

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

THE AMERICAN NATIONAL RED CROSS, GREAT
LAKES BLOOD SERVICES REGION and MID-
MICHIGAN CHAPTER,

Respondent ANRC – Region
Respondent ANRC – Chapter,

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Charging Union OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

Charging Union Teamsters.

Cases 7-CA-52033
7-CA-52288
7-CA-52544
7-CA-52811
7-CA-53018

Cases 7-CA-52282
7-CA-52308
7-CA-52487

**BRIEF OF RESPONDENTS, THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION, AND THE AMERICAN NATIONAL
RED CROSS, MID-MICHIGAN CHAPTER IN SUPPORT
OF EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S DECISION AND RECOMMENDED ORDER**

AXLEY BRYNELSON, LLP
Michael J. Westcott
Leslie A. Sammon
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
608-283-6722

CLARK HILL PLC
Fred W. Batten
William A. Moore
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
313-965-8804

CO-COUNSEL FOR RESPONDENTS

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I. STATEMENT OF THE CASE

On May 5, 2011, Administrative Law Judge Jeffrey D. Wedekind (ALJ) issued his Decision finding Respondent Great Lakes Blood Services Region (the “Region”) and Respondent Mid-Michigan Chapter (the “Chapter”) of the American National Red Cross (“ANRC”)(collectively, the “Respondents”) violated Sections 8(a)(1),(3) and/or (5) of the Act arising out of allegations in charges filed by Charging Party Office & Professional Employees International Union, Local 459, AFL-CIO (“OPEIU”) and Charging Party Teamsters Local Union No. 580 (“Teamsters”), (collectively, the “Unions”), including, among other things, unilaterally changing benefits and past practices, failing to timely provide requested information, and discriminatorily denying guaranteed hours to employees who had engaged in a strike.

As set forth in the Respondents’ Exceptions, the Region and Chapter except to the ALJ’s findings and conclusions of law relating to alleged unilateral implementation of: 1) changes to the 401(k) Savings Plan benefit (suspension of the employer match effective May 1, 2009) and changes to the Retirement System, a defined benefit pension plan (closure of the plan to new hires effective July 1, 2009) as implemented for employees in each of the three OPEIU bargaining units (LCD Unit, Collections Unit and Clerical/Warehouse Unit); 2) changes to the retiree medical program effective January 1, 2009 and July 1, 2009 for employees in the Clerical/Warehouse Unit; 3) changes to the Benefits Advantage health insurance plan effective January 1, 2010 for OPEIU bargaining units and Teamsters bargaining units (MUA Unit and Apheresis Unit); 4) a change to an alleged past practice regarding holding union meetings on the Region’s premises; and 5) a new no-fault attendance policy and/or a unilateral amendment of its attendance policy in November 2008 for Region employees. Additionally, the Region excepts to the ALJ’s findings and conclusions related to alleged failure and/or refusal to provide

information (to OPEIU regarding the demand for blood and to Teamsters regarding employees' names associated with health insurance demographic information) and to findings and conclusions related to the alleged denial of guaranteed hours to certain Collections Unit employees during the week commencing June 7, 2010, following a three-day strike.

II. STATEMENT OF FACTS

A. The American National Red Cross Structure.

The American National Red Cross is a congressionally chartered organization with its national headquarters located in Washington, D.C. (Tr. 1299.) The ANRC has approximately 700 Chapters located in communities across the country. Chapters provide social services, food banks, meals-on-wheels programs and educational programs in their communities and also serve as the front line in responding to local and national disasters. (Tr. 1299-1300.) The ANRC has thirty-six blood services regions and five testing laboratories within the Biomedical Services Division, which is responsible for recruiting donors, collecting blood and processing, testing, and distributing blood products. (Tr. 1300, 1681, 1768.)

The Great Lake Blood Services Region (the "Region") is engaged in the collection, processing and distribution of blood and related services. The Mid-Michigan Chapter (the "Chapter") is engaged in providing relief to victims of disaster and helping people prevent, prepare for and respond to emergencies. (Fourth Consolidated Amended Complaint at ¶ 2.)

B. The Bargaining Units and Collective Bargaining Agreements.

The Office & Professional Employees International Union, Local 459, AFL-CIO ("OPEIU") represents two bargaining units of employees employed by the Region: the Collections Unit ("Collections Unit") and the Laboratory, Clerical and Distribution Unit ("LCD Unit"). (Tr. 258-259; GC-3; GC-4.) OPEIU also represents a unit of clerical and warehouse

employees (“Clerical/Warehouse Unit”) employed by the Chapter. (Tr. 259, 734, 1249, 1257; GC-2.)

The term for the most recent LCD Unit and Collections Unit collective bargaining agreements with OPEIU is March 31, 2004 to March 30, 2008. (GC-3; GC-4.) The term for the Chapter Unit collective bargaining agreement is March 1, 2003 to March 31, 2008. (GC-2.) The contracts were not re-opened in 2008 and each automatically renewed for an additional year. (Tr. 261.) Each of the contracts was re-opened in 2009. (Tr. 261.)

The Teamsters Local Union No. 580 (“Teamsters”) represents two bargaining units of employees employed by the Region: the Apheresis Unit and the Mobile Unit Assistants Unit (“MUA Unit”). (Tr. 749, 753; GC-5; GC-6.) The term for the most recent collective bargaining agreements for the Apheresis Unit and the MUA Unit is May 1, 2005 to April 30, 2009. (Tr. 750, GC-5; GC-6.)

C. The American Red Cross Retirement Program.

1. Overview.

The Retirement System of the American National Red Cross (“Retirement System plan”) and the American Red Cross Savings Plan (“Savings Plan” or “401(k) Savings Plan”) are components of the American National Red Cross retirement program. (Tr. 1300-1301.) The Retirement System plan, which has been in existence since 1936, is a defined benefit plan. (Tr. 1300-1301.) The 401(k) Savings Plan, in existence since January 1, 2000, is a defined contribution plan designed to provide for employees to make pre-tax and after-tax contributions through payroll deduction. (Tr. 1301.)

There is only one American National Red Cross Retirement System and only one 401(k) Savings Plan of the American National Red Cross. (Tr. 1348, 1394.) A participating employer

is a chapter, blood services region or testing laboratory (also identified as a Red Cross unit) that elects to adopt or participate in the Retirement System plan or the 401(k) Savings Plan. (Tr. 1454.) The Region and the Chapter are each participating employers in the Retirement System plan and the 401(k) Savings Plan. (Tr. 1248, 1250-1253, 1454-1455, 1779.) All employees participating in the Retirement System plan are treated equally under the terms of the plan; the same is true for all employees participating in the 401(k) Savings Plan. (Tr. 1348, 1394.)

2. The Process of Change.

The Board of Governors, the entity that governs the American National Red Cross, makes decisions about any significant plan changes or amendments¹ to the Retirement System plan or the 401(k) Savings Plan, acting based on recommendations from committees of the Board and benefit plan governance committees. (Tr. 1306.) Any amendments are approved by the benefit plan committee and/or the Board of Governors prior to a written amendment document being prepared and signed. (Tr. 1459, 1852-1854.) The last active step in making an amendment to a plan is the execution of the amendment document. (Tr. 1341, 1387, 1855.)

Neither the Region nor the Chapter, as participating employers, have any control over the decision-making process or setting the terms for the Retirement System plan or the 401(k) Savings Plan. (Tr. 1348, 1394-1398, 1769-1771.) Regions and chapters either participate in the plans as participating employers or they do not participate. (Tr. 1395.)

¹ Minor, compliance-related changes are typically handled by the benefit plan committee, which is appointed by the Board of Governors. (Tr. 1853-1854.)

3. **History of Changes to the 401(k) Savings Plan and the Retirement System Plan Prior to 2009.**

The 401(k) Savings Plan was first effective January 1, 2000. (Tr. 1351.) An official plan document (R-69) and a summary plan description were created.² (Tr. 1351, 1354.) The SPD was reprinted and distributed in August 2001. (Tr. 1354; R-71.)

The 401(k) Savings Plan has undergone changes since January 1, 2000. The first amendment to the plan, signed August 8, 2001, clarified a number of provisions including replacing “Employer” with “American National Red Cross” as the plan sponsor. (Tr. 1353; R-70.) The second amendment, signed February 4, 2002, made modifications to the plan to come into compliance with the tax code, including a change that increased the amount of compensation that could be considered for the employer matching contribution. (Tr. 1357, 1795; R-72.) Likewise, the third amendment, signed December 26, 2002, restated the contribution limits pursuant to the IRS Code, redefined key employees to be consistent with the Code and clarified the appeal and claims process to bring the process into current compliance with ERISA. (Tr. 1357-1358, 1795; R-73.) The fourth amendment, signed December 30, 2003, brought the plan into compliance with the IRS Code provision regarding required minimum contributions. (Tr. 1363, R-74.) A summary plan description incorporating the changes was created in October 2004 and mailed to employees. (Tr. 1363, 1365; R-75.)

There were also significant and material changes in the benefit levels under the 401(k) Savings Plan that were made effective July 1, 2005. (Tr. 1367.) The changes, reflected in an

² Plan documents and Summary Plan Descriptions (SPDs) are available to any employee who is a participant in the plan. (Tr. 1333, 1350-1351.) SPDs are mailed to employees at the time they become eligible to participate in the plan. (Tr. 1334, 1350-1351, 1355.) SPDs are also periodically redistributed by mail to the homes of all eligible employee participants and are available to employees electronically on the plans’ websites and on the ANRC’s intranet site, “CrossNet”. (Tr. 1355-1356.) SPDs also inform employees of their right to receive a copy of the official plan document. (Tr. 1336.)

amended and restated plan document (Tr. 1367-1368; R-76) and a summary plan description (Tr. 1378-1380; R-77), included:

- A change to the contribution limits for employees. Originally, the plan had a 13 percent limit on pretax contributions, a 10 percent limit on after tax contributions, and a total combined maximum of only 13 percent. Effective July 1, 2005, the limits were changed to allow employees to make contributions of up to 25 percent of their pay on a pretax basis and 10 percent on an after tax basis for a total of 35 percent. (Tr. 1368; R-76 at p. 15.)
- A change to the matching contribution. The employer matching contribution was increased from 50 percent on the first 4 percent of employee contributions to 100 percent on the first 4 percent of employee contributions. (Tr. 1315, 1369; R-58; R-76 at p. 3, 19.)
- A change to the vesting schedule. A three-year cliff vesting schedule was introduced for employees hired on or after July 1, 2005, requiring those employees to complete three years of service before being vested in the employer contributions to the plan. Employees hired prior to July 1, 2005 retained the previous vesting schedule which allowed them to be immediately vested in employer contributions to the plan. (Tr. 1315-1316, 1369-1370; R-58; R-76 at p. 27-28.)
- A change to the loan provisions. A loan provision was added effective July 1, 2005. Previously there was no loan provision. An advice service for employees to access independent professional investment advice was also added. (Tr. 1316, 1370-1371; R-58; R-76 at p. 47-49.)

The Retirement System plan has also undergone changes since it was first effective in 1936, including significant changes in 2005. (Tr. 1305-1306, 1335.) The changes to the Retirement System plan effective July 1, 2005, reflected in an amended and restated plan document (R-62) and summary plan description (R-63), included:

- A change in the eligibility requirements. Employees hired prior to July 1, 2005 immediately became a participant in the Retirement System after one year of employment. For employees hired on or after July 1, 2005, a 1,000 hour requirement was added so that employees became participants only after one year of employment working at least 1,000 hours. (Tr. 1308-1309; R-57; R-62 at p. 6-7.)
- A change to the formula on which benefits were calculated. Up until July 1, 2005, there was a split formula pension payment or pension calculation. The new formula for years of service earned on or after July 1, 2005 became 1.0 percent of average pay, reduced from the previous formula which was a combination of 1.35 percent of pay below the social security covered compensation number and 1.70 percent of final average pay

above the social security compensation number. (Tr. 1309, 1326-1327; R-57; R-62 at p. 17.)

- A change to the calculation of early retirement benefits, i.e., a reduction to early retirement pension payments. For service prior to July 1, 2005, unreduced payments were available at age 60. Beginning with service earned after July 1, 2005, unreduced benefits were not available until age 65. (There was also a transition group, defined by age and length of service that was grandfathered under the pre-July 1, 2005 early retirement benefit.) (Tr. 1309-1310; 1326; R-57; R-62 at p. 19.)
- A change to the post-retirement annual increase. For service earned on or after July 1, 2005, the post-retirement one percent annual increase to the monthly benefit was eliminated. Service earned prior to July 1, 2005 remained eligible for the automatic one percent increase each year. (Tr. 1310; R-57; R-62.)
- A change in voluntary after-tax contributions. Up until July 1, 2005, employees were allowed to contribute one to ten percent of pay to a voluntary contribution account within the defined benefit plan that could be withdrawn or annuitized at retirement. On or after July 1, 2005, voluntary after-tax contributions to the plan were no longer allowed. Voluntary contributions made prior to July 1, 2005 remain in the plan to be available for employees to convert to monthly payments at retirement or for a lump sum withdrawal of the account balance. (Tr. 1310; R-57; R-62.)

Additional changes to the Retirement System plan and 401(k) Savings Plan were made by amendment to the July 1, 2005 amended and restated plans. By the first amendment to the Retirement System plan, signed June 11, 2008, there were changes made to the governance structure for the plan. The fiduciary for the plan was designated to be the benefit plan committee, as appointed by the Board of Governors, and the amendment outlined the responsibility of the benefit plan committee. (Tr. 1336-1337; R-64.) By the second amendment, signed June 11, 2008, several changes were made to the Retirement System plan to come into compliance with the Pension Protection Act of 2006. One of the changes included a change to the level of retirement benefits by adding an annuity option allowing members to elect a 75 percent joint and survivor annuity option. (Tr. 1339, 1789-1790; R-65.)

Additional amendments to the 401(k) Savings Plan were also made after July 1, 2005. The first amendment (R-78), signed April 23, 2008, added a feature called "Catch Up

Contributions” allowing employees attaining age 50 to make additional, unmatched, contributions to the plan. (Tr. 1372.) Similar to one of the amendments made to the Retirement System plan, the second amendment (R-79), signed June 2008, established a new governance structure, with the benefit plan committee as the fiduciary for the plan. (Tr. 1385.) The third amendment (R-80), signed June 11, 2008, brought the plan into compliance with Code definitions for what constitutes eligible retirement plans relating to movement of money in and out of the plan. (Tr. 1386). The fourth amendment (R-81), signed September 2008, brought the plan into compliance with definitions of contribution limits and the definition of 415 compensation, as well as bringing the plan into compliance with USERRA and qualified reservists distributions. (Tr. 1386.)

4. Notice of and Changes To the Retirement System Plan and the 401(k) Savings Plan in 2009 and OPEIU’s Failure to Request Bargaining.

At the time decisions were being made about changes to the Retirement System plan and the 401(k) Savings Plan, the American National Red Cross organization was experiencing financial challenges. Following approval by the Board of Governors for changes to be made to the Retirement System plan and the 401(k) Savings Plan, Gail McGovern, President and CEO of the American National Red Cross sent an announcement of the changes on April 2, 2009. (Tr. 1397, 1400.) The e-mail announced the formation of a Cost Savings Team and described a number of cost saving steps being taken in an effort to help avoid widespread layoffs and meet the American National Red Cross’s commitment to the Board of Governors to balance the budget in fiscal year 2010. The e-mail reported cost saving actions approved by the Board of Governors, including changes to the Retirement System and the 401(k) Savings Plan benefits, stating in relevant part:

Suspending 401(k) Match - Next, considering the soaring liabilities generated by the Retirement System, our defined benefit pension, and the cost of Red Cross matching contributions to the Savings Plan (401(k)), we are taking steps now to reduce future costs while ensuring we can meet our current obligations. Starting with the first paycheck of May, we will be suspending the Red Cross matching contribution to the Savings Plan 401(k). This will affect 401(k) participants in chapters, Biomedical Services and NHQ. We anticipate and hope that this suspension will only be for FY2010. However, as with the merit pay suspension, we must monitor internal and external financial factors as we manage the FY2010 budget and operations and will let you know if this changes.

Closing Pension Plan to New Employees on July 1 – In addition, effective July 1, we will be closing our pension plan to new employees. Employees who join Red Cross units currently participating in the Savings Plan 401(k) on or after July 1, 2009 will be offered an enhanced 401(k) program but will not be eligible to participate in the Retirement System. **This change will not affect current employees.** Current eligible employees will continue to benefit from the Retirement System and Savings Plan to the extent their unit participates in these programs. I want to make clear that these changes will **not** affect Red Cross retirees currently receiving monthly pension payments from the Retirement System.

(GC-61.)

The changes to the plans were reflected in amendments. The decision to adopt the Third Amendment To the Retirement System of the American National Red Cross and the Fifth Amendment To The American Red Cross Savings Plan was made in March, 2009. (Tr. 1341, 1387, 1397.) By the Third Amendment To The Retirement System Of The American National Red Cross, executed April 30, 2009, the plan was closed to future hires (employees hired on or after July 1, 2009 would not be eligible to participate in the Retirement System plan), as well as to any future participating employers. (Tr. 1341; R-66; R-67.) By the Fifth Amendment to the American Red Cross Savings Plan, also executed on April 30, 2009, the employer matching contribution was suspended effective May 1, 2009. (Tr. 1387; R-82; R-83.)³

³ Another significant change made by the Fifth Amendment was the establishment of an employer contribution to the 401(k) Savings Plan for those employees hired on or after July 1, 2009 who would no longer be eligible to participate in the Retirement System plan. The contribution is a non-matching contribution made by the participating employer irrespective of any employee contribution. (Tr. 1388-1389, 1813; R-82.) In addition, the

Lance Rhines, OPEIU service representative, received Gail McGovern's April 2, 2009 announcement from Tim Smelser, Human Resources Supervisor for the Region, on April 15, 2009. (Tr. 683.) At the time he received the announcement, Rhines knew that both the Chapter and the Region were participating employers in the National 401(k) Savings Plan and the Retirement System plan. (Tr. 683-684.) On April 17, 2009, Rhines nevertheless requested that Smelser confirm for him whether the changes to the Retirement System plan and the 401(k) Savings Plan would apply to the OPEIU bargaining units. He received confirmation from Smelser on April 23, 2009, that, as announced, the suspension of the employer match to the 401(k) and closing of the pension plan to new hires beginning July 1, 2009 would apply to OPEIU bargaining units. (GC-62.) Upon learning of the decision to make changes to the 401(k) Savings Plan and the Retirement System plan Rhines admits he did not request or make any demand to bargain with either the Region or the Chapter. (Tr. 737.)

D. History of Contract Language Regarding Retirement.

Lance Rhines has been a service representative for OPEIU since August, 2001, servicing the Collections Unit, the LCD Unit and the Clerical/Warehouse Unit. (Tr. 257-258.) Rhines bargained the most recent 2004-2008 collective bargaining agreements for the Clerical/Warehouse, LCD and Collections Units, serving as lead negotiator. The lead negotiator on behalf of the Region for the LCD and Collections Units was Bill Whittington, former Human Resources Manager for the Region. The lead negotiator on behalf of the Chapter for its bargaining unit was Cynthia Richmond, Chief Operating Officer.⁴ (Tr. 730.)

Fifth Amendment also provided that both matching contributions and annual contributions would be established on a periodic basis at the discretion of the American National Red Cross. (Tr. 1388-1389; R-82.)

⁴ Cynthia Richmond has served as the Chief Operating Officer for the Chapter for approximately seven years. In that capacity, she also serves as the Chapter's human resources representative. (Tr. 1248-1249, 1253, 1257.)

Rhines acknowledges that since at least 2001, the 401(k) Savings Plan and the Retirement System plan referenced in the collective bargaining agreements for each of the units refer to the National plans and that these National plans are what have been available to OPEIU bargaining unit employees under the terms of the collective bargaining agreements with the Region and the Chapter. (Tr. 675-677.) When Rhines bargained the contracts in 2004 he had copies of the summary plan descriptions for the various employee benefit plans. (Tr. 673.) Rhines agrees that the eligibility requirements, the vesting requirements, the amount of benefits and the other terms and conditions for the Retirement System plan have never been set forth in the OPEIU collective bargaining agreements and they have always been set forth in a separate summary plan description. Likewise, Rhines agrees that there is nothing set forth in the OPEIU collective bargaining agreements regarding eligibility to participate (except that an individual must be an employee), the age an individual is eligible for pay outs, vesting requirements, hardship withdrawals or any other terms and conditions of the 401(k) Savings Plan, which are again matters set forth in the summary plan description. (Tr. 675-679, 688.)

The language regarding retirement at Article 31 of the most recent Clerical/Warehouse Unit collective bargaining agreement (GC-2) reads as follows:

ARTICLE 31

RETIREMENT

Section 1. The Employer shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter may be amended by the American National Red Cross.

Section 2. The Employer may choose to participate in the National American Red Cross Savings Plans as presented or as it hereafter may be amended by the National American Red Cross.

It is the same language that appeared in the predecessor agreement (R-108), effective April 1, 2000 to March 31, 2003. The language at Section 1 of Article 31 also appeared in the

Clerical/Warehouse Unit collective bargaining agreement effective March 31, 1998 to March 31, 2000. (R-115.) Section 2, regarding the 401(k) Savings Plan, did not appear in that agreement because the Savings Plan did not exist until January 1, 2000.

The language regarding retirement in the most recent OPEIU collective bargaining agreements with the LCD Unit and the Collections Unit (GC-3; GC-4) reads:

ARTICLE 31

RETIREMENT

Section 1. Employees covered under this contract will receive the same retirement benefits, savings plan, including the American Red Cross Savings Plan (a 401-k plan) and 403(b) plan as other employees at the Great Lakes Region. The American Red Cross has the right to amend the Retirement System, Savings Plan and 403(b) plans in its discretion. The provisions of these plans are fully set forth in separate summary plan descriptions.

Section 4. Bargaining unit members shall be eligible for the 401(k) program that provides for a fifty (\$.50) match for every dollar contributed by the employee up to the first four percent (4%). In the event the employer improves this plan, the members of the bargaining unit shall be eligible for said improvement upon implementation.

The language in the predecessor contracts for the LCD Unit and the Collections Unit,⁵ effective March 31, 2001 to March 30, 2004, included the same language at Section 4. However, Section 1 was different, reading as follows in the LCD Unit agreement: “The Employer shall continue to participate in the retirement program of the American National Red Cross on the same basis as the present or as it hereafter may be amended by the American National Red Cross.” and as follows in the Collections Unit agreements: “The Employer shall continue to participate in the retirement program of the American Red Cross on the same basis it currently participates as such plan presently is in effect and as it hereafter may be amended by the National Organization.” (R-110; R-117; R-119.)

⁵ Prior to 2004, there were two separate collective bargaining agreements covering donor services staff (now combined into one agreement for the Collections Unit). Each agreement covered donor services staff at different locations - the Central/Western Unit and the Eastern/Northern Unit. (R-117; R-119.) The Eastern/Northern and Central/Western contracts were merged into one contract in 2004. (Tr. 668.)

The LCD Unit agreement effective May 6, 1998 to March 30, 2001 included the same language at Section 1 as appears in the March 31, 2001 to March 30, 2004 agreement; it did not include language regarding the 401(k) Savings Plan. (R-109.) Likewise the Collections Unit agreements effective May 7, 1998 to March 30, 2001, included the same language at Section 1 as appears in the March 31, 2001 to March 30, 2004 agreements but did not include any language regarding the 401(k) Savings Plan. (R-116; R-118.)

E. Changes to the Retiree Medical Program.

Changes to the retiree medical benefits were announced in a communication from Gail McGovern dated October 28, 2008. (GC-58.) Rhines first saw the October 28, 2008 announcement on October 28, 2008. The e-mail was forwarded to him by Liz McGwin, the LCD Unit steward. (Tr. 453, 665.) Cindy Krieger, another steward, brought the October 28, 2008 e-mail to Rhines' attention again in January 2009 during a bargaining prep session. (Tr. 457.)

The Clerical/Warehouse Unit contract was in effect at the time of the October 28, 2008 announcement and it was still in effect as of January 1, 2009. (Tr. 452.) The changes to the retiree medical program announced on October 28, 2008 were implemented in two phases. The first phase, effective January 1, 2009, was a change in future eligibility; the second phase, effective July 1, 2009, impacted only individuals already retired and Medicare eligible. (Tr. 1773.) Elimination of retiree medical benefits for current and future employees was to occur January 1, 2009 and effective July 1, 2009, Medicare eligible retirees would be provided coverage under a plan that better integrated their Medicare provisions. (Tr. 450.)

Rhines admits that he never made a request or demand to bargain about the changes to the retiree medical program to anyone at the Chapter. (Tr. 690.) Rhines also admits he did not

communicate with anyone at the Chapter regarding the changes to the retiree medical program to learn whether the changes applied to Clerical/Warehouse Unit employees. (*Id.*)

F. OPEIU March 2009 Information Requests.

OPEIU and the Region were conducting separate negotiations for the Collections and LCD Units, but proposals or information requests submitted in one set of negotiations were considered applicable to both. (Tr. 416.) OPEIU submitted identical information requests in March 2009. (GC-42 and GC-43.) The Region responded to the March 25, 2009 information request (GC-43), on March 27, 2009 (GC-44), stating therein the rationale for denying the information request. The Region inadvertently failed to deliver its response to the March 17, 2009 information request submitted in the LCD Unit negotiations – it had prepared an identical response, but did not deliver it. (Tr. 1547.) OPEIU did not object, resubmit, claim continued relevancy, or otherwise take issue with the Region’s response to its March 25, 2009 information request, nor did it bring to the Region’s attention that it had not received the response to its March 17, 2009 information request. (Tr. 1548.)

G. Teamsters Information Request For Names of Insured Persons Not In The Bargaining Unit.

The Teamsters requested, *inter alia*, the names, ages, gender, race and social security numbers for all Red Cross affiliated employees insured under the National Red Cross insurance plans as implemented by the various blood service regions and chapters nationwide (Paragraphs 21(e) and 24 of Fourth Consolidated Amended Complaint.) While the Region provided age and gender information (ALJD p. 9, lines 48-51), it coded the names and social security numbers of the roughly 34,000 insured Red Cross affiliated employees around the country (*Id.* at p 9, lines 35-36), and thus did not provide actual employee names. After getting the insurance data, the Teamsters did not follow up and seek any further information about the coded data. (Tr. 1545.)

H. Attendance Policy.

The Fourth Amended Consolidated Complaint was amended again during the hearing, to wit: “on or about November 17, 2008, Respondent ANRC Region unilaterally implemented a no-fault attendance policy for its LCD and Collections Units.” (Tr. 1978-79.) November 17, 2008 coincides with the date that an employee was given a verbal warning for excessive absenteeism, but does not coincide with any new written policy or the amendment of any policy. (See GC-29.) In denying the grievance, the Region’s HR Supervisor denied any “no fault” policy, finding excessive absenteeism. (GC-36.) The attendance policy in question had been in place well before the adoption of the 2008 handbook and was memorialized in that handbook. (Tr. 1976.) The policy in the handbook referred to the term “excessive absenteeism” (Tr. 2034-36), and that term has long been the source of disagreements between OPEIU and the Region. (Tr. 711.) Both the HR Manager (Tr. 2033) and the HR Supervisor (Tr. 1942-43; GC-36) denied that any new policy had been implemented.

I. OPEIU Union Meetings on the Premises.

The Region acknowledges that there were historical instances in which OPEIU was permitted to use its facilities for meetings. This was always done after OPEIU had requested permission to use the facilities, and there is nothing in the contract that gives the union any right to use employer facilities for its meetings. (Tr. 252.) Documentary evidence of only three meetings at the Region’s facility was introduced: on or about April 21, 2007 (GC-26 and GC-86), September 22, 2007 (GC -5) and in December 2007. (CPO-5). There was no evidence of any meetings after the December 2007 meeting. There was evidence of a request for a meeting being denied by HR Manager Will Smith prior to 2009, although he was not specific as to the date. (Tr. 2032.) The Region did deny an OPEIU request for a meeting on its premises

in 2009. (Tr. 2032.) There is no record evidence that either party requested to bargain over either the right to use the Region's premises for OPEIU meetings or the denial of the use of the Region's facilities for OPEIU meetings.

J. History of the New Benefits Advantage Healthcare Program for the Region and Chapter.

The Respondents changed the National PPO and EPO plans effective January 1, 2010. The National plans were never part of the expired collective bargaining agreements and were first offered to employees in 2007 (for 2008) with the understanding that the addition of National plan options would not change the local plans. (Tr. 387.) Participation in the National plans was voluntary, and National could make changes in those plans, which it did in 2009. (Tr. 391-92.)

Region and Chapter employees were put on notice on April 2, 2009 that the Benefits Advantage Plan of the American National Red Cross (which included the PPO and EPO plans) would be changing for 2010. (GC-7.) In early bargaining sessions for 2010, OPEIU and the Teamsters were advised that the Region and Chapter were seeking changes in all the health plans (the local and National), but the exact changes in cost and benefits were not known at that time and would not be available until July. (Tr. 1535.) On July 24, 2009 the Benefits Advantage design and cost sharing information was supplied to the Unions (GC-115; R-25; R-28), five plus months in advance of the proposed January 1, 2010 change date. While the Region and the Chapter always sought the "me too" language for 2010 the Respondents were specifically seeking to eliminate the local health insurance plans, change the cost sharing structure between the employer and the employee, and modify the National PPO and EPO offerings. Employees were informed by the Region in September 2009 that the parties were still in negotiations over benefits. (CPO-3.) After the OPEIU cancelled a meeting for October 23 (Tr. 1551), the Respondents believed that it was at a partial impasse with regard to the National EPO and PPO

plan designs because it had to make available plan options to the employees and those were the only National plans that existed at the time for 2010. (Tr. 1554.) The Respondents offered to remove the National EPO and PPO plans if that is what the Union wanted (thereby returning to what had existed in 2007 prior to adding the National plan options), and it stated that for the time being it would not change the cost-sharing for the National plans from the cost-sharing that the union employees then had, nor would it change any of the local plans or the local plan cost-sharing. (*Id.*; See GC-55.) Enrollment packages were sent out to all Union employees on October 26, 2009. Between July 24 and October 26, there were several bargaining sessions with the Unions where the topics of what benefit plans would be offered and how much employees would contribute to the cost of benefits were discussed. (Tr. 1550.) The parties continued to bargain thereafter and could not ultimately agree on the issue of healthcare prior to implementation of the National Plan on January 1, 2010.

The OPEIU objected to the healthcare rollout for the Region employees, but not the Chapter employees. (Tr. 1558.)

K. The June 2010 Strike and Its Impact on Guaranteed Hours.

OPEIU (and others) commenced a work stoppage effective Wednesday June 2, 2010 at 9:00 a.m. (GC-72.) The strike was terminated effective Saturday June 5, 2010 at 9:00 a.m. (GC-74.) The expired collective bargaining agreement contained a guaranteed hours provision, and the parties stipulated that there was no reason, other than the employees' failure to be recalled from the strike, for their not receiving guaranteed hours. (Tr. 545-46).

The OPEIU contacted donors and sponsors to encourage them not to sponsor or donate to the Red Cross (at least during the strike). (Tr. 693.) The strike reduced blood collections during its term and the first week following the strike. (Tr. 1890-91.) Blood donations in the week

following the strike were adversely affected for two reasons: 1) striking telerecruiters had not lined up donors for the week beginning June 7th (first week following the strike); and 2) sponsors, because of the strike, had not lined up donors because they did not know when the strike would end. The Region did nothing to slow down the collection of blood after the strike, and indeed wanted to increase production as much as it could. (*Id.*) Telerecruiters were requested to come back to work immediately when the strike was cancelled, at 9:00 a.m. on Saturday, June 5. (Tr. 694.) Collections Unit staff were brought back to work in an orderly manner as work flow permitted, and as a result, a stipulated number of employees were not returned to work early enough in the first week following the strike to work 40 hours. (GC-22c.)

III. QUESTIONS INVOLVED

- A. Whether the ALJ erred in finding that the Region unlawfully refused to provide the OPEIU with information requested on March 17 and 25, 2009, regarding reduced demand for blood. (Exceptions 1-6)
- B. Whether the ALJ erred in finding that the Region unlawfully failed to include employee names with the demographic information provided to the Teamsters in November 2009 with respect to healthcare coverage. (Exceptions 7-10)
- C. Whether the ALJ erred in finding that the Region implemented a new no-fault attendance policy (or unilaterally amended such policy) in November 2008. (Exceptions 11-15)
- D. Whether the ALJ erred in finding the Region unilaterally and unlawfully changed an existing past practice of allowing the OPEIU to hold union meetings on the premises. (Exceptions 16-19)
- E. Whether the ALJ erred in finding Respondents' changes to the 401(k) Savings Plan and Retirement System plan benefits in the OPEIU bargaining units violated Section 8(a)(5) and (1) of the Act. (Exceptions 32-45)
- F. Whether the ALJ erred in finding the Chapter's changes to the retiree medical program violated Section 8(a)(5) and (1) of the Act. (Exceptions 20-31)
- G. Whether the ALJ erred in finding that the Region and Chapter unilaterally and unlawfully instituted a new BenefitsAdvantage healthcare program on January 1, 2010. (Exceptions 46-49)

- H. Whether the ALJ erred in finding that the Region illegally denied employees guaranteed hours of work or pay during the weeks of June 7 or 14, 2010 following a three day strike. (Exceptions 50-52)

IV. ARGUMENT

A. The ALJ Erred (in Section III A.1.a. of the Decision) In Finding That The Region Unlawfully Refused To Provide The OPEIU With Information Requested On March 17 and 25, 2009 Regarding Reduced Demand For Blood.

The ALJ ignored established Board precedent to the effect that a request for information involving financial information and/or sensitive/confidential business information of a competitive nature has no presumption of relevancy. The Union is required to show probable or potential relevance of the information. See *Dexter Fastener Technologies, Inc.*, 321 NLRB 612, 612-613, fn. 2 (1996), enfd. 145 F.3d 1130 (6th Cir. 1998).

The “probable cause” found by the ALJ in this case was based on comments made by the Region’s representative at one of the early bargaining sessions (ALJD p. 4, lines 17-26) and two letters from the CEO of the National Red Cross to employees dated October 2008 and April 2009 (the “Letters”) (ALJD p. 5, lines 13-18). The Letters related to healthcare containment, but in the March 2009 meetings, no design or cost information was yet available, hence no healthcare concessions had yet been requested. Other concessions had been referenced in the opening meetings with the Union, but those concession requests were not based on an inability to pay but rather lack of value as clearly articulated in the Region’s written response. (GC-44.) The Union, in its information request GC-43, only referenced the statements made by the Region representative, Sabin Peterson, in the bargaining sessions (which it misinterpreted), not the Letters. The ALJ’s reliance on the Letters is misplaced – the Union never relied upon the letters as foundation for the information requests!

More importantly, once an employer states its objection to an information request based upon its belief that the union has misconstrued its position on an issue, it is the union's burden at that point to respond. The Region did not ignore OPEIU's request; it articulated a rational reason for believing that the request need not be honored because it was based on a faulty premise. If the Union had other valid reasons to believe that the request was relevant (i.e., the Letters), it should have articulated those reasons to the Region so that a reasonable resolution could be reached. At no time did the Union take issue with the Region's rationale for questioning the Union information request. (Tr. 1548.)

Once the Region clearly stated in writing its relevancy objection to providing the requested information, it was incumbent upon the Union to come forward with a statement of relevancy. The failure to do so in this case rendered the Region's refusal to provide the requested information proper. The decision of the ALJ finding to the contrary is reversible error.

That is especially true in this case when there can be no question but that the information requested is of a sensitive competitive nature. The Union was requesting pricing and production information. The evidence on the record is that the Region did state that the information requested was confidential, proprietary data. (GC-44.)

B. The Decision Of The ALJ (in Section III A.1.c.) That The Region Unlawfully Failed To Include Employee Names With The Demographic Information Provided To The Teamsters In November 2009 With Respect To Healthcare Coverage Was Erroneous.

The ALJ's rationale for requiring the Employer to provide the "names" of all Red Cross employees is set forth at page 10, lines 1-12 of the Decision and Order. The reasoning stated therein is flawed. The ALJ credits Lynne Meade's testimony that the employees' names "would help the Union identify exactly which employees of which region or chapter were in which plans." (ALJD p. 10, lines 5-7.) The Judge notes elsewhere that Meade's testimony is not

reliable. (ALJD p. 7, lines 40-51.) It is unreliable on this issue as well. No insurance company would (and there is no evidence that any insurance company did) use employee names to base a premium quote. Assuming the Union needed information to quote a plan, it would have to be relevant information – such as gender and age information which was provided. (ALJD p. 9, lines 48-51.) The identity of employees (names and social security numbers) were provided for over 34,000 Red Cross employees in a coded fashion (ALJD p. 9, lines 35-36, and see GC Exhibits 151 and 151(a)), so follow-up questions could have been addressed. Significantly, the Union never followed up on the data that was provided. (Tr. 1545.) Like race and social security number information requests, which the General Counsel apparently agreed were not relevant (ALJD p. 9, lines 45-51), names themselves have no value for the purpose requested.

The ALJ found delay in providing information to the Teamsters. Unreasonable delay is in the eyes of the beholder, and no exceptions have been filed with respect to the ALJ's findings in that regard. But providing "names" is not warranted in this case, and the ALJ's decision should be reversed.

C. The Decision Of The ALJ (in Section III A.2.a.) That The Region Implemented A New No-Fault Attendance Policy Or Unilaterally Amended Such Policy In November, 2008 Is Contrary To The Record Evidence.

The ALJ accurately identifies the allegation of the Teamsters and the General Counsel that the Region "unilaterally implemented a 'no-fault' attendance policy in the Collections and LCD Units on November 17, 2008". (ALJD p. 11, lines 6-10). In making the determination on this point, the ALJ relies on the testimony of Lance Rhines, the service representative for the OPEIU. The problem with such reliance is that the testimony of Rhines was not specific, and where he was specific, the testimony was factually erroneous.

Rhines testified that he was informed by supervisor Kimberly Heintz, in a conversation held in January, 2009 that the Region was implementing a new attendance policy. The Region

disputed that any new policy was implemented **and** that any such conversation actually took place. For these reasons, Rhines was closely questioned about when the conversation took place. (Tr. 301-03, 328-29.) Heintz had voluntarily resigned her employment on October 17, 2008 (Tr. 1956; R-2) which was a full month before the “new” policy was supposedly implemented and approximately three (3) months before Rhines testified that he met with her when she “confessed” to a new policy.

The ALJ substituted his own interpretation of Rhines’ testimony to “find it more likely that Rhines’ memory of dates was simply imprecise due to the passage of time”. (ALJD p. 11, lines 50-51.) It is critical, however, to note that the testimony of Rhines related only to the adoption of a new attendance policy. The HR Manager always operated under the same “excessive absenteeism” policy. (Tr. 1941-42; GC-36.) There is no new policy – no *corpus delicti*, if you will. To “solve” this problem, the General Counsel came up with the hybrid argument that the Region may have only more strictly enforced the existing attendance policy. The more rigid enforcement of an existing policy, however, is a topic about which Rhines did not testify. It follows that the decision of the ALJ in this regard is not supported by the testimony in the record and defies logic.

The action of the Region in enforcing the terms of an existing attendance policy was not a significant change in terms and conditions of employment. The existing handbook language referred to the term “excessive absenteeism.” (Tr. 2034-36.) That policy had been in place well before the adoption of the 2008 handbook. The parties stipulated that the handbook does contain the absenteeism policy. (Tr. 1976.) There was ample testimony that the meaning of “excessive absenteeism” has been a matter of disagreement between the Union and the Region for as long as HR Manager Smith has been with the Region. (Tr. 711.) The argument centers around whether

or not excessive absenteeism is defined by reference to the benefit provisions of the collective bargaining agreement or is not. (*Id.*) Rhines noted his concern about the handbook versus the contract but acknowledged the right of the employer to address attendance abuses on a case by case basis. (R-4.) The Region's enforcement of its attendance policy ebbs and flows even by the account of the Union (Tr. 704, 708), but the Region was not charged with inconsistent enforcement or a tightening of its existing policy, it was charged with adopting a *new* policy. This was not the first time that the enforcement of the existing attendance policy was mistakenly viewed by the Union as a "new policy." (R-42; Tr. 2033.)

D. The Decision Of The ALJ (in Section III A.2.b.) Erroneously Determined That The Region Unilaterally And Unlawfully Changed A Practice Of Allowing OPEIU To Hold Meetings On The Premises.

The record evidence on this issue does not support the findings of the ALJ that a past practice existed with respect to OPEIU holding union meetings on the Region's premises. It is nearly axiomatic that a binding past practice must be an unequivocal course of conduct between the parties, clearly enunciated and acted upon, and a regular and longstanding practice.

The ALJ primarily relied upon the testimony of Elizabeth McGwin that the Union held union meetings on the premises "whenever a vote needs to be taken." (ALJD p. 14, lines 10-13.) How often were votes taken and on what issues? If the witness accurately described the past practice, the denial of the meeting in 2009 did not violate that practice because the requested meeting was not described as one in which a vote needed to be taken. There is no contrary evidence in the record.

At least one OPEIU request for a meeting had been denied in the past in which no vote was to be taken. (ALJD p. 14, lines 23-26.) The record was unclear as to the number of requests granted prior to the request in April 2009 – three (3) requests were granted in 2007 but apparently none in 2008 or 2009. The ALJ completely ignores existing Board law that proximity

in time is relevant with respect to a binding past practice. See *Exxon Shipping Co.*, 291 NLRB 489 (1988).

The testimony of HR Manager Smith is instructive on this issue. The reason for denying the April 2009 request was for the express purpose of avoiding the creation of a past practice. (Tr. 2032.) While the ALJ interprets that testimony as an admission that there was a past practice, actually, the opposite is true. An intent to avoid the creation of a past practice does not constitute an admission of its existence – such an analysis eliminates the requirements of regularity and longstanding, two factors cited as critical by the ALJ. (ALJD p. 14, lines 44-47.)

The decision of the ALJ also misinterprets the law and ignores existing Board precedent regarding a union’s obligation to request bargaining when it believes a past practice is going to be changed. The decision of the ALJ is that the denial of the request to hold a meeting on the premises cannot serve as notification of an intent to change an existing past practice. The law, as stated in *Whirlpool Corporation*, 281 NLRB 17, 23 (1986) is to the contrary:

“If, however, the union is aware of the projected change [in a past practice] in sufficient time to engage in bargaining before the change is implemented, and fails to request the opportunity to do so, it is considered to have waived the right to oppose the change (citations omitted). It is not enough, furthermore, that the union contents itself with simply protesting the modifications and practice or with filing an unfair labor practice charge; the union must ‘prosecute its right to engage in bargaining’ or be deemed to have foregone that right. (emphasis added)(citation omitted).”
Id. at 23.

The refusal of the ALJ to apply *Whirlpool* constitutes reversible error.

E. The ALJ Erred (in Section III A.2.e.) In Finding Respondents Unlawfully Made Changes To The 401(k) Savings Plan And The Retirement System In The OPEIU Bargaining Units In Violation Of Section 8(a)(5) And (1) Of The Act.

It is well settled that if an employer’s action does not change existing conditions, i.e., it does not alter the *status quo*, the employer does not violate Section 8(a)(5) and (1). See *House of*

the Good Samaritan, 268 NLRB 236, 237 (1983). The *status quo* may be established by the terms of an expired collective bargaining agreement or by past practice. “An expired collective bargaining agreement continues to define the *status quo* as to wages and working conditions” and “[t]he employer is required to maintain that *status quo* ... until the parties negotiate to a new agreement or bargain in good faith to impasse.” *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981); *Hen House Market No. 3*, 175 NLRB 596 (1969), *enfd.* 428 F.2d 133 (8th Cir. 1970). The *status quo* can also be defined according to past practice. See *NLRB v. Katz*, 369 U.S. 736, 746 (1962); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977)(“The longstanding practice exception is based on the recognition that certain unilateral changes in terms and conditions of employment do not interfere with the collective bargaining process because they represent the *status quo*.”). The past practice principle is explained in *The Post-Tribune Co.*:

An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). “[T]he vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enfd.* 73 F.3d 406 (D.C. Cir. 1996), *cert. denied* 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)). **Therefore, where an employer’s action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate Section 8(a)(5) and (1).** See *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). **An established past practice can become part of the status quo.** See *Katz*, 369 U.S. at 746. **Accordingly, the Board has found no violation of Section 8(a)(5) and (1) where the employer simply followed a well-established past practice.** See, e.g., *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *affd.* 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

The Post-Tribune Co., 337 NLRB 1279, 1280 (2002)(emphasis added).

Board precedent also illustrates that the *status quo* is dynamic in nature. See, e.g., *Intermountain Rural Elec. Assn.*, 305 NLRB 783, 785 (1991), *enfd.* 984 F.2d 1562 (10th Cir. 1993)(employer required to pay 100% of new insurance premium rates rather than paying the actual dollar amount it contributed under the expired agreement); *Struthers Wells Corp.*, 262 NLRB 1080 (1982)(employer required to pay a cost-of-living adjustment pursuant to escalator clause in an expired collective bargaining agreement); *The Post-Tribune Co.*, 337 NLRB 1279 (2002)(employer's allocation of premiums between the company and employees pursuant to consistent, established practice of allocation did not change the *status quo* although the actual amount the employees paid increased).

It is likewise well settled that when a union is given notice of an employer's intent to change a term or condition of employment it is incumbent upon the union to act with due diligence to request bargaining in order to enforce an employer's bargaining obligation. *AT&T Corp.*, 337 NLRB 689, 692 (2002). A union that receives timely notice of a change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights; a lack of diligence by the union amounts to a waiver of its right to bargain. *Clarkwood Corp.*, 233 NLRB 1172 (1977), *enfd.* 586 F.2d 835 (3d Cir. 1978); *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2d Cir. 1983)(A union's failure to assert its bargaining rights will result in a waiver of those rights.); *NLRB v. Alva Allen Indus.*, 369 F.2d 310, 321 (8th Cir. 1966) (A "union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table.").

- 1. The ALJ erred in finding that the changes to the 401(k) Savings Plan and Retirement System implemented by Respondents in the OPEIU units were not consistent with and a continuation of the dynamic *status quo* under Respondents' expired collective bargaining agreements with OPEIU and/or its past practice of change.**

The ALJ correctly acknowledges that the *status quo* against which an alleged change in terms and conditions of employment must be analyzed may be created by the provisions of an expired contract as well as by the parties' past practice and that the *status quo* is dynamic rather than static in nature. (ALJD p. 24, l. 1-7.) To the extent that it is even necessary to analyze the changes implemented in the Teamsters Apheresis and MUA units under the dynamic *status quo* doctrine, the ALJ is correct that the dynamic *status quo* required the Region to apply the changes to the 401(k) Savings Plan and the Retirement System plan to bargaining unit employees.⁶ (ALJD p. 24, lines 17-25; p. 25, lines 4-7.) However, the ALJ errs in finding that the dynamic *status quo* doctrine fails to compel the same conclusion as applied to the changes to the Retirement System plan implemented in the Region's LCD and Collections units and to changes to the 401(k) Savings Plan implemented in the three OPEIU units. The ALJ erroneously concluded that by implementing the changes to the 401(k) Savings Plan and the Retirement System plan Respondents were not simply maintaining the *status quo* and therefore changed existing terms and conditions in violation of Section 8(a)(5) and (1) of the Act.

Article 31, Section 1 of the Region's LCD and Collections unit contracts requires that bargaining unit employees "will" receive the same retirement benefits as other employees of the

⁶ The ALJ is correct that the retirement language in the Teamsters' contracts (Articles 28 and 30) requires the Region to apply changes to the 401(k) Savings Plan and the Retirement System plan to Teamsters' bargaining unit employees (ALJD p. 23, lines 13-20) but the ALJ incorrectly concludes that the Region was not contractually required to do so because changes were not effective until May and July, 2009, respectively. The alleged unlawful acts at issue in this Complaint are the unilateral changes to the 401(k) Savings Plan and the Retirement System plan. The uncontroverted testimony of Anna Shearer, Vice President of HR Enterprise Services, establishes that the changes to the 401(k) Savings Plan and the Retirement System were made and finalized by execution of the amendments to the plans on April 30, 2009. (Tr. 1341, 1387, 1855; R-66; R-82.) It is undisputed that the terms of the Teamsters' Apheresis and MUA contracts were effective through April 30, 2009. (GC-5; GC-6.) Accordingly, the ALJ's conclusion that the changes were not contractually required is not supported by the record. The ALJ cites *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206-207 (1991) in support of his conclusion. Assuming, *arguendo*, that *Litton* is even applicable to the issue, *Litton* compels a contrary result, i.e., the Region's obligation to offer to bargaining unit employees the ANRC plans, as amended on April 30, 2009, accrued prior to expiration on April 30, 2009, not when those changes later became effective post-expiration in May and July, 2009. Thus, the Region was contractually required and privileged to make the plan changes for Teamsters bargaining unit employees.

Region, specifically naming the 401(k) Savings Plan and Retirement System plan. The ALJ incorrectly interprets this contract language concluding that it means that the Region could choose not to apply the changed provisions of the 401(k) Savings Plan and/or the Retirement System plan to non-unit employees such that its discretion to apply them to its bargaining unit employees is likewise preserved. (ALJD p. 26, lines 22-23.) The ALJ's reasoning is flawed in light of the undisputed evidence in the record – evidence that the ALJ indeed acknowledges – establishing that the Region has no control over whether the ANRC amends the National program or offers different National programs and that once an employer like the Region opts in to participate in the plans and extend plan benefits to its employees all of its employees must be treated equally under the plans. (Tr. 1348, 1394-95; ALJD p. 24, lines 27-28.) Indeed, consistent with this lack of authority or control, and as also acknowledged by the ALJ, there is no evidence that the Region has not consistently over many years adopted and applied changes in the 401(k) Savings Plan and Retirement System made by the ANRC to its employees – unit and non-unit alike. (ALJD p. 24, lines 30-45.) The ALJ errs by suggesting that the Region had discretion under the dynamic *status quo* established by the language of the expired OPEIU LCD and Collections unit collective bargaining agreements as to whether to apply the 2009 amendments to the 401(k) and Retirement System plans to its employees once the ANRC made the decision to amend the plans. The record establishes there is only one 401(k) Savings Plan and only one Retirement System plan. (Tr. 1348, 1394.) It further establishes that neither the Region nor any other participating employer can pick and choose what provisions of the National plans it will apply to its eligible employees under the plans. (Tr. 1348, 1394-1398, 1769-1771.)

The same is true with respect to the language in the Clerical/Warehouse unit collective bargaining agreement, i.e., once the Chapter chose to participate in the ANRC 401(k) Savings

Plan “as presented or as it hereafter may be amended by the [ANRC]”, the Chapter no longer had authority to choose not to apply amendments made by the ANRC to any of its employees participating in the plan. The ALJ erroneously suggests that the contract language, by simply “allowing” the Chapter to participate in the 401(k) Savings Plan, means that the Chapter was not required to continue participation at the expiration of the collective bargaining agreement. This suggestion flies in the face of the multitude of Board cases finding violations of the Act based on employers’ failure to continue participation in employee benefit plans upon expiration of collective bargaining agreement.

Ironically, if, as the ALJ suggests, either the Region or the Chapter chose to discontinue their participation in the 401(k) Savings Plan or the Retirement System plan, as amended on April 30, 2009, after expiration of their collective bargaining agreements at the end of March, 2009, there is no question that the Respondents would be facing the same charge they now face alleging a violation of Section 8(a)(5). The Respondents’ action in continuing to offer benefits to their employees under the amended benefit plans is consistent with and a continuation of the *status quo* established by their expired contracts and the ALJ’s finding to the contrary is not supported by the record or the law.

The ALJ also erred by failing to find that the parties’ past practice of change to the 401(k) Savings Plan and Retirement System became part of the dynamic *status quo* to be maintained at expiration of the collective bargaining agreements. In support of his finding the ALJ cites the Board’s recent decision in *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 (2010)⁷, limiting the reach of the parties’ extensive past practice of unilateral change because the 2009 changes occurred after expiration of the OPEIU collective bargaining

⁷ This case and its companion case, *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 177 (2010), are currently on appeal to the D.C. Circuit Court of Appeals.

agreements whereas previous changes occurring during the terms of the agreements. However, the fact that no changes occurred during a contract hiatus is irrelevant where, as in the instant case and unlike the circumstances in *E.I. DuPont*, Respondents' past practice is not premised upon the authority of a contractual management rights provision or otherwise grounded in waiver.⁸

The ALJ also ignores precedent recognizing that it is the creation of the practice, not the timing of the practice that controls in terms of establishing the *status quo*. For instance, in *Beverly Health and Rehabilitation Services, Inc.*, the Sixth Circuit Court of Appeals recognized it is the scope and consistency of the unilateral action that creates the past practice and it is that pattern of unilateral change that survives contract expiration, separate from the existence of management rights language in the expired contract. The Court explained:

We interpret *Shell Oil* and its progeny as standing for the proposition that if an employer has frequently engaged in a pattern of unilateral change under the management-rights clause during the term of the CBA, then such a pattern of unilateral change becomes a "term and condition of employment," and that a similar unilateral change after the termination of the CBA is permissible to maintain the *status quo*. **Thus, it is the actual past practice of unilateral activity under the management-rights clause of the CBA, and not the existence of the management-rights clause itself, that allows the employer's past practice of unilateral change to survive the termination of the contract.**

Beverly Health and Rehabilitation Services, Inc., 297 F.3d 468, 481 (6th Cir. 2002).

The Board's rationale in *Shell Oil Co.*, 149 NLRB 283 (1964), relied upon by the *Beverly* court, is likewise instructive. The past practice arose solely under the terms of a collective bargaining agreement yet the Board concluded that it was the creation of the practice that was

⁸ Even if the ALJ were correct in interpreting the language of the expired OPEIU contracts with the Region and/or the Chapter as the type of reservation-of-discretion provisions that do not survive contract expiration (ALJD p. 25, lines 22-28; p. 26, lines 25-26), the ALJ is incorrect in his assertion that there is no evidence that the parties intended the provisions to survive contract expiration. Rhines' testimony establishes that he knew that the 401(k) Savings Plan and Retirement System plans in which OPEIU bargaining unit members participated were National plans with the specific terms of the plans set forth in summary plan descriptions separate from the terms of the collective bargaining agreements. (Tr. 675-679).

determinative, even if that practice arose during and was based upon the collective bargaining agreement:

In our opinion, the rights and duties of parties to collective bargaining, during a hiatus between contracts, may be derived from sources other than a formal extension agreement. Thus, it is well settled that notwithstanding the termination of a labor contract, the parties, pending its renewal or renegotiations have the right and obligation to maintain existing conditions of employment. Unilateral changes therein violate the statutory duty to bargain in good faith. We are persuaded and find that **Respondent's frequently invoked practice of contracting out occasional maintenance work, while predicated upon observance and implementation of article XIV, had also become an established employment practice, and as such, a term and condition of employment.**

Id. at 287 (emphasis added). See also *Capitol Ford*, 343 NLRB 1058, fn. 3 (2004)(reasoning that “the mere fact that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice”).

The Respondents' changes to the Retirement System plan and the 401(k) Savings Plan reflect a pattern and practice of unilateral change. That pattern of change became a term and condition of employment that the Respondents were obligated to maintain as part of the *status quo* after expiration of the agreements. Thus, contrary to the ALJ's decision, none of the changes to the retirement benefits constitute a violation of Section 8(a)(5) even if they occurred after expiration of the collective bargaining agreements.

2. **Even if the changes represented a change in the *status quo*, the ALJ erred in finding that the changes were announced as a *fait accompli* and therefore OPEIU did not waive any right to bargain regarding changes to the 401(k) Savings Plan and the Retirement System despite OPEIU's admitted failure to request to bargain.**

“A *fait accompli* finding requires objective evidence; a union's subjective impression of its bargaining partner's intention is insufficient.” *McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV*, 355 NLRB No. 213 (2010); *Bell Atlantic Corp.*, 336 NLRB 1076, 1086 (2001). Contrary to the ALJ's finding there is insufficient objective evidence in the record to conclude

that changes to the 401(k) Savings Plan and Retirement System were announced as a *fait accompli* making it unnecessary for OPEIU to request to bargain.⁹ In support of his finding, the ALJ relies upon the tone of McGovern's April 2, 2009 memorandum, communication of the memorandum generally to ANRC employees in advance of its communication to OPEIU business representative Rhines and HR Supervisor Smelser's "curt" response to Rhines' inquiries regarding the announcement.

The ALJ ascribes significance to the memorandum's description of the changes as "essential", its explanation that the ANRC had "no choice" but to make changes and that the Board of Governors had approved the changes. The ALJ ignores longstanding Board precedent holding that such wording does not suffice to establish a *fait accompli*. The Board has repeatedly held that it is not unlawful for an employer to present a proposed change in employees' terms and conditions of employment in a "positive tone" or even as a "fully developed plan". *Bell Atlantic Corp.*, 336 NLRB 1076, 1086-88 (2001)(positive language used to announce decision was insufficient to establish the notification was a *fait accompli*); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790-91 (1990)("positive language" and presentation of "fully developed plan" in notice does not constitute an indication that a request to bargain would be futile); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993)("an employer's use of positive language in presenting its proposal does not constitute an indication that a request for bargaining would be futile"); *Southern California Stationers*, 162 NLRB 1517, 1543 (1967)(it is not unlawful for an employer to present a change in conditions as a decision already made where the decision is still executory and no steps have been taken to implement it). The Act likewise does

⁹ For the same reasons, Respondents except to the finding that changes were announced to Teamsters as a *fait accompli*. However, because the ALJ correctly found that the Region did not violate Section 8(a)(5) or (1) of the Act when the Region implemented changes to the 401(k) and pension plans in the Teamsters' Apheresis and MUA units it is unnecessary to specifically address the finding in Respondents' brief.

not require an employer to delay the decision-making process itself. Rather it requires only that after reaching a decision concerning a mandatory subject the employer delay implementation of the decision until it has consulted with the employees' bargaining representative. *Bell Atlantic Corp.*, 336 NLRB at 1088, citing *Haddon Craftsmen, Inc.*, 300 NLRB, *supra*, at 790 fn. 8; *Lange Co.*, 222 NLRB 558, 563 (1976); *McGraw-Hill Broadcasting Company, Inc., d/b/a KGTV*, 355 NLRB No. 213, slip. op. at 3 (2010).

Neither the ANRC's decision to make changes to the plans, with approval of the changes by the Board of Governors, nor the announcement of that decision as a developed plan establishes a *fait accompli* where, as here, implementation of ANRC's decision by the Region and Chapter was delayed to provide OPEIU with notice and an opportunity to bargain if OPEIU desired to do so. There is no dispute that Smelser communicated McGovern's announcement to Rhines on April 15 (GC-61), further confirming the specifics of the announced changes that would apply to OPEIU bargaining unit members in a follow up communication to Rhines on April 23 (GC-62). Notice was provided sufficiently in advance of the plan amendments carrying out the decision on April 30 and implementation of the changes in the OPEIU bargaining units in May, 2009 and July, 2009. *See, e.g., WPIX, Inc.*, 299 NLRB 525, 526-527 (1990)(one week actual notice sufficient); *Gibbs & Cox, Inc.*, 292 NLRB 757, 757 (1989)(two weeks sufficient); *Associated Milk Producers, Inc.*, 300 NLRB 561 (1990)(three weeks sufficient); *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988)(ten days sufficient); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 673, 678 (1975) (two days sufficient); Compare *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017-1018 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983)(finding a *fait accompli* where employer implemented changes before announcing them to the union); *Bohemian Club*, 351 NLRB 1065, 1066 (2007)(finding that a change was a *fait*

accompli where the union learned of the change one week after it happened). Any assertion that Smelser's April 15 and/or his April 23 notice directly to Rhines was insufficient to allow OPEIU to request to bargain is not supported by Board precedent.

The ALJ likewise places too much significance on the ANRC's April 2 announcement from a timing standpoint, finding fault because Smelser did not directly notify Rhines prior to the general announcement. Given the circumstances wherein changes were contemplated in the plans in which ANRC employees across the nation participate, the general announcement made on April 2 was reasonable and not evidence of a *fait accompli*. See *California Pacific Medical Center*, 356 NLRB No. 159, slip op. at 7 (2011)(general communication sent to all 6,921 employees, union and non-union alike, rather than particularized communications to employees according to union affiliation is a reasonable approach to dissemination of important information to a large and diverse community of employees and not evidence of a *fait accompli*). Moreover, by directly notifying Rhines of the upcoming changes sufficiently in advance of implementation Respondents satisfied the principal purposes for the notice requirement, i.e., Smelser's notice allowed Rhines the opportunity to consult with OPEIU members to decide how to respond to the intended changes and to request to bargain if it was the Union's desire to do so.¹⁰

¹⁰ Respondents acknowledge the legal significance of providing notice in a manner that allows for meaningful negotiation upon request and further that, in some circumstances notification to employees in advance of direct notification to a union may serve to undermine a union's negotiating position role. Nevertheless, the ALJ fails to recognize that prior notification in and of itself is not fatal absent other objective evidence indicating a refusal to bargain and that the circumstances of the employee notification must be considered. For instance, in enforcing the Board's order in *Roll and Hold Warehouse and Distribution*, supra, the Seventh Circuit while "skeptical of the Board's *fait accompli* finding found most significant that the employer had engaged employees in direct and "full blown discussion" regarding the alleged unilateral policy change prior to the union learning of any change. *Roll and Hold Warehouse & Distribution Corp.*, 325 NLRB at 42. The context of ANRC's general announcement to employees in advance of Smelser's direct notification to Rhines does not compare and the circumstances do not suggest an act to undermine OPEIU's role as collective bargaining representative.

Moreover, the ALJ's emphasis on the notice fails to properly recognize that cases of *fait accompli* turn not on whether a union was directly notified of a change¹¹ but on whether there is objective evidence that an employer does not intend to bargain despite any request to do so. The ALJ misses this important distinction in the cases he cites as supportive of finding a *fait accompli* in the present case. (ALJD p. 15, lines 33-38). For instance, in *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42-43 (1997), the employer representative specifically testified that he did not believe there was any need to provide notice to the union, essentially acknowledging that the employer never intended to bargain over the change. In *Defiance Hospital, Inc.*, 330 NLRB 492, 492-493 (2000), the announcement of a wage increase occurred in the context of the employer's general refusal to recognize and bargain with the union following its merger and affiliation with another union. In *Gratiot Community Hospital*, 312 NLRB 1075, 1080 (1993), the employer representative communicated that the policy change was "non-negotiable". See also *American Medical Response of Connecticut, Inc.*, 356 NLRB No. 155, slip op. at 25 (2011)(employer representatives communicated to employees that they would not be receiving their wage increases because the collective bargaining agreement was "null and void"); *Intersystems Design and Technology Corp.*, 278 NLRB 759, 759-60 (1986)(letter to union declaring that employer had no obligation to bargain concerning reduction in force or the individuals to be terminated); Compare *WPIX, Inc.*, 299 NLRB 525, 526 and fn. 4 (1990)(union not excused from requesting to bargain where union not directly notified by employer but had one week actual notice regarding change where record did not include any

¹¹ Actual notice of an employer's intentions is sufficient to trigger a union's obligation to request bargaining. *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1259-1260 (6th Cir. 1995); *YHA, Inc.*, 2 F.3d 168 (6th Cir. 1993); Accord *W.W. Grainger v. NLRB*, 860 F.2d 244, 248 (7th Cir. 1988).

statements by the employer that it was firmly committed to implementing the change regardless of an asserted desire to bargain by the union).

In stark contrast to the type of affirmative statements signifying a refusal to bargain, the ALJ erroneously construes Smelser's April 23 response to Rhines as indicative of unwillingness on the part of the Region to discuss alternatives prior to implementing the changes to the 401(k) and pension plans. Yet, there is nothing in that communication or any of Smelser's other communications to Rhines or any testimony in the record that conveys that a request to bargain would have been ignored or met with an outright refusal to do so upon request. In that regard, the ALJ likewise fails to even acknowledge Smelser's express invitation in his initial notification on April 15 for Rhines to "call me if you have any questions." (GC-61.) See *Associated Milk Producers, Inc.*, 300 NLRB 561, 563-564 (1990)(no *fait accompli* where employer's letter notifying the union concluded by stating: "[i]f you have any question concerning your proposal or in any manner care to discuss this matter with me ..., please feel free to call me."). Indeed, Smelser's invitation goes beyond what the law requires as there is no requirement that employers invite unions to bargain, rather the law places the onus on unions to make a request to bargain upon being provided with notice of a change in order to enforce an employer's bargaining obligations. *AT&T Corp.*, 337 NLRB 689, 692 (2002); *Jim Walter Resources, Inc.*, 289 NLRB 1441, 1442 (1988).¹² Further, unlike *fait accompli* cases where employer statements and conduct ignore or expressly deny the bargaining implications associated with changes, Smelser's April 15 letter acknowledges the Region's bargaining obligations by specifically referencing its collective bargaining agreements with OPEIU. In short, the ALJ does not and indeed cannot point to sufficient objective evidence in the record to support a conclusion that it would have been futile

¹² Likewise, contrary to the ALJ's intimation (ALJD p. 22, lines 9-11), it is not incumbent upon employers to establish that notice is being provided in the context of negotiating a successor collective bargaining agreement or to provide the statutorily required notice and an opportunity to bargain.

for OPEIU to request to bargain. Absent such evidence, the ALJ erred in finding that Rhines' admitted failure to request to bargain with Respondents can be excused.

F. The ALJ Erred (in Section III A.2.c. and III A.2.d.) In Finding The Chapter's Changes To The Retiree Medical Program Violated Section (8)(a)(5) And (1) Of The Act.

In concluding that the Chapter unlawfully implemented changes to the retiree medical program, the ALJ overlooks a critical fact, i.e., Rhines did absolutely nothing to ascertain if and/or how the changes to the retiree medical program announced in October 28, 2008 would affect Clerical/Warehouse unit employees employed by the Chapter. Rhines' failure serves to make OPEIU's charge untimely under Section 10(b) of the Act. Further, even if the charge were timely, Rhines' failure serves to waive any right OPEIU had to bargain regarding the change.

Section 10(b) of the Act precludes the issuance of a complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). The operative date for the running of the statutory period is when the alleged unlawful act occurred. *United States Postal Service Marina Mail Processing Center*, 271 NLRB 397, 399-400 (1984). The charge alleging a unilateral change to the retiree medical program was filed on March 10, 2011 (GC-1(qqq)), more than a year after the change's effective dates (discontinuance of the program for current employees ineligible for retirement on January 1, 2009 and replacement of the Medicare supplement with a private fee-for-service plan on July 1, 2009).

The 10(b) limitations period commences when the charging party has actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Carrier Corp.*, 319 NLRB 184, 193 (1995). "The concept of constructive knowledge incorporates the notion of due diligence, i.e., a party is on

notice not only of facts actually known to it but also facts that with ‘reasonable diligence’ it would necessarily have discovered.” *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). “A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence.” *St. Barnabas Medical Center*, 343 NLRB 1125, 1126-1127 (2004). “While a union is not required to police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer **or a unit** ... and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer’s unilateral changes.” *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992)(emphasis added). If a party “‘ha[s] the means of discovery [of a fact] in his power, he will be held to have known it[,]’ and ‘whatever is notice enough to excite the attention and put the party on his guard and call for inquiry, is notice of every thing to which such inquiry would have led.’” See *Miramar Hotel Corp.*, 336 NLRB 1203, 1252 (2001), quoting *Wood v. Carpenter*, 1010 U.S. 135, 139 (1879); see also *Mathews-Carlen Body Works*, 325 NLRB 661, 662 (1998)(finding that had the union had exercised reasonable diligence the union would have become aware that respondent had not made fringe benefit payments on behalf of a majority of employees).

Rhines had actual knowledge of the proposed changes to the retiree medical program on October 28, 2008 when he received a copy of McGovern’s communication. Additionally, to the extent Rhines had any question regarding whether the changes would affect the Clerical/Warehouse bargaining unit, the law charges him with constructive knowledge of those facts that he would have discovered through the exercise of reasonable diligence. The record establishes that Rhines exercised absolutely no diligence in attempting to learn whether the changes would affect the Clerical/Warehouse bargaining unit employees. He made no inquiry to

the Chapter's human resources representative, Cynthia Richmond, or to any other Chapter representative. (Tr. 690, 1256.) OPEIU cannot claim ignorance of the change for purposes of Section 10(b) when it made no effort to inquire further upon being placed on notice of the upcoming changes on October 28, 2008.

The ALJ overlooks Rhines' lack of due diligence, relying on Rhines' inquiries to the Region's HR Supervisor, Smelser, concerning retiree medical program changes. The record clearly establishes that the Chapter's Clerical/Warehouse unit is a separate bargaining unit from either of the Region's OPEIU units with its own separately bargained collective bargaining agreement. The record further establishes that Smelser has never been an employee of the Chapter and has no authority to act on behalf of the Chapter. (Tr. 1249-50.) There is no reason to treat an inquiry made to the Region concerning benefits applicable to Region bargaining unit employees as an inquiry made to the Chapter regarding its employees. The ALJ's reliance on Rhines' inquiries to Smelser is misplaced and does not support a finding that OPEIU's allegation against the Chapter regarding changes to the retiree medical program is timely. Whether or not Richmond had knowledge of the changes' impact on Clerical/Warehouse unit employees is of no legal significance in light of Rhines' lack of diligence. Contrary to the ALJ's conclusion, OPEIU should be charged with constructive knowledge of the changes by virtue of its own failure to exercise reasonable diligence to learn of the alleged violation relating to the Chapter.

Even if the charge were timely, the same lack of diligence on the part of OPEIU as it relates to the retiree medical program changes in the Clerical/Warehouse unit dictates a finding that OPEIU waived any right it had to bargain regarding the changes. Again, the ALJ improperly relies on Rhines' inquiries to the Region to support his finding that there was no

waiver despite Rhines admission that he did not make any request to the Chapter to bargain over the changes. (Tr. 690.)

The ALJ further surmises that the changes to the retiree medical program were announced as a *fait accompli* excusing any failure to make a bargaining request. As he did with regard to changes to retirement benefits, the ALJ erroneously relies on the “positive tone” of the October 28, 2008 announcement and the lack of direct notice to OPEIU. As set forth in Section IV.E. above, actual notice is sufficient to trigger a union’s obligation to request bargaining and does not in and of itself establish a *fait accompli*. Likewise, a positive tone or a fully developed plan is not enough. Absent objective evidence that a request to bargain would have been futile there is no *fait accompli*. The ALJ cites no evidence in the record in support of any determination that such a request to the Chapter would have been futile but merely summarily states that such evidence exists. (ALJD p. 15, lines 42-44.)

The ALJ likewise erred in failing to find that the Chapter contract language privileged a change from the Medicare supplemental plan to a private fee-for-service plan.¹³ The language in the contract states, in relevant part:

In the event that the Employer begins participating in a retirement health plan sponsored by the National American Red Cross, the Employer may in its discretion choose to substitute such plan for the coverage described above in this section.

(GC-2.)

The alleged unlawful acts at issue in this Complaint are the unilateral changes to the retiree medical program. The ALJ correctly notes that the record indicates that the decision to

¹³ The Chapter’s answer asserts contractual defenses in response to the allegations regarding the retiree medical program set forth at Paragraph 28(c) of the Fourth Amended Consolidated Complaint. (See Affirmative Defenses at Paragraphs 3, 4 and 5.) Respondents’ post-hearing brief also asserts this defense on behalf of the Chapter as well as the Region, referencing “each of the OPEIU contracts” and citing to the language set forth in each contract, including the Chapter’s collective bargaining agreement (GC-2)(See Respondents’ Post Hearing Brief at p.54.)

make changes to the retiree medical program was made during the term of the contract (ALJD p. 20, lines 10-12). Because the record reflects that the changes occurred prior to the expiration of the Chapter contract, it is appropriate to apply the contract language.

The language provides a “sound arguable basis” upon which it is proper to rely in concluding that the Chapter was privileged to substitute the fee-for-service plan. Under the sound arguable basis standard, where an employer has a “sound arguable basis” for its interpretation of a contract and is not “motivated by union animus or . . . acting in bad faith,” the Board ordinarily will not find a violation of the Act. *Bath Ironworks Corp.*, 345 NLRB 499, 502 (2005). *See also NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickars, Inc.*, 153 NLRB 561, 570 (1965)(in “sound arguable basis” cases the Board has determined that the dispute is solely one of contract interpretation and that it is “not compelled to endorse either of the two equally plausible interpretations”).

The “contract coverage” doctrine applied by a number of courts of appeal lends further support that the Chapter’s action was lawful. Under the “covered by” doctrine ‘[t]here is no continuous duty to bargain during the term of [a collective bargaining] agreement with respect to a matter covered by the contract.’ *Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008). Under the “covered by” doctrine, neither the National Labor Relations Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with the term of the contract and would prefer to negotiate a better arrangement. *NLRB v. U.S. Postal Service*, 8 F.3d, 832, 836 (D.C. Cir. 1993).

Finally, even if a waiver analysis were applied, there has been no violation of Section 8(a)(5). Under the waiver standard, a party may contractually waive its right to bargain about a subject. Where such a waiver is claimed, the test is whether the putative waiver is in “clear and

unmistakable language.” *Provena Hospitals, d/b/a Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Under the clear and unmistakable waiver standard, bargaining partners must unequivocally and specifically express their mutual intention to permit unilateral employment action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. *Provena Hospitals*, 350 NLRB at 811. The language in the Chapter contract establishes that the parties bargained for the Chapter to retain discretion as to substitution of a plan.

Regardless of the standard applied, interpreting the bargained-for language establishes that the Chapter was privileged to take action to substitute the fee-for-service plan under the language in the collective bargaining agreement.

G. The Findings Of The ALJ (in Section III A.2.g.) That The Region And The Chapter Unilaterally Instituted a New Benefits Advantage Healthcare Program On January 1, 2010 In Violation Of Law Is Erroneous And Fails To Follow Existing Board Law.

The finding of the ALJ that the Region and Chapter failed to provide the Unions with a meaningful opportunity to bargain cannot be supported by the record evidence. The opportunity for the Respondents and the Unions to bargain and reach complete agreement on healthcare existed after July 24, 2009. The ALJ concludes that since the parties did not specifically agree on all aspects of the healthcare coverage, there could have been no meaningful bargaining on the topic. Such a conclusion is against the great weight of the record evidence and is inconsistent with existing Board law.

In summarily denying the applicability of the *Stone Container* defense (as set forth in *Stone Container Corporation*, 313 NLRB 336 (1993)) the ALJ essentially ignored consideration of the specific rules in that case and its progeny. Those cases recognized that the general rule, that an employer must refrain from unilaterally implementing any changes to mandatory

bargaining subjects absent an agreement or an overall impasse, does not apply in cases where the bargaining involves a discrete event that occurs during the course of overall contract negotiations. Discrete and reoccurring events “that simply happen to occur while contract negotiations are in progress” fall within the exception so long as an employer gives the union prior notice and an opportunity to bargain. In those cases, the employer need not await total impasse in overall contract negotiations before addressing these “annually occurring events.” See, *Stone Container, supra*. Healthcare plans and benefits, that are annually reviewed and adjusted, have been held to be this type of re-occurring events where the employer is not obligated to refrain from implementing proposed changes until impasse is reached on negotiations as a whole. See, *Alltel Kentucky*, 326 NLRB 1350 (1998) and *St. Gobain Abrasives, Inc.*, 343 NLRB 68 (2004), affd. 426 F.3d 455 (1st Cir. 2005).

Relying upon *Stone Container* and *Alltel Kentucky*, the Board in *TXU Electric Company*, 343 NLRB 132 at fn. 13 (2004) reaffirmed the principle that an employer, after notice and an opportunity for bargaining, may unilaterally address an annually reoccurring “discrete event” without having reached overall agreement or impasse even where the employer implemented a change in existing past practice. The Board reasoned that there must be an exception to the general principles governing collective bargaining in these circumstances:

“...this case deals with a situation in which piecemeal treatment is unavoidable, at least on an interim basis.” The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the respondent had to do *something* with respect to that matter. It could not wait for an overall impasse.” *Id.* at 4 (emphasis in original).

In this case, there can be little doubt that the Region and Chapter have clearly established a practice of participating in National Benefit Plans. While local health plans do not change, the National Plans did change in 2009 without bargaining – employees could accept the changes or elect the bargained local plans. The Unions had ample notice that changes to the

Benefits Advantage Plan were to be effectuated on January 1, 2010. The Unions were given more than adequate opportunity to bargain over both the topic of benefits generally and the impending changes in particular.

The facts in this record come close to replicating those presented in *Neighbors Alaska Drilling, Inc*, 341 NLRB 84 (2004). In that case, for many years, the employer had reviewed healthcare plans at the end of the year, making adjustments as needed, including changing benefits, co-payments and plan administrators, while at the bargaining table, the healthcare issue was actively negotiated as part of broader contract bargaining. The employer notified the union in November that it intended to make changes in the program effective January 1 due to rising healthcare costs. After notice, the employer also mailed out annual enrollment forms to the bargaining unit. The employer went ahead and implemented the changes. The Board accurately found no violation of the Act recognizing that the health insurance review was an annually occurring event, that bargaining over changes to the healthcare plan could not await impasse in the overall negotiations and that the employer did not decline to bargain over the announced changes even after they had been implemented. In the present case, the ALJ erroneously ignored the clear, compelling and applicable precedent, which should have been followed, leading to the same result.

Finally, a brief comment regarding the health insurance implementation is warranted. While the Respondents initially sought a “me too” provision for health insurance, that is not what was implemented on January 1, 2010. For 2010 the “me too” proposal would have eliminated the local plans in addition to changing the “National plans”, and would have changed the cost sharing structure across the board for all the local plans and the National plans. When implementing, the Region and Chapter did not change the general cost sharing formula for local

or National plans, and did not change the local plan designs. The proposal to have the “National” PPO and EPO plan design for 2010 and leave open for further negotiations the cost sharing and local plan issues was documented in the October 23, 2009 exchanges between the Region and OPEIU (copy to Teamsters) (GC-55), after which no agreement was reached on any aspect of the health insurance proposals (including the National plan design). But it was the National PPO and EPO changes that were implemented. Given the nature of health insurance changes that were implemented in comparison to those changes that were *not* made on January 1, 2010, the Respondents fell within the *Stone Container* exception to the partial impasse/implementation rules. [*Stone Container* is a recognized offshoot of the *Bottom Line Enterprises* line of cases, 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994)].

H. The Decision Of The ALJ (in Section III C.2.) That The Region Illegally Denied Employees Guaranteed Hours Of Work Or Pay During The Weeks Of June 7 or 14, 2010 Was Erroneous.

The ALJ specifically (and accurately) found that Union employees returning from strike were not immediately recalled because of the cancellation of blood drives and lack of work resulting from the strike. (ALJD p. 39, lines 9-10 and 13-15.) Striking employees whose work was not tied to blood drives were immediately reinstated. (ALJD p. 3, lines 16-18.) The General Counsel admittedly had no issue with the method and timing of recall of employees subsequent to OPEIU’s unconditional offer to return to work. (ALJD p. 39, lines 20-23.) Despite this factual background, the ALJ found the denial of guaranteed hours prior to reinstatement (which was caused by the strike) to violate Section 8(a)(3).

The case of *Drug Package Co.*, 228 NLRB 108, 113-114 (1977) recognized the Board’s longstanding remedial policy that backpay for returning strikers unlawfully denied reinstatement shall not begin until five days after an unconditional offer to return. *Id.* at 113-114. The policy is in recognition of the practical difficulties an employer may face in reinstating employees

especially where an employer is not in a position to know exactly when employees may seek to return. *Id.* Instead of following the rule in *Drug Package*, the ALJ ruled that the proper analysis is set forth in *NLRB v Great Dane Trailers*, 388 U.S. 26 (1967). That case related to the payment of vacation benefits pursuant to contract based on an accrued benefit analysis. (While the case *sub judice* did include an issue regarding payment of vacation for returning strikers, no exception to that finding has been made.) There is no justification for the ALJ to extend the *Great Dane* accrued benefit analysis (with respect to vacations) to guaranteed hours of work. No case or Board policy extending that analysis to guaranteed hours clauses in a union contract have been cited or found.

Moreover, there is no evidence in the record suggesting the ALJ's interpretation of the guaranteed hours clause of the contract was intended to apply to returning strikers. Extending that argument to its logical conclusion, the Union could time the return of every strike so as to secure the payment of a full week's pay under the guarantee clause.

The short grace period following any unconditional offer to return to work is no more than an administrative consequence of the strike. There is nothing in the history between the parties, any bargaining notes, other evidence in the record or any meeting of the minds that would suggest that the payment of guaranteed hours was required after a strike when there was no work for the returning strikers to perform as a consequence of the strike itself. Such a decision is not supported by any Board law or policy.

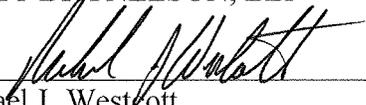
CONCLUSION

For all of the foregoing reasons, Respondents request that the Board grant Respondents' Exceptions to the ALJ's Decision and Order and that the Board reverse the judge's rulings, finding and conclusions relating to said Exceptions.

Dated: June 30, 2011.

Respectfully submitted,

AXLEY BRYNELSON, LLP



Michael J. Westcott
Leslie A. Sammon
2 E. Mifflin Street, Suite 200
P.O. Box 1767
Madison, WI 53701-1767
608-283-6722

CLARK HILL PLC



Fred W. Batten
William A. Moore
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
313-965-8804

CO-COUNSEL FOR RESPONDENTS