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,

Respondents,

and	CASES	7-CA-52033
		7-CA-52288
LOCAL 459, OFFICE AND PROFESSIONAL		7-CA-52544
EMPLOYEES INTERNATIONAL UNION, AFL-CIO		7-CA-52811
		7-CA-53018
Charging Party OPEIU,		
and	CASES	7-CA-52282
		7-CA-52308
LOCAL 580, INTERNATIONAL BROTHERHOOD		7-CA-52487
OF TEAMSTERS		
Charging Party IBT.		

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ANSWERING BRIEF OF OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 459 TO EXCEPTIONS BY RESPONDENTS AMERICAN RED CROSS, GREAT LAKES BLOOD SERVICES REGION AND MID-MICHIGAN CHAPTER TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (Cont'd)

TABLE OF AUTHORITIES (Cont'd)

I. STATEMENT OF THE CASE

Following multiple charges and amended charges filed by Office and Professional Employees Local 459, AFL-CIO ("OPEIU"), and International Brotherhood of Teamsters Local 580 ("Teamsters"), the Regional Director for Region Seven of the National Labor Relations Board ("Board") issued a Fourth Order Consolidating Cases, Fourth Consolidated Amended Complaint and Notice of Hearing ("Complaint"), alleging a multitude of unfair labor practices committed by Respondent American National Red Cross, Great Lakes Blood Services Region ("ANRC Region"), and Respondent American National Red Cross, Mid-Michigan Chapter ("ANRC Chapter")[GC 1(dddd)][1]. A trial was held in these matters on September 27-30, October 1, November 15-17, 30, and December 1-2, 2010, before Administrative Law Judge Jeffrey D. Wedekind. ("ALJ").

On May 5, 2011, the ALJ issued his Decision and recommended Order ("ALJD")[2] in which he found that ANRC Region and ANRC Chapter had violated the Act as to the vast majority of allegations in the Complaint regarding the bargaining unit employees represented by OPEIU. ANRC Region and Chapter filed exceptions to many of the ALJ's findings.[3]

II. ISSUES PRESENTED BY RESPONDENTS' EXCEPTIONS

Whether the ALJ correctly concluded that:

1. On or about November 17, 2008, Respondent Region unilaterally implemented a no-fault attendance policy in its LCD and Collections Units in violation of Section 8(a)(5). (Exceptions 11-15). [4]

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[1] References to the trial transcript will be denoted "T___", and references to exhibits of General Counsel, Charging Party OPEIU Local 459, and Respondents will be denoted, respectively, as "GC_____", "CPO_____", and "R_____".

[2] Upon the joint motion of General Counsel and OPEIU, the ALJ issued an Erratum on May 31, 2011, correcting certain inadvertent inaccuracies in his original Decision. Accordingly, "ALJD" shall refer to the ALJ's original Decision and Order as amended by the May 31, 2011 Erratum.

[3] OPEIU and General Counsel filed exceptions to the ALJ's dismissal of the remaining allegations. OPEIU Local 459 will address only the portions of Respondents' Exceptions which relate to allegations involving OPEIU and the ANRC Region and Chapter bargaining unit employees represented by it.

[4] As to these Exceptions, OPEIU Local 459 adopts in its entirety, Counsel for the General Counsel's Answering Brief in Response to Respondents' Exceptions.

2. On January 1, 2009, Respondents Region and Chapter unilaterally discontinued the Retiree Medical Program for current employees ineligible for retirement and employees hired on or after January 1, 2009, in violation of Section 8(a)(5). (Exceptions 20-25).

3. On or about April 9, 2009, Respondent Region unilaterally changed its practice of allowing union meetings on its premises, in violation of Section 8(a)(5). (Exceptions 16-19).[5]

4. On May 1, 2009, Respondents Region and Chapter unilaterally suspended matching contributions to the American Red Cross 401(k) Savings Plan, in violation of Section 8(a)(5). (Exceptions 32-45).

5. On July 1, 2009, Respondent Region unilaterally closed participation in, and eliminated, the ANRC defined benefit Retirement System (pension plan) for employees hired on or after that date, in violation of Section 8(a)(5). (Exceptions 32-45)

6. On July 1, 2009, Respondents Region and Chapter unilaterally changed the Retiree Medical Program by replacing the Medicare Supplement plan with a Private Fee-For-Service plan, resulting in benefit changes for employees currently eligible to retire and certain employees nearing retirement eligibility, in violation of Section 8(a)(5). (Exceptions 26-31).

7. On January 1, 2010, Respondents Region and Chapter unilaterally instituted a new Benefits Advantage Plan which materially changed available health insurance benefits for employees, in violation of Section 8(a)(5). (Exceptions 46-49).

8. During the week of June 7, 2010, Respondent Region denied various employees the hours or pay guaranteed in Article XVII of the Collections collective bargaining agreement, in violation of Sections 8(a)(3) and 8(a)(5). (Exceptions 50-52)

9. Since on or about March 17, 2009 and March 25, 2009, Respondent Region failed and refused to provide OPEIU Local 459 with requested information which is relevant to and necessary for, the performance of its duties as collective bargaining representative for the involved employees, in violation of Section 8(a)(5). (Exceptions 1-6).[6]

III. RELEVANT GENERAL FACTS

A. RELATIONSHIP BETWEEN THE AMERICAN NATIONAL RED CROSS, AND ITS BLOOD SERVICE REGIONS AND CHAPTERS

The American National Red Cross was founded in 1881 by Clara Barton and chartered by Congress in 1900. (CPO 10, p. 1). The Red Cross' mission statement provides, *inter alia*, that

[5] As to these Exceptions, OPEIU Local 459 adopts in its entirety, Counsel for the General Counsel's Answering Brief in Response to Respondents' Exceptions.
[6] As to these Exceptions, OPEIU Local 459 adopts in its entirety, Counsel for the General Counsel's Answering Brief in Response to Respondents' Exceptions.

the Red Cross will "provide relief to victims of disasters and help people prevent, prepare for, and respond to emergencies." (CPO 10, p. 1). Part of such services includes the collection and distribution of blood products. (CPO 10, p. 1).

The Red Cross "is a single, Congressionally-chartered nonprofit organization". (CPO 10, p. 3). Disaster relief services are provided on a nationwide basis through a network of about 800 Chapters, which are the "front-line responders to large-scale disasters". (CPO 10, p. 3). Blood collection and distribution is operated and provided by the national bio-medical services division, through 35 blood services regions located throughout the country. The blood services regions "are managed centrally from the biomedical services headquarters." (CPO 10, p. 3).[7]

At the top of management and oversight for the organization is the Board of Governors, which functions as a supervisory and policy-making group. As set forth in the By-laws, "all powers of government, direction, and management" are vested in the Board". (CPO 10, p. 30). Every member of the Board is "a Governor of the Red Cross and not the 'special representative of any particular element'", and is, therefore, not representing either a particular Region or Chapter unit separate and apart from the Red Cross nationally. (CPO 10, p. 51). The Board has a Chairman of the Board of Governors who is appointed by the President of the United States. (CPO 10, p. 67). The Red Cross also has a CEO who is nominated by the Chairman of the Board of Governors, and selected by the entire Board. (CPO 10, p. 67).

The Red Cross is a single legal entity. (CPO 10, p. 119). "While chapters and blood services regions are considered 'chartered units' under the Bylaws, neither chapters nor blood services regions are separately incorporated." (CPO 10, p. 116). The IRS has classified the Red Cross as a single, tax-exempt charitable organization, covering its constituent chapters, units and

[7] See also, GC 1 (llll) Exs. B and C, Charter and By-Laws of the American National Red Cross and testimony of Anna Shearer at T-1762-1769.

regions. (CPO 10, p. 4). "Assets held by chapters are assets of the consolidated corporate entity, and title to all property held by chapters must be vested in the Red Cross". (CPO 10, p. 109). "Although each chapter has a board of directors with delegated authority to perform some governance functions, the Board of Governors has ultimate governance and oversight responsibility for each of the chapters. (CPO 10, p. 109). The blood services regions have even less autonomous authority, in that they are both "governed and managed by the national organization", and have only "advisory boards of directors". (CPO 10, p. 109).[8]

The biomedical services business of the Red Cross, which includes its 35 blood services regions, is currently overseen by "eleven division vice presidents, who are employees of the national organization, and who have management authority for their respective blood service region." (CPO 10, p. 116). Each vice president "is accountable to the [national] President and CEO or his/her designee, currently the Executive Vice President for Biomedical Services". The chief executives of each of the 35 blood services regions are also employees of the national organization and report to their respective vice presidents." (CPO 10, p. 116). Authority for the hiring, firing, and performance evaluation for the chief executives of the regions is vested in the national division vice presidents. (CPO 10, p. 116). Although each blood service region is required to adopt its own bylaws, "the blood services regions have been integrated into the national organization, and are managed very much like integrated divisions." (CPO 10, p. 121).

The ultimate consequence and result of the national structure of the Red Cross is, simply and admittedly, that "ultimate governance and oversight responsibility, ***and ultimate liability for all actions of the chapters as well as blood services regions, lie with the national organization's Board and management"***. (CPO 10, p. 119). Thus, for purposes of the instant

[8] Prior to 1993, the blood service regions operated much like the chapters, "with a formal charter, boards and local governance authority and regional chief executive officers having management authority." However, following a consent decree issued at the behest of the FDA in 1993, governance and management control for biomedical services was centralized in the national organization." (CPO 10, p. 115-116).

matters, the Red Cross is no different than a single private corporate entity operating on a nationwide basis, with one or more of its locally based facilities under a collective bargaining agreement with a labor organization. Both the charges and complaints which were filed and issued in this matter against the American National Red Cross, Great Lakes Blood Services Region, and the American National Red Cross, Mid-Michigan Chapter, are properly construed to be actions brought against the National organization, and its two chartered units.

B. BACKGROUND FACTS

OPEIU Local 459 has represented bargaining units of employees at Respondents Region and Chapter for many years (T-260-261). At all times relevant to the instant cases, the OPEIU bargaining units at the Region consisted of a lab, clerical and distribution unit ("LCD"), with about 70-75 employees, and a collections unit ("Collections") with about 165 employees. The employees in the two Region bargaining units are primarily involved in the collection, distribution, and testing of blood products, recruitment and scheduling of donors (telerecruitment), and maintenance and clerical functions. (T-259). The Chapter bargaining unit consists of about 5 employees engaged in disaster relief services and food bank operations. (T-259). Lance Rhines has been the Local 459 service representative for all three bargaining units since 2001. (T-258).

Respondents and OPEIU have been party to a series of individual collective bargaining agreements ("CBA") for all three bargaining units going back to at least 1998. (R 108-110, 115-119). The most recent CBAs between OPEIU and Respondent Region for the Collections and LCD Units, respectively, were four-year agreements effective March 31, 2004, with an original expiration date of March 30, 2008. (GC 3, 4). Because neither party gave notice to terminate, each of these CBAs rolled over by its respective terms for an additional year to March 30, 2009.

(T-261). At midnight on March 30, 2009, the CBAs between OPEIU and the Region expired. (T-261-262, 282, GC 23, 24)(Region Answer ¶ 8).

The most recent CBA between OPEIU and the Chapter was a five-year agreement effective April 1, 2003 with an original expiration date of March 31, 2008, however again, because neither party gave notice to terminate, the agreement rolled over until midnight March 31, 2009, on which date it also expired. (GC 2, T-261, 282)(Chapter Answer ¶ 9).

The parties began formal negotiations for the Region bargaining unit employees, both Collections and LCD, on February 24, 2009 (T-335-336, GC 39). As of the date of commencement of the trial in these matters, the parties had met in 2009 for bargaining over the Collections CBA on 2/24, 3/5, 3/6, 3/27, 3/30, 4/8, 4/27, 6/16, 8/5, 8/20, and in 2010 on 6/16, 7/12, and 8/31. (GC 39). During that same period, negotiations for the LCD Unit took place on 2/24, 3/13, 3/26, 3/29, 3/30, 4/10, 5/6, 8/5, 8/20, and 12/3/09, and 4/26/10. (GC 39). Negotiations for the Chapter began later and were less frequent, however the parties did meet formally on 5/22, 7/13, 8/27, 9/28 and 11/2/09, and on 7/15/10.[9] (GC 54). As of today, a successor CBA has not been agreed upon for any of the three OPEIU bargaining units.

As will be discussed in more detail below, it is undisputed that in 2009, while negotiations for a successor CBA were ongoing, Respondents announced (and subsequently implemented) significant reductions to primary economic benefits, including, among others: (1) the May 1, 2009 suspension of the 401(k) savings plan match; (2) the elimination of participation in the defined benefit pension plan for all employees hired on or after July 1, 2009; (3) the January 1 and July 1, 2009 elimination and/or significant reduction to health care benefits for

[9] As discussed below, the parties had tacitly agreed that the Chapter CBA would likely be patterned on the CBA agreed upon for the Region bargaining units, and thus essentially construed the Region negotiations to also serve as negotiations for the Chapter CBA.

future retirees, and (4) the January 1, 2010 reduction in coverage and significantly increased employee cost-sharing for health insurance benefits.

As correctly found by the ALJ, Respondent took such unilateral actions in the absence of any meaningful bargaining whatsoever with OPEIU, and, admittedly, in the absence of an overall impasse in negotiations over the successor CBAs. As further found by the ALJ, Respondent engaged in a host of additional bad faith bargaining conduct, along with actions directed against employees in retaliation for their union support and activities.

IV. ARGUMENT SUPPORTING THE DENIAL OF RESPONDENTS' EXCEPTIONS AND THE ENFORCEMENT OF THE JUDGE'S DECISION

A. THE ALJ CORRECTLY FOUND THAT RESPONDENT REGION'S DENIAL OF GUARANTEED HOURS AND/OR GUARANTEED PAY VIOLATED SECTIONS 8(a)(3) AND 8(a)(5) OF THE ACT. (Exceptions 50-52)

1. Facts

On June 2, 2010, OPEIU commenced an unfair labor practice strike against the ANRC. (T-487-488, GC 71, 72). On June 3, Region Human Resources Manager Will Smith requested in writing that Rhines advise the Region by no later than 5:00 p.m. if OPEIU intended to end its strike at midnight June 4. (GC 77). Smith further advised Rhines that the Region had already reduced the number of collections (blood drives) for the upcoming weekend and the following week, and that "work may not be available for ***all striking employees*** to return immediately***."*** Smith further advised that "***striking workers*** will be reinstated promptly as work becomes available." (GC 77).

Prior to 5:00 p.m. that same day, Rhines hand delivered to both the Region and Chapter a memo addressed to Region CEO Sharon Jaksa and Chapter CEO John Cauley, advising that OPEIU would be terminating its strike as of 9:00 a.m. on June 5. (GC 74, T-500-501). Contemporaneous with his delivery of the memo, Rhines spoke with Smith who confirmed again

to Rhines that ANRC may have already canceled blood drives previously scheduled for June 5. (T-501). Smith made no mention of the possible cancellation of drives scheduled for June 6 or thereafter.

By memo dated June 4, Respondent Region advised employees that "the Region [had] already reduced the number of collections scheduled for this weekend and next week", and, that "as a result, work may not be available for all ***striking employees*** to return immediately." (GC 75). The Region further advised employees that "***[s]triking workers*** will be reinstated promptly as work becomes available", and that if not contacted by a supervisor on June 4, employees were not scheduled to work on June 7. (GC 75). Thereafter, although the Region reinstated some of the striking employees on June 5, reinstatement was delayed for many striking employees. (T-502, T-1891).

Respondent witness Jamie Bates, the Region's scheduling manager, was the individual in charge of scheduling blood drives at the time of the June 2, 2010 strike. (T-1889-1890). According to Bates, prior to, and upon commencement of the strike, Respondent unilaterally decided to cancel many of the blood drives scheduled to take place on and after June 5, 2010. (T-1890-1891). Although Bates initially testified that these cancellations were caused by a lack of telerecruiters available to recruit donors as a result of the strike, under cross-exam Bates admitted that the telerecruitment function should have ideally been completed seven to twelve days prior to the scheduled drive, which would obviously mean that telerecruitment for drives scheduled from June 5 forward should have been completed prior to start of the June 2 strike. (T-1910-1912, 1915).

Respondent admitted that only two blood drive sponsors allegedly failed to recruit sufficient donors for their scheduled drives, resulting in cancellation. (T-1891, 1898). In one of those two instances, however, the sponsor, General Motors, initially canceled a drive on June 4

which was scheduled for June 8, but later the same day notified Red Cross of its desire to proceed with the drive. (T-1899-1890). Respondent-Region refused to put the June 8 General Motors drive back on the schedule, despite its admission at trial that a canceled drive can be rescheduled upon a one-day notice, and that prior to the strike, Respondent had tried to accommodate sponsors who elected to proceed with a drive after having previously canceled. (T-1899-1901, 1919).

Respondent continued to cancel blood drives well after OPEIU made its June 3 unconditional offer to return to work. In addition, Respondent admittedly made no effort whatsoever to reschedule canceled blood drives originally scheduled for dates on and after June 5. (T-1924-1925). This refusal to reschedule drives occurred in the absence of Red Cross making any attempt whatsoever to ascertain the number of donors scheduled for the drives prior to their cancellation. (T-1917-1918, 1924-1925, CPO 11). Indeed, it was stunningly clear from Bates testimony on cross-examination that she had no idea whether drives were canceled due to a lack of donors (either recruited by the Region or by the sponsor), or whether such cancellations were even tangentially related in some other way to the Union's strike activity. (1915-1925). Bates admitted that she had no knowledge of OPEIU directly causing the cancellation of any scheduled blood drive, and Respondent offered no evidence supporting such a conclusion. (T-1892-1893).

Moreover, and most significantly, Bates admitted that prior to the strike, blood drives had been routinely canceled for any number of reasons, including: (1) too many Red Cross staff calling in absent, resulting in a lack of sufficient staff to accommodate the blood drive (T-1895); (2) intervening funerals being scheduled at the facility at which the drive was scheduled to take place (T-1895); (3) lack of sufficient donors recruited to warrant proceeding with a scheduled

drive (T-1896); (4) cancellation by the sponsor of the drive (T-1897); (5) bad weather (T-1898); and (6) school closings (T-1898).

On June 7, Smith sent a memo to the Region's management team, titled "No leave time use for striking workers until they have been reinstated/No Guarantee". [GC 22(d)]. With respect to the former strikers, the memo directed Region management, *inter alia*, as follows:

- Guarantee Employee X is not reinstated until Tuesday 6/8. Employee X will not be paid under a guarantee this week. Employee X cannot supplement Monday 6/7 as a paid leave day.

With regard to guaranteed pay and/or hours for employees, Article 17, Compensation and Leave, Section 7, of the Collections CBA provides, in relevant part:

> Guaranteed Hours. All full-time employees hired before October 1, 1989, shall be guaranteed forty (40) hours work or pay per week, except for periods covered by annual and granted leaves of absence. All full-time employees hired after September 30, 1989, shall be guaranteed thirty-seven and one-half (37 ½) hours work or pay per week, except for periods covered by annual and granted leaves of absence. (GC 3, p. 19)

OPEIU representative Rhines' unrebutted testimony established that not only have blood drives been canceled frequently in the past for all of the reasons acknowledged by Respondent witness Bates, but further, that if employees fail to receive the hours guaranteed by the terms of the CBA for any reason except vacation or leave, they are paid for those hours. (T-598-599). Respondent HR Supervisor Tim Smelser likewise admitted that prior to the strike, employees received the contractual hours/pay guarantee when they lost work hours due to canceled blood drives. (T-1991). Documents entered into evidence further unequivocally established that employees named in paragraph 15(a) of the Complaint had been denied the guaranteed hours or pay set forth in Article 17 of the CBA. [GC 22(c)].[10] Lastly, Respondent stipulated at trial that none of the

[10] Likewise, in response to paragraphs 25(c) and (d) of the Complaint, Respondent-Region admitted "that certain employees in the Collections Unit were denied pre-approved leave and/or guaranteed hours". [GC 1(oooo)].

individuals named in the Complaint [¶ 15(a)] were denied their guaranteed hours for any reason other than Respondent's delay in reinstating them to work following the end of the strike. (T-545-546).

2. Legal Argument

a. Denial to Former Strikers of Guaranteed Hours/Pay in Violation of Section 8(a)(5) of the Act.

Respondent admittedly caused the delay in reinstatement of employees, refusing to put them back on the schedule once the Union had given its unconditional offer to return on June 3. Respondent further unilaterally canceled blood drives scheduled for June 5 and the following week, then relied upon its self-imposed delay in reinstatement to justify the denial of contractually mandated guaranteed hours/pay. These circumstances hardly qualify as a "disaster or emergency" circumstance privileging Respondent to deny this contractual benefit.

It is well-settled that wages and rates of pay are mandatory subjects of bargaining. *NLRA Section 8(a)(5); Lexus of Concord, Inc.*, 343 NLRB 851, 863, 869 (2004). Here the terms of the Region-Collections CBA clearly and unambiguously provide for weekly guaranteed hours (either 40 or 37 ½ , depending on date of hire) or the equivalent in pay for bargaining unit employees, with the only exception being periods "covered by annual and granted leaves of absence. (GC 3, p. 19).

Respondent admitted in its Answer that it denied the employees named in Par. 15(a) of the Complaint "the hours or pay guaranteed in Article XVII of the collective bargaining agreement", and offered no evidence suggesting that any of the named employees were on either "annual leave" or some other "granted" leave of absence. [GC 1(oooo)]. Rather, it was clear that Respondent unilaterally canceled scheduled blood drives, and made no effort to reschedule such canceled drives after receiving the Union's June 3 unconditional offer to end the strike. Red

Cross then delayed the reinstatement of employees based solely and exclusively on an asserted lack of work due to canceled drives and no other reason whatsoever.[11] As noted above, Respondent stipulated that employees were denied the guarantee solely due the delay in their reinstatement following the strike. (T-545-546).

The expired CBA contains no provision allowing Respondent to deny an employee the requisite guaranteed pay or hours in the event of a delay in reinstatement by the employer following an employee's lawful strike activity. Respondent offered no evidence of a past practice or other basis upon which denials of guaranteed hours or pay under these or similar circumstances had either been agreed to by OPEIU, or waived as a bargaining subject by the Union. Indeed the record evidence indisputably established that in every other circumstance in which employees lost work hours due to the cancellation of blood drives, whatever the reason, they had been consistently paid the contractually required "guarantee".

It is well-established Board precedent that an employer "must continue to apply the provisions of an expired contract until either a new agreement or impasse is reached". *University Moving & Storage Co.*, 350 NLRB 6, 7 (2007); *Made 4 Film, Inc.*, 337 NLRB 1152 (2002); *REC Corp.*, 296 NLRB 1293 (1989). Respondent Region's argument that it was privileged under Board precedent to delay the reinstatement of unfair labor practice strikers, and, therefore, excused from paying the contractual "guarantee" is wholly without merit. Payment of the guarantee was a contractually mandated term and condition of employment which Respondent was required to maintain as the *status quo*, pending an overall bargaining impasse. Respondent cites to no case law (nor is there any) to support a finding that the delay in reinstating striking employees allows an employer to circumvent the negotiated terms of the parties' collective

[11] Although the payroll records for these employees reflect "LWOP" (leave without pay) for the days in question, this was not leave requested by the employee either under the annual leave provisions or as some other contractually recognized leave of absence, but rather, was an absence imposed by Respondent without either the employees' request or consent.

bargaining agreement, or otherwise to discriminate against such employees as a result of their protected activities.

Here, bargaining for a successor agreement was ongoing at the time of Respondent's unilateral changes to the hours/pay guarantee and Respondent has never claimed that the parties were at an overall impasse. Accordingly, as the ALJ correctly found, Respondent-Region's failure to continue in effect the provisions of the expired contract providing for the hours/pay guarantee for the week of June 7, 2010 violated Section 8(a)(5) of the Act.

b. <u>Denial to Former Strikers of Guaranteed Hours/Pay in Violation of Section 8(a)(3) of the Act.</u>

In *Texaco, Inc.*, 285 NLRB 241, 245 (1987), the Board overruled certain prior decisions, and held that the issue of whether an employer violates Section 8(a)(3) by refusing to grant benefits to employees as a result of strike activity would be evaluated by application of the U.S. Supreme Court's enunciated test in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 87 S. Ct. 1792, 18 L. Ed. 2d 1027 (1967). The Board then explained the burdens of proof and evidence required to establish a Section 8(a)(3) violation in these circumstances. It stated:

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. . .Proof of accrual on a case-by-case basis will most often turn on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory rights to be free of such discrimination or coercion. . . . If the employer does not seek to prove waiver, it may still contest the . . .employee's entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is "reasonable and arguably correct", and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under *Great Dane,* even if the employer

> proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.

Applying the above analysis, the Board found that the employer had violated Section 8(a)(3) by suspending a striking employee's pension credit and denying accident and sick benefits to other striking employees, because the benefits had accrued under the existing plan provisions and the employer could not prove either a waiver by the union, or its reliance upon a non-discriminatory contractual provision allowing it to deny such benefits. *Id.* at 246.

Following the *Texaco* decision, the Board has on numerous occasions determined that an employer violated Section 8(a)(3) by denying accrued benefits to strikers. In *Swift Adhesives, Inc.*, 320 NLRB 215, 215-216 (1995), a case remarkably similar to the instant case, the Board found that the employer had violated Section 8(a)(3) by denying accrued vacation benefits to permanently replaced strikers. The Board concluded that, but for their strike activity, the employees would have been entitled to such benefits under the terms of the expired collective-bargaining agreement, and that the employer had failed to proffer any reasonable construction of the CBA which would have sanctioned such denial. *Id.* at 215-216. See also, *Central Illinois Public Service Co.*, 326 NLRB 928, 934-35(1998)(Denial of accrued insurance and supplemental workers' compensation benefits to strikers found to violate Section 8(a)(3), as employer failed to establish either waiver by the union, or contract language privileging such denial); *Lourdes Health System, Inc.*, 316 NLRB 284 (1995)(Denial of accrued vacation and sick pay to strikers who had made unconditional offer to return to work, but had not yet been returned, found to violate Section 8(a)(3), as employer failed to justify application of facially "neutral" policy requirements to strikers); *Genstar Stone Products Co.*, 317 NLRB 1293, 1301

(1995)(Withholding of accrued benefits to strikers found to violate Section 8(a)(3) despite employer's claim it was seeking "advice of counsel").

Following the reasoning of the *Texaco* case and its progeny, the Board and Circuit Courts have likewise found an employer to have violated Section 8(a)(3) by withholding accrued wage bonuses to employees who had engaged in a strike. In *Dayton Newspapers, Inc.*, 339 NLRB 650, 654 (1993), enf'd 402 F.3d 651, 666-667 (6th Cir. 2005), the Board and Court found that an employer who had lawfully locked and out and subsequently laid off employees following their participation in a one-day strike, violated Section 8(a)(3) by denying them a $10,000 "stay-to-the-end" bonus. The Board and Court determined that it was the employer who caused the termination of the employees by laying them off, and that the bonus had accrued on the day their employment was terminated by the employer. *Id.* The Board rejected the employer's argument that by striking, the employees had not remained "actively at work" as required under the eligibility prerequisites for the bonus. Finally, the Board and Court found that the employer, by choosing the strikers for lockout and layoff, had denied them work opportunities afforded to other employees, and could not, therefore, rely on their absence as a basis to deny the bonus. *Id.*

Whether, as Respondent claims, it was legally justified in delaying reinstatement for the strikers, is irrelevant, where, as here, the denial of the pay guarantee is clearly discriminatory. In that regard, Smith's memo to Rhines made it clear that only striking employees would be denied the guarantee, not other employees who either crossed the picket line or never participated in the strike and similarly suffered a lack of work during the same week. Thus, the asserted "lack of work" which Respondent contends caused the delay in reinstatement of strikers resulted in the denial of the hours/pay guarantee only to the former strikers, not to any other employees who similarly failed to work the requisite 37 ½ or 40 hours that week.

As noted above, the evidence was clear that not only had the guarantee been paid to employees in the past regardless of the reason for the lack of work or canceled drives (even if caused by an excess number of employees calling in sick), but also, that contrary to Respondent's assertion, there was evidence presented of only ***one*** sponsor who canceled a scheduled drive due to the strike (and whose subsequent request to be rescheduled was denied by Respondent).

Even assuming Respondent was legally privileged to delay in reinstating the strikers, it was not legally privileged to discriminatorily deny them a wage/hour benefit afforded to non-striking employees during the same period. Accordingly, the ALJ correctly concluded that Respondent's denial of guaranteed hours/pay to strikers violated Section 8(a)(3) of the Act.

B. THE ALJ CORRECTLY FOUND THAT RESPONDENTS' UNILATERAL CHANGES TO RETIREMENT BENEFITS, 401(K) BENEFITS, HEALTH INSURANCE BENEFITS, AND RETIREE HEALTH INSURANCE BENEFITS VIOLATED SECTION 8(a)(5).

1. Facts

a. Changes To (401)(K) and Pension

The most recent expired CBAs between Respondent Region and OPEIU for the Collections and LCD Units identically provide at Article 31, as follows:

> Article 31. RETIREMENT
>
> Section 1. Employees covered under the 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.[12]

[12] Respondent witness Shearer made clear that the "Retirement System" refers only to the defined benefit pension plan, and does not encompass either the 401(k), 403(b), or retiree health plans sponsored by the National. (T-1328-1329). Conversely, the term "Retirement Program" encompasses all retirement related programs, including the retirement system pension plan, 401(k) and 403(b) savings plans, retiree medical plans, and social security benefits. (T-1329).

Section 2. Any employee may choose to participate in the annuity program of the Retirement System of the American Red Cross.

Section 3. The Employer shall pay 50% of the applicable Medicare Supplement premium (or equivalent) for full-time employees retiring at age 65 or over. For full-time employees retiring at age 60-64 with twenty (20) years of service, the Employer shall pay 50% of the applicable regular premium (or equivalent) if the employee is not eligible for Medicare supplement rates. Part-time employees may elect full-time benefits, provided they pay an additional percentage of the Employer's cost on a pro-rated basis. 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 coverages described above in this section.
Retirees age fifty-five (55) or greater with at least ten (10) years of continuous service are provided with retiree life insurance coverage of $5000.00 in accordance with the Retiree Life Insurance Plan, as amended.

Section 4. Bargaining unit members shall be eligible for the 401(k) program that provides for a fifty cents ($.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.[13] (GC 3, 4).

The most recent expired CBA between Respondent Chapter and OPEIU provides at Article 31, 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.[14]

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.

Section 3. The Employer shall pay 50% of the applicable Medicare Supplement premium (or equivalent) for full-time employees retiring at age 65 or over. The Employer shall also pay fifty percent (50%) of the applicable regular health care premiums (or equivalent) for full-time employees who retire at age 60-64 with

[13] In 2005, Red Cross nationally increased the match in the American National Red Cross 401(k) plan from $.50 to $1.00 for every salary-deferred dollar contributed by employees up to the first 4 percent. (CPO 4). Per the foregoing contract language, bargaining unit employees under both the Collections and LCD CBAs likewise received the increase to the match.
[14] The 401(k) match was likewise increased for Chapter employees from $.50 to $1.00 in 2005.

> twenty (20) years of service if the employee is not eligible for Medicare Supplement rates.
>
> The Employer shall pay twenty-five percent (25%) of the applicable Medicare Supplement premium (or equivalent) for part-time employees retiring age 65 or over. The Employer shall also pay (25%) of the applicable Medicare Supplement premium (or equivalent) for part-time employees who retire at age 60-64 with twenty (20) years of service if the employee is not eligible for Medicare Supplement rates. In the event that the Employer begins participating in a retirement health plan sponsored by the American National Red Cross, the employer may, in its discretion, choose to substitute such plan for the coverage describe above in this section. (GC 2).

As indicated above, bargaining for a successor agreement began between Respondent Region and the Union for the Collections and LCD bargaining units on or about February 24, 2009. Between that date and May 1, 2009, the parties had met on 8 occasions for the Collections unit, and on 6 occasions for the LCD unit. Although the parties had not officially met for negotiations between OPEIU and the Chapter as of May 1, 2009, it was admittedly agreed between the parties that Chapter negotiations would begin at some point after commencement of the Region negotiations and likely would be "following along with what was happening in the blood region." (T-1757). [15] Thus, for all intents and purposes, both parties agreed that the on-going negotiations between the Region and OPEIU were, essentially, also tantamount to negotiations between the Chapter and OPEIU.

On April 2, 2009, without having given any prior notice to OPEIU, Red Cross CEO Gail McGovern bypassed the Union, and issued a memo to all employees nationwide, via the American National Red Cross internal website ("Cross Net"), entitled "Cost Savings Steps Difficult but Essential". (GC 7, 61). The memo, stated, *inter alia*, as follows:

- **Suspending 401(k) Match- . . .**Starting with the first paycheck in May, we will be suspending the Red Cross matching contributions to the Savings Plan 401(k). This will affect participants in chapters, Biomedical Services, and NHQ. We

[15] In addition to specific transcript pages cited, OPEIU also would generally direct the Board to Rhines' testimony at (T-547-594).

anticipate and hope this suspension will only be for FY10. However, as with the merit pay suspension, we must monitor internal and external financial factors as we manage the FY10 budge 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 also want to make clear that these changes will not affect Red Cross retirees currently receiving monthly pension payments from the Retirement System.

****

I wish we did not have to go this route, but we have no choice. . .I wish I could guarantee that there won't be more cuts, but we are living in uncertain times. I can guarantee that I will do absolutely everything I can to avoid more large-scale layoffs. . .I truly hope these cuts will be sufficient.

By email dated April 15, 2009, Respondent-Region's Human Resources Supervisor Tim Smelser forwarded the April 2 memo to Rhines stating that "The American Red Cross intends to honor its existing agreements. Where the agreements permit us to make the changes referred to by Ms. McGovern, we will do so." (GC 61). Rhines responded via email the same day asking "Can you be more specific as to what cuts you think you have the latitude to make per the contracts with Local 459, and which ones you intend to make and when?" (GC 61). Having received no response to his April 15 email, Rhines sent another on April 17. (GC 62). On April 23, Smelser, via email to Rhines, stated: "The following benefits changes will occur: Discontinue the 401(k) match beginning May 1, 2009. Close the pension plan to new participants beginning July 1, 2009." (GC 62). That evening, Rhines responded stating: "Obviously, we do not agree. But, having said that, what is National ARC replacing their pension with for non-union employees starting July 1?" (GC 62). The following day, Smelser responded that he was "not sure at this time" and that "[he] will advise." (GC 62).

The evidence is undisputed that the foregoing announced suspension of the 401(k) match was, in fact, implemented, on May 1, 2009, and after their last April 2009 paycheck, employees received no further matching 401(k) contributions by Red Cross. (GC 7, T-905-908; 1438-39). The evidence is further undisputed that effective July 1, 2009, retirement system (pension plan) was closed to any employee hired on or after that date. (GC 7, R-66 T-1340-1341).

The evidence is further undisputed that at no time during negotiations, either before or May 1, 2009, did either Respondent-Region or Respondent-Chapter ever propose the suspension or elimination of the 401(k) match, and that the only proposals made by Respondent Region (and by tacit agreement, Respondent Chapter) were "waiver" proposals that bargaining unit employees would receive the same retirement benefits and savings plan as other employees of the ARC, which benefits could be amended at any time by the Employer. (T-1735, GC 41, 47, 49)[16].

b. <u>Changes to Health Insurance Benefits</u>

The most recent expired CBAs between Respondent-Region and OPEIU for the Collections and LCD Units identically provide at Article 30, as follows:

> <u>ARTICLE 30-INSURANCE</u>
>
> <u>Section 1. Health Insurance</u>. The Employer shall provide full coverage for all full-time employees and dependants. The Employer will provide single coverage for each part-time employee who works two (2) or more days per week and is normally scheduled for at least twenty (20) hours per week. The part-time employee may pay each month for dependent coverage.

[16] Specifically, Respondents' proposals provided:

> Employees covered under this contract will receive the same retirement benefits and savings plan, including the 401(k) and 403(b) plans on the same terms and conditions and subject to the same eligibility rules as other employees of the ARC. The American National Red Cross has the right to amend the Retirement System, the Savings Plan and the 401(k) and 403(b) plans from time to time in its discretion.

The employee will be given the option of choosing either the primary insurer (currently Aetna Insurance) of the Employer or an HMO. The current HMO offerings will include the current national policy for PHP, Priority Health and Health Plus and the local current BCN policy, where offered. Employees will pay the following maximums towards the premium cost of health insurance on a biweekly basis as follows:

Effective 3-31-04:	$11.54
Effective 1-1-05:	$18.30 or less
Effective 1-1-06:	$42.00 or less
Effective 1-1-07:	$47.00 or less
Effective 1-1-08:	$75.00 or less

Effective no later than 1-1-06, employees covered by this collective bargaining agreement shall not be required to pay more towards the cost of health insurance than other Regional employees, whether union or non-union.

Part-time employees who elect second tier or family medical coverage will pay the full amount for dependant coverage.

The Employer shall have the right to substitute the coverage set forth above with health insurance by another carrier or HMO provided that such substitute coverages are comparable and provided that the union is given at least sixty (60) days advance written notice.

The most recent expired CBA between Respondent-Chapter and OPEIU provides, *inter alia,* at Article 30, as follows:

ARTICLE 30-INSURANCE BENEFITS

Section 1. Health Insurance. The Employer shall continue to provide personal and full dependant coverage through Blue Care Network HMO for all full-time employees. The Employer shall continue to provide personal coverage through the BCN for each regular part-time employee. The part-time employee may pay each month for dependant coverage. Blue Care Network HMO coverage shall include VSP vision coverage.

In the event that the Employer elects to add health insurance carriers or HMOs during the term of this Agreement, it shall notify the Union prior to making the change and offer to meet and discuss the additional coverage.

Employee contributions to health care coverage will be made on a bi-weekly basis. Employees will have the option to make contributions on a pre-tax basis. Contribution levels will be as follows:

2003- no contributions		
2004- Single- $10.00	Double- $20.00	Family- $30.00
2005- Single- $10.00	Double- $20.00	Family- $30.00

2006- Single- $12.50	Double- $25.00	Family- $37.50
2007- Single- $12.50	Double- $25.00	Family- $37.50

Beginning in 2007, and effective for employees January 1, 2008, Respondent Region and Chapter, following discussion with, and agreement by, OPEIU, also began offering a national Blue Cross/Blue Shield PPO and EPO plan as part of the National's Benefits Advantage life and benefits program. (T-385-387). The Union conditioned Respondents' offering of the national EPO and PPO both on employee participation being voluntary, and there being no effect on any of the existing local plans currently being provided to employees. (T-387). Prior to January 1, 2009, Respondents notified OPEIU of some minor changes to the national EPO and PPO plans to become effective January 1, 2009, consisting of minor co-pay and prescription drug increases. (T-392). The Union did not object to these minor changes.

With regard to health insurance benefits, in the same April 2, 2009 memo, McGovern stated:

- **Upcoming Changes in Health Insurance Plans-** In the months ahead, we will be looking for additional ways to reduce benefit costs while maintaining market-competitive compensation and benefit programs for our employees. Some examples of benefit plan cost-reduction strategies are closer management of health insurance programs and plan design changes focused on cost containment and effective health-care management.

At an informal meeting in January 2008, Respondent's bargaining representative Sabin Peterson, who is Director of Labor Relations for the American National Red Cross, advised Rhines that it was Red Cross' intent to secure a full "me-too" on health insurance benefits for the bargaining units represented by OPEIU. (T-1691). Rhines expressed his disagreement with such a prospective proposal. (T-1505). Exactly as forecasted by Peterson in 2008, throughout the 2009-2010 negotiations, Respondents' proposals to the Union regarding health insurance benefits were quite similar to those offered for retirement benefits. Specifically, Respondents proposed language as follows:

Regular full-time bargaining unit employees are eligible to participate in the same

> group insurance plans, under the same terms and conditions, as offered to the Region's non-bargaining unit employees.
>
> Any changes or amendments to the plans automatically apply to the bargaining unit employees to the same extent that such changes or amendments apply to the non-bargaining unit employees. The parties further agree that the cost of coverage under the plans is shared between the bargaining unit employees and the Red Cross on the same basis as such costs are shared between the Red Cross and other non-bargaining unit employees. The Region, the Union and the employees are bound by the terms of the plans, and issues regarding the plans shall not be subject to the grievance or arbitration provisions. (GC 41, 47, 49).

From the very beginning of negotiations, Respondents explained to OPEIU that their intent was to eliminate all insurance plans provided under the expired CBAs, and to offer only the National plans offered under the Benefits Advantage Program, which at that time were the BC/BS Premier and Standard PPOs, and the EPO (similar to an HMO). Anticipating such a stance, OPEIU had offered at the very first bargaining session for Collections and LCD on February 24, 2009, to eliminate the local health insurance plans, and to accept the National PPO/EPO plans in effect as of January 1, 2009. (GC 40). Respondents rejected OPEIU's proposal and continued to propose only the above-described "me-too" and waiver.

In order to formulate additional proposals on health insurance, OPEIU began requesting information on the proposed 2010 plan design for the National plans beginning in March 2009. Respondents advised OPEIU that the new plan design would not be available until July. Prior to ever providing OPEIU with the 2010 plan design, Respondent- Region made its "Final Offer" on April 10, 2009. (GC 49). On or about July 16, 2009, Respondents finally provided OPEIU with the proposed plan design for the National PPO/EPO plans to become effective January 1, 2010. (GC 51). The changes were sweeping and significant. Among others, the Premier PPO plan was completely eliminated; co-pays were increased in almost every category of service; the annual out-of-pocket maximum under the EPO increased from $0 in 2009 to $3000/individual, $6000/family in 2010; the annual deductible under the PPO increased from $3000 to

$4000/individual, and from $6000 to $8000/family, and numerous other increases in costs to employees were included. (GC 51).

The parties' next bargaining session was scheduled for August 5, 2009 (GC 39). Before that meeting even took place, Red Cross issued a Cross Net announcement to all employees stating, *inter alia*, as follows:

> . . .[C]hanges are being made to the Benefits Advantage program that will impact employees.
>
> It is important to note that 2010 Red Cross benefit changes have been focused on medical coverage, limiting the increase in payroll deductions for employees while preserving generous preventative care coverage. Annual out-of-pocket provisions are designed to protect employees against large claim situations.
>
> The following information outlines the changes to the BenefitsAdvantage program:

- The Standard and Premier PPO options will be consolidated. There will be additional out-of-pocket costs to employees through increased deductibles, copays and coinsurance. Preventative care coverage will remain covered at 100 percent with no copay. Employees will also continue to be protected by a maximum out-of-pocket provision.

- With the consolidation of the PPO plans, national sector, biomedical services and most chapter employees previously enrolled in the Premier PPO option will see a decrease in their payroll deductions. Those enrolled in the Standard option will experience no change in payroll deduction amounts or a decrease.

- Employees enrolled in the EPO option will experience additional out-of-pocket costs through increased co-pays and added coinsurance features. Providing the most generous level of coverage, employees enrolled in the EPO option will be required to contribute more toward their coverage in 2010. (GC 9).

The memo went on to announce further changes to prescription drug benefit coverage and cost, as well as an added penalty cost for spousal coverage where the employee's spouse had other insurance available, but chose Red Cross coverage instead. The memo confirmed that employees covered by another plan, offered by Kaiser, would continue to be eligible to participate in that

plan. Increases in cost for dental and vision coverage were also announced. (GC 9). Lastly, Red Cross advised employees that:

> We realize the impact that these changes may have on some employees and that changes in payroll deduction amounts as well as office visit co-pays, deductibles and coinsurance can alter family budgets. The changes however are necessary in order to maintain an affordable and market-competitive package of medical, dental and vision coverage. (GC 9).

On July 30, 2009, Rhines communicated to the Region HR Director Will Smith his opposition to the July 28 missive to employees by Red Cross. (CPO 2). Smith responded stating that the Region "was certainly willing and prepared to bargain over the benefits information that was forwarded." (CPO 2). Rhines requested that the Region send a retraction of the announcement to bargaining unit employees. (CPO 2). On September 10, 2009, Smith sent an email to Region employees stating:

> Dear American Red Cross Collections and LCD OPEIU Members:
>
> There has been an inquiry made to the American Red Cross via Lance Rhines of OPEIU Local 459 regarding the communications sent out on the 2010 health insurance benefit plans. This notice is to communicate that we are currently involved in collective bargaining with OPEIU Local 459 and have not reached an agreement on health insurance at this time. (CPO 3).

The Union made proposals on health insurance at the parties' next bargaining session on August 20, 2009. (GC 53). Respondents rejected all proposals made by the Union, and continued to insist on the "me-too" waiver language. More importantly, however, Respondents ***refused to negotiate over the changes announced by Red Cross to be implemented January 1, 2010***. It is undisputed that Red Cross never offered the 2010 plan design as a proposal for health insurance for 2010, nor did it offer proposals on any part of the coverage outlined in that plan. (T-1725). The only proposal Respondents were willing to entertain from the Union was an agreement to language that provided the "me-too" waiver for the duration of the CBA. Indeed,

Respondents would not even commit in writing that the announced 2010 BenefitAdvantage EPO and PPO would remain in effect throughout the 2010 year.

On October 23, 2009, Smith emailed Rhines an "urgent communication", demanding that Rhines decide what benefits should be offered by the Region to bargaining unit employees during the upcoming open enrollment. (GC 54). Smith advised that the choices available to Rhines were either that the Region offer the 2010 Benefits Advantage plan, or that it not offer that plan (GC 54). Smith further communicated that absent response from Rhines, the Region would offer the 2010 BAP plans to employees. Lastly, Smith represented that the Region would also continue to offer employees all of the Local plan choices then in effect under the parties' CBA. (GC 54). Rhines responded that the Union's position was that Red Cross was obligated to offer the 2009 Benefits Advantage plans as well as all of the local plans then in effect. (GC 54). Contrary to Rhines' demand, Red Cross offered employees the significantly altered 2010 Benefits Advantage plan during open enrollment.

c. <u>Changes to Retiree Health Insurance Benefits For Future Retirees.</u>

As noted above, the expired CBAs for all three units contain provisions for a health insurance supplement to be provided to bargaining unit employees upon retirement. Regarding the Region, the Collections and LCD contracts identically provide:

> The Employer shall pay 50% of the applicable Medicare Supplement premium (or equivalent) for full-time employees retiring at age 65 or over. For full-time employees retiring at age 60-64 with twenty (20) years of service, the Employer shall pay 50% of the applicable regular premium (or equivalent) if the employee is not eligible for Medicare supplement rates. Part-time employees may elect full-time benefits, provided they pay an additional percentage of the Employer's cost on a pro-rated basis. 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 coverages described above in this section.

> Retirees age fifty-five (55) or greater with at least ten (10) years of continuous service are provided with retiree life insurance coverage of $5000.00 in accordance with the Retiree Life Insurance Plan, as amended.

For the Chapter, the CBA provides:

> The Employer shall pay 50% of the applicable Medicare Supplement premium (or equivalent) for full-time employees retiring at age 65 or over. The Employer shall also pay fifty percent (50%) of the applicable regular health care premiums (or equivalent) for full-time employees who retire at age 60-64 with twenty (20) years of service if the employee is not eligible for Medicare Supplement rates.
>
> The Employer shall pay twenty-five percent (25%) of the applicable Medicare Supplement premium (or equivalent) for part-time employees retiring age 65 or over. The Employer shall also pay (25%) of the applicable Medicare Supplement premium (or equivalent) for part-time employees who retire at age 60-64 with twenty (20) years of service if the employee is not eligible for Medicare Supplement rates. In the event that the Employer begins participating in a retirement health plan sponsored by the American National Red Cross, the employer may, in its discretion, choose to substitute such plan for the coverage describe above in this section. (GC 2).

It is undisputed, and, moreover, clear from the language of the CBAs, that the above retiree health insurance benefit supplements were not part of the National Red Cross retiree health care plan, but rather, were a locally negotiated benefit. Although the CBAs allowed Respondents to elect to participate in the National plan and to substitute such plan for the contractually described benefits, there was no evidence presented by either Respondent Region or Chapter suggesting that they either did begin participating in the National Plan, or ever advised the Union during the terms of the CBAs that they had elected to do so.

In late October 2008, Rhines received from a bargaining unit employee, a Cross Net memo sent by the National to all Red Cross employees announcing significant changes to the National Retiree Health program. (GC 58). For future retirees, the changes included, *inter alia*, the following: (1) Current retirement eligible employees would only have available to them whatever Red Cross retiree medical benefits were in effect at the time they retired; (2) Current and future employees who were not retirement eligible***, would have no retiree health benefits***;

(3) Subsidies for retiree medical coverage would be "restructured and simplified, resulting in a reduction over time." (GC 58).

Rhines had been advised of no such changes by either the Region or Chapter, and the memo made no mention of either the replacement or elimination of the retiree benefits encompassed by the Region and Chapter CBAs. Rhines thus concluded that the announced changes had no impact on bargaining unit employees, as was the case with the majority of Cross Net memos sent out through Red Cross' intranet system. (T-586-588).

Thereafter, however, as a result of concerns expressed by Region bargaining unit employees who had received the communication concerning the announced changes, Rhines, by email on February 10, 2009 asked Region management whether the announced changes had been implemented for bargaining unit employees. (T-589-594; GC 59). Rhines also requested a copy of the Fact Sheet and FAQ sent to employees by the National, as well as information explaining how the existing Regional supplement had interacted with the National retiree health insurance plan. (GC 59, 60). The Fact Sheet provided by Respondent stated, *inter alia*, that ***"Employees who are in a collective bargaining unit should consult with their collective bargaining representative because the information in this communication may not apply to them".*** (GC 60, p.2). Likewise, the FAQ, sent out by the National in March 2009, specifically provided that:

> Employees who are in a collective bargaining unit ***are subject to the terms of their collective bargaining agreement.*** Bargaining unit employees should consult with their human resources representative or collective bargaining representative for specific information on how these changes affect their individual situations. (GC 60). (Emphasis added).

Subsequent to the receipt of the above information, what followed was the passage of almost one year's time during which Rhines continued to periodically inquire as to whether, or to what extent, the nationally announced changes applied to bargaining unit employees, and management continued to be unable to provide an answer. Finally, in a phone conversation on

February 16, 2010, Smelser advised Rhines that the changes announced in October 2008 had been implemented for bargaining unit employees on January 1, and July 1, 2009, and that such changes completely eliminated the above-described Medicare supplements set forth in the parties' CBAs. (GC 66, T-477, 594). There is no dispute that, prior to this time, there was never any communication from either the Region or Chapter to OPEIU that it had replaced the contractual supplement with the National Plan for retirement eligible employees. Shockingly, Chapter COO Cindy Richmond admitted at trial that until 6 months prior thereto, which was approximately March 2010, she was completely unaware that these changes had been implemented for employees of the Chapter. (T-1259-1260, 1261). It is also undisputed that there was no notice provided to the Union that such changes would apply to bargaining unit employees. Finally, it is undisputed that the announced January 1, 2009 changes occurred during the term of all three CBAs and that the July 1, 2009 changes were implemented post-expiration.

2. Legal Argument

a. General Legal Principals Applicable to The Implemented Changes.

It is well-established that unilateral action by an employer affecting a mandatory subject of bargaining amounts to a *per se* refusal to bargain, and necessarily violates Section 8(a)(5) of the Act. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1998)("An employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment"). Retirement and health insurance benefits are mandatory subjects of bargaining. *Castle Hill Health Care Center*, 355 NLRB No. 196, slip op. at 35 (9/28/10), citing *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971).

Subject to very limited exceptions, an employer must provide a union with advance notice of an intended change, and an opportunity to bargain over same prior to implementation of the change. *Bohemian Club*, 351 NLRB 1065, 1066 (2007); *Tri-Tech Services*, 340 NLRB 894, 895 (2003). In general, a union that has prior notice of a proposed change and an opportunity to engage in meaningful bargaining prior to the employer's implementation of such change, yet fails to demand bargaining, may be deemed to have waived the right to bargain over the change. As stated by the Board in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991):

> When negotiations are not in progress, we can find a waiver of a union's statutory right to bargain over a change in the unit employees' terms and conditions of employment on the basis of the union's failure to request bargaining ***if the union had clear and unequivocal notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining.*** (emphasis added).

There are, however, well settled exceptions both to the employer's ability to effectuate such changes, even if notice and an opportunity to bargain are provided, and to the union's duty to demand bargaining.

First, during the term of a collective bargaining agreement, an employer may not change a term of the CBA without either the express agreement of the union, or an express waiver by the union of the right to bargain over the proposed change, either through the terms of the CBA, or by other explicit agreement *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Atwood & Morrill Co., Inc.*, 289 NLRB 794, 798 (1988)("Section 8(d) of the Act clearly provides that neither party to a collective-bargaining agreement is required 'to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract"). Absent explicit agreement or waiver by the union, the Board and the Courts have clearly and consistently found an employer's mid-term modification of a fixed-term contract to

be unlawful. *La Porte Transit Company, Inc.*, 286 NLRB 132, 136 (1987), citing, *Oak Cliff-Golman Baking Company*, 207 NLRB 1063, 1064 (1973), enf'd, 505 F.2d 1302 (5th Cir.1974) cert. denied 423 U.S. 826 (1975).

Next, once the CBA expires, and during the time the parties are negotiating for a successor agreement, it is well-settled that an employer may not implement changes to terms and conditions of employment which are subject to the negotiations, unless the parties have reached an overall impasse in negotiations. *NLRB v. Katz*, 369 U.S. at 743. In that regard, as the Board held in *E.I. DuPont de Nemours and Company*, 355 NLRB No. 176, slip op. at 1 (8/27/10):

> It is settled law that when parties are engaged in negotiations for a collective-bargaining agreement an employer is obliged to refrain from making unilateral changes, absent an impasse in bargaining for the agreement as a whole. See, e.g., *Register-Guard*, 339 NLRB 353, 354 (2003); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). As the Supreme Court has recognized, "[I]t is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991).

See also, *Lawrence Livermore National Security LLC*, 357 NLRB No. 23, slip op. at 3-4 (Jul. 28, 2011); *Castle Hill Health Care, Inc.*, 355 NLRB No. 196, slip op. at 34 (9/28/10)("While. . . negotiations are ongoing, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.') citing, *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf'd. 15 F.3d 1087 (9th Cir. 1994).

Likewise, when changes are announced or proposed during a period when the parties are engaged in bargaining for an overall contract, the union is not required to demand bargaining over each individual proposed change to terms over which the parties are bargaining. The demand to bargain is presumed, and a union's failure to make a demand over individual changes

of which it has received notice will not be deemed a waiver of the right to bargain. *Naperville Ready Mix, Inc., et al.*, 329 NLRB 174, 182 (1999)(Union did not waive its right to bargain by failing to demand bargaining over proposed layoffs, as parties were involved in overall contract negotiations); *Pleasantview Nursing Home, Inc.*, 351 F.3d 747, 757 (6th Cir. 2003)(During negotiations, "a party need not respond to every [announced change] with a forceful rejection and insistence on further bargaining; further bargaining is assumed and a waiver of the issue will not be presumed unless it is clear and unmistakable").

Lastly, a union's failure to demand bargaining over an announced change will not be deemed a waiver of the right to bargain, where the change is announced as a *fait accompli* by the employer. *Berkshire Nursing Home, LLC*, 345 NLRB 220, 226 (2005). As to whether an announced change constitutes a *fait accompli*, the Board has held as follows:

> A union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*, and an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals. Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated. Thus, where notice is given shortly prior to implementation of the charge because of a lack of intent to alter its position, then the notice is merely informational about a fait accompli and fails to satisfy the requirements of the Act.

Pontiac Osteopathic Hospital, 336 NLRB 1021 (2001). *Smurfit-Stone Container Corp.*, 344 NLRB 658, 669 (2005)(Union does not waive its right to bargain when the change has essentially been made irrevocable prior to the notice or has otherwise been announced as a matter on which the employer will not bargain.) (citations omitted). *Crittendon Hospital*, 343 NLRB 717, 738 (2004)(No waiver where at time of notice employer had no intention of changing its mind, the notice was nothing more than a *fait accompli*).

b. **Pension and 401(k) Changes**

With respect to the May 1, 2009 suspension to the 401(k) match and the July 1, 2009 changes to the defined benefit pension (retirement system), it is undisputed that the announcement of such changes, as well as the changes themselves, occurred while the parties were negotiating for a successor agreement. It is further undisputed that, prior to its April 2, 2009 announcement to employees, Red Cross never advised the Union of its intent to effectuate such changes. It is further undisputed that the parties were not at an impasse in overall contract negotiations, and that the announced changes were implemented on the dates set forth in CEO McGovern's April 2, 2009 emails. Therefore, in accordance with the legal principals outlined above, unless Respondents can present any valid legal defense to these implementations, they must be found to have violated Section 8(a)(5) of the Act.

Respondents argue that OPEIU waived its right to bargain by never making a specific demand to bargain over these announced changes. That defense has no merit. First of all, because the parties were already engaged in overall contract negotiations, OPEIU had no obligation to specifically demand bargaining over the announced 401(k) and pension changes since these subjects were already encompassed by the negotiations, and the Union's demand to bargain was, therefore, presumed. *Naperville Ready Mix, Inc.,et al.*, 329 NLRB at 182; *Pleasantview Nursing Home, Inc.*, 351 F.3d at 757.

Secondly, Red Cross bypassed OPEIU, while directly and unilaterally announcing to employees the suspension of its matching contribution to its 401(k) savings plan and the termination of its defined benefit pension plan for employees hired on and after July 1, 2009. The language of CEO McGovern's April 2 announcement, coupled with the testimony of Anna Shearer that the changes had already been approved by the Board, makes clear that Respondent

had no intention of bargaining with the Union, nor did it have any intention of changing its mind concerning these changes.

In *Pontiac Osteopathic Hospital*, 336 NLRB at 1023-1024, the Board affirmed the ALJ's finding that the employer announced changes to wage and benefit changes as a *fait accompli.* There, the notice to the employees issued on December 8, 1999, stated that "it is the intention of [the employer] to implement several wage and benefit revisions. . .the effective date of these planned revisions is January 2, 2000." *Id.* The ALJ determined that because the notice "did nothing more than inform the union about a decision that it had already implemented", it was tantamount to a *fait accompli* over which the union was not required to demand bargaining. Likewise, in *Berkshire Nursing Home*, 345 NLRB at 226, the Board affirmed the ALJ's finding that the employer's notice of changes was a *fait accompli*, where the announced changes were directed to the employees, not the union, and notified the employees of the precise dates the changes would be implemented, without first affording the union an opportunity to bargain. *Id.* The facts of the instant case, like those above, warrant a determination that both the pension and 401(k) changes were presented as a *fait accompli* and, therefore, no waiver by OPEIU can be found.

In a transparent and feeble attempt at distraction, Respondents' allege the existence of a "practice" of implementing certain changes in the absence of opposition by the Union sufficient to establish a "past practice" which Respondents claim they merely continued by making the respective May 1 and July 1 changes to 401 (k) and pension benefits, and, by which they were thereby relieved of the duty to bargain with OPEIU over such changes. That argument, likewise, is completely lacking in merit.

In a very recent case virtually identical to the instant factual situation, the Board found no independent "past practice" could be established by the employer where all prior changes had

been implemented during periods when CBAs were in effect which authorized such unilateral action. In *E.I DuPont de Nemours and Company*, 355 NLRB No. 177, slip op. at 1 (8/27/10), the Board held:

> The Respondent relied upon the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004). In those cases, the Board found that the employer's unilateral changes to employees' health care premiums during a hiatus between contracts were lawful because the employer demonstrated a past practice of making such changes both when the contract was in effect and during hiatus periods. As the judge explained, however, the Respondent's asserted practice in the instant case was limited to changes made at times when the parties' contract and management-rights provision, which authorized the changes, were in effect. As a result, the judge properly found that the *Courier-Journal* cases were inapposite. Here, because Respondent's prior changes do not establish a past practice of changed implemented during a hiatus, the unilateral changes at issue violated the Act.

Here, Respondents have not established a past practice of making such changes sufficient to relieve them of the duty to bargain to an overall impasse in negotiations. First of all, here, as in *E.I DuPont de Nemours and Company*, there is no evidence of any changes to either the retirement (pension) or 401(k) plans having been implemented during periods of contractual hiatus, indeed there is no evidence of any hiatus whatsoever between CBAs going back to least the year 2000. In a desperate effort to distinguish *E.I DuPont*, Respondents claim that their asserted history of changes was not "premised" on the contractual waiver provisions but rather on an independent "past practice". That argument is ridiculous. The contractual waiver provisions and Respondents' changes to the plans are inextricably intertwined. Not one iota of evidence was presented by Respondents to support the conclusion that absent the existence of the contractual waiver provisions, the Union would not have objected to the unilateral changes made.[17] Indeed, if Respondents' actions were not taken pursuant to the contractual waiver

[17] Indeed, under cross-examination, Respondent witness Shearer admitted that the Union was not even notified by Red Cross of the vast majority of the administrative, or statutory compliance-related changes made to the retirement system plan and 401(k) plan, which further militates against a finding that the Union voluntarily acquiesced to such changes so as to create a "past practice" of unchallenged changes by Respondents to such plans. (T-1762-1839).

provisions, it begs the question why they continued to rigidly insist on the inclusion of these provisions in each and every successive CBA, and made proposals for even broader waivers during the instant negotiations for successor contracts.

Even assuming, *arguendo,* that the contractual waiver provisions are "irrelevant" as Respondents suggest, the evidence of past "changes" introduced by Respondents is wholly insufficient to support the conclusion that the suspension of the 401(k) match, and the total and complete elimination of the defined benefit pension plan, were changes "consistent" with an established past practice.

In a nutshell, the voluminous documents and testimony of Anna Shearer introduced by Respondents unequivocally established the following:

1) With regard to the 401(k) plan, since its introduction in 2000, Respondents have implemented only one change which affected the benefits received by employees, which was an increase in the match from $.50 to $1.00 for every dollar contributed by the employee. For the Region employees, that increase was specifically mandated by the terms of the CBA. All other changes were purely administrative, or a result of changes in IRS guidelines or mandated ERISA regulations; did not impact the level of benefit to the participating employee; and notice of same was not even transmitted to the Union when the changes were made.

2) With respect to the retirement system (pension plan), there was likewise only one substantive change to benefits enjoyed by employees since 2000 which also occurred in 2005.[18]

(R 57-83, T-1297-1477, 1762-1839). A single set of substantive changes occurring simultaneously on one occasion over the course of the instant lengthy bargaining relationship is wholly insufficient to establish a past practice of acquiescence or acceptance by the union of such changes.

[18] Moreover, both the 2005 increase to the 401(k) match and the change to the pension benefit were implemented following discussion and agreement between Respondent representative Bill Wittington and OPEIU representative Lance Rhines.

Even more significantly however, the record is devoid of a single instance in which the 401(k) matching contribution had ever previously been either suspended, reduced, or eliminated by Respondents. Likewise, the record is devoid of any evidence that the defined benefit pension plan had ever been totally eliminated for any group of employees. Indeed, all of the implemented "changes" regurgitated in excruciating detail in Respondents' brief, constituted ***improvements*** to the two benefit plans, and the vast majority were implemented solely due to compliance requirements resulting from a change in the tax code or other applicable statutes such as the Pension Protection Act, or were purely administrative in nature. There was absolutely no evidence presented by Respondents of a "past practice" of reducing or eliminating either the 401(k) benefit or the pension benefit.

A past practice of making improvements or administrative changes to employee benefits does not privilege the unilateral reduction or elimination of those same benefits. Simply put, the evidence must establish that the changes made as part of the "past practice" are of the same nature as the changes at issue. An employer who has a past practice of granting annual wage increases must continue that practice, but that same employer cannot unilaterally implement a wage reduction under the guise of a "past practice" of making "changes" to wage rates. *Palm Beach Metro Transportation, LLC,* 357 NLRB No. 26, slip op. at 1 (Jul. 26, 2011)(Board held that past practice of reducing days and hours of work not established where past reductions were not of a comparable amount of days and hours); *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 2-3 (Aug. 17, 2010)(past changes to prescription drug plan did not establish "past practice" sufficient to allow unilateral implementation of a "generic first" program where prior changes were not similar in nature to the change at issue, even though each change altered the prescription drug plan). It is Respondents' burden of proof to demonstrate a past practice, and that burden requires Respondents to establish that the practice occurred "with such regularity and

frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Id.* Here, Respondents have demonstrated no practice whatsoever of eliminating the 401(k) match and/or defined benefit pension plan, let alone one occurring with such "regularity and frequency" that employees would expect such practice to continue.

Indeed, in direct conflict with Respondents' assertions, the only "past practices" which existed in this case were (1) the maintenance of a minimum $.50 matching contribution on the 401(k) benefit, and; (2) the maintenance of a defined benefit pension plan. Respondents' unilateral elimination of both of these established "past practices" ran afoul of well-settled legal precedent.

Lastly, Respondents argue that even if such past actions were taken pursuant to the contractual waiver provisions under the expired CBAs, rather than pursuant to "past practice", the parties nevertheless "intended the provisions to survive contract expiration". That argument lacks any basis whatsoever in the record evidence and is contrary to extant law.

Under well-settled Board precedent, provisions allowing an employer to exercise unilateral action with regard to a term or condition of employment, expire with the expiration of the CBAs, and therefore, cannot be relied upon by an employer post-expiration to relieve it of the duty to bargain over such changes.[19] For example, in *Ironton Publications, Inc.*, 321 NLRB 1048 (1996), the Board held:

> It is well settled that the waiver of a union's right to bargain does not outlive the contract that contains it, absent some evidence of the parties' intentions to the

[19] OPEIU maintains that, in any event, the provisions of Article 31 in all three CBAs do not constitute a clear and unmistakable waiver sufficient to have allowed Respondents to effectuate the instant "changes" to the 401(k) match or pension plan. Specifically, all three CBAs are devoid of any language allowing Respondents to completely eliminate the matching 401(k) contribution, or to completely eliminate pension plan benefits under the retirement system for some or all employees. Moreover, the Collections and LCD CBAs specifically provide for participation in a 401(k) which provides for a $.50 match for every dollar contributed. Thus Respondents cannot establish that OPEIU "clearly and unmistakably" waived its right under the language of the CBAs to bargain over these changes. See, *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007); *Kingsbury, Inc.*, 355 NLRB No. 195 (9/29/10).

> contrary. Citing, *Buck Creek Coal*, 310 NLRB 1240, fn. 1 (1993); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992).

See also, *Kingsbury, Inc.*, 355 NLRB No. 195 (9/29/10); *Long Island Head Start Child Development Services*, 345 NLRB 973 (2005), vacated on other grounds, 460 F.3d 254 (2nd Cir. 2006); *Blue Circle Cement Co.*, 319 NLRB 954, 954(1995). Contrary to Respondents' assertion, there was absolutely no evidence presented at the hearing to support a conclusion that the parties' intended such "waivers" to survive the expiration of the CBAs. Notably, the only "evidence" offered by Respondents in that regard was Rhines' testimony that the plans were "national" plans, with summary plan descriptions separate from the CBA, facts which were true both prior to, and following contract expiration, and have no bearing whatsoever on the parties' intent. Neither the plan document nor the summary plan description are referred to anywhere in the CBAs, nor is there any contractual provision, testimony, or other evidence adduced at trial suggesting that the parties even discussed, let alone agreed, that the operative provisions would survive contract expiration.

The undisputed facts do not support Respondents' argument that the drastic reduction in 401(k) and pension benefits were made in accordance with an established past practice. Accordingly, the ALJ correctly found that Respondents' unilateral changes to the 401(k) plan and retirement system (pension plan), violated Section 8(a)(5) of the Act.

c. <u>Health Insurance Changes</u>

It is undisputed that as of January 1, 2010, the BC/BC plans offered through Benefits Advantage were a term of employment for bargaining unit employees represented by OPEIU, and a mandatory subject of bargaining. These plans had first been rolled out effective January 1, 2008, and had been available to employees for at least the prior two benefit years. There is further no dispute that on January 1, 2010, Respondents Region and Chapter implemented far

reaching changes to the BC/BS Benefits Advantage plans, as outlined above. There is likewise no dispute that at the time such changes were implemented, the parties were in overall negotiations for a successor agreement. Lastly, there is no dispute that the parties had not reached an overall impasse in negotiations. Therefore, unless Respondents can establish legally recognized circumstances under which such implementations were lawful as an exception to the general legal principals set forth above, their conduct quite clearly constituted an unlawful unilateral change in violation of Section 8(a)(5).

OPEIU made several proposals on health care coverage, including a proposal that Respondents simply give the Union the same monthly amounts they were willing to pay for insurance under its proposed January 1, 2010 plan design, and the employees, with the Union's assistance, would independently obtain their own insurance. (T-1612). Rhines testified the Union continued to have movement in that area. Prior to the trial, Respondents had never claimed to OPEIU that the parties were at impasse over changes to the National EPO/PPO plans. All of these facts militate against the finding of an impasse. However, the most compelling evidence against the existence of an impasse, is the fact that Respondents ***never bargained at all*** with the Union over the changes implemented on January 1, 2010.

It is undisputed that the only health insurance proposal ever made by Respondents was a "me-too" proposal providing that, for the life of the CBA, the bargaining unit employees would be entitled to the same health insurance benefits provided to other employees of the American National Red Cross. Respondents never made a proposal to the Union which was limited to the January 1, 2010 proposed plan design changes for the EPO/PPO. Thus, the only proposal offered to OPEIU was one in which the Union was compelled to accept the "me-too" language for the life of the CBA. It is axiomatic that an impasse cannot occur absent bargaining over the subject at issue. There was no impasse reached on the January 1, 2010 changes, because

Respondent never bargained with OPEIU over those changes. Any assertion by Respondent that by providing the Union with information showing what the January 1, 2010 changes would be it was essentially "bargaining" over such changes is preposterous. Respondents, who were represented in bargaining by Sabin Peterson, a labor attorney of many years experience, were quite careful not to characterize the information provided to the Union as "proposal". (GC 51). Surely, if such information was intended as a proposal, Peterson, as an experienced negotiator, would have labeled it as such. Indeed, Peterson admitted under cross-examination, that the Union's acceptance of the January 1, 2010 plan design changes would have achieved all of Respondents' stated goals for the 2010 year, but, despite that fact, he did not make such a proposal. (T-1721-1724). Lastly, Peterson also admitted he did not have the authority to bargain over the January 1, 2010 plan design changes, a fact confirmed by Shearer. (T-1471, 1726).

Respondents argue they were privileged to implement the January 1, 2010 health insurance changes as a "discreet, recurring event", despite the lack of an overall bargaining impasse.[20] In that regard, the Board has held that if an employer can establish that a proposed change to a term of employment involves a discreet event over which the employer had unilaterally effectuated changes on an annual or regular basis so as to establish a past practice, the employer is obligated only to give the union notice of the proposed change and an opportunity to discuss same. If the parties cannot reach agreement, the employer may implement the change, subject to any future agreements made as part of an overall contract. *Stone Container Corp.*, 313 NLRB 336 (1993); *TXU Electric Co.*, 343 NLRB 1404 (2004). However, even if the change involves a discreet event over which changes had been effectuated on a regular basis, if the change is announced as a *fait accompli*, the employer is prohibited from

[20] Respondents have apparently abandoned the argument that "exigent circumstances" privileged their unilateral changes under the Board's decision in *Bottom Line Enterprises*, 302 NLRB 373, 374, n.10 (1991), enf'd 15 F.3d 1087 (9th Cir. 1994) and *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), which argument was fully addressed in OPEIU's Brief to the Administrative Law Judge.

implementing the change, under the rationale that the union was never given any real opportunity to meet and discuss the issue with the employer. *Brannan Sand and Gravel Company*, 314 NLRB 282 (1994).

The January 1, 2010 changes to health insurance benefits do not fall within the *Stone Container* exception. The record does not support a finding that Respondents had effectuated changes to health insurance on a regular basis in the past, beyond those changes to monthly premium co-pays for local plans as specifically allowed for in the CBAs. Specifically, with respect to the Benefits Advantage EPO/PPOs, it is undisputed that the National plans had been offered to the Region and Chapter employees only since 2008, and that very few changes were made in 2009, with the exception of one or two minor co-pay increases to specific services. Respondent certainly presented no evidence of either the complete elimination of an existing plan, or sweeping plan design changes and significant increases in out-of-pocket costs to employees having occurred on a regular basis. Likewise, Respondent presented no evidence of monthly premium co-pays being unilaterally increased on a regular basis as occurred here with the EPO plan. Although open enrollment occurred each year, changes to local health insurance had occurred only after review and negotiation with the Union.

Furthermore, the January 1, 2010 changes were announced as a *fait accompli*, and Respondent was therefore prohibited from invoking the *Stone Container* exception to implementation of such changes. In that regard, CEO McGovern bypassed the Union and announced to employees on April 2, that "plan design changes focused on cost containment" would be forthcoming "in the months ahead". (GC 61). Shearer admitted that the Employer had made the decision to implement such changes before the information describing the proposed changes was even provided to the Union. (T- 1467). Within a matter of just a few days after the information listing the January 1, 2010 changes had been provided to the Union, and before the

parties could meet to "discuss" the issue, Respondent announced its intent to implement the changes to all employees. (GC 9). The announcement advised employees that all of the changes "will" be implemented, for example, "The Standard and Premier PPO options *will* be consolidated"; "There *will* be additional out-of-pocket costs to employees through increased deductibles, co-pays and co-insurance". (GC 9). Indeed, the only increases not ultimately implemented, were the monthly premium co-pay increases. All of the remaining increases to annual deductibles and co-pays for specific services were increased as announced.

The above facts, coupled with Respondents' refusal to discuss and bargain over the actual January 1, 2010 plan design, warrant the conclusion that these changes were indeed presented as a *fait accompli*, and accordingly, that Respondent could not implement them in the absence of an overall impasse, even if they met the *Stone Container* exception. Accordingly, the ALJ correctly found that, by implementing the January 1, 2010 changes to the Benefits Advantage health insurance plans, Respondents violated Section 8(a)(5).

d. <u>Retiree Health Insurance Changes for Future Retirees</u>

Respondents admit they implemented the change eliminating retiree health benefits for non-retirement eligible future retirees on January 1, 2009. It is undisputed that as of that date, neither the Region nor Chapter CBAs had expired. Therefore, Respondents could not effectuate any unilateral changes to terms embodied in the CBAs absent OPEIU's explicit consent, or its "clear and unmistakable waiver" of the right to bargain over such changes. Whether or not OPEIU demanded bargaining over such change is irrelevant, since it was not obligated to bargain over an announced mid-term contract modification.

The Board has consistently required that in order for a waiver to be found, the waiver must be "clear and unmistakable". This guiding and steadfast principal was recently reconfirmed

by the Board in *Provena St. Joseph Medical Center*, 350 NRLB 808, 811 (2007), in which it stated:

> The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.

See also, *Kingsbury, Inc.*, 355 NLRB No. 195, slip op. at 5, fn. 6 (9/29/10)("Proof of a contractual waiver is an affirmative defense "which must meet a high standard" and it is the Respondent's burden to show that a contractual waiver is "explicitly stated, clear and unmistakable")(citations omitted); *Verizon N., Inc.*, 352 NLRB 1022 (2008)(finding no clear and unmistakable waiver allowing employer's unilateral changes to use of paid vacation and leave to preserve FMLA leave).

Here, the contractual language did not constitute a clear an unmistakable waiver of OPEIU's right to bargain over the complete elimination of retiree health benefits for current and future employees not eligible for retirement as of January 1, 2009. To the contrary, the contractual language allowed only that, if Respondents begin participating in a retiree health plan sponsored by the National, then Respondents could choose to "substitute" the coverage under the National Plan for the coverage under the local CBAs.

First, there is no evidence that Respondents ever "began participating" in the retiree health plan sponsored by the National. In the absence of such participation, there could be no "substitution" of the benefits identified in the CBA with those under the National plan. Next, and even more critically, there is no language granting Respondents the authority and discretion to unilaterally <u>*terminate*</u> retiree health benefits for an entire class of employees, as they did here. The only discretion embodied by the CBA was the right of "substitution" of benefits. The term "substitution" clearly contemplates the replacement of a benefit under one plan with a like

+benefit under another plan. The only thing the Union clearly and unmistakably waived was the right to bargain over the substitution of the locally provided Medicare subsidies with comparable subsidies under the National plan. Here, there was no "substitution" of retiree health benefits for non-retirement eligible employees, and those employees hired after January 1, 2009. Rather, the benefit was completely and totally extinguished. The Union cannot be found to have clearly and unmistakably waived its right to bargain over the total elimination of retiree health benefits for any category of current employees when the CBA specifically provides for such benefits.

With respect to the changes implemented on July 1, 2009 for retirement-eligible employees, as noted above, the changes were implemented post-expiration of all three CBAs. It is undisputed that Respondents never bargained such changes with the Union, and that the parties were not at an overall impasse.[21] Since the CBAs were expired, any unilateral right of substitution, or waiver of the Union's right to bargain over such changes expired with the CBAs themselves. *Ironton Publications, Inc.*, 321 NLRB 1048 (1996). In addition, Respondents here, as with the pension, 401(k), and health insurance changes, likewise announced the changes to retiree health benefits as a *fait accompli.* Therefore, unless Respondents have a legally valid defense to such allegations, the July 1, 2009 implementations violated Section 8(a)(5) of the Act.

Moreover, the changes which were implemented on July 1, 2009 are themselves "waivers" which Respondents could not unilaterally implement without the Union's consent. *McClatchy Newspapers, Inc.v. NLRB*, 131 F.3d 1026, 1034 (DC Cir. 1997); *California Offset Printers, Inc.*, 349 NLRB at 736. In that regard, the implemented retiree health plan provides only that retirement-eligible employees shall be "eligible for the Retiree Medical Program in effect at the time of their retirement", without specifying what the "program" option will or may be, and thus giving Red Cross the ability to make such determinations. (GC 60, p.2). In addition,

[21] Respondents do not assert the continuation of a "past practice" of implementing such changes.

the implemented language as set forth in the Fact Sheet provides that "The American Red Cross reserves the right to change or terminate the Retiree Medical Program. . .to change the eligibility of classes of retirees to be covered by the Retiree Medical Program. . .to change or terminate any Retiree Medical Program. . .term or condition, and to terminate the entire Retiree Medical Program. . .or any parts of them at any time and for any reason." (GC 60, p.2). These types of waivers could not be implemented, and accordingly, the July 1, 2009 implemented changes are *per se* unlawful.[22]

Respondents assert two defenses: First, that the Union waived its right to demand bargaining over the changes to retiree health benefits by the delay in raising such issues, and; Second, that the charges on such matters are barred by Section 10(b) of the Act.

The claim of a "waiver" by the Union of its right to bargain is ridiculous. First as to the January 1, 2009 changes, there was no duty to demand bargaining, since such changes were effected during the term of the CBAs. As to the July 1, 2009 changes, they were announced as a *fait accompli*, thus likewise relieving the Union of the duty to demand bargaining.

Even assuming, *arguendo*, that the changes were not announced as a *fait accompli*, there was not an iota of evidence offered by Respondents to establish that the Union was clearly put on notice of Respondents' intent to make the changes announced in October 2008 applicable to bargaining unit employees. Likewise, there was no evidence presented to suggest that Rhines was made aware that the Medicare supplement benefits negotiated solely as local benefits to the Region and Chapter employees would be extinguished by virtue of the October 2008 announced changes. Any reasonable person reading either the October 2008 announcement or subsequent

[22] Again, although not specifically alleged as an implementation of waiver, this finding would be based on existing "closely related" allegations, and thus appropriate as a matter of law.

Fact Sheet and FAQ would have concluded, as Rhines did, that the changes did not apply to bargaining unit members.

However, the real "nail in the coffin" to this purported defense, is that ***for over one year, not a single HR representative at the Region could tell Rhines whether or not the changes applied to Region employees.*** Likewise, and perhaps even more astounding, the COO of the Chapter, Cindy Richmond, was unaware that the changes applied to Chapter employees ***until 6 months prior to the trial in this matter***, which was even later than Rhines became aware of that fact. Any suggestion that Rhines waived the Union's right to bargain by not jumping through hoops directly with Chapter management, as he had with Region management is, likewise, ridiculous. The admitted fact is that Chapter management ***had no idea the changes had been implemented.*** Thus, even if Rhines would have made the inquiry, what were they to tell him? The evidence unequivocally establishes that Richmond would have advised Rhines that the changes did not apply to bargaining unit employees.

It is the duty of the employer to notify the union of proposed changes, it is not the unions' duty to play a guessing game and jump through hoops every time something is suggested that "might" constitute a change in terms or conditions of employment. *Comar, Inc.*, 349 NLRB 342, 359 fn. 34 (2007)(No waiver where respondent did not show that the union official heard testimony about any of the specific changes that are at-issue here, or that whatever the official heard was specific or reliable enough to constitute meaningful notice). As the Board found in *San Juan Teachers Association*, 355 NLRB No. 28, slip op. at 5 (4/30/10):

> The NLRB does not require a labor organization to demand negotiations every time an employer mentions potential, future changes in order to avoid the risk of waiving its right to bargain under the *Katz* doctrine. More than general statements about changes that might be necessary are required. ***An inchoate and imprecise announcement. . .is insufficient to trigger an obligation to bargain.*** *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961 (1994), enf. denied on other grounds, 79 F.3d 1030 (10th Cir. 1996). (emphasis added).

Accordingly any such "waiver by inaction" defense is wholly unsupported by the evidence and must be rejected.

Respondents' statute of limitations defense under Section 10(b) of the Act should likewise be rejected for essentially the same reasons as the "waiver by inaction" defense. It is well settled that the burden of proving a 10(b) defense rests on the party asserting it. *Nursing Center of Vineland*, 318 NLRB 337, 339 (1995); *St. George Warehouse, Inc.*, 341 NLRB 904, 905 (2004)(Burden not met where employer failed to establish that union knew of the unilateral change within the 10(b) period after it was effected); *Paul Mueller Co.*, 337 NLRB 764, 765 (2002)("Respondent had the burden of showing that the Union knew or should have known [about the unilateral change] prior to the 10(b) period".)

In *Clear Channel Outdoor, Inc.*, 346 NLRB 696 (2006), as in the instant case, the Board found the employer was estopped from arguing that the union knew of the unilateral change prior to the start of the 10(b) period because the employer officials admitted they did not know whether respondent intended to effect the change. In *Dutchess Overhead Doors, Inc.*, 337 NLRB 162, 166 (2001), the Board affirmed the ALJ, who held:

> [The] Respondent would have to show, at the very least, either that the Union knew, more than six months before filing its charge [of the alleged unlawful conduct], or that in the exercise of reasonable diligence the Union should have known this more than 6 months before filing the charge.

Citing, *SAS Electrical Services, Inc.*, 323 NLRB 1239, 1253 (1997). See also, *Concourse Nursing* Home, 328 NLRB 692, 694 (1994), citing *A&L* Underground, 302 NLRB 467, 469 (1991)(Section 10(b) does not bar a charge where the employer has sent conflicting signals or engaged in ambiguous conduct).

It is clear from the facts outlined above, that Respondents cannot meet their requisite burden to establish a 10(b) defense. Clearly, neither Region nor Chapter management knew

within the 10(b) period that the changes to retiree medical benefits had been implemented for bargaining unit employees, so there is no basis upon which either Region or Chapter can argue that the Union should have known. The ambiguity of the communications to employees only further cements this point, as it clearly did not put the Union on notice that such changes had been implemented for bargaining unit employees in place of their locally negotiated retiree health insurance supplements.

Further, any argument that Rhines did not exercise "reasonable diligence" with respect to the Chapter is likewise meritless. In order for the "lack of reasonable diligence" defense to succeed, Respondents must establish that through the exercise of such reasonable diligence, the Union ***would have known*** that the change had been implemented. Here, again, any exercise of diligence by Rhines would have resulted in Chapter management telling him either that the change had not been implemented, or they did not know whether the change had been implemented. There is simply no other conclusion that can be drawn, since Chapter COO Richmond readily admitted that she had no idea the change had been implemented until six months prior to the September 29, 2009 trial. There is no support for an assertion that a union must exercise reasonable diligence where such exercise would not have resulted in knowledge of the action complained of. It is not the Union's job to notify management of the need to determine whether a change to terms of employment had been made. Respondents' 10(b) defense must be rejected. Accordingly, the ALJ correctly concluded that Respondents' January 1 and July 1, 2009 unilateral changes to retiree health care benefits for future retirees violated Section 8(a)(5) of the Act.

V. CONCLUSION

For all of the foregoing reasons, Charging Party OPEIU requests that the Board deny Respondents' Exceptions, affirm the ALJ's Decision as to such matters, find that Respondents ANRC Chapter and ANRC Region violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act as alleged in the Complaint, and order the appropriate remedial relief as requested.

Respectfully submitted this 4th day of August 2011.

s/ Tinamarie Pappas .

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CERTIFICATE OF SERVICE

TINAMARIE PAPPAS states that on August 4, 2011, she e-filed Answering Brief of OPEIU Local 459 to Exceptions by Respondents ANRC-Region and ANRC-Chapter to the Decision and Order of the Administrative Law Judge, through the Board's e-filing system, and served all counsel of record via electronic transmission, at the email addresses set forth below:

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The above statements are true and correct to the best of my information, knowledge and belief.

s/ Tinamarie Pappas .