

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE AMERICAN NATIONAL RED CROSS, GREAT LAKES BLOOD SERVICES REGION and MID-MICHIGAN CHAPTER Respondent ANRC - Region Respondent ANRC - Chapter	CASES 7-CA-52033 7-CA-52288 7-CA-52544 7-CA-52811 7-CA-53018
and	
LOCAL 459, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO Charging Union OPEIU	
and	
LOCAL 580, INTERNATIONAL BROTHERHOOD OF TEAMSTERS Charging Union Teamsters	CASES 7-CA-52282 7-CA-52308 7-CA-52487
Date of Mailing: August 4, 2011	

**CERTIFICATE OF SERVICE OF: COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, certify that on the date indicated above I caused the above-entitled document to be served by Electronic Mail, addressed to the following persons at the following addresses:

VIA EMAIL

Wayne A. Rudell, Esq.
Rudell & O'Neill, PC
22720 Michigan Ave., Suite 300
Dearborn, MI 48124-2730
waynearudellplc@yahoo.com

Michael J. Westcott, Esq.
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, WI 53703
MWestcott@axley.com

Frederick W. Batten, Esq.
Clark Hill, PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
fbatten@clarkhill.com

Tinamarie Pappas, Esq.
Law Office of Tinamarie Pappas
4661 Pontiac Trail
Ann Arbor, MI 48105
pappaslawoffice@comcast.net

William A. Moore, Esq.
Clark Hill, PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226
wmoore@clarkhill.com

DESIGNATED AGENT – NATIONAL LABOR RELATIONS BOARD

/s/ Dynn Nick

Dynn Nick

Dated: 8/4/11

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Charging Union Teamsters

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING
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THE ADMINISTRATIVE LAW JUDGE**

Dynn Nick
Robert A. Drzyzga
Counsels for the Acting General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226-2569

August 4, 2011

TABLE OF CONTENTS

Table of Authorities	i.
INTRODUCTION	1
I. The ALJ did not err in finding that Respondent Region Unlawfully Refused to Provide Charging Union OPEIU with Information Requested on March 17 and 25, 2009. (Respondents' Exceptions 1-6.)	2
II. The ALJ Did Not Err in Finding that Respondent Region Violated 8(a)(5) of the Act by Failing to Include Names with the Demographic Information Provided to Charging Union Teamsters in November 2009 with respect to Healthcare Coverage. (Respondents' Exceptions 7-10.)	4
III. The ALJ Did Not Err in Finding that Respondent Region Unilaterally Implemented a No-Fault Attendance Policy in Violation of 8(a)(5) of the Act. (Respondents' Exceptions 11-15.)	7
IV. The ALJ Did Not Err in Finding that Respondent Region Violated 8(a)(5) of the Act by Unilaterally Changing its Past Practice Regarding Union Meetings Held At Respondents' Facility. (Respondents' Exceptions 16-19.)	10
V. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Changing OPEIU Represented Chapter Employees' Retiree Medical Program. (Respondents' Exceptions 20-31.)	12
VI. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Changing OPEIU Represented Employees' Pension Plan and 401(k) and Savings Plan (Respondents Exceptions 32-45.)	15
1. The ALJ Appropriately Relied on <i>E. I. DuPont De Nemours and Company</i> , 355 NLRB No. 177, slip op. at 1-2 (August 27, 2010), in finding that Respondents Were Not Privileged to Make Post-Contractual Changes to OPEIU Represented Employees' 401(k) Savings Plan and Pension Plan.	15

2.	Even Outside of <i>E.I. Dupont</i> , No Established Past Practice Existed With Respect to the 401(k) Plan and the Pension Plan.	18
3.	The ALJ Appropriately Found that OPEIU did not Waive Bargaining with respect to the Pension Plan and the 401(k) Plan.	22
VII.	The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Implementing a New Benefits Advantage Healthcare Program on January 1, 2010. (Respondents Exceptions 46-49.)	26
VIII.	The ALJ Did Not Err in Finding that Respondents Violated 8(a)(3) and 8(a)(5) of the Act by Denying Employees Pay Under Guaranteed Hours of Work or Pay During the Weeks of June 7 or 14, 2010. (Respondents Exceptions 50-52.)	32
IX.	The Record and the ALJ's Findings Support his Remedy, Order and Posting requirements. (Exceptions 53-56.)	34
	CONCLUSION	35

Table of Authorities

CASES	PAGE(S)
<i>A-1 Door and Building Solutions</i> , 356 NLRB No. 76 (2011)	3, 4
<i>Allied Signal, Inc.</i> , 330 NLRB 1216, 1228 (2000)	22
<i>Alonso & Carus Iron Works, Inc.</i> , 2011 WL 840796 (March 10, 2011 N.L.R.B. Div. of Judges)	22
<i>Associated Milk Producers, Inc.</i> , 300 NLRB 561, 563-564 (1990)	25-26
<i>Bath Ironworks Corp.</i> , 345 NLRB 499, 502 (2005)	15
<i>Bell Atlantic Corp.</i> , 336 NLRB 1076, 1086-88 (2001)	25
<i>Beverly Health and Rehabilitation Services, Inc.</i> , 297 F.3d 468, 481 (6 th Cir. 2002)	18,19
<i>Brannan Sand and Gravel Company</i> , 314 NLRB 282 (1994)	31, 32
<i>Brazos Electric Power Cooperative, Inc.</i> , 241 NLRB 1016, 1018-1019 (1979), enfd. 615 F.2d 1100 (5 th Cir. 1980)	6
<i>Ciba-Geigy Pharmaceuticals</i> , 264 NLRB 1013, 1016-1017 (1982); enfd. 722 F.2d 1120 (3d Cir. 1983)	10, 22, 23
<i>Contract Carriers Corp.</i> , 339 NLRB 851, 858 (2003)	6
<i>Deadline Express</i> , 313 NLRB 1244 (1994)	6
<i>Detroit Newspaper Agency</i> , 317 NLRB 1071, 1072 (1995)	4
<i>Dexter Fastener Technologies, Inc.</i> , 321 NLRB 612, 612-613, fn.2(1996), enfd. 145 F.3d 1130 (6 th Cir. 1998)	3
<i>Drug Package Co.</i> , 228 NLRB 108, 113-114 (1977), enfd. in part and denied in part, 570 F.2d 1340 (8 th Cir. 1978)	32
<i>Dyncorp/Dynair Services</i> , 322 NLRB 602 (1996), enfd. 121 F.3d 698	

(4 th Cir. 1997)	6
<i>E. I. DuPont De Nemours Louisville Works</i> , 355 NLRB No. 176 (2010)	16, 32
<i>E. I. DuPont De Nemours and Company</i> , 355 NLRB No. 177, slip op. at 1-2 (August 27, 2010)	15, 16, 17, 18, 20
<i>Eugene Iovine, Inc.</i> , 328 NLRB 294, fn.2 (1999)	14
<i>Friendly Ford</i> , 343 NLRB 1058 (2004)	21
<i>General Electric Co.</i> , 296 NLRB 844, 857 (1989) enfd. mem. 915 F.2d 738 (D.C. Cir. 1990)	22
<i>Goya Foods of Florida</i> , 356 NLRB No. 184 (June 22, 2011)	34
<i>GTE California, Inc.</i> , 324 NLRB 424 (1997)	7
<i>Haddon Craftsmen, Inc.</i> , 300 NLRB 789, 790-91 (1990)	25
<i>Hyatt Regency Memphis</i> , 296 NLRB 259, 263 (1989), enfd. in relevant part 939 F.2d 361, 372-373 (6 th Cir. 1991)	9
<i>International Protective Services, Inc.</i> , 339 NLRB 701 (2003)	6
<i>Lasher Service Corporation</i> , 332 NLRB 834 (2000)	6
<i>Mercy Hospital of Buffalo</i> , 311 NLRB 869, 873 (1993)	25
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693, 708 (1983)	14
<i>Nabor's Alaska Drilling</i> , 341 NLRB 610 (2004)	31
<i>National Steel Corporation</i> , 335 NLRB 747 (2001)	7
<i>NLRB v. Associated General Contractors</i> , 633 F.2d 766, 770 (9 th Cir. 1980, cert denied 452 US 915 (1981))	7
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967)	5
<i>NLRB v. Great Dane Trailers</i> , 388 U.S. 26 (1967)	33
<i>Ohio Power Co.</i> , 216 NLRB 987, 991 (1975), enfd. 531 F.2d	

1381 (6 th Cir. 1976)	5
<i>Pennsylvania Power Co.</i> , 301 NLRB 1104, 1105 (1991) (footnotes omitted)	4
<i>Pleasantview Nursing Home</i> , 351 F.3d 747, 757 (6 th Cir. 2003)	25
<i>Provena</i> , 350 NLRB 808, at 812, 822 n.19 (2007)	16
<i>S&I Transportation, Inc.</i> , 311 NLRB 1388, 1388 n.1 (1993)	23
<i>SAS Electrical Services, Inc.</i> , 323 NLRB 1239, 1253 (1997)	14
<i>Shell Oil Co.</i> , 149 NLRB 283 (1964)	20
<i>Southern California Stationers</i> , 162 NLRB 1517, 1543 (1967)	25
<i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3 rd Cir. 1951)	6
<i>Stone Container Corp.</i> , 313 NLRB 336 (1993)	27, 30, 31
<i>Texaco, Inc.</i> 285 NLRB 241, 246 (1987)	33
<i>United Rentals, Inc.</i> , 350 NLRB 951, 952 (2007)	9
<i>U.S. Postal Service</i> , 332 NLRB 635, 636 (2000)	6
<i>United States Testing Co.</i> , 324 NLRB 854, 859 (1997)	6
<i>Vanguard Fire & Security Systems</i> , 345 NLRB 1016, 1017 (2005), enfd. In relevant part 468 F.3d 952, 962 (6 th Cir. 2006)	9
<i>Verizon North, Inc.</i> , 352 NLRB 1022, 1022 (2008)	16
<i>Whirlpool Corporation</i> , 281 NLRB 17, 23 (1986)	12

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Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits the following Answering Brief to Exceptions to the Decision of the Administrative Law Judge.¹

¹ The following abbreviations are used in this brief:

INTRODUCTION

Respondents filed fifty-six individual exceptions to the ALJD in the instant matter. In their accompanying brief, Respondents coalesced those exceptions into nine areas in which they assert that the ALJ erred with respect to his findings, specifically that:

- Respondent Region unlawfully refused to provide OPEIU with information requested on March 17, and 25, 2009 (Exceptions 1-6);
- Respondent Region unlawfully failed to include employee names with the demographic information provided to the Teamsters in November 2009 with respect to healthcare coverage (Exceptions 7-10);
- Respondent Region implemented a new no-fault attendance policy in November 2008 (Exceptions 11-15);
- Respondent Region unilaterally changed its past practice of allowing Charging Union OPEIU to hold union meetings on the premises (Exceptions 16-19);
- Respondent Chapter unilaterally changed retiree medical program (Exceptions 20-31);
- Respondent Chapter unilaterally changed its employees' 401(k) Savings Plan and Pension Plan benefits with respect to OPEIU bargaining unit members (Exceptions 32-45);

ALJ-Administrative Law Judge; ALJD-Administrative Law Judge Decision; GC Ex-General Counsel Exhibit(s); Tr.-Transcript; R Ex-Respondent Exhibits.

- Respondents unilaterally implemented a new Benefits Advantage health insurance program on January 1, 2010 (Exceptions 46-49);
- Respondent Region illegally denied employees guaranteed hours of work or pay during the weeks of June 7 or 14, 2010. (Exceptions 50-52)
- The record does not support the ALJ's Remedy, Order and Posting requirements. (Exceptions 53-56)

I. The ALJ did not err in finding that Respondent Region Unlawfully Refused to Provide Charging Union OPEIU with Information Requested on March 17 and 25, 2009. (Respondents' Exceptions 1-6.)

The ALJ appropriately found that Respondents violated the Act by failing to provide information relating to the amount of blood products purchased from and exported by Respondent Region, as well as pricing information, pursuant to OPEIU's requests on March 17 and 25, 2009. In this regard, the ALJ, in apparently crediting OPEIU Business Agent Lance Rhines testimony, found that Chief Negotiator Sabin Peterson himself put the issue into play when, at two separate bargaining sessions with the OPEIU negotiating team, he linked the bad economy to a reduction in demand for Respondents' blood products to concessions by OPEIU so that Respondents may compete with other blood suppliers. (ALJD, p. 4-5) The ALJ further found Respondents' own bargaining notes corroborated the testimonial evidence of OPEIU Business Agent Rhines with respect to Peterson's comments to the OPEIU negotiating team. (ALJD, p. 5,

CPO 7)

In excepting to the ALJ's findings and conclusions, Respondents first assert that OPEIU was required to show probable or potential relevance for the information it sought, citing *Dexter Fastener Technologies, Inc.*, 321 NLRB 612, 612-613, fn.2(1996), enfd. 145 F.3d 1130 (6th Cir. 1998). In citing *Dexter*, Respondents ignore the ALJ's finding that Respondents themselves made the request relevant with Peterson's extended oration to the OPEIU bargaining team linking the bad economy and a reduction in the demand for blood products to Respondents' need for concessions in order to stay competitive. (ALJD p. 5). Under *A-1 Door and Building Solutions*, 356 NLRB No. 76 (2011), as a result of Peterson's remarks, OPEIU was entitled to information that would either support or disprove his representations at the February 24 and March 5 bargaining sessions. *Id.* Moreover, as noted expressly by the Board in *A-1 Door*, its holding was based on the employer's specific claim of an inability to compete and not on any asserted inability to pay. *Id.*, slip. Op. at 4 n. 13. Thus, Respondents' reliance on the fact that at the bargaining sessions, Peterson made no reference to an inability to pay is a distinction without a difference.

In keeping with the relevancy theme, Respondents also argue that once they responded to OPEIU's March 25, 2009, LCD unit information request² by informing OPEIU that the information was "irrelevant" and "confidential," it was

² The record is clear that Respondents never responded to the March 17, 2009 request with respect to the Collections unit. (Tr. 380, 1547).

incumbent upon OPEIU to show relevancy, particularly because of the asserted confidential nature of such information. However, as noted above, the ALJ found that Respondents themselves, by their representative's statements, made the information relevant and it was incumbent upon Respondents to furnish the information. See *A-1 Door*, supra. With respect to the claimed confidentiality issue, Board law is clear that the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and has a duty to seek an accommodation from the other party. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (footnotes omitted); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). Notwithstanding the fact that Respondents have not shown that the information requested by OPEIU was confidential in nature, Respondents failed to seek any accommodation and thus their Exceptions on this issue must be rejected.

II. The ALJ Did Not Err in Finding that Respondent Region Violated 8(a)(5) of the Act by Failing to Include Names with the Demographic Information Provided to Charging Union Teamsters in November 2009 with respect to Healthcare Coverage. (Respondents' Exceptions 7-10.)

The ALJ appropriately found Respondent Region failed to provide names of employees when it provided demographic information to the Teamsters and that employee names were relevant and necessary under the circumstances.

Additionally, the ALJ rejected Respondents' privacy claims.

In their Exceptions, Respondents admit that Respondent Region did not provide the employee names but instead coded the names of all the employees (R

Brief P. 14 G). Nor do Respondents contest the ALJ's finding that it unreasonably delayed in providing its incomplete response to the Teamsters' medical information request after implementation of its enrollment period for its new medical plans. (R Brief P 21, GC 8, Tr. 975, 1593-1594). The Teamsters' lead negotiator, Lynn Meade, testified that the names of employees were necessary in order to present separate proposals on a national and local level for medical plans (ALJD p.10 lines 4-12), and in requesting such information she was responding to the Respondents' proposal for a national plan. The names of the employees were necessary to divide the information to create both national and local proposals. As noted by the ALJ, Respondent Region never offered any reason why this explanation is insufficient. (ALJD p. 10 lines 11-12). Respondent Region admits it never offered an accommodation regarding its privacy assertions, and cites no case law excusing its failure to do so.

Under the Act, an employer is obligated upon request to furnish the union with information that is potentially relevant and that would be useful to the union in discharging its statutory responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The test for relevance is a liberal "discovery-type standard." *Acme*, at 437. The Board has long held that information pertaining to the bargaining unit is presumptively relevant and no showing of relevance is required. *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976).

Presumptively relevant information includes such information as the names of unit employees; copies of insurance plans in effect and rates paid by the employer and

employees; and “any other benefit or privilege that employees receive.”

Dyncorp/Dynair Services, 322 NLRB 602 (1996), enfd. 121 F.3d 698 (4th Cir. 1997); *International Protective Services, Inc.*, 339 NLRB 701 (2003); *Deadline Express*, 313 NLRB 1244 (1994). As to presumptively relevant requests, the employer has the burden of proving the lack of relevance, and a union does not need to make a specific showing of relevance unless the presumption is rebutted.

Contract Carriers Corp., 339 NLRB 851,858 (2003). Since there is a broad discovery-like standard to measure relevance, even potential or probable relevance is sufficient to give rise to an employer’s obligation to provide requested information. *U.S. Postal Service*, 332 NLRB 635, 636 (2000). Information concerning non-unit employees is not presumptively relevant and must be produced only upon a showing of relevance. *NLRB v. Associated General Contractors*, 633 F.2d 766, 770 (9th Cir. 1980, cert denied 452 US 915 (1981)); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018-1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980); *U.S. Postal Service*, 332 NLRB at 636. The union will have satisfied its burden by demonstrating a reasonable belief supported by objective evidence. *United States Testing Co.*, 324 NLRB 854, 859 (1997).

The burden of establishing that requested and relevant information is confidential is on the party asserting it. *Lasher Service Corporation*, 332 NLRB 834 (2000).

An employer cannot avoid its obligation to furnish information merely by asserting that it has a confidentiality interest. Rather, the employer has an obligation to seek an accommodation that meets the needs of both parties.

National Steel Corporation, 335 NLRB 747 (2001); *GTE California, Inc.*, 324 NLRB 424 (1997).

Further, Respondents' argument that Teamsters chief negotiator Meade should be discredited is without merit. It is well established that the Board's policy is not to overrule an ALJ's credibility resolution unless the clear preponderance of all the relevant evidence convinces the Board that the ALJ's findings are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Based on the record as a whole, the preponderance of all the relevant evidence clearly supports the ALJ's credibility resolution in this matter and, therefore, it should not be overturned.

III. The ALJ Did Not Err in Finding that Respondent Region Unilaterally Implemented a No-Fault Attendance Policy in Violation of 8(a)(5) of the Act. (Respondents' Exceptions 11-15.)

The ALJ appropriately found that Respondent Region instituted a new no-fault attendance policy, disciplining employees for every three or four attendance occurrences—unexcused absences and/or tardies--and that the policy was instituted without prior knowledge or consent of OPEIU. (ALJD pp. 11-13)

Respondents take issue with the ALJ's findings by essentially presenting two arguments: 1) that the ALJ relied on OPEIU Business Agent Rhines' testimony and that his testimony was factually erroneous and/or he did not testify on certain points; and 2) that any change that occurred was not a significant change of terms and conditions of employment.

Regarding the first point, Respondents appear to only focus on the ALJ's discussion of Rhines' testimony and the asserted omissions and/or flaws in that testimony, particularly with respect the dates he had discussion with Respondent Region supervisors. With a more thorough reading of the decision, however, one would learn that the ALJ based his decision on several factors, including Rhines' testimony. First, there were emails between the parties over the issue. (ALJD, p. 12, lines 30-33, 48-52) Second, Respondent Region's Human Resources Manager Tim Smelser failed to rebut on the witness stand conversations that Rhines credibly testified to. (ALJD p. lines 37-38) Third, there were memos regarding attendance that Respondent Region sent to employees. (ALJD, p. 12, lines 4-26, p. 13, lines 15-17) Fourth, an internal memo sent to Collections Unit Supervisor Vasuki Johnson outlined Respondents' new "no fault" approach to attendance. (ALJD, p. 13, lines 1-8) Finally, Human Resources Director Will Smith's admitted on the witness stand that Respondent Region had been seeking to implement such a no-fault attendance policy. (ALJD, p. 13, lines 10-15) Thus, contrary to Respondents' implication made in their Exceptions, all of this evidence is clearly delineated in ALJD and fully supports the ALJ's findings on this issue.

Moreover, Respondents' attack on Rhines' testimony is without merit. Yes, Rhines may have been mistaken by 2-3 months regarding the date of conversations with Respondents' supervisors that took place approximately 2 years prior to his testimony on the subject. However, the ALJ reasonably found that Rhines possible memory lapse was understandable, given the passage of time

and appropriately credited his testimony when he reviewed it in light of the other substantial evidence, described above. Similarly without merit is Respondents' contention that the ALJ "substituted his own interpretation of Rhines' testimony" to find that that Respondents implemented a "more rigid enforcement of an existing [attendance] policy. . . a topic about which Rhines did not testify." The ALJ found not that Respondent Region more rigidly enforced an existing policy, but that the Respondents implemented a new no fault attendance policy, a subject on which Rhines testified at length, and a subject in which other substantial evidence was presented. (Tr. 164, 167-168, 172, 300-303, 305, 307-308, 310, 312-316, 318-319, GC 15, 29, 30, 31, 32 , 34, 36, 87, 88, 89, CPO 6.)

Regarding Respondents' claim that "enforcing the terms of an existing attendance policy was not a significant change in terms and conditions of employment," Respondents once more erroneously couch the ALJ's findings in terms of "stricter enforcement." Again contrary to that assertion, the ALJ found that Respondent Region implemented a new no fault attendance policy. Even assuming, *arguendo*, that Respondent Region did, in fact, more strictly enforce an existing policy, Board law is clear that the stricter enforcement of a more stringent policy is a violation of the Act. To that end, the ALJ correctly cited *United Rentals, Inc.*, 350 NLRB 951, 952 (2007); *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005), *enfd.* in relevant part 468 F.3d 952, 962 (6th Cir. 2006); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), *enfd.* in relevant

part 939 F.2d 361, 372-373 (6th Cir. 1991; and *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1016-1017 (1982); enfd. 722 F.2d 1120 (3d Cir. 1983).

IV. The ALJ Did Not Err in Finding that Respondent Region Violated 8(a)(5) of the Act by Unilaterally Changing its Past Practice Regarding Union Meetings Held At Respondents' Facility. (Respondents' Exceptions 16-19.)

The ALJ appropriately found that the preponderance of the evidence adduced at trial—which included testimony by OPEIU Steward Elizabeth McGwinn, Business Agent Rhines and Respondent Region Human Resources Director Will Smith, as well as examples of some of the previous union meetings for meetings held at Respondents' facility—proved that Respondent Region changed its past practice in violation of 8(a)(5) of the Act. (ALJD p. 13-14)

In support of its Exceptions in this regard, Respondents assert at page 23 in their Brief in Support of Exceptions that the “ALJ primarily relied upon the testimony of Elizabeth McGwinn that the Union held meetings on the premises “whenever a vote needs to be taken.” Respondents then go on about the details, or lack thereof, of these asserted union meetings in which a vote needs to be taken.

However, although the ALJ does reference part of McGwinn's testimony, finding that OPEIU held at least “one or two membership meetings every year (whenever a vote needs to be taken)” (ALJD p. 14), the ALJ also references the testimony of OPEIU Business Agent Rhines and Respondent Region's Human Resources Director Smith. Their testimony, individually and together, clearly establishes that Respondent Region routinely and regularly permitted OPEIU use

of its facility for union meetings, regardless of whether a vote was to be taken or not.

Moreover, Respondents made no claim at trial that it denied the use of its facility because it was not a membership meeting in which a vote needed to be taken. In fact, the Respondent Region official who denied the use of the facility—Tim Smelser—did not even bother to testify on the subject. Furthermore, it’s obvious from the general language in the caption of the section—“April 2009 unilateral change in past practice regarding union meetings”—that the ALJ sought to distinguish that union meetings in which votes are taken were the only meetings he contemplated in his decision.

Additionally, an examination of the complete record clearly indicates that OPEIU meetings held at Respondents’ facility were not exclusively meetings where votes are taken. McGwinn testified to numerous meetings that did not involve voting, such as discussions over concerns by bargaining unit members over terms and conditions of employment, or meetings to discuss new procedures introduced by Respondents. (Tr. 208, 209, 277-280, 286, 290, 294.)

Next, Respondents argue that the record was “unclear” as to the number of OPEIU meeting requests granted by Respondents. Contrary to Respondents’ contention, the record is clear: McGwinn testified to OPEIU holding meetings at Respondents’ facility at least once or twice a year pursuant to its request to Respondent Region for the past 28 years, and those requests for union meetings had never previously been denied. Two Respondent witnesses who had intimate

knowledge of the issue, Smelser and Smith, never disputed McGwinn's testimony. In fact, as already noted, Smelser did not testify on the subject at all. As for Smith, he testified that the only time he denied OPEIU's request for the use of Respondents' facilities was when OPEIU sought to use a conference room for a political fundraiser—a use not in any way comparable to a request for a union meeting.

Finally, Respondents argue that the ALJ misinterpreted Board law with respect to “a union's obligation to request bargaining when it believes a past practice is going to be changed,” citing *Whirlpool Corporation*, 281 NLRB 17, 23 (1986), to support its contention. *Whirlpool* involves a “projected change” in which the union had time to bargain. *Id.* at 23. In the instant case, Human Resources Manager Smelser's terse denial to OPEIU when it requested the use of a room can in no way be considered a “projected change” in Respondent Region's past practice. (Tr. 214) Clearly, it was an unequivocal denial. As with other unilateral changes made by Respondents, OPEIU was met with a *fait accompli* with respect to the use of its facility for union meetings. Based on the above, Respondents' exceptions on this point must be rejected.

V. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Changing OPEIU Represented Chapter Employees' Retiree Medical Program.³ (Respondents' Exceptions 20-31.)

The ALJ appropriately found that Respondents did not notify OPEIU of the

³ The ALJ also appropriately found that Respondent Region unilaterally changed OPEIU Represented Region employees' retiree medical program. (ALJD, pp. 15-21). Respondents have not excepted to that finding.

change to Chapter employees' retiree medical program for changes implemented on January 1, 2009 and July 1, 2009. (ALJD pp. 15-21) In making his findings, he correctly rejected Respondents' 10(b) defense.

In their exceptions, Respondents assert that OPEIU Business Agent Rhines "did absolutely nothing" to ascertain whether the changes to the retiree medical program announced in October 28, 2008, would affect Chapter Unit employees. To bolster their assertion, Respondents note that Rhines went to Region Human Resources Manager Smelser and that Smelser "has never been an employee of the Chapter and has no authority to act on behalf of the Chapter."

However, contrary to Respondents' assertion, the record is clear that Respondent Chapter does not have its own human resources department and that Rhines typically deals with the Region regarding national issues that concern Chapter unit employees. Such is the case here. (Tr. 690, 736-738) Moreover, despite Respondents' assertion that Smelser had no authority to act on behalf of Respondent Chapter, the record is replete with evidence showing that Smelser informed Rhines of nationally implemented changes that affected employees of both Respondent Region and the Chapter. (GC 60, GC 61, GC 62). Further, Smelser, in his dealings with Rhines, did not distinguish that these changes would affect only the employees of Respondent Region. Similarly, Rhines did not limit his inquiries only to employees of Respondent Region, but made broad inquiries implicating both Chapter and Region employees. Finally, Respondents provided no evidence that there was some sort of strict policy—or any policy for that

matter—whereby OPEIU was required to deal only with the (non-existent) Chapter human resources department with respect to Chapter employees. Based on the parties’ past dealings, OPEIU reasonably believed that its inquiries to Smelser regarding the retiree medical program included both Chapter and Region employees. Thus, Respondents’ assertion that OPEIU failed to request bargaining with respect to Chapter employees is without merit, particularly in light of the fact that to find waiver with respect to the Chapter unit, the Board must find that OPEIU clearly and unmistakably waived its right to bargain over the issue. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The burden of proof to demonstrate waiver rests on Respondents. *Eugene Iovine, Inc.*, 328 NLRB 294, fn.2 (1999). In the instant case, Respondents have not sufficiently shown that OPEIU had waived its right to bargain over Chapter employees.

Furthermore, in order to succeed in their “lack of reasonable diligence” defense, Respondents must establish that through the exercise of reasonable diligence, OPEIU would have known that the change had been implemented. *SAS Electrical Services, Inc.*, 323 NLRB 1239, 1253 (1997). To that point, Chapter Unit Chief Operating Officer Cindy Richmond testified at trial that she had no idea that the change had been implemented until six months prior to the September 29, 2010, trial. (Tr. 1259-1260, 1261) Obviously, she would not have known about the change had Rhines made the inquiry directly to her, which demonstrates not only that Respondents cannot establish a lack of reasonable diligence on the part of OPEIU under *SAS Electrical Services, Inc.*, supra, but also that

Respondent Region, and particularly Smelser, oversaw these national issues for both Region and Chapter units employees.

Finally, Respondents argue that under a “sound arguable basis” theory, Respondent Chapter was free to make the changes it did to Chapter Unit employees’ Retiree Medical Program, citing, among other cases, *Bath Ironworks Corp.*, 345 NLRB 499, 502 (2005). Reliance on *Bath Ironworks Corp.* is misplaced because there is no language in the Chapter unit collective bargaining agreement in which a “sound arguable basis” can be inferred which would grant Respondent Chapter the authority and discretion to unilaterally terminate retiree health benefits for an entire class of employees as it did in the instant case. The term “substitution” contained in the Chapter contract’s retiree medical provision can in no way be interpreted to mean that the benefit can be totally eliminated by Respondent Chapter. Thus, Respondents’ “sound arguable basis” argument must be rejected.

VI. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Changing OPEIU Represented Employees’ Pension Plan and 401(k) and Savings Plan (Respondents Exceptions 32-45.)

The ALJ appropriately found that Respondents failed to notify OPEIU of the changes to OPEIU represented employees’ pension plan and 401(k) savings plan and then unilaterally implemented said changes. The decision is completely consistent with the evidence presented at trial as well as relevant Board law.

1. The ALJ Appropriately Relied on *E. I. DuPont De Nemours and Company*, 355 NLRB No. 177, slip op. at 1-2 (August 27, 2010), in

finding that Respondents Were Not Privileged to Make Post-Contractual Changes to OPEIU Represented Employees' 401(k) Savings Plan and Pension Plan.

The ALJ, in finding that Respondents violated 8(a)(5) by unilaterally making changes to OPEIU represented employees' 401(k) plan and pension plan, relied on *E. I. DuPont De Nemours and Company*, 355 NLRB No. 177, slip op. at 1-2 (August 27, 2010), wherein the Board found that: (1) absent specific intent by the parties, a contractual waiver expires with the contract; and (2) no past practice can be established where changes were made during terms of agreement that privileged such action. See also *E. I. DuPont De Nemours Louisville Works*, 355 NLRB No. 176 (2010).

With respect to specific intent of the parties manifested in the OPEIU Collection and LCD unit collective bargaining agreements regarding the pension plan and the 401(k) plan, the contract language is clearly ambiguous because the parties fail to explicitly state that the provisions will survive post contract expiration, and, in addition, is subject to more than one interpretation. In terms of intent of OPEIU in this case, the Board's treatment of waiver language is a guiding principle. In assessing waivers, the Board has found that it is not sufficient to find that contractual language can be reasonably interpreted to cover certain conduct. *Provena*, 350 NLRB 808, at 812, 822 n.19 (2007) (quoting *Metropolitan Edison*, 460 U.S. at 708). See also *Verizon North, Inc.*, 352 NLRB

1022, 1022 (2008) (no clear and unmistakable waiver where contractual language regarding “leave of absence” was susceptible of two interpretations).

Despite the lack of evidence in the record regarding the intent of the parties, Respondents nonetheless attempt to argue that the parties intended that the 401(k) plan and pension plan provisions in the applicable collective bargaining agreements continue post-expiration. In this regard, Respondents point to OPEIU Business Agent Rhines’ testimony that “he knew that the 401(k) Savings Plan and Retirement System plans” had “specific terms. . . set forth in summary plan descriptions separate from the terms of the collective bargaining agreements.” Rhines cited testimony says nothing regarding intent, yet it is the extent of Respondents’ argument that the parties intended the applicable provisions to survive post-expiration. Despite Respondents’ assertions, no OPEIU witness, including Rhines, testified to intent. None Respondents’ witnesses testified to intent. Out of the thousands of pages of exhibits entered into evidence, not one manifested an expression of the parties’ intent for the 401(k) and pension provisions in the applicable contracts to extend past the expiration of the contracts.

Moreover, with respect to past practice, all of the changes Respondents made to the 401(k) plan and pension plan occurred during the terms of agreements, the applicable provisions containing language either allowing the amendment, or indicating bargaining unit employees would participate in the plan. Accordingly, under the *E. I. DuPont De Nemours and Company*, 355 NLRB No.

177, *supra*, analysis, none of these changes can be relied on by Respondents as evincing intent on the part of OPEIU.

2. Even Outside of *E.I. Dupont*, No Established Past Practice Existed With Respect to the 401(k) Plan and the Pension Plan.

In excepting to the ALJ's findings and conclusions, Respondents essentially ignore the holding in *E.I. Dupont*, wherein the Board found that past practice is inapplicable when the changes were made pursuant to contractual provisions that privileged such changes. Instead Respondents assert that they had the right to make unencumbered changes to employees' retiree medical program and the 401(k) savings plan by claiming that they were just following past practice with respect to these changes, irrespective of whether a contract was in effect at the time that allowed Respondents to make such changes. While Counsel for the Acting General Counsel asserts that an *E.I. Dupont* analysis is required in the instant case, even under the case law Respondents suggests is applicable, no past practice existed that would allow the changes Respondents made to the 401(k) plan and pension plan in the instant case.

Respondents first cite to *Beverly Health and Rehabilitation Services, Inc.*, 297 F.3d 468, 481 (6th Cir. 2002), a case with no precedential weight on the Board, for the proposition that the creation of the practice, not the timing of the practice, controls in terms of establishing the *status quo*. But even under the 6th Circuit holding, Respondents' argument fails. Hence, while the holding in *Beverly* may at first blush appear helpful to Respondents, a quick review of the court's reasoning

for its decision shows that that case is inapposite to the instant facts. In *Beverly*, while acknowledging that it is possible for an employer to continue certain unilateral changes under an expired management rights clause, the court held that the employer failed to provide sufficient evidence that it had made the changes at issue during the term of the contract. Similarly, while Respondents had made changes in the past in the pension plan and the 401(k) plan, Respondents had never previously made changes to the extent made in the instant case. In the ALJD, the ALJ noted that Respondents made a number of changes to both the 401(k) plans and pension plans over the last 10 years, characterizing most as minor, and others as more significant. (ALJD p. 24, lines 32-45). Of the changes the ALJ found significant, he noted only those changes made in 2005, with respect to the Teamsters only, regarding a modification of the pension plan in which Respondents lowered the percentage for calculating years of benefit service to one percent of average pay, increasing the age to receive unreduced benefits from 60 to 65, discontinuing the post-retirement one percent annual increase, and a modification of the 401(k) plan by requiring new employees to wait 3 years before vesting in employer 401(k) contributions, while increasing the employer match from 50 percent to 100 percent of the first four percent of employee contributions and increasing the maximum amount of employee contributions. (ALJD p. 24, lines 33-45, p. 25, lines 1-2). In fact, the ALJ did not discuss any “significant” changes with respect to OPEIU. Other than the 2005 changes, all other changes made to the pension plan and 401(k) plan over the last 10 years “were minor,

technical, or housekeeping amendments pursuant to legislative changes.” (ALJD, p. 24, lines 33-35.) None of the changes, including the 2005 change in the Teamsters 401(k) plan, matched the significance and extent of the *elimination of pension or 401(k) benefits* for all OPEIU employees, or a class of employees such as new hires, until the Respondents implemented the changes to the plans in May and July 2009. One significant change over a ten year period of time to the 401(k) employer matching contribution rate for an entirely different bargaining unit and union does not establish a *past practice*, especially where, as here, the post expiration change at issue effectively eliminates the plan by discontinuing matching contributions. Likewise, a one-time change to the pension plan in 2005—again for a different bargaining unit and union—does not equate to a past practice with respect to OPEIU-represented employees. Moreover, Respondents bear the burden of establishing the existence of a past practice, a burden they have failed to satisfy. *E. I. Dupont, supra* at p. 13.

Respondents’ reliance on *Shell Oil Co.*, 149 NLRB 283 (1964), is similarly flawed. In *Shell Oil*, the Board found that the operative terms of a subcontracting provision in a collective bargaining agreement continued to be effective past the expiration of said contract, because it did “not appear that the subcontracting during [the] hiatus period materially varied in kind or degree from what had been customary” during the term of the contract. As indicated above, in the instant case there is no question that the “kind” and “degree” of changes Respondents made to the retirement plan and the 401(k) after the respective contracts expired were

radically different and significantly more substantial than the changes made previously.

Finally on this point, Respondents cite *Friendly Ford*, 343 NLRB 1058 (2004), arguing that it was privileged to make changes to the retirement plan and 401(k) plan post-contract expiration. However, in *Friendly Ford*, the employer was a successor to a previous owner and not a signatory to the parties' collective bargaining agreement and the Board found it was free to reject its predecessor's collective bargaining agreement with the union and set its own initial terms and conditions for those bargaining unit and it did so. *Id.* at 1062. Thus, unlike the instant facts, in *Friendly Ford* there was never an operative contract provision between the parties at issue that established a past practice.

Respondents Region and Chapter further argue that because the pension plan and 401(k) plan are operated by the American National Red Cross, neither Respondent had control over the plans, and thus, they appear to argue that they were relieved of any duty to bargain to any changes made. Such an argument is fallacious. First of all, there was ample testimonial and documentary evidence that the National American Red Cross, Respondent Region, and Respondent Chapter constitute a single legal entity. (Tr. 1761-1762, GC Ex. 1(III)). Even assuming, arguendo, that they are separate legal entities, both Respondent Region and Respondent Chapter are the signatories to the respective contracts with OPEIU and they are not absolved of their duty to bargain over changes to employees'

terms of conditions of employment on the basis of the action of a third party. To find otherwise would be absurd.

3. The ALJ Appropriately Found that OPEIU did not Waive Bargaining with respect to the Pension Plan and the 401(k) Plan.

The ALJ appropriately found that OPEIU did not waive its right to bargain over changes in the 401(k) and pension plans. In his decision, he noted that Respondents failed to raise the argument either in its answers to the instant Fourth Amended Consolidated complaint or in their opening statement. (ALJD, p. 21, fn. 34)

Contractual waiver is an affirmative defense. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) and *General Electric Co.*, 296 NLRB 844, 857 (1989) enfd. mem. 915 F.2d 738 (D.C. Cir. 1990). Having failed to raise this affirmative defense with respect to the pension plan and 401(k) plan in their answer to the instant complaint or in their opening statement, Respondents, now attempt to raise the waiver issues in their instant exceptions. However, proof of a waiver is an affirmative defense and must be pled. *Allied Signal, Inc.*, 330 NLRB 1216, 1228 (2000) and *General Electric Co.*, 296 NLRB 844, 857 (1989) enfd. mem. 915 F.2d 738 (D.C. Cir. 1990). If not pled, it is waived. *Alonso & Carus Iron Works, Inc.*, 2011 WL 840796 (March 10, 2011 N.L.R.B. Div. of Judges). In light of Respondents' failure to raise the affirmative defense of waiver in a timely manner, the Board should not now consider it.

Even if the Board does consider the waiver argument as it pertains to the 401(k) savings and pension plans, the record is clear that OPEIU did not waive its right to bargain over Respondents' unilateral changes. With respect to both the 401(k) and pension plans, Respondents announced them as a *fait accompli*.

Respondents while acknowledging "the legal significance" of their failure to provide advanced notice to OPEIU of the upcoming changes prior to notifying employees, bury this acknowledgement in a footnote in their brief. Without question, the most compelling evidence favoring a finding of *fait accompli* is evidence of an employer announcing its planned change directly to employees without advance notice to the union. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). See also *S&I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1 (1993). Such is the case here.

With respect to the actual April 2, 2009 announcement from ANRC CEO Gail McGovern to bargaining unit employees, decreeing the changes to the 401(k) plan and the pension plan, Respondents do acknowledge some of the language she utilized in the announcement, such as the changes were "essential" and the ANRC had "no choice but to make the changes," and that the Board of Governors had approved the changes. This alone, Counsel for the Acting General Counsel would respectfully argue, is enough to show *fait accompli*. However, the April 2 announcement goes much, much further, including such declarations as:

- “The [Respondents’] Board **has approved actions that will** generate approximately \$159 million in savings for fiscal year 2010 through a series of changes. . .”
- “To the greatest extent possible, we want to keep current staff levels, yet reduce the overall costs, **so we have taken several major steps**”
- “Suspending 401(k) Match. . .**we are taking steps now** to reduce future costs while ensuring we can **meet our current obligations.**
- Starting with the first paycheck of **May, we will be suspending the Red Cross matching contribution to the Savings Plan 401(k).**
- “**Closing the Pension Plan to New Employees on July 1. In addition, effective July 1, we will be closing our pension plan to new employees.**”

(GC 61 Emphasis added.)

By any objective standard, these Respondents’ pronouncements do not leave any room for bargaining. They all unequivocally demonstrate that Respondents’ unilateral change train had already left the station and was barreling down the track full speed ahead. Clearly, this April 2 memorandum—sent to employees, but not OPEIU—is the definition of *fait accompli*. Interestingly, around the time the April 2, 2009, memo was sent to employees, OPEIU was in negotiations with Respondents over the terms of new collective bargaining agreements for the respective OPEIU bargaining units, with the parties negotiating on February 24, March 5, March 6, March 27, March 29, and March 30, 2009.

Respondents made no mention to OPEIU of the upcoming changes to the 401(k) savings plan or the pension plan during these negotiations. On this point, given that the parties were in negotiations, even absent the clear *fait accompli* evinced in this case, a request to bargain by OPEIU over the announced changes in the pension plan and the 401(k) plan were unnecessary. See *Pleasantview Nursing Home*, 351 F.3d 747, 757 (6th Cir. 2003).

Respondents next cite several cases in attempting to argue that “positive language” or the presentation of a fully “developed plan” was insufficient to establish a *fait accompli*: *Bell Atlantic Corp.*, 336 NLRB 1076, 1086-88 (2001); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790-91 (1990); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); and *Southern California Stationers*, 162 NLRB 1517, 1543 (1967). In each of these cases cited by Respondents, the unions were provided with some type of advanced notice of the impending changes, rendering any comparison to the instant case invalid.

Respondents also attempt to focus on the time factor between the April 2 announcement and the subsequent implementation on May 1, arguing that OPEIU could have gone to Respondents and requested bargaining. However, in light of the conclusory language of the April 2 memorandum to employees, set forth above, Respondents’ intention of implementing the announced changes was clear.

Respondents finally argue that they did not indicate an unwillingness to bargain over the implementation of the changes. In this regard, Respondents cite *Associated Milk Producers, Inc.*, 300 NLRB 561, 563-564 (1990), in which the

Board did not find a *fait accompli* because the union did not timely respond to a letter indicating that the employer did “not intend to continue to make contributions” to a pension fund. The instant facts are distinguishable from *Associated Milk Producers*. The April 2 McGovern memorandum to employees went well beyond informing employees Respondents “intended” to make changes, it announced that changes had already been “approved,” Respondents have “taken several major steps,” Respondents “are taking steps now,” and Respondents “will be suspending the Red Cross matching contribution.” Respondents conveniently ignore the April 2 memorandum and focus on the subsequent April 15 and 23, 2009, emails from Human Resources Manager Smelser to OPEIU Business Agent Rhines. However, attached to Smelser’s April 15 email was the McGovern’s April 2 memorandum to employees, announcing the implantation of the changes. (Tr. 460, GC 61) And the April 23 email only reiterated what McGovern decreed in the April 2 email. Contrary to Respondents’ contention, these emails actually reinforce the *fait accompli* aspect of the announced changes. Regardless, Respondents cannot ignore the most damning aspect of the unilateral implementation, i.e., the April 2 announcement, and shift focus to the two emails from Smelser and say, “see, look how reasonable we’ve been.” The April 2 announcement is part and parcel of Respondents’ overall behavior and it cannot be ignored or swept under the rug.

VII. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(5) of the Act by Unilaterally Implemented a New Benefits

Advantage Healthcare Program on January 1, 2010.
(Respondents Exceptions 46-49.)

The ALJ appropriately rejected Respondents' reliance on *Stone Container*, 313 NLRB 336, 337 (1993), as a defense, finding that the parties had not reached overall impasse and therefore Respondents could not implement the Benefits Advantage Plan. (ALJD p. 30) The ALJ also correctly found that Respondents did not bargain over the changes in a meaningful manner or in good faith. (ALJD, p. 30)

There is no history of annual changes to the Benefit Advantage Plans. Respondent simply unilaterally implemented changes to its medical plans for the Teamsters and OPEIU. With respect to the Teamsters, although there is language in Article 29 (Apheresis) and Article 31(MUA) arguably indicating that the Teamsters waived its right to bargain over joining the BAP during the term of the agreement,⁴ this waiver expired with the contract on April 30, 2009. The same is true with the three OPEIU collective bargaining agreements.⁵ Respondents' BAP

⁴ In Section 1 of both Articles it states "The employer shall have the right to substitute the coverage set forth above with health insurance provided by another carrier provided that such substitute coverages are comparable and provided the Union is given at least sixty (60) days advance written notice, unless as outlined in Section 9 of this Article. In Section 9 of both Articles it states "Coverage and benefits for all insurances shall not decrease during the life of this Agreement. In the event that during the term of this Agreement the Employer is required by the American National Red Cross to participate in any American National Red Cross insurance programs, the Employer shall convert its current coverages to the most nearly comparable American National Red Cross plans. This language is clear that the waiver only applies during the term of the agreement. ***In the event that during the term of this agreement,...*** which expired April 30, 2009.

⁵ The OPEIU Collections and LCD contracts, Article 30, Section 1, provides, in relevant part: "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. (GC 3, GC 4) The Chapter unit collective bargaining

came into existence in benefit year 2008, and any changes made to the plan occurred once. Accordingly, it is impossible to establish an existing practice when changes were made to the BAP on one prior occasion.

Regarding the local plans, with respect to both the Teamsters and OPEIU, Teamsters' chief negotiator Meade and OPEIU's chief negotiator Rhines testified that only one other local plan was eliminated in the past, and they did not oppose this because no one participated in it. Most importantly, during negotiations, both the Teamsters and OPEIU steadfastly maintained that they were not waiving their right to bargain over health insurance. Additionally, with respect to the Teamsters, Meade made proposals on health care, sought outside assistance from Teamsters headquarters and the Michigan Conference to develop proposals, and made information requests related to health insurance. Rhines, on behalf of OPEIU, made numerous proposals regarding health insurance for all three bargaining units he represented, even in the face of Respondents' intransigence and insistence that OPEIU agree to a full "me too" waiver.

As the ALJ found, there was no impasse with respect to either the Teamsters' or OPEIU bargaining situations. Regarding the Teamsters' plans, Respondents had enrolled employees in its revised BAP prior to providing the union with demographic name information needed for the Union's medical plan proposals. Furthermore, Meade indicated that she felt there could be movement

agreement does not allow substitution of coverages. It merely provides that Respondent – Chapter may add health insurance carriers or HMO's during the term of the agreement. (GC 2, Article 30, Section 1)

on the plans, and both Meade and Rhines felt impasse had not been reached.

Meade also indicated that there were other non-economic and economic issues that could be discussed, including the medical plans. When Respondents imposed their unilateral October 23 deadline for a decision regarding employees' health insurance, Meade was still waiting for information to prepare medical plan proposals. Under these circumstances, no impasse can be found.

For Respondents to even claim that impasse existed on the medical plan is confusing to say the least. Respondents argue that it was not at impasse on the local medical plans, or the cost sharing structure of the national plans, but only on the national plan design. Apparently Respondents are claiming a "split impasse" occurred, selectively choosing a benefit (medical plan) on which to go to impasse, and then again dissecting the portions of the benefit (BAP design) in which they declare impasse, all while ignoring that the Teamsters were attempting to bargain on these issues, had outstanding information requests regarding health insurance, believed that there was room for movement between the parties, and presented alternative proposals. (GC Ex 124, 125; Tr. 852-856) Even Meade's willingness to meet and bargain in good faith with Respondents on cost-cutting measures did not stop Respondents from closing the door on meaningful bargaining when they proceeded to implement changes to the retirement and medical plans.

Along the same lines, OPEIU presented numerous conciliatory proposals to Respondents regarding health insurance that Respondents flatly rejected. (CPO Ex 2, GC Ex 53, 55, 57; Tr. 432, 571, 1558, and 1713) Throughout negotiations,

Respondents repeatedly expressed their unwillingness to bargain over the medical benefit and retirement benefit changes, consistent with their stance in negotiations with the Teamsters. Indeed, Respondents' chief negotiator Peterson testified that the Teamsters should accept these proposals because other Teamsters' locals have done so on prior occasions.

Moreover, contrary to Respondents' argument in their exceptions, as found by the ALJ, the January 1, 2010 changes to health insurance benefits do not fall within the *Stone Container* exception. 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. There is no evidence of either the complete elimination of an existing plan, or of sweeping plan design changes occurring in the past. There is no evidence of monthly premium co-pays being unilaterally increased on a regular basis as occurred here with the EPO plan.

Finally, the January 1, 2010 changes were announced as a *fait accompli*. CEO McGovern bypassed the Union and announced to employees on April 2, 2009, that "plan design changes focused on cost containment" would be forthcoming "in the months ahead." (GC 61). Respondents admitted that they made the decision to implement such changes before the information describing the proposed changes was even provided to either the Teamsters or OPEIU. (T-1467). Within a matter of just a few days after the information listing the January

1, 2010 changes had been provided to the unions, and before the parties could meet to “discuss” the issue, Respondents announced its intent to implement the changes to all employees, advising them that all of the changes “will” be implemented. (GC 9)

The above facts, along with Respondents refusal to discuss and bargain over the actual January 1, 2010 plan design, warrants the conclusion that these changes were indeed presented as a *fait accompli*, and could not be implemented in the absence of an overall impasse.

Likewise, Respondent’s reliance on *Nabor’s Alaska Drilling*, 341 NLRB 610, (2004), is misplaced. In *Nabor’s* the Board adopted the ALJ’s conclusion that the circumstances in that case were similar to the *Stone Container* case, and found no violation. In doing so the Board affirmed the ALJ’s finding that it was not disputed that the health insurance review was an annually occurring event; that the Respondent was not declining to bargain over health insurance but agreed to bargain with the Union both before and after the changes were made to the medical insurance plan; and that there was no evidence that further bargaining would have been fruitless. The ALJ’s analysis in *Nabor’s* specifically distinguished it from the Board’s holding in *Brannan Sand and Gravel*, 314 NLRB 282 (1994). In *Brannnan*, the employer did not satisfy its obligation to give the union timely notice and an opportunity to bargain where the changes to the medical plan were presented as a *fait accompli*, and any attempts at bargaining would have been fruitless.

The instant matter mirrors the circumstances in *Brannan*. The change in the medical plan benefits to the Teamsters' and OPEIU units was announced as a *fait accompli* to employees in all five units. There was no history of annual changes, let alone significant changes. The ALJ noted that although Respondents indicated it was willing to bargain and entertain proposals from all units on medical insurance, this statement was made after the changes were announced to unit employees, and there was no one at the bargaining table with the authority to bargain over the design changes in the medical plans. Furthermore, Respondents chief negotiator Peterson stated that to his knowledge the 2009 plans were already eliminated, and that he never consulted anyone about extending the 2009 medical plans as was requested by the OPEIU. (CPO Ex 2; GC Ex 9, 12, p. 3, and 55; Tr. 571-572, 1587, 1615, 1725-1726, 1733) The ALJ correctly found that in these circumstances, no valid impasse could exist because the Respondents were not engaged in good faith bargaining, and the *Stone Container* defense was not available because of Respondents' failure to bargain over the changes. *E.I. Dupont*, 355 NLRB No. 176, slip op. at p 4. ALJD p.30, lines 1-26. Accordingly, the *Nabor's* case can be distinguished from this case, and cannot be relied upon.

VIII. The ALJ Did Not Err in Finding that Respondents Violated 8(a)(3) and 8(a)(5) of the Act by Denying Employees Pay Under Guaranteed Hours of Work or Pay During the Weeks of June 7 or 14, 2010. (Respondents Exceptions 50-52.)

The ALJ appropriately found that the evidence supported that Respondent

Region's denial of guaranteed hours of pay under Article 17, Section 7 of the Collections Unit contract violated the Act under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967) and *Texaco, Inc.* 285 NLRB 241, 246 (1987). (ALJD, pp. 38-39) In making his finding, the ALJ rejected Respondents' argument that the instant facts be analyzed under *Drug Package Co.*, 228 NLRB 108, 113-114 (1977), *enfd. in part and denied in part*, 570 F.2d 1340 (8th Cir. 1978), finding that the issue of the contractually guaranteed hours were an accrued benefit to Collections Unit employees and that benefit was denied as a result of their strike action. (ALJD p. 39)

In their exceptions, Respondents resurrect *Drug Package Co.*, again arguing that it is controlling in the instant matter, contending that the Board's longstanding remedial policy that back pay for returning strikers who are unlawfully denied reinstatement shall not begin until five days after an unconditional offer to return. However, as the ALJ noted in his decision, the issue in the instant case was not the recall of employees, it was the payment of guaranteed hours arising out of Article 17, Section 7 of the Collections collective bargaining agreement. As in *Texaco*, Collections employees in the instant case accrued guaranteed hours under the contract and Respondent Region refused to pay those guaranteed hours, in the process making clear to OPEIU that its decision not to pay guaranteed hours was based solely on the fact that OPEIU members were engaged in a strike. (Tr. 512, GC 22(d)). At trial, Respondent Region

admitted that it was not aware of any reason other than the strike for employees not receiving their guaranteed hours. (Tr. 546, 1991-1992).

IX. The Record and the ALJ's Findings Support his Remedy, Order and Posting requirements. (Exceptions 53-56.)

Respondents make no substantive argument regarding the ALJ's Remedy, Order and Posting requirements. Counsel for the Acting General Counsel contends that the Remedy and Order and Posting requirements are consistent with the record, the ALJ's findings and Board policy in effect at the time the ALJD was issued. However, consistent with Charging Union OPEIU's brief in support of its exceptions (pp. 24-26), Counsel for the Acting General Counsel requests that the make whole remedy be modified so as to be consistent with *Goya Foods of Florida*, 356 NLRB No. 184 (June 22, 2011).

CONCLUSION

For the reasons set forth above and in ALJ Wedekind's Decision and Order, it is urged that Respondents' Exceptions be denied in their entirety and the Board affirm the findings of fact, conclusions of law, and recommended remedy of ALJ Wedekind in his Decision and Order in this matter, except where inconsistent with Counsel for the Acting General Counsel's and Charging Party OPEIU's Exceptions filed in this case.

Dated at Detroit, Michigan this 4th Day of August, 2011

/s/Robert A. Drzyzga

Robert A. Drzyzga
(313) 226-3238
robert.drzyzga@nlrb.gov

/s/Dynn Nick

Dynn Nick
(313) 226-2519
dynn.nick@nlrb.gov

Counsels for the Acting General Counsel
National Labor Relations Board
Region Seven
Patrick V. McNamara Federal Building
Room 300, 477 Michigan Avenue
Detroit, Michigan 48226-2569