St. George Warehouse, Inc. *and* Merchandise Drivers Local No. 641, International Brotherhood of Teamsters.[1] Cases 22–CA–25400 and 22–CA–25938

April 30, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On January 10, 2005, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[3]

The Respondent operates warehouses from which employees load cargo for domestic and international shipment. The allegations here involve the Respondent's South Kearny, New Jersey facility, where the Union represents a unit of full-time and regular part-time warehouse employees. The election took place in April 1999, and the Union was certified on October 27, 2000. The parties began bargaining in October 2001. At the time of the hearing, they had not yet reached agreement on a contract.

The judge found that the Respondent violated Section 8(a)(1) by assisting with a decertification petition; Section 8(a)(5) and (1) by engaging in surface bargaining and unilaterally enforcing a 15-minute break limitation; Section 8(a)(3), (4), and (1) by issuing written warnings and suspensions to employee Tony Daniels; and Section 8(a)(3) and (1) by issuing written warnings to employee Purcell Robert Wallace. We dismiss the surface bargaining allegation. We also dismiss or find it unnecessary to pass on certain allegations involving the discipline of Daniels and Wallace. We affirm the remaining violations. Our reasoning is set out below.

I. UNLAWFUL ASSISTANCE WITH DECERTIFICATION PETITION

We agree with the judge that the Respondent violated Section 8(a)(1) in October 2002 by assisting employee Louis Buono in circulating a decertification petition. In affirming the violation, we rely only on the conduct of Supervisor Anthony Oliveri. We find it unnecessary to rely on the conduct of General Manager Gabriel Maldonado and Executive Vice President Linda Kuper.

We affirm the judge's denial of the Respondent's motion to amend its answer to deny Oliveri's supervisory status. On the second day of the hearing, during testimony about Oliveri's conduct, the Respondent moved to amend its answer to deny that Oliveri was a statutory supervisor. The judge denied the motion. Pursuant to Section 102.23 of the Board's Rules, the decision whether to allow amendment of the answer during the hearing was within the judge's discretion. For the reasons stated in the judge's decision, we find that the judge did not abuse her discretion in denying the Respondent's motion.

II. ALLEGED SURFACE BARGAINING

A. Facts

The parties bargained from October 2001 through at least October 2003. In 2002, the parties began litigating a prior unfair labor practice case, Case 22–CA–24902. On October 22, 2002, Administrative Law Judge Steven Davis issued a decision in that case finding that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining, by refusing to provide certain information requested by the Union, and by unilaterally transferring work out of the bargaining unit by replacing departing unit employees (called direct hires) with nonunit personnel supplied by a temporary agency (agency employees).[4] At the time of the Davis hearing, the transfer of unit work had reduced the size of the unit from 42 to 8.[5] Judge Davis's recommended Order required the Respondent to restore the unit and maintain a 7:1 ratio of

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] There are no exceptions to the judge's dismissals or to her findings that the Respondent violated Sec. 8(a)(3), (4), and (1) by issuing a written warning to employee Tony Daniels on October 30, 2002, for using his cell phone on the job.

The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's conclusions of law and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted in this case. Accordingly, we shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

[4] The unit expressly excludes all "temporary agency employees."

[5] By the time of the hearing in the present case, the unit consisted of seven employees.

direct hires to agency employees (the ratio the judge found had existed at the time of the 1999 election).[6]

While the Davis case was pending before the judge and the Board, the parties continued bargaining. They met about eight times between September 2002 and April 2003. The parties also exchanged written proposals and reached agreement on a number of issues.

On September 27, 2002, the Union filed the original charge in Case 22–CA–25400, one of the consolidated cases here. On October 17, 2002, less than a week before the Davis decision issued, the Union filed an amended charge alleging, inter alia, that the Respondent violated Section 8(a)(5) by engaging in surface bargaining.[7]

On October 31, 2002, about a week after the Davis decision issued, the Respondent proposed contract language permitting it to transfer unit work to agency employees upon the departure of unit employees—the practice Judge Davis found to be a mandatory subject of bargaining. The Union rejected the proposal.

The parties continued bargaining. On December 27, 2002, the Union gave the Respondent a proposed contract. The contract included a recognition clause that would limit the use of agency employees to 10 percent of the total warehouse work force. The clause also provided that after an agency employee worked a certain number of days, that employee would become a permanent employee and thus a member of the unit. In a letter to the Union dated January 7, 2003, the Respondent stated that the Union's proposal was unacceptable, because: "Under your proposal . . . the Union would gain recognition over agency employees without having to petition the [Board] for recognition." The Respondent proposed that "the employer shall have the right to hire agency employees in order to meet fluctuations and work load." The January 7 letter accepted the Union's proposed language on a number of other issues.

On February 18, 2003, the Respondent accepted most of a management-rights clause proposed by the Union, but the Respondent proposed adding "the right of St. George to hire employees and to enter into contracts with agencies to supply personnel in accordance with the language of the certification. There is to be no restriction on the right to hire directly or the right to hire agency personnel." It is not clear whether there was any discussion of that proposal at the table.

The hearing in the present case began in July 2003 and, after several breaks, concluded in January 2004. On September 22, 2003, the hearing adjourned until October 14. The judge stated on September 22 that the parties "are attempting to settle the contract, which would wrap up the outstanding cases as well. They are meeting with the mediator tomorrow."

The parties then participated in a series of mediation sessions, including one on October 9 with Mediator Alan Budd. On October 29, Respondent President Linda Kuper,[8] and Union Representative Jan Katz had a one-on-one meeting. As discussed more fully below, the Respondent contends that the October meetings were for the purpose of settling the outstanding unfair labor practice charges as well as negotiating a contract. In this regard, one issue discussed by the parties was the Respondent's October 9 proposal that "[t]he pending ALJ Case [the Davis case] would be settled and the pending charges withdrawn," for which, "[a]s a *quid pro quo*," the Respondent would add 23 agency employees to the bargaining unit, thus increasing the size of the unit from 7 to 30. The Respondent's willingness to enter into this "quid pro quo" agreement was, in turn, contingent upon the Union's agreement to an election among the 30 employees. The Union would not agree to an election. The October 29 meeting is the last meeting described in the record.

B. Legal Standard

Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (quoting *NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960)). However, "[a]

[6] In May 2004, after the hearing closed in the present case, the Board dismissed the surface bargaining allegation and affirmed the other violations in the Davis case. 341 NLRB 904, enfd. 420 F.3d 294 (3d Cir. 2005). The Board amended the judge's remedy for the unilateral transfer of unit work, ordering restoration of the unit but leaving to compliance the appropriate ratio of direct hires to agency employees.

[7] A complaint issued in Case 22–CA–25400 on February 27, 2003. A complaint issued in the consolidated case, Case 22–CA–25938, on September 30, 2003. In November 2003, the General Counsel amended the complaint in the consolidated case to allege, as relevant here, that the Respondent "engaged in conduct indicative of surface bargaining" on October 9 by informing the Union that it would not agree to a collective-bargaining agreement unless the Union agreed to an election in the bargaining unit that included newly-added agency employees, and by informing the Union that it was considering withdrawing its offer of an $8 per hour starting wage. The amended complaint further alleges that by engaging in this conduct, the Respondent engaged in surface bargaining in violation of Sec. 8(a)(5).

[8] Kuper, previously the executive vice president, became president in July 2003.

party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973)).

In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines "the totality of the employer's conduct, not just isolated aspects of it." *Logemann Bros. Co.*, 298 NLRB 1018, 1020 (1990). From a party's total conduct both at and away from the bargaining table, the Board determines whether the party is "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co.*, supra at 487.

C. Analysis

Contrary to the judge and our dissenting colleague, we find that the totality of the Respondent's conduct, both at and away from the bargaining table, fails to warrant a finding of surface bargaining. For the reasons stated below, we find that the Respondent's conduct at the table did not demonstrate bad faith. Furthermore, although the Respondent engaged in some misconduct away from the table, those acts are not sufficient to show overall bad-faith bargaining or to taint the Respondent's conduct at the table.

1. Conduct at the bargaining table

The parties met about eight times between September 2002 and April 2003. Although not discussed at length by the judge, the parties' written communications show agreement on numerous issues. For example, in letters to the Union on January 7 and 13, 2003, the Respondent accepted the Union's proposed language on stewards, seniority, leave of absence, nondiscrimination, severability, rest, and job posting. The Respondent also accepted portions of the Union's proposals and gave counterproposals concerning a no-strike/no-lockout clause, hours of work, overtime, vacations, and funeral leave. The Respondent rejected the Union's request for two "floating" holidays per year, but offered to add Good Friday as a holiday. Kuper testified that the parties agreed on a bulletin board policy. According to the January 7 letter, the parties also agreed on discipline/discharge and grievances and arbitration, issues that had been contested during earlier negotiations.[9] The Respondent made concessions on vacations and time-and-a-half pay for weekend work. The Respondent proposed language to incorporate its past practice of supervisors occasionally performing bargaining work, even though in earlier negotiations the Respondent had rejected the Union's requests for such language. The Respondent also offered a wage increase of 30 cents per hour per year, the same amount provided in a contract between the Union and one of the Respondent's competitors.

Nevertheless, the judge concluded that the Respondent had engaged in surface bargaining. We disagree. We address the evidence relied on by the judge below.

a. The Respondent's proposal to replace departing direct hires with agency employees

As noted above, on October 31, 2002, after receiving the Davis decision, the Respondent proposed contract language that would permit it to transfer unit work to agency employees upon the departure of unit employees. The judge suggested that the Respondent's proposal indicated bad faith because it was contrary to the Davis decision. We disagree. The transfer of unit work to agency employees was a mandatory subject of bargaining. The violation in the Davis case was the Respondent's failure to bargain over the practice before implementation. Here, by contrast, the Respondent was seeking to fulfill its duty to bargain by proposing contract language addressing the work transfer issue. Therefore, the Respondent's contract proposal is not indicative of surface bargaining.

b. Conduct at the October 2003 meetings

In finding surface bargaining, the judge and our colleague rely in part on statements made by the Respondent during the mediation session on October 9, 2003, and the meeting between Kuper and Katz on October 29, 2003. The Respondent argues that the judge erred in admitting these statements because the purpose of those meetings was not only to negotiate a contract, but also to settle pending unfair labor practices. The Respondent therefore asserts that statements made in the October 9 and 29 meetings are inadmissible under Federal Rule of Evidence 408, which bars evidence of certain statements made during settlement negotiations.

We agree with the Respondent that the October 2003 meetings were for the purpose of settling the pending charges as well as negotiating a contract.[10] We therefore find, as explained below, that Rule 408 bars the statements on which the judge and our colleague rely. We also find, however, as further explained below, that even

[9] See 341 NLRB at 916, 919 (discussing prior negotiations on these issues).

[10] The General Counsel concedes in his brief that the October 9 mediation session was for the purpose of negotiating the contract *and* settling the unfair labor practice charges.

assuming the statements were admissible, they do not warrant a finding of surface bargaining.

(1) Statements excluded under Rule 408

Federal Rule of Evidence 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. *Evidence of conduct or statements made in compromise negotiations is likewise not admissible.* This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis added.]

Our dissenting colleague concedes, in effect, as does the General Counsel (see fn. 10 above), that the purpose of the settlement discussions was both to negotiate a collective-bargaining agreement and to settle the unfair labor practices. Having made this concession, our colleague would nevertheless find the statements at issue admissible under the "for another purpose" exception to Rule 408 for two reasons. First, he views the record as supporting the conclusion that the parties were seeking to settle only—or "primarily"—the unilateral transfer of work issue and not the surface bargaining claim at issue here. Second, assuming settlement of the surface bargaining claim was included in the settlement discussions, our colleague asserts that the statements made at the October 9 meeting are still admissible because they evidence a separate and independent surface bargaining allegation. After we have explained why Rule 408 bars the admission of the conduct at issue here, we will explain why we find our colleague's arguments unpersuasive.[11]

Under Federal Rule of Evidence 408, "[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible" to prove liability for the "claim" at issue. The record shows that the claims at issue in the settlement discussions included not only the unilateral transfer of unit work issue in the Davis case, but also the surface bargaining claims at issue in that case and in the present case. The judge's own words make this clear. In entering into settlement discussions, the parties were, according to the judge, attempting to settle the contract "which would wrap up the outstanding *cases* as well" (emphasis added). At that time, there were two outstanding cases pending, the Davis case and Case 22–CA–25400. In his October 22, 2002 decision, Judge Davis found not only the unilateral transfer of unit work violation, but also a surface bargaining violation.[12] The complaint in Case 22–CA–25400 (one of the cases consolidated for hearing here) also alleged that the Respondent engaged in surface bargaining.[13] Obviously, then, "wrap[ping] up the outstanding *cases*" would include not only resolving the unilateral transfer of unit work claim in the Davis case, but also settling the surface bargaining claims included in both the Davis case and Case 22–CA–25400.

The evidence establishes that the parties also clearly understood that the purpose of the settlement discussions was not only to negotiate a contract, but also to settle the outstanding unfair labor practices—including the surface bargaining claims. As explained above, after a caucus during the October 9 session with Mediator Budd, the Respondent made a proposal which included as its first item that "[t]he pending ALJ Case [the Davis case] would be settled and pending charges withdrawn. As a *quid pro quo* the employer would add 23 people to the unit." The "pending charges" could only refer to the charges pending in Case 22–CA–25400, including the surface bargaining claim.[14] This was also the under-

[11] In support of his argument that the judge did not err in admitting the statements made at the settlement discussions into evidence, our dissenting colleague also asserts that "[t]he Board will affirm a judge's evidentiary ruling unless that ruling constitutes an abuse of discretion." We agree. Consequently, we cannot affirm the judge's ruling that the statements made in the course of the October 9 and 29 settlement discussions are admissible. Rule 408 states, as relevant here, that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible" to prove liability for the claim at issue. Our dissenting colleague attempts to find that the statements at issue are admissible under the "for another purpose" exception to Rule 408 because, he asserts, they are admitted to evidence a surface bargaining allegation not encompassed within the settlement discussions. However, as clearly established below, the resolution of the surface bargaining claim was a purpose of the settlement discussions. Therefore, the "for another purpose" exception is not applicable and the judge erred in admitting the statements at issue into evidence. Concededly, if the evidence in a given case is "for another purpose," the judge has discretion to admit it. See *Zurich American Insurance Co. v. Watts Industries*, 417 F.3d 682, 689 (7th Cir. 2005). But where, as here, the evidence is not "for another purpose," it falls within the prohibition of Rule 408 and the judge has no discretion to admit it.

[12] Although the Board subsequently reversed the judge and dismissed the surface bargaining allegation, the Board's decision did not issue until May 2004, after the settlement discussions at issue here.

[13] As explained above, the complaint in Case 22–CA–25938, the other consolidated case, did not issue until September 30, 2003.

[14] As the Respondent explained in its brief:

> The purpose of the settlement discussions was to bring out the concerns of each side and to discuss them without having to worry that

standing of the Union. Lori Smith, the Union's representative, testified that the Union wanted a "global agreement" and that "a bi-product [sic] of a Collective Bargaining Agreement" would be the resolution of the "outstanding Unfair Labor Practice *cases*" (emphasis added).

For all these reasons, it is clear that a purpose of the settlement discussions was to "wrap up" the surface bargaining claim at issue here. As the Board explained in *Contee Sand & Gravel Co.,* 274 NLRB 574 fn. 1 (1985):

> Thus, where as here, the alleged unfair labor practice can be proven only with evidence that otherwise is inadmissible under Rule 408, we do not agree with the dissent that the "for another purpose" exception to Rule 408 [is applicable].

Having found that Rule 408 bars admission of statements made at the October 9 and 29 meetings to establish liability for that claim, we now consider our dissenting colleague's arguments set out above and explain why we find them without merit.

Conceding as he must that the Respondent was attempting to settle the outstanding charges during the settlement discussions of October 9 and 29, our dissenting colleague nevertheless asserts that the "for another purpose" exception to Rule 408 applies because "the Respondent emphasizes throughout its brief that the 'primary' settlement issue was the unilateral transfer of unit work in the Davis case." First, a review of footnote 14 above and accompanying text establish that our colleague mischaracterizes the Respondent's position. Second, by even making this argument, our colleague concedes that *a purpose* of the settlement discussions—whether "primary" or not—was to settle the surface bargaining claim. By making this concession, the dissent contradicts its own argument that the statements are admissible under the "for *another* purpose" exception to Rule 408 (emphasis added). Thus, we respectfully suggest our colleague's argument collapses under the weight of its own logic.

The dissent's second argument fares no better. Conceding, in effect, that Rule 408 bars admission of the statements made at the October 9 meeting to establish liability for the surface bargaining claim, our colleague then asserts that, by virtue of the November 2003 amendment to the complaint (see fn. 7 above), the statements are admissible as independent "wrongful acts" that evidence the Respondent's liability for that surface bargaining violation.

We find our colleague's reasoning an attempted end-run around Rule 408, which we reject. The original complaint alleged surface bargaining. As discussed above, we find that the parties were attempting, inter alia, to settle that allegation. Accordingly, under Rule 408, statements made in those settlement discussions cannot be used to prove that allegation. We recognize that the General Counsel, in November 2003, amended the complaint to allege that the Respondent *in the settlement discussion of October 9*, engaged in conduct that was "indicative of surface bargaining." Of course, if a respondent engages in *independently* unlawful conduct during a settlement discussion, evidence of that conduct can be introduced and the matter can be adjudicated. However, we do not read the amendment of the complaint as alleging an independent unfair labor practice on October 9. Rather, we view the amendment as alleging that the conduct of October 9 constituted an indicium of the surface bargaining that had been previously alleged. As we have seen, that allegation was the subject of settlement discussions, and therefore statements made during those discussions that allegedly evidence surface bargaining must be excluded. Inasmuch as the October 9 conduct is assertedly a further indicium of that alleged surface bargaining, the exclusion must extend to the October 9 conduct as well.

Further, assuming as our dissenting colleague argues, that the surface bargaining allegation of the amended complaint constitutes an independent surface bargaining allegation, we would still find that the alleged unlawful conduct of October 9 would be barred by Rule 408 because that conduct "was so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom." See *Contee Sand & Gravel*, supra at 574 fn. 1, discussed above.[15] Our colleague fails to discern this intertwinement in quoting from the Respondent's brief that the parties, in their settlement discussions, "never got beyond" the issue of the work transfer violation found in the Davis case. How-

what was said could or would be used at the trial if negotiations failed. In fairness, Respondent believed that these were the 'ground rules' when it agreed to discuss these . . . issues which were the subject of **both** the Davis decision **and** the pending ULP charges. [Emphasis in original.]

[15] As explained in *Sysco Food Services of Cleveland*, 347 NLRB 1024, 1034 fn. 22 (2006):

> *Contee Sand & Gravel* . . . involved an alleged refusal to sign new labor agreements. The Board refused to admit evidence of past settlement discussions intended to settle a previous unfair labor practice. The previous unfair labor practice concerned the respondent's failure to honor collective-bargaining agreements. In those circumstances, the Board found "that the alleged new collective-bargaining agreements were so closely intertwined with the unfair labor practices then under discussion that they cannot be separated therefrom" and Rule 408 barred the discussions from being used against the employer.

ever, since it was during the attempt to settle this very issue that Kuper proposed the election among an enlarged unit of agency employees, under *Contee Sand*, Kuper's election–related statements—including her statement that there would be no contract without an election—during those discussions must be ruled inadmissible pursuant to Rule 408.[16]

We also do not agree with the dissent that, even assuming the statements at issue were admissible, they evidence surface bargaining.

(2) Statements do not evidence surface bargaining

The first statement we address, and the one on which the judge relied most heavily, involves the Respondent's demand for an election. The judge found that the Respondent offered to convert 23 agency employees to direct hires—increasing the size of the unit from 7 to 30—contingent on an election among the 30 employees. The Respondent stated that there would be no contract without an election. In the judge's view, the Respondent's insistence on an election demonstrated bad faith.

We disagree. The Respondent's demand for an election cannot be isolated from the context in which it was made. In October 2003, the Davis decision was pending before the Board on exceptions. The purpose of the parties' October 2003 meetings was to attempt to resolve the unfair labor practice charges—including the unilateral transfer of work found by Judge Davis—as well as to negotiate a contract. Smith testified that the Respondent's proposals to convert 23 agency employees to direct hires and to have an election were "part of a package" and that the demand for an election was to be "part of a global settlement." Kuper testified that the Respondent was willing to "add to the labor force"—clearly a reference to the issue in the Davis case—in exchange for an election. Thus, the Respondent demanded an election as part of its effort to settle the unfair labor practice claims, including the issues in the Davis decision. Under these circumstances, the Respondent's insistence on an election is not persuasive evidence of its intentions in negotiating a contract. We can only speculate whether, if negotiations had involved only a collective-bargaining agreement and not the settlement of the unfair labor practice claims, the Respondent would have insisted on an election as a condition of entering into a contract. Therefore, considering the context in which the Respondent's statements were made, we cannot find that they show an intent to frustrate agreement.[17]

Our colleague, in finding that the Respondent's election demand is evidence of bad faith, removes the Respondent's statements from their clear and logical context. The judge's findings and the testimony demonstrate that the Respondent's demand for an election was a "quid pro quo" for its proposal to convert 23 nonunit agency employees to direct hires. This proposal, in turn, was contingent upon the settlement of the Davis case and the withdrawal of pending charges. Kuper testified that the election demand was a "quid pro quo" for "adding to the labor force" (i.e., converting some agency employees to direct hires). Katz' testimony about the October 29 meeting with Kuper illustrates this point. Katz testified that Kuper would not agree to "anything" without an election, but Katz also conceded that he and Kuper did not get past the first item on his list of issues to discuss. That item proposed converting 23 agency employees to direct hires. Clearly, the election demand was tied to the hiring of agency employees. The Respondent's statements that it would not agree to a "contract" without an election meant only that any agreement that included the conversion of 23 agency employees to direct hires would be conditioned on an election.

Furthermore, contrary to our colleague's argument, Kuper's testimony that she would sit down and negotiate a contract if the Union won a new election in an expanded unit does not indicate Kuper would not bargain over the *existing* seven-person unit without an election. The Respondent had been bargaining over a contract for

[16] As we understand it, the dissent would characterize Kuper's statement—that there would be no contract without an election—as an independent wrongful act and would then distinguish *Contee* on the ground that *Contee* "did not involve the admissibility of additional wrongful acts committed during settlement discussions." The problem with this argument is that Kuper's statement is not alleged to be an independent wrongful act, i.e., an unfair labor practice. Rather, it is alleged to be conduct "*indicative* of surface bargaining." (See fn. 7 above; emphasis added.) As such, it falls outside the "for another purpose" exception to Rule 408. See, e.g., *Stockman v. Oakcrest Dental Center, P.C.,* 480 F.3d 791, 798 (6th Cir. 2007), where the court explained: "We have also viewed 'another purpose' as including the use of settlement agreements to prove facts unrelated to the subject matter of the negotiations or where 'the claim was based *upon some wrong* that was committed in the course of the settlement discussions, e.g., libel, assault, breach of contract, *unfair labor practice*, and the like.' See *Uforma/Shelby Bus. Forms v. NLRB*, 111 F.3d 1284, 1293–1294 (6th Cir. 1997)." (Emphasis added.) Our dissenting colleague's attempt to distinguish *Contee* must therefore fail because this case, like *Contee*, does not involve the admissibility of additional wrongful acts committed during settlement discussions.

[17] The judge found that the Respondent raised the issue of an election even before October 2003. The judge cites the Respondent's January 7, 2003 letter objecting to the Union's proposed recognition clause on the basis that the clause would give the Union "recognition over agency employees without having to petition the [Board] for recognition." The Union's proposal limited the percentage of agency employees at any given time to 10 percent of the total work force and provided that agency employees would become permanent employees after working 45 days. The Respondent's letter appears to be a reference to the fact that the certified unit expressly excludes agency employees. Therefore, we infer no bad faith from the letter.

the seven-person unit for 2 years. The only reasonable interpretation of Kuper's testimony is that if the Union won an election among the 30 employees (the 7 remaining employees plus the 23 agency employees to be added), the Respondent would negotiate with the Union for a contract covering the 30-person unit. Otherwise, the Respondent had no obligation to bargain for a contract covering the agency employees. The certification expressly excluded temporary agency employees. For all these reasons, our colleague errs in finding that the Respondent's October 2003 election demand was evidence of surface bargaining.

Also based on statements at the October 2003 meetings, the judge found that the Respondent changed its position from a 3- to 1-year contract. We find that the Respondent's change in position does not indicate bad faith. The Union had proposed retroactive wage increases to compensate for the employees' failure to receive merit increases for the 2 years since the election.[18] The Respondent did not agree to retroactive wage increases, but counterproposed a one-time payment to employees in the amount of 80 cents times 2080 (the number of work hours in a year). Under the Respondent's proposal, apparently as a tradeoff for the lump-sum payment, the collective-bargaining agreement would either be a 1-year agreement or a 3-year agreement deemed to be in its third year. In this context, the proposal for a 1-year contract is not evidence of bad faith.

The judge also found that during the October 9 mediation session, after the parties had agreed to an $8 starting wage for new hires, the Respondent's counsel said that $8 was "too rich." Contrary to the judge and our colleague, we find this statement too inconclusive to indicate surface bargaining. Although a withdrawal of an agreed-upon provision may indicate bad-faith bargaining, see *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Respondent here never withdrew the $8 offer and the complaint does not allege that it did. Rather, the complaint alleges only that the Respondent "was *considering* withdrawing its offer." (See fn. 7 above; emphasis added.) As far as the record shows, neither the Union nor the Respondent followed up on the comment.[19] Furthermore, this isolated remark, made at the end of one of the parties' last sessions, does not overcome the evidence of good-faith bargaining during the preceding year.

Finally, the judge found that at the October 29 meeting between Kuper and Katz, Kuper thanked Katz for filing new charges, said that would add 2 years to the proceedings, and stated that she would retire in 7 years and it would make no difference if the dispute was still going on. Based on these statements, the judge and our colleague find that Kuper's attitude was "the antithesis of a sincere desire to agree to a collective-bargaining contract." We disagree. The remark was simply a sarcastic one, and an expression of unhappiness with the prospect of further litigation. In this sense, the remark favors negotiation over litigation. Further, "[a]lthough some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining." *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990). "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." Id. (quoting *Albritton Communications*, 271 NLRB 201, 206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986). In light of this standard, we attach little significance to Kuper's remarks.[20]

c. Other conduct at the table

The other at-the-table conduct on which the judge relied needs little discussion. The judge found that on January 7, 2003, the Respondent made a regressive vacation proposal.[21] However, the proposal appears to have been a mistake and was corrected 2 days later.

The judge further noted that on January 13, 2003, the Respondent proposed a $7 starting wage, even though its prior proposal had been $8. As with the vacation proposal, the evidence fails to show that the $7 offer was anything other than a mistake. In later negotiations, the $8 proposal was back on the table.

Finally, the judge found that the Respondent took an unreasonable position regarding union access to the warehouse to investigate grievances. The judge stated that the Board, in dismissing the surface bargaining alle-

[18] The complaint in Case 22–CA–25400 alleged that the denial of merit increases violated Sec. 8(a)(1). The judge dismissed that allegation.

[19] Moreover, the Respondent's counsel's bargaining notes from the October 9 session suggest that the $8 offer was still in place.

[20] Having considered the overall context of the parties' negotiations, we find no merit in our colleague's argument that Kuper's remarks show that she was merely going through the motions of bargaining. As explained above, the parties exchanged proposals, reached agreement on numerous issues, and met with a mediator. Against that background, Kuper's remarks appear to be nothing more than passing bluster or frustration. Cf. *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003) ("To determine the existence of bad faith, we look to bargaining conduct, not bargaining rhetoric.")

[21] At sec. II,H,2, par. 12, of her decision, the judge states incorrectly that the Respondent's January 7, 2003 letter proposed that "3" weeks of vacation would be earned after 10 years. As the judge explained earlier in her decision, the letter proposed that 2 weeks of vacation would be earned after 10 years.

gation in the prior case,[22] "did not disturb" the judge's conclusion that the Respondent had taken an unreasonable position on access. We disagree. The Board found that the evidence in that case—which included the Respondent's position on access—failed to show surface bargaining. Furthermore, the parties here exchanged several proposals on access and discussed the issue at the table. The Respondent offered reasons for its position and showed some movement. We find that the Respondent's position on access does not indicate bad faith.

In sum, we have examined the evidence on which the judge relied in the context of the Respondent's overall conduct at the bargaining table. The evidence fails to show that the Respondent was "unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co.*, supra at 487.

2. Conduct away from the table

The judge also found that certain conduct away from the table indicated bad faith, specifically the October 2002 unlawful assistance with the decertification petition and the November 2003 implementation of a new health plan. We disagree. The Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *Litton Systems*, 300 NLRB 324, 330 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992). Instead, such conduct "has been considered for what light it sheds on conduct at the bargaining table." In the present case, as we have found, the Respondent's conduct at the table does not show an intent to frustrate agreement. Therefore, the Respondent's conduct away from the table does not, on its own, warrant a finding of overall surface bargaining. Furthermore, as explained below, the conduct away from the table is not sufficient to taint the Respondent's conduct at the table. See *Litton*, supra at 327.[23]

In finding that the Respondent unlawfully assisted with the decertification petition, the judge relied on conduct by Supervisor Anthony Oliveri, General Manager Gabriel Maldonado, and Linda Kuper. As stated in section I, above, we affirm that violation based solely on Oliveri's conduct. We note, however, that none of the three individuals' actions tends to show an intent to frustrate agreement. Neither Oliveri nor Maldonado played any role in negotiations. There is no evidence that any bargaining representative of the Respondent encouraged Oliveri's or Maldonado's actions with respect to the decertification petition. Although Kuper was involved in negotiations, her alleged assistance with the decertification petition is based on a single isolated conversation with employee Louis Buono in October 2002. The judge did not find, and the parties do not contend, that Kuper (or, for that matter, Oliveri or Maldonado) gave any further assistance after that time. The parties continued bargaining for another year after October 2002. In these circumstances, the actions of Oliveri, Maldonado, and Kuper are not evidence of overall bad-faith bargaining. See, e.g., *River City Mechanical*, 289 NLRB 1503, 1505 (1988) (away-from-the-table violations were insufficient to prove surface bargaining).

The judge also found that in November 2003, the Respondent unilaterally implemented a new health insurance plan while negotiations were in progress.[24] When the Respondent's existing health plan was due to expire, the Respondent obtained new, nationwide coverage, which resulted in a decrease in the dollar amount paid by employees. The Respondent contends that the percentage of the total premium paid by employees and by the employer remained the same, and therefore the new coverage did not change the status quo. Although the record does not show how the premiums for past plans were divided between the employer and employees, it does appear that the Respondent had a past practice of changing providers each year and passing premium changes along to employees. Therefore, it is unclear whether the Respondent made a material and substantial change to the status quo. Moreover, even assuming the Respondent's conduct was not consistent with past practice, the record fails to show that the change affected bargaining. See *Litton*, supra at 330. Linda Kuper testified without contradiction that the Union raised no objection when it learned of the new plan, and there is no evidence that the change contributed to the parties' failure to reach agreement.[25]

D. Conclusions on Surface Bargaining

When considered in the context of the overall negotiations and the parties' efforts to resolve the unfair practice claims, the Respondent's bargaining proposals and other actions fail to show an intent to frustrate agreement. We therefore conclude that the totality of the Respondent's conduct does not warrant a finding of surface bargaining. We reverse the judge and dismiss that allegation.

[22] See 341 NLRB at 906–908.

[23] Although our dissenting colleague finds surface bargaining, his finding is not based upon the conduct away from the bargaining table.

[24] This is not alleged as an independent 8(a)(5) violation.

[25] The judge also found, and we agree, that the Respondent violated Sec. 8(a)(5) and (1) around October 2002 by unilaterally enforcing its 15-minute limitation on breaks without giving the Union notice and an opportunity to bargain. However, the judge did not rely on this violation as evidence of surface bargaining, and we find no nexus between the violation and the Respondent's conduct during negotiations. See *Litton Systems*, supra at 330.

III. DISCIPLINE OF EMPLOYEE TONY DANIELS

A. Discipline Other Than the April 26, 2002 Suspension

We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by issuing a written warning and final warning to employee Tony Daniels on September 4, 2002, and by issuing him a written warning on October 14, 2002.[26] We also adopt the judge's findings that the Respondent violated Section 8(a)(3), (4), and (1) by issuing Daniels a written warning on July 24, 2003, and a 2-week suspension on July 25, 2003. Finally, we agree with the judge that the Respondent violated Section 8(a)(3), (4), and (1) by issuing Daniels a "final final" warning on October 9, 2003.[27]

In affirming each of these violations, we agree with the judge that the General Counsel carried his initial burden under *Wright Line* of proving that Daniels' union activity (as to the 8(a)(3) violations) and testimony before the Board (as to the 8(a)(4) violations) were motivating factors in the discipline.[28] However, we find it unnecessary to rely on the Respondent's prior 8(a)(5) violations (see *St. George Warehouse*, 341 NLRB 904) or on the October 2002 unlawful assistance with the decertification petition as evidence of animus. Instead, we rely, as did the judge, on the Board's findings in a prior case that the Respondent violated Section 8(a)(1) and (3) by discharging and disciplining employees because of their union activities and by interrogating employees, giving the impression of surveillance, soliciting grievances, promising benefits, and imposing an unlawful no-solicitation rule. See *St. George Warehouse*, 331 NLRB 454 (2000), enfd. 261 F.3d 493 (3d. Cir. 2001).[29] This prior case included the same types of violations at issue here—retaliating against employees because of their union activity—and involved one of the same managers, Gabriel Maldonado. Furthermore, we adopt the judge's findings that the Respondent's asserted reasons for the September 4 and October 14, 2002 warnings and for the July 25, 2003 2-week suspension were pretextual, and that the suspension also constituted disparate treatment. Pretextual reasons and disparate treatment are among the factors that may support an inference of discriminatory motive. See *Michigan Roads Maintenance Co.*, 344 NLRB 617, 625 (2005); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

B. April 26, 2002 Suspension

The judge also found that the Respondent violated Section 8(a)(3), (4), and (1) by suspending Daniels on April 26, 2002, for loading four "overweight" containers (containers in which the weight of the cargo was improperly distributed). Contrary to the judge, we find that the Respondent carried its burden of proving that it would have suspended Daniels even absent his protected activity. We therefore dismiss that allegation.

As a loader, Daniels is responsible for loading freight into containers, which are then driven or shipped to their ultimate destination. Loaders are required to load the freight in such a way that its weight is evenly distributed within the container. If the weight is improperly distributed, the container will be returned to the warehouse to be reworked.

According to the suspension notice, in a given week four of Daniels' containers were returned to the Respondent "due to the way [they were] loaded," and one of the containers missed its shipping deadline. Daniels admitted that he misjudged one container when loading it, and that the container was "leaning." As to another container, he said that he asked for, but did not receive, help in loading it. He did not recall the other two containers.

[26] We find it unnecessary to pass on the judge's finding that these warnings also violated Sec. 8(a)(4), because the remedy for that violation would be essentially the same as the remedy for the Sec. 8(a)(3) violation. See *Abramson, LLC*, 345 NLRB 231, 231 fn. 2 (2005).

[27] In finding the October 9 warning unlawful, we do not rely on the judge's finding that Daniels was treated disparately for the two incidents of "short-shipping" (i.e., failing to load all the cargo on his load plan) cited in the warning. Instead, we note that the warning stated that it was a "last chance" and that any further misconduct would result in immediate termination. In a clear reference to Daniels' past discipline, the warning states that "[t]his type of conduct" has "only recently occurred after your many years of service" and "cannot be tolerated any longer." Kuper testified that there had been six incidents involving Daniels in 1 year, "which is exorbitantly a lot," and that she issued the "final final" warning as a "last chance." Accordingly, having found that Daniels' discipline in September and October 2002 and July 2003 was unlawful, we also find the October 9 "final final" warning unlawful, because it is based in part on the prior unlawful warnings. *Jennie-O Foods*, 301 NLRB 305, 318 (1991).

[28] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The *Wright Line* standard applies in both 8(a)(3) and 8(a)(4) cases. *Black's Railroad Transit Service*, 342 NLRB 549, 554–555 (2005). Under *Wright Line*, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), affd. 127 F.3d 34 (5th Cir. 1997).

Consistent with his previously stated position, Member Schaumber believes that since *Wright Line* is a causation test, it requires a showing of causal nexus between the anti-union animus and the adverse employment action. See, e.g., *North Fork Services Joint Venture*, 346 NLRB 1025, 1026 fn. 7 (2006).

[29] See, e.g., *Wallace International de Puerto Rico*, 324 NLRB 1046 fn. 1 (1997) (relying in part on prior violations as proof of animus).

The judge found the suspension unlawful. She found that the Respondent treated Daniels disparately, both in deciding to discipline him for the overweight containers and in issuing a suspension rather than a warning. The judge reasoned that Louis Buono was not disciplined for loading an overweight container and that as far as the record shows, no employee other than Daniels had been disciplined for overweight containers. The judge also noted that Daniels had never received a written warning before this incident and that the Respondent generally warned employees before suspending them for problems involving freight.

The judge also questioned whether Daniels was responsible for two of the four incidents cited in the warning. She reasoned that the Respondent introduced no evidence connecting Daniels to those two incidents, and Daniels himself did not recall the incidents. The judge also noted that when issuing disciplinary notices for problems with freight, the Respondent usually listed the freight numbers on the notice, but did not do so here.

The Respondent argues that it would have disciplined Daniels regardless of his protected activity, because he loaded four overweight containers in the same week, and one of the containers missed its shipping deadline as a result.

We find merit in the Respondent's exception. To the extent the judge suggests that two of the incidents cited in the warning did not occur or were not attributable to Daniels, the record does not warrant such a finding. First, Daniels did not deny that those two incidents occurred; he simply said he was not aware of them. Second, there are other warning notices in the record that do not list specific freight numbers.[30] Third, although Linda Kuper did not personally make the decision to suspend Daniels, she did remember the incident and the fact that it involved four overweight containers in a single week, one of which missed its shipping deadline.

Furthermore, the absence of other discipline for overweight containers does not show disparate treatment. There is no evidence that any other employee was responsible for four overweight containers in 1 week. The only other employee specifically named as having an overweight container was Louis Buono. As far as the record shows, Buono had only one overweight container and therefore is not similarly situated to Daniels.

For similar reasons, the fact that Daniels had not received a written warning prior to the April 26 incident does not establish disparate treatment. Although most employees who were suspended had received prior warnings, there is no record of any other incident involving four infractions in a week. A particular form of discipline is not necessarily unlawful solely because an employer has imposed it for the first time. See *National Steel Supply*, 344 NLRB 973, 975 (2005). Here, because Daniels' conduct was unprecedented, there are no similarly-situated employees with whom to compare him. Therefore, the record does not support a finding of disparate treatment.

Therefore, assuming that the General Counsel proved that Daniels' protected activity was a motivating factor for the suspension, we find that the Respondent carried its burden of proving that it would have suspended Daniels even absent that activity. Accordingly, we reverse the judge and find that the suspension did not violate Section 8(a)(3), (4) and (1).

IV. DISCIPLINE OF EMPLOYEE PURCELL ROBERT WALLACE

The judge found, and we agree for the reasons stated in her decision, that the Respondent violated Section 8(a)(3) and (1) by issuing Wallace a written warning on September 4 and a final warning on September 5, 2002.[31]

The judge also found that the Respondent violated Section 8(a)(3) and (1) by issuing written warnings to Wallace on July 31 and August 2, 2002. We disagree. For the reasons stated below, we find that the Respondent proved that it would have issued the warnings even absent Wallace's union activity.

A. July 31, 2002 Warning

Like Daniels, Wallace was a loader. On July 31, 2002, the Respondent issued a written warning to Wallace for "carelessness" based on his failure to load 52 cartons of freight. Wallace admitted that he mistakenly failed to load the cartons.

The judge found that the Respondent treated Wallace disparately and that the warning therefore violated Section 8(a)(3) and (1). In finding disparate treatment, the judge relied solely on the lack of evidence that the "checker" (an employee who assists the loader by checking the freight before loading to make sure it is all there) was disciplined. The Respondent excepts, arguing that Wallace's warning is consistent with warnings to other employees for similar infractions.

Contrary to the judge, we find that the record does not show disparate treatment. There is no evidence that Wallace was assisted by a checker in loading this cargo. Although Wallace testified that a checker is supposed to check every load, the Respondent's president, Linda Ku-

[30] Purcell Robert Wallace, Eduardo Cuyuch, and Eduard Ortoloza all received warnings on which the freight numbers were not listed.

[31] As evidence of antiunion animus, we rely on the Respondent's 8(a)(1) and (3) violations in a prior case, *St. George Warehouse*, 331 NLRB 454 (discussed in sec. III,A, above) and on the judge's finding that the asserted reason for the warnings was pretextual.

per, testified that there is not always a separate employee acting as "checker." Even assuming there was a checker, no witness was asked at the hearing whether the checker was disciplined. Therefore, it is impossible to conclude that the checker was not disciplined.[32]

The Respondent has issued written warnings to other employees for failing to load all their cargo. For example, Felipe Rivera received a 1-day suspension on March 14, 2000, because he "left one case off" his load. Eduardo Cuyuch received a written warning on August 31, 2000, because he "said 16 [cartons] were loaded and they were left behind." Cuyuch received a 1-day suspension on October 27, 2000, when he again left one pallet behind on the dock. Kuper testified that employees are always disciplined for short shipments if the Respondent knows about them.

In light of the evidence that the Respondent issued written warnings to other employees for similar conduct, and in the absence of affirmative evidence that Wallace was assisted by a checker who was not disciplined, we find that the Respondent has carried its burden of proving that it would have disciplined Wallace even absent his union activity. See, e.g., *Advance Auto Parts Distribution Center*, 322 NLRB 910, 910 (1997); *Merillat Industries*, 307 NLRB 1301, 1303 (1992). Accordingly, we dismiss the allegation that the warning violated Section 8(a)(3) and (1).

B. August 2, 2002 Warning

On August 2, 2002, the Respondent issued Wallace another written warning for "carelessness," based on loading cargo into the wrong container. As a result of the mistake, the cargo went to Miami instead of Boston. Wallace testified that the freight was mislabeled by the night crew (who are in charge of writing the appropriate numbers on the cargo), but Wallace admitted that he would have caught the mistake if he had looked at certain other marks on the freight.

The judge found that the warning constituted disparate treatment and therefore violated Section 8(a)(3) and (1). Again, in finding disparate treatment, the judge relied solely on her finding that there was no evidence the checker or night crew were disciplined for the incident. The Respondent excepts, again arguing that Wallace's discipline was consistent with the discipline of other employees for similar incidents.

As with the July 31 warning, no witness was asked whether the checker or night crew were disciplined. The record does not identify the checker and night crew members for this load.[33] Wallace did not even recall if a checker assisted him that day. Therefore, on this record, it is impossible to conclude that the checker and night crew members were not disciplined.

The Respondent has issued written warnings to other employees for mistakes in loading cargo. For example, the Respondent issued a written warning to Louis Buono on September 6, 2002, for loading cargo to the wrong destination. The Respondent issued a written warning to Eduard Ortoloza on December 5, 2000, for an incident in which an extra 48 cartons were shipped. As noted above, the Respondent has also issued several warnings to other unit employees for mistakenly failing to load all their freight.

In light of the evidence that the Respondent issued written warnings to other employees for similar infractions, and in the absence of affirmative evidence that the checker and night crew were not disciplined, we find that the Respondent has carried its burden to prove that it would have issued the warning to Wallace even absent his union activity. See, e.g., *Advance Auto Parts*, supra at 910. Accordingly, we dismiss the allegation that the warning violated Section 8(a)(3) and (1).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusions of Law 6 and 7.

"6. By issuing a written warning and final warning to Tony Daniels on September 4, 2002, and by issuing a written warning to Tony Daniels on October 14, 2002, the Respondent violated Section 8(a)(3) and (1) of the Act.

"7. By issuing written warnings to Tony Daniels on October 30, 2002, and July 24, 2003, the Respondent violated Section 8(a)(3), (4), and (1) of the Act."

2 .Substitute "2002" for "2003" in the judge's Conclusion of Law 11.

3. Delete the judge's Conclusions of Law 4, 5, and 10, and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, St. George Warehouse, Inc., South Kearny, New Jersey, its officers, agents, successors, and assigns, shall

[32] The parties stipulated to an exhibit containing all written discipline issued to unit employees other than Daniels and Wallace from February 1, 2000, through January 31, 2003. Wallace's warnings occurred within that time period. However, the majority of the Respondent's warehouse employees at that time were nonunit agency personnel. Even assuming Wallace was assisted by a checker, there is no evidence who the checker was or whether he was a unit employee. Therefore, it is not possible to infer from the stipulated records that the checker was not disciplined.

[33] For the same reasons stated above in fn. 32, we cannot infer from the stipulated disciplinary records that the checker (if a checker was involved) and night crew members were not disciplined.

1. Cease and desist from

(a) Assisting in the circulation of a decertification petition.

(b) Issuing warnings to, suspending, or otherwise discriminating against any employee for supporting Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, or any other labor organization.

(c) Issuing warnings to, suspending, or otherwise discriminating against any employee for giving testimony under the Act.

(d) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described below, by unilaterally changing employee break times without giving the Union notice and an opportunity to bargain.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of its employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey facility, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Make Tony Daniels whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and suspensions, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and suspensions will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in South Kearny, New Jersey, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

MEMBER WALSH, dissenting in part.

The Respondent, a repeat offender of the Act, is no stranger to Board proceedings or to allegations of surface bargaining.[1] Here, for the second time since 2002, an administrative law judge has found that the Respondent engaged in surface bargaining. For the second time, the majority reverses that finding.

I dissented in the prior case, and I do so again here. Through the conduct and statements of its president and chief negotiator, the Respondent demonstrated its intent to frustrate agreement, continuing its longstanding pattern of hostility to the Union and the collective-bargaining process. Accordingly, the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining.[2]

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[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See *St. George Warehouse, Inc.*, 331 NLRB 454 (2000), enfd. 261 F.3d 493 (3d Cir. 2001) (multiple 8(a)(1) and (3) violations); 341 NLRB 904 (2004) (finding unlawful unilateral transfer of unit work and refusal to provide information; reversing judge's surface bargaining finding), enfd. 420 F.3d 294 (3d Cir. 2005).

[2] I join the majority decision in all other respects, except as follows.

I. LEGAL STANDARD

Section 8(d) of the Act requires "the employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours, and other terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession." Nonetheless, the Act is predicated on the notion that the parties must have a sincere desire to enter into "good faith negotiation with an intent to settle differences and arrive at an agreement." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." Id. In determining whether an employer engaged in surface bargaining, the Board examines the totality of the employer's conduct, both at and away from the bargaining table. Id. The Board then determines "whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003). "[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith." *APT Medical Transportation*, 333 NLRB 760 fn. 4 (2001).

Here, the totality of the Respondent's conduct shows an intent to frustrate agreement. In particular, the Respondent insisted on another union election as a quid pro quo for a contract, even though the Union was already the certified bargaining representative; withdrew an agreed-upon wage provision without explanation; and, through the company president, made statements that demonstrated the lack of any sincere desire to reach agreement.[3] The Respondent engaged in this conduct while the newly certified Union fought to obtain an initial contract.

II. FACTS

The union election took place in April 1999, and the Union was certified on October 27, 2000. The parties began bargaining in October 2001. By January 2004, when the hearing in the present case closed, the parties had not yet reached agreement on a first contract.

The Respondent committed numerous unfair labor practices both during the union campaign and after the certification. During the campaign, the Respondent violated Section 8(a)(1) and (3) by discharging and disciplining employees because of their union activities and by interrogating employees, giving the impression of surveillance, soliciting grievances, promising benefits, and imposing an unlawful no-solicitation rule. *St. George Warehouse, Inc.*, 331 NLRB 454 (2000), enfd. 261 F.3d 493 (3d Cir. 2001).

In October 2002, Administrative Law Judge Steven Davis found that starting shortly after the election and continuing thereafter, the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring work out of the bargaining unit by replacing departing unit employees (called direct hires) with nonunit personnel supplied by a temporary agency (agency employees). At the time of the Davis hearing, this conduct had reduced the unit from 42 employees to 8. The judge also found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining and by refusing to provide information requested by the Union. The Board unanimously affirmed the judge's findings that the Respondent had violated the Act by refusing to provide requested information and by unilaterally transferring unit work to nonunit employees. *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), enfd. 420 F.3d 294 (3d Cir. 2005). The Board majority reversed the surface bargaining violation. Id. at 904–906. I dissented, agreeing with the judge that the Respondent engaged in surface bargaining. Id. at 910–913.

While the Davis case was pending before the Board, the parties continued their contract negotiations. On October 31, 2002, the Respondent proposed contract language that would allow the Respondent to replace unit employees with nonunit agency employees. The Union rejected that proposal. The Union proposed a recognition clause that would limit the use of agency employees to 10 percent of the total warehouse work force. The proposed clause also provided that after an agency em-

First, in finding that the Respondent violated Sec. 8(a)(1) by assisting with a decertification petition, I rely on the conduct of General Manager Gabriel Maldonado as well as the conduct of Supervisor Anthony Oliveri.

Second, in finding that certain discipline issued to employees Tony Daniels and Purcell Robert Wallace violated Sec. 8(a)(3) and (1), I agree with the judge that the Respondent's unilateral transfer of unit work to nonunit employees is evidence of animus. In a prior case, the Board found that the transfer of work violated Sec. 8(a)(5) and (1). See 341 NLRB 904, supra. Although not every 8(a)(5) violation necessarily indicates animus, that violation does. The Respondent unilaterally and methodically decimated the bargaining unit, reducing it from 42 employees to 8. Moreover, the Respondent does not argue that the judge erred in relying on the unilateral change as evidence of animus.

Third, I agree with the judge that the Respondent's unlawful assistance with the decertification petition also indicates animus. See *Champion Rivet Co.*, 314 NLRB 1097, 1098 (1994) (respondent's involvement in antiunion petition was evidence of animus).

Finally, for the reasons stated below in fn. 12, I agree with the judge that a broad cease-and-desist order is warranted.

[3] Because I find this evidence sufficient to establish surface bargaining, I need not rely on the other evidence discussed by the judge.

ployee worked a certain number of days, the Respondent would hire that employee as a direct hire. The Respondent rejected that proposal on the basis that "the Union would gain recognition over agency employees without having to petition the [Board] for recognition."

In October 2002, the Union filed additional unfair labor practice charges, including the surface bargaining charge at issue here.[4] The parties continued to hold bargaining sessions. Between September 2002 and April 2003, the parties held about eight meetings.[5] Letters between the parties in early 2003 show that they apparently reached agreement on some issues, although there was little testimony about those tentative agreements.

One issue on which the parties did not agree was wages. Since at least April 2002, the Respondent had been proposing an $8 starting wage for new hires. Throughout 2002 and most of 2003, the Union did not accept that proposal and continued to press for a higher wage.

Meanwhile, the Respondent continued to transfer unit work to agency employees. By the time of the hearing in the present case, the unit had been further reduced to seven employees.

The hearing in the present case took a total of 7 days and was held intermittently between July 2003 and January 2004. On September 22, the hearing adjourned for several weeks. As the judge stated, the parties were "attempting to settle the contract, which would wrap up the outstanding cases as well."

The parties met separately with a mediator on September 23 and October 2. On October 9, the parties had a face-to-face mediated meeting. The Respondent proposed adding 23 agency employees to the unit (which by this point included only 7 members). However, the Respondent demanded a union election among the 30 employees in exchange. Although the Respondent initially raised the issue of an election in connection with its proposal to increase the unit size, the judge found, and the record shows, that the Respondent insisted there would be *no contract* without an election and the Respondent would not agree to "anything" without an election. Linda Kuper, the Respondent's president, said that the Union had only won by one vote in 1999, and "she could win it this time."

Also at the October 9 session, the Union accepted the Respondent's longstanding proposal for an $8 starting wage—an issue that had been contested for at least 18 months, since April 2002. In response, the Respondent's counsel and lead negotiator said that he had rethought the $8 and it was "too rich."

On October 29, Kuper and Union Representative Katz had a one-on-one meeting. Katz testified that Kuper's position had not changed from October 9 and that Kuper still "would not agree to anything without a vote" (i.e., an election). Katz had come to the meeting with a list of bargaining issues to discuss, but he and Kuper were unable to get past the first item on the list, because Kuper insisted on an election. Also at the October 29 meeting, Kuper thanked Katz for filing new unfair labor practice charges because it would add 2 years to the proceedings. Kuper stated that she would retire in 7 years and did not care if negotiations were still going on at that point. There is no evidence of further bargaining sessions after October 29.

In November 2003, the General Counsel amended the consolidated complaint to allege, inter alia, that the Respondent engaged in surface bargaining during September and October 2003.

III. ANALYSIS

The judge found that the Respondent engaged in surface bargaining. In doing so, the judge relied in part on the Respondent's conduct at the October 9 and 29 meetings. The Respondent argues that evidence from these meetings should have been excluded under Federal Rule of Evidence 408, because the meetings were not "plain vanilla collective bargaining," but instead combined collective bargaining with efforts to settle unfair labor practice charges—primarily the 8(a)(5) unilateral transfer of work found by Judge Davis.

The majority finds that Rule 408 bars evidence from the October 9 and 29 meetings. The majority then concludes that even assuming the evidence was properly admitted, it does not establish surface bargaining.

I disagree. First, the evidence from the October 9 and 29 meetings was properly admitted. Second, when that evidence is considered, the Respondent's conduct does show surface bargaining.

A. Rule 408 Does Not Bar Evidence of the Respondent's Statements at the October 2003 Meetings

The Board will affirm a judge's evidentiary ruling unless that ruling constitutes an abuse of discretion. *Aladdin Gaming, LLC*, 345 NLRB 585, 587–588 (2005).

[4] In February 2003, the General Counsel issued a complaint in Case 22–CA–25400, which included an allegation based on the surface bargaining charge. The complaint alleged surface bargaining based on events that occurred in April through December 2002 and in January and February 2003. In September 2003, the General Counsel issued an additional complaint in Case 22–CA–25938, alleging the unlawful discipline and suspension of employee Tony Daniels. The two cases were consolidated on October 8, 2003. As explained below, the consolidated complaint was later amended to add an allegation of surface bargaining during September and October 2003.

[5] There were no bargaining sessions between April and July 2003, when the hearing in the present case began.

The judge did not abuse her discretion by admitting evidence from the October 2003 meetings.

Rule 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. *This rule also does not require exclusion when the evidence is offered for another purpose*, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. [Emphasis supplied.]

As stated in the plain language of the rule itself, Rule 408 does not bar evidence offered "for another purpose," i.e., for a purpose other than proving liability for or invalidity of the claim being settled.[6] In keeping with that principle, the Board and courts have held that Rule 408 is also "inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., . . . unfair labor practice . . . . Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations." *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284, 1293 (6th Cir. 1997) (affg. in relevant part 320 NLRB 71 (1995)) (quoting 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure: Evidence Sec. 5314 (1st ed. 1980)).[7]

At the October 9 and 29 meetings, the parties were trying to negotiate a collective-bargaining agreement. The Respondent argues, and the majority finds, that an additional purpose of the meetings was to try to settle pending unfair labor practice charges. Although the majority concludes that the parties were attempting to settle all outstanding charges, the Respondent emphasizes throughout its brief that the "primary" settlement issue was the unilateral transfer of unit work in the Davis case.[8] Moreover, the Respondent states that the parties "never got beyond" that issue.

Regardless of which allegations the parties may have contemplated settling, the judge properly admitted the Respondent's statements to prove that the Respondent engaged in surface bargaining during the October meetings. Assuming, as the Respondent contends, that an additional purpose of the meetings was to try to settle the unilateral transfer of unit work, Rule 408 would bar admission of the Respondent's statements only insofar as they were offered to prove the validity or invalidity of that violation—which they were not. The Respondent's statements at the October 9 and 29 meetings were admitted to show that the Respondent was engaging in surface bargaining at that time, not to prove the validity of the unilateral change violation in the Davis case, which had already been litigated.

As noted above, the majority finds that one purpose of the October 2003 negotiations was to wrap up *all* of the outstanding unfair labor practice charges, not just the unilateral transfer of work. The majority observes that a surface-bargaining allegation was pending at the time of the October 2003 negotiations. The majority therefore concludes that evidence from the October meetings, if offered to prove surface bargaining, is not offered "for another purpose."

The Respondent cannot be permitted to shield its bad-faith bargaining in this manner. It is clear that the Respondent's statements at the October 2003 meetings related to the Respondent's position in contract negotiations. The Respondent stated that there would be *no contract* without an election. The Respondent also backtracked from its $8-wage offer, a contract proposal on which the Respondent had stood firm since April 2002,

[6] See also *Zurich American Insurance Co. v. Watts Industries*, 417 F.3d 682, 689 (7th Cir. 2005) (district court has "broad discretion" to admit evidence for another purpose under Rule 408; "we review the district court's decision to do so for abuse of discretion and reverse only if there is manifest error"); *Athey v. Farmers Insurance Exchange*, 234 F.3d 357 (8th Cir. 2000) (judge did not abuse his discretion in admitting evidence of conduct during settlement conference; evidence was "offered for another purpose"); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977) (admission of evidence for another purpose under Rule 408 was not an abuse of discretion).

[7] In *Uforma*, the court held that Rule 408 did not bar evidence of an employer's threat to eliminate the third shift if the union pursued a grievance, even though the threat was made during negotiations to settle the grievance. The court noted that the evidence was offered to prove that the threat itself was unlawful, not to prove the validity of the underlying grievance. 111 F.3d at 1293-1294. See also *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 277 (8th Cir. 1983) (employer violated Sec. 8(a)(3) by conditioning employee's reinstatement on his resignation from the union; Rule 408 did not bar the employer's statement even though it was made during negotiations to settle the employee's discharge grievance, because the evidence was not being offered to prove liability for the underlying discharge grievance).

[8] For example, the Respondent contends in its brief that the discussions were "an effort to settle certain outstanding issues, primarily the hiring of additional employees and Respondents [sic] concern over Local 641 majority status in such event"; that the discussions were "for the primary purpose of trying to resolve the agency issue"; and that the "primary purpose" of the October 9 meeting was to discuss the "agency employee issue."

long before the parties' contemplated settlement of any unfair labor practice allegations. It is not uncommon for parties to combine unfair labor practice charge settlement negotiations with collective bargaining, in an attempt to settle all outstanding matters at the same time. That does not immunize an employer or a union from a bad-faith bargaining charge. As stated above, Rule 408 does not shield a party from wrongful acts—including unfair labor practices—committed during settlement negotiations. *Uforma*, supra at 1293. Therefore, even assuming that an additional purpose of the October 2003 meetings was to "wrap up" all outstanding allegations, including the already-pending surface bargaining allegation (which was based on conduct occurring before the October 2003 meetings), that does not mean that evidence of new, additional "wrongful acts" committed during those negotiations is inadmissible. Such "wrongful acts" include acts of bad-faith bargaining.[9]

The majority also contends that the Respondent's insistence that there would be no contract without an election was "so closely intertwined" with settlement of the transfer of work that the two cannot be separated. The majority finds that the evidence is therefore inadmissible under *Contee Sand & Gravel*, 274 NLRB 574 (1985). *Contee,* however, did not involve the admissibility of additional wrongful acts committed during settlement negotiations. Accordingly, *Contee* does not vitiate the settled principle that Rule 408 does not bar such evidence.

For all of the above reasons, the judge did not abuse her discretion in ruling that the Respondent's statements at the October 9 and 29 meetings were admissible to prove surface bargaining.

B. The Respondent Engaged in Surface Bargaining

The judge correctly found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. As explained below, the Respondent insisted there would be no contract unless the Union—already the certified collective-bargaining representative—agreed to another election. The Respondent also retreated from a critical agreed-upon wage term and, through the company president, Linda Kuper, made statements at the bargaining table that clearly evidenced the Respondent's lack of good faith.

First, the Respondent insisted on a new election as a condition of entering into a collective-bargaining agreement. The majority's suggestion that the election demand related to settlement of the unilateral transfer of work and therefore was not a contract issue lacks merit. The record shows, and the judge found, that the Respondent stated that there would be no contract without an election and that the Respondent would not agree to "anything" without an election.

Not surprisingly, the Respondent's insistence that the Union submit to another election deeply divided the parties and stymied negotiations on other issues. For example, as Katz testified, on October 29 he and Kuper did not get past the first item on his list of bargaining issues, because Kuper continued to insist on an election.

Furthermore, Katz recalled that Kuper's "exact words" were that the Union had won by only one vote in 1999, and "she could win it this time." Kuper also testified that *if* the Union won the new election, then the Respondent "honestly would sit down and rack it out, whatever it was, a contract, whatever it was." Kuper's statements suggest that she did not accept the Union as a legitimate bargaining representative, and that her insistence on another election was a bargaining strategy intended ultimately to oust the Union. Her testimony further demonstrates that without an election, the Respondent was not willing to "rack it out" and bargain with the sincere intent of reaching agreement. Yet, the Respondent was already obligated to bargain with the Union as the certified representative of the unit employees. Accordingly, I agree with the judge that the Respondent's insistence on an election is evidence of surface bargaining.

The Respondent's retreat from an agreed-upon wage proposal also indicates surface bargaining. At least since April 2002, the Respondent had been proposing an $8 starting wage for new hires, but the Union had not agreed to it. On October 9, the Union accepted the proposal. Immediately afterward, the Respondent's lead negotiator stated without further explanation that he had "rethought" the $8-proposal and it was "too rich." The Respondent did not offer a counterproposal. The withdrawal of an agreed-upon provision is evidence of surface bargaining. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Valley Oil Co.*, 210 NLRB 370, 385 (1974) (overruled in part on other grounds in *Abilities & Goodwill*, 241 NLRB 27 (1979)). The majority's attempt to minimize this conduct is unpersuasive. Agreement on a starting wage could have been a major step forward, but instead the Respondent used it as an opportunity to backpedal. Retreating from this key provision without

[9] Contrary to the majority's argument, there is no contradiction in finding that even if "a purpose" of the October meetings was to settle the prior allegations (which would have included a surface bargaining allegation), evidence of new, additional bad-faith bargaining during the October meetings is still admissible under Rule 408. As stated below, Rule 408 does not shield a party from liability for additional wrongs committed during a settlement negotiation. The bottom line is this: whether the parties were primarily trying to settle the transfer of work issue or whether they were trying to "wrap up" all pending allegations, evidence of the Respondent's conduct during the meetings is admissible to prove additional surface bargaining.

offering an explanation or a counterproposal strongly suggests that the Respondent's intent was not to reach agreement, but to frustrate negotiations.[10]

Statements made by Linda Kuper, the Respondent's president, further reinforce that the Respondent lacked a sincere intent to reach agreement. During an October 29 meeting between Kuper and Union Representative Katz, Kuper thanked Katz for filing new unfair labor practice charges, because that would add "another two years of what we are going through right now." Kuper also stated that she would retire in 7 years and that it did not make a difference to her if the negotiations were still going on. Kuper was not asked about these statements at the hearing, and there is nothing else in the record that explains or mitigates her comments. The majority dismisses the comments as part of the "bluster and banter" of negotiations. Certainly, bargaining is a frank exchange of views, and the parties must be able to speak freely. However, as the majority acknowledges, some statements may nevertheless betray an intention to refuse to bargain in good faith. *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990); *Albritton Communications*, 271 NLRB 201, 206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986). The judge found that Kuper's attitude was "the antithesis of a sincere desire to agree to a collective-bargaining contract," and I agree. Kuper's remarks reveal that she was merely going through the motions of bargaining, without any real intent to reach agreement.[11]

Finally, I dissented from the majority's dismissal of the surface bargaining allegation in the prior case. See 341 NLRB at 910–913. I agreed with the judge that the Respondent's conduct demonstrated an intent to frustrate bargaining and prevent the successful negotiation of a collective-bargaining agreement. In my view, the Respondent's bad faith continued during the time period at issue here.

IV. CONCLUSION

Although some factors suggest good-faith bargaining—the parties met and exchanged proposals and reached agreement on some issues—those factors are outweighed by other evidence that the Respondent lacked a sincere desire to reach agreement. The Union was newly certified and struggling to negotiate an initial contract. As stated above, the Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith. *APT*, supra at 760 fn. 4. Here, the Respondent insisted on another union election as a quid pro quo for a contract. Kuper stated that the Union had won by only one vote last time and that "she could win it this time." Kuper testified that if the Union won the election, the Respondent would sit down and negotiate a contract—clearly implying that the Respondent did *not* intend to reach any agreement without an election. The Respondent's overall conduct suggests that it did not accept the Union as a legitimate bargaining representative and instead had embarked on a bargaining strategy intended to frustrate agreement and ultimately to oust the Union. Furthermore, without explanation, the Respondent backed away from its $8-wage offer immediately after the Union agreed to it. Finally, Kuper's own words to Katz on October 29 indicate that Kuper did not care if negotiations lasted another 7 years. In sum, the totality of the Respondent's conduct indicates its intent to frustrate agreement. Accordingly, the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. I dissent from the majority's dismissal of that allegation.[12]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[10] The majority contends that the Respondent never withdrew the offer. However, the Respondent told the Union that the Respondent had "rethought" the offer and that it was "too rich." The obvious message was that the $8-offer was no longer on the table.

[11] Moreover, the judge considered and rejected the possibility that Kuper's remarks were mere "bluster and banter." The judge emphasized her impression that Kuper is "controlled" and "self-possessed" and "does not loosely toss comments into the air." Unlike the Board, the judge had the opportunity to observe Kuper during a 7-day hearing. I defer to the judge's impressions.

[12] Contrary to my colleagues, I also agree with the judge that a broad cease-and-desist order is warranted under *Hickmott Foods*, 242 NLRB 1357 (1979), in light of the Respondent's violations in this case and in prior cases. As stated above, I would affirm the surface bargaining violation here, as well as the other 8(a)(1), (3), and (5) violations affirmed by the majority. Furthermore, the Respondent has a history of violating the Act. See 331 NLRB 454, supra; 341 NLRB 904, supra. Its prior violations include discharging and disciplining employees because of their union activities (conduct repeated in the present case through the unlawful discipline of Daniels and Wallace), unilaterally transferring unit work to nonunit employees, refusing to provide information requested by the Union, interrogating employees about their union activities, giving the impression that union activities are under surveillance, soliciting grievances, promising benefits, and imposing an unlawful no-solicitation rule.

By the above conduct, the Respondent has demonstrated a proclivity to violate the Act. Indeed, the Board relies on the Respondent's prior 8(a)(1) and (3) violations to find antiunion animus in the present case. See sec. III,A, of the majority decision. Therefore, a broad cease-and-desist order is warranted. See *Hickmott*, supra at 1357 ("repeat offenders" with a proclivity to violate the Act are subject to broad injunctive relief).

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT assist in circulating a decertification petition.

WE WILL NOT issue warnings to, suspend, or otherwise discriminate against any employee for supporting Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT issue warnings to, suspend, or otherwise discriminate against any employee for giving testimony under the National Labor Relations Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the unit described below, by unilaterally changing employee breaktimes without giving the Union notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of our employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time warehouse employees employed by us at our South Kearny, New Jersey facility, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL make Tony Daniels whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and suspensions issued to Tony Daniels and Purcell Robert Wallace, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings and suspensions will not be used against them in any way.

ST. GEORGE WAREHOUSE, INC.

Julie L. Kaufman, Esq. and *Brian Caufield, Esq.,* for the General Counsel.

John A. Craner, Esq. (Craner, Satkin & Scheer), of Scotch Plains, New Jersey, for the Respondent.

Gary Carlson, Esq. (Lynch Martin), of West Orange, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Newark, New Jersey, on 7 days between July 22, 2003, and January 6, 2004. The Amended Consolidated Complaint alleges that Respondent, in violation of Section 8(a)(1), (3), (4), and (5) of the Act, informed employees that Respondent was not providing its regularly scheduled merit wage increases because employees supported the Union, solicited employees to sign a petition decertifying the Union, suspended employee Tony Daniels and disciplined employees Tony Daniels and Purcell Wallace, failed to grant employees regularly scheduled merit wage increases, unilaterally changed employees' breaktime and changed its rule concerning employees' use of cellular telephones, undermined the Union's majority status by letter dated September 26, 2003, and engaged in surface bargaining. The General Counsel seeks a remedy pursuant to *Mar-Jac Poultry,* 136 NLRB 785 (1962).[1] The Respondent denies that it has engaged in any violations of the Act and argues that the allegations relating to informing employees that Respondent would not provide regularly scheduled merit wage increases are barred by Section 10(b) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent in March 2004, I make the following[2]

[1] A Complaint issued herein in Case 22–CA–25400 on February 27 and in Case 22–CA–25938 on September 30, 2003. The cases were consolidated by Order dated October 8, 2003. The Consolidated Complaint was amended at the hearing on November 17, 2003.

[2] The record is hereby corrected so that at p. 24, L. 22, the name of the case is *Bannon Mills*; at p. 36, L. 22, and at p. 40, L. 6, the name of the case is *Mar-Jac*; at p. 41, L. 15, the phrase should read "we would be able to stipulate"; at p. 44, L. 2 and for many pages thereafter, the word "cars" should be replaced by "cartons"; at p. 75, L. 5 and in numerous places thereafter, the word "clothes" should be replaced by the word "close"; at p. 96, L. 25 the phrase should read "union shop"; at p. 440, L. 15, and thereafter until p. 445, the General Counsel was not speaking and the record should show that counsel for the Union was speaking and introduced Charging Party Exhibit # 1; on p. 884 at L. 20, the first word is "blades"; on p. 897, L. 5, the phrase should read "handled rigs".

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with a place of business in South Kearny, New Jersey, is engaged in the warehousing of commodities. Annually, Respondent performs warehousing services valued in excess of $50,000 in States other than the State of New Jersey. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, AFL–CIO is a labor organizational within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent has been a party to various proceedings before the Board.[3]

In *St. George Warehouse*, 331 NLRB 454 (2000), the Board found that Respondent unlawfully discharged two employees because of membership in Local 641, interrogated employees about their union activities, promised increased benefits if employees did not select the Union, solicited grievances, created the impression of surveillance, issued written warnings rather than the customary oral warnings, and maintained an unlawful no-distribution, no-solicitation clause. The Third Circuit enforced the Board's decision in a memorandum opinion based on "the entire record, including the employer's demonstrated hostility to its employees' organizing efforts." *St. George Warehouse v. NLRB*, No. 00-2433 (3d Cir. April 23, 2001).

In an unpublished decision at 333 NLRB No. 113 (2001), the Board ordered Respondent to bargain with the Union after Respondent had refused to recognize and bargain with the Union following its certification on October 27, 2000, as the exclusive collective-bargaining representative of a unit of the following employees of Respondent:[4]

> All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey facility, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Negotiations between the company and the Union began in October 2001, following the circuit court's enforcement of the Board's bargaining order.

In *St. George Warehouse*, 341 NLRB 904 (2004), the Board found that Respondent unlawfully delayed in providing the Union with information on health insurance premiums and failed to provide the Union with information relating to temporary agency employees who have performed bargaining unit work. The Board found that prior to the election Respondent had used a fluctuating number of temporary agency employees to supplement directly hired employees in the bargaining unit. Following the election Respondent did not replace unit employees who quit or were fired for cause; instead it used temporary agency employees. As a result the number of unit employees decreased from 42 at the time of the election to 8 at the time of the July 2002 hearing before ALJ Steven Davis. The Board found that Respondent had violated the Act by unilaterally transferring unit work to temporary agency employees without notice to the Union or an opportunity to bargain. The Board did not disturb the ALJ's findings, made after extensive analysis of testimonial and documentary evidence, that some time after the Union won the 1999 election Respondent made a decision to use agency employees rather than directly hired unit employees. The Board ordered the company, inter alia, to rescind the unlawful unilateral transfer of unit work to temporary agency employees and restore the status quo by restoring the unit to where it would have been without the unilateral changes.[5]

In its Answer to the instant Complaint dated February 27, 2003, Respondent admitted that the following individuals hold the positions set forth opposite their respective names and are supervisors and agents of Respondent:

Anthony Fortunato	Owner
Linda Kuper	Executive Vice President[6]
Steven Kuper	Terminal Manager
Gabriel Maldonado	Assistant Terminal Manager[7]
Anthony Oliveri	Night Shift Supervisor
Robert Chapman	Supervisor

The Respondent denied that Paul Smith is a supervisor of Respondent.

A number of other employees testified in the proceeding in addition to the managers and supervisors listed above:

> Purcell Robert Wallace, sometimes referred to as "Rob", has worked at the warehouse for 13 years, and has been a loader of containers in the export department for 8 years.[8] Wallace has been a member of the Union negotiating committee since October 2001 and has attended bargaining sessions with Respondent since November 2001.
>
> Tony Daniels has worked at the warehouse for 11 years performing the duties of a loader in the export department. Daniels has been a member of the Union negotiating committee since October 2001 and has attended bargaining sessions with Respondent since November 2001. Daniels assisted in the investigation of Board charges and testified in the case leading to 341 NLRB No. 120 [904] and in the instant case. Daniels testified in the instant case in July and October 2003 and January 2004.
>
> Louis Buono has been a forklift driver in the warehouse for 6 years. He was on leave of absence from April

[3] In an effort to prevent the instant decision from assuming gargantuan proportions I shall assume familiarity with previous ALJ and Board decisions and I shall give only an abbreviated description of the negotiations between the parties.

[4] Enfd. sub nom. *NLRB v. St. George Warehouse*, No. 01-2215 (3d Cir. Aug. 7, 2001). The election was held on April 16, 1999.

[5] As will be discussed below, the Board reversed the ALJ's finding that the Respondent had engaged in surface bargaining.

[6] At the time of the instant hearing Linda Kuper had become president of St. George USA.

[7] Maldonado testified that he was general manager for 7 years and had recently been named terminal manager.

[8] Witnesses also referred to loaders as hi-lo drivers.

20 to August 20, 2000. Buono has been a member of the Union negotiating committee since January 2003.

B. Morning and Afternoon Breaks

The record shows that employees in the warehouse receive two 15-minute breaks, one in the morning and one in the afternoon. Employees do not clock out during these breaks.[9] All the witnesses agreed that employees had a tendency to extend the 15 minutes into longer time spans.

Purcell Robert Wallace testified that after October 2002 management began pushing the breaks back to 15 minutes. Wallace said that Maldonado stated that the employees wanted a union shop and "we're going to show you how a union shop runs." Wallace said that Maldonado made this announcement to all loaders in the warehouse. For a while the breaks were indeed held to 15 minutes but eventually the employees went back to their old habit of taking longer breaks. On cross-examination Wallace could not recall whether Maldonado made his statements in 2002 or 2003. Wallace went on to testify that Maldonado made the "union shop" statement once when Wallace was walking alone on his way back to work from the lavatory and another time when the announcement was made to anyone within hearing distance. Wallace's affidavit given to a Board agent mentions that for 2 weeks the company enforced 15-minute breaks but the affidavit does not refer to Maldonado's alleged statements linking the enforcement to a union shop. Wallace further testified that he took only 15 minutes for his break and that he does not know how long anyone else took. Of course, this testimony is inconsistent with his earlier testimony. Given the contradictory nature of Wallace's testimony on this subject and the fact that Wallace's affidavit makes no mention of the "union shop" statement, I shall not rely on Wallace's testimony concerning the enforcement of 15-minute breaks.

Louis Buono testified that employees, including himself, occasionally lengthened their breaks by 5 to 15 minutes. After he filed a decertification petition in October 2002 the supervisors came out and told everybody that the break was over after 15 minutes. Buono said this went on for a few days in a row. He identified the supervisors as "Edwin" and "Harry".

General Manager Gabriel Maldonado testified that he has indeed gone around the warehouse saying "break is over" because the employees often took breaks of over 15 minutes. Maldonado denied telling Wallace in relation to breaktimes that "you want a union shop, we will show you how a union shop is run."

I find, based on the testimony of Buono and Maldonado, that after Buono filed the decertification petition Respondent enforced the 15-minute breaktime rule. Apparently this 15-minute limit had not been enforced previously. Respondent did not give notice to the Union and an opportunity to bargain concerning this change in working conditions. This was a violation of Section 8(a)(5) of the Act.

[9] Employees may take a ½-hour lunchbreak, but they must punch the timeclock when they cease work for lunch and when they return to work and they are not paid for this time. Many warehouse employees do not take a lunchbreak.

C. Use of Cell Phones During Working Hours

Tony Daniels testified that on October 30, 2002, he believed that he had lost his wallet. Daniels wished to check whether his wallet was in his truck. Daniels asked Maldonado for permission to go to his truck which was parked across the street from the warehouse. Apparently this permission was granted. Daniels did not tell Maldonado about a lost wallet. Not finding the wallet in the truck, Daniels telephoned his wife to see whether the wallet was at home. His wife called him back "at the job" to say that she had found the wallet. Daniels received a written warning, signed by Paul Smith, "Supervisor", for "unauthorized use of cell phone during working hours . . . 8:15 AM."[10]

Daniels testified that Maldonado had told the employees that they were not permitted to use their cell phones on the warehouse floor during working hours. Employees were permitted to use their cells during workhours off the warehouse dock. Daniels has seen other employees go down the ramp that leads off the dock and use their cell phones. Buono testified that he had never been given any company policy about cell phone use. He stated that if he had to use a phone he would ask his supervisor. Buono used his break time to telephone the Regional Office from a container parked in a loading dock.

Maldonado testified that employees are not permitted to make phone calls during work time. He denied telling employees that they could use a cell phone while on duty as long as they were off the dock. Employees are permitted to make phone calls on their breaktime outside the warehouse. Maldonado said that if he observed an employee using a cell phone during working hours he would give the employee a verbal warning. If the employee were caught a second time using a cell phone during working hours he would send the employee home for the day.

Maldonado said that on October 30, 2002, he was at door 52 and he observed Daniels at the dock by door 25 using a cell phone. Maldonado instructed Paul Smith to find out why Daniels was using the phone. Maldonado explained that "Smith is one of the dock bosses, he's my right hand, the one I trust." Smith reported back that Daniels said Maldonado had given him permission to talk on the phone with his wife. Maldonado told Smith to "write him up" for cell phone use.

Paul Smith testified that he saw Daniels in a loading bay using his cell phone. When Smith asked why he was on the phone Daniels replied that Maldonado had given him permission. Maldonado denied giving permission and Maldonado told Smith to write up a warning.

I find, based on the testimony of Maldonado, that Respondent did not permit its employees to make telephone calls during working hours. I note that Daniels claimed to Paul Smith that Maldonado had given him permission to use the telephone, thus implying that he needed permission to call during working time. Buono testified that he had used a cell phone during his break time. He was unaware of any other policy concerning phone use. I do not credit Daniels that Respondent had no ob-

[10] The recitation of facts concerning the wallet and the phone calls is taken both from Daniels' testimony and from his written remarks on the warning notice.

jection to employees using working time to make calls so long as they did this off the dock. I find it incredible that Respondent maintained a policy that employees could walk off the dock to use a cell phone while they were supposed to be working. The fact that some employees may have used a cell phone surreptitiously does not show that Respondent condoned this activity. Thus, I do not find that Respondent unilaterally changed its telephone policy.

Although Maldonado said that for the first offense of using a telephone during working hours he would give the employee a verbal warning, this is not the procedure he followed in the instance of Daniels using the cell phone. Instead of issuing a verbal warning to Daniels Maldonado ordered Smith to write up Daniels. Respondent offered no testimony to explain why Daniels received more onerous discipline than a mere verbal warning. Nor does Respondent contend that this was a repeat infraction. In the case of Daniels, a known and active supporter of the Union, Respondent did not follow its disciplinary policy as enunciated by Maldonado; instead it imposed harsher punishment for a first instance of using a cell phone during working hours. I shall deal below with this incident in my discussion of discipline imposed on Daniels.

D. Status of Paul Smith

Wallace identified Paul Smith as a supervisor. He testified that Smith and other supervisors including "Edwin" and Maldonado went around telling employees to get back to work because break was over.

Daniels also identified Paul Smith as a supervisor. When Daniels was hired, Smith looked at his application and telephoned him to begin work. As discussed in detail below, Daniels received a written warning notice dated October 30, 2002, signed by Smith in the space reserved for "supervisor." Smith was walking by a container being loaded by Daniels and he accused Daniels of damaging the cargo. Smith notified Maldonado and Daniels was given a warning. Daniels stated that he had worked with Smith in March 2003 and he observed Smith give orders to hi-lo drivers about which freight to pick up and which truckers to assist. Smith walks all around the warehouse seeing what the employees are doing. He gives recheck sheets to employees when freight must be rechecked. Those supervisors who have company issued walkie-talkies include Maldonado, "Edwin," "Carlos," and Smith. Rank-and-file workers do not have walkie-talkies.

Linda Kuper stated that Paul Smith is a dock boss. Kuper said that Smith, who has worked for the company for 13 or 14 years, had begun work as a hi-lo driver and had eventually been promoted to export supervisor. However, Smith had a break in service in 1997 or 1998 and came back again as a hi-lo driver.[11] Smith has been a dock-boss since 2002.[12] According to Kuper, Smith assigns truckdrivers to a door where they are to park the container for loading. Smith also assigns loaders to loading duties at a door. Depending on how much freight is to be loaded Smith assigns a helper to the loader. Smith's job description, according to Kuper, is to use his discretion to determine how best to utilize labor in the warehouse to get the job done. Smith uses this discretion without consulting a manager. Smith is assigned to fill the soda machine and to empty out the cash; according to Kuper no other employee is trusted to do this. Kuper testified that Smith can write up a warning without authorization of a manager. He offers his opinion concerning discharges. Smith fills out accident reports and he may excuse an injured employee to go home. Kuper identified a number of documents where Smith was described as a supervisor. On August 8, 2002, Kuper wrote to the U.S. District Court in Trenton, New Jersey, asking that Smith be excused from jury service for a number of reasons, including that during a popular vacation time "We had planned for Mr. Smith, as one of our supervisors, to open & close our facility." In addition, Smith signed as "Supervisor" on February 5, 2003, a "Supervisor's Report of Accident." On February 12, 2002, Respondent certified a document for hazardous materials transportation training on behalf of Smith whose title was given as "dock supervisor." On December 30, 2002, the accounting manager of Respondent signed a document needed by Smith for a loan and identified Smith as "supervisor." On June 19, 2002, Smith signed as "supervisor" a notice that an employee had abandoned his job by being a no-call no-show for 3 consecutive days.

Kuper testified that unlike managers, Smith and other dock bosses are paid hourly and receive overtime and the same benefits as loaders. Kuper identified an employee named Chapman as an hourly supervisor. She stated that an hourly supervisor is a dock boss. He is like a front desk manager, getting everybody going in the right direction, keeping things organized, enforcing the rules, manipulating the truckdrivers, and the paperwork.

Maldonado testified that there is no set number of employees that "Smith is responsible for." Depending on what Smith is doing at a particular time, "I have him do anything for me . . . it could be with 10 guys over here . . . it could be 15 guys doing something that I want to get done." Maldonado said that if Smith saw an employee in any part of the warehouse doing something incorrect he could issue discipline to that person because "he's a dock boss." As discussed above, Maldonado said that Smith was one of the dock bosses, "he's my right hand, the one I trust."

Paul Smith, testifying about his duties, stated that he reported to Maldonado but Smith contradicted Maldonado's testimony and attempted to downplay his own authority in the warehouse. I note that in questioning Smith, counsel for Respondent twice referred to "employees whom you supervise." Smith said that he does not sign a warning without consulting his manager; he recommends discipline to either Maldonado or Steve Kuper.[13] Smith agreed, however, that if he sees an employee doing something wrong he fills out a warning slip and signs it, because he was the one that brought up the incident. Smith described his duties as working in the import and pick-up department. Daniels and Wallace and Buono work in the export department. He sees them during the day and he offers them ad-

[11] Smith said the break in service was in 1995.

[12] Smith voted in the 1999 election.

[13] The chain of command runs from Steve Kuper, to Maldonado and to Smith.

vice. Smith stated that he assigns helpers to the loaders and he admonishes the helpers if they are not doing their work.

Smith testified that in lieu of a raise in 2001 he asked for and was granted an additional week of vacation. In December 2002, also in lieu of a raise, owner Anthony Fortunato rented him the vending machines in the warehouse for $100 per month and permitted Smith to stock the machines and keep the cash deposited in the machines. Smith has a Nextel walkie-talkie. Fortunato allows him to make personal calls on the Nextel as long as he contributes "a little" to the cost of the service.

I rely on the testimony of Linda Kuper and Maldonado, as well as Respondent's written records, to find that Paul Smith is a supervisor. Smith became a dock boss in 2002. From that date Smith has been identified as a supervisor on disciplinary notices, in correspondence to government entities and in other official correspondence. Respondent utilized Smith to open and close the warehouse. Kuper identified dock bosses as "hourly supervisors" who enforce the rules and keep employees organized and going in the right direction. As will be discussed in detail below, Kuper testified that when an employee asks for a raise the dock boss gives his opinion to the manager on the issue of granting the raise. Smith assigns employees to tasks such as loading containers and helping a loader with a difficult cargo. Smith exercises his discretion in utilizing the available labor force in the warehouse. Smith initiates disciplinary action and gives his advice concerning terminations. He admonishes employees when he sees them doing something wrong.

I find that Smith is a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

E. The Issue of Wage Increases

1. Alleged unilateral change

The General Counsel alleges that Respondent ceased its merit wage increase program in violation of Section 8(a)(1), (3), and (5).

Linda Kuper testified that before the April 1999 election employees received wage increases based on merit and productivity, including attendance, speed, accuracy and the like. According to Kuper, an employee's performance was evaluated when the employee asked his supervisor for a review. The review was up to the dock boss who would provide an opinion to the manager. Kuper said she was not involved in doing these reviews.

Kuper testified that the company had never told the Union that employees received regular annual merit wage increases. Kuper stated that the company did not automatically review wages and that no fixed amount of wage increase was paid. She denied that raises were given on an employee's anniversary date. Kuper stated that the Union had not made a demand for merit increases, but had only sought to establish a minimum wage, starting rates and across-the-board increases. The Respondent has offered a $.30 annual wage increase as its final position and has offered to implement this proposal.

Kuper testified that Respondent gives Christmas presents to employees, but that not every employee receives a present and that a range of amounts is given. She discusses the matter of these gifts with Steve Kuper, Maldonado, and Fortunato and takes into account employees' performance, attention, accuracy, and productivity. Kuper said that employees do not request gifts.

Kuper identified a letter which John A. Craner, Esq., who represents the Respondent in collective-bargaining negotiations, wrote to counsel for the General Counsel on December 12, 2002, as follows:

> [T]he Company has not granted merit increases since the Union was certified because to do so would place the Company in an extremely difficult position. . . . Moreover, the Union insisted at the outset of negotiations in 2001 [prior to year end when such merit increases would be considered] that the Company no longer grant discretionary increases but rather bargain for across-the-board increases. . . . Thus, because of the bargaining position of the Union seeking across-the-board wage increases, the Company has not given any employee a merit increase. The Company chose to respond to the Union's demands concerning across-the-board increases and abandoned its merit increase program in 2001 when negotiations commenced. The Union did not object at year end 2001 to the fact there were no merit increases.

I note that there is no testimony to support Craner's assertion that the Union insisted in 2001 that the company no longer grant discretionary increases. Further, Kuper's testimony that the company stopped giving raises after the election in 1999 is not correct. As will be seen below, the record shows that the last raises were given in January through March 2001.

Lori Smith, Esq., is the Union's legal representative and has been its collective-bargaining representative since October 2001. Smith testified that the first discussion of economics during the negotiations took place in April 2002 when the Union made an economic demand. The Union proposed that all employees be brought up to a rate of $16.75/hr, with increases of $1/hr in two succeeding years of a 3-year contract. New hires would have less favorable rates.

Craner replied in a letter dated April 8, 2002, which proposed:

> an across-the-board increase of $0.25 per hour in each of the three years of the proposed contract for a total package of $0.75. . . . The company will also continue its present practice of discretionary bonuses (and please note I used the word "discretionary" to mean that the discretion is with the company alone).

In May 2002, the Union changed its demand to a top rate of $15.50. Lori Smith testified that the Union did not mention merit increases in its demands.

Smith testified that Craner had informed her that the company gave only discretionary bonuses. Craner told her that Respondent could not continue giving the bonuses because such action would constitute an unfair labor practice. Eventually, Smith stated, she found out that what Craner had termed discretionary bonuses were in fact regular merit increases.

Lori Smith testified that at a negotiation session on September 18, 2002, she asked the company about the manner in which wage increases had been given in the past. Linda Kuper told her that on an employee's anniversary date a merit increase

of $.50 to $1 was granted.[14] Before this exchange, Smith had not known that Respondent gave regular wage increases. She believed that the company gave only the discretionary bonuses mentioned in Craner's letter. Smith said that previous to September 18 the Union had been concentrating on bringing all employees up to a higher wage rate and trying to establish a minimum hiring rate. Between April and September she had not spoken to bargaining committee members about any other type of wage issue. At the September 18 session, Smith requested a history of wage increases for unit employees in order to prepare for a scheduled meeting on September 24. On September 23 Smith received an incomplete list with figures which Craner characterized as "not 100% accurate." Because the wage information was so inaccurate as to be unusable the September 24 session ended after only one-half hour. On September 27 Smith wrote to Craner detailing the problems with the information and again requesting that accurate information be provided to the Union. In a letter from Craner and in a subsequent spreadsheet, both provided to the Union on September 30, 2002, Respondent corrected the information it had previously supplied and filled in many, but not all, the gaps in the wage history of unit employees.

Respondent provided revised wage data which purport to show a history of wage increases given to employees who were on the *Excelsior* list in 1999 revised as of September 30, 2002. Many employees on this list were employed for less than 1 year and thus received no wage increases. For other employees Kuper stated that the payroll records were incomplete. However, the wage data show that in general Respondent did provide annual wage increases to its employees:

1. Employee Aroca was hired in January 1997 and he received increases of $.50 in August 1997, $1.00 in May 1998, $.75 in June 1999, and $1.00 in November 2000.

2. Buono was hired in April 1998 and he received wage increases of $1.00 in August 1998, June 1999 and January 2001.

3. Daniels was hired in October 1991 and he received wage increases of $1.00 in 1992, $.50 and $1.00 in January and July of 1993, $1.00 in 1994, $1.50 in February 1995, $.50 in February 1996, $.50 in February 1997, $.50 in February 1998, $.50 in February 1999 and $.75 in March 2001.

4. Employee Leach was hired in January 1990 and he received raises of $1.00 in November 1990, $.50 in August 1991, $.50 in August 1992, $.50 in August 1994, $.50 in July 1996, $.75 in October 1997, and $1.00 in August 1998.[15]

5. Employee Mateo was hired in March 1992. He received raises of $.50 in October 1992, $.50 in June 1995, $1.00 in January 1998, $1.00 in August 1999, and $1.00 in March 2001.[16]

6. Employee Pericles was hired in November 1996 and he received increases of $.50 in February 1997, $.50 in January 1998, $.75 in December 1999 and $1.00 in February 2001.

7. Employee Rivera was hired in February 1991 and he received increases of $.50 in November 1992, $.50 in January 1993, $.50 in January 1994, $1.50 in March 1995, $1.00 in January 1997, $1.00 in January 1998, $.75 in February 2000 and $1.00 in February 2001.

8. Smith, who testified to having received annual wage increases, was hired in March 1990 and he received increases of $.50 in November 1990, $1.50 in January 1993, $.75 in August 1994, $.50 in July 1996, $.75 in October 1997 and $1.00 in August 1999.

9. Wallace was hired in February 1988 and he received increases of $.50 in August 1988, $2.00 in July 1989, $1.00 in October 1991, $1.00 in June 1995, $1.00 in January 1997, $1.00 in February 1999 and $1.00 in January 2001.[17]

10. Employee Zapatier, who was hired in October 1997, received raises of $1.00 in June 1998, $.75 in August 1999 and $1.00 in November 2000.

As will be discussed below the Respondent and the Union continued bargaining concerning various matters. On April 8, 2003, the parties held a negotiating session during which Lori Smith proposed that the company should put its regular merit increase into effect so as to bring the employees up to date for the 2 or 3 years during which many of them had not had any increase. Smith said this would result in the parties not being so far apart on wages. The company asked the Union for a proposal and it also suggested that a mediator be called in. The Union took the position that it would discuss merit increases in the presence of a mediator. Smith testified that other than the discussion on April 8, 2003, the Union had never made any proposal concerning regular merit increases and it had never taken the position that Respondent should either continue with or cease granting merit increases.

Lori Smith denied that the company had offered to implement its $.30/hr wage increase proposal at any of the bargaining sessions.

In *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d (D.C. Cir. 1996), the Board set forth its rationale governing the duty of an employer to persist in a merit raise program that is entirely discretionary as to amount. The Board summed up the employer's program in that case as "appraising every employee once a year, considering each employee for a merit wage increase, and granting a merit increase to at least 80 percent of the employees." The Board found that a merit review program in which an employer retains elements of discretion can be a term and condition of employment. The Board reviewed cases arising under *NLRB v. Katz*, 369 U.S. 736 (1962), and found that a discontinued merit raise that constitutes a change in a term of employment is unlawful under *Katz*. The employer must bargain to agreement or impasse before making any change in such a term of employment. Further, the

[14] Steve Kuper was present at this meeting. Steve Kuper, the highest manager who was involved in the decisions about raises, was not called to testify herein.

[15] Although Respondent's records show that Leach was hired in 2000 this is clearly incorrect.

[16] Mateo's records are marked incomplete by Respondent.

[17] Wallace took a leave in 1998.

Board stated, an employer with a practice of granting regular merit increases must bargain with the Union as to the exercise of discretion in determining the merit increase. Members Stephens and Cohen joined the opinion but did not "fully subscribe to the reasoning in the discussion concerning . . . a past practice that is scheduled to recur during negotiations for a contract." Members Stephens and Cohen stated their views as follows: "Where there is a past practice concerning an annual event (e.g., an annual wage increase), and the event is scheduled to recur during negotiations for a contract, the employer satisfies its bargaining obligation if it gives reasonable advance notice and opportunity to bargain about the scheduled event." The employer may propose to continue the practice, to modify it or to delete it. The Board's decision distinguished cases where the merit increases had been given at random irregular intervals in the past. In *Ithaca Journal-News*, 259 NLRB 394 (1981), the Board had discussed a practice under which employees received increases at varying intervals from their anniversary dates. The Board found that in 1 year only 10 out of 13 employees received a raise while in the next year 2 employees received two increases, 9 received one increase, and 7 received no increases. The dates the raises were granted appeared largely random. The amount of wage increases also did not follow any discernible pattern. There was no formal or written evaluation of employees, there was no minimum standard nor any objective, articulable criteria. The Board found that the employer did not have a merit increase program that it was bound to continue during negotiations. In *American Mirror Co.*, 269 NLRB 1091 (1984), the Board found that the raises were in discretionary amounts based on diverse considerations and "the raises there had been given at random irregular intervals in the past and, hence, the employer's withholding of them did not constitute a change . . . in a clearly established pattern that had become a term of employment." 315 NLRB at 1240–1241.

It is evident from a summary of the testimony given above that there is a degree of confusion about the merit wage increases given by Respondent. Linda Kuper testified that the last increases were given in 1999 but this is clearly contrary to the evidence. Craner wrote that the increases were given at the end of the year, but this is also inaccurate. Lori Smith testified that on September 18, 2002, she asked Kuper about the manner in which wage increases had been given in the past and purportedly learned that there were anniversary date increases. I do not credit this because Respondent's records show there was no such thing as anniversary date increases. Further, Kuper denied telling Smith that Respondent gave anniversary date raises. Moreover, the negotiating committee had two bargaining unit members, Daniels and Wallace, both of whom were long term employees of the company. It strains credulity that they had not informed their bargaining agent of the manner of providing wage increases at the company and had not made it clear that the merit increases were not being given after the first few months of 2001. Thus, I do not credit Lori Smith that she had somehow been mistakenly led to believe that Respondent gave discretionary increases and later learned that it also gave regular merit increases.

The list of employees given above shows that in every calendar year most bargaining unit employees (8 out of 10), received a raise. Aroca received a raise every year from 1997 to 2000. Buono received three increases from 1998 to 2001. Daniels received 10 increases from 1991 to 2001. Leach received seven raises from 1990 to 1998. Pericles received four raises from 1997 to 2001. Rivera received eight increases from 1991 to 2001. Zapatier received three increases from 1998 to 2000. Mateo's records are incomplete, but he did receive at least three raises from 1998 to 2001. Paul Smith testified that he received annual wage increases although the records submitted by Respondent do not bear this out.

As shown in the recitation of facts above, the dates on which the raises became effective do not appear to fit any pattern, and the amounts of the increases vary. It is impossible to conclude that the increases, over time, bear any consistent relationship to an individual employee's anniversary date. For example, Daniels was hired in October and he received one increase in each of January, March, and July and five increases in February. Rivera was hired in February and he received one increase in each of November and March, four increases in January, and two increases in February. There is no evidence that a merit review was routinely conducted at a fixed time in the calendar year or in relation to a hiring date. The only evidence in the record shows that employees were reviewed when they asked. Further, although Kuper stated that the amount of the raise an employee received was based on the dock boss' report to management concerning the employee's productivity, attendance, accuracy, and speed, there is no evidence that the criteria were standardized in any way or that the criteria were applied equally so that, for example, in a given year the best employees received $1 and lesser performing employees received $.75 or $.50.

I have not been able to find any case where so little predictability was attached to a merit wage increase practice and yet the practice was held to constitute a term and condition of employment as to which an employer must give notice and an opportunity to bargain. In *Daily News of Los Angeles* and in the numerous cases discussed by the Board therein, the raises were based on performance appraisals and were regularly given at fixed times, either calendar dates or anniversary dates with only the amount of the increases being left to the employer's discretion, based on established merit appraisal criteria.

The court of appeals decision enforcing *Daily News of Los Angeles* describes the program in that case as "an established practice of annually evaluating the *merit* of each employee based upon standard performance evaluations, and then determining an appropriate increase based only on the merit criterion. The program was in no sense whimsical, for each employee was assured an annual evaluation and a merit increase if his or her evaluation warranted it." 73 F.2d at 408. (Emphasis in original.)

In contrast, in the instant case, there is no evidence that Respondent was committed to granting annual merit evaluations and no evidence that an employee who met established criteria was assured of a wage increase. The record simply does not contain any evidence that each time an employee asked for an evaluation it would be done and a raise would follow a good

evaluation. The record bears out Linda Kuper's testimony that the merit wage increases were not regular or automatic and that no fixed amount was paid each year. It is clear that Respondent exercised its discretion in all aspects of deciding whether to grant a wage increase including timing and amount and application of criteria.

I do not find that the Respondent's practice of granting merit wage increases was a term and condition of employment. Thus, I do not find that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by failing to continue the practice during negotiations with the Union.

2. Statements to employees concerning wage increases

Daniels testified that in the fall of 2002 Supervisor Paul Smith came to speak to him during breaktime. Smith said, "I haven't had a raise in two years because of the Union." Smith said no supervisors and no workers were getting raises. Daniels replied that he had not had a raise in 3 years going on 4 years. Smith continued by saying the Linda Kuper said no worker was getting a raise because of the Union. Smith told Daniels that because Daniels was on the negotiating team he was taking bread out of Smith's mouth and from the workers' mouths. According to Daniels, Smith concluded by saying he hoped they never signed a collective-bargaining agreement.

Paul Smith testified that he knew that Daniels had a role with the Union and he asked Daniels about the Union in passing once in a while. Smith denied that he informed employees that the company would not give regularly scheduled merit wage increases because they had brought in a union. He testified that he could not recall a conversation where he complained to Daniels that he had not received a raise for 2 years and that Daniels was taking bread out of his mouth. Smith did not recall telling Daniels that he hoped the company would not sign a contract with the Union.

I credit Daniels' testimony about his conversation with Paul Smith. Smith confirmed that he asked Daniels about the Union periodically because he knew that Daniels was involved with the Union. Daniels' recollection of the conversation comports with the reality, confirmed by Smith's testimony, that Smith had not received a raise for 2 years running. Further, I have found above that Kuper told employee Buono that the company was not giving raises because it was negotiating with the Union and it is likely that Smith knew the company's explanation for failing to give raises. Finally, Smith did not deny salient portions of Daniels' testimony, he merely said he could not recall the conversations.

As discussed above, I have found that Maldonado told Buono in April 2002 that Respondent was not giving raises due to the proceeding with the Union. Also in April 2002 Linda Kuper told Buono that the company was not giving raises because it was negotiating with the Union.

An employer violates the Act when it informs employees that they are being deprived of a benefit which the employer has regularly granted in the past because they have chosen union representation. I have found above that the merit wage increases given by Respondent were not a term and condition of employment. It appears that Linda Kuper's statement to Buono that no raises were given because the company was negotiating with the Union was an accurate statement of fact. Maldonado's statement that the company was not giving raises due to the proceeding with the Union was also accurate. The Company and the Union had not reached agreement as to wages; therefore, no wage increases were being given. I do not find that these statements violated the Act.

I do not find that Paul Smith's statements to Daniels were unlawful. Daniels was a member of the negotiating team and he was well aware of the status of discussions between the employer and the Union. Smith expressed his displeasure at the length of the negotiations and the fact that supervisors were being deprived of raises. Smith blamed the Union and the members of the negotiating committee, including Daniels. I find that Smith's comments concerning the length of the negotiations and the concomitant delay in wage increases are reasonably interpreted as an expression of frustration with the failure to reach agreement.

F. The Decertification Petition

Louis Buono filed a decertification petition in Case 22–RD–1355 on October 17, 2002. Buono works on the day shift as a forklift driver. He has been employed by Respondent since April 1998 with a break for a leave of absence from April to August 2000. Buono, who said he understood that the company gave annual raises of $.50 or $1, testified that he received $1/hr raises in August 1998, June 1999, and January 2001.[18] Steve Kuper always informed Buono that he was receiving a raise. In April 2002 Buono asked Maldonado about getting a raise. Maldonado replied the company was not giving out raises due to the proceeding with the Union and he suggested that Buono should speak to Linda Kuper. Other employees were asking Buono what was going on with the Union about this time.

Maldonado accompanied Buono when he went to speak to Kuper in her office. Buono did not punch out before he attended this meeting. Buono asked Kuper questions about what was going on with the Union and whether the employees could get raises. Buono was concerned that the negotiations had gone on for 3 years and the employees had not received any raises or benefit increases. Kuper said that the company was in negotiations with the Union and if she gave a raise it could be used against the company as "bribery." Kuper said the Union had accused the company of surface bargaining, a term which she compared to hard bargaining. Kuper said she did not want a Union; she is the person running the company and she wants to decide who deserves a raise. Buono, who knew that in order to remove a union a petition had to be signed, asked Kuper whether, if he obtained a petition to get rid of the Union, she would be able to start giving employees their raises. Kuper said she could not make any promises but she said "they would continue their business as usual before the Union was there."

During this meeting Kuper told Buono how unions work and what was going on. After consulting with company counsel over the telephone, Kuper gave Buono a copy of a collective-bargaining agreement between Local 641 and a company

[18] Buono did not receive a raise in 2000 because of his 4-month leave of absence.

named Railhead, a competitor of Respondent. Kuper told Buono he could show the contract to other employees. Kuper said the Railhead contract showed that at the other company the Union had obtained annual raises of $.40 and $.30 per year.

Kuper testified that Buono came to her office asking for a raise and wanting to know what he could do to get a raise. Kuper told him to speak to the Union. Kuper denied telling Buono that if the Union left then the company would go back to business as usual, meaning raises every year. She denied telling Buono that she did not want a Union and that she wanted to be the one to decide who deserved a raise. Kuper acknowledged that she gave Buono a copy of the Railhead contract.

Buono eventually spoke to eight employees who were directly employed by Respondent about signing the decertification petition. Buono used the Railhead contract when he spoke to his coworkers. He reminded them that Respondent gave raises of $1 per year.

One day after he had punched out Buono spoke to three employees whom he believed did not speak English. Buono testified that he asked supervisor Anthony Oliveri to interpret.[19] Buono told Oliveri that he had a petition about the Union and he asked Oliveri to call three employees who were working so that he could speak to them. At first Oliveri refused, saying it would be a problem. Eventually Buono convinced Oliveri and the latter called the three employees off the job to the dock office. Oliveri translated while Buono explained that he had a petition against the Union and that he was asking the three men to sign the petition. Oliveri told Buono that the men said they wanted to take some time to decide. After the three went back to their jobs Oliveri said that he and the three employees did not get along. Buono apologized to Oliveri because he had not realized that there was a personal problem. Buono then asked a temporary employee to come with him to interpret and he went over to speak to the three men again. At this point he realized that one of the three, "Jose," speaks good English. Buono then explained that the petition had nothing to do with Oliveri and that he himself was filing the petition. Jose asked what the company was offering if they signed the petition. Buono replied the company was not offering anything because it would be bribery. Buono said he hoped if the Union left that the company would go back to giving a raise every year.

One week before the petition was officially filed, Buono and two other employees went to the Regional Office with a draft signed petition.[20] Buono informed Maldonado that he had to leave work to file a petition against the Union. Maldonado said, "go ahead." Maldonado did not tell Buono to punch out and Buono did not punch out. Buono testified that he was paid for the few hours that he spent at the Regional Office. Buono testified that normally Respondent requires 1 day's notice from employees who ask to leave work early.

Linda Kuper testified that Buono should have punched out for his trip to the Regional Office. Buono's manager should have checked Buono's timecard to see that he punched out. Maldonado stated that he told Buono to punch out when he left for the Regional Office. Maldonado said that Buono was punched out "for an hour or so . . . something like that." I note that Respondent did not introduce Buono's time card or payroll records to show that Buono punched out and was not paid for the time he spent taking the petition to the Regional Office.

At some point after these events Maldonado told Buono that he was on the union negotiating committee and that he would henceforth attend bargaining sessions.

The Complaint herein alleges that Anthony Oliveri is the night-shift supervisor and a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. The Complaint further alleges that Oliveri solicited employees to sign a decertification petition. Respondent's Answer admitted that Oliveri and others are supervisors and agents but specifically denied that Smith is a supervisor. Respondent's Answer denied that Oliveri solicited employees signatures for the decertification petition. On the second day of the instant hearing while counsel for the General Counsel was presenting evidence concerning the decertification petition counsel for the Respondent said the admission of Oliveri's supervisory status was a mistake and moved to amend the Answer to deny that Oliveri is a supervisor. This motion was denied on the basis that the Complaint, issued in February 2003, was specific in its mention of Oliveri so that Respondent could not have overlooked Oliveri's name and made a mistake, and that Respondent's motion was made after 1-1/2 days of trial in late July and after the General Counsel had prepared the case and had begun to present it.

Anthony Oliveri testified that he is a dock boss. Oliveri recalled that about 1 year ago Louis Buono asked him to act as an interpreter for some Spanish-speaking employees. Buono said he had a petition to get the Union out. Oliveri said he had known Buono for a long time so he overcame his initial reluctance and agreed to do Buono a favor. Buono brought employee Jose Aroca into the office where Oliveri has a desk and keeps supplies.[21] Oliveri translated Buono's statements to Aroca for about 5 minutes. The subject of the translation was that Buono had a petition to get the Union out.[22] Oliveri said that he had not known that this would be the subject matter until Buono began speaking. After he ceased translating Oliveri told Buono that he should have warned him because Oliveri did not want to be in the middle of this. On October 14, 2002, Linda Kuper sent a memo to Oliveri stating, "It has come to our attention that you permitted Louis Buono to speak to employees during working hours. This is not permitted and is against company rules. Please ensure that this not happen again." (sic)

I credit the testimony of Buono that Maldonado took him to see Linda Kuper to discuss the question of a wage increase. I credit Buono's version of the conversation with Kuper. I find

[19] Anthony Oliveri is not Buono's supervisor but their shifts overlap. Buono testified that Oliveri assigns duties to the men on the night shift and decides which crew is working on which particular job. Oliveri assigns helpers and he roams the docks checking to make sure employees are doing their jobs. There are 40 night employees and Oliveri is the person on the dock responsible for these men. Another supervisor named "James" works at night. This person has office duties.

[20] The petition was typed at the Regional Office and Buono returned it by mail a week later.

[21] Although Oliveri stated that Buono wanted him to translate for other employees, only Aroca came into Oliveri's office.

[22] Oliveri never saw the petition.

that she told him she could not give raises because it might be seen as bribery, that she told him she was engaging in hard bargaining, that she did not want a union and that she said she wanted to run her own company and decide who would get a raise. As I observed Buono I formed the impression that he was completely candid and, although he was subject to some confusion over dates, I believe that Buono was accurate about the substance of his testimony. Buono is still employed by Respondent and thus has no motive to shade his testimony against the interests of his employer; indeed, Buono has every incentive to help his employer. Further, Buono's narration of his meeting with Kuper was given forthrightly and gave the impression of deriving from his memory of the meeting rather than being learned by rote. Buono's general recollection of the meeting and most of the details he testified to were not denied by Kuper. Thus, I do not credit her denial that she told Buono that she did not want the Union, that she wanted to decide who gets a raise and that if the Union left the company would go back to business as usual.

I credit the testimony of Buono and Oliveri that Buono told Oliveri that he had a petition to get the Union out and that he needed an interpreter for some employees. I credit the testimony of Buono that Oliveri took the three employees off the floor and brought them to his office and interpreted for Buono.[23] As stated above, Buono's testimony was against his own interest because he is still employed by Respondent. Oliveri's testimony was not convincing. Oliveri said that he took an employee away from his work as a favor to Buono without knowing the subject about which Buono wished to address him. It is not credible that a dock boss would agree to such an action without knowing what it was all about, especially since Oliveri acknowledged that he himself was going to be translating for the employee. Further, although Oliveri said that had he known it was about a decertification petition then he would have refused he stated that he continued to translate for Buono for 5 minutes. Surely, quite soon after beginning the translation of Buono's remarks Oliveri must have known that he was talking about an effort to decertify the Union. Yet he continued on for 5 minutes. This convinces me that Oliveri was not averse to translating the decertification message and lends credence to Buono's version of the incident. I find that Oliveri took three employees away from their work and brought them to his office and translated for Buono in an effort to obtain the employees' signatures on a decertification petition.

I credit the testimony of Buono that Maldonado did not tell him to punch out when he went to the Regional Office with his decertification petition and I credit Buono's testimony that he was paid for the time. Kuper said that Maldonado had the responsibility for checking Buono's timecard. Maldonado said that he told Buono to punch out and he maintained that Buono was not paid for the time. Yet Respondent, which was in a position to produce the documentary evidence to support this declaration, did not produce Buono's timecard or payroll record. These documents are the best evidence on the question whether Buono was on the clock when he traveled to the Regional Office in an effort to decertify the Union. In the absence of reliable evidence to the contrary, I credit Buono that he was paid for the time. I also find that Kuper encouraged Buono in his attempt to decertify the Union. She told him that she did not want a union and that she wanted to be the one to decide who gets a raise. She told Buono that in the absence of the Union the company would go back to business as usual in the granting of wage increases. To emphasize her position concerning the Union Kuper gave Buono a copy of the Railhead contract and said he could show it to other employees.

The totality of the Respondent's conduct with respect to the decertification petition at St. George Warehouse would lead employees to believe that it supported the petition. Linda Kuper gave Buono a copy of the Railhead contract to show other employees so that he could convince them that the company gave larger wage increases than were obtained by the Union through collective bargaining. Kuper told Buono that she did not want a Union because she wanted to be the one to decide who would get a raise. The employer provided assistance by permitting Buono to solicit signatures of employees during their worktime, by providing a supervisor's translation services during worktime and by permitting Buono to travel to the Regional Office with his petition while he was on the clock. Respondent thus violated Section 8(a)(1) of the Act by assisting in the circulation of the decertification petition. *Process Supply*, 300 NLRB 756, 758 (1990).

G. Respondent's September 26, 2003 Letter to Employees

On September 22, 2003, the hearing in the instant case was scheduled to continue. Instead, the hearing was adjourned based on an off the record statement to the ALJ which was summed up as "the parties are attempting to settle the contract, which would wrap up the outstanding cases as well." The parties met with a mediator the next day, September 23, and they scheduled another meeting for October 1, 2003. In the interim the company sent a letter to unit employees signed by Linda Kuper. The two-page letter mentions various issues, including the size of the unit, the length of negotiations, the wage proposals made by both sides to the negotiations, the demand for a Union shop and the decertification petition. The General Counsel's brief cites the following three paragraphs as evidence that the Respondent, in violation of Section 8(a)(1), blamed the Union for its own unlawful conduct and informed employees that it is futile to support the Union.[24]

> For almost the past year and a half, St. George has also been trying to convince the Union to allow us to pay you the $.90, three year, wage increase we have offered—*but the Union refuses to allow us to do so.* They believe that they can somehow compel St. George to pay more. Needless to say, they can believe whatever they want. The Union, realizing that the demands it made were not realistic, has *reduced* its demands—*your demands*—to $1.50 over three years, or a $.60 difference over three years ($.20 per

[23] I find that three employees were involved in this incident. Buono so testified and Kuper's warning notice to Oliveri speaks of "employees."

[24] The original letter contains the italicized portions in the quotations.

year), between what St. George is willing to pay and what the Union is seeking in wages, and, *still they will not let us pay you anything!* The reason we cannot pay you by ourselves is because it is against the law.

What we believe the Union does not understand is that if the Company is unwilling to pay more money in wages and is not willing to force those who do not want to pay dues to pay dues to the Union, *where does that leave you?* The answer is that it leaves you where you are right now and where you have been for the past two plus years and where you may be for years to come. Where are we all going with this scenario?

The problem is that while all the legal maneuvering between St. George and the Union is going on, you, our employees, are not receiving wage increases because the Union will not agree to allow us to do so. Please understand that all of this legal maneuvering could go on for years!

I have found above that Respondent did not violate the Act by failing to grant the discretionary merit wage increases. Therefore, I cannot find that the letter blames the Union for the company's unlawful action. As pointed out by the General Counsel, there is no evidence in the record that the Union told the employer to cease giving wage increases or that the employer offered to put wage increases into effect before a contract was signed. It is possible to read Kuper's letter as implying that the company was willing to grant a raise but that the Union refused to permit this. It is also possible to read the letter as a statement that the Union is unwilling to agree to the company's wage proposals. In any case the letter clearly says that it is against the law for the company to increase wages "by ourselves". It is correct that the Respondent may not take unilateral action to raise wages and Respondent is truthfully informing the employees of its lawful action in failing to grant a wage increase. The General Counsel also contends that the three quoted paragraphs advise employees that it is futile to support the Union because the Union could not force Respondent to agree to contract terms, and that the letter is meant to disparage the Union and undermine employee support for it during the parties' first contract negotiations. However, the letter only states the positions of the parties and that the company is "unwilling" to pay what the Union demands. The letter does not state that Respondent will not bargain over the Union's demands, only that the bargaining may continue for some time. I do not find that the cited portions of the letter violate Section 8(a)(1) of the Act.

H. Surface Bargaining

1. The negotiations

Lori Smith testified that at the September 24, 2002 negotiating session Craner told her that until the decision by ALJ Davis was reviewed by the Board there would not be any kind of agreement. Smith's September 27, 2002 letter to Craner protests that he has "made it quite clear that no agreement will be reached until the ALJ's decision is rendered—other than an agreement in which the union accepts . . . the 'proposals' which are on the table." Smith testified that after Judge Davis' decision was issued, Craner said on several occasions that the parties should wait until the Board ruled on the ALJ decision. Smith acknowledged that the Board decision in the case before Judge Davis was expected to have an impact on the number of people who would be subject to a prospective agreement. Craner said that in light of the parties' adverse position it was unlikely that a collective-bargaining agreement would be reached before the Board decided the case.

Lori Smith testified that the parties received ALJ Davis' decision around October 22, 2002. Smith then received a letter dated October 31, 2002, from Craner which supplied certain information concerning the agency personnel used by Respondent to perform bargaining unit work.

The October 31 letter acknowledged that ALJ Davis found a violation in the unilateral transfer of unit work to agency employees. Accordingly, the letter amended the Respondent's contract proposal to include the following language which the company offered to bargain over at the next meeting:

> In view of the fact that the certification issued by the National Labor Relations Board finds the appropriate bargaining unit as all full-time and regular part-time warehouse employees, excluding all temporary agency employees *(*inter alia*)*, the Company shall have the right to transfer unit work to agency employees in the event a full-time or regular part-time warehouse employee employed directly by the Company resigns, quits, or is terminated for cause, and that such agency employee shall not be covered by the terms of this collective bargaining agreement and that the employment of said agency employee shall not constitute a violation of any other provision of this contract to the contrary notwithstanding. (sic)

The parties next met for negotiations on November 5, 2002. Lori Smith testified that she told Craner that the proposed language codified the destruction of the bargaining unit, but Craner insisted on that language. Smith also asked why the fact that the warehouse was bonded would affect a union agent's ability to enter the warehouse to investigate grievances. Smith asked whether there were any restrictions required by Respondent's customers. Craner did not offer a legal basis for denying access to the Union. Craner proposed that the union agent would discuss his need to investigate a grievance with Linda Kuper, that Kuper would then review the grievance to see whether access was required and if she determined that the agent needed to speak to employees she would bring employees to her office to speak with the union agent. The union agent would not be permitted to enter the warehouse.

Lori Smith next received a letter from Craner on November 12, 2002. Craner agreed to certain dates for bargaining sessions. The letter also requested the Union's "final position with regard to all of the matters we have discussed" including the company proposal regarding the use of agency employees. On November 22, Smith answered Craner's letter saying that the Union was not prepared with any final positions because the request was "premature given the course of negotiations to date."

At the next meeting the parties went through the various union proposals. The Union offered a formula which permitted agency employees to constitute 10 percent of warehouse em-

ployees and provided that agency employees would become permanent employees after 45 days. The company rejected this stating that it wished to replace directly hired employees as they left its employ. The Union made a revised visitation proposal which provided reasonable access to company premises to investigate grievances and enforce the contract. This was not accepted.

Before the next bargaining session, Craner wrote a letter dated January 7, 2003, to Lori Smith which stated the company's position. In relevant part, the letter stated the company's agreement to a 3-year contract except that it objected to the Union's desire to make it retroactive to November 1, 2001. The company would agree to a contract effective as of the date agreement was reached. The Respondent reiterated that it would not agree to any provision that gave the Union "recognition over agency employees without having to petition the National Labor Relations Board." Apparently Craner viewed the unit as consisting only of the directly hired employees then employed and was taking the position that the unit was now fixed at eight employees.[25] The company proposed that it have "the right to hire agency employees in order to meet fluctuations and work load." The company adhered to its position that it would not agree to a union shop or checkoff provision. The company renewed its proposal that in the case of grievance investigations the union agent would "first come to see Linda Kuper . . . and any investigation or discussion of the grievance can proceed from that point forward." Craner stated, "What the company does not want . . . is to have a Union representative wandering through a bonded warehouse. . . ." The company responded to the Union's vacation language by proposing "one week of vacation after one year of continuous employment and two weeks of vacation after ten years. . . ." This was a change from prior practice which had been to grant 2 weeks of vacation after 3 years of employment. The letter also accepted or rejected many union proposals dealing with a myriad of issues including health insurance, where the company rejected the union demand and instead proposed to "continue the present employee contribution toward hospitalization."

The parties next met on January 9, 2003, when they discussed Craner's letter. The Union presented new access language. The new demand would grant the Union access to the shop four times a month during the first year of the agreement and twice a month thereafter, and also access during breaks and lunch hours. Reasonable notice was to be given by the Union and there would be no interference with company business. After some discussion, the Union agreed to prepare another proposal. The Union made a new wage proposal which countered the company's May 2002 offer of a $.30 across-the-board yearly increase, the granting of discretionary bonuses, and a minimum of $8/hr for new hires. The Union now asked for $.50/hr across the board and a minimum $13/hr rate. This was lower than previous union demands.[26] When it was pointed out to Craner that he had changed the vacation provision, he reverted to the existing policy of 2 weeks after 3 years.

On January 13, 2003, Craner wrote to Lori Smith responding to some of the union proposals made on January 9. There appeared to be some agreement on hours of work and an additional third week of vacation after 15 years. Regarding wages, Craner rejected the Union's $.50 proposal and said, "The company still maintains its $.30 proposal." Craner reduced the $8 minimum starting rate he had offered in May 2002 stating, "With regard to the minimum starting rate, the Company counterproposes a $7.00 per hour minimum starting rate."

The parties met on February 3, 2003. Lori Smith presented a new proposal to deal with union visitation to investigate grievances and enforce the contract. The new language provided for notice to the employer, the provision of a private area to confer with employees and a management escort if the union agent required access to the work area. The parties discussed wages and the company pointed out that the Union's agreement with Railhead provided only $.30/hr wage increases. The Union replied that the Railhead contract was generous in medical insurance, holidays and other economic benefits.

After the February 3 session company representatives took the Union agents into the warehouse to show the Union a video of a hi-lo accident which had led to termination of an employee. Lori Smith, Jan Katz, and employee committee members walked through the warehouse. At one point Jan Katz said hello to a person in the warehouse and Craner said that was a problem, that was why the Respondent would not permit Union access to the warehouse.

On February 18, the bargaining session was canceled due to weather and Craner wrote to Smith giving the company responses to Smith's February 3 proposals. Craner modified the employer's proposals relating to the management-rights clause, the unit work clause and the issue of Union access. Regarding visitation, the company agreed to some of the language proposed by the Union on February 3, but still required notice to Linda Kuper and still seemed to permit Kuper to decide, in each case, whether the Union needed to meet with a employees in order to investigate grievances. The company agreed to provide a private location for the Union to confer with employees. The company proposal required consent of management before a union agent could enter the warehouse.

The parties met on April 8, 2003. Lori Smith asked that the company put its regular merit increase into effect to bring the employees up to date on their hourly wages. If raises were given to make up for the last 2 or 3 years, then the parties would not be so far apart on minimum wages. The employer asked the Union for its proposal. Further, the employer suggested that the parties employ a mediator. The Union said it would hold its merit increase proposal for the mediator and discuss merit increases with a mediator present.

On April 23, 2003, the parties met in the mediator's office. Lori Smith stated that the Union did not seek further negotiations because the instant hearing was about to begin and she thought she would let the proceeding go forward and see what happened.

As set forth above, the instant hearing was adjourned on September 22, 2003, to permit the parties to discuss a resolution of

[25] When the negotiations had begun in 2001 there had been 14 directly hired employees. At the time of the instant hearing there were seven directly hired employees in the unit.

[26] The Union had no demand for merit increases.

the issues including the unfair labor practices and the collective-bargaining agreement. Lori Smith testified that she told Respondent that the Union would not withdraw any charges unless a contract were signed. The Union wanted a "global agreement." Smith understood that Craner wished to resolve issues relating to the ratio of direct to agency hires and other issues in the case decided by ALJ Davis. Smith was told that Craner wanted the Board to continue to process the decertification petition.

On September 23, 2003, the parties attended a mediation session with Mediator Wellington Davis. Each side stayed in a separate room. At the end of the day the parties agreed to meet on October 2.[27] In the interim, the September 26 letter from Kuper to unit employees was distributed. Lori Smith thought the letter showed the company's bad faith; the company would not pay more in wages, it would not agree to a check off and it implied that the Union was to blame for the failure of employees to receive wage increases.

The parties met again on October 9, 2003, with Mediator Alan Budd. There were extensive face to face discussions on this occasion. The Union made wage proposals designed to bring wages up to date on missed wage increases. The Union proposed a signing bonus of $1500 per employee, a raise in each employee's current rate of $1.50 per hour and annual wage increases for a 3-year contract. The company proposed that instead of retroactive pay it would give a signing bonus of $1664 to the seven remaining unit employees. The bonus would not go into the wage scale but there would be a $.30/hr increase on the effective date of the contract. The employer for the first time proposed a 1-year agreement rather than the 3-year agreement that the parties had been discussing throughout their negotiations.[28] The company offered an $8/hr rate for new employees and it proposed to move 23 agency employees onto its own payroll. The employer's offer was contingent on an election being held among the 30 unit employees. Craner explained that either a Board election or a private election must be held within 45 days of the agreement. If the Union won, then the contract would become effective. Craner said there had to be an election or there would be no contract.

The Union asked for a $10/hr starting wage rate for the 23 agency people to be added to the unit. Eventually, Lori Smith agreed to the $8/hr starting wage rate proposed by the company. At that point Craner responded, "Well, I think $8.00 is a little bit too rich. I'm beginning to think $8.00 is too rich."

Smith stated that she would not agree to an election, saying that there had already been an election and the Union had won.

Jan Katz, vice president and business agent of Local 641, testified that he was present at the meeting on October 9, 2003, with Mediator Budd. Katz testified that although from the beginning of their negotiations the parties had been bargaining for a 3-year contract, on this day Craner proposed a 1-year contract. Craner said the contract would be treated as the last year of a 3-year contract but there would be no retroactivity. A signing bonus of about $1660 would be paid but the amount would not go into the wage rate. Katz was taken aback because the length of the contract had never been an issue before this day. In previous negotiations, Katz testified, the Union and the company had agreed to an $8/hr start rate for new hires. Craner said at this meeting, "We rethought the $8.00 and it is too rich."

Katz recalled that the company was willing to reach a compromise based on the decision of ALJ Davis. The judge had ordered that 49 agency employees become part of the unit and the company was willing to accept 23. The company also demanded that an election be held in a unit consisting of the 7 directly hired employees now in the unit and the 23 agency employees to be added. Without a vote, the company would not agree to anything. Katz testified that he recalled Linda Kuper's "exact words." She said that the Union only won by one vote last time and she could win it this time.

Linda Kuper stated that she could not recall Craner's statement that the company was withdrawing the offer of an $8/hr starting rate. She said she never heard Craner say the company would only agree to a 1-year contract. However, the company position at the meeting with Mediator Budd was for a contract with no retroactive pay which would expire 1 year after it was signed.

Linda Kuper testified that she had agreed to attend settlement negotiations in order to resolve all the charges. She had agreed to increase the labor force if the Union would withdraw its charges and go forward with an election.

Craner's notes of the October 9 session with Mediator Budd were admitted into evidence. Craner stated on the record that his notes show that the Union spoke of settling the unfair labor practice case dealing with the annual merit wage increases by the computation of a "back pay" amount. The Union believed that the remedy would amount to $170,000. The Union suggested that instead of a remedy it would settle for a $1.50/hr increase for the seven unit employees and a signing bonus of $1000. The Union demanded a $10.50/hr start rate for the agency people to be added to the company based on the fact that the employer was currently paying the agency $10.50/hr for each employee. The company counter proposed $8/hr. After a caucus, Craner and Linda Kuper returned and made the following proposal:

> 1A. The pending ALJ Case would be settled and pending charges withdrawn. As a *quid pro quo* the employer would add 23 people to the unit.
>
> 1B. An election would be held in a unit of 30 employees within 45 days from the date of agreement.
>
> 2. The starting rate for the 23 new employees would be $8.00/hr with a $.30/hr increase after one year.
>
> 3. The contract would be retroactive for existing employees only two years from the date of signing. The contract would begin on October 1, 2001. The 7 existing employees would receive $1,664 on the date of signing and a wage increase of $.30/hr in the third year.
>
> 4. There could be either a Board election or a private election.

[27] Apparently this meeting took place, with the parties situated in separate rooms and Mediator Wellington Davis presiding.

[28] The employer's proposal was for either a 1-year agreement or a hypothetical 3-year agreement with only 1 year to run until completion. Either way, there would be only a 1 year wage increase added to each unit employee's wage scale.

Katz testified that he and Linda Kuper met again on October 29, 2003.[29] Katz gave Kuper an outline of union proposals. The first paragraph of the proposals dealt with the 23 agency employees to be added to the unit. The union proposal contained paragraphs dealing with start rates and wage increases, health insurance, union security, discipline, contract terms, and a section which stated simply "No election." Katz testified that at the beginning of the meeting Kuper said she would not agree to anything without a vote and she would not agree to hire the 23 people without a vote. Kuper said there would be no contract without an election. Katz said that he never got beyond the first paragraph in telling Kuper what he was proposing. Katz and Kuper did not discuss anything further that day.

Katz testified that Linda Kuper told him she did not want anybody running her business. She thanked him for filing additional unfair labor practice charges which she said would "bring this to another two years." Kuper said she would retire in 7 years time and it would not make a difference if this were still going on.

Linda Kuper agreed with Katz' recollection that they never got beyond discussing the first paragraph of his proposals because the Union would not agree to an election. She said the only reason she would agree to add to the labor force was to have an election. Kuper testified that after Katz left the meeting she read his entire proposal and then sent it to Craner with her comments. Kuper did not deny Katz' testimony that she told him she did not want anybody else running her business, nor did she deny that she thanked Katz for filing more charges and adding another 2 years to the proceedings. Kuper did not deny that she told Katz she planned to retire in 7 years and it would not make a difference to her if the dispute were still going on at that time.

Kuper said that the company and the Union had reached agreement previously on the employer's contribution for the cost of individual health insurance coverage, but not family coverage.

On January 6, 2004, the final day of the instant hearing, Kuper testified that she had been considering a new companywide health insurance plan for employees throughout the fall of 2003. The old insurance plan expired on November 1, 2003, and on that date the Respondent implemented a new health insurance plan for employees, including unit employees. She did not inform the Union and did not negotiate about the new plan. There is no record evidence that the Union was aware of the situation before January 6, 2004.

2. Conclusions

The General Counsel contends that various factors show that Respondent has engaged in surface bargaining by conduct both "at the table" and "away from the table" which establishes that Respondent was determined to prevent the parties from reaching agreement.

In *Atlantic Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board summarized its views on surface bargaining. The Board began by stating the obligation of the parties under Section 8(d) of the Act to meet and confer in good faith "but such obligation does not compel either party to agree to a proposal or require the making of a concession." Although the parties have a duty to negotiate with a sincere purpose to find a basis of agreement the Board cannot force a party to make a concession on any specific issue. An employer's overall conduct must be scrutinized to determine whether it has bargained in good faith. The total conduct will show whether an employer is lawfully engaging in hard bargaining or unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party may stand firm on a position based on a reasonable belief that it is fair and proper or that "he has sufficient bargaining strength to force the other party to agree." Thus, adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith. Conduct indicative of a lack of good faith includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings.

The General Counsel cites the cessation of the merit increase program and the September 26, 2003 letter to employees about their failure to receive wage increases. I have found above that the Respondent's conduct in these two instances did not violate the Act.

The General Counsel cites as evidence of delaying tactics the fact that Respondent replied to the Union's September 18, 2003 request for wage information with incomplete information on September 23, thus rendering the Union "unable to conduct an analysis of employees' past wages increases . . . and intelligently formulate proposals" for the scheduled September 24 negotiating session. Indeed, it would have been better had Respondent produced complete wage information on its first try. However, Respondent did not have much time to compile wage information going back more than 10 years in some instances. A time period of 5 days to furnish the information excuses some inaccuracies and incompleteness. Further, Respondent did ultimately supply corrected information. I do not find that Respondent deliberately engaged in delaying tactics by failing to supply complete wage information on September 23, 2003.

The General Counsel asserts that Respondent's desire to delay negotiations is evidenced by Craner's suggestion that negotiations be held in abeyance until after Judge Davis issued his decision. I do not find that Respondent violated the Act in this regard. Respondent did not refuse to meet and negotiate and it did in fact meet with the Union and bargain for a contract.

In its review of ALJ Davis' decision at 341 NLRB 904 the Board found that Respondent had not engaged in surface bargaining. The Board restated the standard it applied as follows: "Good-faith bargaining presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract. . . . However, a party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. . . . In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. . . . From the context of a party's total conduct, the Board deter-

[29] No other representatives were present.

mines whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." (Citations omitted.)

In its review of ALJ Davis' decision the Board found that Respondent had not engaged in bad-faith actions at the table. Respondent had met regularly with the Union, Respondent had not engaged in regressive bargaining, Respondent had agreed to certain of the Union's demands, including a grievance and arbitration provision, Respondent had proposed a wage increase and Respondent had explained its position on various union demands. The Board also found that that Respondent's conduct away from the table had not demonstrated surface bargaining. Although the Board found that Respondent had violated Section 8(a)(1) and (5) by unilaterally transferring unit work and refusing to provide certain information to the Union, the Board found that "General Counsel failed to show a nexus between the Respondent's 8(a)(5) violations and the Respondent's conduct at the bargaining table."

Based on the record in the instant case, however, I find that Respondent engaged in bad-faith bargaining and that Respondent's conduct comprises the use of tactics designed to frustrate the possibility of arriving at an agreement and evinces its lack of sincere desire to reach ultimate agreement.

The General Counsel cites the unilateral implementation of a new health insurance plan for employees on November 1, 2003. It is clear that during the time that Linda Kuper was meeting regularly to negotiate with the Union she knew that the current policy was expiring, and she was engaged in choosing and implementing new health insurance for unit employees. It is also clear that the parties had bargained and exchanged proposals concerning health insurance costs and employer contributions. Respondent was under a duty to give notice that the policy was expiring and to negotiate concerning this term and condition of employment before selecting a new policy. *Christopher Street Owners Corp.*, 294 NLRB 277 (1989). The making of a unilateral change in a mandatory subject of bargaining is an element considered by the Board in finding an intent to frustrate the bargaining process indicative of surface bargaining.

I note that Judge Davis had found a violation in Respondent's refusal to provide, and delay in providing, health insurance information on the ground that it was confidential. The Board agreed that the failure to furnish the information was unlawful, but the Board disagreed with Judge Davis that the failure to provide insurance information showed bad-faith bargaining. The Board stated, "when the Respondent provided information about employees' health care premiums, negotiations ensued." The Board cited those negotiations in support of its finding that Respondent had not engaged in surface bargaining. As the evidence in the instant case shows, the Respondent eventually decided that it need not negotiate about employees' health care.

Respondent had been negotiating with the Union concerning employee health insurance and Respondent had received an opinion from the National Labor Relations Board reiterating its duty to bargain about health insurance. The record shows that the parties had agreed on a rate of contribution for individual coverage. Yet a few months later, Respondent adopted a new health insurance program without informing the Union in open defiance of the Board's language about the necessity of negotiating on this subject. This unilateral change had a direct effect on the bargaining. It sent a message that Respondent would not adhere to its duty to bargain and refrain from unilateral changes. The Union could not know whether, after it exchanged offers and made compromises on any subjects, its efforts would be negated by Respondent's failure to adhere to a component of the bargain or by the company's unilateral action.

The General Counsel asserts that Respondent engaged in bad faith bargaining when it took new positions on vacations and on the minimum starting rate. As set forth above the company practice had been to grant 1 week of vacation after 1 year of employment and 2 weeks vacation after 3 years of work. There is no dispute that the company had proposed to continue this practice. Without any explanation Craner's January 7, 2003 letter offered a new proposal that 3 weeks vacation would only be earned after 10 years. At the negotiation session of January 9, 2003, Craner reverted to the employer's original offer of 2 weeks vacation after 3 years of employment. Similarly, the record is clear that the company had proposed a minimum wage rate of $8/hr and that the company had maintained this proposal since spring 2002. However, Craner's January 13, 2003 letter clearly states that the employer is counter proposing a $7/hr minimum. At the October 9, 2003 meeting held with Mediator Budd the employer once again proposed an $8/hr minimum wage. Lori Smith accepted this proposal, whereupon Craner replied that the company had rethought the $8/hr and, "It is too rich."[30] The record does not offer any illumination of the reason for Respondent's see-sawing position on vacations. The only testimony on the minimum wage issue on behalf of the Respondent is Linda Kuper's statement that she could not recall Craner withdrawing the $8/hr starting rate. Thus, the record does not show that the changes in the employer's minimum hourly wage position are based on any movement in other areas of the bargaining or have any rational connection to a desire to further the progress of the negotiations. Vacations and minimum hourly starting wages are essential elements of a collective-bargaining agreement. By engaging in regressive bargaining on these two major issues the Respondent impeded and frustrated the progress of negotiations and showed that it did not have a sincere desire to reach agreement with the Union.

Much the same analysis can be applied to the Respondent's position on the length of the contract. Since October 2001 the parties had been negotiating on the basis of a 3-year contract. All the wage proposals exchanged between them had provided for increases over a period of 3 years. Craner's letter of January 7, 2003, specifically signified agreement to a 3-year contract and questioned only the retroactivity: the employer wanted a 3-year contract effective as of the date of signing. However, at the October 9, 2003 meeting with Mediator Budd the company for the first time proposed that any agreement signed would expire after 1 year. Thus, the employer would sign a fictionally titled 3-year agreement with no retroactivity that would expire in 1 year or it would sign a 1-year agreement.

[30] I credit the testimony of Jan Katz and Lori Smith to this effect.

Respondent offered no testimony on the record to show why after 2 full years of negotiations it changed its position on such a significant item. I can only draw the conclusion that Respondent changed its position to inject yet another roadblock into the bargaining and frustrate the chances of agreement. Such a major change without explanation does not evince a sincere desire to come to terms on a contract.

The General Counsel asserts that Respondent engaged in bad-faith bargaining concerning union access to investigate grievances and enforce the collective-bargaining agreement. As a basis for his conclusion that the company engaged in surface bargaining ALJ Davis relied on Respondent's refusal to permit union agents access to the warehouse for the investigation of grievances. Judge Davis found that Respondent "unreasonably maintained that the agent could contact employees at home or present his request to Kuper who would decide if he could speak to an employee or investigate an issue. This would result in the Union surrendering its authority to act as the employees' representative." In its reversal of the judge on the issue of surface bargaining, the Board discussed and rejected many factors cited by the ALJ to support his conclusion that the company engaged in surface bargaining. However, the Board did not disturb the ALJ's finding that Respondent maintained an unreasonable position with regard to union access to investigate grievances.

After receipt of ALJ Davis' Decision, in a letter dated October 31, 2002, the company informed the Union that it based its restrictive offers of union access in part on the fact that the warehouse is bonded. The only other indication in the record of the employer's concerns came much later, in February 2003, when management walked the Union through the warehouse to view a video and Craner objected to Katz greeting an employee, saying that was why the employer would not permit access. Following the October 2002 ALJ decision, bargaining on union visitation continued. At the November 5, 2002 session, Craner maintained his position that Linda Kuper would decide whether the union representative needed to speak to an employee to investigate a grievance and the union agent would not be permitted to enter the warehouse. The Union revised its visitation demands to incorporate a "reasonable" criterion for determining whether access was necessary, but the employer rejected this new language. On January 7, 2003, Craner reiterated the company's position that a union agent wishing to investigate a grievance must first come to see Linda Kuper and that the union agent could not wander through the warehouse. The Union presented new access language on January 9 and the parties discussed this. On February 3, 2003, the parties discussed yet another union access proposal which went further towards dealing with the employer's concerns and provided for notice before a union agent appeared at the warehouse, a private area to confer with employees and management escort before entering the work area. On February 18, 2003, Craner approved some of the Union's new language but maintained his position that Linda Kuper would decide whether the Union needed to meet with an employee in each case where the Union requested such a meeting in order to investigate a grievance. The Respondent's language required that if a union representative needed to confer with an employee to investigate a grievance "he shall first contact Linda Kuper" and "If the grievance is such that the need to meet with the grievant or/or shop steward is reasonable, and will not interfere with the operation of the Company's business, the Company will make the employee/grievant and/or the shop steward available. . . ." Respondent has presented no evidence that it ever changed its position that Linda Kuper would be the one to decide whether a union agent needed to speak to an employee to investigate a grievance. Indeed, Respondent presented no testimony to contradict Lori Smith's recitation of the substance and meaning of Respondent's position on union access and visitation.

The essence of the employer's contract proposal is that before gaining access to employees to investigate grievances the Union must convince Respondent's second highest ranking manager that it has a reasonable need to do so. Thus, the Union would be required to disclose to Linda Kuper the substance of the grievance and obtain her agreement to investigate it. In fact, the Union would have a partner in deciding whether a grievance should be investigated, and that partner would be the company's vice president. In such a case, the Union could not exercise its statutory function to represent the employees. Employees would be loath to contact the union representative with complaints or questions and the Union's ability to investigate meritorious grievances would be compromised. The Respondent's insistence on maintaining Linda Kuper as the arbiter of the Union's need to speak to employees in order to investigate grievances shows a lack of good-faith bargaining because it unreasonably intrudes management into one of the prime functions of the labor organization.[31]

The General Counsel argues that the Respondent's position on the use of agency employees to perform unit work further demonstrates its bad faith in the negotiations. As set forth above, ALJ Davis found a violation in the unilateral transfer of unit work to agency employees. Upon review, the Board held, "We . . . agree with the judge, for the reasons stated in his decision, that the Respondent's unilateral transfer of unit work to temporary agency employees violated Section 8(a)(5) and (1)." Judge Davis found that following the election the Respondent increased its use of agency employees and eroded the unit from 42 employees to 8 at the time of his hearing.[32] The Board ordered Respondent to "Rescind the unlawful unilateral transfer of unit work to temporary agency employees and restore the status quo by restoring the unit to where it would have been without the unilateral changes." The Board stated that it would "leave to the compliance stage the determination of the proportion of direct hires and agency employees that the Respondent must maintain in order for the unit to be properly restored."[33]

Immediately upon receiving Judge Davis' decision, the company provided the Union with the information it had requested

[31] I have noted above that the Board did not disturb Judge Davis' finding that the Respondent's position unlawfully required the Union to surrender its authority to act as the employees' representative.

[32] At the time of the instant hearing this number had declined to seven.

[33] Because the Board issued its decision on review of ALJ Davis' findings after the close of the instant hearing and after the filing of briefs, I do not have the benefit of the parties' views concerning the effect of the Board remedy on the instant case.

concerning the agency employees. As quoted above in Craner's October 31, 2002 letter the company also offered to bargain about the use of agency employees. In fact, the employer proposal was that it have the right to transfer unit work to agency employees and that the agency employees shall not be covered by the agreement. Thus, Respondent was proposing that the Union agree to the ratification of a practice that had just been found unlawful by ALJ Davis because of its unilateral nature. Lori Smith objected to this proposal but Craner insisted on his language. The Union next proposed a formula which permitted agency employees to constitute 10 percent of warehouse employees. Respondent rejected this stating that it wished to replace directly hired employees as they left the company. On January 7, 2003, Respondent repeated its determination that no more directly hired employees would be added to the unit and it proposed that the contract give it the right to hire agency employees. Respondent emphasized that it would not agree to the Union gaining recognition over additional employees without having to petition for an election.

The next discussion of agency employees took place at the October 9, 2003 meeting with Mediator Budd. The employer offered to add 23 agency employees to the payroll contingent upon an election in the unit within 45 days of the agreement. If the Union won the contract would become effective. The Union rejected this offer. Craner made it clear that without an election the Respondent would not agree to anything. Kuper stated that she would agree to increase the labor force if the Union would withdraw its charges and go forward with an election. Linda Kuper said the Union only won by one vote last time and this time she could win the election.[34] When Katz and Linda Kuper met again on October 29, 2003, the Union presented an offer which included the addition of 23 agency employees to the 7 directly paid employees. At the beginning of the meeting Kuper said she would not agree to anything without a vote and she would not agree to hire the 23 people without a vote. Linda Kuper told Katz that she did not want anyone running her business and she thanked him for filing new charges, thereby adding 2 years to the proceedings. Kuper said she would retire in 7 years and it would not make a difference if the dispute were still going on at that time.[35]

Respondent's Brief urges that "wanting to codify existing practices is not 'surface bargaining.'" Respondent further argues that its proposal to hire 23 agency employees in exchange for an immediate election and a voiding of the contract if the Union lost the election was a "settlement proposal" and not a "collective-bargaining proposal." Respondent asserts that it is unfair to add 23 people to a unit of 7 employees because the unit would then "be bound to a Union they had no role in choosing."

Respondent seems to urge that the proposal to add 23 agency workers to the unit in return for an immediate election was made only during negotiations with a mediator. Respondent seems to take the position that the company's demand for an election in exchange for hiring 23 agency employees was made during settlement negotiations for all pending cases in addition to a contract and therefore the demand cannot be unlawful. Respondent's brief ignores the evidence in the record. Craner's letter of January 7, 2003, setting forth the company's bargaining position was written before any negotiations took place to settle all the outstanding cases. The January 7 letter states that the employer would not agree to any contract that gave the Union "recognition over agency employees without having to petition the National Labor Relations Board for recognition." This language thus sets forth that Respondent would not agree to add agency employees to the direct hires in the unit without an election. Respondent did not modify this position from January 7, 2003, onwards. Indeed, when Katz and Linda Kuper met at the final bargaining session of October 29, 2003, the record is uncontradicted that Kuper told Katz that she would not agree to anything without a vote and there would be no contract without an election. Kuper testified that she and Katz never got beyond the Union's first proposal which provided for the addition of 23 agency employees into the unit because the Union would not agree to an election.

The Board has found that the Respondent's unilateral erosion of the bargaining unit and transfer of unit work to agency employees was unlawful. The Board has ordered that Respondent rescind the unlawful transfer of work and restore the status quo. That is the law of the instant case. Therefore, any insistence by the Respondent that it would continue its unlawful erosion of the bargaining unit is unlawful and constitutes bargaining in bad faith. The record is clear that the Respondent continued its insistence on replacing directly hired employees with agency employees and continued its determination that no more directly hired employees would be added to the unit from the moment it received Judge Davis' decision in October 2002 until the last bargaining session on October 29, 2003. Further, the record is clear that on January 7, 2003, the Respondent not only repeated its determination to continue its unlawful course of action and further erode the bargaining unit but it also stated its determination that it would demand an election as a quid pro quo for ceasing its unlawful unilateral action. If the Union did not win the election the contract would not become effective. This position that there would be no contract without an election, and therefore no cessation of unlawful unilateral activity without an election, was repeated by Linda Kuper at the final bargaining session. There can be no greater indication of "at the table" bad-faith bargaining than outright defiance of the Act and a Board Order. Respondent has been told that it was unlawful to erode the bargaining unit by unilateral transfer of work yet Respondent will not agree to cease the activity and begin restoring the any employees to the unit unless the Union offers the concession of an immediate election.[36] Respondent's position is that if the Union does not win this election there will be no contract. In effect, Respondent is conditioning its compliance with the Board order and its duty to bargain on the Union's agreement to an election.

[34] Kuper did not deny making this statement. I credit Katz' description of this meeting.

[35] Kuper did not deny making these statements. I credit Katz' description of this meeting.

[36] Respondent's argument that it would be unfair to saddle 23 employees with a Union they did not choose ignores that Respondent's own unlawful actions have brought about the situation it now decries.

Respondent's argument that it has offered to bargain about the agency employees is disingenuous. The testimony and documentary evidence show that Respondent was not prepared to budge on this issue. Kuper's position was, as she stated, that she had no reason to add to the bargaining unit unless an election was held. The undisputed evidence shows that she told Katz that she could win this election. Thus, Kuper conditioned the signing and effectiveness of a collective-bargaining agreement on the holding of an election which she believed the Union would lose. Respondent's position was not lawful "hard bargaining": it was outright defiance of the agency entrusted with enforcement of the Act.

In this regard it is useful to take note of Linda Kuper's statement to Katz in which she thanked him for filing new charges and said that would add two years to the legal proceedings involving the parties. Kuper added that it would make no difference if the dispute were still going on in 7 years. Kuper did not deny making these statements and she did not attempt to explain them away. Thus, I take these statements at face value. I observed Kuper closely during the 7 days of the instant hearing. Kuper is a very competent, self-possessed, intelligent, and hard driving executive with national responsibilities for the company. She does not loosely toss comments into the air and she is always in control of her language and demeanor. I observed that Kuper was at all times aware of the import of her comments and that everything she said in the hearing room had a purpose. This was true both while Kuper was testifying and while she was at counsel table engaging in off the record discussions for various purposes such as responding to the General Counsel's subpoenas. I conclude that at the last bargaining session between the parties when Kuper thanked Katz for filing more charges and prolonging the legal proceedings she was not engaging in "water-cooler banter." Kuper was serious when she told Katz that she did not care if there were still a dispute in 7 years. Kuper was telling Katz the truth. She did not care how long matters dragged on between the parties. She was not in a hurry to reach agreement and she did not care whether the parties reached agreement or not. Linda Kuper's attitude is the antithesis of a sincere desire to agree to a collective-bargaining contract with the Union.

Finally, Respondent's unlawful assistance in filing the decertification petition had a direct impact on the negotiations between the parties. At a time when Respondent had a duty to bargain in good faith it was engaging in actions to undermine the Union. The effort to decertify the Union, together with Respondent's unlawful, shifting, capricious and unexplained bargaining positions and its unilateral changes, shows a desire to frustrate negotiations rather than to conclude a collective-bargaining agreement. Respondent has engaged in unlawful surface bargaining in violation of Section 8(a)(5) of the Act.

I. DISCIPLINARY ACTIONS AGAINST DANIELS AND WALLACE

1. Background

Most of the disciplinary actions alleged as violations of the Act arise from the job performance of Daniels and Wallace while engaged in the task of loading containers.

Each loader is given a manifest or "load plan" to show the freight that must be loaded on a particular container to which the loader has been assigned.[37] The load plan shows the location of the freight in the warehouse, the number of pieces to be shipped by each customer and the weight of the pieces of freight. The freight must be "picked" from locations in the warehouse, then it must be staged near the loading bay of the warehouse where the container is parked and then the freight must be loaded into the container. On some occasions, the loader has also picked the freight. On other occasions, the individual who has picked the freight and staged it is not the one who is assigned to load the container. According to Linda Kuper, three individuals are responsible for insuring that the correct pieces of freight are loaded onto a container according to the manifest prepared for each container. These are the "picker", the "checker" and the "loader." Indeed, the checker must indicate by his initials on each load plan that he has checked that all items indicated have been staged for loading and the loader must indicate by showing the number of items loaded that he has correctly followed the load plan. Linda Kuper testified that if a container goes out without all of its freight all three individuals must be disciplined, namely, the person who pulled the freight from the warehouse, the checker and the loader.

Various employees testified about the frequency with which mistakes are made in dealing with freight. Purcell Robert Wallace testified that employees occasionally leave freight off a container. Sometimes the supervisor orally informs the employee and sometimes the supervisor says nothing but merely puts the freight on the next container going to the destination. Wallace said this type of short-shipping occurred often.

Wallace testified, without contradiction, about a meeting held by Linda Kuper in her office about August 27, 2002. The purpose of the meeting was to discuss the mishandling of freight by shipping it to the wrong destination. An employee named Hilda was in tears at this meeting. Linda Kuper said everybody was mishandling freight. At the meeting Kuper said that from now on they would be more careful. Kuper said that from now on there would be three signatures on each load sheet: the loader, the checker and the supervisor would all sign to show that the freight is correct.

The record shows that containers must be loaded so that the weight on each axle of the container is within legal limits. If one axle carries too much weight the container may be deemed overloaded even if the total weight of freight in the entire container is within legal limits. The weight of the freight indicated on a manifest is based on information supplied by the customer. When a loader loads freight onto the container he must calculate the weight on each axle to achieve a legal and safe load. A loaded container is taken by a driver to a weigh station prior to being loaded on a vessel or driven out on the road. If the container is overweight an overweight ticket is issued and the driver returns to the warehouse with the container so that the freight may be repositioned or "reworked." The company is responsible for getting the driver of a container out on the road in a specified length of time. Respondent pays drivers for extra

[37] The company also maintains other extensive documentation relating to each shipment received and each container that is loaded in the warehouse.

time spent due to mistakes such as overloading and the need to rework the freight.

The warehouse is equipped with video recorders that show the staging areas and the loading bays or doors. The videos are kept for an unspecified time so that if questions arise as to the location or loading of freight or damage to freight the videos may be reviewed. Further, loaders and supervisors take still pictures of freight both outside and inside the containers on certain occasions. These practices were not described in full detail in the instant record.

The documents in the record show that the employer maintains a system of progressive discipline, although not all written warnings lead to suspensions. Maldonado testified that for the first offense of using a cell phone during working hours he would give an employee a verbal warning and for the second offense of such a cell phone use he would send the employee home for the day. Documents submitted as a joint exhibits to establish all discipline given to unit employees from February 1, 2000, to January 31, 2003, show the following pattern:

Louis Buono

In February 2000 Buono was given a "2nd warning" for absence without phone call and suspended for two days. When he was again absent without phone call he was given a "3rd warning" and suspended for a week.

In September 2002 Buono was given a written warning for misloading a skid of freight bound for Oregon onto a container bound for San Francisco. The load numbers were specified on the warning.

In November 2002 Buono was given a warning for leaving the warehouse without punching out. Two weeks later Buono was given a warning for damaging the roof of a container while using a forklift to load freight. A picture of the damage was included on the warning.

Jose Aroca

In April 2000 Aroca was given a one day suspension for "damaging freight by putting two holes into two drums." The freight number was specified on the warning.

Richard Zapatier

In February 2000 Zapatier was given a warning for taking 10 ½ hours to strip (unload) two containers. The freight numbers were specified on the warning.

Luis Gonzalez

In April 2000 Gonzalez was given a "2nd warning" for being late on three occasions in one week. He was told that the next day he was late he would be given a one-day suspension.

In June 2002 Gonzalez was terminated for being a no show, no call for three consecutive days.

Thurman Smith

On September 6, 2000 Smith was given a warning for refusing to clean up and leaving without permission.

On September 29, 2000 Smith was given a warning for refusing to clean up and leaving without permission and he was suspended for one day.

Juan Mateo

In April 2000 Mateo was given a written warning for missing freight on a load. The freight number was specified on the warning.

Felipe Rivera

In March 2000 Rivera was given a "3rd warning" for leaving one case off a load. Rivera was suspended for a day. The number of the load was specified on the warning.

Mark Allen

In April 2000 Allen was given a warning for taking 5 ¼ hours to strip a container. The number of the load was given. Allen was told that next time he would get a one-day suspension.

In September 2000 Allen was given a written warning for miscounting freight on a load and indicating 40 instead of 39 cartons. The number of the load was indicated on the warning.

In June 2001 Allen was given a one-day suspension for refusing to wear his safety vest.

Eduardo Cuyuch

In August 2000 Cuyuch was given a written warning for checking a load and indicating that 16 cartons had been loaded when in fact the cartons were left behind.

In October 2000 Cuyuch was given a "2nd warning" for leaving one pallet on the dock and he was suspended for one day. The number of the load was specified on the warning.

In September 2001 Cuyuch was given a written warning for being late three times in one week.

In November 2001 Cuyuch was given a "2d warning" for no call, no show. He was suspended for a day.

In January 2002 Cuyuch was given a "4th warning" for calling in sick and failing to bring an excuse. He was given a two-day suspension.

Jose Martinez

In February 2000 Martinez was given a written warning for taking six hours to strip a container. The number of the load was specified on the warning.

On April 12, 2000 Martinez was given a "2nd warning" for taking 6 ¼ hours to strip a container. He was told that he would be suspended next time. The number of the load was specified on the warning.

On April 25, 2000 Martinez was given a written warning for "damaging freight." The number of the load was indicated on the warning.

In June 2000 Martinez was given a "2nd warning" for taking 6 ½ hours to strip a container and failing to mark the damages on the freight. The number of the load was specified on the warning.

In August 2000 Martinez was given a written warning for writing the wrong lot numbers on freight. The number of the load was specified on the warning.

On September 1, 2000 Martinez was given a written warning for driving carelessly and causing damage to a hi-

lo. He was given a one day suspension and warned that he would be terminated next time.

On September 29, 2000 Martinez was given a written warning for failure to clean up and leaving. He was suspended for one day.

On November 11, 2002 Martinez was given a "2nd warning" for leaving without advising his supervisor and not completing his load. He was told that the next incident would lead to a one-day suspension. The number of the load was specified on the warning.

On January 31, 2003 Martinez was terminated for deliberately driving his hi-lo into another hi-lo, injuring the driver of the other hi-lo, denying that he engaged in the conduct and defying management when confronted with his actions.

Edward Ortolaza

In December 2000 Ortolaza was given a written warning for loading extra cargo which then had to be returned at the company's expense. The destination of the cargo was given on the warning.

Johnny Seggara

In June 2002 Seggara was terminated for no call, no show for three days and then giving a false excuse by saying that his mother was on life-support.

2. Tony Daniels

a. April 26, 2002 warning for overweight containers

On April 26, 2002 Daniels was given a written warning stating that in the "given week" four containers he had loaded had been sent back from the weigh station to the warehouse because they were overweight. No freight numbers or destinations were given on the warning nor were the four containers identified in any way. The warning stated that one container missed the cut off, meaning that because time was taken to rework the load the container did not make it to the dock in time to be loaded onto the vessel for shipping. Daniels was given a 1-day suspension with this warning. Daniels wrote his remarks on the warning stating that he had asked for help in loading one container but did not receive help. Daniels had a problem with some rolls that were 10 feet long. As to a second container, Daniels wrote that the client had supplied a manifest with incorrect weights listed for the freight. Daniels loaded the container according to the listed weights and did not know that they were incorrect when he did this. Daniels noted that this was his first written warning and it was unfair to issue a suspension for a first warning.

Daniels testified that he had asked manager Robert Chapman for assistance in loading one container but that no helper had been assigned to help him. Without assistance, Daniels had trouble positioning the freight correctly in the container. As to the container where the customer supplied incorrect weights, Linda Kuper testified that customers did supply bad information on occasion; sometimes the customers make a mistake and sometimes they deliberately lie. With respect to this specific incident Kuper stated that Daniels may have relied on a load plan that had incorrect weights and in that case the overweight was not his fault. Maldonado also testified that customers supplied incorrect weights on occasion.

Daniels did not know anything about the other two containers mentioned in the warning.

Daniels testified that it had happened in the past that containers he had loaded came back from the weigh station because they were overweight. He had never been issued discipline for such an occurrence in the past.

Daniels testified that after serving the suspension on April 29, 2002, he saw an overweight ticket in the dock supervisor's office for a container loaded by employee Louis Buono. Respondent's records show that Buono was not disciplined for this occurrence.

Linda Kuper testified that the decision to discipline Daniels had been made by Maldonado or Steve Kuper. Steve Kuper was not called to testify by Respondent. Maldonado, who testified for Respondent, was not asked about this incident. Linda Kuper could not recall being involved in the incident. Thus, there is no testimony and no evidence in the record about the two containers that Daniels did not acknowledge overloading. Not one scrap of paper with a name or number was introduced to show that Daniels had in fact overloaded the two "phantom" containers. For aught that appears in the record Daniels was blamed for another employee's failings. I note that in the vast majority of warnings issued by the company where the problem relates to cargo the warning slip identifies the freight by number or destination.

Further, Respondent presented no evidence to refute Daniels' testimony that he asked for but was not given help in loading one container. Daniels, a long term employee with a clean disciplinary record, knew that he needed help and he blamed the lack of help for the problem with the container. As to the second container for which Daniels blamed the overload on incorrect customer weight information, Respondent offered no evidence to refute Daniels' claim.

Thus, I find that Respondent has not connected Daniels with two of the four containers cited in the warning and has not met the testimony showing that he was unfairly blamed for problems with the other two containers. Further, the record shows that no other employees have been given written warnings or suspended for overweight containers. Indeed, Buono was responsible for an overweight ticket and he was not disciplined. Daniels himself has not been disciplined in the past when a container loaded by him was found to be overweight. Finally, the evidence shows that Respondent generally warns employees before issuing suspensions for problems with freight. As detailed above many employees receive repeated written warnings for similar infractions without being suspended.

b. September 4, 2002 warning for missing freight and final warning notice

This freight in question was loaded on May 6, 2002. Respondent learned from a client on August 27, 2002, that one piece out of a lot consisting of five cartons (or pallets) destined for Hong Kong/Melbourne had been incorrectly shipped. Four of the cartons arrived in one container as scheduled, but one carton was loaded into the wrong container and arrived instead

in Kee Lung, Taiwan and had to be reshipped at the company's expense.

Daniels had pulled the freight from the locations where it was stored in the warehouse and he had loaded the container which was bound for Hong Kong/Melbourne.

On September 4 Daniels was issued a warning for carelessness due to the missing carton. Daniels wrote his response on the warning stating, "I pulled the cargo and it was verified by checker. But one pallet someone loaded in their container." Also on September 4 Daniels was issued a "Final Warning" for substandard/careless performance. This document cites the April 26 warning and 1-day suspension and the May 6 misloading of one pallet.[38]

The facts show that the errant carton or pallet was placed into a container being loaded by Rob Wallace at a bay about 40 feet distant from the area where Daniels was loading his container. Wallace's container was bound for Taiwan.

Daniels testified, and the record shows, that he had correctly pulled all the freight and marked the load plan correctly when this was done. Daniels noted on the load plan that he split the lot of five pallets in order to balance the load in the container; that is, he loaded part of the lot and kept the rest in the staging area for loading in another part of the container. This is not an uncommon procedure. The same load plan indicates that Daniels split another lot in the container and there have been no complaints that this lot was not complete when received. Daniels explained that a loader counts the freight before it is loaded but once he starts splitting a load he can't always recall how many pieces are on and how many pieces are left to load.

Respondent claims that some of the photographs show Daniels and Wallace speaking near the staging area. Daniels could not recall whether he spoke to Wallace while he was loading the container. Daniels was unable to identify himself in the picture where he is allegedly speaking to Wallace. Linda Kuper testified that neither videos nor still pictures would enable a viewer to check the marks and numbers on a piece of freight and thus identify the freight.

Daniels testified that when he received the September 4 warning he asked Maldonado to show him the videos of the area in order to determine who moved the fifth carton. There are two video cameras trained on the relevant area. Maldonado did not respond and he did not show Daniels a video.

Daniels testified that he had no idea how the fifth carton ended up in Wallace's container. He denied moving his carton from his staging area to Wallace's staging area. He denied seeing Wallace take one of his cartons away from the staging area. Daniels stated that the carton could have been moved while he was on break or lunch; it would take 1 minute for the pallet to be moved from Daniels' location to Wallace's location.

Maldonado testified that he had viewed the video tape. Although Maldonado said that the tape no longer existed, he did not explain why it had not been preserved. Maldonado gave two conflicting accounts of what he saw on the video tape before it ceased to exist. In response to questions by counsel for Respondent, Maldonado stated that the video tape showed Tony Daniels and Rob Wallace talking. Wallace had the errant pallet and he dropped it and then "Tony [Daniels] picked it up, and he went and got it again. The cargo ended up being completely wrong at the time. . . . I don't recall exactly how it happened." Of course, this account of the missing video does not support Respondent's theory of the incident. The cargo could have ended up on Wallace's container only if Rob Wallace, and not Tony Daniels, had picked it up. And Maldonado acknowledges that he does not recall "exactly" how it happened. Immediately after giving this testimony, Maldonado responded to leading questions by counsel for Respondent that the missing video showed Rob Wallace picking up the cargo and taking it to his container.

Linda Kuper also testified about the video; she did not view the video but Steve Kuper saw it and told her about it.[39] Linda Kuper did not explain why the video had ceased to exist. Linda Kuper stated that the video shows Daniels pulling the freight to his staging area. The video shows Wallace pulling freight from an area that is not his staging area but Kuper did not say whose area this was. Kuper said that the video showed Daniels and Wallace standing together. Kuper said she had no explanation for how the mix-up happened. Kuper did not testify that the missing video showed Daniels giving Wallace his freight or Wallace picking up Daniels' freight. Kuper testified that she issued the final warning to Daniels because she believed that the mix-up was intentional.

I note that none of the still pictures produced at the instant hearing show any transfer of freight such as Respondent alleges must have taken place.

Robert Wallace testified about this incident.[40] Wallace stated that he did not purposely move Daniels' freight and load it in his container. He said that someone else could have moved the freight while he was on break or lunch. Wallace explained that sometimes all the loaders are called away from their jobs to help with urgent pick-ups at the other end of the warehouse. If that occurred on May 6 then only the supervisors would be present in his area. Wallace said that when he got the warning notice for this incident he and Daniels asked Maldonado to show them the video as proof of misconduct, but the company never showed them the video.

I find that the evidence before me does not show that Daniels and Wallace engaged in any behavior that resulted in placing one carton of Daniels' cargo into the container that Wallace was loading. First, both Daniels and Wallace deny that they had a part in moving the freight to the wrong container. Second, the video that should have shown this behavior has ceased to exist under conditions that were not explained by the company. Third, Steve Kuper, who viewed the video, did not testify that it showed Daniels and Wallace moving the errant carton from one location to another. Fourth, Maldonado, who also viewed the video, testified about the incident in contradictory

[38] The final warning states that the four containers mentioned in the April 26 warning were rejected due to "improper loading and bracing of hazardous material." There is no evidence in the record concerning hazardous material and I shall disregard this unsupported statement.

[39] Steve Kuper did not testify in this proceeding.

[40] Wallace received a warning and final warning for this incident. These will be discussed below.

ways and then admitted he could not recall "exactly" how it happened. Finally, anyone in the warehouse could have placed the carton in the wrong location while Daniels and Wallace were on break or at lunch or away from the loading bays for any other reason. The record is undisputed that this mischief could have been done in just 1 minute.

c. October 14, 2002 warning for substandard performance

On October 14, 2002, Daniels was given a warning for taking too long to load a 72 cubic meter cargo weighing 40,000 pounds that was started at 10:15 a,m, and done at 3 p.m. The warning stated that this was substandard performance. Daniels wrote his disagreement on the warning slip saying that he was balancing the load according to the weight and checking and rechecking the freight. Daniels testified that a 72 cubic meter load should take 4 to 5 hours to load depending on the type of freight. This amount of cargo would fill the container to capacity. Daniels noted that the time span indicated on the warning would include time for the checker to perform his job and for the driver to count the freight, if he was so minded. Daniels stated that he had been spoken to before about slowness but that he had never been warned or disciplined on that subject. Respondent supplied no evidence about the specific nature of the October 14 warning. Linda Kuper testified generally that she had heard that Daniels spent time talking to drivers about religion but she did not have any knowledge of the incident leading to the warning. No one from the company testified on the basis of expert and direct knowledge as to the time required to load the freight in question. Thus, Daniels' testimony that he took a reasonable length of time to load the container is unrefuted and I shall credit it. I therefore find that Daniels did not take an unreasonable length of time in loading the container referred to in the October 14, 2000 warning.

d. July 24, 2003 warning for damage

On July 22, 2003, Daniels testified in the instant hearing. On July 24 he was given a written warning for carelessness, damage to company property, violation of company procedures and unnecessary damage to cargo. The warning states that Daniels put the blades of his forklift between the pallet and the cargo while attempting to remove the cargo from the pallet, that the pallet broke and that the blades went into the cartons damaging the cartons and the contents. The warning states that Daniels' excuse as to why he and his helper did not load the cartons manually was that he was "trying to save [his] arms." Daniels wrote on the warning slip that he disagreed. He did not recall saying he was saving his arms. Daniels wrote that he loaded the freight partially by hand. Daniels said the pallet was broken before he began loading the freight and that some of the cartons were damaged before he began loading them. Daniels wrote that he took pictures of the freight before loading it into the container that would bear out his contentions.

Daniels testified that the cargo in question consisted of about 100 bolts of fabric enclosed in reconditioned cardboard that was soft enough to tear by hand. Each bolt was about 80 inches long and 12 inches wide and weighed from 75 to 80 pounds. A number of pallets were stacked up; each pallet contained numerous cartons. One or more of the pallets were already broken when Daniels began unloading the freight. Daniels stated that he took pictures of the freight before beginning to load and he gave the camera chip to his supervisor. At first Daniels and his helper tried loading the cartons by hand but just one pallet of cartons took 10 to 15 minutes to unload. In an effort to work faster, Daniels had the helper lift the corner of the freight so that the forklift blades could be inserted between the cartons and the pallet and the cartons could be lifted onto the blades and put into the container. This method took 2 minutes per pallet. Daniels admitted that while he was removing the freight in this way he accidentally caused 4 or 5 inches of his forklift blade to enter a carton. The carton was torn but Daniels was not aware of this until Paul Smith entered the container and said the carton was torn. Smith did not open the carton to check the fabric for damage. Smith left the container and returned with Maldonado. Maldonado did not ask to see the punctured carton and he did not check the cargo for damage. Respondent did not introduce any evidence at the hearing that the freight was considered damaged by the customer or that a damage report had been lodged by the customer.

Maldonado testified that Daniels should have taken each pallet into the container with his hi-lo and then, with the helper, manually removed the cargo from each pallet. Maldonado stated that he saw cartons that were ripped and rolls of fabric inside. Maldonado testified that the company did not open the cartons to check for damage because the cargo was already loaded and "we left the cartons in place and [the customer] will let us know the damages." Maldonado stated that if there were a damage claim it would be in the file. Maldonado said that the cartons in question had yellow tape on them. When the cartons were delivered to the warehouse they were already ripped open and crushed and the company put yellow tape over some of the damaged areas. Maldonado maintained that Daniels was responsible for further damage to the cartons.

In an effort to show that Daniels did not perform his task properly Maldonado produced pictures of the loading process. However, the load sheet shows that Daniels began loading at 12:25 and ended at 3:15 p.m. Daniels took lunch from 12:30 to 1 p.m.. Maldonado's pictures do not cover the entire time period in question. He admitted that certain information could have been missing due to the gaps in his video. I shall not rely on any information based on the pictures because they are fragmentary.

I find that the evidence shows that the cartons of fabric were damaged before Daniels began to load them. Maldonado acknowledged that the cartons were damaged and that the company had put yellow tape on some areas of the damage. I also credit Daniels' testimony that the pallets were damaged before he began to load. Daniels took pictures of the damage to the cartons and pallets before beginning to load the container and these pictures are in the custody of Respondent. Because the pictures were not produced at the hearing I will assume that they would not have supported Respondent's position herein. I note that Paul Smith and Maldonado did not inspect the cartons for damage after Daniels had been loading them and that there is no evidence that the customer considered that the freight was damaged. Thus, as far as this record is concerned, Daniels did not break the pallets, he did not damage the freight and, at

most, he may have made a few holes in the already damaged reconditioned cartons. I find that Respondent did not consider the damage to be significant.

e. July 25, 2003 suspension for mishandling freight

Daniels was suspended on July 25, 2003, by letter from Linda Kuper. Kuper informed Daniels that on July 15 he "negligently and carelessly mishandled freight, possibly damaging the freight, contrary to established freight handling procedures . . . more seriously, you failed to report what had occurred so that the freight could be examined to determine the extent of the damage." Kuper stated her intention to hold a hearing to determine whether Daniels should be discharged or otherwise disciplined "particularly in light of the final warning issued to you this past September, [2002]. Before a hearing can be held we must first determine the extent of the damage to the freight in question. As soon as this information is received, I will contact you. . . ." Kuper ended the letter by saying she would be away until August 4 at which time "I should have a report regarding damage."

The freight in question was loaded on three pallets stacked in a pyramid. Respondent contends that Daniels incorrectly removed the top pallet. Instead of inserting his forklift blades under the top pallet and removing it Daniels removed the bottom pallet in order to cause the top pallet to dislodge and tip over to the floor. Daniels testified that the top pallet was heavy and had sunk into the cartons stacked on the pallet beneath. Daniels maintained that there was no space to insert the blades between the pallet and the cartons on which it was resting. Daniels testified that the freight was staged by a temporary forklift driver named Carlos. Daniels asked Carlos why he had brought the freight in a pyramid even though the manifest showed that the freight consisted of heavy door hardware. Carlos said he could not get the top pallet off. It had sunk into the freight on which it rested and he could not get inside to lift the pallet off.

Daniels testified that if a carton is dropped or damaged he is not required to report it. It is common to load freight that has been dropped. However, if a drum is punctured or there is a leak of freight then it cannot be loaded.

The record contains detailed statements by Daniels and Union President William Cunningham that Daniels used a correct method to handle the freight.[41] The record also contains a detailed statement by Maldonado given when the video tape of the event was played at the instant hearing to the effect that Daniels used an improper method and that the corner of one carton was crushed. Maldonado stated that the video does not show any damage to the freight.[42]

The freight in the cartons consisted of metal door parts such as door handles and door knobs. Daniels testified that he did not believe he had damaged the freight because he did not hear any rattling from inside the cartons. Daniels recalled that the cartons were shrink wrapped and he saw no damage. However, the company practice is to tape such types of damage and continue the shipping process. Cunningham stated that the video showed that no damage had occurred. If there had been damage then the shrink wrap around cartons would have broken and the cargo would have spilled on the floor.

No evidence was presented that the freight had in fact been damaged. Linda Kuper did not present any damage report or claim when she met with the Union to discuss the suspension. Neither Linda Kuper or Maldonado testified that there had been a damage report or claim. Thus, there is no proof in the record that the cargo was damaged. Although counsel for Respondent stated on the record that Linda Kuper would identify and testify about a damage report, Kuper never did so.

Kuper testified that if Daniels had informed his supervisor of the damage he would have been less likely to receive discipline for the incident because the company would have had a chance to recoup the freight. However, Maldonado testified that there is no set reporting procedure at the company in case freight drops to the floor. If a loader sees damage to a carton he should tell his dock boss who will take a picture of the carton and then the carton will be taped up.

Linda Kuper testified that she met with Daniels and Union President Cunningham to discuss the penalty. Kuper maintained that Cunningham agreed Daniels had mishandled the freight and that the parties then negotiated the length of the suspension. Cunningham disputed this version of the meeting. Cunningham stated that Kuper had suspended Daniels indefinitely. By the time he met with Kuper on August 3, Daniels had lost a lot of work and Cunningham was mainly concerned with getting him back to work immediately. I credit Cunningham's testimony. Cunningham's demeanor was impressive and his recitation of the events had the ring of truth.

I credit Cunningham that Daniels used a proper method to deal with the pyramided pallets. As I viewed the video in the courtroom, it did seem to me that the top pallet was very heavily embedded into the cartons on which it rested and that it would have been impossible to insert the blades under the pallet without piercing the cartons. I believe that Daniels made the best of a bad situation. He used his judgment and his judgment was proved correct: the freight was loaded and no damage occurred to the contents of the cartons.

I do not credit Linda Kuper's testimony about any of the matters relating to this suspension. First, Kuper's letter stated that the purpose of the hearing would be to consider the damage report and to decide Daniels' discipline accordingly. Kuper's letter mentioned the possibility of discharge. No damage report was received and Kuper did not offer any explanation for her failure to support the basis of the suspension letter. Kuper did not explain why a suspension from July 25 through August 3 was appropriate in light of the fact that the freight was not damaged. The fact that Kuper may have been away from the premises is not a justification for imposing a 2-week suspension. Manager Maldonado testified that the video on which Kuper based her letter did not show any damage to the freight. The conclusion seems inescapable that Kuper seized upon a serendipitously discovered incident on a video tape to attempt to discharge, and at least to suspend, Daniels.

[41] Cunningham has over 30 years experience driving a forklift and moving freight.

[42] Managers at the warehouse had first reviewed the video tape while searching through it to go over an event not involving Daniels.

f. October 9, 2003 warning for short shipments

On October 9, 2003 Daniels received a "final, final warning" from Linda Kuper. The warning was for two short shipments on containers loaded by Daniels. The warning stated, in part

> This type of conduct, which has only recently occurred after your many years of service without similar incidents, cannot be tolerated any longer. The cost to the company is simply too great. . . . The fact that you indicated on your tally sheets that the material had been shipped is evidence of your negligence. There will be no further reprieves. The next time there is an incident, you will be terminated immediately. . . .

Daniels admitted that he made a mistake regarding one load by failing to count all nine cartons of freight that comprised one lot thereby leaving off two of the cartons. Daniels had been the one who picked the freight in the warehouse as well as loaded it on the container. When Daniels went to pull the freight he found a large circled "9" on the pallet and he assumed all the pieces on his load plan were on the same pallet. The pallet contained both large and small cartons and Daniels assumed that some small cartons were hidden by the larger ones.

The record shows that the checker who counted the freight after Daniels picked it and staged it also miscounted the freight and indicated by his initials that all nine pieces of freight had been correctly staged for loading. There is no evidence that the checker was disciplined for his malfeasance.[43] Testifying about this incident, Linda Kuper stated that if there are pieces missing the checker is supposed to inform the loader of this fact.

Maldonado informed Daniels that there were two cartons missing from the lot. When Daniels and Maldonado searched the location in the warehouse area indicated on the load sheet used by Daniels to pick the freight, the two cartons were not in the location. Further, the load sheet did not indicate that the freight had been split up in the warehouse. Eventually, Daniels and Maldonado found the two cartons in a different location of the warehouse.

The second load referenced in Linda Kuper's warning letter involved freight that was not picked by Daniels. This load had already been staged when Daniels was assigned to load the container. Daniels did not count the freight but he asked the checker if the freight was all there. The checker informed Daniels that all the freight was present and Daniels loaded the container. In the event, one piece of freight was missing. The load plan indicates that someone circled the number representing the two pieces to show that they had been loaded. Daniels denied making the circle. The record shows that many people in the warehouse have access to the load plan both in the office and in the warehouse and it is impossible to determine who placed the mark on the paper. There is no evidence in the record that the person who picked the freight or the person who checked it have been disciplined for negligence in failing to account for the missing freight.

[43] The copy of the load sheet given to Daniels contains the checker's initials. There is another load sheet used by the checker and not given to Daniels which apparently does not show that the checker circled the missing items.

3. Purcell Robert Wallace

Purcell Robert Wallace has worked for the company since February 1988. In 1999 he tested positive for a controlled substance and he served a 30-day suspension from the company. Since then his record has been spotless until the discipline discussed below. Wallace is a member of the union negotiating committee and has attended bargaining sessions since November 2001.

Linda Kuper testified that overall the company has been happy with his performance.

a. July 31, 2002 written warning for missing freight

Wallace received a written warning on July 31, 2002, for failing to load 52 cartons into a container. Wallace admitted that he had made a mistake. He participated in a dock search for the freight and it was found in the location indicated on the load sheet. There is no evidence that the checker was disciplined for failing to catch this error.

b. August 2, 2002 written warning

Wallace received a written warning on August 2, 2002, for "loading eight pallets with the wrong marks." The cargo went to Miami instead of Boston. Wallace testified that his supervisor told him that the freight had been mismarked. Apparently when the freight had been unloaded into the warehouse the night crew had put a partially incorrect set of numbers and marks on the freight. Wallace had been assigned to pick the freight as well as to load it. He checked the numbers on the freight against the load sheet he had been given and then he picked and staged the freight. Wallace said that from one to four times a month he comes across freight that is mismarked; sometimes it is possible to check the mistake because a customer name might have been written on the freight. Wallace emphasized that from the warning slip one could not tell whether he had made a mistake or whether because the freight had the wrong mark it would have been impossible to prevent the cargo going to the wrong destination.[44] Wallace stated that since the checker had not caught the mistake it may be that only the night crew was to blame. In any case, the record contains no indication that the checker was disciplined for this mistake.

c. September 4 and 5, 2002 warning and final warning

Wallace was given a written warning for carelessness in loading one pallet bound for Hong Kong into his container going to Kee Lung. (This is the May 6 incident discussed above in relation to Tony Daniels.) Wallace was also given a "Final Warning Notice" dated September 4, 2002, written by Linda Kuper. Kuper cited the two warnings dated July 31 and August 2, 2002. Kuper went on to state that Wallace had wrongfully placed a pallet from Daniels' cargo area into his container: "Surveillance cameras clearly show you placing this pallet into your container . . . . This means that you would have had to make a physical effort to go to [Daniels' staging area] and pull one of the five pallets belonging in [Daniels' container]. . . . Under normal circumstances we would have termi-

[44] I note that no load number was given on the warning slip and no supporting paperwork was introduced at the hearing.

nated you for the incident . . . because we believe it was intentionally done. However, because of your length of service and prior performance we are offering you another chance to correct yourself."

As discussed above, Wallace denied placing Daniels' pallet into the Kee Lung container and when Wallace demanded to see the video he was told that Maldonado had nothing to show him.

Also, as discussed above, Linda Kuper testified that she had not seen the video to which she referred in the warning notice and she did not testify that it showed any improper transfer of freight from Daniels to Wallace. As discussed above, Maldonado did not testify reliably about what he may have seen on the missing video tape.

I conclude that the record does not support the discipline meted out to Wallace in connection with this incident. In fact, other than conjecture there is no evidence to show that Wallace and Daniels engaged in any misconduct. Both of these long-term employees denied under oath transferring the cargo to the wrong container and thus I conclude that an unknown person is responsible for the deed.

4. Conclusions about discipline to Daniels and Wallace

Daniels and Wallace were the two original employee members of the union negotiating committee. They were identified as supporters of the Union and they attended the bargaining sessions at which Linda Kuper was present from the inception of negotiations in 2001. Tony Daniels assisted in the investigation of Board charges leading to the case before ALJ Davis and the instant case. Daniels testified as a witness for the General Counsel in the unfair labor practice trails before ALJ Davis as well as in the instant case.

Daniels has worked for the company since 1991. He had a spotless record until the spate of disciplinary warnings recited above. Daniels was given yearly wage increases by the employer.

Wallace has worked for the company since February 1988. In 1999 he tested positive for a controlled substance and he served a 30-day suspension from the company. Since then his record has been spotless until the discipline discussed below. Linda Kuper testified that overall the company has been happy with his performance.

The Respondent's anti-Union animus is well established. In 331 NLRB 454 (2000), the Board found that Respondent unlawfully discharged and disciplined employees, interrogated employees, and engaged in other activity violative of the Act because its employees supported Local 641. As discussed above, in April 2001 the Third Circuit cited "the employer's demonstrated hostility to its employees" organizing efforts." Since that time, the Board has concluded that Respondent unlawfully eroded the bargaining unit and refused to supply information to the Union. I have found above that Respondent unlawfully assisted in the filing of a decertification petition. I find that Respondent's antiunion animus was a motivating factor in discipline issued to both Daniels and Wallace. *Wright Line*, 251 NLRB 1082 (1980). It is clear that Respondent is engaged in a course of conduct to rid itself of members of the bargaining unit and supporters of Local 641. By issuing pretextual and disparate warnings and final warnings to Daniels and Wallace Respondent is constructing a basis for eventual discharge of these two employees.

I have found above that the April 26, 2002 warning to Daniels for four overweight containers was not supported by the evidence. In effect, the incidents cited in the warning were a pretext for issuing discipline to Daniels because of his support for the Union and assistance to the General Counsel. Even if Daniels had been at fault with respect to the containers, Respondent has not shown that it would have imposed the discipline it chose in the absence of Daniels' protected activity. As stated above, I have found that contrary to its usual practice Respondent suspended Daniels for 1 day for this first infraction.[45] This discipline was a violation of Section 8(a)(3) and (4) of the Act.

I have found above that Respondent had no evidence of improper action by Daniels with respect to the misloaded carton that resulted in the September 4, 2002 warning and final warning. In effect, the discipline was based on a pretext and on a misstatement of what was shown on the missing video tape. This discipline was issued in violation of Section 8(a)(3) and (4) of the Act.

I have found above that Respondent presented no evidence to counter Daniels' testimony that he took a normal amount of time to load the container cited in the October 14, 2002 warning notice. Thus, I find that this discipline was a pretext to punish Daniels for his protected activity. This discipline was issued in violation of Section 8(a)(3) and (4) of the Act.

I have found above that Respondent gave Daniels a written warning for using his cell phone on October 30, 2002, rather than the verbal warning that Maldonado testified was the customary penalty for a first infraction. As discussed above, I find that this was a violation of Section 8(a)(3) and (4) of the Act.

I have found above that contrary to the July 24, 2003 warning Daniels did not damage company property and he did not damage the freight. Daniels may have put a few holes in the cartons which had already been damaged and taped by Respondent before he began the loading process. The record shows that Respondent does not discipline employees for damaging cartons, although it does issue warnings for damage to freight. Employee Aroca was suspended for putting holes into two drums, thereby "damaging the freight" and Martinez was warned for "damaging freight." Thus, I find that in the absence of Daniels' protected activity and assistance to the General Counsel, Respondent would not have issued the written warning. Respondent thus violated Section 8(a)(3) and (4) of the Act.

I have found above that with respect to the July 25, 2003 indefinite suspension letter for damaging freight, the evidence shows that there was no damage to the freight being handled by Daniels. I have found that Daniels followed an accepted proce-

[45] As shown above, Buono was suspended only for the second and third infractions involving absence, Thurman Smith was not suspended on the second occasion he refused to work and left early, Rivera was suspended for a third warning, Cuyuch was suspended for the second instance involving missing freight, and Martinez engaged in a dizzying number of infractions before receiving even a 1-day suspension.

dure in handling the freight. Maldonado conceded that there is no set rule for reporting a carton that is dropped and Maldonado testified that in viewing the video he ascertained that there was no damage to the freight. Some cartons were pierced, but I have accepted Daniels' and Cunningham's testimony that this was inevitable. As discussed above, Respondent does not have a practice of disciplining employees who damage cartons. Thus, the infraction was a pretext. But even if Daniels had damaged the freight, the 2-week suspension was all out of proportion to the discipline imposed on other employees for more serious infractions, for example, Martinez who was suspended for 1 day when he damaged his hi-lo by careless driving. Respondent treated Daniels disparately when it suspended him for 2 weeks for damaging some cartons. Respondent thus violated Section 8(a)(3) and (4) of the Act.

I have found above with respect to the October 9, 2003 final, final warning that Daniels alone was disciplined for mistakes which were attributable to other employees as well. Although Linda Kuper testified that the picker, the checker and the loader should all be disciplined when freight was missing from a container, this did not occur in either of the two instances cited in the October 9, 2003 warning. In one instance a checker mistakenly assured Daniels that the freight was correct before he loaded it and in the other instance both the picker and the checker missed one piece of freight that Daniels should have loaded. Respondent treated Daniels disparately in this instance. Further, the warning informed Daniels that he was in danger of being discharged. Respondent may not rely on prior unlawfully imposed discipline to impose further discipline. Respondent violated Section 8(a)(3) and (4) of the Act by issuing the warning and informing Daniels that he would be discharged for further infractions.

I have found above that Respondent disciplined Wallace for errors cited in warning notices dated July 31, 2002, and August 2, 2002. In both of these instances the checker involved in the loading mistake was not disciplined and in one instance the night crew had mismarked the freight but the evidence does not show that members of the crew were disciplined for their mistake. Wallace was treated disparately because of his activities in support of the Union. I find that he was disciplined in violation of Section 8(a)(3) of the Act.

I have also found above that Respondent disciplined Wallace on September 4 and 5, 2003, and gave him a final warning notice where there is no proof that Wallace was responsible for the freight being loaded into the wrong container. Respondent relied on a pretextual statement of what was shown on the missing video tape to discipline Wallace because of his support for the Union. Respondent thus violated Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. At all material times the Union has been, and is, the exclusive representative of the employees in the following appropriate collective-bargaining unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey facility, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. By unilaterally changing employee breaktimes Respondent violated Section 8(a)(5) and (1) of the Act.

3. By assisting in the circulation and filing of a decertification petition Respondent violated Section 8(a)(1) of the Act.

4. At all times since October 2002 and at all material times thereafter Respondent has failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the unit set forth above in violation of Section 8(a)(5) and (1) of the Act.

5. By issuing a written warning to and suspending Tony Daniels on April 26, 2002, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

6. By issuing a written warning and final warning to Tony Daniels on September 4, 2002, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

7. By issuing written warning notices to Tony Daniels on October 14 and October 30, 2002, and July 24, 2003, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

8. By suspending Tony Daniels on July 25, 2003, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

9. By issuing a final, final warning to Tony Daniels on October 9, 2003, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

10. By issuing written warning notices to Purcell Robert Wallace on July 31 and August 2, 2002, Respondent violated Section 8(a)(3) and (1) of the Act.

11. By issuing a written warning notice on September 4 and a final warning notice on September 5, 2003, to Purcell Robert Wallace Respondent violated Section 8(a)(3) and (1) of the Act.

12. The General Counsel has not shown that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel seeks a remedy pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). The Board has long held that where there is a finding that an employer has failed or refused to bargain in good faith with the union after it has been certified the Board's remedy should ensure that the union has at least 1 year of good-faith bargaining during which its majority status cannot be questioned. A shorter period of time may be assigned depending on the nature of the violations found, the number and extent of collective-bargaining sessions and the impact of the unfair labor practices upon the bargaining process. It is plain from my discussion above that I consider Respondent's bad-faith bargaining particularly egregious especially because it was carried on in defiance of prior Board and ALJ decisions. However, the Board has previously declined to

extend the certification year. 341 NLRB 904, 909 (2004). Therefore, I am unable to afford the additional remedy that would normally be ordered for the surface bargaining engaged in by Respondent.

Because the Respondent has a proclivity for violating the Act (see, e.g., *St. George Warehouse*, 331 NLRB 454 (2000), enfd. sub nom. *NLRB v. St. George Warehouse*, No. 00-2433 (3d Cir. April 23, 2001); *St. George Warehouse*, 341 NLRB 904, (2004), and because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Because the unilateral change in employee breaktimes was not enforced by Respondent after some period of time it is unnecessary to order Respondent to restore the prior practice with regard to employee breaktimes.

[Recommend Order omitted from publication.]