

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE

AMERICAN RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION

and

Cases 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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

Ahavaha Pyrtel
Rotimi Solanke
Counsels for the Acting General Counsel
National Labor Relations Board
Subregion 33
300 Hamilton Blvd., Suite 200
Peoria, IL 61602-1246

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
II. RESPONDENT'S EXCEPTIONS	3
III. EXCEPTIONS TO FINDINGS AND CONCLUSIONS ON UNILATERAL CHANGES	3
A. Procedural History	3
B. Unilateral Changes to Wages and Benefits Prior to Certification	5
1. Freezing of Merit Increases	5
2. Suspension of 401(k) Matching Contributions	6
3. Elimination of Pension Plan for New Employees	6
4. Changes to Health Insurance Benefits	7
5. Unilateral Changes by Reassignment of Team Leader Duties to Team Supervisors	8
6. Respondent's General Duty to Bargain	10
7. The ALJ Properly Applied the <i>Mike O'Connor Chevrolet</i> "At Your Peril" Doctrine	10
8. The ALJ Properly Rejected Respondent's Claim that it had No Duty to Bargain Over Decisions Made Prior to the Union's Certification	16
9. The ALJ Properly Rejected Respondent's Dynamic Status Quo Argument	17
10. The ALJ Properly Found that Respondent Violated the Act by Unilaterally Promoting Team Leaders to Non-Unit Team Supervisor Positions While they Retained Unit Work	21
C. Unilateral Changes to Employee Terms and Conditions of Employment Post Certification	23
1. The ALJ Properly Found that Respondent's Changes in Assignment of Loading Duties Violated the Act	23
2. The ALJ Properly Found that Respondent Violated Section 8(a)(5) of the Act by Unilaterally Changing Paid Time Off Leave Policies	25
3. The ALJ Properly Found that Respondent Violated Section 8(a)(5) by Unilaterally Assigning Non-Unit Instructors/Trainers and Team Supervisors to Perform Unit Work at Blood Drives	29

IV. EXCEPTIONS TO FINDINGS AND CONCLUSIONS ON FAILURE TO PROVIDE INFORMATION AND REFUSAL TO BARGAIN ON DISCIPLINE AND DISCHARGE OF UNIT EMPLOYEES 31

 A. The ALJ Properly Found that Respondent Violated Section 8(a)(5) By Refusing to Provide Information to the Union on Employee Discipline 31

 B. The ALJ Correctly Found that Respondent Violated the Act by Refusing to Bargain Over Unit Employee Discipline..... 33

V. EXCEPTIONS TO FINDING AND CONCLUSION ON REMEDY 35

VI. CONCLUSION 40

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION THIRTY-THREE

AMERICAN RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION

and

Cases 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

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

COMES NOW Counsel for the Acting General Counsel (the "General Counsel"), and pursuant to Section 102.46(d) of Board's Rules and Regulations, Series 8, as amended, files this answering brief opposing Respondent's exceptions.

I. STATEMENT OF THE CASE

These cases were heard before Administrative Law Judge Arthur J. Amchan on seven hearing days between August 8-16, 2011. The Complaint in these cases alleged that Respondent violated Section 8(a)(5) and (1) by unilaterally and without notice to the Union discontinuing matching employee 401(k) contributions, suspending employees' merit pay

increases, closing the retirement pension plan to new employees and changing health insurance benefits; reassigning team leader duties to supervisory employees; changing employee job descriptions, classifications/titles, pay grades and/or salary tiers; changing work assignments of employees on loading and unloading vehicles, including assigning non-bargaining unit employees to perform unit work of loading and unloading vehicles; changing the ceiling on the amount of paid time-off hours employees could carry over from year-to-year from 160 hours to 120 hours; and, reassigning non-bargaining unit instructors/trainers and team supervisors to perform bargaining unit work on blood drives. The Complaint further alleged that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide information to the Union on employee benefits and failing to provide discipline and discharge notices to the Union, including information supporting such actions. Lastly, the Complaint alleged that by its overall course of conduct, including some of the conduct alleged above and other listed conduct, the Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

On November 4, 2011, Administrative Law Judge ("ALJ") Arthur J. Amchan issued his decision finding that Respondent violated Section 8(a)(5) as alleged by the General Counsel, except with respect to the allegation of a unilateral change with respect to employee job descriptions, classifications/titles, pay grades and/or salary tiers, the allegation that Respondent refused to provide information on employee benefits, and the allegation that Respondent engaged in overall bad faith bargaining.¹ Respondent has filed exceptions, with supporting brief, to the ALJ's decision on those issues on which the General Counsel prevailed, as noted above.

¹ Neither the General Counsel nor the Charging Party filed exceptions to the ALJ's decision

II. RESPONDENT'S EXCEPTIONS

Respondent's exceptions fall broadly into three categories. Firstly, Respondent excepts to the ALJ's findings of fact and conclusions of law on six 8(a)(5) items that alleged that Respondent unilaterally, and without notice to the Union, changed employee wages, terms and conditions of employment. As more fully explained below, these unilateral changes include changes effected prior to certification of the Union and those changes that occurred since certification of the Union. Secondly, Respondent excepts to the ALJ's finding and conclusion that Respondent refused to provide information on discipline and discharge of unit employees and refused to bargain over employee discharges in violation of Section 8(a)(5). Lastly, the Respondent takes exception to the ALJ's findings and conclusions with respect to the remedy of imposition of a six-month extension of the certification year pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).²

III. EXCEPTIONS TO FINDINGS AND CONCLUSIONS ON UNILATERAL CHANGES

A. Procedural History: The Union filed its representation petition in Case 33-RC-5033 on March 21, 2007, seeking to represent a unit of Respondent's employees. (R. Exh. 180, Jt. Exh. 1, 2) A representation hearing was held and, on May 4, 2007, the Regional Director issued a Decision and Direction of Election finding the following unit appropriate [ALJD p. 2, LL 23-40; GC Exh. 1(hhh), 4, Jt. Exh. 1, p. 2] :

All full-time, part-time and per diem collections specialists I, collections specialists II, collections technicians I, collections technicians II, mobile unit assistants I, mobile unit assistant I/collections specialists I, mobile unit assistant I/collections technicians I, mobile unit assistants I/CTI-HH, mobile unit assistants II, mobile unit assistant II/collections specialists I, mobile unit assistants II/CTI-HH, mobile unit supply

² To the extent that any exceptions of Respondent touch upon matters relating to the credibility of any witnesses, such exceptions should be overruled and the ALJ's resolutions affirmed. It is well-settled Board policy not to disturb the credibility resolutions of an administrative law judge unless a clear preponderance of all the evidence leads the Board to conclude that an administrative law judge's resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F.2d 362 (3rd Cir 1951). Respondent has made no such showing in this case with respect to any factual issues it raises.

clerks, collections assistant, and team leaders employed by the Employer in its Donor Services department, excluding office clerical and professional employees, guards and supervisors as defined in the Act and all other employees.

On May 18, 2007, Respondent requested review of the decision of the Regional Director finding that the team leaders were not supervisors within the meaning of the Act. (Jt. Exh. 1, p. 2-3) On May 30, 2007, the Board granted Respondent's request for review. (Jt. Exh. 1, p. 3) Respondent requested the election be postponed pending the outcome of its request for review, which request was denied by the Regional Director. The Board denied Respondent leave to appeal the decision of the Regional Director. (ALJD p. 2, LL 43-44; Jt. Exh. 1, p. 3) On June 1, 2007, a representation election was conducted. Respondent challenged the ballots of team leaders. The Regional Director impounded all ballots pending disposition on Respondent's request for review. (Jt. Exh. 1, p. 3) On September 1, 2010 the Board issued a Decision on Review and Order affirming the Decision of the Regional Director. (Jt. Exh. 1, p. 3) The ballots were counted on September 16, 2010, and a tally of ballots issued. The tally of ballots revealed, of the 170 eligible voters in the unit, 112 votes cast for the Union and 48 votes cast for Respondent. (ALJD p. 3, LL. 1-3; Jt. Exh. 1, p. 3):

On September 23, 2010 Respondent filed objections to the conduct of the election. (Jt. Exh. 1, p. 3) On October 7, 2010, the Regional Director issued a Supplemental Decision on Objections overruling Respondent's objections and the Union was certified as the exclusive collective-bargaining representative of a unit of Respondent's employees. [(ALJD p. 3, LL. 3-5; Jt. Exh. 1, 4; GC Exh. 1(ggg)] Subsequent to its certification, on October 12, 2011, the Union requested that the Respondent bargain with it for a collective-bargaining agreement. Respondent refused to recognize or bargain with the Union. (ALJD p. 3, LL. 7-8) On October 21, 2010, Respondent filed a Request for Review of the Regional Director's Supplemental

Decision with the Board. (Jt. Exh. 1, p. 4) On December 15, 2010, the Board denied Respondent's Request for Review. [(Jt. Exh. 1, 4; GC Exh. 1(fff)]

Respondent refused to recognize and bargain with the Union until January 7, 2011, and only after the Union filed a charge in Case 33-CA-16139 alleging a refusal to meet and bargain in violation of Section 8(a)(5), a charge upon which complaint issued on December 28, 2010. The parties settled this case on January 21, 2011. The parties' settlement agreement extended the certification year through January 7, 2012. The parties met to bargain for the first time on February 28, 2011. (ALJD p. 3, LL. 15-18; Jt. Exh. 1, p. 5, Group Exh. A)

B. Unilateral Changes to Wages and Benefits Prior to Certification:

On April 2, 2009, national Red Cross CEO Gail J. McGovern sent a memorandum to employees across divisions and regions of the Red Cross, including bargaining unit employees of Respondent. The memorandum informed employees that the Red Cross was experiencing budgetary difficulties, needed cost savings, and was freezing merit raises for the fiscal year 2010, suspending employer contributions to the 401(k) plan, closing participation in the pension plan to employees hired after July 1, 2009, and offering those disqualified an enhanced 401(k) plan, and planned to make changes to employee health insurance benefits. [GC Exh. 2(b)] The McGovern memorandum was posted on CrossNet, an internal Red Cross website available to all employees and also placed in employee mailboxes. Respondent's managers discussed these wage and benefit reductions with unit employees, informing them that wage and benefit reductions were necessary to stave off layoffs. (Tr. 476-479)

1. Freezing of Merit Increases: Prior to institution of the pay freeze, Respondent gave yearly merit wage increases to eligible employees coinciding with the end of its fiscal year in June. (Tr. 385-386) Eligible employees received wage increases of up to 6% based upon their performance evaluations. (Tr. 37-38, 388, 482) Employees rated fully

successful, exceeds expectations and above received wage increases based on matrixes prepared by management each year that defined ranges for merit increases. (G.C. Exh. 52; Tr. 428-430) Employees rated as needs improvement or clearly unsatisfactory, or employees with deficient work performance were ineligible for merit raises. (G.C. Exh. 50) For fiscal year 2010, ending June 2010, the national Red Cross adjusted the merit increase cycle to October of each year to make the wage increase schedule uniform across the Red Cross. (G.C. Exhs. 47, 48) Respondent did not give wage increases in fiscal year 2010, but gave eligible employees a 3% lump sum payment in lieu of merit increases. (ALJD p. 3, LL. 40-44; Tr. 544) On August 10, 2011, the Red Cross reinstated merit wage increases for its employees but Respondent informed the Union that it was withholding these wage increases from unit employees because it would bargain over wages as part of an economic package in negotiations. (ALJD p. 4, LL. 2-5; G.C. Exh. 89)

2. Suspension of 401(k) Matching Contributions: Respondent's 401(k) plan is a tax deferred retirement savings plan. Respondent is a participant employer in the national Red Cross' 401(k) savings plan. (R. Exh. 150) Employees are permitted to contribute up to 35% of gross pay each year. Respondent matched up to 4% of employee contributions to their 401(k) account until Respondent suspended its matching contributions in May 2009. (ALJD p. 3, LL. 38-40; G.C. Exh. 2(b), 46) Although Respondent suspended its matching contributions employees remained free to continue contributions without employer matching contributions. (Tr. 91) Some employees opted not to contribute without employer matching funds. (Tr. 498) On August 10, 2011, Respondent informed the Union that the Red Cross would reinstate its matching contributions to its 401(k) plan effective January 1, 2012, and Respondent would do so for unit employees, absent the Union's objection. (G.C. Exh. 90)

3. Elimination of Pension Plan for New Employees: Respondent's employees participate in the national Red Cross retirement system, a defined benefit pension

plan providing retirement and death benefits for employees and their beneficiaries. The plan is funded through employer and employee contributions. (R. Exh. 120) Upon retirement an employee is paid a monthly retirement benefit based upon 1% of final average pay multiplied by the employee's years of service. (Tr. 917-918) Effective July 1, 2009, Respondent closed the retirement system to new employees. [(ALJD p. 3, L. 41;G.C. Exh. 2(b)] In lieu of participation in the retirement plan, Respondent implemented a 2% non-matching contribution to a 401(k) plan for new employees. (Tr. 937)

4. Changes to Health Insurance Benefits: Respondent provides employees with comprehensive health insurance benefits, including medical, dental and vision plans. In the fall of every year there is an open enrollment period for employees to select or change medical benefits for the following year. (Tr. 927) Prior to January 1, 2008, the national Red Cross provided its divisions and regions a menu of national and local health insurance plans. Respondent had a local John Deere plan. Effective January 1, 2008, Respondent, in line with the national Red Cross effort to consolidate health insurance benefits, went to a national Red Cross Benefits Advantage plan. (Tr. 396, 926-927) This change that was effective in January 2008 effected a change from a health maintenance organization ("HMO") plan to a preferred provider organization ("PPO") type of health insurance coverage. (Tr. 396)

Subsequent to CEO McGovern's memorandum to employees advising of changes in health benefits, Respondent implemented changes to employees' health benefits that went into effect January 1, 2010. (G.C. Exh. 54) The change in medical plans included consolidation of previously existing Premier and Standard PPO plan offerings into a single PPO plan, and some increases in annual individual and family deductibles, and increases in primary care, emergency room and urgent care co-pays. An exclusive provider plan ("EPO") continued to be an option for employees, with changes to deductibles and co-pays. (ALJD p. 4, LL. 12-18); G.C. Exh. 54) The changes to medical benefits included changes to prescription coverage such as reductions

in retail co-pays for generic drugs but introduction of 20% and 40% co-insurance for certain brand drugs, and institution of a generics preferred program encouraging use of generic prescriptions. The changes included elimination of subsidies for vision coverage. A further change in health insurance benefits was institution of a spouse or domestic partner surcharge of \$100 on employees who enrolled their spouses or partners in Respondent's health plans where such spouses or domestic partners could obtain coverage through their own employers. (ALJD p. 4, LL. 20-23; G.C. Exh. 54; Tr. 398-399, 468-469)

Respondent did not notify the Union of the freeze in merit increases, suspension of 401(k) plan contributions, closure of the retirement plan to new employees, and changes in health insurance benefits leaving the Union to learn of these changes through unit employees. (Tr. 397, 77-79) By letter dated May 8, 2009, to Respondent's CEO Shelly Heiden, Union Regional Director Kent Beauchamp reminded Respondent of its obligation to maintain the status quo on wages, hours and working conditions until Respondent fulfilled its obligation to bargain. Beauchamp requested that Respondent rescind the unilateral changes and bargain with the Union. Respondent did not respond to Beauchamp's letter. (G.C. Exh. 3; Tr. 78)

5. Unilateral Changes by Reassignment of Team Leader Duties to Team Supervisors:

At the time of the election in June 2007, Respondent employed some approximately 40 team leaders in its collections department. (ALJD p. 7, LL. 18-20; G.C. Exh. 1(hhh); Tr. 454) Team leaders lead teams of collection employees staffing blood drives. In addition to working hands-on performing patient histories and drawing blood products, team leaders performed administrative tasks such as completing and keeping paperwork for drives, performing reviews and assessments of employees on their drives. (Tr. 444-445, 453) Team leaders were responsible for overall functioning of the drive, including ensuring proper performance of regulated tasks by employees on their teams, typically collections specialists I and IIs. (Tr. 453)

If there were multiple team leaders on a drive one was designated the team leader for the drive and others worked as regular staff. (Tr. 447) Team leaders were supervised by team supervisors who did not regularly work at blood drives. (Tr. 452)

While Respondent's request for review was pending before the Board on the supervisory status of team leaders, in about April 2009, Respondent informed team leaders that it would implement a policy to "...ensure that team leaders function as full-time supervisors at all blood drives with greater than 25 donors." Team leaders would continue to perform their regular team leader duties as "working supervisors" on blood drives with 25 or fewer donors. (G.C. Exh. 5; Tr. 448-450) In July of 2009, Respondent promoted 17 team leaders into non-unit, team supervisor positions. (ALJD p.7, LL 20-21; Tr. 599, 1008) These team supervisors now perform work that team leaders previously performed on drives with more than 25 donors. (Tr. 453-454) Where a team supervisor is not available on a drive with more than 25 donors, a team leader is assigned as a "non-operational supervisor." (Tr. 1002) Prior to the promotion of these team leaders to team supervisors, the position of team supervisor did not exist in its current form. [ALJD p.7, LL. 23-25; G.C. Exh. (hhh); Tr. 1000] The team supervisor position as that position previously existed is now a collection manager position. (Tr. 1000) The position of team leader is now substantially the same position as a collections specialist II or a collections specialist II with charge capability. (Tr. 59, 641) Respondent did not notify the Union of the change in team leader duties, leaving the Union to learn of the change from employees. (ALJD p.7, L. 20; G.C. Exh. 4; Tr. 79) On June 17, 2009, the Union requested Respondent's CEO Shelly Heiden cease implementation of its change in team leader duties. Respondent refused. (GC Exh. 4; Tr. 80)

6. Respondent's General Duty to Bargain:

Section 8(a)(5) and (1) of the Act obligates an employer with a duty to bargain to refrain from making unilateral changes in employees' wages, hours, terms and conditions of employment. *Flambeau Airmold Corp.*, 334 NLRB 165, 165-166 (2001). Unilateral changes, to violate the Act, must be to mandatory subjects of bargaining and must work changes in employees' wages, hours, terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). However, not every unilateral change by an employer violates the bargaining obligation imposed by the Act. To violate the Act, a unilateral change must be material, substantial and significant. *Peerless Food Products, Inc.*, 236 NLRB 161 (1978). Unilateral actions by an employer in such circumstances are *per se* refusals to bargain in violation of Section 8(a)(5). Section 8(d) of the Act imposes on the employer an obligation to meet and bargain in good faith with employees' collective bargaining representative on mandatory subjects of bargaining, prior to implementation of any changes in wages, hours, and terms and conditions of employment. *Q-1 Motor Expresses, Inc.*, 323 NLRB 767 (1997). With respect to a newly certified union, an employers obligation is to maintain in place the current terms and conditions of employment until negotiations result in agreement on any proposed changes or valid bargaining impasse is attained. *Bryant and Stratton Business Institute*, 321 NLRB 1007, 1017-1018 (1996); *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992); *General Motors Acceptance Corp.*, 196 NLRB 137, enfd. 476 F.2d 850 (1st Cir. 1973).

7. The ALJ Properly Applied the *Mike O'Connor Chevrolet* "At Your Peril" Doctrine:

On exceptions, Respondent urges that the ALJ erred in applying by rote the holding of the oft-cited case of *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enfd. denied on other grounds, 512 F.2d 684 (8th Cir. 1975). Respondent argues that the facts of this case do not come within the holding of *Mike O'Connor Chevrolet* because in this case the ballots were

impounded after the election and not counted until September 16, 2010, more than 3 years after the representation election. Respondent maintains that the lack of an election tally showing the Union ahead left it with no way of knowing that the Union had garnered the support of a majority of employees in the unit. Respondent further excepts to the ALJ's determination that the impounding of the ballots and lack of a tally of the ballots for over three years was "immaterial" in the case. (ALJD p.5, LL. 20-28; R. Br. 12-13)

The ALJ properly analyzed and followed the essential holding of the *Mike O'Connor* case with respect to an employer's obligation to refrain from unilateral changes in terms and conditions of employment while objections and election challenges are pending. In *Mike O'Connor Chevrolet*, in overruling the ALJ's determination and finding that the employer violated the Act by unilateral changes while challenged ballots were pending (8 for the union and 6 for the employer, with 3 challenged ballots), the Board reaffirming well-entrenched precedent stated:

"...absent compelling economic considerations for doing so, an employer acts at its peril, in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, (sic) the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes." *Id.* at 703.

The vice of permitting an employer to make unilateral changes in terms and conditions of employment prior to final disposition on pending objections and challenges, as stated by the Board in *Mike O'Connor Chevrolet*, is that "...such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued." *Id.* The Board continued in *Mike O'Connor Chevrolet*, "...to hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending." *Id.* The "at your peril"

doctrine discourages an employer from postponing its bargaining obligations by filing of spurious challenges to an election. *NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318, 320 (4th Cir. 1987), citing *Fugarzy Continental Corp. v. NLRB*, 725 F.2d 1416, 1421 (D.C. Cir. 1984). Moreover, the rule recognizes that representation elections are entitled to a presumption of validity and that the choice of unit employees should be promptly effectuated. *NLRB v. 1199, National Union of Hospital and Health Care Employees*, 824 F.2d 318, 320-321 (4th Cir. 1987).

The language in *Mike O'Connor Chevrolet* does not admit of the exception that Respondent seeks to foist upon it. As the ALJ in the present case put it, Respondent is "simply incorrect" in placing a crabbed interpretation on its holding that would see the "at your peril rule" apply only where there is a tentative election tally available, and by implication only where the union is ahead. (ALJD p.5, L. 22) The holding of *Mike O'Conner Chevrolet* does not contemplate the horse race of which party is up or down at the end of an election, pending final disposition of objections and challenges. In finding that the "at your peril" doctrine applied and that Respondent here bore the risk that the Union might be certified on disposition of its Request for Review by the Board, the ALJ properly concluded that the core difference between the present case and Board precedent was the length of time between the time of the election and certification of the Union and that this was immaterial. (ALJD p. 5, LL. 25-28) The ALJ here appropriately compared the facts here to cases where at the conclusion of an election there are determinative challenged ballots that could swing provincial election results and, as such, rejected Respondent's contention that application of the "at your peril" doctrine depended on employer knowledge a union had prevailed to be without merit. (ALJD p. 5, LL. 30-36; R. Brf. p. 14) It is a protean proposition that with determinative challenged ballots pending there can be no "majority" to speak of and, as the ALJ pointed out in his decision, there is a real possibility that resolution of challenges may undo a union's initial lead. (ALJD p. 5, LL. 38-41)

Respondent's attempt to carve out an exception to the "at your peril" doctrine has already been rejected by the Board in cases where employers ahead on tentative election tallies made unilateral changes while union objections and challenges were pending, and unions prevailed on those objections and challenges and were certified. So, for example, in *Drukker Communications, Inc.*, 258 NLRB 734, 750 (1981), the employer sought to defend itself from its precertification unilateral changes claiming it was ahead in the initial election tally and had no basis for believing the union would prevail. The ALJ, with Board approval, rejected that argument stating that "...there is no basis for such a distinction." *Id.*; accord, *Tweel Importing Co.*, 219 NLRB 666, 673 (1975). The holding of these cases is well-nigh conclusive authority that Respondent's exceptions with respect to application of the "at your peril" doctrine are without merit.

Respondent's exception to the ALJ's finding and conclusion that the equities favored finding violations based on the precertification unilateral changes to wages and benefits is without merit. (ALJD p.5, LL. 42-45; R. Brf. p. 17) There can be no more compelling case for application of the "at your peril" doctrine than a case as this where employees voted decidedly for the Union and waited over three years for Board certification, and even after that long exhaustive wait, Respondent persists with its "appeal and delay everything" approach. The ALJ aptly recognized that it would be inimical to the Act in these circumstances to permit Respondent to make unilateral changes during the over three-year interregnum. Contrary to Respondent's contention on brief (R. Brf. p. 19), the ALJ did not fault Respondent for filing a request for review that prolonged resolution of the representation election on the issue of inclusion of team leaders in the bargaining unit, rather he recognized that the equities of the situation would not warrant putting the risk of Respondent's loss on the employees, in line with clear Board precedent. And, to be sure, what the "at your peril" doctrine and the ALJ assigned was risk, not fault. Respondent was free to pursue its arguments with the Board, but it is not

entitled to a risk-free pursuit of its review. Respondent discounted the very real possibility that it could lose and do so at its own peril. Respondent was at all stages represented by able and skilled labor attorneys fully aware that Respondent's obligation to bargain would reach back to the election in the event its request for review failed. Respondent took a studied risk and must abide the consequences of its risk. In fact in this case, once the Union became aware of the McGovern memorandum advising employees of the changes, the Union cautioned Respondent of its bargaining obligations and asked to bargain. Respondent shrugged off the Union's request. (G.C. Exh. 3; Tr. 78)

Respondent's contention that to have heeded the Union's request to bargain over the changes would have subjected it to liability under 8(a)(2) or that it was placed in a "damned-if-you-do-damned-if don't" situation is fanciful. (R. Brf. 18-19) No such liability under 8(a)(2) could attach, and Respondent can cite no authority for such a proposition. Respondent misapprehends the nature of the duty to bargain where certification or results of an election is pending. Prior to certification only a limited duty to bargain attaches and, specifically, a duty to avoid unilateral changes in wages, hours, and working conditions. Only when certification issues does the plenary obligation to bargain kick in with the duty to bargain relating back to the election. *Kirkpatrick Electric Co.*, 314 NLRB 1047, 1049 (1994). Thus, it is incorrect to suggest as Respondent does that it is being required to have fully recognized the Union and attempted to negotiate a contract while its request for review was pending with the Board. (R. Brf. p. 19)

Invariably in every case Respondent cites on brief, the "at your peril" doctrine is applied to find unlawful unilateral changes that occur in the hiatus between a representation election and resolution of challenges and objections and union certification. Respondent's approach attempts to distinguish cases that can't be meaningfully distinguished from the instant case. See, for example, *Production Plated Plastics, Inc.*, 247 NLRB 595 (1980) (finding the employer violated Section 8(a)(5) by unilateral change to restroom policies after an election and while

objections were pending and before certification); *Flamingo Hilton-Reno*, 321 NLRB 409 (1996) (finding that the employer violated 8(a)(5) by unilateral changes in refusing to deal with the union on layoffs, changing work days and hours, transferring work outside the unit, and granting wage increases in the period between a representation election and the ruling on objections and union certification). In addition to application of the “at your peril” doctrine in objections and challenge cases, as Respondent’s brief notes (R. Brf. 19), the Board also applies the doctrine where an employer unilaterally changes terms and conditions of employment during the period it is refusing to bargain by testing certification. See for example, *San Miguel Hospital Corp.*, 355 NLRB No. 43, slip op. at 11 (2010); *Food & Commercial Workers Local 1996*, 336 NLRB 421 (2001).

Respondent on brief cites Board cases applying the “at your peril” rule where the unilateral changes are motivated by antiunion animus. (R. Brf. 14-15) See e.g., *Keystone Casing Supply, Inc.*, 196 NLRB 920, 923 (1972); *King Radio Corp. Inc.*, 166 NLRB 649, 652 (1967). These cases are not instructive in the current context. Here, the General Counsel did not allege and the ALJ did not base his findings and conclusions on the existence of antiunion animus. Indeed, it is clear that unlawfully motivated or not, an employer violates Section 8(a)(5) when it makes changes in terms and conditions of employment during the pendency of objections which result in certification of a union. *Venture Packaging*, 294 NLRB 544, 549-550 (1989).

Furthermore, an examination of the Section 10(b) implication is instructive. Respondent’s argument on application of the “at your peril” doctrine, if adopted, would mean that employees are foreclosed from a remedy because the 10(b) period began to run once the Union became aware of the McGovern memorandum and its changes to wages and benefits, in about April 2009. The Union could not have waited for certification to occur, a year and a half later, before filing its charge. Had it done so, the charge would be untimely and rightly barred by

Section 10(b) since the limitations period ran in relation to the election and not the certification. See, *Drukker Communications*, 258 NLRB 734-735.

The ALJ properly applied the "at your peril" doctrine to the facts of the instant case where the underlying unilateral changes in freezing wages, changing 401(k), retirement and health insurance benefits are not in dispute. The ALJ's findings and conclusions in this regard are free of error and should be affirmed.

8. The ALJ Properly Rejected Respondent's Claim that it had No Duty to Bargain Over Decisions Made Prior to the Union's Certification:

Respondent argues that the ALJ erred in finding a duty to bargain attached to its unilateral changes that were implemented prior to the Union's certification on October 7, 2010. Respondent urges that it had no duty to bargain over its unilateral changes that were decided upon and implemented prior to the tally of ballots and certification in this case. (R. Brf. pp. 19-20) Respondent's argument is a subset of Respondent's argument regarding the application of the "at your peril" doctrine, because if that doctrine was properly applied by the ALJ, as the General Counsel argues, then Respondent's argument in this regard collapses. There is no evidence and Respondent does not claim that any of the unilateral changes alleged were either decided upon or implemented prior to the election of June 1, 2007, the crucial date. The ALJ's analysis clearly sets out when the bargaining obligation attached to Respondent such that it was not privileged to make changes in terms and conditions of employment, i.e., the date of the election. (ALJD p. 5, LL. 20-22) Cases cited by Respondent in this regard, *KDEN Broadcasting Co.*, 225 NLRB 25, 26 (1976); *Eastern Maine Medical Center*, 253 NLRB 224, 242 (1980), *enfd.* 658 F.2d 1 (1st Cir. 1981), are of negligible value because those cases deal generally with the different context where an employer withholds benefits that it has traditionally granted because employees select union representation. These cases have little correlation with the facts in the instant case. Respondent's exceptions in this regard should be overruled.

9. The ALJ Properly Rejected Respondent's Dynamic Status Quo Argument:

In its exceptions, Respondent contends that the ALJ erred in finding that Respondent changed the *status quo* with respect to benefits when it implemented the noted changes to the 401(k) plan, the retirement plan, and the health insurance benefits. Respondent urges that the *status quo*, for determining whether a unilateral change occurred at all in benefits, is the Respondent's participation in the national Red Cross benefit plans, which have been amended in the past. (R. Brf. p. 22) In finding that the Respondent violated Section 8(a)(5) by unilaterally changing employee benefits as set forth in CEO McGovern's memorandum to employees of April 2, 2009, [G.C. Exh. 2(b)] the ALJ rejected Respondent's argument that because the changes were made by the Red Cross at the national level it had no control over such benefits and was required to abide such benefit changes. The ALJ concluded that the fact that the national Red Cross could make changes to benefits for its unorganized employees did not privilege Respondent to make the changes to benefits of unit employees. (ALJD p. 6, LL. 41-45) As the ALJ's decision points out, the *status quo* for Respondent's employees was that they received matching contributions to their 401(k) plan accounts. That *status quo* included a retirement plan for new bargaining unit employees and the health insurance plans as existed prior to the plans Respondent implemented effective January 1, 2010. (ALJD p. 7 , LL. 1-3)

Respondent's description of the *status quo* and past practice as one in which Respondent's employees participated in national Red Cross benefit plans is pure sophistry. (R. Brf. p. 22) Respondent urges that changes to employee benefits directed from the national Red Cross is the dynamic *status quo*. As the Respondent makes the argument, it was in keeping with this changing *status quo* and past practice that Respondent made the benefit changes at issue. Respondent's arguments, if adopted, would leave Respondent free to change and even

abolish virtually all employee benefits. Indeed, it would beg the question as to what exactly was left for the Union to bargain about if key benefits were all off limits and non-negotiable.³

As the Board put it in *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999), an employer's past "unlimited discretion" is not a "practice" which evolves into a term or condition of employment. The ALJ rightly rejected Respondent's dynamic *status quo* arguments and it should be rejected again. With a newly certified union, it will invariably be the case that the employer has a history of changes to terms and conditions of employment of employees. That is always the *status quo* from which a new bargaining relationship proceeds. Respondent's unilateral changes here smack of reliance on a historic right, its prior unfettered discretion to act unilaterally, and not a coherent, established past practice of specific, predictable changes to its 401(k) plan, retirement benefits and health insurance plans. Respondent's right to exercise sole discretion over hours, wages and benefits ended on advent of the Union and the duty to bargain. *Goya Food of Florida*, 347 NLRB 1118, 1120 (2006). Furthermore, Board precedent applying the dynamic *status quo* doctrine Respondent urges here shows it is rarely, if ever, successfully invoked against a newly certified union, there being no bargaining history to look to and no basis for a waiver of bargaining rights. Thus, dynamic *status quo* cases more typically involve cases where disputed changes in benefits occur against a backdrop of a bargaining history. See, e.g., *Post-Tribune Co.*, 337 NLRB 1279 (2002).

Respondent's dynamic *status quo* defense is not founded on a past practice with reasonably fixed and certain criteria that in any way limit Respondent's discretion. See, *Eugene Iovine, Inc.*, 328 NLRB 294 (1999). So, for example, the McGovern memorandum announcing the changes, in language and tone, makes clear that the circumstances were unusual and unexpected, precipitated by the onset of budget shortfalls. [G.C. Exh. 2(b)] There is no

³ Respondent has bargained with the Union with a bargaining team that consists of no representative of the national Red Cross. (R. Brf. pp. 125-126)

evidence this turn of events was anticipated or expected by employees. The nature of the changes to the 401(k) plan and retirement plans were unanticipated and without precedent. With respect to health benefits, contrary to Respondent's suggestion, there is not a clear, coherent history of making changes. Although there is evidence of open enrollments for employees to make health insurance coverage changes yearly in the fall, those changes (sometimes elective on the part of employees) are a far cry from the changes initiated as part of McGovern's cost-cutting measures. Respondent's unilateral changes in health benefits on January 1, 2010, included consolidating two preferred provider organization plans into a single plan, increases in deductibles and co-pays, introduction of co-insurance for brand drugs, and elimination of all vision coverage.⁴ A particularly significant change was imposition of a \$100 surcharge to cover spouses who could otherwise obtain coverage through their employer. (G.C. Exh. 54) The nature of these changes was markedly different from any prior changes. Indeed, the evidence establishes that it was in January 2008, after the representation election, that the national Red Cross attempted to consolidate health insurance benefits. (Tr. 396, 926-927) Based on the history of these benefits, no employee could predict with any certainty what, if any changes at all, would be made in the future to 401(k) matching contributions, retirement plan and healthcare benefits. Disparate changes on a mandatory subject of bargaining do not necessarily establish a past practice of making changes. *Caterpillar, Inc.*, 355 NLRB No. 91, slip op. 2-3 (2010), (quoting *Owens-Corning Fiberglas*, 282 NLRB 609 (1987)). There is no clear thread running through these changes that would make them anticipated, rote and in keeping with a practice. The ALJ properly found the absence of evidence of a regularly reoccurring change defined by objective criteria. (ALJD p. 7, LL. 5-6)

⁴ Respondent is correct in stating that the ALJ incorrectly referred to the local John Deere plan available to Respondent's employees as having been eliminated in January 2010. That plan was in fact unilaterally terminated in January 2008. (Tr. 396) This oversight in no way detracts from the ALJ's decision that Respondent's subsequent changes to the employees' health plans in January 2010 violated Section 8(a)(5). That decision does not rest in any way on the elimination of the John Deere. Other changes in health benefits amply support the ALJ's decision. Respondent's exception on the ALJ's incorrect reference to the John Deere plan should be overruled.

The ALJ also properly adjudged that Respondent did not establish by competent evidence that it was required to implement the benefit changes, concluding the changes implemented could have been negotiated. The ALJ's decision notes, for example, that in September 2010 the national Red Cross implemented an initiative across all regions to standardize job descriptions and pay of its employees, but it exempted those units of the Red Cross in collective-bargaining units. (ALJD p. 7, LL. 9-11; Tr. 969) Furthermore, and contrary to Respondent's arguments, the ALJ considered the decision in *American Red Cross, Blood Services, Connecticut Region*, JD(NY) 28-11 (2011), and *American National Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter*, JD 27-11 (2011), and found those cases inapposite given the bargaining history and applicable contractual language in those cases. (ALJD p. 7, fn. 1) If anything, these Red Cross cases establish that the prerogatives of the national Red Cross and Respondent's bargaining obligations under the Act are not in conflict. To the contrary, the cited Red Cross cases establish that the bargaining requirements of the Act can be harmonized with the Respondent and the national Red Cross' benefits.⁵ It is noteworthy here that when it has suited its own purposes, Respondent has been able to decouple wages and benefits from the national Red Cross. Thus, on August 10, 2011, Respondent informed the Union that pay raises frozen by the national Red Cross were being reinstated, but not for Respondent's unit employees. (G.C. Exh. 89) Respondent further suggested in reinstating 401(k) matching funds that it could withhold it from unit employees if the Union requested. (G.C. Exh. 90) Respondent clearly has flexibility on these benefits. The

⁵ There is no evidence that all units of the national Red Cross are obligated to participate in all national Red Cross benefit programs. It is clear that participating units may withdraw from benefit programs they participate in. For instance, the 401(k) savings plan specifically permits a participating employer to withdraw from participation. (R. Exh. 150, p. 76, Art. 13.6) Also establishing that Respondent has discretion in the menu of benefits it offers to its employees is language in Respondent's employee handbook that notifies employees that Respondent has "elected" to participate in the national Red Cross retirement plan, and "elected" to participate in the 401(k) plan. (G.C. Exh. 47, p. 47) Respondent is not as tethered to the national Red Cross benefit plans as it suggests.

ALJ properly found and concluded that the benefit changes were the very sort of issues that lend themselves to adjustment by collective bargaining. (ALJD p. 7, LL. 11-14)

The ALJ's finding and conclusion, rejecting Respondent's dynamic *status quo* argument, and finding that Respondent violated Section 8(a)(5) by unilateral changes in employees' terms and conditions of employment, is free of error and should be affirmed.

10. The ALJ Properly Found that Respondent Violated the Act by Unilaterally Promoting Team Leaders to Non-Unit Team Supervisor Positions While they Retained Unit Work:

On exceptions, Respondent also argues that the ALJ erred in finding and concluding that Respondent violated Section 8(a)(5) of the Act by, unilaterally and without bargaining, promoting unit team leaders into non-unit team supervisor positions. Respondent urges that the ALJ erred in not identifying a specific decrease in work to the unit team leaders and automatically finding that the promotion of team leaders to non-unit team supervisors *ipso facto* resulted in diminution of bargaining unit work. (R. Brf. p. 24) Applying *Suzy Curtains, Inc.*, 309 NLRB 1287, 1289 (1992), the ALJ found that Respondent violated the Act because, in promoting team leaders to non-unit team supervisors, Respondent changed the *status quo* in as much as the team supervisors continued to perform unit work. (ALJD p. 24, LL. 5-8)

As Respondent points out on brief, it is an employer's prerogative to create and staff supervisory positions and such decisions are not mandatory subjects of bargaining. *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993) (citing *St. Louis Telephone Employees Credit Union*, 273 NLRB 625, 627-628 (1984)). (R. Brf. p. 24) Here, however, the unilateral change was not Respondent's creation of the team supervisor position or even the staffing of those positions but the removal of unit work from the bargaining unit when team supervisors continued to perform work they previously did as team leaders. Citing *The Lutheran Home*, 264 NLRB 525, 528 (1982), and *Tesoro Petroleum Corp.*, 192 NLRB 354, 359 (1971), Respondent contends that the loss of work did not have a significant impact on the bargaining

unit. (R. Brf. p. 25) In effect, Respondent urges that any removal of work from the unit did not rise to the level of a “..material, substantial and significant” change. *Peerless Food Products, Inc.*, 236 NLRB 161 (1978).

The ALJ's decision makes clear the facts underpinning his conclusion of a violation. Prior to the change, which was announced in April 2009, Respondent employed 30-40 team leaders who were the highest ranking employees on mobile blood drives. A team leader led a team of four to five employees drawing blood products, monitoring performance of tasks, completing paperwork, performing administrative duties, and assessing and evaluating employees on the team. (ALJD p. 7, LL. 18-21; Tr. 444-446) In April 2009, Respondent created a non-unit team supervisor position and promoted about 17 unit team leaders into those positions. These new team supervisors would be in charge of blood drives with goals of more than 25 blood donors. The team leaders would continue to be in charge of blood drives of up to 25 donors. (ALJD p. 7, LL. 21-23; G.C. Exh. 5; Tr. 449-450) The team supervisor position was different from the team supervisor position that previously existed. Team supervisors, as they previously existed, worked on-site at Respondent's offices and were rarely at blood drives. (Tr. 455, 1000) As the ALJ notes in his decision, the net effect of Respondent's reorganization and change was that on blood drives of 25 or more donors, team leaders were stripped of their lead and administrative duties. (ALJD p. 7, LL. 21-22, 27-30) In sum, on those blood drives with more than 25 donors, team leaders work as rank-and-file employees obtaining donor health histories and drawing blood while team supervisors perform work previously done by team leaders.

By any measure the removal of 17 team leaders from the bargaining unit by promoting them to team supervisors and having them perform work previously done by team leaders is significant. Team supervisors, after all, were not regularly assigned to staff blood drives. Contrary to Respondent's assertion on brief, the ALJ's decision identifies the loss of work and

impact to the unit, i.e., the lead duties and paperwork functions on drives with 25 or more donors which were taken over by team supervisors. Respondent's memoranda to team leaders announcing the change clearly lists the duties taken on by team supervisors, and these duties are substantially the duties previously performed by team leaders. (G.C. Exh. 5) Such a change by removal of work and employees from the bargaining unit has an appreciable impact on unit work. *Cincinnati Enquirer*, 279 NLRB 1023, 1032 (1986). In *Cincinnati Enquirer* and *Suzy Curtains*, *supra*, the Board found that the promotion of a lone employee had an impact on the unit. It is simply not sustainable that the mass promotion of 17 team leaders in this case would have no impact on the unit. And, moreover, Respondent is flat wrong when it asserts team leaders suffered no loss of hours. (R. Brf. p. 27) They invariably did when team supervisors performed their work on drives of over 25 donors.

The ALJ's findings and conclusion with respect to Respondent's unilateral promotion of team leaders to team supervisors and retention of unit work by them is free of error and should be affirmed. Respondent's exceptions should be rejected.

C. Unilateral Changes to Employee Terms and Conditions of Employment Post Certification:

1. The ALJ Properly Found that Respondent's Changes in Assignment of Loading Duties Violated the Act:

Respondent excepts to the ALJ's finding and conclusion that Respondent violated Section 8(a)(5) by unilaterally changing the assignment of loading and unloading duties from Mobile Unit Assistants ("MUA"s) to General Services Supply Clerks ("supply clerks"). Respondent offers two reasons why the ALJ erred in this regard. First, Respondent contends that the decision to change the work duties and schedules, as alleged, was made prior to the Union's certification and implemented thereafter. Second, Respondent contends it met its bargaining obligation because it told the Union it was willing to bargain over the changes in contract negotiations, but not individual schedule changes. (R. Brf. 27) Neither contention

withstands even cursory scrutiny. Respondent's contention that the change in job duties occurred prior to the Union's certification is not supported by the evidence. The evidence establishes that the assignment of work from MUAs to service clerks occurred in February 2011. (Tr. 975) As set forth above, Respondent's obligation to bargain attached on the date of the election.

As the ALJ also found, Respondent's unilateral reassignment of the loading and unloading duties from MUAs to supply clerks required adjustments in the work hours of both groups of unit employees. So, for example, to effect Respondent's change in having supply clerks load mobile units, supply clerk Jake Irions went from working a shift that started at 6 a.m. to a shift starting as early as 3 a.m., and he began to work weekends which he had never done before. (ALJD p. 9, LL. 29-33; Tr. 979-980) The ALJ rightly rejected Respondent's contention that the change at issue affected just Irions and was not a material change in working conditions. Citing *Carpenters Local 1031*, 321 NLRB 30, 32 (1996), the ALJ appropriately concluded that even if it were true that a lone employee was affected by the change in duties and schedules there would still be a violation of Section 8(a)(5) because a material, unilateral change affecting a single employee is no less a violation. (ALJD p. 9, LL. 26-29) Respondent's interpretation of its bargaining obligations, that it need not bargain over a change that affects only one employee, would in effect mean it need not deal or bargain with the Union on any issue that affects only one employee, such as a grievance a lone employee may file. There is simply no support for that proposition and Respondent relies on no more than its bare assertion. The evidence establishes that the changes involved multiple departments of Respondent and affected all MUAs and supply clerks to varying degrees.

Furthermore the ALJ was right to reject Respondent's argument that no violation occurred because it offered to bargain over the changes it had already made. (ALJD p. 9, LL. 36-38) The ALJ recognized that inviting the Union to bargain after the changes in duties and

schedules are implemented, leaving the Union to make effete demands at the bargaining table, was insufficient to meet Respondent's obligation to bargain before the changes.

The ALJ properly found that Respondent violated Section 8(a)(5) of the Act when it unilaterally, and without notice to the Union, changed the loading/unloading duties of MUAs and supply clerks. The ALJ's findings and conclusion are free of error and should be affirmed.

2. The ALJ Properly Found that Respondent Violated Section 8(a)(5) of the Act by Unilaterally Changing Paid Time Off Leave Policies:

Respondent excepts to the ALJ's finding that it violated Section 8(a)(5) when it unilaterally and, without notice to the Union, changed the number of paid time off ("PTO") hours employees could carry forward from year-to-year. Respondent urges that the ALJ erred because the General Counsel's allegation was time barred by Section 10(b) of the Act, and because the change was not a substantial, significant or material change. (R. Brf. pp. 28-29) Neither argument has merit. The facts surrounding this violation are not disputed by Respondent. As the ALJ found, Respondent's leave policies permitted employees to accrue and bank their all-inclusive leave allotments. Leave accruals included leave for whatever purpose, including vacation, sick time and other absences. Employees were permitted to carry over up to 160 hours of leave from year to year until January 1, 2011, when Respondent unilaterally reduced that cap to 120 hours. Respondent first announced the change to employees in September 2009. It also reminded employees of the change in August 2010. (ALJD p. 9, LL. 41-43, p. 10, LL. 2-3; G.C. Exh. 53; Tr. 418-419) As the deadline of December 31, 2010, loomed and employees were unable to schedule leave because Respondent needed them to work, Respondent unilaterally accommodated some employees, permitting them to work and use leave simultaneously. (Tr. 491, 1018) However, on January 1, 2011, five unit employees who had in excess of 120 hours forfeited those hours. (Tr. 1019)

Respondent contends that the ALJ erred in not finding this allegation time barred given that the unfair labor practice charge was not filed until March 23, 2011, and the Respondent had notified its employees of the change in September 2009. (R. Brf. p. 28) The ALJ, however, found no evidence that the Union had knowledge of the change in PTO policies within the six-month period preceding the filing of the charge. The uncontroverted evidence is that the Union found out about the PTO change between December 2010 and January 2011. (Tr. 112)⁶ The ALJ rightly applied the Board's holding in *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), and found that Respondent had not met its burden to establish that the Union had "clear and unequivocal notice of the violation outside the 10(b) period." In its exceptions, Respondent still fails in that regard and seeks to impute knowledge to the Union because it claims, without any evidence, that shop stewards and bargaining committee members received notice of the change to PTO policies. (R. Brf. p. 28) Respondent fails to identify the shop stewards and bargaining committee members whose knowledge should be imputed to the Union. Respondent goes so far as to suggest that knowledge to employees themselves is sufficient to impute knowledge to the Union. Respondent faults the ALJ for failing to impute knowledge to the Union.

Union knowledge of the change that would trigger the 10(b) bar may be actual or constructive. *California Portland Cement Co.*, 330 NLRB 144 (1999). Like its other unilateral changes, Respondent admittedly gave no actual notice to the Union and refused to bargain when asked. As noted above, the Union did not find out about the change in PTO policies until December 2010, at the earliest, when an employee mentioned it to the Union. (ALJD p.10, LL. 9-10; Tr. 112-113, 418) Even assuming that a shop steward or members of the bargaining committee knew of the changes before then, that does not translate into constructive knowledge as Respondent urges. There is no reasonable basis for Respondent to believe that shop stewards or bargaining committee members were authorized agents of the Union, nor did the

⁶ Union representative Kent Beauchamp confirmed the change with unit employee Keith Steele in February 2011. (Tr. 113)

Union hold them out to the Respondent as possessing such authority. *California Portland Cement, Co. supra., Brimar Corp.*, 334 NLRB 1035, fn. 1 (2001). It is significant that at the times relevant to the change in PTO policies, Respondent refused to recognize or deal with the Union in any way, keeping them at arm's length. No bargaining had occurred and there is no evidence in the record that the shop stewards and bargaining committee were even appointed and serving. In any event, knowledge of employees or union members is not knowledge of the Union. See, *Fire Tech Systems*, 319 NLRB 302, 305 (1995); *Patsy Trucking, Inc.*, 297 NLRB 860, 862-863 (1990). The cases cited by Respondent on brief offer no support for its position. *Aztec Bus Lines*, 289 NLRB 1021 (1988) has no relevance to the issues presented here, being a case involving coercive statements, refusals to reinstate strikers, and refusals to bargain in good based on a refusal to sign a labor agreement. That case raised no 10(b) issues and is not a useful reference in the present case.

Respondent's contention that the change to the policy occurred in 2009 is without merit. The fact is that in 2009 unit employees, though notified of the future change, could carry over 160 hours. By its very nature the change at issue here could not occur and was inchoate until January 1, 2011. For this reason, the ALJ was right to find that the change in PTO carry over policy occurred no earlier than January 2011 and the 10(b) period could not begin to run before then. *Leach Corp.*, 312 NLRB 990 (1993).

Respondent's second argument also fails. Respondent argues that its change to the PTO policies was not substantial, significant and material. Respondent claims that this is so because only five employees of 160-170 employees forfeited hours by having in excess of 120 hours on January 1, 2011. Doubtless, the five employees who forfeited leave hours could not have considered it insignificant. Respondent further claims that even if there was a change in the PTO benefit, such was a *de minimis* violation of the Act. (R. Brf. p. 30) The injury of a unilateral change is not measured by the tally of unit employees impacted but, as the Board has

put it, the harm to the status of the bargaining representative in the eyes of the employees and undermining of the union in the eyes of the employees. *Page Litho, Inc.*, 311 NLRB 881, (1993), citing *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967).

Respondent errs in the suggestion that unit employees who did not forfeit hours came by no detriment. Thus, cases cited by Respondent on brief, such as *Mitchellace, Inc.*, 321 NLRB 191 (1996), are of little value here because in that case the alleged unilateral change in break policies, which the Board and ALJ rejected, did not affect all employees and did not vary the amount of break time the employer allowed employees. In the present case the PTO carryover ceiling affects every single unit employee by design. As the ALJ found, the change is significant not just as to the employees who forfeited hours but those that may do so in the future. (ALJD p. 10, LL. 10-14) Contrary to Respondent's contention, it is not speculation at all for the ALJ to find that employees would forfeit hours where even with Respondent's efforts to accommodate some employees and avoid forfeiture some employees forfeited hours. Employees who forfeited no hours were significantly impacted because they clearly lost benefits and had their conditions of employment changed. In *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), the unilateral change that the Board found significant enough to violate the bargaining obligation was change in PTO policies that, as a witness put it, required having "...to use my PTO time at a time when I didn't want to use it." *Id.* at 1029. Here, the change in PTO policies goes even further in divesting employees of earned PTO time in excess of the unilaterally set 120-hour cap.

The ALJ's findings and conclusions with respect to Respondent's reduction of PTO carryover hours are free of error and should be affirmed as the facts establish a timely charge and a unilateral change in violation of Section 8(a)(5).

3. The ALJ Properly Found that Respondent Violated Section 8(a)(5) by Unilaterally Assigning Non-Unit Instructors/Trainers and Team Supervisors to Perform Unit Work at Blood Drives:

Respondent excepts to the ALJ's finding that the Respondent violated Section 8(a)(5) when it permitted its non-bargaining unit instructors/trainers and team supervisors to perform bargaining unit work at blood drives. (R. Brf. p 32) As set forth in the ALJ's decision, the uncontroverted evidence establishes that after the Union's certification, on March 11, 2011, instructor/trainer Sara Schwartzlose worked hands-on alongside unit employees on a mobile drive. On March 16, 2011, instructor/trainer Linda Walker did the same thing. On June 30, 2011, instructor/trainer Shelly Jackson also performed unit work. Respondent assigned team supervisor Sophia Frederick to perform unit work on a blood drive on April 11, 2011. Team supervisor Rachael Jaskula likewise performed unit work on April 24, 2011. The work performed by these non-unit employees included obtaining donor histories and drawing blood products. (ALJD p.10, LL. 32-39; Tr. 595-597)

Respondent contends that the General Counsel did not establish that a specific change occurred with respect to the cited instances where non-unit employees performed clearly routine unit work. In finding that the Respondent violated the Act, however, the ALJ, in line with *Eugene Iovine*, 328 NLRB 294 fn. 2 (1999), found that the Respondent did not establish that its assignment of work to non-unit instructors/trainers and team supervisors was consistent with a past practice. (ALJD p. 10, LL. 43-44) The evidence clearly establishes that the work of drawing blood and duties incident to that task are duties of the certified bargaining unit. There is no evidence that instructors/trainers and team supervisors are expected to routinely work at blood drives. Respondent's Director of Collections Lisa Mott testified that team supervisors may directly assist a phlebotomist who is having difficulty with a particular donor's venipuncture, or may help where employees are confronted with problems or unusual health history questions on mobile drives. (Tr. 997-998) Respondent's memo to team leaders in April 2009 regarding the

performance of some of their duties by team supervisors lists the responsibilities of full-time supervisors. Nothing on this list suggests that team supervisors perform hands-on work on blood drives. (G.C. Exh. 5) Thus, the argument that non-unit instructors/trainers and team supervisors could and did regularly share the work of unit employees is not sustainable, and there is no support whatsoever for the Respondent's suggestion that there was a practice of non-unit employees staffing blood drives.⁷

In fact, here Respondent's theories sit uneasily with each other. On the one hand Respondent claims a past practice existed that privileges its work assignments. On the other hand, it denies that non-unit employees were assigned to perform unit work. It, therefore, is understandable that the ALJ appropriately discounted the conclusory testimony of Respondent's Director Mott who testified vaguely on this point, suggesting that instructors/trainers and team supervisors on blood drives would have been engaged in performing hands-on tasks as a requirement for clinical competency or continuing education. So perfunctory and arid was Mott's testimony that she could not answer even the most elementary questions about the clinical competency requirement she claimed instructors/trainers and team supervisors were required to satisfy.⁸ Mott's testimony was manifestly inadequate to establish a history or practice of these non-unit employees performing unit work, even in the narrowest of circumstances for a limited purpose. There is no evidence that Mott was ever at any of the mobile sites in question or knew anything about those specific

⁷ Even assuming that there was a practice of assigning hands-on work of drawing blood and completing donor health histories to team instructor/trainers and team supervisors, it was up to Respondent to prove that up specifically, i.e., evidence that the specific work performed by these non-unit employees is identical to the work they had previously done or the claimed past practice. See, e.g., *St. George Warehouse Inc.*, 341 NLRB 904, 924 (2004), (finding a unilateral change and rejecting the employer's position that it had an established practice of assigning unit work to non-unit employees, where the past practice was that the non-unit employees supplemented and augmented unit work, but were later being used to supplant unit employees).

⁸ There was no testimony on the qualifications of instructor/trainers and team supervisors, how often and by what means such clinical competencies had to be established. There was no evidence on how the requirements are administered and by whom.

drives. Respondent did not call a single instructor/trainer or team supervisor to testify, let alone the actual individuals who Evans testified performed unit work. Respondent offered no evidence at hearing to contradict the General Counsel's witness, employee Scott Evans, who testified to specific dates and times when these non-unit employees performed unit work. (Tr. 595-597)

Based on the evidence, the ALJ properly concluded that Respondent violated Section 8(a)(5) by assigning instructors/trainers and team supervisors to perform bargaining unit work at blood drives. The ALJ's decision is free of error and should be affirmed.

IV. EXCEPTIONS TO FINDINGS AND CONCLUSIONS ON FAILURE TO PROVIDE INFORMATION AND REFUSAL TO BARGAIN ON DISCIPLINE AND DISCHARGE OF UNIT EMPLOYEES

A. The ALJ Properly Found that Respondent Violated Section 8(a)(5) By Refusing to Provide Information to the Union on Employee Discipline:

Respondent contends that the ALJ erred in finding that Respondent failed to furnish requested information to the Union regarding employee discipline. Respondent urges that the request was unduly burdensome and it reached an accommodation requiring the Union to furnish names of specific employees whose discipline records were requested, and the Union failed to do so. (R. Brf. p 34) The ALJ rightly rejected this argument. As the evidence establishes, after the Union's certification and at the initial bargaining session on February 27, 2011, the Union requested Respondent provide the names of all employees disciplined post certification. Respondent did not provide the information, causing the Union to follow up with a written request on April 14, 2011. The Union specifically requested copies of discipline meted out to unit employees and documents supporting such discipline. Respondent failed to provide the information. (ALJD p. 12, LL. 9-13) Indeed, when union representative Tim Lavelle asked for the information initially, Respondent's attorney Charles Pautsch's inveterate response was to refuse to provide the information and put off compliance by stating that if Lavelle would get the names of the employees Pautsch would try to get the information. (Tr. 330) While Respondent

contends that there was an accommodation in which the Union was to provide it with names of some employees, this was simply not the case. The Union did offer to give the Respondent the names of employees it may have learned of, particularly terminated employees, but the Union pointed out that its information would likely be incomplete as they had no way of knowing if any names that had come to the attention of the Union represented the sum total of employees disciplined or discharged. (Tr. 135-136) At some point later in negotiations Respondent was only able to confirm the names of two discharged unit employees and union representative Lavelle relayed the information to Respondent. (Tr. 303) It did little good, however, as Respondent persisted in refusing to provide the requested information, information that is presumptively relevant and should have been provided as a matter of course. *Westside Community Mental Health Center, Inc.*, 327 NLRB 661, 667 (1999); *Transport of New Jersey*, 233 NLRB 694 (1994).

The ALJ considered and rejected Respondent's argument of an accommodation with the Union, noting that "...the union may not be subjected to a burdensome procedure of obtaining desired information where the employer has the information in a more relevant form." *Chesapeake and Potomac Telephone Company*, 259 NLRB 225, 230-32 (1981) *enfd.* 687 F.2d 633 (2nd Cir. 1982). Thus, as found by the ALJ, the mere fact that the Union may have known and offered to give Respondent the names of some of the employees coming within the request does not absolve Respondent of its responsibility to provide the information. (ALJD p. 12, LL. 18-21) The ALJ aptly relied upon and cited *New York Presbyterian Hospital*, 354 NLRB No. 5, slip op. at 8 (2009), and *King Soopers, Inc.*, 344 NLRB 842, 844 (2005) for that proposition. Respondent had the requested information but refused to provide it. The facts here clearly indicate a brush off by Respondent and a desire to skive out of its obligation to provide information to the Union. At the time the requests were made it would not have been difficult to cull out information on employee discipline and discharge given the short duration of the

request, since certification, a period of barely four months. It is difficult to conceive of how the Union's narrow request could be viewed as burdensome. Indeed, in the usual course of a bargaining relationship it is not unusual for an employer to automatically send a union copies of discipline issued to unit employees. As the ALJ pointed out in his decision, Respondent offered no explanation on what it had done to attempt to obtain even some of the information or what steps it was taking to comply with the request. Respondent was dismissive of its obligation and wholly relied on its assertion of burdensomeness. The ALJ rightly concluded that Respondent failed to make reasonable or diligent efforts to meet the Union's request and/or, otherwise, reach an accommodation with the Union. (ALJD p. 12, LL. 30-34). This decision and conclusion is well supported by Board law, as cited by the ALJ. See, e.g., *Chesapeake and Potomac Telephone Company, supra*; *Yeshiva University*, 315 NLRB 1245, 1248 (1994).

The ALJ's findings and conclusions with respect to Respondent's failure to provide information on unit employees' discipline in violation of Section 8(a)(5) is free of any error and should be affirmed by the Board.

B. The ALJ Correctly Found that Respondent Violated the Act by Refusing to Bargain Over Unit Employee Discipline:

In its exceptions to the ALJ's finding that Respondent failed and refused to bargain over unit employee discipline, Respondent contends that the ALJ erred because its refusal to allow union representatives to attend discharge meetings of two unit employees did not constitute refusals to bargain because the underlying discharge decisions were made and a foregone conclusion. Respondent further argues that the Union made no requests to bargain as found by the ALJ. (R. Brf. p. 35)

The underlying evidence supporting the ALJ's findings and conclusion of a refusal to bargain over discipline establish that some time after certification of the Union, the Union learned of the discharge of unit employees. As was its wont, Respondent did not notify the

Union. The Union found out from employees. (Tr. 318-319) Sometime after the Union's certification and prior to the first bargaining session on February 27, 2011, Respondent discharged two unit employees, Shonda Sledge and Cory Tatroe. Union representative Lavelle had previously notified Respondent's management that the Union wanted to be involved or consulted on the issue of unit employee discipline. (Tr. 319-321) In both cases, on the discharge of Sledge and Tatroe, after the Union requested to be present at disciplinary meetings, and the affected employees requested the Union's attendance, Respondent rescheduled the meetings for earlier in the day and summarily discharged the unit employees, giving the Union the slip. (Tr. 319-321) Respondent's Labor Relations Representative Sabin Peterson later informed the Union that the meetings were not investigatory as the discharge decisions were already made. Although Saban offered to provide the Union with information explaining the discharges he did not do so. (Tr. 321-322) Respondent never explained why it abruptly changed course and rescheduled the meetings, in each case dismissing the employee hours prior to the originally appointed time.

On these facts the ALJ appropriately concluded that Respondent had failed and refused to bargain over discipline of unit employees. Underlying the ALJ's decision on this point is that at the relevant time period, after the Union's certification and prior to the first bargaining session on February 27, 2011, Respondent had categorically refused to recognize or negotiate with the Union. As noted by the ALJ, the Union had sent a written request to the Respondent to bargain over employees' terms and conditions of employment on October 12, 2010, and also a specific letter of December 16, 2010, inviting the Respondent to bargain specifically over employee discipline. (ALJD p. 15, p. 20-24; G.C. Exh. 6, 7) Respondent rebuffed the Union on each occasion and refused to consult with the Union before imposition of the discipline and after the discipline (to the extent that the discipline may be mitigated or reconsidered). In fact here, the Union was totally unsighted on the discharge of unit employees because Respondent shared no

information with the Union that would have enabled it to attend its duties as collective-bargaining representative. Even assuming *arguendo* that the noted meetings were investigatory, Respondent simply refused to deal with the Union because it refused to recognize the Union, leaving the Union harried and irrelevant to the discipline process.

There can hardly be a term and condition of employment of employees more vital to employees and their representative than the permanent separation of employees from the bargaining unit. The Board has long held that the discipline and discharge of employees are mandatory subjects of bargaining. See *Crestfield Convalescent Home*, 287 NLRB 328 (1987); *Ryder Distribution Resources*, 302 NLRB 76, 90 (1991). In the context of a newly certified union, such as here, until a labor agreement sets out the procedures to be applied, an employer that wishes to terminate an employee must bargain with the union over the issue. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). Moreover, the imposition of discretionary discipline is subject to bargaining even if the imposition of discipline does not represent a particular change in an employer's discipline policies. *Washoe Medical Center Inc.*, 337 NLRB 202, 203 fn. 1 (2002). Respondent's contention on brief that it did not refuse to bargain over discipline and discharges because it made bargaining proposals on discharge and discipline in negotiations in May and July 2011 misses the point. (R. Brf. p. 35) Respondent cannot meet its obligation to bargain over discipline and discharges of specific employees by offering general bargaining proposals many months after the fact.

Respondent refused to bargain over unit employee discipline and discharge in violation of Section 8(a)(5) as the ALJ found. The ALJ's decision is free of error and should be affirmed.

V. EXCEPTIONS TO FINDING AND CONCLUSION ON REMEDY

Respondent excepts to the ALJ's finding and conclusion that Respondent's violations of the Act warranted an extension of the certification year for a six-month period, in line with *Mar-*

Jac Poultry Co., 136 NLRB 785 (1962), commencing from the date Respondent rescinds its unilateral changes. (R. Brf. p. 36) The ALJ based his six-month extension of the certification year on his specific finding that the unfair labor practices proven by the General Counsel undermined and undercut the Union's status as the statutory collective bargaining representative. (ALJD p. 17, LL.41-43) In granting the six-month extension, the ALJ rejected the General Counsel's request for a full one-year extension of the certification year. [G.C. Exh. 1(ccc)] On exceptions, Respondent urges that even if it violated the Act as found, a *Mar-Jac Poultry* extension of the certification year is not warranted because it did not refuse to recognize the Union, engage in overall bad faith bargaining or surface bargaining, or engage in conduct that tainted negotiations during the certification period. (R. Brf. 39) As Respondent correctly points out the ALJ recommended dismissal of that portion of the General Counsel's Complaint that alleged that Respondent engaged in overall bad faith bargaining. (R. Brf. p. 40)

It is long-standing Board law that upon finding that an employer, after certification of a union, has failed or refused to bargain in good faith with that union, the Board remedy must ensure that such a union is allowed a one-year period of good faith bargaining during which the majority status of the union is beyond challenge. *Mar-Jac Poultry Co.*, *supra*. This extension of the certification year, the *Mar-Jac* remedy, is not an extraordinary remedy. Rather, it is a standard remedy where "...an employer's unlawful conduct precludes appropriate bargaining with the union. *Covanta Energy Corp.*, 356 NLRB No. 98, slip op. at 24 (2011), citing *Outboard Marine Corp.*, 307 NLRB 1333, 1348 (1992). The *Mar Jac* remedy is not reserved only for cases where bargaining grinds to a complete halt. Such a remedy may lie for other types of unfair labor practices, such as where there is a refusal to provide information to a union necessary for informed bargaining. *Id.* slip op. at 40, citing *Valley Inventory Service*, 295 NLRB 1163 (1989). A *Mar Jac* remedy is appropriate where an employer's unilateral changes have affected and compromised negotiations. *Cortland Transit, Inc.*, 324 NLRB 372 (1997). Even

where a *Mar-Jac* extension of the certification year is warranted, the Board does not routinely extend the certification for a full one-year period and, depending on the facts of a particular case, may extend the period short of a full year. In either case, however, the record must support the need for an extension of the certification year and the length of such extension. *American Medical Response*, 346 NLRB 1004, 1005 (2006).

In determining the length of time of an extension, the Board considers such factors as the nature of the violations, the number, extent and dates of collective bargaining sessions, the impact of the violations on the bargaining process and the union's conduct in negotiations. *Metta Electric*, 338 NLRB 1059, 1065 (2003) enfd. in relevant part 360 F.3d 904, 912-913 (8th Cir. 2004).⁹ Respondent's unlawful conduct started early and was severe as it was persistent, affecting all employees in the bargaining unit and touching upon virtually all terms and conditions of employment. Respondent spared no employee benefit from its unilateral changes. As discussed above, even prior to certification of the Union, Respondent made serious changes, freezing wages and 401(k) matching contributions, changing retirement and healthcare benefits of employees. Respondent engaged in unilateral conduct that saw the gutting of the team leader classification by removing a substantial number of employees from the bargaining unit and taking away significant amount of work from team leaders. Betraying its own *Mike O'Connor Chevrolet* arguments as but a ruse, Respondent continued with its unilateral changes post certification, changing unit employees' PTO leave policies, changing the load/unloading duties and work hours of MUAs and supply clerks, including awarding their work to non-unit warehouse employees. Respondent also, at whim, assigned non-unit instructors/trainers and team supervisors to perform unit work on mobile drives. These unilateral changes could not but erode the Union's standing in the eyes of employees, this against the backdrop of a three and a half-year delay as the representation proceedings were

⁹ Respondent here has taken exceptions to the extension of the certification year at all and not specifically the duration, the six-month extension granted by the ALJ.

pending, as Respondent pushed the discredited and rejected argument that team leaders were statutory supervisors. Even with the trial afoot, Respondent, ever dismissive of its bargaining obligation and the Union, continued with its unilateral changes, ending its unilateral wage freeze for all employees, except unit employees. The Board has found this particular type of conduct to be discriminatory and in bad faith and so inimical to good faith bargaining as to be inherently destructive of employee rights under the Act. *United Aircraft Corp.*, 199 NLRB 658, 662 (1972). These unilateral changes have had the desired and predictable effect of disadvantaging the Union at the bargaining table as it tries to bargain, having been set back by the wage freeze and subsequent withholding of the wage increase allowed to others.¹⁰ It is also the case here, judging from the amount of time spent debating the unilateral changes in negotiations, that the Union's attention and energies were diverted away from actual negotiations to forge a contract. (Tr. 601, 749-750) Time and again in negotiations, the Union was hobbled, forced on its back heels, haplessly protesting unilateral changes it was powerless to do anything about, with Respondent's attorney Pautsch flannelling the Union's protests. It is well-nigh impossible to have meaningful negotiations in that posture. Employees attendant in negotiations would have been right to conclude that Respondent had bested the Union by its willingness to unilaterally change their terms and conditions of employment at whim and move the ground under the Union.

It is simply inaccurate of the Respondent to argue here that there was no refusal to bargain. It is undisputed that after certification on October 7, 2010, Respondent refused to recognize the Union until January 7, 2011, and met for the first time ever for negotiations on February 27, 2011, frittering away some four months of the certification year. (ALJD p. 3, LL. 4-9) Respondent, as the ALJ found, also refused to provide information and flat-out refused to

¹⁰ The fact that the Union continued to bargain in this highly tainted environment, and may yet do so successfully, does not detract from the need for a *Mar Jac* extension of the certification year. The Board has ordered *Mar Jac* extensions even in circumstances, where, braving an employer's violations, the union yet succeeds in reaching agreement. *Outboard Marine, supra* at 1348.

bargain over discipline and discharge of unit employees. The rub of the Respondent's unlawful bargaining stance is not lost on employees who testified to employee demoralization at seeing the Respondent succeed in flouting its bargaining obligation and the Act. (Tr. 504-505, 530-531) The above factors taken together make for a strong case for the six-month *Mar Jac* remedy the ALJ ordered. See, generally, *Southern California Permanente Medical Group*, 356 NLRB No. 106, slip op. at 21-22 (2011). If anything, the six-month extension granted by the ALJ errs on the side of modesty given the nature of the violations proven and the corrosive impact they have had on negotiations. Contrary to Respondent's argument, the Board orders a *Mar Jac* remedy even without an allegation or finding of overall bad faith bargaining or surface bargaining in violation of the Act. See e.g., *Southern California Permanente Medical Group*, and *Northwest Graphics, Inc.*, 342 NLRB 1288, 1290 (2004) (holding that the employer's good faith bargaining in the first six months of bargaining did not make inappropriate a *Mar-Jac* remedy when in the latter six months the employer bargained in bad faith).¹¹

Although the ALJ recommended dismissal of the allegation of overall bad faith bargaining alleged by the General Counsel, finding that the Respondent did not limit the number of bargaining sessions or their duration and Respondent did not refuse to explain its bargaining proposals, (ALJD p. 16, LL. 11-12, 45), he nevertheless found that Respondent engaged in serious and serial unilateral changes and refused to bargain over the discipline and discharge of unit employees. The ALJ most certainly did not give Respondent's bargaining a clean bill of health. The ALJ's failure to find overall bad faith in negotiations does not necessarily establish that Respondent has been bargaining in good faith and has otherwise fully met its statutory duty to do so. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1010 fn. 5 (1996). Even where there is evidence that an employer engaged in some good faith bargaining during the

¹¹ Cases relied on by Respondent, such as *Visiting Nurse Services of West Massachusetts, Inc.*, 325 NLRB 1125 (1998), are plainly inapposite. In *Visiting Nurses*, the Board declined a *Mar Jac Poultry* extension where the unilateral changes at issue occurred prior to the certification and there was no evidence negotiations were fettered by the changes. *Id.* at 1132.

certification year this does not foreclose a *Mar-Jac Poultry* remedy. *Northwest Graphics, Inc.*, *supra*. The ALJ's recommended dismissal of the overall bad faith bargaining allegation does not undermine the need for a *Mar-Jac Poultry* remedy.

The ALJ's findings and conclusions of law affording a six-month *Mar Jac* extension of the certification year to the Union is free of error and should be affirmed.

VI. CONCLUSION

Counsel for the General Counsel respectfully moves the Board to affirm Administrative Law Judge Amchan's rulings, findings, conclusions, and recommended order with respect to all arguments and matters raised in Respondent's exceptions.

Dated at St. Louis, Missouri, this 17th day of January 2012.



Ahavaha Pyrtel
Rotimi Solanke
Counsels for the Acting General Counsel
National Labor Relations Board
Subregion 33
300 Hamilton Blvd., Suite 200
Peoria, IL 61602-1246

TABLE OF AUTHORITIES

Cases

<i>American Medical Response</i> , 346 NLRB 1004, 1005 (2006).....	42
<i>American National Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter</i> , JD 27-11 (2011).....	23
<i>American Red Cross, Blood Services, Connecticut Region</i> , JD(NY) 28-11 (2011).....	23
<i>Aztec Bus Lines</i> , 289 NLRB 1021 (1988).....	31
<i>Bridgeport and Port Jefferson Steamboat Co.</i> , 313 NLRB 542, 545 (1993).....	24
<i>Brimar Corp.</i> , 334 NLRB 1035 fn. 1 (2001).....	30
<i>Broadway Volkswagen</i> , 342 NLRB 1244, 1246 (2004).....	29
<i>Bryant & Stratton Business Institute</i> , 321 NLRB 1007, 1010 fn. 5 (1996).....	45
<i>Bryant and Stratton Business Institute</i> , 321 NLRB 1007, 1017-1018 (1996);	11
<i>California Portland Cement Co.</i> , 330 NLRB 144 (1999)	30
<i>Carpenters Local 1031</i> , 321 NLRB 30, 32 (1996).....	27
<i>Caterpillar, Inc.</i> , 355 NLRB No. 91, slip op. 2-3 (2010).....	22
<i>Chesapeake and Potomac Telephone Company</i> , 259 NLRB 225, 230-32 (1981) enfd. 687 F.2d 633 (2 nd Cir. 1982).....	37
<i>Chesapeake and Potomac Telephone Company, supra; Yeshiva University</i> , 315 NLRB 1245, 1248 (1994).....	38
<i>Cincinnati Enquirer</i> , 279 NLRB 1023, 1032 (1986).....	26
<i>Cortland Transit, Inc.</i> , 324 NLRB 372 (1997).....	42
<i>Covanta Energy Corp.</i> , 356 NLRB No. 98, slip op. at 42 (2011)	42
<i>Crestfield Convalescent Home</i> , 287 NLRB 328 (1987).....	40
<i>Drukker Communications</i> , 258 NLRB 734-735.....	18
<i>Drukker Communications, Inc.</i> , 258 NLRB 734, 750 (1981)	15
<i>Eastern Maine Medical Center</i> , 253 NLRB 224, 242 (1980), enfd. 658 F.2d 1 (1 st Cir. 1981).....	19

<i>Eugene Iovine</i> , 328 NLRB 294 fn. 2 (1999)	33
<i>Eugene Iovine, Inc.</i> , 328 NLRB 294 (1999).....	21
<i>Eugene Iovine, Inc.</i> , 328 NLRB 294, 297 (1999).....	20
<i>Fire Tech Systems</i> , 319 NLRB 302, 305 (1995).....	30
<i>Flambeau Airmold Corp.</i> , 334 NLRB 165, 165-166 (2001).....	11
<i>Flamingo Hilton-Reno</i> , 321 NLRB 409 (1996)	17
<i>Food & Commercial Workers Local 1996</i> , 336 NLRB 421 (2001).....	17
<i>Fugarzy Continental Corp. v. NLRB</i> , 725 F.2d 1416, 1421 (D.C. Cir. 1984).....	13
<i>General Motors Acceptance Corp.</i> , 196 NLRB 137, enfd. 476 F.2d 850 (1 st Cir. 1973).....	12
<i>Goya Food of Florida</i> , 347 NLRB 1118, 1120 (2006).....	21
<i>KDEN Broadcasting Co.</i> , 225 NLRB 25, 26 (1976)	19
<i>Keystone Casing Supply, Inc.</i> , 196 NLRB 920, 923 (1972).....	17
<i>King Radio Corp. Inc.</i> , 166 NLRB 649, 652 (1967).....	17
<i>King Soopers, Inc.</i> , 344 NLRB 842, 844 (2005)	37
<i>Kirkpatrick Electric Co.</i> , 314 NLRB 1047, 1049 (1994)	16
<i>Leach Corp.</i> , 312 NLRB 990 (1993).....	31
<i>Mar-Jac Poultry Co.</i> , 136 NLRB 785 (1962)	3, 41
<i>Metta Electric</i> , 338 NLRB 1059, 1065 (2003) enfd. in relevant part 360 F.3d 904, 912-913 (8 th Cir. 2004)	42
<i>Mike O'Connor Chevrolet</i> , 209 NLRB 701 (1974).....	12
<i>Mitchellace, Inc.</i> , 321 NLRB 191 (1996).....	32
<i>New York Presbyterian Hospital</i> , 354 NLRB No. 5, slip op. at 8 (2009).....	37
<i>NLRB v. 1199, National Union of Hospital and Health Care Employees</i> , 824 F.2d 318, 320-321 (4 th Cir. 1987)	13
<i>NLRB v. Advertisers Mfg. Co.</i> , 823 F.2d 1086, 1090 (7 th Cir. 1987).....	40
<i>NLRB v. C & C Plywood Corp.</i> , 385 U.S. 421, 430 fn. 15 (1967).....	32

<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	11
<i>NLRB v. Sandpiper Convalescent Center</i> , 824 F.2d 318, 320 (4 th Cir. 1987)	13
<i>Our Lady of Lourdes Health Center</i> , 306 NLRB 337 (1992).....	12
<i>Outboard Marine Corp.</i> , 307 NLRB 1333, 1348 (1992).....	42
<i>Owens-Corning Fiberglas</i> , 282 NLRB 609 (1987)	22
<i>Page Litho, Inc.</i> , 311 NLRB 881, (1993).....	31
<i>Patsy Trucking, Inc.</i> , 297 NLRB 860, 862-863 (1990).....	31
<i>Peerless Food Products, Inc.</i> , 236 NLRB 161 (1978)	11, 25
<i>Pontiac Osteopathic Hospital</i> , 336 NLRB 1021 (2001)	32
<i>Post-Tribune Co.</i> , 337 NLRB 1279 (2002)	21
<i>Production Plated Plastics, Inc.</i> , 247 NLRB 595 (1980).....	16
<i>Q-1 Motor Expresses, Inc.</i> , 323 NLRB 767 (1997)	11
<i>Ryder Distribution Resources</i> , 302 NLRB 76, 90 (1991)	40
<i>San Miguel Hospital Corp.</i> , 355 NLRB No. 43, slip op. at 11 (2010)	17
<i>Southern California Permanente Medical Group</i> , 356 NLRB No. 106, slip op. at 21-22 (2011) ..	44
<i>Southern California Permanente Medical Group, and Northwest Graphics, Inc.</i> , 342 NLRB 1288, 1290 (2004)	45
<i>St. George Warehouse Inc.</i> , 341 NLRB 904, 924 (2004)	34
<i>St. Louis Telephone Employees Credit Union</i> , 273 NLRB 625, 627-628 (1984)	24
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3 rd Cir. 1951)	3
<i>Suzy Curtains, Inc.</i> , 309 NLRB 1287, 1289 (1992).....	24
<i>Tesoro Petroleum Corp.</i> , 192 NLRB 354, 359 (1971)	25
<i>The Lutheran Home</i> , 264 NLRB 525, 528 (1982)	25
<i>Transport of New Jersey</i> , 233 NLRB 694 (1994)	36
<i>Tweel Importing Co.</i> , 219 NLRB 666, 673 (1975)	15
<i>United Aircraft Corp.</i> , 199 NLRB 658, 662 (1972).....	43

<i>Valley Inventory Service</i> , 295 NLRB 1163 (1989).....	42
<i>Venture Packaging</i> , 294 NLRB 544, 549-550 (1989).....	18
<i>Visiting Nurse Services of West Massachusetts, Inc.</i> , 325 NLRB 1125 (1998)	45
<i>Washoe Medical Center Inc.</i> , 337 NLRB 202, 203 fn. 1 (2002).....	40
<i>Westside Community Mental Health Center, Inc.</i> , 327 NLRB 661, 667 (1999).....	36

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the attached COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS was served electronically on the following parties on January 17, 2012.

MICHAEL J. WESTCOTT, ESQ.
LESLIE A. SAMMON, ESQ.
AXLEY BRYNELSON LLP
POB 1767
MADISON, WI 53701-1767
mwestcott@axley.com
lsammon@axley.com

KENT BEAUCHAMP
REGIONAL DIRECTOR
AFSCME COUNCIL 31
POB 2328
SPRINGFIELD, IL 62705-2328
kbeauchamp@afscme31.org

GAIL E. MROZOWSKI, ATTY
CORNFIELD & FELDMAN
25 E. WASHINGTON ST.
SUITE 400
CHICAGO, IL 60602-1803
gmrozowski@cornfieldandfeldman.com

SHELLY HEIDEN CEO
AMERICAN RED CROSS
405 W JOHN H GWYNN JR AVE
PEORIA, IL 61605
heidens@usa.redcross.org



AHAVAHA PYRTEL
ROTIMI SOLANKE
COUNSELS FOR ACTING GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
SUBREGION 33
300 HAMILTON BOULEVARD, SUITE 200
PEORIA, IL 61602-1246
TELEPHONE: (309)671-7060
E-MAIL: ahavaha.pyrtel@nrlb.gov