

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

AMERICAN RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION,

Respondent.

And

Case Nos. 33-CA-15821
33-CA-15896
33-CA-16144
33-CA-16204
33-CA-16207
33-CA-16229
33-CA-16246
33-CA-16247
33-CA-16248

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
(AFSCME), COUNCIL 31, AFL-CIO

Charging Union.

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO
DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE
DATED NOVEMBER 4, 2011 (JD-67-11)**

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I. STATEMENT OF THE CASE

On November 4, 2011, Administrative Law Judge Arthur J. Amchan (ALJ) issued a Decision and recommended Order (the “Decision”)¹ finding American Red Cross, Heart of America Blood Services Region (“Respondent”) violated Section 8(a)(5) and (1) of the Act arising out of allegations in charges filed by AFSCME, Council 31 (“Union”). As set forth in Respondent’s Exceptions and this Brief in Support of Exceptions, Respondent excepts to the ALJ’s findings and conclusions that the Respondent violated the Act by unilaterally changing the terms and conditions of employment of bargaining unit employees by: (1) discontinuing its matching contribution to unit employees’ 401(k) plan contributions, suspending employees’ merit pay increases, closing its defined pension plan to new employees and announcing and making changes to its health insurance benefits [Case 33-CA-15821]; (2) promoting team leaders to team supervisor positions and having them continue to perform bargaining unit work [Case 33-CA-15896]; (3) reassigning truck loading and unloading assignments from the Mobile Unit Assistants to the General Supply Clerks [Case 33-CA-16204]; (4) decreasing the number of paid time off (PTO) hours an employee can carry over from year-to-year from 160 hours to 120 hours [Case 33-CA-16229]; (5) assigning or otherwise authorizing non-unit employees to perform bargaining unit work, such as drawing blood from donors [Case 33-CA-16248]; and failing or refusing to bargain with the Union concerning the discipline of unit employees [Case 33-CA-16247]; and by failing to provide the Union with information it requested regarding unit employee discipline and discharge [Case 33-CA-16247]. ALJD 16:27-45; 17:1-14.

The Respondent’s Exceptions to the Decision and Order of The Administrative Law Judge should be granted because neither the record nor the law supports a finding that

¹ Throughout the brief, the references to the Decision will be set forth as “ALJD” followed by page number and line numbers.

Respondent violated the Act. The alleged unilateral changes do not constitute violations of the Act for a number of reasons. First and foremost, Respondent was under no legal duty to bargain at the time the actions were taken because there had been no demonstration of the Union's majority status. Likewise, Respondent had no duty to bargain regarding decisions made regarding changes prior to the Union's certification, even for those decisions that were implemented after certification. Even if there were a duty to bargain Respondent's preservation of the dynamic status quo with respect to certain of its actions does not constitute a violation of the Act. To the extent the changes do not represent substantial, significant and material changes there is likewise no violation of the Act.

II. STATEMENT OF FACTS

A. The Heart of America Blood Services Region.

The American National Red Cross ("ANRC") is a federally chartered, non-profit organization with its headquarters located in Washington, D.C. The American Red Cross, Heart of America Blood Services Region is one of 36 blood services regions throughout the United States responsible for collecting, manufacturing and distributing blood and blood products and is also one of five regions comprising the Mid-America Blood Services Division of the ANRC. (Tr.² 53-54, 56, 389, 909-910). ALJD 2:9-15. The Region has facilities located in Peoria, Illinois and Chicago, Illinois. (Tr. 54-55, 57-58).

B. Procedural Background.

The Union filed a representation petition on March 21, 2007. (R-180). ALJD 2: 23. On May 4, 2007, a Decision and Direction of Election was issued by the Regional Director. (Jt.-1; GC-1(hhh)). On May 18, 2007, Respondent filed a timely request for a review of the Decision

² "Tr." refers to the transcript of the administrative hearing before ALJ Amchan conducted on August 8, 9, 10, 11, 12, 15 and 16, 2011. Exhibits to the administrative record are noted as follows: General Counsel Exhibits (GC); Respondent Exhibits (R), and Joint Exhibits (Jt.).

finding that team leaders were not supervisors within the meaning of the Act; the request was granted on May 30, 2007. (Jt.-1). ALJD 2:42-44. A representation election was conducted on June 1, 2007. All ballots were impounded pending the outcome of the request for review. (Jt.-1) ALJD 2:46-47.

More than three years later, on September 1, 2010, the Board issued a Decision on Review and Order affirming the Regional Director's decision. On September 16, 2010, the impounded ballots were counted. The tally of ballots demonstrated that a majority of ballots counted were in favor of union representation. (Jt.-1). ALJD 2:47; 3:1-3.

On September 23, 2010, Respondent timely filed objections to conduct affecting the results of the election. (Jt.-1). ALJD 3:4-5. The objections were overruled by the Regional Director and on October 7, 2010, the Union was certified as the collective bargaining representative. (Jt.-1; GC-1(ggg)). ALJD 3:4-5.

On October 21, 2007, Respondent requested a review of the Regional Director's Supplemental Decision. The Request for Review was denied by the Board on December 15, 2010. (Jt.-1; GC-1(fff)). ALJD 3:10-11.

On January 7, 2011, Respondent advised the Union that it was recognizing it as the collective bargaining representative for the unit. Pursuant to a settlement agreement reached between Respondent and the Union, the certification year was extended until January 7, 2012, with an agreement to conduct the first bargaining session no later than February 28, 2011. (Jt.-1.)

C. Pre-Certification Fact Chronology.

1. The 401(k) Savings Plan, the Retirement System Plan, merit pay increases and health insurance. (Exceptions 1-7.)

On April 2, 2009, a communication was distributed to all employees of the American National Red Cross throughout the nation containing a message from Gail J. McGovern,

President and CEO of the ANRC. McGovern communicated the financial challenges facing the ANRC and the formation of a team that had been formed to identify cost-savings measures that would help avoid broad layoffs and meet the organization's commitment to its Board of Governors to balance the budget in fiscal year 2010. (GC-2(b)). McGovern announced the ANRC's intent to: 1) suspend merit pay increases for fiscal year 2010; 2) suspend the employer matching contribution to the 401(k) Savings Plan effective the first paycheck of May, 2009; 3) close the pension plan to new employees effective July 1, 2009; and 4) look for additional ways to reduce benefit costs with changes to the health insurance plan. (GC-2(b)).

Thereafter, the ANRC amended its Retirement System, closing participation in the Retirement System to employees hired on or after July 1, 2009. At the same time, the ANRC amended its 401(k) Savings Plan, which, among other things, indefinitely suspended the employer matching contribution effective May 1, 2009, and for those employees that would no longer be eligible for the Retirement System, introduced a two percent (2%) non-matching employer contribution effective July 1, 2009. (Tr. 937).

With respect to merit increases, pursuant to the National directive, on or about August 2009 (fiscal year 2010), for performance between July 1, 2008 and June 30, 2009, none of Respondent's employees received a merit increase. (Tr. 42).

There were also changes to health insurance benefits offered to Respondent's employees effective January 1, 2010, consistent with the changes forecasted by the April 2, 2009 announcement. (GC-54).³

³ The ALJ's Decision incorrectly refers to elimination of the John Deere Company plan as part of the changes beginning January 1, 2010, which are the only changes alleged as unlawful in the Complaint. The John Deere Company plan was eliminated in January 1, 2008. (Tr. 396). (Exception 7.)

2. The Respondent's participation in the ANRC benefit plans and past practice of change.

Respondent is and has been a participating employer in the National Retirement System and the National 401(k) Savings Plan. (Tr. 1038-1039). Respondent has also offered National health insurance benefits since standardization of the benefits effective January 1, 2008. (Tr. 928; see also GC-54).

The ANRC Retirement System, a traditional defined benefit plan, has been in place since 1936. (Tr. 911) The Retirement System has changed, by amendment, many times since 1936. (Tr. 911-912) Changes to the Retirement System affect all participating employers in the plan, including Respondent, which has been a participating employer since the 1990s. As participants in the Retirement System plan, blood services regions like Respondent have no say with regard to the terms and conditions of the plan or changes to the plan. (Tr. 912, 916-917).

The Retirement System plan was amended and restated July 1, 2005, incorporating a number of plan design changes. (Tr. 912-914; R-120). The changes to the plan affected all blood services regions participating in the plan. (Tr. 914) Since July 1, 2005, the Retirement System has been amended on four (4) additional occasions, with each and every amendment applied to all of the blood services regions, including Respondent. (Tr. 914).

The American National Red Cross Savings Plan is a defined contribution 401(k) plan. There has always been just one ANRC 401(k) Savings Plan, which was established in January, 2000. (Tr. 917-918). Blood services regions are participants in the 401(k) Savings Plan but, as is the case with the Retirement System, the blood services regions have no control over the terms or conditions of the plan or changes to the plan. (Tr. 918). Respondent has been a participant in the 401(k) Savings Plan since its inception in 2000. (Tr. 919).

The 401(k) Savings Plan has undergone change, by amendment to the plan, as approved by the Board of Governors. There have been seven (7) amendments to the 401(k) Savings Plan since its inception in January, 2000. Each and every one of the amendments has been applied to the various blood services regions, including Respondent. (Tr. 922-923).

The ANRC also offers health insurance benefits. During the first six (6) calendar months of 2007 a decision was made to revamp the health and welfare program, standardizing the program to become more consistent and more market competitive. (Tr. 942, 928-929). A decision was made that all employer units of the ANRC would participate in a National program designed to provide core medical, dental and life insurance coverage to eligible employees. The National program was redesigned so that all ANRC participating employers would participate in this standardized program; options were eliminated and consolidated, eligibility was standardized, and cost sharing was also standardized. (Tr. 928-929) The standardization was effective January 1, 2008; every eligible employee had to actively enroll in the new standardized program. (Tr. 929-930) Ever since January 1, 2008, there has been an open enrollment in the fall of each year with new changes to the plan design and coverage and/or pricing and/or the network each year effective January 1. (Tr. 930)

The Respondent's employees participate each fall in an open enrollment process for health insurance coverage for the following calendar year. Annual changes to health insurance benefits occurring throughout the years dating back to calendar year 2007 include changes to plan design, changes to co-pays, co-insurance, and premiums, changes in in-network and out-of-network coverage, and changes to carriers. (Tr. 1039-1041)

3. The consent decree and the Compliance Plan's requirements for standardization.

The ANRC has operated under the terms of a consent decree with the Food and Drug Administration (FDA) for approximately 20 years. The consequences of operating under a consent decree are significant, the most significant consequence being that the FDA can shut down business. (Tr. 945-946).

Throughout the years that the ANRC has operated under a consent decree it has at times been subject to consequences for noncompliance, such as incurring fines and receiving adverse determination letters. (Tr. 460, 946-947). After receipt of an adverse determination letter issued by the FDA in 2006, the ANRC Board of Governors ordered a special audit to be conducted throughout the organization to determine the state of the organization. (Tr. 946-947). The most important issue identified by the audit was the state of the Collections Department, which is the largest department in the organization and which was also determined to be the department with the largest number of errors. (Tr. 947). Errors within the Collections Department can range from insignificant or minor clerical errors to significant errors that could affect the safety of the donor or the unit of blood being collected. (Tr. 947).

In response to the audit a Compliance Plan was created to present to the FDA, establishing ANRC's plan to achieve compliance with the requirements of the consent decree. (Tr. 947-949; R-148). Pursuant to the terms of the Compliance Plan the ANRC sought standardization among all the blood services regions throughout the nation in several areas, including standardization of operating procedures, standardization of collection processes, standardization of job descriptions, and standardization of training. (Tr. 947-949; R-148)

The standardization in the Collections Department included implementing a supervisory oversight structure with alignment of staff with a collections supervisor, providing supervisors

with adequate supervisory time to work with and train assigned staff and to be free to be able to oversee the staff in an effort to errors. (Tr. 948-949, 952; R-148). A commitment was made to have an independent supervisor assigned to any mobile unit drive or daily operation with a goal of greater than 25 scheduled donors. (Tr. 948; R-148). All blood services regions, including Respondent, were mandated to comply with the initiative.⁴ (Tr. 953-954).

The directive from National to assign team supervisors to supervise blood drives with goals of 25 or greater was received by the Respondent in December 2008 or January 2009. (Tr. 995). The Respondent's Team Supervisor position in its present state was created in August, 2009, at the time the Team Leader position was restructured. (Tr. 994-995, 1000). There was no effect on Team Leader pay or benefits with the restructuring. There was also no effect on the number of hours worked by Team Leaders. (Tr. 463, 1004).

Team Supervisors have staff who report to them directly. In that regard, Team Supervisors are responsible for monitoring their staff's performance, completing and giving them their monthly reviews, mid-year review and annual review. (Tr. 994) On drives with goals of 25 or greater, Team Supervisors are considered "non-operational" supervisors, although the expectation is that Team Supervisors will assist staff to perform tasks, such as a difficult venipuncture or a difficult health history if staff needs help. (Tr. 996-997). The expectation that Team Supervisors provide assistance to staff, if needed, has been the expectation since August 2009. (Tr. 997).

Team Leaders are in charge the day of the blood drive for drives with goals of 25 or fewer donors. Team Leaders have responsibility for the staff at the drive that day but have no

⁴ The ALJ incorrectly ignored the un rebutted testimony of Pat DeMaris (incorrectly referred to as Anna Shearer in the Decision), who testified that all regions were mandated to comply with the Supervisor initiative. In doing so the ALJ fashioned his own interpretation of language in the Compliance Plan without any factual record to support his interpretation or the erroneous inferences derived from the interpretation. (Exceptions 25-27.)

staff that report directly to them, as is the case with Team Supervisors. (Tr. 994) By virtue of the creation of the Team Supervisor position, Team Leaders no longer had staff reporting to them. The only change in Team Leader duties identified as a result of no longer having a team is that Team Leaders no longer perform monthly reviews, quarterly assessments, or yearly reviews of team members. (Tr. 452-453) Team Leaders also perform tasks at the drive (health histories and venipunctures) in addition to any paperwork associated with being in charge of the drive. (Tr. 1003) If a Team Supervisor is not available for a drive with greater than 25 donors, a Team Leader will be assigned to the drive and expected to operate as the non-operational supervisor. (Tr. 1003).

4. The Paid Time Off (PTO) Policy.

Respondent maintains a paid time off (PTO) program that allows employees to use PTO for absences due to illness, vacation or personal need. (Tr. 416; GC-46; GC-47). The PTO program has always included a limit on the number of PTO hours that employees are allowed to carry over for use into the next calendar year. (Tr. 1015).

On or about June, 2009, a decision was made as part of an initiative of the Mid-America Blood Services Division to standardize the carryover limit among regions in the Division. (Tr. 1015; GC-53). Respondent was instructed to implement the decision, decreasing the annually carryover limit from 160 hours to 120 hours. (Tr. 417-418; GC-53). The ultimate implementation date set for the change was scheduled for December 31, 2010. (Tr. 1015).

On September 15, 2009, Respondent communicated the change via e-mail and by newsletter, explaining that the carryover limit would be changed to 120 hours effective December 31, 2010. (Tr. 418-419; 1015-1016; GC-53). As December 31, 2010 approached, there were additional communications to employees in all-employee organizational update

meetings in August and again in October, 2010, reminding them to use their PTO to avoid forfeiture. (Tr. 1016-1017; R-169). Managers were also instructed to remind staff to utilize their PTO so they would not lose any time due to the transition from 160 hours to 120 hours. (Tr. 1016-1017). As an additional measure to avoid possible PTO forfeiture, some employees were paid for PTO in addition to the hours they worked (instead of taking off). (Tr. 491-493, 1018). ALJD 10:4-5. Ultimately, there were only five (5) bargaining unit employees from among a total of approximately 170 bargaining unit employees that forfeited any PTO by virtue of being over the 120 hour limit as of December 31, 2010. (Tr. 1018-1019). ALJD 10:6-7.

5. Loading and unloading vehicles.

Respondent collects blood at both fixed and remote sites. Various blood collection vehicles (trucks, mini-vans and self-contained units or “buses”) driven by certain of Respondent’s employees are used to transport required supplies, equipment, blood products and staff to and from mobile blood drive sites. The vehicles are initially loaded at the Respondent’s fixed site located in Peoria, Illinois before being driven to a remote collection site and are also unloaded at the Peoria site at the conclusion of a drive. (Tr. 517-521).

On or before November 2009 a decision was made at the Mid-America Division level to assign responsibility for loading and unloading vehicles to Supply Assistants. Final implementation of the decision by Respondent at the Regional level occurred on February 19, 2011. (Tr. 975-976). The loading and unloading duties previously performed by Mobile Unit Assistants (MUAs) were assigned to Supply Assistants.⁵ The Respondent employs about 20 to 25 MUAs. (R-3). At the time the Respondent employed four (4) full-time Supply

⁵ Unloading during the week was assigned to Supply Assistants; unloading on the weekends continued to be performed by MUAs.

Assistants and added two (2) part-time Supply Assistant positions shortly before the implementation. (Tr. 979).

To date, loading duties remain the responsibility of the Supply Assistants. Unloading duties were reassigned to MUAs effective August 6, 2011. (Tr. 539, 984).

D. Post-Certification Chronology.

1. The Union's information request regarding termination information.

At the conclusion of the parties' first bargaining session on February 27, 2011, Kent Beauchamp, the Union's chief spokesperson, raised an issue regarding employees who had been terminated and requested information about their terminations, i.e., the discipline and supporting documents for the discipline. (Tr. 135-136). The Union had learned that there had been five employees terminated by Respondent between October 7, 2010, when the Union was first certified, and February 27, 2011. (Tr. 318) Tim Lavelle, a Union representative at the bargaining table, testified that at the conclusion of the bargaining session the way things were left with regard to the information request was that the Union would provide names of those the Union knew of who had been disciplined or discharged and provide that information to the Respondent. (Tr. 331).

That was the understanding that Charles Pautsch, Respondent's chief spokesperson, walked away with from the first bargaining session. Pautsch testified that he requested that the Union provide names of those persons the Union was interested in because he believed it would be time consuming to go through all of the files necessary to pull the information. As indicated in Respondent's minutes, and as acknowledged by both Union representatives in their testimony, the Union agreed it would send the names of the four to five people who had been terminated. (Tr. 685-686; R-4)

Michelle Agnew, Respondent's Human Resources Manager, similarly testified that Beauchamp had indicated at the first bargaining session that the Union may want to bargain over employees who had been terminated but said that the Union would provide the Respondent with names. (Tr. 1030) Agnew testified that as of the time the Respondent received Beauchamp's April 14, 2011 letter regarding the information, the Respondent had not yet received the names of the individuals that the Union had committed to provide.⁶ (Tr. 1032) As the person responsible for follow-up items relating to information requests and bargaining she testified that it was her typical practice to remind herself of tasks she needed to complete by marking an asterisk in her bargaining notes. At the administrative hearing she testified that none of her bargaining notes, to date, included a list of names. (Tr. 1033)

2. Team Supervisors and Instructors.

Neither Team Supervisors nor Instructors are assigned to perform bargaining unit work. (Tr. 1004-1005) Team Supervisors may on occasion perform venipunctures or health histories but only for the purpose of assisting staff on mobiles with a difficult venipuncture or history or to maintain clinical competencies with respect to performing these types of tasks. (Tr. 997-998) Likewise, in addition to providing training to staff with respect to performing procedures, Instructors also must maintain their clinical competencies and, in that regard, are required to perform venipunctures and health histories for that purpose. (Tr. 997-998, 1012)

III. ARGUMENT

A. The ALJ Erred In Finding Changes Made By Respondent Prior To The Union's Certification Violated The Act. (Exception 50.)

1. The ALJ Erred In Applying The *Mike O'Connor* "At Your Peril" Rule. The Rule Should Not Apply Because Respondent Had No

⁶ Lavelle testified that as of the May 9, 2011 bargaining session he was still planning to talk to his members to get a list of names to the Respondent regarding those who had been terminated. (Tr. 353-354)

Objective Evidence Suggesting Majority Support For The Union Was Established. (Exceptions 8-11.)

The ALJ applied the *Mike O'Connor* line of cases and concluded that Respondent violated the Act when it suspended the 401(k) matching contribution effective May, 2009, closed the Retirement System plan to new hires effective July 1, 2009, suspended merit increases effective August, 2009 and made changes to health insurance benefits effective January 1, 2010. The ALJ's automatic application of the rule failed to take into account a critical distinction between the instant case and cases where the *Mike O'Connor* rule provides that an employer "acts at its peril" when implementing unilateral changes pending certification of a representation election. The ALJ erred in finding "immaterial" the fact that there were no ballots counted or tallied for three years between the election on June 1, 2007 and the Union's certification on October 7, 2010. ALJD 5:25-28. A close examination of the *Mike O'Connor* line of cases establishes that in the absence of any objective evidence suggesting the Union had attained majority status, Respondent did not violate Section 8(a)(5) in making changes to wages and benefits pending the Union's certification and the ALJ's determination must be reversed.

"The touchstone in these [*Mike O'Connor*] cases for determining the union's majority status and the employer's concomitant duty under Section 8(a)(5) is the election tally. If it is the result of the employees' free choice, the Board's vote count is dispositive of the employer's postelection obligation to bargain, even during the pendency of objections." *W.A. Krueger Co.* 325 NLRB 1225, 1230 (Oviatt, concurring and dissenting in part). Conversely, if there is no election tally and the employer has no knowledge to even suggest a possible union victory, the rule cannot apply in the first instance.

In *Mike O'Connor*, 209 NLRB 701 (1974), the employer was aware when it filed its objections that there were eight votes in favor of the union and six against. The Board's ruling

that the employer “acts at its peril” therefore must be read in this context. *Mike O’Connor* relied upon several cases that had previously utilized the “at your peril rule”—*Fleming Mfg. Co.*, 119 NLRB 452 (1957); *King Radio Corp., Inc.*, 166 NLRB 649, 652 (1966); *Laney v. Duke Storage Warehouse Co., Inc.*, 151 NLRB 248, 267 (1965); *Keystone Casing Supply, Inc.*, 196 NLRB 920, 923 (1972); and *Zelrich Co.*, 144 NLRB 1381, 1383 (1963) See *Mike O’Connor*, 209 NLRB at 703-04 n.10-11. A close examination of these cases reveals that they involve situations where the employer was aware of the election results at the time it took unilateral action.

For instance, in *Fleming Mfg. Co.*, 119 NLRB 452 (1957), “[t]he union’s majority was established on July 16, 1956, when the tally of ballots was counted. On that day [the employer] admittedly was aware of the establishment of the union’s majority status.” *Id.* at 464. The Board held that “once any employer becomes aware of a properly designated bargaining representative, he may not unilaterally make changes in the employees’ terms and conditions of employment, without first giving the representative an opportunity to bargain collectively.” *Id.*

In *King Radio Corp., Inc.*, 166 NLRB 649, 652 (1966), the Board applied the “at your peril” rule after finding that “the Company had a ‘planned scheme or design’ to retaliate against its employees for their selection of the union, and that the Company ‘embarked upon a course of action immediately after the election to show the employees that their statutory rights were meaningless.’” Likewise, in *Laney v. Duke Storage Warehouse Co., Inc.*, 151 NLRB 248, 267 (1965), *enfd.* in part 369 F.2d 859(5th Cir. 1966), the Board held that post-election unilateral conduct was unlawful because “[a]fter the election the [employer] knew that the union had won the election and represented a majority of their employees. The employer decided not to recognize the Board’s decision and certification.”

Also, in *Keystone Casing Supply, Inc.*, 196 NLRB 920, 923 (1972), the Board found a violation of the Act based on “the essentially uncontroverted evidence that management’s sudden, unilateral change in its leave and vacation policy was in retaliation against the employees for having voted 7 days earlier for union representation.” Finally, such was also the case in *Zelrich Co.*, 144 NLRB 1381, 1383 (1963), where the employer “had been paying a Christmas bonus for 5 years, [but] withheld the bonus in December 1962, in retaliation for the employees’ choosing the union in the Board election held December 14”

Other cases that predate *Mike O’Connor* but that were not cited therein also adhere to this rationale. For example, in *Tennessee Valley Broadcasting Co.*, 83 NLRB 895, 898 (1949), the Board found that “from the date of the election at which the union established its majority, [the employer] engaged in a series of dilatory and evasive conduct designed to put off, and if possible avoid entirely, the performance of its statutory duty to bargain” The Board ruled the employer committed an unfair labor practice by engaging in unilateral action pending certification of the election because it had no “good faith doubts [about] the union’s right to recognition on any tenable ground.” Likewise, in *Jordan Bus Co.*, 107 NLRB 717, 729 (1954), the employer’s representative “acted as observer at the election, signed the tally of ballots, and did not file any objections to the conduct thereof.” On these facts, the Board found the employer had no good faith basis to dispute the union’s right to represent its employee. Therefore, the Board applied the rule that “when an employer is aware of the existence of a properly designated bargaining representative, he may not unilaterally make changes in the terms or conditions of employment” *Id.*; Cf. *Cooks Market, Inc.*, 159 NLRB 1182, 1183 (1966)(rejecting the General Counsel’s contention that the respondent was obligated to bargain with the union

immediately following the election at the point where challenges were determinative and the final results of the election were not known).

Cases subsequent to *Mike O'Connor* also involve employers that knew that the union had won the initial election and made unilateral changes pending a decision on their objections challenging the results. *See, e.g., Production Plated Plastics, Inc.*, 247 NLRB 595, 600-601 (1980) (“employer was well aware that the union had received a majority of the votes cast in the appropriate unit [and] nonetheless while its objections were pending unilaterally changed its restroom policy”); *Alberts, Inc.*, 213 NLRB 686, 693 (1974) (employer’s agents “were aware, when they took their unilateral action, of the union’s majority status” and informed employees that they had “asked for it” and were “going to get it.”); and *UBC Western Council of Indus. Workers*, 321 NLRB 409, 415 (1996) (employer acts at its peril if it makes unilateral changes and refuses to deal with a union “that has prevailed in a representation election”).

The cases cited by the ALJ supporting application of the *Mike O'Connor* rule also involve situations where the employer knew the outcome of the election at the time of its alleged unilateral action⁷ and/or otherwise had a tally of ballots that at least suggested that the union had garnered the majority of the votes based on the ballots that were counted.⁸

These cases stand in stark contrast to the situation that Respondent found itself in, i.e., the absence of any tally of ballots to even suggest that the Union may attain majority status. “An employer may, ordinarily, withhold recognition and refuse to bargain with a union until it is certified by the Board if it in good faith doubts the union’s right to recognition on any tenable ground.” *Tennessee Valley Broadcasting Co.*, 83 NLRB 895, 898 (1949). It cannot be gainsaid that Respondent had no tenable ground upon which to base a good faith doubt as to the Union’s

⁷ *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26 (2011)(testing certification based on objections to the conduct of the election); *Alta Vista Regional Hospital*, 357 NLRB No. 36 (2011)(same).

⁸ *Overnite Transportation Co.*, 335 NLRB 372, 373 (2001)(219 ballots for the union and 201 against).

right to recognition. With no tally of ballots Respondent had nothing indicating even the possibility of a union victory.

The ALJ's reasoning that equities of the situation dictate assigning the risk of unilateral action to Respondent further calls into question the result reached, suggesting that the ALJ reached the outcome based on an improper assignment of fault on the part of the Respondent for the delay between the election and certification. The ALJ reasons that "the equities for such a result are even clearer since it was Respondent's unsuccessful challenge to the ballots of the team leaders that was responsible for the long delay in certification in a unit in which the employees overwhelming favored union representation." ALJD 5:43-45. The ALJ's "equities" analysis has no support in law or fact. Respondent, in good faith, exercised its right to challenge the appropriateness of including the team leaders in the unit; it was the Board's extended delay in deciding the case that resulted in a three year gap between election and certification. During this time Respondent had absolutely no evidence upon which to base any belief that majority support was established and certainly had no way to predict, absent a crystal ball, that "employees overwhelming favored union representation."

Where there has never been an initial tally of the votes, and where there is no evidence of union majority support, it still remains true that "the Union's majority status as well as the question concerning representation [is] not resolved until the Board's certification [is] issued." *Harbor Chevrolet Co.*, 93 NLRB 1326, 1328 (1951). *See also Kal-Die Casting Corp.*, 221 NLRB 1068, 1072 n.11 (1975) ("Absent proof of majority established independently of a Board-conducted election or significant employer violations that relate to the bargaining obligation, the basic principle of *Harbor Chevrolet Company*, 93 NLRB 1326 (1951), has not been materially affected.")

To require Respondent to bargain with the Union at a time when no votes had been counted and when there was no other indication of majority support would force Respondent into a separate Section 8(a)(2) violation. “[T]he Board has held that an employer violates Section 8(a)(2) by recognizing a union that lacks majority support” regardless of its subjective belief as to whether the union has obtained majority status. *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717, 720 (2001). See also *Ladies’ Garment Workers v. NLRB*, 366 U.S. 731 (1961) and *Windsor Castle Health Care*, 310 NLRB 579 (1993). If an employer violates the Act for even a good faith mistake as to the majority status of a union, then it would have been reckless for Respondent to bargain with the Union following an election where no votes had been counted.

In this case the election ballots were impounded and no votes were tallied until September 16, 2010. There is no evidence in the record, or even an allegation, that Respondent had knowledge that the Union won the election or otherwise had majority support prior to that date. The factual record establishes that the decisions and/or implementation of certain of the alleged unlawful conduct occurred prior to any objective evidence of the Union’s majority status. The decision and implementation of changes to benefits occurred well in advance of the tally of ballots on September 16, 2010 and certification on October 7, 2010. Changes in the retirement benefits – the 401(k) Savings Plan and the Retirement System – announced April 2, 2009, were made and implemented by May 1, 2009 and July 1, 2009. The suspension of merit increases was effective for Respondent’s employees in August, 2009. Changes to the health insurance benefits were effective January 1, 2010.

In these circumstances, there is no basis to find Respondent violated Section 8(a)(5) under the *Mike O’Connor* “act at your peril” rule. To do so would place Respondent in an impossible situation, facing liability under Section 8(a)(5) for acting unilaterally if it was

ultimately determined that the Union won the election; yet, subject to liability under Section 8(a)(2) if Respondent would have bargained with the Union and the Union lost the election. The *Mike O'Connor* rule makes eminent sense when an employer is aware that the union has won the election and is “testing the certification” or otherwise has at least some indication that the union may have achieved majority status. Applying it where the votes were never counted and where the employer has no evidence of even the possibility of union majority support leaves the employer in a no-win, “damned-if-you do, damned-if-you don’t” situation. The *Mike O'Connor* “at your peril rule” should not be applied here where the election ballots were impounded and there was not a tally of votes or any other objective evidence of majority support before the alleged unlawful conduct occurred. The ALJ’s conclusion that Respondent acted at its peril in violation of Section 8(a)(5) when it made these changes cannot be affirmed.

2. The ALJ Erred In Ignoring Well-Established Board Precedent Establishing That Respondent Had No Duty To Bargain Regarding Decisions Made Prior To Certification Even If The Decisions Were Implemented Post-Certification. (Exceptions 8, 16.)

As discussed above, there was no apparent ballot victory for the Union until the point in time that the ballots were no longer impounded and had been opened, counted and tallied. That date was September 16, 2010. The law is clear that “an employer’s obligation under Section 8(a)(5) of the Act to refrain from making unilateral changes in working conditions commences at the time of an apparent ballot victory for a labor organization rather than at the time of its official certification.” *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992); *Tri-Tech Services, Inc.*, 340 NLRB 894, 895 (2003).

The aforementioned rule, however, does not apply to changes planned prior to the establishment of the bargaining obligation. *Mail Contractors of America, Inc.*, 346 NLRB 164 (2005) (“If an employer makes a decision to implement a change before becoming obligated to

bargain with the union, it does not violate the Act by its later implementation of that change”); *SGS Control Services*, 334 NLRB 858 (2001); *Embossing Printers, Inc.*, 268 NLRB 710 (1984) (cancellation of bonus after union certified as bargaining representative was lawful because employer’s decision to cancel bonus was made before it became obligated to bargain).

Having made decisions prior to the attachment of a bargaining obligation, “[i]t is well settled that it is the employer’s duty to proceed as it would have done had the union not been on the scene.” *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), enf’d. 658 F.2d 1 (1st Cir. 1981). Moreover, an employer has no obligation or affirmative duty to volunteer to a union, at the time the change is implemented, that the decision had been made prior to the point in time when the union was recognized. *Mail Contractors of America, Inc.*, supra, at 164.

Under these well settled principles, Respondent did not violate Section 8(a)(5) of the Act by virtue of any changes based on decisions made prior to the attachment of any bargaining obligation even if implementation of the decisions occurred after the tally of ballots on September 16, 2010. The principle applies to a number of the alleged unilateral changes at issue in this Complaint and provides yet another basis for finding Respondent acted lawfully.

For example, it is undisputed that the decisions announced by CEO McGovern on April 2, 2009 to amend the 401(k) Savings Plan and the Retirement System plan, to make annual changes to the health insurance plan for calendar year 2010 and to suspend merit increases in August 2009 were made and implemented prior to any tally of ballots. Each of these changes occurred pre-certification and, indeed, prior to any showing of majority status, such that no obligation to bargain attached.

3. The ALJ Erred In Finding The Alleged Unilateral Changes To Benefits Represented Changes To The Status Quo And Therefore Violated Section 8(a)(5). (Exceptions 12-18.)

It is well established that a unilateral change in employees' terms and conditions does not violate Section 8(a)(5) if it does not alter the status quo. *House of the Good Samaritan*, 268 NLRB 236, 237 (1983). The threshold inquiry, therefore, is what the status quo was prior to the alleged unlawful change. The principles relating to a change in the status quo were succinctly stated by the Board in *Post-Tribune Co.*, 337 NLRB 1279 (2002):

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

In other words, changes that merely preserve the dynamic status quo, consistent with past practices, are not a violation of the Act. See *Soule Glass and Glazing Co. v. N.L.R.B.*, 652 F.2d 1055, 1084-85 (1st Cir. 1981). A longstanding practice may constitute a term and condition of employment and an employer does not violate the Act if it acts consistently with that practice in making unilateral changes. *Courier-Journal I*, 342 NLRB 1093, 1094 (2004); *Courier Journal II*, 342 NLRB 1148 (2004).

The record here establishes that the status quo with respect to benefits is the Respondent's participation in the ANRC National plans. The record also establishes a past practice of change to the National plans, over which the Respondent has no control, with changes applied to the Respondent's employees just as those changes are applied to ANRC employees across the nation. The factual record further establishes that as a participating employer the Respondent does not exercise control over what happens with the plans and that each time the National plans change those changes are applied to Respondent's employees. (Tr. 912, 914, 916-918, 922-923). It is pursuant to this past practice of change that changes were made in 2009, preserving the dynamic status quo as required by the Act.

This dynamic status quo concept in the context of the Respondent's lack of discretion with regard to applying changes to the National plans to its employees is essentially the same principle applied in the multitude of cases wherein employers are held to violate Section 8(a)(5) for failure to continue to grant annual wage increases while bargaining for an initial contract. See, e.g., *Covanta Energy Corp.*, 356 NLRB No. 98 (2011); *Jensen Enterprises*, 339 NLRB 877 (2003); accord *More Truck Lines, Inc.*, 336 NLRB 772 (2001); *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), *enfd. mem.* 718 F.2d 1088 (4th Cir. 1983)(recognizing the duty to maintain the status quo imposes upon the employer an obligation to implement benefits that have become conditions of employment by virtue of prior commitment or practice). The status quo required the Respondent to continue its participation in the National plans and apply those plans, as amended by National, to its employees. That is exactly what occurred in May and July, 2009, with respect to the 401(k) Savings Plan and the Retirement System plan, and again, on January 1, 2010 with regard to health insurance benefits.

The ALJ mischaracterizes Respondent's position, suggesting that Respondent's basis for making changes to 401(k) benefits, Retirement System benefits and health insurance benefits for its employees was simply because the ANRC made changes with respect to unorganized employees of other divisions or chapters. ALJD 6:42-45. The ALJ is incorrect in this regard, ignoring the factual record supporting Respondent's privilege and indeed obligation to make changes to these benefits according to the dynamic status quo, which is Respondent's participation in the National plans, whatever those National plans may be.

To the extent the ALJ suggests that Respondent somehow had discretion not to apply changes made to the National plans to its employees, the ALJ is wrong. ALJD 7:1-9. Unlike *Goya Foods of Florida*, 347 NLRB 1118, 1120 (2006), cited by the ALJ, Respondent did not rely "on an asserted historic right to act unilaterally" in applying the changes made to the National plans to its bargaining unit employees. Likewise, this is not a situation involving an employer's discretion which "appears to be unlimited." as in *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), also cited by the ALJ. Rather, as recognized in *American Red Cross, Blood Services, Connecticut Region*, JD(NY) 28-11 (2011), at pp. 37-40, Respondent had no control over changes made to the plans by ANRC and the changes did not involve exercise of any discretion by the Respondent. Similar to the situation in the *Connecticut Region* case, the status quo with respect to Respondent's employees was participation in the National plans with any amendments enacted by the Board of Governors applies to Respondent's employees.

Contrary to the conclusion reached by the ALJ, Respondent has established that it was required to implement changes to retirement and health benefits, as those benefits were changed by ANRC, as part and parcel of its obligation to maintain the dynamic status quo. Respondent did not violate Section 8(a)(5).

B. The ALJ Erred In Finding That Respondent Violated The Act By Promoting Team Leaders To Supervisory Positions.⁹ (Exceptions 19-27, 50.)

Respondent excepts to the ALJ's finding that Respondent violated the Act by promoting a number of Team Leaders to Team Supervisor positions, as it is contrary to well-established Board precedent. Under such precedent, an employer's decision to promote bargaining unit employees to non-unit supervisory positions triggers a violation of the Act only if there is actual evidence that the promotion results in an identifiable, material loss of work for bargaining unit employees. In his decision, the ALJ failed to identify such a decrease in work, and instead appeared to assume that the mere act of promotion of bargaining unit employees to non-bargaining unit positions necessarily resulted in a loss of work sufficient to constitute a violation of the Act. In making this assumption, the ALJ committed reversible error.

In his decision, the ALJ wrote:

It is a violation of Section 8(a)(5) to unilaterally promote a unit employee to a supervisory position if that employee continues to perform unit work. Such a personnel action in effect changes the status quo by taking unit work away from the bargaining unit, *Suzy Curtains, Inc.*, 309 NLRB 1287, 1289 (1992). Thus, the issue with regard to this complaint allegation is not so much whether the remaining team leaders were no longer doing unit work but rather whether the newly promoted team supervisors were performing unit work. I find that this is so and that Respondent violated the Act by promoting team leaders to supervisory positions and having them perform what had heretofore been bargaining unit work.

ALJD 8:5-12.

It is well-established that "neither the [employer's] decision to create new supervisory positions nor the selection of individuals to fill these positions is a mandatory subject of bargaining." *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993) (citing *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 626 (1984)). Where an employer

⁹ Although not addressed by the ALJ, Respondent maintains its position that no obligation to bargain attached with respect to the Team Supervisor initiative because both the decision and implementation of the decision occurred prior to certification of the Union.

wishes to select unit employees for non-unit, supervisory promotions, and the unit does not suffer a measurable and identifiable loss of work, the Board does not find that the employer has a duty to bargain over the promotions. See *Lutheran Home of Kendallville, Indiana*, 264 NLRB 525, 528 (1982) (noting a “sharp distinction” in an employer’s bargaining obligations based on whether the bargaining unit “suffers a *significant loss* of work” through promotions) (emphasis added); *Tesoro Petroleum Corp.*, 192 NLRB 354, 359 (1971) (“In determining whether bargaining was required, the Board has evaluated such questions as whether the removal of the unit work has a *significant impact* on the bargaining unit”) (emphasis added). An employer has an obligation to bargain with a union only if its actions actually reduce bargaining unit work. See *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB at 545.

In light of this authority, the Board should reverse the ALJ’s finding that Respondent violated Section 8(a)(5) when certain Team Leaders who applied for Team Supervisor positions were promoted to the positions. Principally, the ALJ’s decision rests on the mistaken legal assumption that the mere promotion of bargaining unit employees to non-unit positions necessarily entails a diminution of bargaining unit work. Board precedent does not follow such an automatic rule. For example, in *Suzy Curtains, Inc.*, 309 NLRB 1287 (1992), which the ALJ cites to in his decision, the union alleged that the employer violated Section 8(a)(5) of the Act by: (A) promoting a bargaining unit warehouse employee to a non-unit supervisory position, and (B) “reorganizing its entire warehouse operation.” See *Id.* at 1289, 1293-94. With respect to the second allegation, the ALJ found – as did the Board – that the employer violated the Act after scrutinizing records which showed a clear decrease in the number of warehouse employees following the reorganization. *Id.* at 1293-94. None of the warehouse employees subject to the reorganization were promoted or reassigned to other positions. See *Id.* at 1289, 1293-94.

Instead, the positions appear to have been eliminated. *Id.* at 1293-94. With respect to the first allegation, the ALJ found that the employer violated the Act by relying upon evidence which showed that, of the promoted employee's five principal job duties, only one of these job duties was performed by the promoted individual's replacement. The Board adopted the ALJ's decision, and noted that a careful comparison of the promoted individual's job responsibilities – both before and after the promotion – showed that his promotion removed substantial work from the bargaining unit. See *Id.* at 1289.

The ALJ's analysis clearly deviates from *Suzy Curtains*. Here, the ALJ appeared to follow the assumption that in all cases where a promoted unit employee continues to perform at least some unit work after a promotion, an employer necessarily takes work from the bargaining unit and violates the Act. Contrary to *Suzy Curtains*, in the case at hand, the ALJ did not engage in a careful comparison showing a significant loss in bargaining unit work. See also *Lutheran Home*, 264 NLRB at 528; *Tesoro Petroleum*, 192 NLRB at 359. Because the ALJ failed to identify the requisite significant loss of bargaining unit work among Team Leaders, and incorrectly assumed a *de facto* loss of bargaining unit work in all cases where promoted employees continue to perform bargaining unit work, the Board should reverse the ALJ's decision that the Region violated Section 8(a)(5) of the Act as it relates to Team Supervisor promotions.

With respect to Team Leader duties, the record establishes the single change to duties identified by the Team Leader who testified was that Team Leaders no longer have a team of four to five staff who report to them. (Tr. 449-450). In turn, no longer having a team means only that Team Leaders no longer perform monthly reviews, quarterly assessments, or yearly reviews of team members. The elimination of this single supervisory duty does not rise to the

level of a substantial, material and significant change in job duties. The fact that neither the hours nor the pay or benefits of Team Leaders changed as a result of the elimination of this one duty further supports a finding of no violation of the Act. The ALJ's finding of a violation is in error.

C. The ALJ Erred In Finding Respondent's Reassignment of Loading Duties Violated The Act. (Exceptions 28-33, 50.)

At the outset, as a decision made prior to the Union's certification, albeit implemented post-certification, no bargaining duty attached with respect to any change to loading duties or hours of the MUAs and Supply Clerks. See Section III.A.2. The ALJ's finding should be reversed on that basis.

Second, to the extent there was a request to bargain regarding the changes, there is no evidence in the record of a refusal to do so. Respondent's response was merely that it would not be productive to bargain over individual schedules, like the changes to the schedule of the Supply Clerk, not that the Respondent would not bargain over schedules. (Tr. 750; R-21) In the absence of a refusal to bargain, the ALJ's finding cannot be sustained.

D. The ALJ Erred In Finding Respondent's Change To The Paid Time Off Policy Violated The Act Because The Union's Allegation Is Time Barred And, Even If The Allegation Were Timely, The Change Is Not Substantial, Significant and Material. (Exceptions 34-38, 50.)

Assuming, *arguendo*, that a duty to bargain attaches to changes pending a showing of majority status and/or to changes arising from decisions pre-dating the Union's certification,¹⁰ there is no violation of the Act with respect to the change to the PTO carryover because the allegation is untimely and because the change does not represent a material, substantial or significant change subject to the duty to bargain.

¹⁰ The decision to decrease the PTO carryover dated back to June, 2009, pre-dating the Union's certification, even though final implementation of the decision did not occur until December 31, 2010. (Tr. 1015; GC-53).

1. To the extent there is any duty to bargain regarding the PTO carryover limit, the allegation is time barred.

The ALJ excused the Union's failure to file its charge within the 6-month limitation period, concluding that the Union did not have clear and unequivocal notice of the change to the PTO carryover limit outside the Section 10(b) period. ALJD 10:22-23. In doing so, the ALJ erroneously concluded that notice provided to Respondent's employees did not provide notice to the Union. Additionally, the ALJ failed to recognize that the Union, through notice to the employees, had knowledge of facts necessary to support a ripe unfair labor practice charge a full 18 months in advance of its untimely charge filed March 23, 2011.¹¹

The Board's decision in *United States Postal Service Marina Mail Processing Center*, 271 NLRB 397 (1984) makes clear that the relevant fact for purposes of the limitations period is the date of the alleged unlawful act, not the date its consequences become effective. Once a charging party has actual or constructive notice that the alleged unfair labor practice has been committed, the limitations period has commenced. *Marina Mail Processing Center*, 271 NLRB at 399-400; *Concourse Nursing Home*, 328 NLRB 692, 694 (1999); *Carrier Corp.*, 319 NLRB 184, 193 (1995).

In this case it was Respondent employees elected as stewards and members of the bargaining committee who received notice of the decision to change the carryover limit. As employees of the Region they received initial notice of a planned change as far back as September 2009, with repeated reminders that the effective date of the change was upcoming. Under the circumstances, the members' knowledge about the change to the PTO carryover limit is the Union's knowledge, making untimely the charge filed more than 18 months after the decision to change the limit was first communicated. See, e.g., *Aztec Bus Lines v. San Diego*

¹¹ The charge was filed on March 23, 2011, not February 25, 2011, as stated in the Decision. See GC-1(y).

AFL-CIO Bus Drivers Local Division, 289 NLRB (1988) (finding that notice to an employee, even inadvertent notice, was notice to the union since she was chief shop steward); Advice Memorandum 1-CA-43131 (August 9, 2006)(union learned of the proposed change through the employer’s notification to employees, including the union president who was also an employee).

Moreover, unlike *Leach Corp.*, 312 NLRB 990 (1993), cited by the ALJ in support of the conclusion that the unfair labor practice occurred on January 1, 2011, the record supports that through notice to employees holding positions with the Union, the Union had knowledge of the facts to support a ripe unfair labor practice as early as September 2009, and no later than August, 2010. If the Union had any question in September, 2009 as to whether the PTO carryover limit had changed, there could be no lingering question as of August, 2010, when Respondent again communicated the change effective January 1, 2011. The ALJ erred in refusing to dismiss the allegation as untimely.

2. The Change To The PTO Carryover Limit Does Not Represent A Substantial, Significant and Material Change.

The ALJ’s conclusion that the change to PTO carryover represents a material change to terms or conditions of employment does not comport with Board precedent and is based on speculation not supported by the record.

The Board has made clear that not all unilateral changes in bargaining unit employees’ terms and conditions of employment constitute unfair labor practices. Even when an employer makes a change that would otherwise pertain to a mandatory subject of bargaining, the Board has not found a violation when there has been no significant detriment to unit employees. See *Alamo Cement Co.*, 277 NLRB 1031 (1985). To be found unlawful, the unilaterally imposed change must be “material, substantial and significant” and must have a “real impact” on or be “a significant detriment to” the employees or their working conditions. *Outboard Marine Corp.*,

307 NLRB 1333, 1339 (1992), *enfd.* 9 F.3d 113 (7th Cir. 1993)(Table); *UNC Nuclear Industries*, 268 NLRB 841, 847 (1984); *Pacific Diesel Parts Co.*, 203 NLRB 820, 824 (1973); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1062 (1970), *affd.* sub nom. *Retail, Wholesale Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). “The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact.” *W-I Forest Products Co.*, 304 NLRB 957 (1991), citing *Rust Craft Broadcasting*, 225 NLRB 327 (1976). “A change is measured by the extent to which it departs from the existing terms and conditions affecting employees.” *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), *enfd.* mem. 852 F.2d 572 (9th Cir. 1988).

Contrary to the ALJ’s conclusion, the change to the PTO carryover does not represent a substantial, significant and material change sufficient to trigger a duty to bargain. The record establishes that for the overwhelming majority of bargaining unit employees moving the carryover number from 160 hours to 120 hours had absolutely no impact on their PTO benefit. They used the PTO they accrued, moving into calendar year 2011 without PTO in excess of 120 hours and without any PTO hours forfeited. Indeed, when the decision was made to move the PTO carryover limit from 160 to 120 hours employees were provided with nearly eighteen months to use accrued PTO in an effort to ensure that employees had sufficient time to use their benefits without exceeding the carryover limit. With the exception of five employees, from among a bargaining unit of almost 160-170 employees, employees suffered absolutely no detriment in terms of their PTO benefit.

Even if moving from 160 to 120 hours for purposes of carryover may somehow be seen as a reduction in the PTO benefit, *de minimis* reductions affecting the terms and conditions of only a few employees have nevertheless been determined not to amount to a material, substantial

or significant change. For instance, in *Mitchellace, Inc.*, 321 NLRB 191 (1996), the Board affirmed the administrative law judge, finding that a company's action requiring employees to be at their work stations (not on their way back to their work stations) by the end of their break time did not constitute a material, substantial and significant change. In so concluding, the administrative law judge noted that in some cases the action would reduce break time by more than 20%; however, he also considered significant that for some employees the action would result in no change whatsoever. *Mitchellace, Inc.*, 321 NLRB at 193-194; see also *Litton Systems*, 300 NLRB 324, 331-332 (1990), *enfd.* 949 F.2d 249 (8th Cir. 1991), *cert. denied* 503 U.S. 985 (1992) (no material, substantial or significant change arising out of installation of a new buzzer system for regulating break time which led to a 20% reduction in the time some employees spent on their breaks); *Berkshire Nursing Home*, 345 NLRB 220, 221 (2005)(finding that the mere fact that an employee is "disadvantaged" by a change, although perhaps relevant to the test of whether a change is material, substantial and significant, is not alone sufficient to satisfy the test).

The ALJ erroneously concluded that the change, affecting only five employees, represented the type of "real impact" or "significant detriment to" the terms and conditions of the bargaining unit employees necessary for finding a violation of Section 8(a)(5). The ALJ's conclusion cannot be affirmed, particularly, given that in an attempt to bolster the conclusion, the ALJ improperly speculated that employees may forfeit hours in the future – speculation that has no basis in the record. ALJD 10:9-14.

E. The ALJ Erred In Finding Respondent Assigned Bargaining Unit Work To Non-Bargaining Unit Instructor/Trainers And/Or Team Supervisors In Violation Of The Act. (Exceptions 39-45, 50.)

In finding a violation of the Act relating to the allegation that non-unit Instructor/Trainers and/or Team Supervisors have performed bargaining unit work, the ALJ errs in a fundamental manner by assigning the burden of proof to Respondent rather than to General Counsel. It is axiomatic that the General Counsel bears the burden to prove a violation of the Act. *Brooks Foundry, Inc.*, 166 NLRB 581, 587 (1967). For purposes of a violation of Section 8(a)(5), the General Counsel must prove there has been a change. *Pan American Grain Co.*, 351 NLRB 1412, 1415 n.9 (2007). Simply put, if there is no proof of a change there is no violation. Instead of applying this basic principle, the ALJ improperly places the burden on Respondent to prove the absence of change.

The General Counsel has not developed a factual record that supports a finding that any change has occurred with respect to the handful of instances that the ALJ relies upon in making a sweeping statement that non-unit employees have performed bargaining unit work “on several occasions.”¹² ALJD 10: 31-32. The only testimony presented at the hearing on this issue was from a Collections Technician who testified regarding four incidents during March and April, 2011, and one example during June, 2011 when he *believed* either an Instructor or a Team Supervisor had been assigned to perform bargaining unit work. (Tr. 595-597, 601-602; see also GC-70 and GC-71). The Technician admitted that he did not know if this was a change in practice from what had occurred previously. (Tr. 608-609, 613-614).

In finding these isolated instances somehow amount to a violation of the Act, the ALJ improperly disregarded the testimony in the record from the Director of Whole Blood

¹² Contrary to the record, the ALJ also erroneously states that Team Supervisor Kahla Crackel performed unit work on a blood drive. (Tr. 598).

Collections who testified that Team Supervisors, in general, and those Team Supervisors specifically testified about by the Collection Technician, have not been assigned to do bargaining unit work. (Tr. 1004-1005). The ALJ also improperly disregarded testimony that like Instructors, Team Supervisors must maintain their clinical competencies and, in that regard, are required to perform venipunctures and health histories in order to do so. (Tr. 997-998, 1012). Further, even if it were proper to place the burden on Respondent to prove the absence of change, the testimony presented by Respondent was sufficient to establish such a past practice of Instructors and Team Supervisors performing venipunctures and health histories.

The ALJ cites to a statement made by Respondent at a bargaining session on April 25 promising that non-unit employees would not perform bargaining unit work. Although unclear as to the reasoning for referencing the statement, to the extent the ALJ infers from this statement that Respondent somehow admitted that Instructors and/or Team Supervisors were performing bargaining unit work, he is wrong. The record establishes that the statement on April 25 was made by Respondent specific to the issue of warehouse employees performing loading and unloading and a reassurance that warehouse employees would no longer perform that work. (Tr. 749-750; R-21).

The facts simply do not support the ALJ's finding that Respondent violated the Act by assigning non-bargaining unit employees to perform bargaining unit work on mobile drives.

F. The ALJ Erred In Finding Respondent Violated The Act By Failing To Provide The Union With Information Regarding Employee Discipline. (Exceptions 46-48, 50.)

Despite the scope of the allegation in the Complaint as to the information allegedly requested by the Union, it is clear from the testimony at the hearing that the Union's information request relating to discipline information is limited to the information regarding four or five

individuals terminated after the Union's certification in October, 2010. When the information was first requested by Beauchamp, Pautsch responded that it would be unduly burdensome. Pautsch seasonably raised the objection. See, e.g., *J. I. Case Co. v. NLRB*, 253 F.2d 149, 154, 156 (7th Cir. 1958). The record reflects that the agreed upon accommodation for purposes of responding to the request was for the Respondent to provide information regarding the four to five employees the Union identified and that the ball was in the Union's court. There was no reason for the Respondent to go further to explore the burdensomeness of responding to the request, as the ALJ suggests [ALJD 12:27-30], because the parties agreed upon an alternative accommodation.

It is also clear from the testimony and exhibits presented at the hearing that the Union never presented the names of the individuals to the Respondent prior to the Complaint being filed. The only person that could testify to any names was Beauchamp, who was unable to provide the names, but testified that "at some point he [Lavelle] sent across the table names of one or two people, *I think*". (Tr. 303) Tellingly, none of the bargaining minutes prepared by Beauchamp or Lavelle included any names, nor does the comprehensive set of bargaining minutes prepared by Respondent include any names. In the end, any delay in response by the Respondent is due to the simple fact that Respondent never received the information promised by the Union in order for the Respondent to respond to the information request.

G. The ALJ Erred In Finding Respondent Failed To Bargain Regarding Employee Discipline. (Exception 49, 50.)

The ALJ bases his finding of a violation for failure to bargain regarding employee discipline on: (1) Respondent's alleged refusal to allow Union representation during the termination meetings of two of its employees; and (2) Respondent's alleged refusal to bargain over employee discipline in response to a demand in October, 2010 and December 16, 2010.

With respect to the first basis, even if the record supported any inference that Respondent declined to allow Union representation at a termination meeting, that conduct does not constitute a refusal to bargain.

With respect to the second basis, the ALJ cites absolutely no evidentiary support in the record, but rather summarily concludes that the “Respondent violated the Act as alleged”. ALJD 15:20-22. The ALJ references GC-6 as one of the demands to bargain regarding employee discipline; GC-6 is entirely silent as to any such request. The ALJ also references GC-7, dated December 16, 2010. To the extent GC-7 constituted a request, the record shows that indeed there were discussions at the bargaining table. On May 9, 2011 the Respondent submitted a proposal to the Union on Discharge and Discipline. (GC-40; Tr. 225). Additionally, the Respondent submitted another proposal on Discharge and Discipline on July 5, 2011. (R-75; R-76).

There were also discussions across the bargaining table regarding past and future discipline. Beauchamp testified that at the May 9, 2011 bargaining session there was some discussion about information related to employee discipline. Beauchamp stated, “Again, I think I testified earlier, I didn’t think, we didn’t want to bargain over discipline that we thought was justified, but, you know, we might want to bargain over discipline that we don’t think was justified...”. (Tr. 226, emphasis added). This testimony was bolstered by Agnew who testified that Beauchamp had stated that the Union would like to bargain over the employees who had been terminated and he would provide the names so the Union could receive sufficient information to determine whether they wanted to bargain or not. (Tr. 1030). Those names were never provided by the Union. (Tr. 1032-1033). As a result, no further bargaining over the topic was requested nor did it occur.

H. To The Extent That Any Finding Of A Violation Of The Act Is Affirmed, The Decision's Recommended Order To Extend The Union's Certification Is Erroneous And Contrary To *Mar-Jac Poultry* And Its Progeny. (Exception 51, 52.)

The ALJ's recommended Remedy and Order requires the Respondent to bargain in good faith and honor the Union's certification for an additional six-month period commencing from the date upon which the Respondent rescinds its allegedly illegal unilateral changes. ALJD 17: 38-43, 19: 5-6. The ALJ bases the recommendation upon the Board's decision in *Mar-Jac Poultry*, 136 NLRB 785 (1962). Neither this record nor the Board's precedent support a *Mar-Jac* extension.

In *Mar-Jac*, an employer filed a petition for an election with the Board. 136 NLRB at 785. Prior to the filing of the petition, the employer and the incumbent union bargained for approximately six months, making "considerable progress" toward an initial CBA. *Id.* at 786. Subsequently, however, the employer refused to bargain for an extended period during the certification year. *Id.* In light of the employer's conduct, the Board denied the employer's representation petition, reasoning that allowing an election would unfairly permit the employer to benefit from its refusal to bargain in good faith. *Id.* As stated by the Board:

[The employer] has, largely through its refusal to bargain, taken from the Union a substantial part of the period when Unions are generally at their greatest strength – the 1-year period immediately following the certification. Thus to permit the employer now to obtain an election would be to allow it to take advantage of its own failure to carry out its statutory obligation.

Id. at 787.

To remedy the employer's conduct, the Board ordered that the certification period be extended to a minimum of one year. *Id.* The Board noted that it would award similar remedies "in future cases revealing similar inequities." *Id.*

Subsequent Board decisions have helped clarify when so-called “*Mar-Jac* extensions” are warranted. In *Spurlino Materials, LLC*, 353 NLRB 1198 (2009), for example, the Board reviewed an ALJ’s order granting an 8-month extension of the certification period against an employer that operated a ready-mix concrete business. The ALJ ordered the extension after concluding that the employer violated Sections 8(a)(5) and (1) of the Act by: (a) unilaterally assigning unit work on a construction project to non-unit employees; (b) unilaterally creating new job positions; and (c) instituting a new evaluation and testing system to select unit employees for a project. *Spurlino Materials, LLC*, 353 NLRB at 1198. Additionally, the ALJ concluded that the employer violated Sections 8(a)(3) and (1) of the Act by failing to select outspoken union supporters for a project, and subsequently terminating one of these pro-union employees. *Id.* Finally, the ALJ concluded that the employer violated Section 8(a)(1) by interfering with an employee’s union representation rights during an investigatory meeting. *Id.* The Board adopted the ALJ’s conclusions, also finding an additional violation of Section 8(a)(3) and (1) arising out of a discriminatory failure to dispatch one of the union supporters. *Id.* at 1198-99.

However, the Board reversed the ALJ’s imposition of an 8-month *Mar-Jac* extension. *Id.* at 1200-1201. In so doing, the Board clarified the circumstances under which such relief is warranted:

The Board has often granted *Mar-Jac* extensions in cases involving a complete refusal to bargain, overall bad-faith bargaining, or a breakdown in negotiations caused by unfair labor practices. In this case, there is no allegation that the Respondent engaged in a complete refusal to bargain or overall bad-faith bargaining. Furthermore, there is no showing that its unilateral changes and other unfair labor practices had any impact on the parties’ ongoing contract negotiations.

Id. at 1201.

Southern Mail, Inc., 345 NLRB 644 (2005) is also instructive. There, as in *Spurlino Materials*, the Board rejected the ALJ's recommended order imposing a *Mar-Jac* extension. In his decision, the ALJ found that the employer, a contract mail carrier for the U.S. Postal Service, committed at least a dozen ULPs under Sections 8(a)(1), (3), and (5). *Id.* at 644-45. With respect to Sections 8(a)(1) and (5), the ALJ found that the employer's violations included unilaterally altering the driving routes of unit employees, unilaterally altering a policy regarding employees correcting their time cards, unilaterally altering drug-testing protocols, and failing to provide the union with requested information on two occasions. To remedy these violations, the ALJ ordered – among other things – a 12-month *Mar-Jac* extension. *Id.* at 651 n.2. Upon review of the ALJ's order, the Board reversed, reasoning that the employer's conduct did not warrant such a remedy:

Here . . . the [employer], during the certification year, made several unlawful unilateral changes and refused to furnish information. However, neither the General Counsel nor the [union] contends that the [employer] has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the Union's certification, nor do either of them contend that the [employer's] violations of Section 8(a)(5) have tainted negotiations during the certification year. Under these circumstances, we will remove the Mar-Jac remedy from the recommended order.

Id. at 651 n.2.

Visiting Nurse Services of Western Massachusetts, Inc., 325 NLRB 1125 (1998) goes further in defining the conditions under which *Mar-Jac* relief is justified. There, the Board held that *Mar-Jac* relief was inappropriate where the employer, a hospital, violated Sections 8(a)(1) and (5) of the Act by unilaterally implementing a series of changes regarding payroll procedures, holiday pay, job duties, and job classifications. *Id.* at 1132. The union, which represented a bargaining unit of the hospital's nurses, physical therapists, and social workers, prevailed in a

decertification election which took place in January of 1995. *Id.* at 1126. A certification of representation was issued to the union on December 20, 1996. *Id.* at 1132. The General Counsel and the union argued that the employer's unilateral changes tainted negotiations during the ensuing certification year, and that the union should accordingly be provided with a new certification year to bargain freely without the fear of another decertification petition being filed. *Id.* The Board rejected this request, noting that the evidence failed to establish the specific factual predicates necessary for the imposition of a *Mar-Jac* extension:

We find that the record fails to establish that an extension of the certification year is warranted here. There is no support in the record for the General Counsel's contention that the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. Indeed, the only record evidence of events subsequent to the December 20, 1996 certification shows that the parties had a negotiating session on March 20, 1997, at which they agreed upon a change in insurance plans. Citing this March 1997 negotiating session, the General Counsel acknowledges in his brief that "the parties continue to meet and negotiate." Likewise, the Union asserts in its brief that the Respondent "has continued to bargain well after [its] unilateral actions." Thus, the General Counsel and the Union do not contend, and the record does not show, that the Respondent has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the Union's certification. Nor does the record show that the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. The requested Mar-Jac remedy is therefore not supported by the record.

Id. at 1132; *see also* *Buck Creek Coal*, 310 NLRB 1240, 1240 (1993) (reversing the ALJ's *Mar-Jac* extension where there was no evidence that an employer's unilateral change "had any meaningful impact on the course of contract negotiations at the bargaining table").

These decisions follow a common rule: Unless the evidence shows that the employer refused to recognize the union, engaged in overall bad-faith bargaining or surface bargaining, or that the employer's conduct tainted negotiations during the certification period, *Mar-Jac* relief is

inappropriate. In the case at hand, the ALJ did not conclude that any such conduct occurred. In fact, he specifically found that Respondent did *not* engage in surface bargaining and dismissed the allegations that Respondent engaged in bad faith bargaining during negotiations. ALJD 12:45-47, 13:1-2 and generally ALJD 12-16. Further, as in *Visiting Nurse Services*, the evidence shows that the parties have continued to engage in fruitful negotiations at the bargaining table, notwithstanding any allegedly unilateral changes to the bargaining unit employees' terms and conditions of employment.

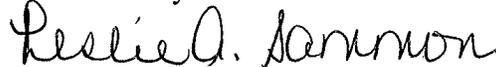
Against this backdrop, it is also significant that the Union already enjoys an extension of the certification year until January 7, 2012. (Jt.-1) In short, the Union has "ample time to carry out its mandate" and there is no necessity for any further extension of the Union's certification as recommended by the ALJ.

CONCLUSION

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

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