The American National Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter *and* Local 459, Office and Professional Employees International Union, AFL–CIO *and* Local 580, International Brotherhood of Teamsters. Cases 07–CA–052033, 07–CA–052288, 07–CA–052308, 07–CA–052282, 07–CA–052811, 07–CA–053018, 07–CA–052544, and 07–CA–052487

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA, AND MCFERRAN

On May 5, 2011, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondents, the American National Red Cross, Great Lakes Blood Services Region (the Region) and Mid-Michigan Chapter (the Chapter), jointly filed exceptions and a supporting brief. The Acting General Counsel and Charging Party Local 459, Office and Professional Employees International Union, AFL–CIO (OPEIU) each filed an answering brief to the Respondents' exceptions, and the Respondents filed a reply brief. The Acting General Counsel and OPEIU also each filed exceptions and a supporting brief. The Respondents filed an answering brief, and OPEIU filed a reply brief.

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[1] and briefs, and has decided to affirm the judge's rulings, findings[2] and conclusions except as specifically set forth below, to adopt his remedy as modified, and to adopt the recommended Order as modified[3] and set forth in full below.

[1] No exceptions were filed to the judge's finding that the Region: (1) violated Sec. 8(a)(1) by directing union steward LaShawnda Spears not to discuss with other employees a disciplinary investigation of her business-related cell phone use during work time; (2) violated Sec. 8(a)(3) and (1) by issuing Spears a written verbal warning for her reaction to the directive that she not discuss the investigation; (3) violated Sec. 8(a)(5), (3), and (1) by denying six employees in the laboratory, clerical and distribution (LCD) unit preapproved leave during the week of June 7, 2010, in response to their participation in an unfair labor practice strike the previous week; and (4) violated Sec. 8(a)(5) and (1) by (a) delaying in providing Teamsters Local 580 information it requested on May 11, June 10, and July 31, 2009, regarding health insurance coverage of employees in the mobile unit assistant (MUA) and apheresis units; (b) making unilateral changes in the retiree medical program in January and July 2009; (c) failing to provide OPEIU with information it requested on May 19 and 21, 2010, regarding the transfer of telerecruiter work; (d) bypassing OPEIU and announcing to employees on May 18, 2010, that it intended to transfer telerecruiter work from its LCD unit employees to nonunit locations; and (e) bargaining with a fixed mind and no intention of reaching an agreement with respect to the transfer of telerecruiter work.

[2] The Respondents have 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.

We adopt the judge's dismissal of allegations that the Region violated Sec. 8(a)(5) and (1) by unilaterally reducing local health insurance options for the 2010 benefit year for employees in the apheresis, MUA, collections and LCD units. Members Hirozawa and McFerran also adopt the judge's dismissal of the allegations that the Region and Chapter violated Sec. 8(a)(5) and (1) by bargaining in bad faith with a fixed mind and no intention of reaching agreement with respect to BenefitsAdvantage health insurance, pension, and 401(k) benefits. For the reasons stated in fn. 11, infra, Chairman Pearce would find the violations.

We agree with the judge's findings that the Region violated Sec. 8(a)(5), (3), and (1) by denying 89 collections unit employees guaranteed hours during the week of June 7, 2010, in response to the unfair labor practice strike. For the reasons stated by the judge, we also adopt his findings that the Region violated Sec. 8(a)(5) and (1) by: (1) failing to provide information requested by OPEIU on March 17 and 25, 2009, regarding Region's assertion that the demand for blood had decreased; (2) failing to provide the Teamsters, as part of its demographic information request in November 2009, the names of all American National Red Cross employees enrolled in any health insurance program nationwide; (3) unilaterally implementing a stricter no-fault attendance policy covering its collections and LCD unit employees in November 2008; and (4) unilaterally changing its past practice pertaining to union meetings held on its property by refusing to permit such meetings by OPEIU in April 2009. We further adopt the judge's findings, for the reasons he stated, that the Region and the Chapter violated Sec. 8(a)(5) and (1) by unilaterally implementing a new BenefitsAdvantage health insurance program for employees in all five bargaining units in January 2010; and that the Chapter violated Sec. 8(a)(5) and (1) by making unilateral changes in the retiree medical program in January and July 2009. Although we agree with the judge that *Stone Container Corp.*, 313 NLRB 336 (1993), provides no defense to the Respondents' unlawful implementation of the new BenefitsAdvantage health insurance program, we note that this defense is inapplicable in any event because it applies only where parties are negotiating for an initial collective-bargaining agreement and not, as here, to negotiations for successor contracts. *Oak Hill*, 360 NLRB 359 (2014).

Member McFerran would find it unnecessary to reach the *Stone Container* argument regarding the Region and the Chapter's unilateral adoption of the new health insurance program in January 2010. She would find instead that the Region and the Chapter unlawfully presented the changes as a fait accompli. While she agrees with her colleagues that the Region violated Sec. 8(a)(5) in connection with the Teamsters' information request for the names of all American National Red Cross employees enrolled in any health insurance program nationwide, she would provide the Region with the opportunity, in the compliance proceeding, to show that a statutory confidentiality requirement prevents it from providing the names to the Union.

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and we shall substitute new notices to conform to the Order as modified.

The American National Red Cross (ANRC) is headquartered in Washington, D.C. and operates approximately 36 regions and 700 chapters nationwide. The regions provide blood services, and the chapters provide disaster relief and emergency services. The Respondents are a region and a chapter that operate in Michigan.[4]

The OPEIU and Teamsters represent certain of the Respondents' employees in five units. The OPEIU represents two separate units of the Region's employees: its collections employees, and its laboratory, clerical, and distribution (LCD) employees. The OPEIU also represents a unit of clerical and warehouse employees (clerical/warehouse unit) employed by the Chapter. The most recent OPEIU collective-bargaining agreements (CBAs) with the Region and the Chapter expired on March 30 and 31, 2009, respectively.[5] The Region and OPEIU commenced negotiations for successor contracts in late February, and negotiations for a successor agreement between the Chapter and OPEIU commenced in May.

The Teamsters represents separate units of the Region's apheresis employees and mobile unit assistants (MUAs). The most recent agreements between the Teamsters and Region covering these two units were effective through April 30. Negotiations for successor agreements commenced in late April.

The ANRC has for many years maintained a nationwide retirement program consisting of a defined benefit pension plan and a defined contribution 401(k) plan. The Board of Governors of the ANRC administers both plans and has made amendments to them on an annual basis. Although the regions and chapters are not required to participate in the ANRC pension and 401(k) plans, the Respondents and Unions agreed to do so through provisions in their respective collective-bargaining agreements. Based on those contractual provisions, the Respondents unilaterally applied the annual changes adopted by the ANRC to employees in the five units during the terms of the respective collective-bargaining agreements. Consistent with the terms of the agreements, the Unions did not oppose these changes.

The ANRC announced in April that, due to an economic downturn, matching contributions to the 401(k) plan would be suspended effective May 1, and employees hired after July 1 would be excluded from participation in the pension plan. The Respondents unilaterally implemented these post-expiration changes in the five units shortly after the CBAs expired. The Unions protested and filed unfair labor practice charges.[6] The complaint alleges that the unilateral changes made in each unit violated Section 8(a)(5) and (1) of the Act.

Relying on *E. I. DuPont de Nemours, Louisville Works*, 355 NLRB 1084 (2010), the judge found that the Chapter violated Section 8(a)(5) and (1) by unilaterally implementing, postexpiration, 401(k) changes announced by the ANRC to the OPEIU-represented clerical/warehouse unit, and that the Region violated Section 8(a)(5) by unilaterally implementing, postexpiration, pension and 401(k) changes in the OPEIU-represented collections and LCD units. As to these units, the judge found that the pension and 401(k) language in the expired contracts constituted "reservation-of-rights" provisions that neither survived contract expiration nor permitted postexpiration unilateral changes to these benefits. As to the Region's changes to the pension and 401(k) plans for the Teamsters-represented apheresis and MUA units, and the Chapter's changes to the pension plan for the OPEIU-represented clerical/warehouse unit, however, the judge dismissed the allegations, implicitly finding that the relevant contract provisions were not reservation-of-rights clauses limited to the contracts' terms, but were part of a dynamic status quo that continued postexpiration.

Following the judge's decision, the United States Court of Appeals for the District of Columbia Circuit remanded the 2010 DuPont decision to the Board for further proceedings consistent with the court's opinion. *E. I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), denying enf. of 355 NLRB 1084. In response to that remand, the Board issued *E. I. DuPont de Nemours*, 364 NLRB 1648 (2016), in which it reaffirmed Board precedent that unilateral changes to terms and conditions of employment, purportedly made pursuant to a past practice developed under an expired management-rights clause, are unlawful.[7] Applying the status quo doctrine under *NLRB v. Katz*, 369 U. S. 736 (1962), the Board held that during negotiations for a successor CBA, the employer has a statutory duty to maintain the status quo by continuing in effect the employment terms and conditions that existed at the expiration of the parties' agreement. Id., slip op. at 4. But because the essence of a management-rights clause is the union's

[4] The ANRC is neither a respondent nor a party to the collective-bargaining agreements discussed below.

[5] All dates are in 2009 unless indicated otherwise.

[6] The judge found that because these changes were announced as a fait accompli, it was unnecessary for the Unions to request bargaining.

[7] One Board member, who is not a member of the panel in this case, expressed disagreement with the principles regarding unilateral changes and past practice set forth in *DuPont*. See, e.g., *E. I. DuPont de Nemours & Co.*, 364 NLRB 1648, at 1662–1675 (Member Miscimarra, dissenting).

consensual surrender of its statutory right to bargain during the term of the contract, that waiver, like any waiver of a statutory right, does not survive contract expiration, absent evidence of the parties' contrary intent. Thus, the status quo doctrine under *Katz* does not privilege the employer to continue making unilateral changes that, during the term of the agreement, would have been authorized by the now-expired management-rights clause. Id., slip op. at 5. And, because unilateral changes implemented during the term of a contract under the authority of a management-rights clause are based on a union's bargaining waiver, the right granted to an employer to make changes to employees' terms of employment under that clause does not create a past practice permitting an employer to continue to unilaterally implement changes postexpiration. Id., slip op. at 5–6.

Applying these principles to the instant case, we adopt the judge's findings that the Chapter violated Section 8(a)(5) and (1) by unilaterally implementing, postexpiration, 401(k) changes announced by the ANRC to the OPEIU-represented clerical/warehouse unit, and that the Region violated the Act by unilaterally implementing ANRC's changes to the pension and 401(k) provisions in the OPEIU-represented collections and LCD units.[8] For the reasons discussed below, however, we reverse the judge and find that the Region's unilateral changes to the 401(k) and pension benefits for employees in the apheresis and MUA units and the Chapter's unilateral changes to pension benefits for employees in the clerical/warehouse unit likewise violated Section 8(a)(5) and (1) of the Act.

Discussion

The relevant pension and 401(k) provisions of the expired contract between the Respondent Region and Teamsters Local 580 covering the apheresis and MUA units state:

> Article 31- Retirement
>
> Section 1. The [Region] shall continue to participate in the retirement program of the National Red Cross on the same basis as the present, or as it hereafter may be amended by the National Red Cross.
>
> Section 3. The [Region] agrees that the bargaining unit employees will participate in any future 401(k). . . matching pension plan offered by the National Red Cross on the same basis as other employees.

The expired contract between the Respondent Chapter and the OPEIU covering the clerical/warehouse unit contained the same article 31, section 1 pension clause as above. In analyzing the legality of the unilateral changes, the judge stated that the "threshold inquiry" was determining, first, what the status quo was before the Respondents made the alleged unlawful changes to the pension and 401(k) benefits and, second, whether the changes altered the status quo. Noting that the status quo may be created by a contract provision as well as by a past practice of the parties, the judge examined the above contractual pension and 401(k) provisions covering each unit. He concluded that the language of the pension and 401(k) clauses covering the apheresis and MUA units and the pension clause covering the clerical/warehouse unit, together with the unilaterally implemented changes made to both benefits during the terms of contract without objection by the Unions, established a "dynamic" status quo, requiring the Respondents to continue to implement the changes announced by the ANRC after the contracts expired. Accordingly, the judge dismissed the allegations that the Respondents unlawfully implemented them. We disagree.

A. The Contract Provisions Do Not Survive Expiration

We find both clauses are the equivalent of management-rights clauses pursuant to which the Unions agreed that unit employees would be covered by the ANRC's pension and 401(k) plans and that the Respondents would implement changes made by the ANRC to those plans without first bargaining with the Unions about those changes, during the term of the contracts. By agreeing to these clauses and acquiescing to the changes made pursuant to them, the Unions granted the Respondents the managerial prerogative to act unilaterally with respect to the pension and 401(k) benefits during the term of the contract and thereby waived their right to bargain over a mandatory subject of bargaining.

[8] As stated above, the judge found that the 401(k) clause covering employees in the clerical/warehouse unit, and the pension clauses and 401(k) clauses covering employees in the collections and LCD units, were reservation-of-rights clauses because they reserved to the Respondents the right to decide whether to participate in the ANRC plans rather than mandating such participation. Accordingly, relying on the Board's 2010 decision in *E. I. DuPont*, the judge found that because there was no evidence that the parties intended the clauses to survive expiration of the contracts covering these units, and because the changes made to the 401(k) and pension benefits during the terms of the contracts did not establish a past practice that privileged postexpiration changes, the unilateral changes to both benefits violated Sec. 8(a)(5) and (1). We affirm the judge's findings as consistent with the analysis set forth in *E. I. DuPont*, 364 NLRB 1648, at 1650–1657. We add that regardless of whether the Respondents retained discretion to participate in the ANRC plans or contractually committed to do so, our agreement with the judge's finding that the 401(k) and pension clauses covering these units were reservation-of-rights clauses is based on the fact that, by their agreement to the provisions, the Unions waived their right to bargain over whatever changes were made to these benefits only for the duration of the contracts.

However, that waiver was effective only for the term of the contracts. Under well-established Board law, recently reaffirmed in *E. I. DuPont*, a management-rights clause containing a union's statutory bargaining waiver does not survive the contract that contains it, absent evidence that the waiver was intended to outlive the contract. 364 NLRB 1648, at 1652 (citing *Holiday Inn of Victorville*, 284 NLRB 916, (1987)). To hold otherwise would make the expiration of the clause "meaningless wherever the employer had taken advantage of the waiver to make changes," and, as the Board further explained in *E. I. DuPont*, defining the status quo as something so "fluid" necessarily "discourages, rather than promotes, collective bargaining," contrary to the aims of the Act. Id. (citing *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636–637 (2001)).

Unlike the judge, we do not find that the language of the two clauses—stating that the Respondents "shall continue to participate in" and "will participate in" the ANRC plans as offered or amended in the future by the ANRC—evinces a postexpiration waiver. A union's waiver of a statutory bargaining right must be "clear and unmistakable" and will not be inferred from general contract language. *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992). The contract language relied on by the judge falls well short of this standard. It makes no reference to the period beyond the contracts' expiration, and fails to unequivocally and specifically express an intention to permit the Respondents to continue implementing unilateral changes to the pension and 401(k) benefits after contract expiration. In the absence of evidence of such an intent, we reject the judge's finding that the contract provisions established the postexpiration status quo that, in effect, continued the Unions' bargaining waiver regarding these benefits. Nor can the Unions' acquiescence to changes during the term of the CBAs be construed as consent to postexpiration changes. *E. I. DuPont*, at 1653.

In *E. I. DuPont*, the Board explained that an approach that permits the employer to reserve to itself the right to act unilaterally after expiration of the CBA granting that right renders the expiration of that contractual clause meaningless. The Board further explained that extending the union's surrender of its statutory right to bargain postcontract undermines the collective-bargaining process by making it harder to reach a successor agreement, while simultaneously undermining the union as the representative of the employees. Id. at 1653.

The Respondents were not permitted to unilaterally change contractual benefits following the expiration of the parties' CBAs; rather, they had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date until they bargained to agreement or reached good-faith impasse in overall bargaining for a new agreement. "When the collective-bargaining agreements expired, the [401(k) and pension] benefits in effect on the expiration dates became fixed as the status quo subject to this statutory duty to bargain." *E. I. DuPont*, 364 NLRB 1648, at 1657. Neither good-faith impasse nor agreement was reached when the Respondents made their unilateral changes in this case.

We further disagree with the judge that changes made during the contracts' terms created a past practice that privileged unilateral changes postexpiration. In *E. I. DuPont*, the Board specifically rejected this contention, explaining that "the status quo after contract expiration cannot include the right to make unilateral changes since such changes cannot be made in the absence of waiver." 364 NLRB 1648, at 1652 (internal citations omitted). See also *Register Guard*, 339 NLRB 353, 356 (2003) (because the past changes were "implemented under a contractual provision that has since expired, [they] do not establish a past practice allowing the [respondent] to implement the new . . . commissions" after the contract expired). The same conclusion is warranted here. None of the prior unilateral changes to the pension and 401(k) benefits was made independent of the Unions' contractual bargaining waiver that expired with the contracts.

B. There is No Cognizable Past Practice That Would Privilege the Postexpiration Unilateral Changes

Even if the contractual provisions in this case were not the equivalent of management-rights clauses, we would nevertheless find, contrary to the judge, that there was no established past practice that would permit the kinds of unilateral changes that the Region and the Chapter made to the pension and 401(k) plans after the contracts expired.

As we explained in *E. I. DuPont*, supra, past practices that are "regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. . . . A past practice must occur with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *E. I. DuPont*, 364 NLRB 1648, at 1651–1652, citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (citations omitted).

The prior changes in this case, which all occurred during the terms of collective-bargaining agreements, lacked the regularity or frequency required to create a past practice. *Caterpillar, Inc*., 355 NLRB 521, 522–523 (2010).

Further, even assuming the prior changes could establish a cognizable past practice, the 2009 postexpiration changes "represented a material departure from that past practice." Id. at 523. As the judge noted, "significant" changes to the pension and 401(k) plans were made only once during the terms of the contracts—in 2005.[9] The pension plan changes mainly involved modifications to the formula or vesting period for calculating retirement benefits or eligibility for such benefits. The 2005 change regarding the 401(k) plan was a beneficial change that increased the Respondents' matching contributions from 50 to 100 percent on the first 4 percent of employee contributions. By contrast, the 2009 postexpiration changes discontinued 401(k) matching contributions and excluded an entire subgroup of unit employees from the pension plan, thereby going well beyond the nature and scope of changes the Respondents made during the terms of the CBAs.

Moreover, even assuming no material departure, the changes made during the contract fail to establish a past practice that privileged the postexpiration changes because they were not based on fixed criteria as required under *E. I. DuPont*, 364 NLRB at 1648. The Board and the courts have repeatedly held that employers may act unilaterally pursuant to an established practice only if the changes do not involve the exercise of significant managerial discretion. Id. This is a "narrow exception" for situations "where there is a history of predictable changes to a discrete term or condition of employment that would be expected to continue in a non-discretionary, regular manner." Id. Here, the only criterion limiting the Respondents' right to act unilaterally was set forth in the 401(k) provision,[10] which required that any changes to unit employees' 401(k) benefits had to be "on the same basis as other [nonunit] employees." The Board in *E. I. DuPont* found this same language "to be no meaningful limitation at all" since the employer was free to do exactly as it pleased with regard to the benefits of the unrepresented employees. 364 NLRB 1648, at 1646.

In sum, the Respondents were obligated by the Act to maintain the status quo by continuing the pension and 401(k) benefits as they existed at the time of contract expiration until they bargained to agreement or impasse for new contracts. By the Region's unilateral implementation of changes to pension and 401(k) benefits in the apheresis and MUA units prior to reaching impasse, and the Chapter's unilateral implementation of changes to pension benefits in the clerical/warehouse unit prior to reaching impasse, the Respondents breached their obligation to maintain the status quo and thereby violated Section 8(a)(5) and (1) of the Act.[11]

AMENDED REMEDY

We amend the judge's remedy to order the Respondents to make whole the employees for any loss of benefits and any additional expenses they incurred as a result of the Respondents' unlawful unilateral changes, even if the employees' union representatives do not demand restoration of the status quo. *Goya Foods of Florida*, 356 NLRB 1461 (2011). The judge, relying on *Comau, Inc.*, 356 NLRB 75, 75 fn. 10 (2010), enf. denied 671 F.3d 1232 (D.C. Cir. (2012), ordered that if the Unions chose to retain any of the unilaterally implemented changes, make-whole relief for those changes would not apply. In *Goya Foods*, however, the Board rejected this limitation on make-whole relief by overruling precedent, including *Comau*, and returning to its prior remedial requirement that "employees who have suffered losses due to a unilateral change in terms or conditions of employment shall be made whole, even if their exclusive bargaining representative decides not to demand restoration of the status quo." 356 NLRB at 1463. See also, *UPS Supply Chain Solutions, Inc*., 364 NLRB 25, 25–26 (2014).[12]

[9] The 2005 changes included pension modifications that added an early retirement penalty, changed the calculation for years of benefit service, and discontinued a 1 percent increase to postretirement pension benefits. The 401(k) changes in 2005 included a new vesting period for eligibility for matching contributions and an increase of employer matching contributions from 50 to 100 percent on the first 4 percent of employee contributions.

[10] The pension provision contained similarly limiting "on the same basis" language.

[11] Having found that the Respondents violated Sec. 8(a)(5) and (1) by unilaterally implementing changes to the pension and 401(k) benefits and implementing a new BenefitsAdvantage health insurance plan covering employees in all five units, Chairman Pearce would reverse the judge's finding that the Respondents did not bargain in bad faith with respect to these three subjects. Chairman Pearce notes that "[u]nilateral action by an employer that modifies mandatory topics of bargaining is a per se violation of Section 8(a)(5) [and that [w]hen such unilateralism occurs during bargaining, it is generally proof that the employer has not bargained in good faith." *Omaha World-Herald*, 357 NLRB 1870, 1885 and fns. 20–21 (2011). As the Supreme Court stated in agreeing with the position of the Board, "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198(1991). Here, the Respondents unlawfully implemented changes to the pension, 401(k) and BenefitsAdvantage health insurance plans at the same time that these plans were the subject of negotiations with the Unions for successor contracts. Chairman Pearce would find, therefore, that by such conduct the Respondents engaged in bad faith bargaining in violation of Sec. 8(a)(5)(1).

[12] For the reasons set forth in *Goya Foods*, 356 NLRB at 1464, we reject the Respondents' exception to the retroactive application of *Goya Foods* to the make whole remedy in this case.

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), we shall also order the Respondents to compensate employees for the adverse tax consequences, if any, of receiving lump sum backpay awards and file a report with the Regional Director allocating the backpay awards to the appropriate calendar years for each employee.

Finally, with respect to the unlawful unilateral changes to the retiree medical and BenefitsAdvantage health insurance programs, the Respondents will be allowed to litigate in compliance whether it would be impossible or unduly burdensome to restore the unit employees' benefits to the terms that existed prior to those changes. See *Larry Geweke Ford*, 344 NLRB 628, 629–630 (2005) (employer permitted to litigate in compliance whether it would be unduly or unfairly burdensome to restore health insurance coverage in effect prior to the unilateral change).

ORDER

A. The National Labor Relations Board orders that the Respondent, American National Red Cross, Great Lakes Blood Services Region, Lansing, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide or timely provide relevant and necessary information requested by OPEIU Local 459 or Teamsters Local 580.

(b) Unilaterally implementing more stringent attendance policies covering employees in the collections and LCD units during periods when Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(c) Unilaterally changing its past practice of permitting OPEIU Local 459 to hold union meetings on its premises during periods when Region and OPEIU 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(d) Bypassing OPEIU Local 459 and announcing to employees that it intends to transfer telerecruiter work from the LCD unit during periods when Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(e) Bargaining with OPEIU Local 459 with a fixed mind and no intention of reaching an agreement with respect to the transfer of the telerecruiter work from the LCD unit.

(f) Unilaterally changing the retiree medical program for employees in the collections and LCD units during periods when Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(g) Unilaterally suspending matching contributions to the 401(k) savings plan for employees in the collections and LCD units during periods when the Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(h) Unilaterally suspending matching contributions to the 401(k) savings plan for employees in the apheresis and MUA units during periods when the Region and Teamsters Local 580 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(i) Unilaterally eliminating the pension plan for new hires in the collections and LCD units during periods when the Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(j) Unilaterally eliminating the pension plan for new hires in the apheresis and MUA units during periods when the Region and Teamsters Local 580 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(k) Unilaterally implementing a new health insurance program for employees in the collections and LCD units during periods when Region and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(l) Unilaterally implementing a new health insurance program for employees in the apheresis and MUA units during periods when Region and Teamsters Local 580 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(m) Directing employees not to talk to their coworkers about pending disciplinary matters.

(n) Disciplining employees because they engaged in protected concerted activities and to discourage employees from engaging in such activities.

(o) Discriminatorily and unilaterally denying preapproved paid annual leave to employees in the collections and LCD units because they engaged in a strike or other protected concerted activities and to discourage employees from engaging in such activities, and during periods when Region and OPEIU 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(p) Discriminatorily and unilaterally denying guaranteed hours to employees in the collections unit because they engaged in a strike or other protected concerted activities and to discourage employees from engaging in such activities during periods when Region and OPEIU 459 are engaged in negotiations for a collective-

bargaining agreement and have not reached impasse.

(q) 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) Furnish OPEIU Local 459 in a timely manner the information it requested on March 17 and 25, 2009 regarding a reduced demand for blood.

(b) Furnish OPEIU Local 459 in a timely manner the information it requested on May 11, June 10 and July 31, 2009, regarding employee health insurance.

(c) Furnish OPEIU Local 459 the information it requested on May 19 and 21, 2010, regarding the proposed transfer of telerecruiter work from the LCD unit.

(d) On request, bargain in good faith with OPEIU Local 459 with respect to the proposed transfer of telerecruiter work from the LCD unit.

(e) Furnish Teamsters Local 580 in a timely manner the health insurance demographic information it requested on July 31, 2009, with the employees' names included.

(f) On request, rescind the unlawful unilateral changes made in the collections and LCD units to its no-fault attendance policy and to its practice regarding union meetings, and restore the status quo ante that existed prior to these changes until such time as it has bargained with OPEIU Local 459 to an agreement or impasse.

(g) On request, rescind the unlawful unilateral change to the retiree medical program for employees in the collections and LCD units, and restore the status quo ante that existed prior to the change until such time that it has bargained with OPEIU Local 459 to an agreement or impasse.

(h) On request, rescind the unilateral change in the collections and LCD units by its suspension of matching contributions to the 401(k) savings plan, and restore the status ante that existed prior to the change until such time it has bargained with OPEIU Local 459 to an agreement or impasse.

(i) On request, rescind the unilateral change in the apheresis and MUA units by its suspension of matching contributions to the 401(k) savings plan, and restore the status quo ante that existed prior to the change until such time it has bargained with Teamsters Local 580 to an agreement or impasse.

(j) On request, rescind the unilateral change in the collections and LCD units by its elimination of the pension plan for new hires, and restore the status quo ante that existed prior to the change until such time it has bargained with OPEIU Local 459 to an agreement or impasse.

(k) On request, rescind the unilateral change in the apheresis and MUA units by its elimination of the pension plan for new hires, and restore the status quo ante that existed prior the change until such time it has bargained with Teamsters Local 580 to an agreement or impasse.

(l) On request, rescind the unlawful unilateral change in the collections and LCD units by its January 2010 implementation of a new health insurance program, and restore the status quo ante that existed prior to the change until such time it has bargained with OPEIU Local 459 to an agreement or impasse.

(m) On request, rescind the unlawful unilateral change in the apheresis and MUA units by its January 2010 implementation of a new health insurance program and restore the status quo ante that existed prior to the change until such time as it has bargained with Teamsters Local 580 to an agreement or impasse concerning a health insurance program.

(n) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to employees in the collections and LCD units as a result of the unilateral change to the attendance policy, and, within 3 days thereafter, notify the employees that this has been done and that the discipline will not be used against them in any way.

(o) Make whole the employees in the collections, LCD, apheresis, and MUA units for any loss of benefits and any additional expenses they incurred as a result of its unlawful unilateral changes, in the manner set forth in the remedy section of the judge's decision, as further amended in this decision.

(p) Make whole Jennifer Clark, Jeannie Wright, Michael Turner, Judy Letts, Ron Silver, and Stephanie Coats for any loss of earnings and other benefits suffered as a result of its unlawful denial of their preapproved paid annual leave following the June 2010 unfair labor practice strike, in the manner set forth in the remedy section of the judge's decision.

(q) Make whole the following employees for any loss of earnings and other benefits suffered as a result of its unlawful denial of guaranteed hours following the strike, in the manner set forth in the remedy section of the judge's decision, as amended: Kristine Adler; Cheryl Albert; Jacquelyn Barton; Lynn Blake; Ruth Blakeslee; Michelle Brennan; Megan Brown; Kelly Brust; Carla Bunn; Karen Caramango; Robert Carpenter; Gail Case; Nichole Cheza; Jennifer Clark; Heather Diepen; Tara Eberhard; Brianne Edmonds; Jennifer Ellis; Stacy Emede; Kathleen Emig; Jereatha Flannery; Dechara Fountaine; Brenda Fundunburks; Mary Gardner; Russell Hager; Reynett Henderson; Chad Hier; May

Hill; Robin Hilliard; Carly Hoffman; Freda Holley; Amber Holton; Amy Holysz; Jason Hruskach; Jaiml Johnson; Diana Jones; Penny Jugovich; Patsy Kaiser; Garred Kasprzycki; Eric Kendziorski; Patti Ketelaar; Heather Keyton; Angela Kinney; Sharron Kirkby; Michelle Lahti; Sandra Lalumandiere; Joshua Lanning; Minette Lefkiades; Judy Letts; Constance Longcore; Heather Lytle; Elijah Mcintosh; Janet Michael; Kerri Michaud; Tonia Miles; Barbara Moore; Emily Nichols; Laurel Perkins; Jennifer Pogue; Kathleen Poirot; Steven Prchlik; Sharon Proctor; Ashley Ramsey; Lisa Reeves; Joan Rogers; Julianne Ruhstorfer; Sara Sackman; Rita Serva; Lisa Shute; Ronald Silver; LaShawnda Spears; Holly Spring; Christine Stafford; Rebecca Starr; Sandra Steggerda; Karl Sternberg; Christopher Summers; Robert Swicker; Lesley Thibault; Teresa Thomas, Rachel Thrush; Nancy Topel; Kelly Tracy; Michael Turner; Brigitte Vandebroek; Carol West; Kelly White; Jeannie Wright; and Dale Wyman.

(r) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(s) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written "verbal" warning issued to Lashawnda Spears on April 30, 2010, and within 3 days thereafter, notify Spears in writing that this has been done and that the warning will not be used against her in any way.

(t) 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.

(u) Within 14 days after service by the Region, post at its facility in Lansing, Michigan, copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 November 17, 2008.

(v) 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.

B. The National Labor Relations Board orders that the Respondent, American National Red Cross, Mid-Michigan Chapter, Lansing, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the retiree medical program for employees in the clerical/warehouse unit during periods when the Chapter and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(b) Unilaterally suspending matching contributions to the 401(k) savings plan, and eliminating the pension plan for new hires, in the clerical/warehouse unit during periods when the Chapter and OPEIU Local 459 are engaged in negotiating for a collective-bargaining agreement and have not reached impasse.

(c) Unilaterally implementing a new health insurance program for employees in the clerical/warehouse unit during periods when the Chapter and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

(d) 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) On request, rescind the unlawful unilateral changes to the retiree medical program, the pension and 401(k) retirement programs, and the health insurance

[13] 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."

program for employees in the clerical/warehouse unit, and restore the programs that existed prior to the changes until such time as it has bargained with OPEIU Local 459 to an agreement or impasse.

(b) Make whole the employees in the clerical/warehouse unit for any loss of benefits and any additional expenses they incurred as a result of its unlawful unilateral changes, in the manner set forth in the remedy section of the judge's decision, as further amended in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director of Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(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 reimbursement due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Lansing, Michigan, copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 January 1, 2009.

(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.

[14] 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."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
An Agency of the United States Government

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 fail to provide or timely provide relevant and necessary information requested by OPEIU Local 459 or Teamsters Local 580.

WE WILL NOT unilaterally implement more stringent attendance policies for the collections and LCD units during periods when we and OPEIU 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally change our past practice of permitting OPEIU Local 459 to hold union meetings on the premises during periods when we and OPEIU 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT bypass OPEIU Local 459 and announce to you that we intend to transfer telerecruiter work from the LCD unit during periods when we and OPEIU are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT bargain with OPEIU Local 459 with a fixed mind and no intention of reaching an agreement with respect to the transfer of telerecruiter work from the LCD unit.

WE WILL NOT unilaterally change the retiree medical program for employees in the collections and LCD units during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally suspend matching contributions to the 401(k) savings plan for employees in the collection and LCD units during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally suspend matching contributions to the 401(k) savings plan for employees in the apheresis and MUA units during periods when we and Teamsters Local 580 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally eliminate the pension plan for new hires in the collections and LCD units when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally eliminate the pension plan for new hires in the apheresis and MUA units when we and Teamsters Local 580 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally implement a new health insurance program for employees in the collections and LCD units during periods when we are engaged in negotiations with OPEIU Local 459 for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally implement a new health insurance program for employees in the apheresis and MUA units during periods when we are engaged in negotiations with Teamsters Local 580 for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT direct you not to talk to your coworkers about pending disciplinary matters.

WE WILL NOT discipline you because you engaged in protected concerted activities and to discourage you from engaging in such activities.

WE WILL NOT discriminatorily or unilaterally deny you preapproved paid annual leave because you engaged in a strike or other protected concerted activities and to discourage you from engaging in such activities, or during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT discriminatorily or unilaterally deny guaranteed hours to you because you engaged in a strike or other protected concerted activities and to discourage you from engaging in such activities, during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

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

WE WILL furnish OPEIU Loca1 459 in a timely manner the information it requested on March 17 and 25, 2009, regarding the reduced demand for blood.

WE WILL furnish OPEIU Local 459 in a timely manner the information it requested on May 11, June 10, and July 31, 209, regarding employee health insurance.

WE WILL furnish OPEIU Local 459 the information it requested on May 19 and 21, 2010, regarding the proposed transfer of telerecruiter work from the LCD unit.

WE WILL, on request, bargain in good faith with OPEIU Local 459 with respect to the proposed transfer of telerecruiter work from the LCD unit.

WE WILL furnish Teamsters Local 580 in a timely manner the health insurance demographic information it requested on July 31, 2009, with the employees' names included.

WE WILL, on request, rescind the unlawful unilateral changes we made in the collections and LCD units to the no-fault attendance policy and to the practice regarding union meetings, and restore the status quo ante that existed prior to these changes until such time as we have bargained to an agreement or impasse with OPEIU Local 459 concerning the attendance policy and practice regarding union meetings.

WE WILL, on request, rescind the unlawful unilateral changes to the retiree medical program for employees in the collections and LCD units and restore the status quo ante that existed prior to the changes until such time we have bargained with OPEIU Local 459 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in the collection and LCD units by our suspension of matching contributions to the 401(k) savings plan, and restore the status quo ante that existed prior to the changes until such time we have bargained with OPEIU Local 459 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in the apheresis and MUA units by our suspension of matching contributions to the 401(k) savings plan, and restore the status quo ante that existed prior the changes until such time we have bargained with Teamsters Local 580 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in the collections and LCD units by our elimination of the pension plan for new hires, and restore the status quo ante that existed prior to the changes until such time we have bargained with OPEIU Local 459 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in the apheresis and MUA units by our elimina-

tion of the pension plan for new hires, and restore the status quo ante that existed prior to the changes until such time we have bargained with Teamsters Local 580 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in the collection and LCD units by our January 2010 implementation of a new health insurance program, and restore the status quo ante that existed prior to the changes until such time we have bargained with OPEIU Local 459 to an agreement or impasse.

WE WILL, on request, rescind the unlawful unilateral changes in apheresis and MUA units by our January 2010 implementation of a new health insurance program, and restore the status quo ante that existed prior to the changes until such time we have bargained with Teamsters Local 580 to an agreement or impasse.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to any unlawful discipline issued to employees in the collections and LCD units as a result of the unlawful unilateral change to the attendance policy, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the prior discipline will not be used against them in any way.

WE WILL make whole the employees in the collections, LCD, apheresis, and MUA units for any loss of benefits and any additional expenses they incurred resulting from our unlawful unilateral changes, plus interest.

WE WILL make whole Jennifer Clark, Jeannie Wright, Michael Turner, Judy Letts, Ron Silver, and Stephanie Coats for any loss of earnings and other benefits resulting from our unlawful denial of preapproved annual leave following the June 2010 unfair labor practice strike, with interest.

WE WILL make whole the following 89 employees for any loss of earnings and other benefits resulting from our unlawful denial of guaranteed hours following the June 2010 strike, with interest: Kristine Adler; Cheryl Albert; Jacquelyn Barton; Lynn Blake; Ruth Blakeslee; Michelle Brennan; Megan Brown; Kelly Brust; Carla Bunn; Karen Caramango; Robert Carpenter; Gail Case; Nichole Cheza; Jennifer Clark; Heather Diepen; Tara Eberhard; Brianne Edmonds; Jennifer Ellis; Stacy Emede; Kathleen Emig; Jereatha Flannery; Dechara Fountaine; Brenda Fundunburks; Mary Gardner; Russell Hager; Reynett Henderson; Chad Hier; May Hill; Robin Hilliard; Carly Hoffman; Freda Holley; Amber Holton; Amy Holysz; Jason Hruskach; Jaiml Johnson; Diana Jones; Penny Jugovich; Patsy Kaiser; Garred Kasprzycki; Eric Kendziorski; Patti Ketelaar; Heather Keyton; Angela Kinney; Sharron Kirkby; Michelle Lahti; Sandra Lalumandiere; Joshua Lanning; Minette Lefkiades; Judy Letts; Constance Longcore; Heather Lytle; Elijah McIntosh; Janet Michael; Kerni Michaud; Tonia Miles; Barbara Moore; Emily Nichols; Laurel Perkins; Jennifer Pogue; Kathleen Poirot; Steven Prchlik; Sharon Proctor; Ashley Ramsey; Lisa Reeves; Joan Rogers; Julianne Ruhstorfer; Sara Sackman; Rita Serva; Lisa Shute; Ronald Silver; LaShawnda Spears; Holly Spring; Christine Stafford; Rebecca Starr, Sandra Steggerda; Karl Sternberg; Christopher Summers; Robert Swicker; Lesley Thibault; Teresa Thomas, Rachel Thrush; Nancy Topel; Kelly Tracy; Michael Turner; Brigitte Vandebroek; Carol West; Kelly White; Jeannie Wright; and Dale Wyman.

WE WILL, within 14 days of the Board's order, remove from our files any reference to the unlawful written "verbal" warning we issued to Lashawnda Spears on April 30, 2010, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

THE AMERICAN RED CROSS, GREAT LAKES BLOOD SERVICES REGION

The Board's decision can be found at www.nlrb.gov/case/07–CA–052033 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

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

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 unilaterally change the retiree medical program for the clerical/warehouse unit during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally suspend matching contributions to the 401(k) savings plan, or eliminate the pension plan for new hires, in the clerical/warehouse unit during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

WE WILL NOT unilaterally implement a new health insurance program for the clerical/warehouse unit during periods when we and OPEIU Local 459 are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

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

WE WILL, on request, rescind the unlawful unilateral changes made to the retiree medical program, the pension and 401(k) programs, and health insurance programs in the clerical/warehouse unit, and restore the status quo ante that existed prior to the changes until such time we have bargained with OPEIU Local 459 to agreement or impasse.

WE WILL make whole the employees in the clerical/warehouse unit for any loss of benefits and any additional expenses they incurred resulting from our unlawful unilateral changes, plus interest.

THE AMERICAN RED CROSS, MID-MICHIGAN CHAPTER

The Board's decision can be found at www.nlrb.gov/case/07–CA–052033 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Dynn Nick, Esq. and *Robert A. Drzyzga, Esq.*, for the General Counsel.

Michael J. Westcott, Esq. (Axley Brynelson, LLP), and *Fred W. Batten, Esq. (Clark Hill, PLC)*, for the Respondents.

Tinamarie Pappas, Esq. (Law Offices of Tinamarie Pappas), for Charging Party OPEIU Local 459.

Wayne A. Rudell, Esq. (Rudell & O'Neill, PC), for Charging Party Teamsters Local 580.

DECISION*

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this consolidated proceeding alleges that the Great Lakes Blood Services Region and the Mid-Michigan Chapter of the American National Red Cross have violated Section 8(a)(1), (3), and/or (5) of the Act in numerous respects since November 2008, shortly before their most recent labor agreements with OPEIU Local 459 and/or Teamsters Local 580 expired in early 2009.[1] Allegations against the Region and/or the Chapter include failing to timely provide requested information, unilaterally changing various benefits and past practices, failing to bargain in good faith with respect to certain subjects, discriminatorily disciplining a union steward, and unilaterally and discriminatorily denying accrued benefits to employees who had engaged in a strike.[2]

* Corrections have been made according to an errata issued on May 31, 2011.

[1] The allegations are based on charges and amended charges filed and served on various dates from April 23, 2009, through September 8, 2010, and are set forth in a Fourth Consolidated Amended Complaint (fourth complaint) issued on September 10, 2010 (GC Exh. 1(dddd)), as further amended during the hearing (Tr. 9–14, 140–141, 350–351, 1978–1979; see also Tr. 773–777).

[2] The Respondents' answers to the fourth complaint (GC Exhs. 1(nnnn) and 1(oooo)) assert that the Regional Director's consolidation of the cases against them was improper. However, the chief administrative law judge previously denied the Respondents' motions to sever the cases on March 30, 2010 (GC Exh. 1(sss)), after issuance of the second complaint, and the Respondents did not seek special permission to appeal that ruling with the Board. Nor did they renew their motions

Following a prehearing conference, the cases were tried before me on 11 days over a 2-month period from September 27 through December 2, 2010, in Lansing, Michigan. Thereafter, on March 8, 2011, the General Counsel, the Charging Party Unions, and the Respondents filed posthearing briefs.[3]

After considering the briefs and the entire record,[4] for the reasons set forth below I find that a preponderance of the record evidence supports most, but not all, of the General Counsel's allegations.

FINDINGS OF FACT

I. JURISDICTION

The Respondent Region collects, processes, and distributes blood and related services. The Respondent Chapter provides relief to victims of disasters and helps people prevent, prepare for, and respond to emergencies. Both have offices in Lansing and facilities throughout Michigan. The complaint alleges, the Respondents admit, and I find that the Respondents each annually derive over $250,000 in revenue and sell and ship from their Lansing offices and facilities goods valued over $50,000 directly outside Michigan, and that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See, e.g., *Dane County Chapter, American National Red Cross*, 224 NLRB 323 (1976). They also admit, and I find, that Charging Parties OPEIU Local 459 and Teamsters Local 580 (hereinafter OPEIU and Teamsters) are labor organizations within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The American National Red Cross (ANRC) is a congressionally chartered organization with a headquarters in Washington, D.C. and approximately 36 regions and 700 chapters around the country. As indicated above, the regions provide blood services, and the chapters provide disaster relief and emergency services. (Tr. 1299–1300; GC Exh. 1(lll) (attachments); CPO Exh. 10.)

The Respondents in this case are a region and a chapter located in Michigan. Both have their own IRS Employer Identification Numbers (Tr. 1761–1762), and are the alleged and admitted employers in this proceeding.

The Charging Parties are two labor unions that represent certain of the Respondents' employees in five separate units. The OPEIU represents the Region's collections employees and laboratory/clerical/distribution (LCD) employees, and the Chapter's clerical/warehouse employees. The Teamsters represents the Region's apheresis employees and mobile unit assistants (MUAs).

The most recent collective-bargaining agreements between the Respondents and the Unions covering the five units expired in early 2009. The OPEIU agreements with the Region and the Chapter were effective by their terms through March 30 and 31, 2008, but rolled over for another year in the absence of a reopener (GC Exhs. 2–4, 23–24; Tr. 261, 393, 668–669, 687, 743). The Teamsters agreements with the Region were effective through April 30, 2009 (GC Exhs. 5, 6).

The Region and the OPEIU began negotiations for successor contracts in late February 2009, about a month before the old contracts expired. The separate negotiations between the Region and the Teamsters began a few months later, in late April 2009. The first Chapter bargaining session with the OPEIU was in May 2009.

The chief negotiator/spokesperson for the Region and the Chapter with respect to all five contracts was Sabin Peterson, the director of labor relations for the ANRC. The chief negotiators for the Unions regarding their respective contracts were Lance Rhines, the service representative for the OPEIU, and Lynn Meade, the business representative for the Teamsters.

Over the next 2 years, the parties held numerous bargaining sessions, either directly or with the assistance of Federal and/or state mediators.[5] Unfortunately, the negotiations were unsuccessful; no new agreement had been reached in any of the five units as of the date of the hearing in this proceeding.

III. ALLEGED UNFAIR LABOR PRACTICES

As indicated above, the complaint alleges numerous 8(a)(1), (3), and (5) violations by the Region and/or Chapter with respect to one or more of the units beginning shortly before and continuing throughout the negotiations. Each of these allegations is addressed below, starting with the 8(a)(5) allegations in early 2009.

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to sever after issuance of the fourth complaint (which differs significantly from the second), at the hearing (during which the complaint was further amended), or in their posthearing briefs. Thus, I can only speculate what the Respondents' arguments might now be. In any event, I find that the Respondents have failed to show that consolidation was an arbitrary abuse of the Regional Director's discretion, or that they suffered any prejudice as a result of the consolidation. See generally *Service Employees Local 87 (Cresleigh Mgmt.)*, 324 NLRB 774, 774–776 (1997).

[3] The Respondents' counsel filed separate briefs, divided by allegation/issue. The brief filed by attorney Westcott is cited as "West. Br.", and the brief filed by attorney Batten as "Bat. Br."

[4] Where the record revealed substantial differences between witnesses as to significant matters, I have specifically addressed them. As for other, less important differences or matters, it may accurately be inferred that I credited the testimony cited, to the extent it supports my factual findings, and discredited any contrary testimony. In making my credibility findings, I considered, as appropriate, not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, and whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts. I have also considered "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole.'" *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. em. 56 Fed. Appx. 516 (D.C. Cir. 2003), quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996).

[5] See GC Exh. 39. There were relatively few bargaining sessions for the OPEIU chapter unit. It is a very small unit, with only about 6 or 7 employees (compared to 70–75 in the LCD unit and about 165 in the collections unit), and usually follows what the OPEIU region units do. See GC Exh. 54; Tr. 259, 561–562, 734–735, 1757. There are approximately 12 employees in the Teamsters apheresis unit, and 40 in the Teamsters MUA unit (Tr. 749).

A. The 8(a)(5) Allegations

1. Region's failure to timely provide requested information

The complaint alleges that the Respondent Region either refused to provide, or unreasonably delayed providing, certain information requested by the OPEIU and Teamsters during the contract negotiations.

a. Refusal to provide OPEIU with information requested on March 17 and 25, 2009, regarding reduced demand for blood

The first of these allegations is that the Region unlawfully failed and refused to provide the OPEIU with information it requested on March 17 and 25, 2009, regarding the reduced demand for blood. For the reasons set forth below, I find that a preponderance of the evidence supports this allegation.

At the very first negotiating session between the Region and the OPIEU for both units on February 24, 2009, Peterson advised that there were going to be no improvements in the contracts as everybody was "worth less this year than last due to the economy" (Tr. 338, 364–366). He continued with this message at the next session on March 5 for the collections unit. Indeed, he advised that the Red Cross would "need some significant concessions" from the employees. In support, he cited certain "pressures" on the Red Cross. Specifically, he cited the poor economy and resulting lower demand for blood (which he said occurred because people were losing insurance and putting off having medical procedures performed). He also indicated that competitors were charging less than the Red Cross for blood and were going after the Red Cross' donors and hospitals. (CPO Exh. 7; Tr. 366–369, 381–383, 549–550.)

In response to these statements, on March 17 Rhines sent a letter to Peterson requesting information, on behalf of the collections unit, regarding the amount of blood products purchased from, and exported by, the Region over the last 2 years; the projected amount of blood products to be purchased from, and exported by, the Region over the next 2 years; and the current price for blood products purchased from the Region (GC Exh. 42). On March 25, Rhines sent an identical letter to Peterson on behalf of the LCD unit (GC Exh. 43), as Peterson had made clear that concessions would be sought in that unit as well (Tr. 371.)

On March 27, the Region submitted a written response to the Union (Tr. 1546–1547). The response denied that Peterson had ever linked the reduction in demand for Red Cross products to the concessions sought by the Region, i.e. that he had ever stated that a major reason for seeking concessions was that the economy had caused a reduction in the demand for blood. The response further stated that:

> To the extent you have misunderstood our position, we will be explicit. The concessions we are seeking are unrelated to the current economic recession or to demand for our products. Rather, we are seeking concessions because we are unwilling to continue making payments for what we see as nonproductive or nonvalue added activities.

The response advised that the requested information was therefore "not relevant to bargaining." It also asserted that the information was "confidential, proprietary data." Accordingly, it denied the Union's request for both reasons. (GC Exh. 44.)[6]

In agreement with the General Counsel, I find that the Region unlawfully refused to provide the requested information. Contrary to the Region's contention, the information was clearly relevant to bargaining; it became so when Peterson specifically cited the reduced demand for blood and price competition as support for the Region's need for significant concessions. See generally *Kraft Foods North America*, 355 NLRB 753, 755 fn. 6 (2010), and cases cited there. See also *General Electric v. NLRB*, 466 F.2d 1177, 1184 (6th Cir. 1972).[7] The Region's subsequent denial that Peterson had done so—after receiving the Union's information requests—is contrary to a preponderance of the credible evidence, including the Region's own, detailed bargaining notes and the Red Cross' direct communications to employees during the same time period. See CPO Exh. 7 (Region's bargaining notes of March 5 session); and GC Exhs. 7 and 58 (October 2008 and April 2009 memos from ANRC CEO Gail McGovern notifying employees that certain "cost-cutting" changes in the existing medical and retirement plans were "essential" due to the economic downturn and expected decline in fundraising revenue and "softening in the demand for blood").

The Region's "explicit" statement in its March 27 response that the concessions it was seeking had no relationship to the economy or demand for blood, but were sought solely to increase productivity and value, is therefore equally incredible and unworthy of belief. Accordingly, it was insufficient and ineffective to shed the Region's duty to substantiate its original claims on request. See *Chemical Workers v. NLRB*, 467 F.3d 742, 752–754 (9th Cir. 2006); and *C-B Buick*, 206 NLRB 6, 7 (1973), enfd. in relevant part 506 F.2d 1086 (3d Cir. 1974).

The Region has also failed to show that it has a legitimate and substantial confidentiality interest in the information. Although it summarily asserted that the information was "confidential/proprietary data" in its March 27 response, it presented no evidence or argument in this proceeding to support that claim. See *Southern New England Telephone Co.*, 356 NLRB 338, 12 (2010), and cases cited there (blanket claims of confidentiality are not sufficient; the party asserting confidentiality must show that such interests are legitimate and substantial). Further, as noted by the General Counsel, it is uncontroverted that the Region's CEO had voluntarily disclosed specific pricing information to Rhines in the past (Tr. 375). Moreover, it is also uncontroverted that the Region never made any effort to seek an accommodation with the Union to protect its asserted confidential/proprietary interests (Tr. 381). Contrary to the Region's unsupported contention in its posthearing brief, the

[6] The response on its face indicates that it was responding to the March 25, 2009 information request on behalf of the LCD unit. Peterson testified that he had prepared a similar response to the identical March 17 request on behalf of the collections unit, but he inadvertently forgot to send it, and the Union never questioned him further about it (Tr. 1546–1547).

[7] The General Counsel does not contend that the subject information was presumptively relevant.

Region, not the Union, had the duty to seek an accommodation. See id.

b. Delay providing Teamsters with information requested on May 11, June 10, and July 31, 2009 regarding employee health insurance

The General Counsel also alleges that the Region unlawfully delayed providing the Teamsters with information it requested on May 11, June 10, and July 31, 2009, regarding employee health insurance. For the reasons set forth below, I find that the Region violated the Act in this regard as well.

Each year, all Red Cross employees, both union and nonunion, are offered a choice of medical insurance plans. This occurs every October/November, during a so-called "open enrollment" period, when each employee is provided a list of available options for the upcoming calendar/benefit year (Jan. 1–Dec. 31) and allowed to select the particular options he/she desires. Planning for the annual open enrollment typically begins in the spring, i.e. in February or March. The ANRC's benefits staff reviews the most recent claims data and trends to establish rates for the self-insured plans. It also collects plan design changes and rates from the fully insured plans. In addition, the staff attempts to negotiate more favorable rates with the plan administrators. The target date to have all changes set is July. August is then devoted to "unit selection," during which each region and chapter identifies the options it will provide to its employees. The "open enrollment" materials are then prepared in September and early October for distribution to the employees.

Starting with the 2008 benefit year, the open-enrollment offering was referred to as "BenefitsAdvantage." It included three national Blue Cross Blue Shield self-insured options: an EPO (exclusive provider organization) and a standard and a premium PPO (preferred provider organization). It also included additional plans limited to certain geographical areas and other fully insured options pursuant to local collective-bargaining agreements. Thus, pursuant to the provisions of the Region's 2005-2009 collective-bargaining agreements with the Teamsters covering the MUA and apheresis units, employees in those units were offered several options in addition to the three national EPO and PPO options. (Tr. 204–206, 221–226, 239–246, 908–910, 1401–1406, 1411–1413, 1720–1721, 1800–1810, 1839–1840; GC Exhs. 5, 6, 182.)

However, at the first negotiating sessions for the MUA and apheresis units in late April 2009, Peterson advised the Union that it was very cumbersome for the Red Cross to have hundreds of healthcare contracts all over the country; that the Red Cross wanted to have just one national plan or group of plans that all employees participated in. He therefore proposed replacing the insurance provisions in the expiring contracts with so-called "me too" language providing that the unit employees would be "eligible to participate in the same group insurance plans, under the same terms and conditions, as offered to the Region's non-bargaining unit employees" (GC Exhs. 92, 97; Tr. 794–795, 999).

Thereafter, on May 11, 2009, Meade sent a letter to Peterson, on behalf of both units, requesting certain information relating to health insurance. Specifically, the letter requested "summary plan documents and costs for each of the health care plans offered to any management and nonmanagement personnel employed by the American Red Cross." (GC Exh. 101.)

Peterson responded on June 10 (GC Exh. 108). He stated that the Union's request for information regarding nonunit employees was not presumptively relevant; however, the request would be reconsidered if the Union explained how such information was relevant. As for the other requested information, he noted that the Red Cross had already provided the Union with the 2009 benefit-plan information applicable to Region employees in March, before bargaining began (R. Exh. 40).[8] He also noted that the Union had been provided with a disk containing all the updated group insurance summary plan descriptions (SPDs) on May 21 (GC Exh. 102). Finally, he advised that future rates and costs for the 2010 plans would be provided when the information became available after July 1.

Meade replied later that day with another information request (the second request at issue here). She again requested "costs for each healthcare plans offered to all American Red Cross employees," including the "total cost of the plans that is charged to the American Red Cross." She explained that "information of cost(s) for union and non-union employees and management is relevant to these bargaining negotiations to be able to determine total cost(s) per employee in [sic] able to justify standardization of costs and to be able to compare what is currently being offered with any potential cost savings plans." (GC Exh. 109; Tr. 824–828.)

Peterson responded later the same day. He reiterated that the Red Cross would have no additional information to provide the Union until after July 1. (GC Exh. 110.)

Thereafter, on July 24 (by email) and 29 (by hand-delivery), Peterson did, in fact, provide Meade with information on the national EPO and PPO plans that the Region intended to offer its employees during the upcoming open enrollment for the 2010 benefit year. The information included both the plan designs and a "cost sharing strategy document" setting forth the employer's percentage share of the premium costs. Peterson advised Meade that she could calculate the employer and employee shares of the premiums herself based on this information. (R. Exhs. 25–26, 28–29).[9]

[8] Meade initially testified that she could not recall being provided with this information (Tr. 1045). However, the record shows that the Region's Human Resources (HR) Supervisor, Timothy Smelser, advised her by email on March 9 that the insurance binder was complete and available (R. Exh. 30). Further, although Meade refused to admit that she received Smelser's email, testifying only that she "might" have received it (Tr. 1046), on further examination she admitted that she did go and pick up the insurance information (Tr. 1047). Accordingly, to the extent there is any ambiguity or conflict in the record on this question, I credit Smelser and find that Meade did, in fact, receive the information from him in March (Tr. 1939, 1981).

[9] Meade denied or refused to admit that she received this information from Peterson or anyone else in management, either by email or in person, claiming that she only got it because Rhines forwarded his copy to her (Tr. 846–847, 1023–1024, 1051, 1113, 1031, 1036, 1042, 1140; GC Exh. 115). However, I discredit Meade's testimony in this regard as it is contrary to both the cited documentary evidence and inherent probabilities. Further, she has a history of claiming that she did not

Peterson's response, however, did not include information on other regional or local plans that would be offered to other Red Cross employees around the country for 2010. Accordingly, a week later, at the next bargaining session on July 31, Meade submitted another information request (the third request at issue here). The request specifically asked for "any and all of the health insurance plans that will be offered to any American Red Cross employee starting January 1, 2010 regardless of region or locality," including "what each and every plan is and the cost to the American Red Cross and what the cost-sharing fee structure [is] for each and every employee."

Meade's July 31 request also sought two additional types of information: 1) enrollment information, i.e. the total number of American Red Cross employees enrolled in any local, regional or national health insurance program";[10] and 2) demographic information on every employee currently enrolled locally, regionally, and nationally, including the employee's name, social security number, age, sex, and race. It explained that the above information was necessary "in order to do an accurate cost analysis of health insurance plans" and to "evaluate the Employer's proposal with regard to healthcare and to formulate counter-proposals." (GC Exh. 162; see also Meade's follow-up email the same day, GC Exh. 127.)[11]

The Union received no response to this request until the parties' next meeting on August 24. Peterson at that time advised Meade that it would be "very difficult" to obtain such information (Tr. 881). Eventually, however, on October 23 (the Friday before open enrollment for 2010 began), the Region's human resources (HR) Manager, William Smith, emailed Meade the requested information regarding plan designs and rates and enrollment data. The information revealed that, in fact, the ANRC would be still be offering several regional fully-insured Kaiser plans in certain states or regions for 2010, in addition to the national EPO and PPO plans. When Meade inquired about why the ANRC was doing this if it wanted all employees to be in the same plan or group of plans, Peterson advised that the ANRC wanted to continue offering the Kaiser plans where it was a good value. (GC Exhs. 137–150; Tr. 953–961, 998, 1531–1534, 1571).

Approximately a month later, on November 24 (after open season had ended), Peterson emailed Meade the demographic information as well. It included a list of every Red Cross employee (albeit by a code number rather than by name), and identified their gender, date of birth, type of medical coverage, and state. Regarding the delay, Peterson explained that he did not realize the Union was still requesting the data, but was advised by legal counsel that it was.[12] (GC Exhs. 8, 151, 151(a); Tr. 964–975, 1578–1581.)

Based on the foregoing facts, in agreement with the General Counsel, I find that the Region unlawfully delayed providing the information regarding all Red Cross employees that the Union requested in each of its three requests on May 11, June 10, and July 31. First, the Region itself made the information regarding health insurance plans in other geographical areas relevant by asserting, in support of its "me too" proposal at the first bargaining session, that the ANRC wanted to eliminate all such local plans around the country and have all Red Cross employees participate in the same national plan or plans. Both Peterson and Anna Shearer, the ANRC's vice president of HR enterprise services, acknowledged that one of the reasons the Region wanted this was to cut costs and obtain greater value for the money (Tr. 1408, 1599). In these circumstances, the relevance of the requested plan design, cost, enrollment, and demographic information in other geographical areas should have been apparent to the Region without requiring any further explanation from the Union (especially since, as indicated above, the ANRC was planning to offer several regional plans in 2010 in addition to the national EPO and PPO plans). In any event, the Union's explanations on June 10 and July 31 why it was seeking such information were sufficient to demonstrate the relevance of its request. See generally *Castle Hill Health Care Center*, 355 NLRB 1156, 1193 (2010), and cases cited there.

Second, the Region has failed to provide an adequate explanation for the long delays in providing the information to the Union. As indicated above, the Region did not provide the requested information about plan designs and costs for all Red Cross employees (for either 2009 or 2010) until October 23—over 5 months after Meade's initial May 11 request, over 4 months after her second, June 10 request, approximately 3 months after the 2010 information became available in July, 2-1/2 months after the Union filed the unfair labor practice charge on July 31, and the last business day before open enrollment for 2010 began. It also did not provide the enrollment data until October 23, 2-1/2 months after it was requested. And it did not provide requested demographic data until November 24, 4 months after it was requested, a month after the Union filed its amended unfair labor practice charge on October 30, and after the open season had ended. The Region's assertion on August 24 that the information was very difficult to obtain has never been supported with any explanation or evidence. Further, it is belied, at least in part, by Peterson's admission in his November 24 email that he did not even begin compiling the demographic information until the Region's attorney reminded him (most likely after the amended unfair labor practice charge was filed on October 30) that the Union was still waiting for it.

receive emails from management, only to later admit that she did so. Compare R. Exh. 36 with R. Exh. 37 and Tr. 1054–1055. See also fn. 8, above.

[10] Meade's original, May 11 request had asked for the enrollment data in plans offered to the Region's employees, and Peterson's June 10 response provided that information. Thereafter, on July 27, Meade also requested national enrollment information (GC Exh. 116), and the Region's HR Manager, William Smith, emailed her the enrollment data for the national PPO and EPO plans the following day (GC Exh. 118). However, Smith did not provide enrollment data for other plans offered to Red Cross employees around the country (Tr. 845).

[11] The same day, the Union filed the unfair labor practice charge in Case 07–CA–52282 alleging that the Region was unlawfully refusing to provide information regarding health benefits (GC Exh. 1(g)).

[12] The Union had filed an amended unfair labor practice charge on October 30 regarding the Region's failure to timely provide information (GC Exh. 1(y)).

Accordingly, I find that the Region violated the Act as alleged. See, e.g., *Comar, Inc*., 349 NLRB 342, 353 (2007) (4-month delay); *El Paso Electric Co.*, 355 NLRB 428, 458–464 50–51 (2010) (3-month delay); *Bundy Corp*., 292 NLRB 671 (1989) (2 1/2 month delay); and *Woodland Clinic*, 331 NLRB 735, 737 (2000) (7-week delay).[13]

c. Failure to include the employees' names with the demographic information provided to the Teamsters in November 2009

As discussed above, the Region not only delayed providing the requested health insurance demographic information to the Teamsters, but it also failed to include with that information the names of any of the Red Cross employees, unit or nonunit. Rather, each employee was identified only by a coded number. The General Counsel alleges that the Region's failure to include the requested names was unlawful.[14] For the reasons set forth below, I find merit in this allegation as well.

The Region makes essentially two arguments with respect to this allegation. First, it argues that the employees' names are not relevant to their stated purpose; i.e. that names are "not demographic in nature—no insurance proposals are influenced by an individual's name." (Bat. Br. 9.) However, Meade explained why the Union needed the information when she made the request on July 31. She provided a similar explanation at the hearing. Specifically, she testified that the names would help the Union identify exactly which employees of which region or chapter were in which plans. Although the information provided by Peterson included each employee's state, there could be differences in plans offered within each state. Together with the various other information requested, this information would then permit the Union to do a comprehensive analysis of all the various plans and to propose its own regional and/or national plan or plans. (Tr. 872–875; 963–966.) The Region has not offered any reason why this explanation is insufficient. Accordingly, I find that the information is relevant.

Second, the Region argues that the employees' names were properly omitted to preserve privacy. However, the Region did not specifically express this concern to the Union at the time. Nor has it provided any explanation in this proceeding why merely disclosing what medical plan an employee has chosen raises legitimate and substantial privacy concerns. Indeed, although the open enrollment documents themselves (GC Exhs. 182, 183) discuss employee privacy rights under the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[15] the Region does not cite those documents, HIPAA, or any other evidence or legal authority, in support of its position. Accordingly, I find that the Region has failed to carry its burden. See *Comar*, 349 NLRB at 351, 355 (rejecting employer's argument that disclosing nonunit employees' health benefit and insurance information by name would violate their privacy, as there was "no reason to believe that disclosure of the names would somehow reveal medical history or other sensitive information about the individuals"; the employer "did not show that nonunit employees objected to having the information regarding their individual terms and conditions of employment shared with the Union"; and there was no evidence showing that the employer "generally made special efforts to keep such information secret" within its facility, "or that nonunit employees had a reasonable expectation of privacy with respect to such information"). See also *Woodland Clinic*, 331 NLRB at 737; and *River Oak Center for Children*, 345 NLRB 1335, 1336 & fn. 12 (2005), enfd. 273 Fed. Appx. 677 (9th Cir. 2008) (unpub.).

d. Failure to provide OPEIU with information requested on May 19 and 21, 2010, regarding transfer of telerecruiter work

Finally, the complaint alleges that the Region unlawfully failed to provide certain information requested by the OPEIU on May 19 and 21, 2010. The requested information concerned the Region's announced plans to transfer telerecruiting work from the LCD unit to one or more other facilities; specifically, a copy of a power point presentation regarding the transfer, and the current number, wages, and benefits of employees in the telerecruitment departments in the three other facilities under consideration. The Region admitted this allegation at the hearing (Tr. 1487, 1498). Accordingly, I find that the Region violated the Act as alleged.

2. Unilateral changes in benefits and past practices

As indicated above, the complaint also alleges that the Region and/or the Chapter violated Section 8(a)(5) of the Act by making various unilateral changes to certain benefits and past practices beginning in late 2008.

a. Unilateral implementation of no-fault attendance policy in November 2008 (Region)

The first allegation is that the Region unlawfully implemented a "no-fault" attendance policy in the collections and LCD units on November 17, 2008. More specifically, the General Counsel alleges that the Region began more strictly enforcing its existing attendance policy by disciplining unit employees for only three or four previously unscheduled absences or tardies

[13] The scope of the General Counsel's allegations, i.e. whether the General Counsel is also alleging that the Region unlawfully delayed providing information on plans offered to the Region's unit and nonunit employees, is somewhat unclear from the complaint and posthearing brief. In any event, to the extent the General Counsel is alleging that the Region unlawfully delayed providing such information, I find that the facts fail to support that allegation.

[14] The demographic information provided by Peterson also did not include each employee's social security numbers or race. However, neither the complaint nor the General Counsel's posthearing brief alleges or asserts that the Region unlawfully failed to include this information. Although the complaint does appear to allege that the Region unlawfully failed to include each employee's age and gender, this information was, in fact, included with the information Peterson emailed Meade in November (GC Exhs. 151 and 151(a)), and the General Counsel's posthearing brief does not address those issues either.

[15] Under the heading "Your Privacy Rights," an attachment to the enrollment materials states that protected health information (PHI) "may" include the fact that an employee is enrolled in or has participated in a plan.

regardless of the reason (for example, even if the absence was for medical reasons and the employee had accrued sick leave) (Tr. 1961, 1966, 1975). The General Counsel alleges that the Region was obligated to provide the OPEIU with advance notice and an opportunity to bargain over the change and its effects, but failed to do so.[16] For the reasons set forth below, I find that this allegation is supported by a preponderance of the evidence.

The Board has repeatedly held that an employer's more stringent or consistent enforcement of attendance and other personnel rules that it previously enforced in only a lax or sporadic manner constitutes a significant change in mandatory terms and conditions of employment requiring bargaining. See, e.g. *United Rentals, Inc*., 350 NLRB 951, 952 (2007); *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017 (2005), enfd. in relevant part 468 F.3d 952, 962 (6th Cir. 2006); *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), enfd. in relevant part 939 F.2d 361, 372–373 (6th Cir. 1991); and *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016–1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). The Region does not take issue with this legal principle; nor does it contend that it actually gave the Union advance notice and an opportunity to bargain. Rather, it denies that it ever implemented a new, no-fault attendance policy or changed how the attendance policy was enforced (Tr. 1967–1968; Bat. Br. 16.)

The record evidence, however, indicates to the contrary. Thus, Kimberly Heintz, the Region's collections manager in late 2008, specifically acknowledged to Rhines that management had instituted a new policy of disciplining employees for every three or four occurrences, and that there would be no excused absences under the policy.[17] The Region's HR Supervisor, Timothy Smelser, subsequently acknowledged this to Rhines as well during a meeting regarding the discipline of an employee for attendance problems.[18]

The Region also communicated directly with its employees about the new policy during this period. Thus, on October 8, 2008, the Region sent a memo to all employees in the Teamsters' MUA unit specifically acknowledging that unscheduled leave was being used "frequently" and that "management has not [exercised] their right to enforce the use of unscheduled" leave under the attendance policy set forth in the employee handbook.[19] The memo stated that "management's expectation is that the [leave] will be scheduled"; that if leave is called in after the schedule is posted, it will "automatically" be considered as unscheduled leave; and that "excessive unscheduled [leave] will be subjected to progressive discipline." It notified the employees that it would "start enforcing the above guidelines on November 10, 2008." (CPO Exh. 6.)[20]

The Region sent a similar memo regarding "unscheduled leave" to the employees in the OPEIU collections unit on December 9, 2008. Again, the memo acknowledged that there had been "excessive unscheduled leave"; that management had not been "consistent in the supervision of staff calling in for unscheduled leave"; and that "the need to make further process improvements to stabilize the collections team concept has become evident." It stated that "the expectation of management is that requests for time off will be scheduled on a routine basis"; that "scheduled leave requests need to be submitted to the scheduler on or before the Monday of the preceding week before the next schedule is to be posted"; and that "in the event these requests are not approved and/or the staff calls in after the schedule is posted, then these occurrences would be considered as unscheduled leave." It notified the employees that "we will start enforcing the above guidelines for the schedule posted for 1/12/09, and therefore all leave requests must be submitted for approval by 12/22/08." (GC Exh. 34).[21]

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[16] The General Counsel's posthearing brief (pp. 140–141) also appears to argue that the change violated the sick-leave and family-leave provisions of the OPEIU collective-bargaining agreements (which were still in effect at the time). However, the complaint does not allege that the change violated the contract or could not be implemented without the OPEIU's consent, i.e. it does not contain an 8(d) allegation. Further, the General Counsel did not otherwise give sufficient notice of this theory during the trial, and the issue was therefore not fully litigated. Accordingly, it is both unnecessary and inappropriate to address the issue. See *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 fn. 5 (2007).

[17] The Region argues that Rhines' uncontroverted testimony about his conversation with Heintz should be discredited because he said the conversation occurred in January 2009 (Tr. 302, 305, 603–605, 732), but Heintz had voluntarily terminated her employment with the Region on October 29, 2008 (R. Exh. 2; Tr. 1956). However, given the independent, documentary evidence supporting the allegation, I find it more likely that Rhines' memory of dates was simply imprecise due to the passage of time (approximately 2 years) since the event.

[18] Again, it appears Rhines may have been mistaken regarding when this conversation occurred. He testified that it occurred during a March 2009 grievance meeting over a counseling that had been issued to an employee in the LCD unit (Villareal) in November 2008 for "three sick occurrences" and one tardy over the previous 3 months (Tr. 300–301, 306, 314–317, 601, 732; GC Exhs. 29, 30, 32.) However, a series of emails submittted into evidence by the General Counsel (GC Exh. 32) indicate that the conversation more likely occurred during a similar meeting on January 5, 2009 regarding a different employee (Owens), and that Rhines subsequently asked Smelser at the March 2009 Villareal meeting to verify whether there was, in fact, a no-fault attendance policy. In any event, I find that the conversation occurred sometime in early 2009. Indeed, Smelser never specifically denied that the conversation occurred (although he had previously denied that the Region implemented a "no-fault" attendance policy when he denied the Villareal grievance at the third step on April 10, 2009 (GC Exh. 36; Tr. 322)).

[19] The policy, which was quoted in the memo, states: "The following offenses are not acceptable while performing Red Cross business: - Excessive absenteeism, tardiness, or abuse of sick leave . . ." (GC Exh. 37).

[20] The complaint does not allege stricter enforcement of the attendance policy in the Teamsters MUA unit. However, the memo generally supports Rhines' testimony and the General Counsel's contention that the Region had been lax in enforcing the attendance policy set forth in its employee handbook, and decided in late 2008 to change this practice.

[21] Smelser had emailed Rhines a copy of this memo earlier the same day for "review." Rhines responded that he had a "concern" about "the Employee Handbook vs. the Contract," but "you certainly have the right to address proven abuses, either way," and the Union would "take them as they come." (R. Exh. 4.) However, the memo did not specifi-

The record indicates that, a few weeks later, on December 17, Smith, the Region's HR manager, also sent an internal management email to a collections supervisor (Vasuki Johnson) discussing how to interpret and apply the attendance policy set forth in the handbook. Smith advised her that "a general guideline on the definition of excessive absenteeism is that any combination of three or more occurrences (unexcused absences and/or tardies) in a rolling 12-month cycle is considered cause for disciplinary action," and that "an unexcused absence is any absence that was not scheduled and approved prior to the schedule going up unless the supervisor otherwise approves a change and/or switch." (GC Exh. 88.)

At the hearing, Smith attempted to minimize the significance of this internal memo, stating that he was just explaining to Johnson, who had recently returned to the Region after several years, what the Region's "consistent" policy was (Tr. 2054–2055). However, he admitted that the Region had been seeking to implement such a no-fault attendance policy for some time; indeed, the Region had previously proposed it to the Union in 2006 or 2007 and the Union rejected it (Tr. 2057). Further, as indicated above, the Region's own memos to employees in late 2008 indicate that the Region's past interpretation and/or enforcement of its attendance policy had not been "consistent."[22] Accordingly, for all the foregoing reasons, I find that the Region's unilateral decision, in late 2008, to begin consistently and automatically disciplining employees for only three or four instances of unscheduled leave, regardless of the reason, violated Section 8(a)(5) of the Act as alleged.[23]

cally state that only three or four instances of unscheduled absences or tardies would warrant discipline regardless of the reason, and there is no contention that this exchange constituted advance notice to, or bargaining with, the Union over the decision to implement such a new policy.

[22] The record indicates that the Region had also issued LCD-unit employee Villareal a counseling approximately 6 months earlier, on May 1, 2008, because she had a total of four tardies and sick absences during the previous month alone (R. Exh. 3). However, the record does not reveal whether the counseling was successfully grieved or sustained. In any event, the fact that Villareal was counseled in May 2008 in arguably similar circumstances is not particularly significant under the above-cited legal precedent given that the Region's communications to both its employees and the Union in late 2008 acknowledged that the Region had not been consistently disciplining employees in such circumstances, and that it was going to "start" doing so.

[23] The Region's answer to the complaint (GC Exh. 1(oooo)) also asserts that this allegation is barred by the Section 10(b) 6-months limitations period. However, the Region has not pressed this affirmative defense in the Respondents' posthearing briefs. In any event, it is without merit. The OPEIU filed the charge alleging the violation on April 21, 2009 (GC Exh. 1(a)), within a few months of the Region's December 9, 2008 memo to the collections unit employees and Rhines' subsequent conversation with Smelser, and only a few weeks after the Region denied Villareal's step-three grievance challenging her November 2008 counseling (see fn. 18, above). Further, the Region has not met its burden of showing that the Union had "clear and unequivocal notice" of the violation outside the 10(b) period. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council v. NLRB*, 483 F.3d 628 (9th Cir. 2007); *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); and *Taylor Warehouse v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996).

b. April 2009 unilateral change in past practice regarding union meetings (Region)

The complaint also alleges that, on April 9, 2009, the Region unilaterally changed its past practice of allowing the OPEIU to hold union meetings on the premises. I find that this allegation is supported by a preponderance of the evidence as well.

As indicated above, it is well established that an employer may not make material and substantial unilateral changes in past practices involving mandatory subjects of bargaining—and this includes a past practice of allowing union meetings on the employer's premises. See *Dow Jones & Co.*, 318 NLRB 574, 576 (1995), affd. 100 F.3d 950 (4th Cir. 1996) (table). See also *New York Telephone*, 304 NLRB 183 (1991). Here, there is no dispute that the Region summarily denied the OPEIU's request to hold an upcoming union membership meeting on its premises in April 2009. Rather, the Region argues that there was no past practice of allowing the OPEIU to do so.

Again, however, the record indicates otherwise. Elizabeth McGwin, a 28-year member of the Union and a steward or alternate steward in the LCD unit since 2005, testified that the Union holds at least one or two membership meetings every year (whenever a vote needs to be taken); that the Union has always held membership meetings on the premises; and that the Region had never before denied permission to hold them on the premises (Tr. 209). Rhines essentially confirmed this, testifying that virtually all union meetings, except for an occasional picnic or meeting at a restaurant, are held on the premises; and that, although the Region had sometimes asked the Union to change the date or time, it had never actually denied the Union's request to hold a membership meeting on the premises (Tr. 286–287). Further, several union notices from Rhines' computer archive files were introduced into evidence indicating that membership meetings were, in fact, held on the premises in April, September, and November 2007, and February 2009 (GC Exhs. 25–27; CPO Exh. 5; Tr. 286).

Finally, HR Manager Smith admitted that he could only remember one time that he had denied a request: "a few years ago" when Rhines had wanted to use a room to hold a "fundraising meeting for a state senator candidate" (clearly not a typical union membership meeting to vote on internal union matters). (Tr. 2032.) Smith also admitted that there were no exigent circumstances preventing the Union from holding a membership meeting on the premises in April 2009. Indeed, he admitted that he denied the request only

> because we were in negotiations, and we had heard all kinds of conversation about past practices, and we didn't want to establish a past practice at that point in granting favors and using our facility with, at any point, any time . . . no choice on our end (Tr. 2032).

Perhaps recognizing the evidentiary problems with its primary argument, the Region alternatively argues that the Union waived its rights by failing to request bargaining after the request was denied. However, this argument is also without merit. The Region did not notify the Union that it intended to

change its past practice; it summarily denied the request and thereby effectively advised the Union that the practice had already changed (Tr. 212, 214; see also GC Exhs. 19–21). In short, as indicated by the General Counsel, the Region's response was a fait accompli. Thus, the Union was not required to request bargaining to preserve its rights under the Act. *Dow Jones*, 318 NLRB at 577.

Accordingly, in agreement with the General Counsel, I find that that the Region had a "regular and longstanding" practice of allowing union membership meetings on the premises, and that the employees "could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). I further find that the Region unlawfully failed to provide the OPEIU with advance notice and an opportunity to bargain before significantly changing this past practice by summarily denying, without any substantial business justification, its request to hold a union membership meeting on the premises in April 2009.

c. January 2009 unilateral change in retiree medical program (Region and Chapter)

The complaint also alleges that, on January 1, 2009, both the Region and the Chapter unilaterally discontinued the retiree medical program for current employees in the three respective OPEIU units who were not yet eligible for retirement, as well as for those employees hired thereafter. The complaint alleges that the Respondents were required to give the Union prior notice and an opportunity to bargain over the decision and the effects, and therefore violated Section 8(a)(5) by failing to do so.

The Respondents do not dispute that they made the alleged unilateral change effective January 1, 2009. Nor have they argued that the change did not materially and substantially modify a mandatory subject of bargaining.[24] However, they assert that the Union waived its rights because it had notice of the "proposed" change in late October 2008, approximately 2 months before it became effective, but admittedly failed to request bargaining. In support, the Respondents cite *KGTV*, 355 NLRB 1283 (2010); *Bell Atlantic Corp*., 336 NLRB 1076 (2001); and *Haddon Craftsmen*, 300 NLRB 789 (1990), review denied sub nom. *Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991) (table). (West. Br. 51–53.) For the reasons set forth below, I reject the Respondents' defense.

It is uncontroverted that neither the ANRC nor the Respondents directly notified the Union of the change; the Union only learned of the change from a union steward, shortly after the ANRC's president and CEO, Gail McGovern, sent an October 28, 2008 memo to all employees announcing both the January 1 change and a second change to occur on July 1, 2009 (discussed below). (Tr. 453, 665, 1816.) Further, the announcement to employees indicated that the final decision to modify the program had already been made by the ANRC. Thus, the subject line stated that the program had been "changed" and the announcement explained in some detail why the ANRC Board of Governors had decided that the changes were "necessary" (GC Exh. 58). In sum, the changes to the retiree medical program were announced to the employees, not the Union, and as a fait accompli, not as "proposed" changes.

The cases cited by the Respondents are therefore clearly distinguishable. Thus, in all three cases, the employer directly notified the union, and did so before (*Haddon*) or at approximately the same time (*KGTV* and *Bell Atlantic*) that it notified the employees. See *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 (1997) (expressly distinguishing *Haddon* on the ground that "notice was given to union officials either in a meeting or in a letter before general notice was given to employees"), enfd. in relevant part 162 F.3d 513, 519–520 (7th Cir. 1998). Accord: *Defiance Hospital*, 330 NLRB 492 (2000). See also *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1259–1260 (6th Cir. 1995). Further, in *KGTV*, the simultaneous notices were consistent with the provisions of the parties' contract. Similarly, in *Bell Atlantic*, there were other, independent circumstances to support giving the employees virtually simultaneous notice; moreover, the employer otherwise made clear in its communications to the union that it was willing to explore alternatives. Thus, unlike here, there was insufficient objective evidence in those cases that the employer had no intention of bargaining with the union or changing its mind.

In any event, in agreement with the General Counsel, I find that the Respondents have failed to establish that the Union had sufficient notice prior to implementation that the changes would actually apply to the unit employees. See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem.15 F.3d 1087 (9th Cir. 1994); and *Gratiot Community Hospital*, 51 F.3d at 1260 (union has no duty to request bargaining over a proposed change until it receives "clear and unequivocal" notice). The uncontroverted evidence shows that Rhines reasonably believed at the time of the announced changes that the January 2009 change would not apply to the unit employees. Thus, all three of the OPEIU contracts contained specific provisions stating that the Region and Chapter "shall" pay a percentage of the Medicare supplement or regular premium (or the equivalent) for retirees, and all three of the contracts were effective until the end of March 2009 (GC Exhs. 2–4, art. 31, sec. 3). In addition, the ANRC had a history of sending announcements to all Red Cross employees even when they did not apply to employees covered by collective-bargaining agreements (Tr. 587–588). Further, ANRC Vice President Shearer testified that the changes to the retiree medical plan were not, in fact, applicable where there were specific provisions in collective-bargaining agreements (Tr. 1773).

Moreover, when Rhines formally requested Region HR Supervisor Smelser for clarification in early February 2009 (GC Exh. 59)—because another steward had recently been mailed something about the announced changes—Smelser orally responded either that he did not believe the changes would apply, or that he did not know whether they would apply. And when

[24] As indicated by the General Counsel, it is well established that an employer is obligated to bargain over future retirement benefits of current unit employees. See *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971). See also *Southern Nuclear Operating Co.*, 348 NLRB 1344, 1350 (2006), enfd. in part and vacated in part 524 F.3d 1350, 1356 (D.C. Cir. 2008).

Rhines formally asked for clarification again on April 17, Smelser's April 23 written response did not include the announced changes to the retiree medical program among the changes that impacted unit employees. (GC Exhs. 61, 62; Tr. 462–469, 690, 740–741.)

Thereafter, in mid-August, Rhines made another written inquiry to Smelser (GC Exh. 63)—again prompted by information received by a unit employee—and the two met about 2 weeks later, on August 25, to review the personnel files of several recent retirees. After reviewing the files, Smelser again advised Rhines that he did not believe the changes had been implemented by the Region. (Tr. 464, 471–472.) However, in December, a recent retiree notified Rhines that his insurance costs had gone "way up" (Tr. 475). Accordingly, Rhines again contacted Smelser (GC Exh. 65). In response, on February 16, 2010, Smelser informed Rhines that the Region had, in fact, adopted the new national plan and was applying the change to the unit employees effective January 1, 2009 (Tr. 477–479; GC Exh. 66).[25]

As for the Chapter, Rhines admittedly did not communicate directly with it regarding the announced changes to the ANRC retiree medical program. However, he testified that he typically deals with the Region regarding national issues because the Chapter does not have its own human resources department and usually follows along with what the Region does on such issues. (Tr. 690, 736–738.) Further, Cynthia Richmond, the Chapter's COO (who serves as the Chapter's HR person and works in the same office building as the Region's HR staff), acknowledged that even she did not know whether the changes to the retiree medical program applied to the unit employees until 6 months prior to the November 2010 hearing in this proceeding (Tr. 1261–1262).

In sum, even if the January 2009 change to the ANRC program was only a "proposed" change in late October 2008, it was plainly not a "proposed" change when the Union finally received clear and unequivocal notice that the change would apply to the unit employees; by that time the change had already been effective for over a year. Clearly, in these circumstances, the Union did not waive its rights by not requesting the Respondents to bargain over the change. See, e.g., *Ciba-Geigy Pharmaceuticals*, 264 NLRB at 1017–1018.[26]

The Respondent Region also asserts various other affirmative defenses to this allegation: that the January 2009 change was "covered by" and permitted under the terms of the extant collective-bargaining agreements; that the Region had a sound arguable basis for believing that it was contractually privileged to make the change; and that the Union contractually waived the right to bargain over the change.[27] However, the Region has not argued these defenses in the Respondents' posthearing briefs. In any event, I find that they are without merit.

Under well-established Board precedent, a waiver of the statutory right to bargain must be "clear and unmistakable"; the fact that a matter may be "covered by" the contract is insufficient. *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Some courts, however, have adopted the opposite view, i.e. they have rejected the Board's "clear and unmistakable waiver" standard in favor of the less-stringent "contract coverage" test. See *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007); *Postal Service v. NLRB*, 8 F.3d 832, 837 (D.C. Cir. 1993); and *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). See also *Automatic Sprinkler v. NLRB*, 120 F.3d 612, 616 (6th Cir. 1997).

As indicated above, the Region's answer appears to assert that the subject change was lawful under both standards. However, the particular contractual language the Region relies on is unclear. In his opening statement, the Respondents' counsel stated only that "the contract language" permitted the change (Tr. 123). And, as noted above, the issue is not even covered by the Respondents' posthearing briefs.

Nevertheless, the logical place to look is the language in article 31 (Retirement) of the contracts (GC Exhs. 3, 4), the article where the contractual obligation to pay retiree medical benefits is set forth.[28] In relevant part, Section 1 of that article states as follows:

> Employees covered under this contract will receive the same retirement benefits, savings plan, including the American Red Cross Savings Plan (a 401-k plan) and 403(b) plan as other employees at the Great Lakes Region. The American Red Cross has the right to amend the Retirement System, Savings Plan and 403(b) plans in its discretion. The provisions of these plans are fully set forth in separate summary plan descriptions.

In addition, after setting forth the specific retiree medical benefits the Region "shall" pay, Section 3 states:

> In the event that the [Region] begins participating in a retirement health plan sponsored by the [ANRC], the [Region] may

[25] Smelser at that time also attached an 8-page fact sheet about the changes that Rhines had previously requested, which was dated a year earlier, in March 2009. At the very end of the last page, the fact sheet stated:

> Employees who are in a collective bargaining unit are subject to the terms of their collective bargaining agreement. Bargaining unit employees should consult with their human resource representative or collective bargaining representative for specific information on how these changes affect their individual situations.

[26] The Respondents also assert that the allegation regarding the January 2009 change is barred by the 10(b) limitations period, inasmuch as the underlying charge (GC Exh. 1 (qqq)) was not filed until March 22, 2010. However, for the same reasons discussed above, I find that the Respondents have failed to show that the Union had clear and unequivocal notice of the violation more than 6 months prior to the charge. See cases cited at fn. 23, supra. See also *Concourse Nursing Home*, 328 NLRB 692, 694 (1999) (Sec. 10(b) will not bar a charge where the employer has sent conflicting signals or engaged in ambiguous conduct).

[27] Unlike the Region, the Chapter (which is represented by the same counsel) does not assert any of these additional defenses in its answer.

[28] Each of the five, now-expired OPEIU and Teamsters contracts contain a general "management rights" provision; however, the Respondents do not rely on those provisions with respect to any of the allegations in this case. See, e.g., Tr. 126.

> in its discretion choose to substitute such plan for the coverages described above in this section.

The foregoing provisions fail to support the Region's defense under either standard. Although the phrase "retirement benefits" in the first sentence of section 1 appears broad enough to include retiree medical insurance, as indicated above section 3 of the same article contains specific provisions requiring the Region to pay certain retiree medical benefits for unit employees, without apparent regard for whatever the Region pays for nonunit employees. Further, the second sentence of section 1, which expressly addresses the Region's "right to amend," only refers to the "retirement system." Respondents' own witnesses testified that the "retirement system" means only the defined pension plan and does not include the retiree medical program (Tr. 1266, 1329, 1777). Moreover, as noted, the Region has not specifically cited section 1 in support of its defense.[29] Finally, the above-quoted language in Section 3, which follows the specific provisions of the retiree medical plan, only permits the Region to "substitute" a different plan sponsored by the ANRC for the previously negotiated coverages; it does not permit the Region to eliminate future retiree medical benefits altogether. In sum, the contract language does not "clearly and unmistakably" waive the OPEIU's right to bargain over such changes, and to the extent it "covers" the matter, it indicates that the Region cannot make such changes unilaterally.

Accordingly, I find that the Region and the Chapter violated the Act as alleged by failing to provide the OPEIU with advance notice and an opportunity to bargain over the January 2009 change to the retiree medical program and its effects.

d. July 2009 unilateral change in retiree medical program (Region and Chapter)

The complaint also alleges that the Region and the Chapter unlawfully modified the retiree medical program on July 1, 2009, after the contracts had expired, for those employees in the OPEIU units who were currently eligible or nearing eligibility to retire. For the reasons set forth below, I find that a preponderance of the evidence supports this allegation as well.

As indicated above, the July 2009 change to the ANRC retiree medical program was announced to employees in the same October 28, 2008 notice that announced the January 1, 2009 change affecting ineligible employees. The change at that time was described generally as follows:

> Effective July 1, 2009, Medicare-eligible retirees will be provided coverage under a plan design that better integrates with Medicare provisions. This plan will generally provide a lower premium but will have some increased out-of-pocket expenses for using healthcare services. Current retirement-eligible employees and a specially defined group of employees close to meeting eligibility requirements will have access to Red Cross-subsidized coverage when they retire. Red Cross subsidies for retiree medical coverage are being restructured and simplified, generally resulting in a reduction over time.

(GC Exh. 58.) A subsequent, March 2009 fact sheet described the change in more detail, specifically advising employees that the Medicare Supplement plan would be "replaced" by a "new" private fee-for-service (PFFS) plan and describing how it would affect future retirees' premiums and costs (GC Exh. 60).

Again, the Respondents do not dispute that they applied this change to their unit employees effective July 1, 2009, or that it constituted a material and substantial change. However, they argue that the change did not involve a mandatory subject of bargaining. In support, they cite ANRC Vice President Shearer's testimony that it only impacted individuals who were already retired and Medicare eligible (Tr. 1773). However, on its face, the July change would likewise affect current employees when they retired; indeed, this is presumably the reason that the ANRC discussed the change in the October 2008 memo and March 2009 fact sheet that it distributed to current employees. Thus, like the previous change in January, it constituted a mandatory subject of bargaining. See fn. 24, supra.

The Respondents also assert several affirmative defenses to the allegation. As with the January 2009 change, the Respondents assert that the OPEIU waived its rights because it admittedly did not request bargaining after receiving notice of the July 2009 change in October 2008, when the ANRC announced it. However, for essentially the same reasons discussed above, I find that this defense is without merit. Like the January 2009 change, the ANRC announced the July 2009 changes to employees in October 2008 as a fait accompli. Further, although this change to the ANRC program was not scheduled to become effective until July 2009, several months after contract expiration, Rhines' inquiries to HR Supervisor Smelser in early 2009, about whether the Region would apply the ANRC changes to the unit employees, failed to yield a clear response. Moreover, as indicated above, on April 23 and August 25, 2009—both 5 weeks before and 7 weeks after the ANRC's July 1 implementation date—Smelser indicated to Rhines that the change would not be applied to the unit employees. It was not until February 16, 2010, well after the change had been implemented by the ANRC, that Smelser notified Rhines that, in fact, the Region had applied the change to the unit employees, and provided him with the March 2009 fact sheet. Finally, Chapter COO Richmond admitted that even she did not know that the change would be applied to unit employees until mid-2010.[30]

Both of the Respondents' answers also assert the same "contract coverage/sound arguable basis/contractual waiver" defenses that the Region asserted with respect to the January 2009 change to the retiree medical program. However, only the Region asserts this defense in the Respondents' posthearing briefs. The Region specifically cites the following language from section 3 of article 31 of the Region's contracts with the OPEIU previously discussed above:

[29] As discussed in the next section, the Respondents likewise do not specifically cite the language in section 1 as justification for the July 2009 unilateral change in the retiree medical program—even though they do specifically cite the language in section 3. Expressio unius est exclusio alterius.

[30] For the same reasons, I also reject the Respondents' 10(b) defense to this allegation (which, again, is not mentioned or discussed in their posthearing briefs).

> In the event that the [Region] begins participating in a retirement health plan sponsored by the [ANRC], the [Region] may in its discretion choose to substitute such plan for the coverages described above in this section.[31]

The Region argues that, because "the changes . . . were made during the term of each of the contracts (albeit effective post-expiration), the contract language applies and privileged Respondent Region to act to substitute the Medicare supplement plan with the private-fee-for-service plan" (West. Br. 54).

The problem with this argument is its premise. Although the record indicates that the ANRC decided well before the end of March 2009 to make the future changes in its retiree medical program, there is no contention or evidence that the Region was required by the ANRC to participate in its retiree health plan or substitute the announced changes. Indeed, the language of article 31, section 3 indicates to the contrary. See also R. Exh. 59 (the May 2005 American Red Cross Retirement Program News Bulletin), which states that employees are eligible under the retiree medical plan if, among other things, their particular region or chapter "participates in the Life & Health Benefits Plan." Moreover, as discussed above, ANRC Vice President Shearer admitted that the changes were not intended to apply where there were specific, collectively-bargained retiree medical provisions.

Further, there is no evidence that the Region began participating in the new ANRC plan, and/or chose to adopt or substitute the announced changes, during the terms of the contracts pursuant to the reservation-of-discretion language in article 31, section 3. In fact, the objective circumstances indicate the opposite. As discussed above, the Region did not advise Rhines that it would apply the changes to unit employees until February 2010, after previously indicating to the contrary in April and August 2009.

Finally, there is no evidence that the parties intended the reservation-of-discretion language to survive expiration of the contract. Thus, even assuming arguendo that the language constituted a clear and unmistakable waiver of the right to bargain over substitute ANRC plans or changes of this kind (or "covered" the right to make such substitutions or changes), the language was no longer operable at the relevant time for determining the parties' rights and obligations under the Act. See *E. I. Dupont de Nemours, Louisville Works*, 355 NLRB 1084, 1085–1087 (2010) (even a narrow contractual reservation of management discretion does not survive contract expiration absent evidence that the parties intended it to survive).[32]

As noted, the Chapter does not argue the foregoing defense in the Respondents' posthearing briefs—even though its answer asserted the defense and its contract contains the same language in article 3, section 3. In any event, I reject the defense for essentially the same reasons above.[33]

The Respondents' answers lastly assert that the July 2009 change was a continuation of the status quo as defined by the provisions of the expired contracts and/or the Respondents' past practice of unilateral changes. However, the Respondents have not cited any contractual provisions or past changes, or offered any argument, in support of this defense. Indeed, the defense was not even mentioned in either their opening arguments or their posthearing briefs (even though, as discussed below, they did argue a similar defense with regard to other unilateral change allegations). Accordingly, I find that they have failed to satisfy their burden of proof. See *Caterpillar, Inc*., 355 NLRB 521, 523 (2010) (the burden of proving that a unilateral change was consistent with past practice is on the employer). See also *Beverly Health and Rehabilitation Services v. NLRB*, 297 F.3d 468, 481 (6th Cir. 2002).

e. Unilateral changes in the 401(k) savings and pension plans in May and July 2009 (Region and Chapter)

The complaint also alleges that the Region and the Chapter violated Section 8(a)(5) by unilaterally suspending employer matching contributions to the 401(k) savings plan on May 1, 2009, and closing the pension plan to new hires on July 1, 2009. The General Counsel alleges that these changes were unlawfully implemented in all five of the units represented by the OPEIU or Teamsters without providing the Unions prior notice or an opportunity to bargain. For the reasons set forth below, I find that a preponderance of the evidence supports this allegation, in whole or in part, in the three OPEIU units, but not the two Teamsters units.

The Respondents do not dispute that the changes were made in all five units, or that they materially and substantially changed mandatory subjects of bargaining. However, they assert several affirmative defenses. As with the changes to the

[31] As noted above (fn. 29), the Region does not rely on the management-rights language in section 1 of article 31.

[32] The OPEIU's posthearing brief (p. 53) concedes only that "the Union clearly and unmistakably waived . . . the right to bargain over the substitution of the locally provided Medicare subsidies with *comparable* subsidies under the National plan" (emphasis added). In light of my findings above, it is unnecessary to address this issue. For the same reason, it is also unnecessary to address whether, as suggested by the Respondents, article 31, section 3 waived the OPEIU's right to bargain over prospective changes, i.e. changes adopted before, but effective after, the contracts (including their reservation-of-discretion provisions) expired. Compare *Southern Nuclear Operating Co. v. NLRB,* 524 F.3d 1350, 1360 (D.C. Cir. 2008), vacating in relevant part 348 NLRB 1344 (2006) (management rights provisions contained in or incorporated into parties' 1998–2001 contracts waived union's right to bargain over future retiree benefit changes announced in October 2000 but not effective until January 1, 2006), and *Mississippi Power Co. v. NLRB*, 284 F.3d 605, 625 (5th Cir. 2002), denying enf. in part of 332 NLRB 530 (2000) (reservation-of-rights clause "by its nature include[d] (or, at least fail[ed] to exclude) prospective changes to medical insurance benefits of future retirees"), with *Ryder/ATE*, 331 NLRB 889 (2000), enfd. sub nom. *First Transit, Inc. v. NLRB*, 22 Fed. Appx. 3 (D.C. Cir. 2001) (unpub.) (rejecting employer's defense that change in attendance policy was permitted by the contract's management rights clause; although employer decided to implement, and provided union with a copy of, the new policy during the contract term, the policy was not implemented until after the contract and its management rights clause had expired).

[33] As previously mentioned, Chapter COO Richmond admitted that even she did not know that the change would be applied to unit employees until mid-2010.

retiree medical plan, the Respondents first argue that the Unions waived their rights because they admittedly did not request bargaining (West. Br. 19–27).[34] For essentially the same reasons discussed above, I reject this argument. Like the previously announced changes to the retiree medical plan, both of these additional changes were announced to the employees in a memo from ANRC CEO McGovern. The memo, dated April 2, 2009, advised the employees that the changes were "essential" due to the economic downturn; that the ANRC had "no choice" but to make the changes; and that the Board of Directors had already approved the changes after reviewing the options (GC Exh. 7). Further, it is uncontroverted that neither the ANRC nor the Respondents directly notified the Unions of the changes prior to notifying the employees.

Region HR Supervisor Smelser did eventually send a copy of the ANRC memo to Rhines and Meade. However, he did not do so until almost 2 weeks later, on April 15. Further, there is no evidence that he did so because the parties had begun, or were about to begin, negotiating new contracts, or to otherwise provide the statutorily required advance notice and opportunity to bargain. Indeed, his letter stated that he was simply responding to "questions" that had been asked about the effect of the announcement on the Region's existing collective-bargaining agreements. And his response was that:

> The American Red Cross intends to honor its existing agreements. Where the agreements permit us to make the changes referred to by Ms. McGovern, we will do so. (GC Exh. 61, and R. Exh. 107).

Moreover, it was not until April 23, a week before the change to the 401(k) plan was scheduled to take effect ("the first paycheck of May"), that Smelser specifically informed Rhines that the changes applied to the OPEIU unit employees. Again, he only did so at that time because Rhines had formally asked him for clarification on April 17, after receiving the April 15 letter. And nothing in Smelser's court response indicated that the Region was prepared to discuss alternatives before implementing the changes. (GC Exh. 62.)[35]

In sum, a preponderance of the objective evidence indicates that, as with the changes to the retiree medical program announced in October 2008, any request to bargain over the changes to the pension and 401(k) plans would have been futile. It was therefore unnecessary, under the Board and court precedent cited above, for the Unions to make a request.[36]

The Respondents' answers also assert the same "contract coverage/sound arguable basis/contractual waiver" defenses asserted in response to the allegations involving the retiree medical plan. However, again, only the Region addresses these defenses in the Respondents' posthearing briefs. Further, the only contractual provisions it cites in support are the "retirement" provisions in its contracts with the Teamsters covering the apheresis and MUA units (West. Br. 27–33). Those provisions state as follows:

> Section 1. The [Region] shall continue to participate in the retirement program of the National Red Cross on the same basis as the present, or as it hereafter may be amended by the National Red Cross.
>
> . . . .
>
> Section 3. The [Region] agrees that bargaining unit employees will participate in any future 401(k) or 403(b) matching pension plan offered by the National Red Cross on the same basis as other employees. (GC Exh. 5 (apheresis unit), art. 28; GC Exh. 6 (MUA unit), article 30).)

The Region argues that these contractual provisions "privileged, and indeed required" it to make the changes to the 401(k) and pension plans (West. Br. 32). This does, in fact, appear to be true; that is, although the ANRC does not require the regions and chapters to participate in its national plans,[37] the provisions of the parties' contracts on their face require the Region to participate in whatever 401(k) and pension plans the ANRC offers to employees. Thus, the provisions state that the Region "shall" and "will" participate in the ANRC plans as offered or amended by the ANRC. Unlike the contractual provisions relating to retiree medical benefits, there is no discretion reserved to the Region in this respect.[38]

[34] Unlike with the retiree medical plan allegations, the Respondents did not actually assert this waiver defense in their answers to the complaint or opening statements regarding these allegations. However, both the General Counsel and the OPEIU anticipated and specifically address the defense in their posthearing briefs (GC Br. 107–115; OPEIU Br. 38–39). In any event, given my conclusion that the defense fails on the merits, it is unnecessary to decide whether the defense is also untimely. See generally *Trident Seafoods v. NLRB*, 101 F.3d 111, 116–117 (D.C. Cir. 1996).

[35] Meade testified that Smelser told her orally sometime prior to April 30 that he did not know whether the changes applied to the Teamster units (Tr. 1106). Although Meade was an evasive and less than fully credible witness overall (see, e.g., nn. 8 and 9, supra), I credit her testimony in this regard. Her testimony was uncontroverted and Smelser's initial correspondence and delay in subsequently responding to Rhines indicates that he may very well have been uncertain, at least until April 23, whether the changes could lawfully be applied to the units.

[36] The OPEIU alternatively argues that no request was necessary because a union is not required to demand bargaining over individual proposed changes when the parties are engaged in bargaining for an overall contract, citing, e.g., *Pleasantview Nursing Home*, 351 F.3d 747, 757 (6th Cir. 2003) ("In a negotiation, a party need not respond to every statement with a forceful rejection and insistence on further bargaining; further bargaining is assumed and a waiver of the issue will not be presumed unless it is clear and unmistakable."). However, it is unnecessary to address this alternative argument. It is undisputed that the changes here were not proposed at the bargaining table prior to implementation. Indeed, as found above, there was no "proposal" to make the changes at all; rather, they were announced as a fait accompli.

[37] As with the ANRC retiree medical plan, individual regions and chapters are not required by the ANRC to participate in the national 401(k) and pension plans. Although all the regions have chosen to do so, approximately 200 chapters do not participate in the pension plan and 350 do not participate in the 401(k) plan. Further, some chapters have their own 401(k) plans. (Tr. 1331, 1460, 1736, 1775–1779; R. Exh. 69).

[38] For this reason, it is again unnecessary to address the parties' arguments about whether an employer may make prospective changes pursuant to a reservation-of-discretion or management rights clause that

However, the evidence shows (R. Exhs. 66, 82), and the Region acknowledges (Tr. 490; West. Br. 20), that, while the changes to the national plans were adopted by the ANRC on or before April 30 (the last effective date of the Teamsters contracts), the changes were not effective, and the Region did not implement or apply them to the unit employees, until at least May 1 and July 1, 2009, respectively. Thus, as the contract provisions were no longer in effect on those dates, they did not require the Region to implement the changes—at least not as a matter of contract law. See generally *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 206–207 (1991).

As noted above, the Respondents do not cite any other contractual provisions in support of these defenses (even though the OPEIU contract with the Chapter, contains the same section-1 language, GC Exh. 2, art. 31, sec. 1). In any event, as indicated above, all of the OPEIU contracts with the Region and Chapter expired even earlier, at the end of March 2009 (after rolling over for 1 year). Thus, for the same reason, I find that they did not privilege or require the Region or Chapter to implement the changes.

Finally, the Respondents' answers also again assert that the changes were lawful because they continued the status quo as defined by the provisions of the expired contract and/or the Respondents' past practice of unilateral changes. For the reasons set forth below, I find that this defense has merit, at least in part, with respect to some of the units but not others.

It is well established that a unilateral change in employees' terms and conditions does not violate Section 8(a)(5) if it does not alter the status quo. The threshold inquiry, therefore, is what the status quo was prior to the change. See *Life Care Centers of America*, 340 NLRB 397, 399 (2003); and *Crown Elec. Contracting*, 338 NLRB 336 (2002). The status quo may be created by the provisions of the expired contract as well as by the parties' past practice. *Litton*, 501 U.S. at 206; and *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982). Moreover, it may be dynamic (active) as well as static (fixed). See *Post-Tribune*, 337 NLRB 1279 (2002) (unilateral increase in dollar amount of employees' health insurance costs secondary to premium increase imposed by insurance carrier was not unlawful because employer followed its past practice in allocating the carrier's premium increase to employees on an 80/20 and 60/40 percent basis); and *Intermountain Rural Electric Assn.*, 305 NLRB 783, 785 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993) (status quo under the provisions of the parties' expired contract required the employer to pay 100 percent of the new medical and dental insurance rates set by insurers, rather than just continue paying the premium rates which had been in effect under the previous medical and dental plans).

Here, the record indicates that the status quo in the apheresis and MUA units was established by the provisions of the expired Teamsters contracts, and that it was dynamic rather than static. Thus, as indicated above, the provisions specifically stated that the Region "shall continue to participate" in the ANRC retirement program "on the same basis as the present, or as it hereafter may be amended by the [ANRC], and "will participate in any future 401(k) . . . matching pension plan offered by the [ANRC] on the same basis as other employees." These provisions clearly contemplate that the status quo between the Region and the Teamsters unit employees includes, not just the current ANRC retirement program, but any amendments to the program or future 401(k) plans offered to other employees by the ANRC.[39]

Further, there is no evidence that the Region has any control over whether the ANRC amends the national program or offers different national plans. As indicated above, the record indicates that such decisions are made by the ANRC staff and board of directors in Washington, D.C. See also Tr. 1348, 1394–1398, 1769–1771, 1842–1845. Nor is there any evidence that the Region has not adopted or applied past changes in the pension and 401(k) plans made by the ANRC. The record indicates that the ANRC made numerous changes to the pension and 401(k) plans over the years. Most were minor, technical, or housekeeping amendments pursuant to legislative changes (R. Exhs. 64, 65, 70, 72, 73, 74, 79, 80, 81; Tr. 1337–1338, 1354–1358, 1386, 1458, 1788–1799, 1870). And some were more significant. For example, in July 2005, during the terms of the 2005–2009 Teamsters contracts, the ANRC substantially modified the pension plan by lowering the percentage for calculating years of benefit service to 1 percent of average pay, increasing the age to receive unreduced benefits from 60 to 65, and discontinuing the post-retirement 1 percent annual increase and voluntary after-tax contributions by employees. The ANRC also modified the 401(k) plan at that time by requiring new employees to wait 3 years before vesting in employer 401(k) contributions, while increasing the employer match from 50 percent to 100 percent on the first 4 percent of employee contributions, and increasing the maximum amount of employee contributions. (R. Exhs. 57, 58, 76; Tr. 1306–1310, 1314–1316, 1780, 1864–1866; see also R. Exh. 78 (adding catch-up feature to allow participants over 50 to make additional 401(k) contributions).) There is no evidence that these changes were not applied to the employees in the apheresis and MUA units in accordance with the retirement provisions of the contracts. See Tr. 1102–1103.[40]

Finally, in agreement with the Region, I find that the changes to the 401(k) and pension plans that were implemented in the Teamsters apheresis and MUA units in May and July 2009 were consistent with, and continued, the dynamic status quo.

will expire with the contract before the changes are effective. See cases cited at fn. 32, above.

[39] This reading is consistent with a February 2003 arbitration decision submitted into evidence by the General Counsel. See GC Exh. 160 (ruling that the Region was required to count meal vouchers as taxable income under the terms of the retirement provisions in the 1999–2002 MUA contract—which were essentially identical to the 2005–2009 contract—and a February 2000 amendment to the ANRC pension plan).

[40] As noted above (fn. 39), the parties in late 2000 disagreed over the proper interpretation of certain ANRC plan provisions and amendments. However, such an isolated disagreement does not warrant a conclusion that the Region has not applied the provisions or amendments to the Teamsters employees when they were adopted by the ANRC.

Accordingly, the changes as applied to those units were not unlawful under extant precedent.

The same conclusion is warranted with respect to the July 2009 changes to the pension plan as applied to the Chapter clerical/warehouse unit represented by the OPEIU. As noted above, like the Teamsters contracts with the Region, article 31, section 1 the OPEIU contract with the Chapter provided that the Chapter "shall continue to participate in the retirement program of the [ANRC] on the same basis as the present or as it hereafter may be amended by the [ANRC]" (GC Exh. 2). Thus, for the same reasons set forth above, I find that the Chapter was simply continuing the status quo, and did not violate Section 8(a)(5), by implementing the July 2009 changes to the pension plan in the OPEIU clerical/warehouse unit.

A different conclusion is warranted, however, with respect to the May 2009 change in the 401(k) plan as applied to the Chapter clerical/warehouse unit. Article 31, section 2 of the OPEIU contract with the Chapter stated only that the Chapter "may choose to participate" in the ANRC 401(k) plans "as presented or as it hereafter may be amended by the [ANRC]." Thus, as the Respondent Chapter acknowledges (West. Br. 39), unlike the pension provisions, the 401(k) provisions of the expired contract did not mandate the Chapter to participate in the current or amended ANRC plan, but simply allowed to the Chapter to participate.

As discussed above, the Board in *E. I. DuPont* held that such reservation-of-discretion provisions do not survive contract expiration in the absence of evidence that the parties intended them to survive. Consistent with that holding, the Board also held that prior unilateral changes implemented under the authority of such provisions during the contract term do not establish a "past practice" permitting unilateral changes when no contract is in effect. 355 NLRB 1084, 1085–1087. Here, there is no evidence that the parties intended the provision to survive contract expiration, or that any of the ANRC's prior changes to the 401(k) plan were implemented by the Chapter outside the term of the contract or by some other contractual authority. Thus, the Respondents' defense must fail in this respect.

For similar reasons, the Respondents' defense also fails with respect to both the pension and the 401(k) changes as applied to the Region collections and LCD units represented by the OPEIU. The relevant language covering those units was contained in sections 1 and 4 of article 31 of both of the expired contracts. As previously discussed, section 1 stated as follows:

> Employees covered under this contract will receive the same retirement benefits, savings plan, including the American Red Cross Savings Plan (a 401-k plan) and 403(b) plan as other employees at the Great Lakes Region. The American Red Cross has the right to amend the Retirement System, Savings Plan and 403(b) plans in its discretion. The provisions of these plans are fully set forth in separate summary plan descriptions.

Section 4 stated as follows:

> Bargaining unit members shall be eligible for the 401(k) program that provides for a fifty cents ($.50) match for every dollar contributed by the employee up to the first four percent (4%). In the event the [Region] improves this plan, the members of the bargaining unit shall be eligible for said improvement upon implementation. (GC Exhs. 3, 4.)

The Region argues that section 1 defines its postcontract obligations, i.e. the status quo, and that the language mandates it to apply the same pension and 401(k) plan to the unit employees as it applies to other employees of the Region. It further argues that plan documents referred to in that section reserve the right to amend the plans at any time, and that those reservation-of-rights provisions also define the status quo upon expiration just as other terms and conditions of expired contracts. Finally, the Region argues that the parties' bargaining history indicates that section 4 is merely a reference to the 401(k) plan rather than a definition of the benefits available to the unit employees. (West. Br. 39–42.)

However, the Region does not argue, nor could it reasonably do so, that section 1 requires the Region to continue participating in the current ANRC pension and 401(k) plans or any amended plans. That section simply requires the Region to apply the plans to the unit employees if the Region chooses to apply those plans to its nonunit employees. Thus, as the Region could choose not to apply the provisions to its nonunit employees, its discretion not to likewise apply them to its unit employees is preserved.[41]

The Region's remaining arguments are also without merit under extant law. As discussed above, reservation-of-rights provisions do not survive contract expiration or define the status quo during the hiatus between contracts absent a contrary intent. Again, there is no evidence that the parties intended the reservation-of-rights provisions of section 1 and/or the referenced plan documents to survive contract expiration. Nor is there any evidence that the ANRC's prior changes to the pension and 401(k) plans were implemented by the Region in the collections and LCD units outside the terms of the contracts or by some other contractual authority. Thus, neither the language of section 1 (including the plan documents, assuming arguendo that they were effectively incorporated into section 1), nor the prior changes, established a status quo permitting the postcontract unilateral changes in May and July 2009. Finally, given

[41] This does not necessarily mean that the Region could make any employer-wide changes to retirement benefits without providing the OPEIU notice and opportunity to bargain. See *Trojan Yacht*, 319 NLRB 741, 742–743 (1995) (general language stating that the pension plan would be "maintained in the same manner and to the same extent such plans are generally made available and administered on a corporate basis" was not a clear and unmistakable waiver), citing with approval *Rockford Manor Care Facility*, 279 NLRB 1170, 1172–1173 (1986) (language stating that "participat[ion] in the Company's health and life insurance programs on the same basis as other [i.e., nonunit] employee members of the group" was ambiguous and did not waive the union's right to participate in deliberations about which option was the more appropriate for all employees). However, whether the contract permits the Region to make employer-wide changes without bargaining is a different question than whether the contract mandates the Region to apply any amended ANRC pension and 401(k) plans to the unit and nonunit employees. (And only the latter question need be addressed here, given that the changes occurred post-contract expiration.)

that section 1 provides no support for the subject changes, it is irrelevant whether section 4 places any limits on section 1.

f. Unilateral reduction of choices among local health plans in October 2009 (Region)

The complaint also alleges that the Region violated 8(a)(5) by unilaterally reducing the choices among local health insurance options under the BenefitsAdvantage plan for unit employees beginning October 26, 2009, during the open enrollment period for the 2010 benefit year. Specifically, the General Counsel alleges that the employees had been offered three local Blue Care Network (BCN) options under the plan in the past (East, West, and Mid-Michigan), but were only offered one for the 2010 benefit year. For the reasons set forth below, I find that the General Counsel has failed to prove this allegation by a preponderance of the evidence.

First, it is not clear which units the General Counsel contends were unlawfully affected by the alleged unilateral change. Although it is undisputed that the Region has offered all three local options to all of the unit employees in the past (GC Exh. 12), at trial, counsel for the General Counsel initially stated that the unilateral-change allegation applied only to the OPEIU units (Tr. 774). However, counsel later stated that the allegation also applied to the Teamsters units (Tr. 776) and introduced testimonial and documentary evidence showing that an employee in the Teamsters MUA unit (Hemstreet) had been offered all three local BCN options for 2009 but only one (Mid-Michigan) for 2010 (Tr. 908–910; GC Exhs. 182, 183). However, the General Counsel's posthearing brief mentions this evidence only in a footnote (Br. 85, fn. 78), and ultimately argues that the Region unlawfully reduced the number of local options only in the LCD and collections units represented by the OPEIU (Br. 150).[42]

Second, only one of the 70–75 employees in the LCD unit (McGwin) was called to testify in support of the allegation. McGwin testified that she was able to select any of the three local BCN options in the past, and that she had previously selected the Mid-Michigan plan for 2008 before switching to the West-Michigan plan for 2009. (Tr. 202–227, 247–250.) However, no documentary evidence was presented to substantiate this. The only documentary evidence introduced was McGwin's October 2009 open-enrollment worksheet showing that she was offered only the West-Michigan local plan (and the national PPO and EPO plans) for 2010 (GC Exh. 18). Moreover, McGwin admitted that she selected the Mid-Michigan plan for 2008 because that is where she worked at the time, and the West-Michigan plan for 2009 because that is where she lives—thus suggesting, consistent with the Region's position (and the names of the plans themselves), that there is some connection between geographical location and available local options, i.e. while the BenefitsAdvantage offering includes all three local BCN plans, an employee may only select a local plan covering the geographical service area that he/she works and/or lives. See also GC Exh. 163, pp. 11, 20 (discussing effect of changes in address or zip code on plan eligibility).

Third, no evidence whatsoever was presented at trial regarding what local options were offered to employees in the collections unit for 2010. None of the approximately 165 employees in that unit were called to testify regarding this allegation. Nor was any documentary evidence introduced to support the allegation with respect to that unit. Contrary to the OPEIU's contention, the lack of documentary evidence cannot be blamed on the Region's failure to produce the information in response to a General Counsel subpoena. HR Supervisor Smelser testified that the Region does not maintain the subpoenaed records; that annual enrollment materials are sent to and received from employees by Hewitt Associates, a third-party administrator (Tr. 1989–1990). I credit Smelser's testimony in this regard as it is consistent with the record as a whole, including the testimony of ANRC Vice President Shearer (Tr. 1408–1413) and LCD-unit employee McGwin (Tr. 221, 229–236, 249) regarding the annual enrollment process, and the open-enrollment and BenefitsAdvantage materials themselves (GC Exhs. 18, 163, 182, 183). Accordingly, an adverse inference that the absent documentation would support the complaint allegation is unwarranted. See *Hansen Bros. Enterprises*, 313 NLRB 599, 608 (1993), review denied 812 F.2d 1443 (D.C. Cir. 1987) (table), cert. denied 484 U.S. 845 (1987); and *Champ Corp*., 291 NLRB 803 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

Finally, the available record otherwise supports the Region's contention that it did not eliminate any of the three local BCN plans from the 2010 offering. Thus, although the Region was admittedly seeking to eliminate the local plans, HR Manager Smith specifically advised Rhines in writing on October 23, 2009, that all three local BCN plans would still be offered to unit employees in 2010, given that no agreement or impasse had yet been reached in the negotiations on that issue (GC Exh. 55; Tr. 575–576).[43] Further, the General Counsel's own evidence confirms that at least two of the plans were included in the 2010 BenefitsAdvantage offering. As indicated above, McGwin's open enrollment packet included the West-Michigan plan and Hemstreet's included the Mid-Michigan plan (along with the national PPO and EPO plans and her current Physicians Health Plan (PHP) plan).

Accordingly, for all the foregoing reasons, I find that this allegation should be dismissed in its entirety.

[42] The General Counsel's posthearing brief also at times discusses the allegation as if both Respondents committed the violation (Br. 84–85). However, the complaint clearly alleges a violation only by the Region.

[43] The expired contracts in the LCD and collections units required that the annual health insurance offering include "the local current BCN policy, where offered" (GC Exhs. 3, 4, art. 30, sec. 1). Although Smith advised Rhines on October 23 that the unit employees would be able to select "any" of the local BCN options that had been available for the 2009 benefit year, including the East, West, and Mid-Michigan plans, there is no evidence that the Region determined or controlled the geographical service area covered by each local BCN plan.

g. Unilateral implementation of new BenefitsAdvantage health insurance program in January 2010 (Region and Chapter)

This is the last of the complaint unilateral-change allegations. It alleges that both the Region and the Chapter unlawfully implemented a new BenefitsAdvantage health insurance program effective January 1, 2010, without providing the Unions a meaningful opportunity to bargain. The General Counsel alleges that the new 2010 BenefitsAdvantage program significantly changed the unit employees' benefits by (1) merging the standard and premier PPO options and eliminating the premier option; (2) increasing out of pocket costs to employees through increased deductibles, copays, and coinsurance; (3) increasing the coinsurance for formulary drugs; (4) imposing a surcharge on employees with a spouse or partner who has access to medical coverage for themselves through their own employment but elect coverage under an ANRC option; (5) increasing employee contributions for the PPO dental option; and (6) suspending the employer subsidy for vision coverage for full-time employees. I find that the General Counsel has proven this alleged violation by a preponderance of the evidence.

Again, there is no dispute, and the record establishes, that the ANRC made the foregoing changes to the national, self-insured EPO and PPO plans, and that the Respondents implemented the changes in all five units, for the 2010 benefit year, i.e. the unit employees' October 2009 open enrollment materials included the changes and the changes were implemented and effective January 1, 2010 (GC Exhs. 9, 10, 12, 18; and Tr. 491, 1471, 1806).[44] There is also no dispute that the changes materially and substantially changed a mandatory subject of bargaining.

However, the Respondents deny that they failed to provide the Unions with a meaningful opportunity to bargain over the changes. Indeed, they contend that the parties reached impasse in negotiations over the 2010 national plan designs before the open enrollment period began on October 26, 2009. Accordingly, because the changes were made pursuant to the Red Cross' annual health-benefits review process, the Respondents contend that they were entitled to implement the changes without waiting for an overall impasse in the contract negotiations,[45] citing *Stone Container Corp*., 313 NLRB 336, 337 (1993) (employer lawfully implemented wage increase, despite absence of an overall impasse in ongoing contract negotiations, because wage reviews and increases were discrete annually occurring events and the union was given sufficient opportunity to bargain before implementation). (Bat. Br. 21–26.)[46]

The Respondents' *Stone Container* defense fails to withstand scrutiny. The record confirms that Peterson advised Rhines and Meade on July 24, 2009, that the above-described changes had been made to the national plans for the 2010 benefit year. See GC Exh. 115, and fn. 9, supra.[47] The record likewise confirms that Rhines repeatedly objected to the changes and offered several specific alternatives (CPO Exh. 2; GC Exhs. 53, 55, 57; Tr. 432, 571, 1558, 1713), and that Meade proposed alternatives as well (GC Exhs. 124, 125; Tr. 852–856). However, the record also clearly establishes that the Respondents did not bargain over the changes in a meaningful manner or with good faith. Thus, although Region HR Manager Smith assured Rhines on July 31 that the Region was "willing and prepared to bargain over the benefits information" that Peterson provided to Rhines

[44] Unlike with the other employee benefits discussed above, the record is somewhat unclear whether the regions and chapters have discretion not to offer the national self-insured EPO and PPO plans to their employees. ANRC Vice President Shearer testified that, since 2008, all regions and chapters have been mandated to provide core benefits to full-time employees through BenefitsAdvantage (Tr. 1402–1403, 1474, 1801). She also testified that there is a "rule" (apparently unwritten) that chapters and regions are not to offer separate plans (Tr. 1474). However, as discussed earlier in this decision (see part III.A.1.b), BenefitsAdvantage is an umbrella program that includes more than just the self-insured EPO and PPO plans. Thus, Shearer testified that it includes eight Kaiser plans that are made available to employees in certain regions of the country (Tr. 1462). She also acknowledged (and this case illustrates) that unionized regions and charters may negotiate additional local plans, which are likewise administered under BenefitsAdvantage (Tr. 1475). Further, Peterson testified that the Region had discretion whether to offer the self-insured EPO and PPO plans to its employees (Tr. 1589). This is consistent with Smith's letter to Rhines on October 23, 2009 (GC Exh. 55), and the Region's December 23, 2009 position statement (GC Exh. 12, p. 4), both of which specifically stated that one of the Region's options was to not offer those plans. In any event, counsel made clear at the hearing, during discussion of a related evidentiary objection, that the Respondents are not contending that the issue of the plan designs was not amenable to bargaining (Tr. 1850–1851).

[45] The Respondents acknowledge that the parties had not reached an overall impasse. Indeed, as indicated above, they do not even contend that the parties were at impasse over the local health insurance plans. Nor do they contend that the parties were at impasse over cost-sharing under the EPO and PPO and local plans, which they also did not change. They contend that the parties were only at impasse over the narrow issue of what the EPO and PPO plan designs would be in the BenefitsAdvantage offering to the unit employees for the 2010 benefit year.

[46] The Respondents did not specifically assert this *Stone Container* defense in their answers. However, Respondents' counsel generally alluded to it during opening statements (Tr. 119); the defense was anticipated and addressed by the OPEIU in its posthearing brief; and the defense arguably relates to the Respondents' tenth affirmative defense, which asserts that the parties "were at impasse under the circumstances which met the exigency exception recognized in *Bottom Line Enterprises* [302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994) (table)]" (GC Exhs. 1(nnnn) and (oooo)). The Respondents make no other arguments relating to that affirmative defense; specifically, they do not argue that the interim changes were compelled by an *economic* exigency within the meaning of *Bottom Line* or *RBE Electronics*, 320 NLRB 80 (1995). In any event, as with the Respondents' waiver defense to the May and June 2009 unilateral changes to the 401(k) and pension plans (see fn. 34, supra), it is unnecessary to address whether the defense has been untimely raised given my conclusion that the defense is without merit.

[47] To the extent there is conflict in the record about whether the 2010 BenefitsAdvantage national EPO and PPO plan design was actually "proposed" to the Unions as a contract proposal, I find that a preponderance of the credible evidence indicates that it was not; rather, the Respondents simply advised the Unions that the 2010 design was what they intended to offer all unit and nonunit employees during the annual upcoming open enrollment period.

on July 24, he did so only after the ANRC had already advised the unit employees of the changes and Rhines inquired about it (CPO Exh. 2; GC Exh. 9; Tr. 571–572). Moreover, under cross-examination by counsel for the General Counsel, Peterson acknowledged that neither he nor anyone else at the bargaining table even had the authority to negotiate over the design of the 2010 EPO and PPO plans; that as far as he knew the ANRC had decided to eliminate the 2009 national plans and they were therefore "no longer available"; and that he never consulted with the ANRC about continuing the 2009 plans as proposed by Rhines (Tr. 1587, 1615, 1725–1726, 1733). See also the Region's October 23, 2009 correspondence to Rhines (GC Exh. 55) and December 23, 2009 position statement (GC Exh. 12, p. 3) (admitting that the Region could not change the plan design).

In these circumstances, no valid bargaining impasse over the plan design changes could have possibly occurred. See, e.g., *NLRB v. Big Three Industries*, 497 F.2d 43, 48 (5th Cir. 1974) (a valid impasse presupposes good faith bargaining). Nor could the changes be implemented without an overall impasse under the analysis in *Stone Container*. Cf. *E. I. Dupont*, 355 NLRB 1084, 1087 (rejecting employer's *Stone Container* defense where employer refused to bargain over changes).[48]

The Respondents' answers also assert that the changes were a continuation of the status quo as defined by the expired contracts and the Respondents' past practice of unilateral changes. The Respondents, however, have not cited any provisions in the expired contracts or past history of unilateral changes supporting these defenses.[49] Indeed, they do not even mention the defenses in their posthearing briefs. I therefore find that they have failed to carry their burden of proof.

3. Bad-faith bargaining over mandatory subjects

As indicated above, the complaint also alleges that the Region and/or the Chapter violated Section 8(a)(5) of the Act by failing to bargain in good faith over certain mandatory subjects.

a. Failure to bargain in good faith over transfer of telerecruiter work since May 2010 (Region)

The complaint alleges that the Respondent Region violated Section 8(a)(5) by bypassing the OPEIU and announcing to employees on May 18, 2010, that it intended to transfer telerecruiter work from the LCD unit to other, out-of-state locations. It further alleges that, since July 2010, the Region has bargained with a fixed mind and no intention of reaching an agreement with respect to the transfer. As with the related refusal-to-provide information allegation discussed earlier in this decision (part III.A.1.d), the Region admitted these allegations at the hearing (Tr. 1487–1498). Accordingly, I find that the Region violated the Act as alleged.

b. Bargaining with a fixed mind in contract negotiations over health insurance, 401(k), and pension benefits (Region and Chapter)

The General Counsel also alleges that, since February 2009, both the Region and the Chapter have bargained in bad faith during contract negotiations by bargaining with a fixed mind and no intention of reaching an agreement in any of the units regarding health insurance, 401(k), and pension benefits. For the reasons set forth below, I find that this allegation is not supported by a preponderance of the evidence.

The law is clear that an employer may take a firm stand on a position in bargaining, i.e., an employer's mere refusal to change its position does not constitute bad faith. See, e.g., *St. George Warehouse*, 341 NLRB 904, 906 (2004); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 757–759 (6th Cir. 2003); and *Sign and Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969). On the other hand, the Board and courts have also held that an employer may not engage in the mere pretense of negotiating by bargaining with a completely closed mind. See, e.g., *Mid-Continent Concrete*, 336 NLRB 258, 260–261 (2001), enfd. sub nom *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002); *Clear Pine Mouldings v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), cert. denied 451 U.S. 984 (1981); and *NLRB v. Wonder State Mfg.*, 344 F.2d 210, 215 (8th Cir. 1965). See also *Pleasantview*, 351 F.3d at 758. In distinguishing between the two—whether an employer has engaged in lawful hard bargaining or unlawful surface bargaining—the totality of the employer's conduct is examined, including its conduct both at and away from the bargaining table and the proposals themselves. See, e.g., *Regency Service Carts*, 345 NLRB 671 (2005); and *Liquor Industry Bargaining Group*, 333 NLRB 1219, 1220-1222 (2001), enfd. 50 Fed.Appx. 444 (D.C. Cir. 2002) (unpub.).

Here, it is clear that health insurance, 401(k), and pension benefits were important issues for all parties (Tr. 402, 1504–1515, 1693, 2026, 2067; R. Exh. 100). Further, it is undisputed that the Respondents proposed so-called "me too" language with respect to all three benefits, and that this language reserved to the Respondents unlimited discretion to make whatever changes they wanted whenever they wanted (provided only that they made the same changes for nonunit employees). Indeed, the "me too" health insurance proposal even contained language expressly removing the subject from the grievance/arbitration procedure.[50] See *Regency Service*, and *Liquor*

[48] In light of this finding, it is unnecessary to address whether the Region's unlawful failure to timely provide health insurance information to Meade also prevented the Region from implementing the changes to the EPO and PPO plans in the Teamsters units. See part III.A.1.b and c, above.

[49] Each of the expired contracts contains a provision (article 30 in the OPEIU contracts and arts. 28 or 31 in the Teamsters contracts) regarding employee health insurance (GC Exhs. 2–6). However, as noted, the Respondents do not cite those provisions in support of this defense. Nor do the provisions on their face appear to provide such support. Finally, there is no contention or evidence that the parties had reached a side agreement in 2008 or 2009 (the first benefit years that the BenefitsAdvantage umbrella program were offered to unit employees) providing that any subsequent changes to the EPO and PPO options could be made by the Respondents without notice or bargaining with the OPEIU. See Tr. 385–392.

[50] The Region's "me too" 401(k) and pension proposal for the OPEIU collections unit stated:

Industry, above (broad management-rights proposals accompanied by no-grievance/arbitration and no-strike proposals evidenced bad faith).[51] It is also undisputed that the Respondents never wavered from their "me too" proposals, notwithstanding that the OPEIU or the Teamsters made several counterproposals, including dropping the local health insurance plans. Moreover, as found above, the Region and/or the Chapter contemporaneously engaged in unlawful conduct by making unilateral changes in the very same benefits and failing to timely provide requested information. The Region also admittedly engaged in unlawful, fixed-mind bargaining with the OPEIU in the summer of 2010 regarding the transfer of telerecruiter work from the LCD unit.

However, as discussed above, such "me too" language was nothing new; the retirement provisions of the expired contracts contained similar language. Although the "me too" health insurance proposal contained additional language removing the subject from the grievance/arbitration procedure, such language was not included in the "me too" 401(k) and pension proposal. And there is no evidence whether the parties ever specifically discussed deleting the offensive grievance/arbitration language from the "me too" health insurance proposal, i.e. there is no evidence that the Respondents insisted on including the language in the "me too" proposal over the Unions' objection.

Further, Peterson provided a reasonable explanation to the Unions why the ANRC and the Respondents wanted the "me too" language: to achieve greater commonality and consistency of administration and experience and lower costs (Tr. 422, 432, 994, 1128, 1509–1510, 1599–1602, 1613, 1723–1724; CPO Exh. 7). The evidence fails to establish that this was not the true reason for seeking the provisions. Although the ANRC continued to offer several regional fully-insured Kaiser health plans for the 2010 plan year (see part III.A.1.b, and fn. 44, above), there is no real dispute that the ANRC wanted to eliminate the numerous additional local health plans around the country to increase the number of "lives" in the national plans. Further, while Rhines offered to drop the local plans for the region and chapter units, he did not offer to accept the same 2010 national EPO and PPO plan provisions being offered to nonunit employees. See GC Exhs. 40, 50, 53, 56, 57; and Tr. 432–441.

Moreover, the record indicates that several other regions and chapters had successfully negotiated similar "me too" health-insurance and retirement provisions with other local unions around the country (Tr. 1511, 1636–1638, 1719; see also R. Exh. 100). Indeed, Rhines and Meade themselves actually agreed at some point during their separate contract negotiations with Peterson to accept "me too" language with respect to the 401(k) plan (Tr. 660, 986; GC Exh. 159). Thus, it was certainly reasonable for the Respondents to believe that it was "fair and proper" to stand firm on their position, and/or that they had "sufficient bargaining strength to force" the Unions to agree. *Atlanta Hilton*, 271 NLRB at 1603. Cf. *Mid-Continent*, 336 NLRB at 260 (citing employer's failure to offer a legitimate explanation for its proposal or provide any evidence that it had considered or implemented similar provisions at other facilities as evidence of bad faith).[52]

The similar or related unfair labor practices found in this proceeding are also insufficient to establish that the Respondents—which had executed several contracts with the Unions in the past—were attempting to avoid reaching any new agreements. The Region's admission that it recently engaged in fixed-mind bargaining over the transfer of telerecruiter work from the LCD unit does not establish that the Respondents had approached contract negotiations in all five units in the same manner since February 2009. As for the related information and unilateral-change violations, the Respondents did timely provide the Unions with a substantial amount of information; their asserted defenses to the unilateral-change allegations were not entirely frivolous (indeed, I have found merit to some of them); and the parties have continued to meet and negotiate since the unfair labor practice charges were filed. Further, it is doubtful that the fundamental differences between the parties, especially over the "me too" health-insurance proposal, would have been any less fundamental in the absence of the 8(a)(5) violations.

Finally, the cases cited by the General Counsel in support of this allegation are distinguishable. Thus, in *Overnite Transportation Co*., 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th

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

The Region's "me too" health insurance proposal for the same unit stated:

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

See GC Exh. 41. The "me too" proposals for the other four units were virtually or exactly the same. See GC Exh. 46 (LCD unit), 92 (MUA unit), 97 (apheresis unit), and CPO Exh. 1 (Chapter clerical/warehouse unit). See also Tr. 439–441, 561–563.

[51] The Respondents' proposals also retained the no-strike provisions in the prior contracts. However, neither the General Counsel nor the Charging Parties have cited or relied on this as support for the allegations.

[52] To the extent *Liquor Industry*, 333 NLRB at 1219 fn. 1, could be read to suggest that evidence of similar agreements is irrelevant or insufficiently probative, I find that it is distinguishable. In that case, the contract purportedly containing the similar provision was executed by the parties *after* the respondents' alleged unlawful refusal to bargain in good faith had occurred and was litigated. Thus, it could not have had any bearing on the respondents' alleged unlawful behavior.

Cir. 1991), there was abundant evidence that the employer was "making good on [its preelection] promise never to cooperate with the [u]nion," rather than "honestly and in good faith attempting to preserve uniformity among its [union and nonunion] terminals." 938 F.2d at 818. Similarly, in *Cleveland Sales Co.*, 292 NLRB 1151 (1989), enfd. by unpub. per curiam opinion 1990 WL 142349 (6th Cir. 1990), the Board relied heavily on evidence that the employer "did not want to bargain with the union," and "wished and planned to get rid of the union," in finding that the employer unlawfully insisted on a contract of less than 1-year duration without good reason. 292 NLRB at 1156.

Regency Service and *Liquor Industry*, discussed above, are also distinguishable. In *Regency Service*, the proposed management-rights clause was "extremely broad," encompassing numerous subjects, and the employer made various statements indicating that it did not want to reach an agreement with the newly certified union. 345 NLRB at 672, 675. And in *Liquor Industry*, the employer's proposal would have granted broad discretionary authority over the "critical subject" of wages, "the most important issue in negotiations," and the employer refused to provide any explanation for its proposal. 333 NLRB at 1221.

Accordingly, for all the foregoing reasons, I find that this allegation should be dismissed in its entirety. See *St. George Warehouse*, 341 NLRB at 906–908; and *Atlanta Hilton & Tower*, 271 NLRB at 1603.[53]

B. The 8(a)(1) and (3) Allegations

The General Counsel also alleges that the Respondent Region violated Section 8(a)(3) and/or (1) of the Act by the way it responded to two incidents in March 2010 involving Lashawnda Spears, a phlebotomist and union steward in the collections unit. The first incident occurred on March 22. Late that afternoon, Spears received a message from Rhines that Smelser, the Region's HR supervisor, wanted her to contact him immediately, no later than 4 p.m., to provide certain information he needed to complete the payroll. Specifically, Smelser needed information from Spears regarding the amount the Region owed to a probationary employee for meal vouchers under the terms of the expired collective-bargaining agreement. At the time, Spears was working on a mobile truck unit at an offsite blood drive. She had just hooked up a donor to an apheresis machine to begin a 30-minute double-red cell procedure. However, the machine appeared to be functioning properly, the donor had no complaints, it was already near 4 p.m., and there was a mobile truck phone near the donor bed. So she went ahead and called Smelser on the mobile phone to give him the requested payroll/voucher information while she was monitoring the donor. (Tr. 152–155, 159, 263–266, 1224, 1228, 1241.)

Unfortunately for Spears, this caught the eye and ear of Sherrie Bristol, the team supervisor on the mobile blood drive. Bristol saw Spears using the mobile phone by the donor bed and overheard her talking about employee meal vouchers. Later, when Spears was on break, Bristol told Spears that she should not make phone calls while taking care of donors, even when the call is about business rather than personal matters. Spears responded that she was not going to use her breaktime for business matters. Bristol, however, repeated that Spears should not use the phone in front of donors, to which Spears replied, "I *got* it Sherrie"— in a tone that made Bristol feel that she was being mocked. (Tr. 156–158, 182, 1226–1231, 1243; R. Exh. 5.)

Bristol subsequently called and reported the incident to the Collections Manager, Sareta Miller, who supervises both her and Spears. The following day, March 23, Miller put a memo in Spears' office mailbox notifying her that a "discipline investigation" had been initiated regarding Spears "using [a] cell phone during work time." The memo advised Spears that a meeting would be scheduled to discuss the matter, and that she should "feel free to contact" Miller if she had any questions. (Tr. 1165–1167, 1190–1192; GC Exh. 13.)

The second incident occurred the following morning, March 24, when Spears went to see Miller about the memo. Spears was particularly upset that the memo incorrectly suggested that she had been using her personal cell phone at work. She told Miller that Bristol had "lied" by reporting this. Miller responded that Bristol had not reported that Spears was using her personal cell phone, and if the memo (which she did not have in front of her at the moment) said that, it was her (Miller's) mistake. Spears asked Miller why, then, she was being disciplined, since the call was to Smelser to give him the voucher information he had requested. Miller replied that she could not talk anymore about the matter at that time; that it would have to wait until the meeting.

Spears at that point left Miller's office and the conversation ended. However, after a moment, Miller decided to follow Spears out. Miller was concerned that Spears would start talking about the situation with the staff, who were beginning to arrive for an onsite blood drive. She eventually caught up with Spears about 20 or 30 feet down the hallway, at the doorway to where the donor room, staging area, and breakroom were located, and told her to "not talk to anyone about this." This apparently enraged Spears, who began yelling that she had not talked to anyone, and that she was being treated like a child. In response, Miller, who was normally very soft-spoken, also began speaking in a loud, but controlled, voice, telling Spears that she would have to settle down or go home. Eventually, however,

[53] The General Counsel also argues (Br. 115–119) that the Respondents were prohibited from unilaterally implementing their "me too" proposals under the principles of *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998); and *KSM Industries*, 336 NLRB 133 (2001), reconsideration granted in part 337 NLRB 987 (2002). See also OPEIU Br. 49, and Teamsters Br. 8. However, the complaint does not allege that the Respondents unlawfully implemented the "me too" proposals. Nor have the Respondents ever asserted in this proceeding that the parties were at impasse over the "me too" proposals, that they were entitled to implement their "me too" proposals, or that the alleged unlawful unilateral changes were implemented pursuant to those proposals. Accordingly, I find that it is both unnecessary and inappropriate to decide the issue. See generally *Allied Mechanical Services*, 346 NLRB 326, 329 (2006); *NLRB v. Quality C.A.T.V.*, 824 F.2d 542, 547 (7th Cir. 1987); and *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983), cert. denied 467 U.S. 1241 (1984).

after about 3–5 minutes, Miller and Spears walked away from each other and the situation deescalated.[54]

A disciplinary meeting was held about a month later, on April 30. Rhines attended with Spears, and Smelser attended with Miller. After the meeting, Smelser decided that Miller should not discipline Spears for using the mobile phone while monitoring a donor, because Miller had not made the Region's policy on phone usage clear enough to the staff. Nevertheless, Miller issued a written "verbal" warning to Spears (the first step in the progressive disciplinary system) for the two subsequent verbal exchanges with Bristol and Miller on March 22 and 24, respectively, that occurred in connection with that conduct. (Tr. 1175–1177, 1205). Specifically, the verbal warning (GC Exh. 14) cited Spears for the following conduct:

> March 22 & 24, 2010
> Lashawnda was loud, rude, and unprofessional to supervisor and Site manager. Acting in a manner that is contrary to the best interest of the American Red Cross.

The General Counsel alleges two violations based on the above facts: first, that Miller's broad and unqualified statement to Spears on March 24 not to talk to the staff violated Section 8(a)(1); and second, that Miller's April 30 verbal warning to Spears for her conduct on March 22 and 24 violated Section 8(a)(3). I find that both allegations are well supported.

1. The 8(a)(1) statement

The Region asserts that Miller simply "ask[ed]" Spears "not to discuss the phone issue so as not to disrupt the blood drive set up," and that it was "an isolated remark," with "no follow up of any kind." (Bat. Br. 4). However, Miller admitted that she never qualified her statement in this or any similar manner. Although she testified that she *intended* to do so—because Spears had a history of talking to staff about union matters during work—and was interrupted by Spears, I have discredited this testimony. See fn. 54, supra. Further, Miller acknowledged that at least one other employee (in addition to Supervisor Nimmo) was present when she made the statement to Spears (Tr. 1169–1170). Moreover, the statement is apparently what prompted the heated exchange that was subsequently cited in support of issuing Spears a verbal warning.

Accordingly, I find that Miller's statement violated the Act as alleged and warrants a remedial order. See *Desert Palace*, 336 NLRB 271 (2001) (absent an overriding substantial and legitimate business justification, an employer cannot prohibit employees from discussing an ongoing disciplinary investigation with fellow employees); and *Intermet Stevensville*, 350 NLRB 1349, 1355 (2007) (employer's directive to employee not to discuss her discipline with other employees while working violated Section 8(a)(1) where employer failed to prove that employee had previously impeded production or been warned or disciplined about impeding production or that other employees were restricted from talking during work).

2. The 8(a)(3) verbal warning

The Region argues that the verbal warning did not violate the Act because Spears was not acting in a representative capacity when she mocked Bristol and yelled at Miller, and the warning Miller gave her for that conduct was therefore unrelated to union activity. In short, the Region argues that "there is . . . nothing to connect the verbal warning to any protected activity." (Bat. Br. 3–4.) However, as indicated by the General Counsel, it is undisputed that the exchanges with both Bristol and Miller arose from Spears' conduct in her representative capacity as a union steward (telephonically reporting voucher/payroll information to HR Supervisor Smelser at his request), and that Spears' cited behavior on both March 22 and 24 occurred while defending that conduct (in response to being accused of violating the Region's rule against using the mobile phone in front of donors while exercising her steward duties).

Thus, Spears did not "just happen[] to be a steward" who was being investigated by her employer for conduct that occurred in her individual capacity as an employee. *Tampa Tribune*, 346 NLRB 369, 370 (2006) (finding that employer lawfully disciplined employee for his outburst while being "coached" by foreman for shutting down the pressline without a backup line running, even though employee was the union steward). Rather, her conduct as union steward was at the heart of the disciplinary investigation and related discussions that occurred on March 22 and 24. See *American Red Cross Blood Services Div.*, 316 NLRB 783, 786–787 (1995), and cases cited therein.

[54] The foregoing factual summary of the exchange between Spears and Miller is based on both their testimony and the testimony given by Rhines (who was able to hear much of the exchange because Spears called him on her cell phone so that he could do so), and Michelle Nimmo, a supervisor in the Region's donor recruitment division (who was unpacking her computer at her open cubicle next to the door and saw and/or heard the entire exchange). See Tr. 159–161, 183, 189, 266–268, 1167–1171, 1181–1183, 1202, 1206, and 1211–1216. To the extent there are inconsistencies between witnesses, I have given the greatest weight to Nimmo, as she was physically present throughout, she impressed me as having the clearest memory of the events, she was the least interested of any of the witnesses (although a member of management, she works in a different division and is not supervised by Miller), her testimony was consistent with the known or undisputed facts and inherent probabilities, and her demeanor betrayed no reason to discredit her testimony. For example, based in part on Nimmo's testimony, I discredit Miller's testimony that she had intended to add "during working time" when she initially told Spears not to talk about the matter with staff, but that Spears "interrupted" and "cut off" her statement (Tr. 1201). According to Nimmo, Spears had her back turned to Miller at that time, and did not respond until after she turned around to face Miller (1211–1212). Further, Miller made no mention of being cut off when she reported the incident to HR (Tr. 1202). I likewise discredit Miller to the extent she suggested that Spears had a history of improperly talking to other employees about disciplinary or other union matters during work. See Tr. 1181–1182 (testifying that she thought Spears would talk to the staff during work based on her "past experiences with [Spears]"). Miller's testimony was not corroborated by any other witness, she offered no examples, and she admitted that Spears had never been disciplined for such conduct (Tr. 1182–1184). Finally, I also discredit Miller's testimony that Spears said she did not have to listen to Miller and that Miller could not tell her anything (Tr. 1167–1170). Again, this was not corroborated by Nimmo or any other witness and, as discussed infra, the verbal warning that Spears eventually received made no mention of any insubordinate statements or conduct by Spears.

See also *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 453–454 (7th Cir. 1989).

In agreement with the General Counsel, I also find that Spears' cited "loud, rude, and unprofessional behavior" on March 22 and 24 was not so opprobrious or egregious that she lost the protection of the Act under the relevant factors set forth in *Atlantic Steel*, 245 NLRB 814 (1979). As discussed below, I find that those factors—the place of the discussion, the subject matter of the discussion, the nature of the employee's conduct, and whether the conduct was provoked by the employer's unfair labor practices—clearly weigh in favor of finding that Spears remained protected.

Place of discussion

As indicted above, the March 22 exchange with Bristol occurred while Spears was on break. Further, there is no evidence that any other employees or donors overheard Spears' remark. As for the March 24 exchange with Miller, the record indicates that the exchange occurred in or near a work area, and that other employees walked in or out of the area and would have overheard it. However, Miller is the one who followed Spears there and initiated the exchange in that area (Tr. 1169–1170). See *Kiewit Power Constructors*, 355 NLRB 708 (2010) (finding that the place of discussion was at least a neutral factor where respondent chose to distribute the warnings in a group-employee setting in a work area during working time, and should have reasonably expected that employees would react and protest on the spot).

Subject matter of discussion

As discussed above, the underlying subject matter of both discussions concerned Section 7 activity. The March 22 exchange concerned Spears' conduct, in her representative capacity as union steward, of using the mobile phone in front of a donor to provide payroll/voucher information to HR Supervisor Smelser at his request. The March 24 exchange revolved around the same subject, and also specifically concerned Spears' right to discuss the disciplinary investigation of her alleged March 22 improper phone use with her fellow employees. Thus, this factor clearly favors protection.

Nature of conduct

While Spears' comments on March 22 and/or 24 were apparently considered inappropriately loud, rude, and/or unprofessional, they were not considered insubordinate. Nor is there any contention that Spears used profane, obscene, or personally denigrating terms or made any threatening comments or gestures. Further, the record indicates that her comments in both instances were spontaneous and that she voluntarily disengaged from the more volatile, March 24 discussion after only a few minutes. See *Goya Foods*, 356 NLRB 476 (2011); and *Plaza Auto Center*, 355 NLRB 493 (2010) (finding that such circumstances weigh in favor of protection).

Provocation by employer's unfair labor practices

As indicated above, the more heated discussion on March 24 with Miller was clearly provoked, at least in part, by Miller's unlawful directive not to talk about the disciplinary investigation with other employees. Thus, this factor also favors protection.

Accordingly, for all the foregoing reasons, I find that Miller's statement and warning to Spears both violated the Act as alleged.

C. The 8(a)(3) and (5) *Allegations*

The General Counsel lastly alleges that the Region unlawfully denied 6 collections and LCD-unit employees preapproved paid leave, and 89 collections-unit employees guaranteed hours or pay, during the week commencing Monday, June 7, 2010, immediately following a 3-day unfair labor practice strike.[55] The General Counsel alleges that these actions violated both Section 8(a)(3) and (5) because they were discriminatory, in retaliation against the employees for engaging in the strike, and because they were unilateral, without providing the OPEIU notice or an opportunity to bargain over the decision or effects.

As with most of the allegations in this proceeding, the Region admits the underlying facts; that is, there is no dispute, and the evidence is uncontroverted, that the named employees participated in an unfair labor practice strike beginning June 2 (GC Exh. 71; and Tr. 196–197, 493–495, 698–699); that the strike ended effective Saturday, June 5 (GC Exh. 74; Tr. 491, 500–501); and that during the following week beginning Monday, June 7, the Region unilaterally denied all of the named unit employees preapproved paid leave and/or guaranteed hours (GC Exhs. 1(nnnn), 1(oooo), 22(c); Tr. 346–347).

However, the Region asserts that it did so because the previously scheduled blood drives for that week had been cancelled by the Region or the sponsors due to uncertainty about when the strike would end or the lack of signed-up donors. The Region asserts that, consequently, there was no work available for the named collections and LCD employees and they had not yet been returned to "active status" at that time. The Region contends that, in these circumstances, it should be relieved of any obligation to provide paid annual leave or guaranteed hours during that period, citing *Drug Package Co.*, 228 NLRB 108, 113–114 (1977), enfd. in part and denied in part, 570 F.2d 1340 (8th Cir. 1978) (reaffirming Board's longstanding remedial policy that backpay for former strikers who were unlawfully denied reinstatement shall not begin until 5 days after their unconditional offer to return, in "recognition of the practical difficulties [the employer] may face in reinstating employees, when [the employer] is not in a position to know exactly when they may seek to return") (Bat. Br. 5–7.)

The record evidence supports the Region's explanation for why blood drives during the week of June 7 were cancelled (Tr. 693–700, 1888–1930). Although the Union issued a "press advisory" on June 1 stating that the strike would be limited to 3 days (GC Exh. 71), the Union had not included this statement

[55] The complaint lists 90 named employees who were denied guaranteed hours. However, the parties stipulated during the hearing that there were actually 89 such employees. See GC Exh. 22(c); and Tr. 346. Employee Ranum, who was listed twice in the complaint, is omitted altogether from the stipulation. Three other employees who were named in the complaint—Rhein, Starin, and Whitehill—are also omitted from the stipulation. On the other hand, the stipulation includes three other employees—Flannery, Fountaine, and Tracy—who were not named in the complaint.

in the advance notice of the June 2 strike it gave the Region as a "courtesy" on May 21 (GC Exh. 72). The evidence also supports the Region's assertion that the named collections and LCD employees were not immediately recalled beginning June 7 because of the cancellation of blood drives and lack of work (Tr. 1891; GC Exhs. 22(d), 75, 77; CPO Exh. 11). Indeed, it is undisputed that the Region immediately recalled other former strikers who worked as telerecruiters in the LCD unit, as their work is not tied to scheduled blood drives (Tr. 694–697, 1891).

Moreover, the General Counsel's posthearing brief (p. 158) specifically states that "[t]he recall of employees subsequent to OPEIU's unconditional offer to return to work is not an issue in the instant case." Thus, the General Counsel appears to concede, and I therefore presume, for purposes of this proceeding, that the Region lawfully delayed recalling the named employees due to lack of work. See *Zimmerman Plumbing & Heating Co*., 334 NLRB 586, 588 (2001), and cases cited there (employer may delay reinstating former strikers where there is a bona fide absence of available work).

Nevertheless, it does not necessarily follow—either from the Board's policy that reinstatement may be delayed due to lack of work, or from the Board's policy that such practical problems warrant delaying backpay for 5 days—that the Region's actions here with respect to the unrecalled former strikers were lawful. As indicated in *Drug Package* and *Zimmerman Plumbing*, both policies are grounded in the Board's interpretation of the language and purpose of the statute. In contrast, the Region's obligations to pay employees for preapproved annual leave and guaranteed hours arise from the provisions of the parties' expired collective-bargaining agreements (which, as discussed above, continue to define the status quo post-expiration).

In these circumstances, in agreement with the General Counsel and the OPEIU, I find that the proper analysis is set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The issue in that case, similar to the issue here, was whether the employer violated Section 8(a)(3) of the Act by refusing to pay striking employees vacation benefits pursuant to the provisions of the parties' expired contract. The Board held that it did, and the Court upheld the Board's finding. The Court held that once it has been shown that an employer engaged in discriminatory conduct that could have adversely affected employee rights, the burden is on the employer to establish that it was motivated by legitimate objectives. Applying this analysis, the Court held that the Board properly found that the employer violated Section 8(a)(3) inasmuch as the vacation benefits had accrued to the strikers prior to the strike, the only reason the strikers were denied the accrued benefits was because they participated in the strike, and the employer failed to submit any evidence of a legitimate motive for its discriminatory conduct.

The Board has applied the same analysis in subsequent cases under similar circumstances. See, e.g., *Texaco, Inc*., 285 NLRB 241, 246 (1987) (employer unlawfully denied accident and sick benefits and pension credits to disabled employees during strike where the benefits were accrued, the benefits were denied based on protected strike activity, and the employer had failed to show that the union had expressly waived the right to receive such benefits during a strike or that there was a reasonable and arguably correct nondiscriminatory contract basis for denying the benefits); *Lourdes Health Systems*, 316 NLRB 284 (1995) (employer unlawfully denied termination benefits, including vacation and sick leave pay, to unrecalled former strikers who wished to resign, as the benefits had accrued and the employer had given such benefits to other employees who were not on active work status when their employment terminated); *Swift Adhesives*, 320 NLRB 215 (1995), enfd. 110 F.3d 632, 634 (8th Cir. 1997) (employer unlawfully denied to permanently replaced strikers vacation pay that had accrued under the terms of the parties' expired contract, where employer would have deemed the employees eligible to receive the benefits but for their participation in the strike, and the employer failed to show a legitimate and substantial business justification for denying the benefits); and *Dayton Newspapers*, 339 NLRB 650, 656 (2003), affd. in relevant part 402 F.3d 651, 666 (6th Cir. 2005) (employer unlawfully denied laid off former strikers accrued "stay to the end" bonuses where bonuses were withheld on the apparent basis of the strike and employer failed to show a legitimate and substantial business justification for denying the bonuses). See also *Pride Care Ambulance*, 356 NLRB 1023,1026–1027 and 1039–1041(2011) (employer unlawfully denied vested health insurance coverage to strikers after they returned to work by requiring them to re-enroll and wait 90 days to requalify for health insurance eligibility), and cases cited therein.

For the reasons set forth below, applying the same analysis here, I find that the Region's denial of preapproved paid annual leave and guaranteed hours to the former strikers violated the Act as alleged.[56]

1. Denial of preapproved paid annual leave

The provisions of the expired LCD and collections contracts provide that full-time employees shall earn a certain number of hours of paid annual leave each week depending on their length of service. They further require that employees submit their specific annual leave requests for approval well in advance, either in December of the prior year (collections contract), or between January 1–15 for the upcoming 15 months (LCD contract).[57] Finally, they provide that the Region may not cancel or reschedule vacations unless "emergency or disaster conditions so require." (GC Exh. 3, art. 22; GC Exh. 4, art. 20.)[58]

There is no dispute that, pursuant to the foregoing provisions, all six of the named former strikers had accrued annual

[56] The Supreme Court in *Great Dane* indicated that an employer's discriminatory actions might also be found unlawful, regardless of whether the employer established a legitimate business justification, if the actions were "inherently destructive of employee interests." 388 U.S. at 34. However, the Court found it unnecessary to address the issue in that case given that the employer had failed to establish a business justification. For the same reason, there is likewise no need to address the issue here.

[57] The LCD contract contains separate provisions for requesting summer leave (Memorial Day–Labor Day). Although the date for making the request is not specified, the description of the procedure indicates that it is also done well in advance.

[58] The expired collections contract further provides that the Region may not do so without "reasonable cause and notice of at least 4 weeks."

leave and had previously requested and were approved to take such leave during the week of June 7. Thus, for example, the record indicates that Michael Turner, a former striker in the collections unit, had requested to take the leave in December 2009, and the Region approved the request in January 2010 (GC Exh. 16; Tr. 195). Nevertheless, on June 10, while he was on his previously scheduled and approved vacation, Turner was informed that the Region would not be paying him for the leave time. And, in fact, he was not paid for the time in his next paycheck. (Tr. 197–199; GC Exh. 17.)

As indicated above, the Region admits that it unilaterally denied Turner and the other five unit employees paid annual leave because of the strike and resulting cancellation of blood drives. Further, it does not contend that these circumstances constituted "emergency or disaster conditions" requiring cancellation of the leave. This contractual language was obviously intended to address situations when there is an unexpected *increase* in the number of blood drives, not when, as here, there is a decrease. Finally, the Region has cited no provisions in the contracts, or any other evidence of a past practice, that would even arguably require employees to be in "active status" during or immediately prior to taking their previously approved leave. Compare *Advertiser's Mfg. Co*., 294 NLRB 740 (1989) (employer did not violate Section 8(a)(3) by denying holiday pay to strikers because the relevant handbook provisions expressly included an active on-duty work requirement the day before and after July 4 and for 3 months before Memorial Day, and there was no evidence of a contrary past practice), with *Glover Bottled Gas Corp*., 292 NLRB 873 (1989) (employer violated Section 8(a)(3) by denying bereavement and vacation benefits to returning strikers where employer's contention that most recently expired contract required employees to work continuously from April 1 to March 31 to be eligible for vacation pay was unreasonable and not even arguably correct).

In agreement with the General Counsel, therefore, I find that the Region has failed to establish any legitimate or substantial business justification for its action, and that it violated Section 8(a)(3) of the Act as alleged. As it is undisputed that the Union was not provided advance notice or an opportunity to bargain, I find that the Region's action also violated Section 8(a)(5) of the Act See *Pride Care*, supra; and *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006).

2. Denial of guaranteed hours

The same conclusion is warranted with respect to the Region's denial of guaranteed hours to the 89 former strikers in the collections unit. Article 17, section 7 of the expired collections contract (GC Exh. 3) provides that all full-time employees are "guaranteed" a certain number of "work or hours each week" (40 hours for those hired before October 1, 1989, and 37-1/2 hours for those hired thereafter). The only listed exception is for "periods covered by annual and granted leaves of absence." See also Tr. 510.

Again, it is clear that all of the named former strikers qualified for guaranteed hours under these provisions. The only stated requirement is that they be employees, and it is well established that strikers do not lose their employee status. Thus, like paid annual leave, the hours guarantee was an accrued benefit. See *Texaco*, 285 NLRB at 245–246 (a benefit is "accrued" when it is "due and payable" on the date the employer denied it "based on past performance with no further work required for continuing receipt"). See also *Circuit-Wise*, 309 NLRB 905, 912 (1992) (longevity bonus had "accrued" to strikers where entitlement to bonus was based solely on employee status without any requirement of further work).

There is also no dispute that the only reason the former strikers were denied guaranteed hours during the week following the strike was because they had participated in the strike and had not yet been called in due to lack of work. The Region's counsel stipulated at the hearing that this was the only reason and that the former strikers were not denied guaranteed hours because they had requested and been granted annual leave or other leave of absence (Tr. 546).[59]

Finally, there is no evidence of a past practice inconsistent with the expired contract provisions that would arguably support denying guaranteed hours to employees who are not in "active status" because of lack of work. On the contrary, HR Supervisor Smelser acknowledged that employees are normally paid their guaranteed hours when drives are cancelled (Tr. 1991–1992). (Indeed, as noted by Rhines, "that is the whole point of the guarantee" (Tr. 598–599).)

Accordingly, I find that the Region's unilateral rescission of the 89 former strikers' vested right to guaranteed hours following the strike also violated Section 8(a)(3) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent Region violated Section 8(a)(5) and (1) of the Act by:

(a) failing and refusing to provide OPEIU Local 459 with the information it requested on March 17 and 25, 2009 regarding the reduced demand for blood;

(b) unreasonably delaying providing Teamsters Local 580 with the information it requested on May 11, June 10, and July 31, 2009 regarding employee health insurance;

(c) failing and refusing to include the names of employees with the health insurance demographic information it eventual-

[59] This factual stipulation appears inconsistent with the evidence the General Counsel presented in support of the annual-leave allegation regarding Turner. Turner is one of the 89 stipulated collections-unit employees allegedly denied guaranteed hours the week of June 7. However, as discussed above, the evidence shows that Turner was on annual leave that entire week. Four of the other five named employees who were allegedly denied paid annual leave 1 or more days the week of June 7 (Clark, Letts, Silver, and Wright) are also among the 89 stipulated collections-unit employees denied guaranteed hours the same week. Nevertheless, in the absence of a timely or proper motion to withdraw from the stipulation, I find that the stipulation is binding on the Region. See *Arbors at New Castle*, 347 NLRB 544, 545 (2006), and cases cited there. See also Graham, 3 Handbook of Fed. Evid. Sec. 801:26 (6th Ed. 2010); and Wright and Graham, 22 Fed. Prac. & Proc. Evid. Sec. 5194 (1st ed. 2010). This, however, does not prevent the parties from reaching a mutually agreeable settlement different from the terms of the remedial order to correct this or any other errors or inconsistencies in the stipulation. (It appears they might all have an incentive to do so. See fn. 55, supra.)

ly provided to Teamsters Local 580 in response to its July 31, 2009 request;

(d) failing and refusing to provide OPEIU Local 459 with the information it requested on May 19 and 21, 2010 regarding the transfer of telerecruiter work from the LCD unit to other, out-of-state locations;

(e) unilaterally implementing a more stringent, no-fault attendance policy covering employees in the collections and LCD units in November 2008, without providing OPEIU Local 459 notice or an opportunity to bargain over the change and its effects;

(f) unilaterally refusing, contrary to past practice, to permit OPEIU Local 459 to hold union meetings on its premises in April 2009, without providing the Union prior notice or an opportunity to bargain over the change and its effects;

(g) eliminating the pension plan for new hires in the collections and LCD units in July 2009, without providing OPEIU Local 459 prior notice and an opportunity to bargain over the change and its effects;

(h) bypassing OPEIU Local 459 and announcing to employees in May 2010 that it intended to transfer telerecruiter work from the LCD unit; and

(i) bargaining with OPEIU Local 459 since July 2010 with a fixed mind and no intention of reaching an agreement with respect to the transfer of the telerecruiter work from the LCD unit.

2. Both the Respondent Region and the Respondent Chapter violated Section 8(a)(5) and (1) of the Act by:

(a) unilaterally changing the retiree medical program in January 2009 by discontinuing the program for both current employees not yet eligible to retire and future hires in the collections, LCD, and clerical/warehouse units, without providing OPEIU Local 459 prior notice and an opportunity to bargain over the change and its effects;

(b) unilaterally changing the retiree medical program in July 2009 by replacing the Medicare Supplemental Plan with a private fee-for-service plan for employees in the collections, LCD, and clerical/warehouse units currently eligible or nearing eligibility to retire, without providing OPEIU Local 459 prior notice and an opportunity to bargain over the change and its effects;

(c) unilaterally suspending matching contributions to the 401(k) savings plan for employees in the collections, LCD, and clerical/warehouse units in May 2009, without providing OPEIU Local 459 prior notice and an opportunity to bargain over the change and its effects; and

(d) unilaterally implementing a new BenefitsAdvantage health insurance program in January 2010 for employees in the collections, LCD, clerical/warehouse, apheresis, and MUA units, without providing OPEIU Local 459 and Teamsters Local 580 a meaningful opportunity to bargain over the change and its effects.

3. The Respondent Region violated Section 8(a)(1) of the Act on March 24, 2010 by directing Lashawnda Spears, an employee in the collections unit and the OPEIU Local 459 steward, not to talk to other employees about a pending disciplinary matter.

4. The Respondent Region violated Section 8(a)(3) and (1) of the Act by issuing a written "verbal" warning to Spears on April 30, 2010.

5. The Respondent Region violated Section 8(a)(3), (5), and (1) of the Act by:

(a) denying preapproved paid annual leave during the week of June 7, 2010 to six employees in the collections and LCD units who had participated in a 3-day unfair labor practice strike the previous week; and

(b) denying guaranteed hours during the same week to 89 employees in the collections unit who had participated in the strike.

6. The Respondents' unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondents did not otherwise violate the Act as alleged by the General Counsel.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order the Respondent Region and the Respondent Chapter to rescind the unlawful unilateral changes one or both of them made to the unit employees' terms and conditions of employment, and to restore the status quo ante that existed prior to the changes until such time as they bargain with Teamsters Local 580 and/or OPEIU Local 459 in good faith to a contrary agreement or bona fide impasse.[60] With respect to the Region's unlawful change in the attendance policy, this obligation shall include removing from its files any discipline issued to employees in the collections and LCD units as a result of the change, and notifying the employees that this has been done and that the prior discipline will not be used against them in any way.

I shall also order the Respondents to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. Backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[61] It further includes reimbursing the unit employ-

[60] Respondents may litigate in compliance whether it would be unduly burdensome to restore the status quo ante with respect to the unilateral changes in health insurance coverage or other benefits. See *Comau, Inc.*, 356 NLRB 75 fn. 7 (2010). If the Unions choose to retain one or more of the unilaterally implemented changes, then make-whole relief for those changes is inapplicable. Ibid.

[61] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of

ees for any expenses ensuing from the Respondents' failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the same manner as backpay described above.

Similarly, I shall order the Respondent Region to make whole the named employees in the collections and LCD units who were unlawfully denied preapproved paid annual leave and guaranteed hours following the strike. Such amounts shall be computed in the same manner described above.

I shall also order the Respondent Region to provide the requested information it unlawfully failed to provide OPEIU Local 459 or Teamsters Local 580; to bargain in good faith with OPEIU Local 459 on request with respect to the transfer of telerecruiter work; and to rescind the written "verbal" warning it issued to Spears, expunge any reference to the discipline from its files, and advise Spears that this has been done and that the discipline will not be used against her in any way.

Finally, I shall order the Respondents to each post a notice to their employees regarding their respective violations in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

[Recommended Order omitted from publication.]

Respondents delinquent contributions during the period of the delinquency, Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that Respondents otherwise owe the fund.