holidays in 2005 and 2006, he did not address any modifications to Respondent's sick leave policy. (R. 15, 16)

In mid to late 2006, Lopez was also given supervisory authority over Respondent's Fleet Maintenance employees. (Tr. 1307) On January 1, Lopez again issued a memorandum to all employees under his supervision, including now the Fleet Maintenance employees, modifying Respondent's sick-leave rules for the year by requiring employees to provide a doctor's note if they use one day of sick leave after a specified holiday. (R. 17) Despite the fact that

Respondent’s Fleet Maintenance employees were now represented by the Union, Lopez never provided the Union notice or an opportunity to bargain about this change, and did not even provide them with a copy of the memorandum. (Tr. 1308) Lopez issued a similar memorandum in January 2008, and again ignored the Union regarding the memo. (GC. 101; Tr. 719)

The Board has found that unilateral changes to employee sick leave and sick leave reporting procedures violates Section 8(a)(5) of the Act. *Kendall College of Art & Design*, 288 NLRB 1205, 1213 (1988); *Flambeau Airmold Corp.*, 334 NLRB 165, 165-166 (2001). Here, it is undisputed that the sick leave reporting procedures were changed for the Fleet Maintenance employees for the first time in January, after the Union’s certification, and again in 2008, and that Respondent never provided the Union with notice or an opportunity to bargain about these changes. Respondent’s claim in its Exceptions that there was no change in policy is simply unsupported by the record. *Resp’t Br. Supp.* at 41. Before January, Respondent’s Fleet Maintenance employees had never been required to comply with Lopez’ previous memoranda requiring them to provide a doctor’s note if they used one day of sick leave. Thus, when Lopez issued his directive to the Fleet Maintenance employees, who were now represented by the Union, without providing the Union with notice and an opportunity to bargain over this change, Respondent violated Section 8(a)(1) and (5). Accordingly, the ALJ properly found a violation.

3. Unilateral Change of Longevity Bonus Violated Section 8(a)(5).

Respondent maintained a long standing practice of paying employees the following longevity bonuses in appreciation for their years of service. (GC. 70)

10 Years of Service	15 Years of Service	20 Years of Service
Certificate of Appreciation	Certificate of Appreciation	Certificate of Appreciation
Check for \$1,000	Check for \$2,000	Check for \$5,000
Company Watch		

Employee Jesus Duran, was scheduled to receive a bonus for 10 years of service on October 9, his anniversary date. (GC. 70; ALJD at 30) While Duran eventually received his certificate and cash bonus on December 4, he never received his company watch. (Tr. 738-39; ALJD at 30) Although Respondent was negotiating with the Union, it never informed them it had discontinued providing employees with a company watch after 10 years of service. (Tr. 541)

The Board has previously found that an employer's unilateral discontinuance of a practice of awarding a tenth anniversary gold watch is unlawful. *Longhorn Machine Works*, 205 NLRB 685, 689 (1973). Here, there is no dispute that Respondent did not provide Duran with a watch as required by its bonus program, and that Respondent never informed the Union of this change in practice. Respondent's sole Exception to this finding is that this was an "unintentional oversight regarding a single employee." *Resp't Br. Supp.* 40. However, Respondent presented no evidence supporting this claim. Significantly, Duran was the last person scheduled a ten-year service award in 2007 (GC. 70), and Respondent presented no evidence that it revived the discontinued practice after refusing to provide Duran a company watch. Moreover, Respondent's Final Offer discontinued the company watch award. (GC. 25, p. 40) Accordingly, the ALJ properly found a violation.

J. Respondent Failed to Provide the Union With Relevant Information.

An employer's duty to bargain includes the duty to provide relevant information, and a union's request for the names and payroll information concerning bargaining unit employees is presumptively relevant. *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257, 1257 (2000). A presumptively relevant information request is made in good faith, unless the contrary is shown. *Id.* at 1258. Furthermore, the union's "good faith" is met if at least one reason for the demand can be justified. *Ormet Aluminum Mill Products*, 335 NLRB 788, 805 (2001).

1. November 13 Information Request For Employee Names

On November 13, just after the bargaining session, where Respondent presented its Final Offer, the Union sent Respondent an information request, consisting of about 40 pages, and containing numerous paragraphs and subparagraphs. (GC. 1 (ab) Exhibit A; GC. 62; ALJD at 32) The first paragraph asked for a list of current employees, including their names, date of hire, rates of pay, job classification, last known addresses, and phone number.³⁸ Id. Respondent replied to one part of the Union's information on December 11, to another part on December 12, and to the remainder on January 30, 2008. (GC. 66) However, with respect to the list of employees and related information, Respondent never provided this information, stating that "[t]he requested information was previously provided on October 20, 2006" (GC. 66; ALJD at 32) When asked by Respondent's counsel, Aguirre testified the Union asked for current list of employees, because their list was over a year old. (Tr. 687; ALJD at 32)

Here, Aguirre testified that one reason he made the information request was because the Union's list of current employees was a year old. As the ALJ noted, in *Long Island Day Care Services*, 303 NLRB 112, 130 (1991), "it is not unreasonable for a union to request updated information from time to time." Moreover, "during the course of 8 months, it would be reasonable to expect not only employee turnover, but also some changes in addresses and job classifications." Id. at 130 fn. 8; See also, *People Care, Inc.*, 327 NLRB 814, 823 (1999).

Respondent's claim that it was privileged from providing the information because the request was made in bad faith, *Resp't Br. Supp.* at 41, is not supported by the record. Aguirre credibly testified that he sought a current list of employees, showing their names, rates of pay, and dates of hire, because the list the list in the Union's possession was over a year old, and they

³⁸ In its post-hearing brief the General Counsel limited the breadth of the allegation to the employee name, payroll, and contact information. (ALJD at 32)

did not have a current list of employees. There is simply no evidence that the Union requested current names, payroll, and contact information of employees in bad faith or to harass as Respondent claims. Accordingly, the ALJ properly found a violation.

2. November 21 Request for Names of Strike Replacements.

After the strike started, on November 21, the Union submitted an information request to Respondent asking for the names and addresses of all employees performing bargaining unit work, their current positions, dates of hire, wage rates, to identify for any replacement workers whether they were permanent or temporary and the name of employee they were replacing. (GC. 56, 58; ALJD at 60) On November 30, Respondent provided the Union with a list indicating the first name and last initial of the replacement workers it deemed as permanent, their dates of hire, wage rates, and the name of striking employee and position they were replacing. (GC. 59, 60; Tr. 198-200) Respondent did not give the Union the full names of the strike replacements, asserting that it was concerned for their safety, and alleging that some had been “verbally hassled.” (GC. 59; ALJD at 60) On December 12, Respondent agreed to provide the full names of each replacement, but only if the Union signed a Nondisclosure Agreement. (ALJD at 60) At the hearing, Respondent admitted that it had no knowledge of any police action regarding these alleged incidents, and provided no evidence connecting the Union with any of the allegations of harassment. (Tr. 190; ALJD at 61) The Union never received the full names of the replacement employees. (Tr. 201-02, 540; ALJD at 60-61)

A union is presumptively entitled to the names and payroll information of bargaining unit employees, including strike replacements; information about strike replacements can only be withheld if there is a clear and present danger the information would be misused. *Page Litho, Inc.*, 311 NLRB at 882; *Grinnell Fire Protection Systems Co.*, 332 NLRB at 1257. As noted by

the Eight Circuit, strike replacements do not have an extreme privacy interest in their names, which are commonly known in the workplace. *Grinnel Fire Protection Systems v. NLRB*, 272 F.3d 1028, 1030 (8th Cir. 2001). Here, Respondent cannot show a clear and present danger of misuse, and its claim that some replacements were “verbally hassled” falls short. In nine days of hearing, Respondent presented no evidence that any replacement was harassed. Indeed, the lack of severity of these claims is underscored by Respondent’s failure to report this alleged harassment to the police. Accordingly, the ALJ properly found a violation.

VI. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1), (3) and (5) of the Act, as set forth in the ALJD, and Respondent’s exceptions should be rejected. The Board should affirm and adopt the ALJ’s findings of fact, conclusions of law, and recommended Order. It is further requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent’s numerous violations of the Act.

Dated at Phoenix, Arizona, this 14th day of July 2009.

Respectfully submitted,

/s/John T. Giannopoulos

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sessions and the record reflects no conduct by the Respondent away from the bargaining table which would suggest that its bargaining positions were taken in bad faith in order to frustrate agreement on a contract. It appears that the judge attempted to substitute his judgment for that of the Respondent in assessing the appropriateness of the substantive terms of its collective-bargaining proposals. That the Board may not do. Accordingly, we dismiss the 8(a)(5) allegations.

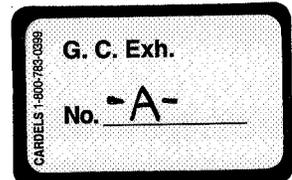
Id. at 910.

Ironically, several of the proposals deemed “predictably unacceptable” by the General Counsel were actually accepted by the Union: Merit Shop and Discipline & Discharge. Even Respondent’s Management Rights proposal was accepted by the Union, subject only to an agreement being reached on Dues Checkoff. The Board and the courts have held that an employer may take a firm position with regard to Management Rights, Union Security, and Dues Checkoff. *KFMB Stations*, 349 NLRB No. 38 (2007); *Logemann Brothers, co.*, 298 NLRB 1018, 1020 (1990), *Commercial Candy Vending Division*, 294 NLRB 908, 909 (1989). As the Seventh Circuit stated:

Union security and checkoff are mandatory subjects of bargaining, and “(a) party ... is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force agreement by the other party”. *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

Atlas Metal Parts Co. v. NLRB, 660 F.2d 304, 308 (7th Cir. 1981).

Here, Respondent sought alternatives to Dues Checkoff and always indicated that it was rejecting the proposal “at this time.” It is not at all unusual for employers to hold on Dues Checkoff until the very end of negotiations and to offer it at the last minute in exchange for something important to the employer. Here, the Union never got close enough on economics to warrant using this bargaining chip.



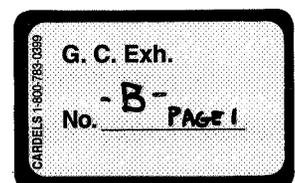
Here, the record contains none of the obstructive type of conduct that characterizes surface bargaining. To the contrary, it clearly demonstrates that Respondent has been bargaining in good faith. It met regularly with the Union, made proposals and counterproposals, compromised on numerous articles, and reached agreement on all but a handful of issues. The issues that separate the parties have been discussed at length, and a federal mediator has assisted in the process. The parties, however, despite their best efforts, have not yet been able to reach a complete agreement. This "inability to reach an agreement in no way indicates a failure to bargain in good faith." *NLRB v. Alva Allen Industries*, 369 F.2d 310, 318 (8th Cir. 1966). Further, Respondent has not declared impasse and has advised the Union that it is willing to return to the bargaining table. The Union has not pursued that option.

There simply is no compelling evidence of bad faith. The General Counsel's alleged elements of bad faith are without merit.

a. Impact Of § 10(b) of Act

In *Local Lodge 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court distinguished the use of evidence outside the § 10(b) period to shed light on events within the 10(b) period versus use of such evidence to find otherwise unobjectionable conduct within the 10(b) period unlawful:

However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be



charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 416-417.

Here, the Union's initial charge was not filed until November 14. Thus, the evidence predating May 14 can only be used to shed light on events post-dating May 14. They may not form the basis for an unfair labor practice finding. Respondent further contends that the relevant § 10(b) date is actually September 6 as the Union's overall bad faith bargaining charge was not filed until March 6, 2008. This charge dramatically expanded the issues from those raised in the earlier charges, changed the entire scope and content of the complaint, and was not closely related to the earlier charges.

b. Alleged Delay In Responding To Requests To Schedule Dates

It is not clear what evidence the General Counsel relies upon in support of his allegation that Respondent delayed in responding to requests to schedule dates. There was some delay in scheduling an initial meeting, but this was due to legitimate reasons. Kenn Carr, the Respondent's counsel and intended chief negotiator, was elevated to the Texas Court of Appeals in October 2006. Thereafter, Respondent acted reasonably expeditiously in hiring Mark Flora to represent it. Upon being hired, Flora immediately contacted Victor Aguirre, arranged for a get-acquainted meeting with Flora traveling to San Antonio hotel where Aguirre and Juan De la Torre were staying, and scheduling an

CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF, EL PASO DISPOSAL, L.P., Cases 28-CA-21654 et al., was served via E-Gov, E-Filing, E-mail, and by overnight delivery on this 14th day of July 2009, on the following:

Lester A. Heltzer, Executive Secretary
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One copy via overnight delivery service on the following, and efforts have been made to notify by telephone:

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