Atlas Refinery, Inc. *and* Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL–CIO. Case 22–CA–28403

January 15, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 7, 2009, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[4]

We adopt the judge's findings, for the reasons he stated, that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge employees who would not return to work under the new terms and conditions of employment that the Respondent unlawfully implemented; and by soliciting employees to withdraw from the Union; that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez because they supported the Union's efforts to continue collective bargaining; and that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) refusing to bargain with the Union as long as Jeff Gilliam was part of the bargaining committee,[5] (2) unilaterally implementing new terms and conditions of employment on June 9, 2008,[6] absent a valid impasse,[7] and (3) locking out employees in order to evade its duty to bargain with the Union.

The General Counsel has excepted to the judge's apparently inadvertent failure to find and remedy the Respondent's unlawful withdrawal of recognition. We find merit in the exception. At the hearing, the judge granted the General Counsel's motion to amend the complaint to allege that the Respondent's withdrawal of recognition from the Union on June 13 violated Section 8(a)(5) and (1) of the Act. As the judge found, the Respondent unlawfully solicited employees to sign letters resigning from the Union. Therefore, the letters were tainted and the Respondent could not rely on them as evidence of the

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Teamsters Local 523 v. NLRB*, __ F.3d __, 2009 WL 4912300 (10th Cir. Dec. 22, 2009); *Narricot Industries, L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted 130 S.Ct. 488 (2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] Chairman Liebman finds it unnecessary to pass on the judge's failure to grant the General Counsel's motion to amend the complaint to allege that the Respondent engaged in direct dealing as the remedy for this additional violation would be cumulative and would not materially affect the remedy in light of the Respondent's unlawful withdrawal of recognition.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The Respondent has contended, in its answering brief, that it cannot restore the status quo due to its financial condition. This issue is appropriately resolved at the compliance stage of this proceeding. The Respondent will have the opportunity to show at that time, on the basis of evidence that was not available as of the close of the unfair labor practice hearing, that restoration of the status quo, including reinstatement of the five unlawfully discharged employees, would be unduly burdensome. *Texas Dental Assn*., 354 NLRB No. 107, slip op. at 1 (2009) (citations omitted).

[5] Member Schaumber notes that the Respondent offered no evidence that Gilliam's presence would bring ill will to the negotiating table and make good-faith bargaining impossible. *Pan American Grain Co*., 343 NLRB 205, 206 (2004), citing *KDEN Broadcasting Co.,* 225 NLRB 25, 35 (1976).

[6] Dates are in 2008 unless otherwise noted.

[7] In adopting the judge's conclusion that the parties had not reached impasse, Member Schaumber notes that the Respondent failed to show that further bargaining would be futile at a critical stage of the bargaining process. The parties had not yet discussed important provisions in the Respondent's final proposal, including a five year contract term and new wage rates for a proposed third tier of employees, or the Union's June 2 proposal to cut wages, proffered on the day of the purported impasse. Further, there was no evidence substantiating the Respondent's claim to the Union that it needed to implement its final offer upon the expiration of the current contract for financial reasons.

Union's loss of majority status.[8] Although the judge failed to conclude as a matter of law that the Respondent unlawfully withdrew recognition, the judge's decision and recommended Order clearly contemplates a continuing bargaining relationship. We therefore find that the Respondent's June 13 withdrawal of recognition, based solely on the unlawfully solicited resignation letters, violated Section 8(a)(5) and (1) of the Act. The judge also correctly found unlawful, but failed to specifically remedy, the Respondent's June 9 implementation of new terms and conditions of employment and its lockout of unit employees on June 9. Accordingly, we have amended the conclusions of law and the remedy and substituted a new Order and notice to reflect the violations found and to conform to the Board's standard remedial language.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 6.

"6. By refusing to bargain with the Union as long as Jeff Gilliam was part of the bargaining committee; unilaterally implementing new terms and conditions of employment on June 9 without bargaining to a valid impasse; locking out employees in order to evade its duty to bargain with the Union; and withdrawing recognition from the Union on June 13, the Company violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily discharging Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez, we shall order it to offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9]

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing wage rates and other terms and conditions of employment without bargaining to a valid impasse, by locking out unit employees, and by withdrawing recognition from the Union, we shall order the Respondent to cease and desist, and, on the request of the Union, rescind the unlawful unilateral changes made on and since June 9, 2008, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire at midnight on June 6, 2008, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. We shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages and other benefits attributable to its unlawful conduct. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, supra. We shall additionally order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health and pension benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra. We shall further order that the Respondent make all contributions to employee pension and any other funds that it owes under the collective-bargaining agreement with the Union which was in existence on June 6, 2008, and which contributions the Respondent would have paid but for the unlawful unilateral changes, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979).[10]

The judge recommended an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition, but did not justify imposition of such an order as required by the United States Court of Appeals for the District of Columbia Circuit. Nevertheless, for the reasons set forth below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-

[8] See *Narricot Industries*, 353 NLRB No. 82, slip op. at 1 (2009), enfd. 587 F.3d 654, supra, and cases cited.

[9] The General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516 fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

[10] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's failure to make contributions to the funds, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the funds.

bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics v. NLRB,* 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB,* 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB,* 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Supra at 738. Consistent with the court's requirement, we have examined the particular facts of this case and we find that a balancing of the three factors warrants an affirmative bargaining order.[11]

(1) As the Board stated in *Parkwood Developmental Center,*[12] an affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and resulting refusal to collectively bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the order's duration is not indefinite but only for a reasonable period of time sufficient to allow the good-faith bargaining that the Respondent's unlawful withdrawal of recognition cut short. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees' Section 7 right to union representation is vindicated. It will also give employees an opportunity to fairly assess the Union's effectiveness as a bargaining representative and determine whether continued representation by the Union is in their best interests.

(2) An affirmative bargaining order also serves the Act's policies of fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table—results that might not be in the employees' best interests. It fosters industrial peace by reinstating the Union to its rightful position as the bargaining representative chosen by a majority of the employees. Also, as mentioned, providing this temporary period of insulated bargaining will afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the effects of the Respondent's unlawful withdrawal of recognition and refusal to bargain.

(3) As an alternative remedy, a cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another challenge to the Union's majority status before the employees had a reasonable time to regroup and bargain with the Respondent through their chosen representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair where the Respondent's unfair labor practices already have given rise to a tainted solicitation to employees to resign from the Union. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.[13]

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violation in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Atlas Refinery, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees because of their support for the Union during collective bargaining.

(b) Soliciting employees to withdraw from the Union.

(c) Discharging or otherwise discriminating against any employee for supporting Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, or any other union.

[11] Member Schaumber does not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." He agrees with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Alpha Associates*, 344 NLRB 782, 787 fn. 14 (2005). He recognizes, however, that the view expressed in *Caterair International*, supra, represents extant Board law. *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005). Regardless of which view is applied here, Member Schaumber agrees that the affirmative bargaining order is appropriate.

[12] 347 NLRB 974, 976–977 (2006).

[13] *Parkwood*, supra, 347 NLRB at 977; see also *Goya Foods of Florida*, 347 NLRB 1118, 1123 (2006); *Smoke House Restaurant*, 347 NLRB 192, 194 (2006).

(d) Refusing to bargain with the Union as the labor representative of its employees by placing restrictions as to who can be on the Union's bargaining committee.

(e) Unilaterally implementing changes in terms and conditions of employment in the absence of a lawful bargaining impasse.

(f) Failing to honor and continue the terms and conditions of the contract with the Union that was set to expire on June 6, 2008, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(g) Locking out employees in order to evade its duty to bargain with the Union.

(h) Unlawfully withdrawing recognition from the Union.

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

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

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Respondent at its Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(b) On the request of the Union, rescind the unlawful unilateral changes made since June 9, 2008, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on June 6, 2008, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

(c) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits provided for in the contract that was set to expire on June 6, 2008, with interest, as provided for in the amended remedy section of this decision.

(d) Make contributions, including any additional amounts due, to the employee pension fund and any funds established by the collective-bargaining agreement with the Union that was in existence on June 6, 2008, and which the Respondent would have paid but for the unlawful unilateral changes as provided for in the amended remedy section of this decision.

(e) Make whole its employees for any loss of earnings and other benefits suffered as a result of the lockout against them in the manner set forth in the amended remedy section of this decision.

(f) Within 14 days from the date of this Order, offer Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(g) Make Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(j) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix"[14] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by the Respondent at any time since May 8, 2008.

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

Dated, Washington, D.C. January 15, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge employees because of their support for the Union during collective bargaining.

WE WILL NOT solicit employees to withdraw from the Union.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, or any other union.

WE WILL NOT refuse to bargain with the Union as the labor representative of our employees by placing restrictions as to who can be on the Union's bargaining committee.

WE WILL NOT unilaterally implement changes in terms and conditions of employment in the absence of a lawful bargaining impasse.

WE WILL NOT fail to honor and continue the terms and conditions of the contract with the Union that was set to expire on June 6, 2008, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL NOT lock out employees in order to evade our duty to bargain with the Union.

WE WILL NOT unlawfully withdraw recognition from the Union.

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

WE WILL recognize and, on the request of the Union, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by us at our Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL, on the request of the Union, rescind the unlawful unilateral changes made since June 9, 2008, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on June 6, 2008, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse, or the Union agrees to changes.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits provided for in the contract that was set to expire on June 6, 2008, with interest, as provided for in the amended remedy section of the Board's decision.

WE WILL make contributions, including any additional amounts due, to the employee pension fund and any funds established by the collective-bargaining agreement with the Union that was in existence on June 6, 2008, and which the Respondent would have paid but for the unlawful unilateral changes as provided for in the amended remedy section of the Board's decision.

WE WILL make whole our employees for any loss of earnings suffered as a result of the unlawful lockout, in the manner set forth in the amended remedy section of the Board's decision.

WE WILL, within 14 days from the date of this Order, offer Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of the Board's decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio and Alexander Nunez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ATLAS REFINERY, INC.

Tara Levy, Esq., for the General Counsel.
Thomas Ryan, Esq. (Laddey, Clark & Ryan), of Sparta, New Jersey, for the Respondent.
David Tykulsker, Esq. (Tykulsker & Associates), of Montclair, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Newark, New Jersey, on April 21, 22, 23, 24, 27, and 28, 2009. The charge was filed June 10, 2008,[1] the amended charge was filed June 24, and the second amended charge was filed July 24. The complaint was issued March 6 and amended on April 7, 2009. The complaint alleges that Atlas Refinery, Inc. (the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by: interfering with, restraining, and coercing employees' Section 7 rights; discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act; and failing and refusing to bargain collectively and in good faith with Local 4-406, United Steel, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (the Union), the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act. The Company denies that it engaged in any violations of the Act.

Upon submission of post-trial briefs, the General Counsel moved to amend the complaint to include an allegation that William Bauman, as the Company's agent, unlawfully refused to bargain with the Union on June 9 by directly dealing with employees regarding their terms and condition of employment. The General Counsel contends that an amendment to the complaint alleging such a violation of Section 8(a)(5) and (1) is appropriate because:

> Here, the facts establish "direct dealing, a violation of the duty to bargain, all taking place within a few days and all aimed at coercing employees to work under the Employer's terms. The issue was fully litigated when the facts describing the violation were elicited through the testimonial admission of Company's witnesses."

This is the first mention of such an amendment, as the General Counsel did not raise it during or at the conclusion of the trial. The Charging Party's counsel supports the motion. The Company, in its supplemental letter brief, however, opposes the motion to amend the complaint on the grounds it is devoid of any compelling justification and would intrude on the Company's due process rights.[2] The Company concedes that the Board has the authority to decide issues not specifically plead if they have been fairly and fully litigated. It insists, however, that

> The employer did not know the General Counsel was placing in question its conduct in relation to its communication with employees on or about June 9, 2008 and, therefore, did not have a fair opportunity to present their defense to such portrayal of that conduct.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation with an office and place of business in Newark, New Jersey, is engaged in the manufacture of chemicals. Annually, the Company sells and ships from its

[1] All dates are 2008, unless otherwise indicated.

[2] A conference call was held with counsel for the parties on July 14, 2009, to discuss the Company's response to the motion. Initially, counsel for the Company was given until July 3, 2009, to file his response, but failed to do so. The Company's counsel explained that the failure to do so was attributable to an oversight by support staff. The General Counsel opposed any additional time to file a supplemental or reply brief and added that the Company's post-trial brief was also served late—it was filed by the due date, June 19, 2009, but not served until the next business day. I acknowledged the General Counsel's concern regarding the late service of the Company's brief, but explained my preference for receipt of briefs in the absence of prejudice and significant delay to the adjudication process—especially where the issue involved a post-trial motion to amend the complaint. Moreover, there was no previous request by the General Counsel that I disregard the Company's brief on that basis. Under the circumstances, I granted the Company's request to permit it to serve and file a supplemental letter brief by the end of the day.

[3] The Company's supplemental letter brief was e-filed with the National Labor Relations Board (Board) before the close of business on July 14, 2009.

[4] The Charging Party's unopposed motion to correct the transcript, dated July 9, 2009, is granted and received in evidence as CP Exh. 3.

Newark facility (the facility) products, goods, and materials valued in excess of $50,000 directly to points outside the State of New Jersey. The Company admits, and I find, that it is a Company engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

The Company manufactures lubricants and auxiliaries for the leather industry at its facility in Newark, New Jersey (the facility). Steven Schroeder Sr. is president and chief executive officer. Steven Schroeder Jr. is executive vice president.[5] Robert Webber Jr. was the Company's vice president of operations.[6]William Baumann is operations manager, Joseph Gargiano is finance manager, and Julian Stacy is plant manager. Thomas Ryan, Esq. serves as the Company's labor counsel. At all relevant times herein, Schroeder, Bauman, and Stacy were supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.[7]

Michael Fisher was the Union's International representative assigned to accomplish renewal of the contract. Cary Krand was the Union's president. Gilbert Alers was the chief steward and was joined on the bargaining committee by Raymond Ardiente and Bibiano Dechavez. The following employees of the Company constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees employed by the Company at its Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

This controversy involves the conduct of the parties during collective bargaining and subsequent to the breakup of negotiations. During most of these sessions, the Union's bargaining committee was comprised of Fisher,[8] Krand, Alers, Ardiente, and Dechavez. The Company was represented by Schroeder, Bauman, and Ryan.[9]

B. The Expired Collective-Bargaining Agreement

The first collective-bargaining agreement between the parties had a term of March 19, 1999, to April 9, 2003. It was renewed on March 27, 2003, until April 9, 2008, but further provided that, "if not terminated at the end of that period by sixty (60) days' prior written notice, one party to the other, shall continue thereafter until terminated by either party on sixty (60) days' prior written notice, or amended by mutual consent." (Art. 2.) Other pertinent provisions in the contract included: union security and dues deduction (art. 3); a strike clause (art. 5); hours of work and overtime (art. 6); vacations (art. 7); sick leave and leave of absence (art. 8); workmen's representation and methods of settling disputes (art. 11); safety and health (art. 12); pensions (art. 13); welfare benefits (art. 14); wages (art. 15); meetings (art. 16); and a management clause (art. 17). Of particular note, wage rates (art. 15.1) established a two-tier wage structure as of March 27, 2003—a first tier for employees who were hired by the Company on or before March 27, 2003, and a second tier for employees hired by the Company after March 27, 2003. Both tiers listed the same job classifications, but provided a higher level of pay for tier 1 employees than tier 2 employees, as listed on the addendum to the contract. In addition, the Company agreed to pay a $1200 signing bonus to employees on the payroll as of March 27, 2003, and another $1200 lump sum payment to each employee of record as of April 9, 1994.[10]

C. Bargaining from January until May 8

On January 22, the Union mailed a letter to the Company requesting bargaining for a new contract.[11] In addition to receiving the Union's letter shortly after that date, the Company received a notice from the Federal Mediation and Conciliation Service (FMCS), dated January 29, that the FMCS received notice that negotiations between the Union and Company were about to begin. Not receiving a response from the Company, the Union sent another letter, dated February 27, requesting the parties begin negotiations.[12]

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[5] Unless otherwise indicated, all references to Schroeder are to Steven Schroeder Jr., unless otherwise indicated.

[6] Webber was the Company's former vice president of operations at some point prior to January 2008, as indicated by the correspondence and the testimony of Michael Fisher, the Union's representative, on cross-examination. (Tr. 126–128; GC Exh. 2; R. Exh. 1.)

[7] The Company's answer conceded supervisory and agency status on the part of these individuals. While I found Schroeder and Bauman credible for the most part, as discussed, infra, portions of their testimony was overly general, contradicted each other and lacked the detail one would expect in a failure to bargain case.

[8] Fisher was the Union's primary witness. Much of his testimony was based on his past recollection, as recorded in or refreshed by his detailed notes of the collective-bargaining sessions. Nevertheless, the Company did not challenge the accuracy of his notes, which were received as evidence. I was most impressed by the spontaneity of Fisher's extensive testimony, which spanned parts of 3 days, including readily conceding, where applicable, his lack of knowledge or recollection about certain events. Given such credibility, I credit the accuracy of Fisher's notes as to what the parties discussed during the collective-bargaining sessions.

[9] GC Exhs. 5, 7, 10, 13, 15, 21.

[10] GC Exh. 2.

[11] I credited Fisher's testimony that the January 22 letter, which he sent by certified mail, was received by the Company, even though it was addressed to the attention of Webber, who was no longer employed by the Company in January 2008. Asked about the return receipt on cross-examination, Fisher offered to produce it if given the opportunity. (GC Exh. 2; Tr. 126–127.) On rebuttal, Fisher produced the return receipt establishing that the letter was received by the Company on January 24. (CP Exh. 2; Tr. 681–682.)

[12] Given the compelling evidence that the Company received the Union's request to commence bargaining on January 24 and a letter from the FMCS on or about January 29, I find the Company's insistence that it did not receive a request from the Union until February 27 to be devoid of any credibility whatsoever. In fact, the Company's failure to explain why Schroeder, Baumann, or Ryan would not have been notified of the Union's letter and, instead, hide behind the fact that the letter was addressed to a former vice president, reflected the Company's intention to delay the commencement of bargaining. (R Exh. 1.)

The Company and the Union met on March 11 for their first bargaining session. At this meeting, the Union presented its initial proposal for a new contract. The material changes from the expiring contract included: a 3-year contract; remittance of union dues directly to the international union; an increase in wages to cover increased union dues during periods of disagreement; extending the seniority recall rights for laid-off employees; increased holidays, sick leave for tier two employees; increased personal leave and vacation time; increased severance pay; annual wage increases of 10 percent, with a 5-percent differential pay for second shift employees and a 10-percent differential pay for third-tier employees; a better health and prescription plan; and increasing the Company's pension contributions.[13]

The parties held their second bargaining session on March 19. Schroeder provided a slide show presentation of the Company's financial condition. Schroeder explained that the Company sustained substantial financial loss, mainly due to nonlabor costs, and needed to reduce total costs. As a result, the Company has reduced costs by eliminating management and administrative positions, and reducing wages for such positions. Ryan followed Schroeder's presentation by explaining the details of the Company's proposal. He conveyed the Company's willingness to modify the union-security clause, as requested by the Union. However, Ryan explained that the Company could not afford to maintain the current level of wages and benefits, and provided a proposal that went in the opposite direction on the remaining issues: reduction of recall rights to 90 days; reduced holidays by 1 day; elimination of severance pay; the reduction of sick leave from 12 to 5 days for all employees; reduction of the Company's pension contributions; increasing employee's share of the costs for their health benefits from 35 to 70 percent; an ability to change health plans without union consultation; elimination of lump-sum payments; and a reduction of wages by 30 percent over the term of the contract. The Company's proposal was silent, however, with respect to the contract term.[14]

The Union responded to the Company's proposals at the March 19 meeting by requesting 3 years of audited financial documents from the Company. The Company agreed to the request. In a letter to the Union, dated March 24, Ryan stated that he was forwarding under separate cover the last 3 years of the Company's audited financial statements.[15]

On April 1, Krand e-mailed the Company's representatives and proposed "that we meet and discuss a possible contract extension and to discuss the noneconomic language of our proposals, due to the audit, the economic issues can be addressed at a later date when the audit is completed. Please let us know as to your availability so we can continue the negotiation process." Ryan responded the same day by e-mail and letter. In his letter, Ryan acknowledged "that we cannot proceed with the negotiations on economic issues pending a review of financial documentation by the Union," but asked "if the Union is agreeable to move forward with negotiation on non-monetary topics." He listed eight topics considered by the Company to be nonmonetary: leave of absence; notification periods for layoffs and work changes; number of days for recall rights; creation and deletion of jobs; work hours; union size committee; moving and successor clause; and transfer language.[16]

The parties held their third bargaining session on April 4. During that meeting, the Union further addressed its initial proposals of March 11. The Company also sought to discuss the economic issues, including those contained in its proposal. The Union refused, however, noting that it needed more time to review the Company's financial information. After further discussion, the Union withdrew its proposal for one extra week of vacation and the parties reached a tentative agreement regarding the Union's name change, the frequency of Union dues deductions, and extended the expiration date of the contract from April 9 to May 9. The extension agreement was signed on April 8.[17]

The parties held their fourth bargaining session on April 10. During that meeting, the Union withdrew its demand for a wage increase commensurate with a union dues increase and the parties reached tentative agreements concerning four company proposals: modify notice period for hourly work assignments to 2 weeks (modifying art. 6.3); remove provision regarding "Alternate Day men" (art. 6.4.B); updating work week provision "to include 7/3/07 amendment (art. 6.6.A);" and limiting personal leave up to 6 months. In addition, the parties entered into confidentiality agreements regarding the production of the Company's financial information. Later that afternoon, Schroeder forwarded the Company's audited financial statements for 2005 and 2006 and, pending completion of the 2007 audit, unaudited financial information for 2007.[18]

The fifth bargaining session was held on May 6. During that meeting, the Union withdrew its proposals 30 and 32 relating to an increase in the shoe allowance and adding the work rules into the agreement. The Company withdrew its proposal to eliminate advanced vacation pay. In addition, the parties agreed on several Company proposals: work rules—no change; job description—no change; and reducing the vacation request of 4 to 2 weeks (art. 7.2.C).[19]

The parties held their sixth bargaining session on May 8 at the Company's facility. During a morning session that lasted approximately 5 hours, the Union withdrew six of its proposals:

[13] Schroeder confirmed Fisher's testimony that the Union presented its initial proposal on March 11. (Tr. 26–34, 133–139, 155, 286, 447–448, 556.)

[14] At the March 19 session, the Company provided the Union with the portions of the document describing the Company's proposals, while the remainder of its presentation, mainly depicting the Company's financial condition, was displayed in a Power Point slide show. (GC Exhs. 5–6, 34; Tr. 37–45, 159–160, 163, 286, 449, 559–560.)

[15] R. Exh. 5; Tr. 402, 451.

[16] R. Exhs. 6–7.

[17] Fisher and Schroeder provided consistent testimony regarding the topics addressed at the April 4 session. (GC 7–9, 34; Tr. 49–52, 294–296, 459–461.)

[18] Consistent with all of my findings as to what was discussed at the negotiating sessions, Fisher's notes corroborated or supplemented his credible testimony, which was also consistent here with the Company's witnesses, as well as the written agreements entered into between the parties during each session. (Tr. 54–58, 299–301, 462–463, 505–506; GC Exhs. 8, 10–12, 34; R. Exh. 9.)

[19] Tr. 58–59, 464–465; GC Exhs. 13–14, 34.

two changes regarding hours of work and overtime (arts. 6.3, 6.4 and 6.8.A), two changes regarding holidays (art. 6.9), vacation (art. 7.1), and sick leave (art. 8.1.1). The Company withdrew three of its proposals: removing provision relating to eyeglass coverage (art. 14.3); requiring grievants to be present at all step meetings (art. 11.2); and no rate changes for transfers based on seniority (art. 4.1.K). The parties did agree to the Union's proposal to protect shop stewards from losing pay while involved in contract negotiations (art. 11).[20] Before the parties broke for lunch at the Union's request at approximately 1:30 p.m., Krand informed the Company that the Union was willing to discuss economic issues during the afternoon session.[21]

D. May 8 Refusal to Bargain and May 9 Contract Extension

During the lunchbreak, Schroeder and Baumann saw Jeff Gilliam, a former employee, and former chief steward for the Union at the Company, in or around the Company's parking lot. The Company discharged Gilliam on March 12 for "unauthorized absence." At the time of his discharge, he was the Union's chief steward at the Company.[22] Schroeder told Gilliam to stay off the Company's property. Gilliam appeared irritated by Schroeder's directive, but nothing else transpired and Schroeder and Baumann continued on their way to lunch.[23[

As the afternoon bargaining session was about to resume, the Union demanded that Gilliam be permitted to attend the negotiations. He had not previously attended any of the bargaining sessions. Schroeder refused on the grounds that Gilliam was no longer an employee and would not be permitted on company property. The Union responded by threatening to conclude the bargaining session if Gilliam was not permitted to attend. The Company maintained its position and the Union contingent began to leave. While the Union representatives were in the parking lot, Fisher approached Baumann once again. Fisher suggested the parties move the bargaining session to the New Jersey State Board of Mediation, a neutral site, if it was indeed a problem about Gilliam entering company property. Baumann refused the request and the union representatives left.[24]

The following day, May 9, Ryan filed an unfair labor practice charge with the Board. The charge alleged essentially that the Union: refused to bargain in good faith; demanded the participation in negotiations of Gilliam, an employee discharged for defrauding the Company of compensation and abusing leave; conspiring with Gilliam and making fraudulent representations to the Company to conceal that Gilliam had taken a job with another employer while continuing to received leave and benefits from the Company; and representing that Gilliam was working for the Union when he was in fact working for another employer. The charge also claimed similar unlawful conduct by Gilliam and sought injunctive relief ordering the Union to bargain in good faith, prohibit Gilliam from attending bargaining, and require him to return all compensation received while he was working for another employer. That same day, however, the parties entered in a second extension agreement extending the contract until June 6.[25]

Ryan followed up the Company's charge with a letter to the Union, dated May 12. He essentially reiterated the Company's position in opposing Gilliam's participation in contract negotiations and urged the Union to agree to resume negotiations without him during the weeks of May 12 and 19. Reserving its right to choose its representatives at bargaining sessions, the Union, nevertheless, agreed to resume bargaining without Gilliam and the Company's charge was subsequently withdrawn.[26]

E. Bargaining from May 14 through June 2

The parties met for a seventh bargaining session on May 14. During that meeting, the Union told the Company that its preliminary findings revealed the Company's increased expenses were not due to labor costs, but rather, escalating costs for material and supplies. It also apprised the Company there was still outstanding financial information. Nevertheless, based on its initial assessment of information received, the Union agreed to a concession regarding its wage proposal, decreasing its requested increase from 10 percent in each year of the agreement to 7 percent in each year. On May 20, the Company provided the Union with the remaining financial records. That financial information was reviewed by the Union's international, which provided the Union with a written report on May 22.[27]

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[20] The parties actually signed the agreement on May 14. (GC Exh. 16.)

[21] Fisher did not refute Schroeder's testimony that the Union agreed to the Company's request to discuss the economic issues after lunch. (Tr. 63–64, 468–469; GC Exh. 15, 34.)

[22] The Union asserted that the Company unreasonably denied Gilliam's request for a 1-year leave of absence under the contract. The discharge was subsequently grieved and is still pending before arbitration (GC Exh. 17; Tr. 60–63, 402–403.)

[23] This finding is based on Baumann's unrefuted, but vague, testimony that Gilliam became upset at learning of the Company's refusal to permit him into bargaining session on May 8. Besides describing Gilliam as swinging or waving his arms in irritation that day, Baumann did nothing more than describe someone who exhibits animated gestures when he speaks—not an uncommon scene at the collective-bargaining table. Moreover, Baumann's concession on cross-examination that he omitted such an observation from his report to a Board investigator was not credible. If indeed it amounted to behavior that contributed to the Company's decision to exclude Gilliam from bargaining, there is no doubt Baumann would have mentioned it at that time. As such, it is clear that Gilliam's antics, if any, did not faze management in the least that day. (Tr. 644, 667–668.)

[24] Schroeder's testimony that Gilliam was not permitted to attend bargaining because he did not sign a confidentiality agreement was not credible for two reasons. First, the company representatives did not raise that concern on May 8 and the consistent testimony of Schroeder and Baumann reflects a view that Gilliam should be excluded because he was terminated for cause. Second, the parties prepared a form that was signed by all of the union representatives and there is no reason why this could not have been made available to Gilliam. (Tr. 63–66, 317–319, 324–325, 469–471, 547–552, 644–645, 678–680.)

[25] GC Exhs. 18–19; R. Exhs. 19–20.

[26] GC Exh. 20.

[27] Schroeder's contention that nothing of significance was discussed at the May 14 session is belied by Fisher's credible and unrefuted testimony, and corroborated by his notes, that the Union offered to reduce its 10-percent wage hike demand to 7 percent. (Tr. 69–72, 341–342, 477–479; GC Exhs. 21–23, 34; R. Exhs. 22, 24.)

Anticipating that contentious negotiations lay ahead regarding the economic issues, the parties agreed to continue negotiations with the assistance of FMCS mediators Guy Serota and James Kinney. Prior to the commencement of mediation, the Union requested additional financial information from the Company. The Company provided the information by e-mail to the Union. It included audited financial statements and tax returns for the Company for 2003, 2004, 2005, and 2006, as well as the "draft" copy of the recently prepared audited 2007 numbers. The Company also provided the Union with its 2008 financial forecast, based on its first quarter financial information. Most notably, the 2008 information indicated that the Company's lender, Bank of America, was threatening to foreclose on approximately $1,800,000 in loans.[28]

Under the auspices of the FMCS, the parties met at the FMCS office in New Jersey for an eighth bargaining session on May 27. During that session, the parties focused mainly on the outstanding economic issues. At those sessions, both sides moved substantially from their initial proposals. The Union decreased its requested wage proposal significantly, from the 7-percent yearly increases to a wage freeze in the first year, with a sign-in bonus and a 3-percent wage increase in each of the second and third years. The Union also offered an additional concession by suspending its demand for the employee birthday holiday in the first year, with that holiday "snapping back" in the second and third years The Union insisted, however, that it still wanted the 10-percent increase in pension fund contributions required by the fund to maintain the current benefit level.

At this meeting, the Company offered a mélange of economic proposals. Schroeder proposed for the first time the elimination of company contributions to the union pension fund. In lieu of a pension fund, he proposed the parties establish instead a 401(k) plan with costs to be shared with the employees. Notwithstanding the previous tentative agreements, Schroeder then proposed, also for the first time during negotiations, the elimination of the union-security clause at article 3.2 of the contract.[29]

Schroeder tempered the bitterness of the proposed pension cuts and union security elimination, however, by favorably responding to the Union's movement on wages. The Company modified its wage proposal from a 30-percent wage cut to a 25-percent wage cut in the first year for the first and second tiers, and a 3-percent increase in the third and fourth years. In this proposal, the Company effectively made its first proposal on the contract length, seeking a 4-year term.[30] The Company also modified two other proposals. With respect to health benefits, it proposed to pay half of required contributions, with employees paying the other half. As to sick and personal leave, it proposed six sick days, including two personal days. The Company did not modify its offer of eight holidays, but added to its proposal a fourth week of paid vacation for employees with more than 20 years of service.[31]

Notwithstanding significant progress made by the parties on May 27, negotiations hit a bump after Krand asked if management was willing to receive the same cuts that it was demanding of bargaining unit employees. Krand also inquired as to what happened to $500,000 in cash listed as an asset held by the Company in its 2008 financial reports. Schroeder became upset at the inquiry, believing Krand's questions impugned management's honesty, and the bargaining session ended.[32]

The parties met for their ninth bargaining session on June 2. The meeting began with Serota explaining that it was the Union's turn to respond to the Company's previous offer regarding wages, health benefits, pension, sick leave and personal days, holidays and vacation, the length of the contract, and union-security. The parties then caucused in separate rooms. The Union, through Serota, conveyed to the Company for the first time that it was willing to accept wage reductions, as follows: a 5-percent wage cut in year one, flat in year two, and a 3-percent raise in year three. The Company responded to the Union's proposal by reducing its previously proposed 25-percent wage cut to 20 percent. The Union met to review the Company's proposals and prepare its complete response. When Fisher had a question concerning the proposal, he went to look for the mediator. He found him caucusing with management. Serota told Fisher not to worry and assured he would be right over to transmit an offer from the Company.[33]

F. Company's "Final Proposal"

After speaking with the Company's representatives for a period of time on June 2, Serota recommended that the Company present "a last and final offer" to the Union in anticipation of the contract's June 6 expiration. The Company then prepared a proposal which its representatives described as its "best and final offer," accompanied by a warning that there would be no

[28] The record reveals steady progress by the parties on the non-economic issues prior to their request for to move negotiations to the FMCS, leading me to conclude that they expected contentious negotiations ahead on the economic issues, commencing with the seventh bargaining session. (GC Exh. 23; R. Exhs. 22, 24, 26.)

[29] My findings regarding the May 27 session are based primarily on Fisher's credible testimony, which was not contradicted by Schroeder's vague testimony regarding the discussions at that session. Moreover, Schroeder conceded that this was the first time that the Company sought to remove the union-security clause. (Tr. 73–74, 77–79, 82, 343, 348-351, 365, 479–480, 485, 564, 568; GC Exhs. 24, 34.)

[30] The Company's proposal represented a significant change in its position.

[31] Schroeder testified generally that, on May 27, the Company was still seeking cuts in benefits and holidays, while the Union was still seeking increases. (Tr. 480–481, 564.) That assertion was not credible. First, he failed to rebut Fisher's detailed testimony as to the proposals exchanged on May 27. (Tr. 80–81, 350–351, 564.) Secondly, Schroeder's testimony was contradicted by Baumann's evasive and impeached testimony on cross-examination, when he conceded his previously sworn statement that "there was a lot of movement on that day. (Tr. 663–665.)

[32] Schroeder's denial that he became annoyed when Krand asked whether the Company was hiding $500,000 was not credible, as he previously told a Board investigator that he became "upset." (Tr. 75–77, 81, 354–355, 482, 586–588.)

[33] As additional evidence of his unreliability on an important issue, Schroeder testified generally on direct that during the morning of June 2, the Union presented an offer, and the Company presented a counter-offer, but provided no details. He only became more specific when pressed on cross-examination. (Tr. 77–85, 343, 351, 366–369, 371, 377, 480, 486–487, 564, 568–571.)

further extensions to the contract, which would expire at midnight on June 6.

The Company's "final" proposal included: a 5-year contract and a reduction in wage rates for tiers one and two by 15 percent in year one and 5 percent in year two, flat in year three, a 3-percent increase in year four, and again in year five. Significantly, the Company proposed a term which was a year longer than the Company's previous offer and signaled a shift from its wage proposal at the previous session for a 20-percent wage cut. The Company's proposal also included an offer to pay 60 percent of employees' health insurance premiums, with employees paying 40 percent. This development also constituted movement by the Company, which proposed on May 27 that employees assume 50 percent of premium costs. The Company also proposed: 6 personal days, including 2 days which could be used for personal business; eight holidays, if the status quo remained as to the pension fund; and nine paid holidays. This proposal constituted an increase from the Company's previous offer of eight. The Company changed its position on pension benefits on June 2 from its position taken on May 27. Rather than cease contributing to the pension fund, or giving employees a choice between the pension fund and the Company's profit-sharing plan, the Company offered to continue contributing to the pension fund at the same rate as under the expiring contract. It renewed its demand, however, that the Union delete the union-security clause in article 3.2. Schroeder then instructed the union committee to "[g]o back to work." The Union decided to conclude the session. It requested that the Company put its proposal in writing, which the Company did. Fisher waited for the written version of the "final" proposal. The mediators did not schedule any additional session upon the presentation of the Company's final proposal.[34]

On June 5, the union representatives discussed the Company's "final" proposal with the bargaining unit members at the facility. The employees rejected the Company's demands for concession, including significant wage cuts, and directed Fisher to resume negotiations. As a result, Fisher verbally conveyed the employees' sentiment to Schroeder and asked him to agree to a contract extension beyond June 6. Fisher confirmed his conversation with Schroeder by sending him an e-mail later that evening and asking to resume bargaining on June 10. In addition, Fisher asked whether company management was willing to cut its wages to the same or greater extent that it sought of the bargaining unit members. Fisher also asked the Company to provide the estimated savings created by the wage cuts it demanded of bargaining unit employees. Schroeder replied by e-mail that the Company made significant cuts in "non-Union and management compensations and costs, as previously shared with [the Union]; including the President of the Company foregoing his salary as of May 15th."[35]

G. Company's "Revised Final Proposal"

On June 6, the Company sent Fisher an e-mail containing a "revised final proposal (see attachment) in an effort to arrive at an immediate settlement. One of the points you made this morning was that the Union still feels that the wage reductions are too deep. Therefore, the Company is modifying the wage rates accordingly." Schroeder then proceeded to lay out a new approach. First, the Company sought to reduce all tier I rates by 10 percent in year one, reduce 10 percent in year two, flat in year three, increase 3 percent in year four and increase an additional 3 percent in year five. Secondly, the Company proposed to reduce all tier II rates by 15 percent in year one, reduce 5 percent in year two, flat in year three, increase 3 percent in year four, and increase an additional 3 percent in year five. Thirdly, the Company proposed to establish a tier III rate for all new hires at $11.50 per hour. The Company increased its health benefit proposal by $100 to $300 per month for any employee not participating in the health plan, and added a fifth week of paid vacation for employees who worked over 30 years. Moreover, in contrast to the previous agreements on April 8 and May 9, the Company's June 6 proposals did not include a retroactivity provision. Thus, to the extent the proposals involved decreased compensation, the June 6 proposals, because they did not operate retroactively, resulted in a concession to the Union. Schroeder's e-mail concluded with a remark that "[t]he Company's financial circumstances require us to resolve this contract without any further delay. We cannot agree to any further extensions. The [contract] expires tonight, June 6th, at midnight. Please meet with the union members as soon as possible and advise of their decision prior to the start of work (6:30 a.m.) on Monday morning." Fisher followed up with a telephone call to Schroeder shortly thereafter and repeated the Union's request to resume bargaining and asked for an additional agreement to extend the contract. Schroeder refused Fisher's request and, as stated in his e-mail a few minutes later, reminded Fisher that the Company awaited the Union's decision on Monday morning.

On June 7, the Union sent an e-mail to the Company stating that the Company had not responded to its earlier questions as to whether it would cut management salaries to the comparable extent sought of employees and the savings that would result from its proposed employee reductions. The Union also added that the Company was saving money because there were union workers on layoff.

On Sunday, June 8, Schroeder wrote Fisher, describing changes the Company made generally in management compensation and personnel changes to try to save money. Schroeder advised the Union that if it accepted its latest proposal, "everybody works on Monday under the new terms. If it is rejected, the Company will be implementing the new terms of employ-

[34] Schroeder's contention that Serota told the Company's representatives that the parties were at impasse is not supported by the credible testimony or other evidence, including the continued discussion of the issues by the parties and the Company's subsequent submission of a revised final proposal. (Tr. 82–89, 367–369, 376–379, 487, 567–568, 570–571; GC Exhs. 6, 25.)

[35] Given Fisher's conversation and e-mail to Schroeder on June 5, the Company's contention that the Union failed to respond to its first "final" offer between June 2 and 6 is without merit. (Tr. 89–93, 362, 382–385, 571; GC Exh. 26.)

ment unilaterally and replacing any employees who choose not to work." Schroeder asked for the Union's decision "by 6:29am [sic] on Monday, June 9th."[36]

H. Company Locks Out Employees

Prior to 6:30 a.m. on June 9, the Company changed the employee access codes so employees would not be able to enter the facility. In addition, contrary to its custom and practice, the Company deployed security guards at the facility's entrance on June 9. Sometime between 6:15 and 6:25 a.m., Fisher arrived and was informed that employees were locked out. He briefly discussed the Company's revised final proposal with the employees present and asked for a vote as to whether employees should vote on the contract or seek to continue bargaining with the Company. Most employees voted in favor of the Union seeking to resume bargaining. At that point, Fisher and Alers entered the Company's reception area and encountered Baumann and Schroeder. Fisher informed them that the bargaining unit employees were locked out of the facility, did not accept the Company's revised final proposal, and wanted the Company to return to the bargaining table. Schroeder confirmed that the employees were locked out because they did not accept the terms of the revised final proposal. Fisher left, went outside to tell the employees that management refused to bargain and was implementing the terms of the second final offer. He also advised them to go home and start collecting unemployment.[37]

At 6:30 a.m., Schroeder, Bauman, and Stacey went out to the gate where the employees and their union representatives gathered. Schroeder told the employees who gathered that the Company was open for business, and that anyone who would like to come to work under the terms of the second final offer, which he referred to as the "new contract," was welcome to come to work and to contact Bauman or Stacy.[38]

Six employees returned to work on June 9: John Carrasca, Manuel Goncalves, Jason Malinowski, Edward Olander, Les Porzio, and Ruben Quingalahua. A seventh employee, Carlos Alers, was on approved leave, but telephoned management on June 9 and informed them that he would return to work the following week after his vacation concluded. The next morning, on June 10, Edmondo Maisonet also returned to work. The Company also allowed two employees away on military leave, Danny Rivera and Marco Sanchez, to return at the conclusion of their tours.[39]

I. Company Implements the Revised "Final" Proposal

Shortly after the six employees reported to work on June 9, Schroeder, Bauman, and Stacy gathered them for a meeting. During the meeting, Schroeder informed the employees—Carrasca, Goncalves, Malinowski, Olander, Porzio, and Quingalahua—that the Company implemented its revised "final" proposal to the Union, which modified the contract as follows: reduced wages, paid holiday benefits, sick and personal leave benefits, and health benefits; eliminated employee severance pay, recall rights of laid-off employees, union security and contributions to the union pension fund; and established a 401(k) savings plan. He also told them there was no longer a labor representative for employees at the Company and that in order to return to work they would need to sign an agreement containing the new terms and conditions of their employment. Bauman then met individually with each employee, presented the employee with an individual agreement establishing his wages, benefits, and terms and conditions of employment, reviewed and discussed it with them.[40]

Since June 9, the Company has made additional changes in terms and conditions of work, deviating from its revised final proposal. It no longer contributes to the pension plan. The Company does not apply the seniority provisions of the contract, which were not changed in the revised final proposal. The Company has also applied different terms from the revised final proposal with respect to vacation, sick leave, and leave of absence for union business. Finally, the Company changed the right of employees to be recalled from layoff.[41]

J. The Company Solicits Union Resignations

On June 9, Bauman and Schroeder, with the assistance of Porzio, also urged each of the six returning employees to withdraw their union membership. In furtherance of that objective, they provided each of those employees with identical form letters stating that they were resigning from the Union. Each letter stated, "This letter confirms my verbal resignation from the membership of the United Steel Workers of America (USW) Local 4-406, given to Mike Fisher on the morning of Monday June 9th, 2008."[42] One of the returning employees, Goncalves, could not read English, yet Bauman told him to sign it if he wanted to continue working for the Company.[43]

[36] There was fairly consistent testimony by Schroeder and Fisher, as borne out by the e-mails, regarding their communications on June 6, 7, and 8. (GC Exhs. 9, 18, 26–28; Tr. 93–95, 492–494, 586.)

[37] The testimony of both Fisher and Porzio established that Fisher put the question to a vote before entering the facility to speak with management about the lockout. Fisher testified that only 2 employees voted in favor of voting on the Company's revised final offer, while Porzio testified that 12 employees voted in favor of, and 5 opposed, Fisher seeking further negotiations with the Company—it is undisputed that a majority of bargaining unit members present did not want to vote on the revised offer. (Tr. 96–97, 387–390, 571–573, 611–613.)

[38] It is not disputed that the Company changed the entrance gate access codes and that Schroeder issued the ultimatum that employees agree to the terms and conditions of the revised final proposal in order to be permitted to return to work. (Tr. 96, 110, 387, 414, 419–430, 433–436, 495, 626, 637–638.)

[39] This finding is based on the fairly testimony of Fisher, Goncalves, Maisonet and Porzio as to who returned to work on June 9. (Tr. 108, 122, 247, 614; GC Exh. 31.)

[40] There is no dispute as to what Schroeder told the employees at this meeting. (Tr. 189, 194, 239–240, 251, 255–256, 259, 568, 615–616, 658; R. Exh. 41; GC Exh. 32.)

[41] The Company does not deny making these changes, but insists that the lack of a contract permitted it do whatever it wanted. (Tr. 575, 591–595; GC Exh. 1, arts. 4.1(h) and 13.1; GC Exh. 28.)

[42] The fact that the letters followed identical formats and were provided to employees by Baumann to sign as an ultimatum is clear and convincing evidence that the resignation letter campaign was initiated by the Company, not the employees. (GC Exh. 31.)

[43] Goncalves' subpoenaed testimony was confused and inconsistent as to whether he was asked to sign the union resignation letter by

Bauman presented Maisonet with a similar letter when he returned to work on June 10. It stated: "This letter confirms my resignation from the membership of the United Steel Workers of America (USW) Local 4-406 on the morning of Tuesday June 10th, 2008, Sincerely," Maisonet read it and signed it.[44]

None of the returning employees who signed resignation letters spoke with Fisher about resigning from the Union.[45] As a result, he first learned about the resignation letters when he received a letter, dated June 13, from the Company withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit based on the resignation letter.[46]

K. Stacy Threatens Alers

After management addressed the returning employees, Stacy placed a telephone call to Alers, the Union's chief shop steward and a member of the Union's negotiating committee during the 2008 negotiations.[47] Alers did not answer the call, so Stacy left a message on his answering machine. In the message, Stacy told Alers that two employees, "Eddie O" and "Ruben," were returning to work and that Eddie Maisonet was "on the verge" of coming back. Stacy added: "Gilbert, if you don't come to work by the end of the day, Steve Schroeder says you're never coming back. . . . Today's the last window of opportunity to come back, Gilbert. If you come back, you'll be taking 20 dollars and 65 cents an hour. I don't think you can find anything out there. . . . Use your head, Gilbert, better come back today or it's over." Alers returned Stacy's call, declined Stacy's advice to return to work, and forwarded an audiotape of Stacy's recorded telephone message to the Union.[48]

L. Company Terminates Remaining Nonworking Employees

During the afternoon of June 10, five additional employees attempted to return to work—Alers, Ardiente, Dechavez, the three employee members of the Union's bargaining committee, and two others, Aybar Braudilio and Alexander Nunez. They were notified, however, that they had been discharged. Fisher met with the employees on June 10. After conferring with the employees, Fisher learned that a majority of the workers returned to work. The remaining employees decided to inquire about returning to work. As a result, Fisher told Bauman on June 10 that the workers wanted to return to work under the last proposal that the Company presented. Bauman said he would check with Schroeder. Bauman relayed the offer to Schroeder. Bauman returned and told Fisher to call Thomas Ryan, Esq., the Company's counsel. Schroeder, after consulting with Ryan, determined that the contract expired and the offer to return to work was no longer on the table. Ryan notified Fisher by e-mail of the Company's position that the offer expired on Monday morning, June 9, and that employees who had not returned to work had been terminated.[49]

A letter, dated June 11, confirming the termination was issued to each of the five remaining employees who did not return to work on June 9. The letter also explained that these individuals would receive, under separate cover, information with regard to benefit continuation and their COBRA rights. The Company neither recalled any of these five employees, nor provided them with severance pay. Instead, it replaced them with two temporary workers.[50]

Analysis and Discussion

A. Motion to Amend the Complaint

The General Counsel's belated motion to amend the complaint to allege a direct dealing allegation in violation of Sec-

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Porzio or Baumann. It is clear that Porzio and Baumann were both involved in the circulation of the letter, but in this instance, I found the most credible version to be Goncalves' prior statement, as contained in a sworn affidavit, indicating that Baumann asked him to sign it. (Tr. 187–192, 205–207, 224–225; GC Exh. 31.) Even if Porzio asked him to sign the letter, I find that Porzio, admittedly interested in "a position where you had particularly close relations with management," would have been acting at the request of Schroeder or Baumann. (Tr. 619–620.)

[44] Maisonet's subpoenaed testimony was also confusing, evasive, and revealed a witness under pressure. Asked whether he was given the resignation letter by Porzio or Baumann, Maisonet's testimony shifted several times. After extensive cross-examination and redirect examination, however, he revealed that it was actually Schroeder who asked him to sign the document. He qualified his final response by adding that Schroeder said that Porzio told him to give it to Maisonet. Schroeder's delivery of the letter, however, indicates that the Company was involved in the effort to decimate the Union's membership and decertify it. (Tr. 234–235, 240–267.)

[45] Les Porzio and John Carrasca, employees admittedly biased against the Union and directed to testify by Stacy, testified that they informed Fisher of their resignation from the Union before he entered the facility on June 9. (Tr. 611–613, 617–620, 626, 631–634, 636, 662.) Fisher, on the other hand, denied that anyone told him on June 9 that they were resigning from the Union. (Tr. 108.) He was corroborated in that respect by Goncalves, who credibly testified that he never spoke to Fisher about resigning. (Tr. 188.) Such testimony by Fisher and Goncalves, as well as Porzio's apologetic remark to Fisher that he needed a salary and could not afford to go on strike, seemed more credible and consistent with the overall testimony. Moreover, the credibility of testimony by Porzio and Carrasca was diminished by Bauman's evasive response regarding the circumstances by which they came to testify. (Tr. 662–663.) The overall testimony reflected a chaotic scene in which employees were confronted with a sudden decision as to whether to report to work or go home. Schroeder did not raise the issue of Union representation at that moment and there is no reason to believe that employees, faced with an excruciating decision, would have taken the time to inform Fisher about their Union status.

[46] GC Exh. 33.

[47] Stacy is an admitted supervisor and agent (complaint and answer). He acts with apparent as well as actual agency. Any reasonable employee in Alers' shoes would have understood Stacy to be communicating on behalf of the Company. Stacy's words should thus be imputed to the Company, regardless of Schroeder's denial that Stacy was not authorized to threaten employees to persuade them to return to work on June 9. (Tr. 502.)

[48] An audiotaped recording of Stacy's telephone message was played during the hearing and received in evidence. It corroborates Alers' testimony as to the substance of Stacy's ultimatum. (GC Exh. 38; Tr. 414–421, 424–429.)

[49] It is not disputed that the five employees attempted to return to work under the terms of the "final" offer and were rebuffed because they had been terminated. (Tr. 36–37, 102, 106, 110, 397–399, 575, 577, 580, 665; GC Exhs. 5, 7, 10, 13, 15, 21, 29–30.)

[50] The replacement of the five discharged employees by two temporary employees is not disputed. (GC Exh. 30; Tr. 100–101, 575.)

tion 8(a)(5) and (1) is premised on the following conduct by Bauman on June 9:

> Immediately after locking out employees, and permitting those to work who agreed to the Employer's terms, and after proclaiming that there was no longer a Union at Atlas, Operations Manager Bill Bauman,[51] admitted supervisor and agent engaged in direct dealing by (1) communicating directly with the Union-represented employees who returned to work (2) to establish wage and terms and conditions of employment declared by the Employer (3) without the presence of the Union. [Citations omitted.]

As previously noted, this is the first mention of such an amendment, as the General Counsel did not raise it during or at the conclusion of the trial. The Company opposes the motion on the grounds that granting the motion would deny the Company due process by denying the Company a fair chance to present a defense.

Section 102.17 of the Board's Rules and Regulations allows amendment to the complaint "as may be deemed just." Additionally, as counsel for the General Counsel contends, an unpleaded matter may support an unfair labor practice finding if the matter is "closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The General Counsel overlooks, however, the due process requirement "that a company have notice of the allegations against it so that it can present a defense." *Stallone Electrical Contractors*, 337 NLRB 1139 fn. 14 (2002).

The Administrative Procedure Act (APA), 5 U.S.C. Section 554(b)(3), provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." Counsel for the General Counsel offers no justification for her failure to offer the amendment prior to the close of the hearing and, thus, provide the Company with the entire spectrum of allegations against it. See *Medin Realty Corp*, 307 NLRB 497, 503 (1992) (denying a motion to amend the complaint and noting that the General Counsel failed to provide a reason for not amending the complaint at some point prior to submitting post-trial brief).

In conclusion, the motion to amend the complaint was submitted extremely late—after the record closed and incorporated into the General Counsel's post-trial brief. Moreover, no justifiable excuse was offered for the General Counsel's failure to move before the record closed to add an allegation consisting of facts with which it was well aware long before trial. The fact that the testimony crossed into the realm of direct dealing does not absolutely convince me that the matter was fairly and fully litigated. Bauman, the supervisor alleged to have engaged in direct dealing, testified that he met with the employees either on June 10 or 11 to discuss the terms of employment but denied negotiating with the employees.[52] Such testimony certainly relates to a charge that the Company unilaterally changed employees' terms and conditions. It appears, however, that the Company approached that charge by having Bauman tersely deny any allegations of direct dealing. As such, I am not convinced that the Company would not have offered additional testimony or other evidence had it known it was also facing a direct dealing charge. Under the circumstances, the post-trial motion to amend the complaint is denied.

B. The Company's Refusal to Bargain if Gilliam was Involved

The complaint alleges that the Company violated Section 8(a)(5) and (1) by refusing to bargain with the Union as long as Gilliam, a former chief steward, was part of its negotiating committee. The Company contends that resumption of negotiations was not conditioned on Gilliam's absence. Additionally, the Company contends that it was entitled to object to Gilliam's participation in negotiations based on the ill will of the Union and the conflict of interest flowing from Gilliam's conduct.

Generally, both parties have a right to choose whomever they wish to represent them in negotiations, and neither party can control the other party's selection of representatives. *General Electric Co. v. NLRB*, 412 F.2d 512, 517 (2d Cir. 1969). There have been exceptions to this general rule, however, where there is a showing of persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible. *People Care, Inc.*, 327 NLRB 814, 824 (1999). The Board has permitted such refusals in egregious situations, like those involving physical altercations or threats of violence. *Pan American Grain Co.*, 343 NLRB 205 (2004); *People Care, Inc.*, 327 NLRB at 824. On the other hand, the mere fact that a union representative was previously discharged by the employer is not a sufficient reason to refuse to deal with that representative. *Quality Food Management*, 327 NLRB 885, 889 (1999).

The Company refused to continue bargaining with the Union on May 8 if the latter was represented by Gilliam and filed an unfair labor practice against the Union as a result. It maintained its position in Ryan's May 12 letter to the Union, which clearly conditioned the resumption of bargaining on Gilliam's exclusion from the Union's bargaining team. Invoking an essentially symbolic reservation of rights to insist on Gilliam's participation, the Union relented and agreed to resume negotiations without him. As such, the Company's assertion that the resumption of negotiations was not conditioned on Gilliam's absence is a hollow one. The Company forced the Union to proceed without Gilliam and the only issue that remains is the reasonableness of the Company's position.

The evidence demonstrates that the Company's grounds for insisting on Gilliam's exclusion were shifting and baseless. The Company's witnesses initially relied on the fact that Gilliam was no longer an employee and, thus, not entitled to be on company property. When urged to move negotiations to a neutral site—the New Jersey State Board of Mediation—the Company still refused. When confronted with that reality, the Company's witnesses alluded to the fact that Gilliam had not signed a confidentiality form. That excuse was also less than credible, since commonsense suggests that such a concern would have been addressed by the Company's insistence that Gilliam sign the same confidentiality form signed by the Union's representatives. None of the Company's witnesses testified, however, that

[51] "Bill" Baumann identified himself on the record as "William." (Tr. 640.)

[52] Tr. 658.

they raised such a concern to union representatives on May 8. Finally, the Company's witnesses suggested that Gilliam became upset or annoyed when he learned that he would not be able to participate in bargaining. They did not, however, describe any conduct on Gilliam's part that seemed likely to spark conflagration at the bargaining table. To the contrary, based on their familiarity with Gilliam, they were merely describing some of his well-known mannerisms.

The Company cites *NLRB v. International Ladies' Garment Workers' Union, AFL–CIO*, 274 F.2d 376 (3d Cir. 1960), in support of its position that the Union's offer to bargain with Gilliam was not made in good faith. Additionally, the Company quotes a passage from *International Ladies' Garment Workers' Union* which cites *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950), for the proposition that an employer may refuse to negotiate with a union representative who evidenced hostility to it by past activities. However, the facts in *International Ladies' Garment Workers' Union* and *Kentucky Utilities* are easily distinguishable from the case at hand.

In *Kentucky Utilities*, the company indicated its willingness to bargain with the Union through representatives other than Ira Braswell. Braswell was previously discharged by the company and expressed hostility toward it in several speeches. In those speeches, Braswell stated he had a grudge to settle with the company, accused company's officials of being liars, and hoped the company would collapse financially. Id. at 812. Additionally, Braswell was withdrawn as a negotiator at the request of the company on two previous occasions and the Union representatives had orally agreed that Braswell was not a proper representative and would not be called upon to conduct any negotiations. Id. at 813-814. Under the circumstances, the court found that Braswell's expressed hostility to the company and desire to see it suffer financial harm made any attempt at good faith bargaining a futility. Id. at 813.

In *International Ladies' Garment Workers' Union*, the Union refused to bargain with one of the company's representatives, Robert Mickus, because Mickus previously worked for the Union for 10 years, holding highly confidential positions. *International Ladies' Garment Workers' Union*, 274 F.2d at 377, 379. The company hired Mickus to perform the same functions that he had with the union and there was evidence that the company sought to use Mickus' knowledge of Union strategy to its advantage. Id. at 379. Under the circumstances, the court held that the company's ploy displayed an absence of fair dealing and constituted bad faith bargaining. Id.

In this case, the Company simply asserts that there was ill will and a conflict of interest given Gilliam's conduct. However, the Company offered no credible evidence that Gilliam displayed any hostility towards it or came into contact with any confidential information while employed by the Company. The only similarity between the case at hand, *International Ladies' Garment Workers' Union* and *Kentucky Utilities Co*. is the fact that Gilliam was discharged by the Company and subsequently took a job with another company. That similarity, however, is not a satisfactory reason for refusing to bargain with Gilliam.

In *Quality Food Management*, 327 NLRB at 889, the employer refused to bargain with the union as long as the union's bargaining committee contained a formerly discharged employee. The Board upheld the judge's ruling that the employer violated Section 8(a)(5) and (1) because the employer failed to provide any evidence that the formerly discharged employee was an improper or disruptive member of the union's bargaining committee that would make good-faith bargaining impracticable. Id. Similarly, Gilliam's status as a discharged employee was insufficient to support a refusal to bargain and the Company failed to produce persuasive evidence that Gilliam's presence was improper or disruptive as to make good-faith bargaining impracticable. Under the circumstances, the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as long as Gilliam was part of the bargaining committee.

C. The Unilateral Change of Terms and Conditions of Employment

The complaint alleges that the Company violated Section 8(a)(5) and (1) on June 9 by changing bargaining members' wages, hours, and other terms and conditions of employment without affording the Union an opportunity to bargain. Specifically, it is alleged that the Company implemented its revised final proposal on June 9, which included reductions in wages, paid holidays, vacation, sick and personal leave, and health benefits of employees in the unit, at a time when no impasse in negotiations had been reached, and then proceeded to lock out employees until such time as they would agree to work under the terms that it had implemented. It is further alleged that such a revised final proposal deviated from an earlier "final" offer proposed during negotiations. The Company contends that a "final" proposal was submitted to the Union, based largely on the advice and opinion of the mediators, after the parties reached impasse. Additionally, the Company contends that the Union failed to respond to its "final" offer, so the Company made minor modifications and asked for the Union's response to the Company's revised final proposal by the morning of June 9. When the Union rejected the revised final proposal on June 9, the Company allowed employees to return to work under the terms and conditions of that proposal.

Concerning unilateral implementation, an employer has "a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). The Board recently explained impasse in *Area Trade Bindery Co.*, 352 NLRB 172, 175 (2008):

> By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,* 484 U.S. 539, 543 (1988). . . . "A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973).

Factors to consider when determining whether or not an impasse exists include, "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of the negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists* AFTRA, 395 F.2d 622 (D.C. Cir. 1968). The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

In this respect, the Company relies on a statement made by a mediator that the parties were at impasse. It also contends that the Union refused to agree to any wage cuts, agreed only nominal benefit cuts, and that continued negotiations were futile. However, as noted in footnote 34, the Company's contention that mediators advised its representatives that the parties were at impasse was not supported by credible testimony or other evidence.

The evidence revealed that the parties met for nine bargaining sessions over a span of 3 months. The parties would have had approximately 4 months of negotiations prior to the contract expiration, except that the Company ignored the Union's initial letter requesting bargaining. As previously discussed, had the Company responded to the Union's January 22 letter, it is reasonable to expect that negotiations would have gotten underway in February instead of on March 11. Furthermore, economic issues were only discussed during the final three bargaining sessions. Economic issues were also going to be addressed during the afternoon of the sixth bargaining session, but that session ended when the Company, as noted above, illegally prevented Gilliam from joining the Union's bargaining team. In any event, the first six sessions focused primarily on numerous noneconomic issues because the Company needed to provide the Union with financial statements, which the Union then needed time to review.

During the seventh bargaining session, the Union discussed its preliminary findings regarding the Company's finances, but requested more financial information. When the progress of negotiations hit a snag, the parties agreed to continue negotiations with the assistance of FMCS mediators. The eighth bargaining session on May 27 focused on economic issues and the parties made "a lot of movement on that day."[53] Those discussions led to the ninth bargaining session on June 2, when the Union conveyed to the Company for the first time that it was willing to accept wage reductions. The Company responded by reducing its previously proposed wage cut. The Company then proposed a "final" proposal to the Union, to which the Union responded by requesting the proposal in writing and concluding the bargaining session. Subsequently, the Union rejected the "final" proposal and requested resumption in bargaining. The Company responded by e-mail on June 6 with a revised final proposal reducing its previously proposed wage cuts. Notwithstanding such movement, as well as the difference in the Company's evolving economic proposals, it contends that the Union rejected its revised final proposal by requesting continued bargaining. Such a stance by the Union, however, is hardly indicative of a party unwilling to make additional wage concessions.

Even though the parties met nine times, the important economic issues were only discussed during the last three sessions and there was clear movement on the part of the Union. Indeed, by Baumann's own admission, the parties made a lot of progress during the eighth bargaining session. Applying the *Taft* factors, the scant number of bargaining sessions on the economic issues and the movement of the parties concerning those issues indicate the absence of an impasse. See *Beverly Farm Foundation, Inc.*, 144 F.3d 1048, 1052–1053 (7th Cir. 1998) (upholding Board finding that no impasse existed after 19 bargaining sessions where economic issues were only discussed at three of those sessions and the union continued to be flexible); *A.M.F. Bowling Co.*, 314 NLRB 969 (1994) (finding no impasse after seven bargaining sessions where the employer's three detailed economic proposals differed from one another and the union demonstrated flexibility throughout the course of bargaining).

The last of the *Taft* factors, the "contemporaneous understanding of the parties as to the state of negotiations," also supports a finding of no impasse if either negotiating party remains willing to move further toward an agreement. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). In *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), the Board concluded that the employer's assertion that it reached its final position did not amount to an impasse because the union declared and demonstrated its willingness to be flexible. Similarly, an impasse did not exist in this situation because the Union indicated its willingness to be flexible when it conceded that it was willing to accept wage reductions directly before the Company proposed its "final" proposal.

Assuming, arguendo, that an impasse arose, it would have merely suspended, but not terminated, bargaining. *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963); *Philip Carey Mfg. Co.*, 140 NLRB 1103 (1963). As such, an employer may make unilateral changes upon impasse, but such changes must "not [be] substantially different . . . than any [offers] which the employer . . . proposed during the negotiations." *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

Since June 9, the Company has made additional changes in terms and conditions of work, deviating from its revised final proposal: it no longer contributes to the pension plan; it does not apply the seniority provisions of the contract, which were not changed in the revised final proposal; it has applied different terms from the revised final proposal regarding vacation, sick leave, and leave of absence for union business; and it has modified the right of employees to be recalled from layoff.

Under the circumstances, the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its revised final proposal on June 9 without affording the Union an opportunity to continue bargaining.

D. Lockout

The complaint alleges that the Company violated Section 8(a)(5) and (1) by locking out its employees until such time as they would agree to work under the terms that it implemented.

[53] Tr. 664–665.

The Company concedes that it changed the locks to the plant, anticipating strike activity, prior to the commencement of work on June 9, but denies that its actions constituted a lockout because employees were free to return to work under the terms of the Company's revised final proposal.

A lockout arises when an employer withholds employment from its employees for the purpose of either resisting their demands or gaining a concession from them. See *Irwin's Barker & Beauty Supply*, 220 NLRB 1212, 1216 (1975). The Company changed the access codes to the employee entrance gate so employees could not enter the facility. That tactic enabled Schroeder to inform employees that they were free to enter the facility and report to work, but only under the terms of the revised final proposal. Thus, the Company denied its employees entry into the Company's facility in order to compel acceptance of the terms of its revised final proposal or face discharge. Clearly, this action constituted a lockout.

"Proper analysis of the problem [lockout] demands that the simple intention to support the employer's bargaining position . . . be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." A*merican Ship Building Co.*, 380 U.S. 300, 309 (1965). An employer does not violate the Act when it locks out employees after an impasse has been reached, for the sole purpose of bringing economic pressure to bear in support of its legitimate bargaining position. Id. at 318. However, "[w]hen an employer locks out its employees for the purpose of evading its duty to negotiate with the employees' bargaining representative, the employer violates sections 8(a)(5) and (1) of the Act." *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991).

The Company's lockout of employees was unlawful, as it was not instituted in support of a legitimate bargaining position. The Company locked employees out to force acceptance of the unilaterally implemented terms and conditions of employment. As previously discussed, such implementation was also unlawful, as no impasse existed at the time. Under the circumstances, the violated Section 8(a)(5) and (1) of the Act by locking out its employees in order to evade its duty to bargain with the Union.

E. Employee Threats

The complaint alleges that plant manager Stacy, acting as the Company's agent, violated Section 8(a)(1) by threatening to discharge employees who would not return to work under the new terms implemented by the Company. The Company denies that it threatened to discharge employees who did not return to work under the Company's revised final proposal. Additionally, the Company contends that Stacy's call to Alers was not made on behalf of, or with the knowledge of, the Company nor was it made to coerce or intimidate Alers.

In analyzing an 8(a)(1) charge, "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Section 8(a)(1) violations do not turn on the employer's motive or on whether the coercion succeeded or failed. Id.

Stacy's subjective motive in making the call is not relevant. As noted at footnote 7, Stacy, the plant manager, was acting as an agent of the Company. He accompanied Schroeder and Bauman to the entrance gate when Schroeder addressed employees and issued the ultimatum of returning to work under the new contract or going home. Given Stacy's position and role, a reasonable person would believe that Stacy was conveying a message on behalf of the Company. That message could reasonably be construed as threatening Alers with termination if he refused to accept the Company's unlawfully implemented terms and conditions of employment and abandon his right to engage in protected concerted activity, that is, support the Union's request to continue bargaining over employees' terms and conditions of employment. Stacy's telephone call to Alers essentially confronted the latter with a Hobson's choice—accept the Company's unfair labor practice or face discharge. Under the circumstances, Stacy's statement to Alers constituted a threat in violation of Section 8(a)(1).

F. The Solicitation of Employees to Withdraw from the Union

The complaint alleges that the Company solicited employees on June 9 to withdraw their membership in the Union in violation of Section 8(a)(1). The Company denies any involvement in the decision of bargaining unit members to resign as members of the bargaining unit. It contends that its employees voluntarily withdrew their union membership and sought to end the Union's designation as exclusive collective-bargaining representative.

An employer may not "initiate a decertification petition, solicit signatures for the petition or lend more than minimal support and approval to the securing of signatures and the filing of the petition." *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985). A violation will not be found, however, "if preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned." *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1967).

The credible evidence strongly suggests that the Company initiated or promoted the effort to have employees resign from the Union. The resignation letters signed by employees followed identical formats and were provided to employees by Schroeder, Baumann, or Porzio. While not alleged in the complaint to have acted as the Company's agent, Porzio was admittedly biased against the Union and interested in pleasing management. Moreover, the employees were presented the union resignation letters to sign shortly after returning to work and being forced to sign letters acknowledging the unilaterally imposed terms and conditions of the new contract. The Company, in its proof, provided no credible evidence to demonstrate that the resignation effort was initiated solely by employees and that its role was limited to one of clerical support. Under the circumstances, the Company's effort to have employees resign from the Union created an atmosphere of coercion in violation of Section 8(a)(1).

G. The Discharge of Bargaining Unit Members

The complaint alleges that the Company discharged Alers, Dechavez, Braudilio, Nunez, and Ardiente in violation of Section 8(a)(3) and (1) because they assisted the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities. The Company denies

that it had discriminatory motivation in discharging these employees and contends that it legally terminated those employees who chose not to return to work.

The 8(a)(3) and (1) violations are established based on the Company's discriminatory conduct that was motivated by an antiunion purpose. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1982), the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. A prima facie case requires that the General Counsel demonstrate protected activity, employer knowledge of that activity, and animus against protected activity. If these elements are met, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. If, however, the evidence establishes that the reasons given for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *United Rentals*, supra at 951–952 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). Conduct violative of Section 8(a)(5) may evidence union animus. *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001).

On June 9, the five employees, Alers, Dechavez, Braudilio, Nunez, and Ardiente, engaged in protected concerted activity. As members of the bargaining unit, the five employees supported the Union's position that the Company's revised final proposal was unacceptable and the employees were in favor of continued bargaining. The Union informed the Company that the employees took this position. The Company responded by unilaterally implementing changes to their terms and conditions of employment and illegally locking them out. The employees chose not to return to work under the newly implemented changes. On June 10, the five employees returned and informed the Company of their intention to return to work, but the Company discharged them.

In conclusion, the five employees, Alers, Dechavez, Braudilio, Nunez, and Ardiente were "forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer." *Noel Corp.*, 315 NLRB 905, 909 (1994); *RCR Sportswear*, 312 NLRB 513 (1993). Under *Wright Line*, the employees engaged in protected activity by insisting on further bargaining. The Company was aware of the protected activity based on the statements made to management by Fisher that employees supported continued bargaining. The Company's antiunion animus is established by its Section 8(a)(5) and (1) violations of unilaterally implementing terms and conditions of employment and illegally locking out employees. Lastly, the Company failed to offer evidence that it would have discharged the employees even in the absence of their protected activity. Under the circumstances, the Company violated Section 8(a)(3) and (1) of the Act by discharging the five employees because they supported the Union's request to continue bargaining over their terms and conditions of employment.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

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

> All production and maintenance employees employed by the Company at its Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

4. The Company violated Section 8(a)(1) of the Act by threatening to discharge employees who would not return to work under the new terms and conditions of employment implemented by the Company and soliciting employees to withdraw from the Union.

5. By discharging Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez because they supported the Union's efforts to continue collective bargaining, the Company violated Section 8(a)(3) and (1) of the Act.

6. By refusing to bargain with the Union as long as Jeff Gilliam was part of the bargaining committee, unilaterally implementing new terms and conditions of employment on June 9 without affording the Union an opportunity to bargain, and locking out employees in order to evade its duty to bargain with the Union, the Company violated Section 8(a)(5) and (1) of the Act.

7. The aforementioned practices affect commerce within the meaning of Section 8(a)(1), (3), and (5), and Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

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

ORDER

The Respondent, Atlas Refinery, Inc., of Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees because of their support for the Union during collective bargaining.

(b) Soliciting employees to withdraw from the Union.

(c) Discharging or otherwise discriminating against any employee for supporting Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO or any other union.

(d) Refusing to bargain with the Union as the labor representative of its employees and placing restrictions as to who can be on the Union's bargaining committee.

(e) Unilaterally implementing new terms and conditions of employment without affording the Union an opportunity to bargain.

(f) Locking out employees in order to evade its duty to bargain with the Union.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit (the bargaining unit) concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Company at its Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

(b) Within 14 days from the date of this Order, offer Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix A"[55] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 2008.

(g) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix A, in both English and Spanish, at its own expense, to all employees in the bargaining unit who were employed by the Respondent at its Newark, New Jersey facility at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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

Dated, Washington, D.C. August 7, 2009

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten to discharge or discharge employees, or otherwise discriminate against any of you for supporting

[55] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local 4-406, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, or any other union.

WE WILL NOT solicit employees to withdraw from the Union.

WE WILL NOT refuse to bargain with the Union as the labor representative of our employees and place restrictions as to who can be on the Union's bargaining committee.

WE WILL NOT unilaterally implement new terms and conditions of employment without affording the Union an opportunity to bargain.

WE WILL NOT lock out employees in order to evade our duty to bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by us at our Newark facility, excluding all office clerical employees, professional employees, guards and supervisors, as defined in the Act.

WE WILL, within 14 days from the date of this Order, offer Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio, and Alexander Nunez whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Gilbert Alers, Raymond Ardiente, Bibiano Dechavez, Aybar Braudilio and Alexander Nunez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

> LOCAL 4-406, UNITED STEEL, PAPER AND FORESTRY, RUBBER,MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICEWORKERS INTERNATIONAL UNION, AFL–CIO