Delta Sandblasting Company, Inc. *and* International Union of Painters and Allied Trades, District Council 16. Cases 20–CA–176434 and 32–CA–180490

October 16, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On September 15, 2017, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, which the Charging Party Union joined, and the Respondent filed a reply brief. The Union filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Union filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions as modified below, to amend the remedy, and to adopt the judge's recommended Order as modified and set forth in full below.[3]

This matter arises from the parties' negotiations over a successor contract after their collective-bargaining agreement expired in August 2015. We affirm the judge's finding that the General Counsel failed to establish that a "meeting of the minds" over the terms of a successor contract had been reached. The judge therefore correctly dismissed the allegation that the Respondent violated the Act by refusing to execute a successor contract.[4] For the reasons stated below, we also affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its contributions to the employees' pension fund in March 2016 without providing the Union notice and the opportunity to bargain.[5]

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[1] Member Emanuel is recused and took no part in the consideration of this case.

[2] The Respondent and the Charging Party 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.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and the unit description alleged in the Complaint. We shall also substitute a new notice to conform to the Order as modified. We otherwise find that the Board's standard remedies are sufficient to effectuate the policies of the Act, and accordingly we deny the Union's request for additional remedies. We disagree with our colleague that fluctuations in the size of the Respondent's workforce warrant a notice-mailing remedy. The result of such fluctuations is that some individuals who worked for the Respondent when the unfair labor practice was committed may no longer do so. But it is *always* the case that employees who worked for an employer at the time it committed an unfair labor practice may no longer be working for that employer when the remedial notice is posted, and the Board *rarely* orders notice mailing. Rather, notice mailing is generally made contingent on the respondent's having gone out of business or having closed the facility involved in the proceeding. We adhere to the Board's traditional practice.

Member McFerran joins her colleagues in finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally reducing its contributions to the employees' pension fund without providing the Union notice and the opportunity to bargain. Unlike her colleagues, however, she would grant the Charging Party Union's request that the Respondent also be required to mail copies of the notice, at its own expense, to all employees since the first date the unfair labor practice occurred. The Respondent performs marine sandblasting and painting services in the San Francisco Bay area. As the judge found, the Respondent's workforce varies between six and fifty employees, based on the demand for the Respondent's services. In light of the fluctuating nature of the work and workforce, and the fact that some employees who were working when the violation occurred may not be called to work during the 60-day notice posting period and may not otherwise learn of the violation, Member McFerran would find that a notice-mailing remedy is appropriate. See, e.g., *Veritas Health Services, Inc.*, 363 NLRB No. 108, slip op. at 2 (2016), enfd. in relevant part, 895 F.3d 69 (D.C. Cir. 2018) (ordering respondent to mail copies of notice to per diem employees who do not regularly report to respondent's facility); and *Teamsters Local 104 (Blue Rodeo)*, 325 NLRB No. 121, slip op. at 3 (1998) (ordering respondent to mail notice in view of the "itinerant and sporadic working conditions" of the affected employees).

[4] The General Counsel did not except to the judge's dismissal of the "*Heinz*" violation. See *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (parties are obligated to execute a collective-bargaining agreement once an agreement is reached). However, the Union did except, arguing that the judge improperly relied on the hearsay testimony of witnesses Floyd Farley and John Capovilla regarding a conversation they overheard between the Respondent's former president, James Sanders, Sr. (Sanders Sr.) and Union representative Jose Santana. We need not and do not rely on this testimony, nor do we rely on the similar "state of mind" testimony of Joyce Sanders (Ms. Sanders) and James Sanders, Jr. regarding the same conversation. Even disregarding this testimony, the record lacks sufficient evidence to support a finding that the Union and the Respondent reached a meeting of the minds regarding the terms of a successor contract. See *Golden Cross Health Care of Fresno*, 314 NLRB 1201, 1201 fn. 2 (1994) (not relying on evidence excepted to as hearsay where substantial other evidence supported the judge's conclusion), ptn. for review dismissed 87 F.3d 1318 (9th Cir. 1996).

[5] In her conclusions of law, the judge correctly concluded that the Respondent ceased making required pension contributions in March 2016. At other places in the decision and recommended Order, the judge stated that the Respondent unilaterally changed the pension contribution rate in April 2016. We affirm the judge's conclusion of law that the Respondent unilaterally changed its pension contribution rate in March 2016, as this date is supported by the record, and we amend the judge's decision and recommended Order to the extent it states otherwise.

The Respondent performs marine sandblasting and painting services in the San Francisco Bay area, and its unit employees have been represented by the Union for many years. By its terms, Section 18.1 of the parties' 2008-2015 collective-bargaining agreement (the 2008-2015 CBA) required the Respondent to contribute to the Pacific Coast Shipyards Pension Fund (pension fund) at the rate specified in Wage Schedule A. The record shows that in 2007 and 2008, the Respondent contributed to the pension fund at a rate of $1.95 per hour worked per employee. However, in 2008, the pension fund notified the Respondent that the fund had entered critical status as defined by the Pension Protection Act of 2006 (PPA). The PPA requires that a critically underfunded pension fund adopt and implement a rehabilitation plan designed to resolve its underfunding. In accordance with the PPA, the pension fund adopted and implemented a rehabilitation plan that increased pension fund contribution rates. The pension fund then notified contributing employers, including the Respondent, of these increased rates. Section 18.4 of the 2008–2015 CBA states that the Respondent and the Union have the "joint responsibility . . . to instruct the Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability that currently exists."

The record does not indicate the rates paid by the Respondent from 2009 to 2013. But the record does show that the Respondent contributed to the pension fund at the rate required under the rehabilitation plan from April 2014 forward, and at the time the 2008–2015 CBA expired on August 31, 2015, the Respondent was contributing to the pension fund at the rate of $9.78 per hour. The Respondent continued to contribute at this rate until January 2016, when it increased its contribution rate to $11.38 per hour. In each case, these were the rates required by the pension fund under its PPA-mandated rehabilitation plan. Moreover, Wage Schedule A for 2014-2015 lists a pension contribution rate of $8.18 per hour, with a planned increase to $9.78 per hour on January 1, 2015. In these circumstances, we affirm the judge's finding that those rates were incorporated into the 2008-2015 CBA.[6]

In March 2016, the Respondent, without providing the Union with notice or an opportunity to bargain, reduced its pension contribution rate to $1.95 per hour. The Respondent informed the pension fund by letter that it did not "have the money at this time to pay the mandatory (critical status) amount due." Notably, the Respondent did not assert that it was ceasing making pension fund contributions at the rehabilitation plan rate because it was not required to make them. To the contrary, it admitted in its letter to the pension fund that the "critical status" rate—i.e., the rate required under the rehabilitation plan—was "mandatory."

The Respondent advances that argument now. It does not dispute that it has an obligation to maintain the status quo of its pension fund contributions while it bargains for a successor contract with the Union. Instead, the Respondent argues that its status quo obligation only requires it to make pension fund contributions at a rate of $1.95 per hour. We reject this contention. As noted above, we have found that the $9.78 per hour rate was incorporated into the parties' agreement and was applicable at the time the agreement expired. Moreover, it is undisputed that the Respondent paid the escalating rehabilitation plan rates both before and after the 2008-2015 CBA expired in August 2015, which further bolsters our conclusion that those rates were incorporated into the parties' agreement and thus were part of the status quo the Respondent was obligated to maintain.[7] See, e.g., *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994) (following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all terms and conditions of employment that constitute mandatory subjects of bargaining until the parties either agree on a new contract or reach an impasse in negotiations), enfd. 136 F.3d 727 (11th Cir. 1998), cert denied 525 U.S. 1067 (1999).[8]

[6] Union representative Santana testified that he inserted Wage Schedule A showing the increased pension contribution rates into the expired contract, and Sanders Sr. then executed it. Ms. Sanders, the Respondent's secretary and treasurer, testified that she was familiar with Wage Schedule A, and she identified it as a "rate sheet" that showed the "different amounts" Respondent was required to pay and did, in fact, pay. She also testified that, when she received the rate sheet, it was not attached to a collective-bargaining agreement; Sanders Sr. had simply handed it to her. Ms. Sanders' testimony that Wage Schedule A was stored as a stand-alone document is consistent with Santana's testimony that Wage Schedule A was a rate sheet that could be inserted into the contract. Ms. Sanders' identification of Wage Schedule A as the rate sheet containing the pension contribution amounts paid by the Respondent bolsters the conclusion that, however the Respondent stored Wage Schedule A, it was treated as part of its collective-bargaining agreement with the Union.

[7] Indeed, the Respondent increased its contribution rate to $11.38 per hour on January 1, 2016, incorporating a $1.60-per-hour increase required by the rehabilitation plan. The Respondent paid the $11.38-per-hour rate in January and February 2016. And it ceased paying that rate in March 2016, noting an inability to pay, not that the rehabilitation plan rates were not owed.

[8] In its exceptions brief, the Respondent contends that the parties reached an impasse in bargaining in May 2016. The Respondent did not assert this defense in its answer or at the hearing. The Board finds a contention untimely raised and waived when a party raises it for the first time in exceptions to the Board. *Wind-Chester Roofing Products*, 302 NLRB 878, 878 fn. 1 (1991). Accordingly, we find that the Respondent's untimely raised impasse defense has been waived, and we will not consider it.

We reject the Respondent's contention that requiring payment of the rehabilitation plan rates incorporated into Wage Schedule A forces the Respondent to violate Section 302(c)(5)(B) of the Labor Management Relations Act (LMRA).[9] LMRA Section 302(c)(5)(B) requires that employer payments to an employee trust fund, such as the pension fund here, be made pursuant to "a written agreement" that specifies "the detailed basis on which such payments are to be made." Although it is not the responsibility of the Board to enforce this provision of the LMRA, neither does the LMRA "bar the Board, in the course of determining whether an unfair labor practice has occurred, from considering arguments concerning Section 302 to the extent they support, or raise a possible defense to, unfair labor practice allegations." *BASF Wyandotte Corp*., 274 NLRB 978, 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986).

We find that the requirements of Section 302 are satisfied on the facts of this case. An employer's obligation to make fringe benefit contributions has "been enforced in a variety of circumstances, absent a signature to a current collective bargaining agreement." *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restoration Inc*., 385 F.3d 761, 770 (7th Cir. 2004), cert. denied 544 U.S. 999 (2005). Indeed, "the Board has consistently held that an expired contract, under which the obligation to make payments to the fringe benefit funds arose, is sufficient to meet the 'written agreement' requirement of Section 302(c)(5)(B)." *Concord Metal, Inc*., 298 NLRB 1096, 1096 (1990). The Board and courts have also noted that compliance with Section 302(c)(5)(B) may derive from sources other than a collective-bargaining agreement. See *Hen House Market No. 3 v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) ("A trust fund agreement separate and apart from the collective bargaining agreement would surely satisfy the statutory prerequisite."). The LMRA requires "merely a writing detailing the bases on which the contributor's payments are to be made on behalf of the employees." *Richmond Homes*, 245 NLRB 1205, 1213 (1979). Furthermore, multiple documents may be read together to meet the requirements of the LMRA. Id. Thus, a collective-bargaining agreement that references a trust agreement setting forth the detailed basis on which payments are to be made satisfies the requirements of the LMRA. *Carpenters St. Louis Council (Ficken Construction)*, 276 NLRB 682, 692 (1985).

Hen House Market No. 3 provides guidance for the matter at hand. There, the Eighth Circuit found that the requirements of Section 302(c)(5)(B) were satisfied by references to the trust fund agreements within the expired collective-bargaining agreement, where the employer had made payments pursuant to the trust fund agreements. Similarly here, the rehabilitation plan rates were incorporated into the expired agreement via Wage Schedule A and Section 18.4, and the Respondent made contributions for at least 2 years at those rates. Thus, as in *Hen House Market No. 3*, the Respondent "certainly agreed" to the rehabilitation plan rates "not only because they are incorporated by reference into the collective bargaining contract itself, but also because [it] made contributions" pursuant to the rehabilitation plan's terms. *Hen House Market No. 3 v. NLRB*, 428 F.2d at 139. The expired 2008-2015 CBA, by recognizing the parties' obligation to eliminate underfunding and by incorporating the plan's rates in Schedule A, satisfies Section 302(c)(5)(B)'s requirement for a "detailed basis . . . specified in a written agreement."

Moreover, it is undisputed that the rehabilitation plan rates were validly adopted and implemented by the pension fund pursuant to the PPA. The courts do not appear to have considered the interplay between LMRA Section 302 and the PPA to date. However, the PPA specifically authorizes pension plans to impose rehabilitation rates on employers in circumstances when the parties have failed to agree to those rates.[10] This statutory authority would be wholly illusory if, as the Respondent posits, the LMRA nevertheless allows employers to avoid making the required payments on the ground that they are not authorized by a written agreement. We are reluctant to ascribe to Congress the intent to both require and prohibit rehabilitation plan payments to a pension fund in circumstances like those presented here. See *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional en-

R.V. Cloud Co., Inc. v. Western Conference of Teamsters Pension Trust Fund, 566 F. Supp. 1426 (N.D. Cal. 1983), cited by the Respondent, is clearly distinguishable. There, the court held that an employer had no *contractual* obligation to contribute to a pension fund after the parties' agreement expired because the employer and union had not reached agreement on a new contract. The court did not address the employer's obligation to continue contributions at the level specified in the expired agreement as part of its obligation under the Act to maintain the status quo, and with good reason: the parties in that case did not dispute the employer's continuing obligation to make those contributions.

[9] The judge declined to consider the Respondent's LMRA defense. Instead, she noted that even assuming the payment of the rehabilitation plan rates to the pension fund violated the LMRA, "this would not excuse [the Respondent's] failure to provide the Union with notice and opportunity to bargain," and she deferred to compliance whether the rehabilitation plan payments to the pension fund would violate the LMRA. Because we have rejected the defense here, there is no need to address it in compliance.

[10] See Employee Retirement Income Security Act §§ 305 (c)(7) and (e)(3)(C), 29 U.S.C. §§ 1085(c)(7) and (e)(3)(C). Indeed, the PPA *requires* covered pension funds to impose rehabilitation plans.

actments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

For the reasons stated above, we find that the Respondent was contractually obligated to make pension fund contributions at the rate of $9.78 per hour at the time the parties' collective-bargaining agreement expired on August 31, 2015, and it violated Section 8(a)(5) and (1) of the Act by unilaterally reducing its contribution rate to $1.95 per hour after March 2016. The parties dispute whether the Respondent was obligated to pay the escalating rates imposed by the pension fund after the parties' agreement expired. We leave this issue to compliance.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing its contributions to the Pacific Coast Shipyards Pension Fund in March 2016, we shall order the Respondent to make whole its unit employees covered by the pension plan by making all required contributions to the pension fund that have not been made, including any additional amounts due the pension fund in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with 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).

ORDER

The National Labor Relations Board orders that the Respondent, Delta Sandblasting Company, Inc., Petaluma, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the International Union of Painters and Allied Trades, District Council 16 (Union) as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit by unilaterally changing its contributions to the Pacific Coast Shipyards Pension Fund:

> All production, repair and maintenance Employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by the Employer and the Union; excluding all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unlawfully implemented in March 2016.

(c) Make all required contributions to the Pacific Coast Shipyards Pension Fund on behalf of the above bargaining-unit employees that have not been made since March 2016, including any additional amounts owed to the fund, in the manner set forth in the amended remedy section of this decision, and continue such payments until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

(d) Make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest, in the manner set forth in the amended remedy section of this decision.

(e) 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 rec-

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of monetary benefits due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Petaluma, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, 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 this proceeding, 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 March 2016.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. October 16, 2018

John F. Ring,	Chairman
Lauren McFerran,	Member
Marvin E. Kaplan,	Member

[11] 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."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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 change your terms and conditions of employment without first notifying the International Union of Painters and Allied Trades, District Council 16 (the Union) and affording it an opportunity to bargain.

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, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by the Employer and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-

1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

WE WILL rescind the changes in the terms and conditions of employment for our bargaining-unit employees that were unilaterally implemented in March 2016.

WE WILL make all required contributions to the Pacific Coast Shipyards Pension Fund on behalf of the bargaining-unit employees that have not been made since March 2016, including any additional amounts owed to the fund, and we will continue such payments until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL make unit employees whole for any expenses ensuing from our failure to make the required pension contributions, with interest.

DELTA SANDBLASTING CO.

The Board's decision can be found at www.nlrb.gov/case/20-CA-176434 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 SE, Washington, DC 20570, or by calling (202) 273-1940.

Cecily A. Vix, Esq., for the General Counsel.
Alan S. Levins and *Paul E. Goatley, Esqs. (Littler Mendelson),* for the Respondent.
David A. Rosenfeld and *Caroline N. Cohen, Esqs. (Weinberg, Roger & Rosenfeld),* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case on March 30, 2017, in San Francisco, California. Charging Party International Union of Painters and Allied Trades, District Council 16 (Charging Party or the District Council) filed a charge on May 16, 2016, and the Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing on October 27, 2016 (the complaint). The General Counsel alleges that Respondent Delta Sandblasting Company, Inc. (Respondent or Delta) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to execute a complete written agreement reached with Auto, Marine & Specialty Painters Local Union No. 1176 (Local 1176 or the Union), as well as by unilaterally decreasing the amount of its pension fund contributions. As set forth in detail below, I find that the General Counsel has proven the second, but not the first, of these allegations.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. On May 18, 2017, posthearing briefs were filed by the General Counsel (joined by Charging Party) and Respondent and have been carefully considered.[1] Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

A. Jurisdiction

At all times material herein, Respondent, a California corporation with a principal place of business located in Petaluma, California, has been engaged in providing painting and sandblasting services in the marine repair industry. During the 12-month period immediately preceding the issuance of the instant complaint, Respondent, in the normal course and conduct of its above-described business operations, purchased and received at its Petaluma facility goods in excess of $50,000 directly from points outside the State of California. It is alleged, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I additionally find, based on the testimony of Charging Party's Director of Service José Santana (Santana), that it is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Factual Background

Delta is a family owned business that performs marine sandblasting and painting services in the San Francisco Bay area. Its number of employees varies between six and fifty workers, based on the demand for its services. Delta was owned and operated by its president, James "Bobby" Sanders, Sr. (Sanders) until his death on May 4, 2016. Thereafter, Delta's operations were taken over by his son, Robert Sanders, Jr. (Sanders, Jr.). For many years, Local 1176 has represented a unit of sandblasters employed by Delta (the unit). The Union has delegated responsibility for bargaining over the unit to the District Council. Santana is responsible for overseeing Local 1176; since 2008, he has also served as the business representa-

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's post-hearing brief and "R. Br." for Respondent's posthearing brief.

tive responsible for dealing with Delta. (GC Exh. 1(g), 1(l); Tr. 18–22, 97, 219, 229, 246, 251.)

1. The parties' bargaining history

Historically, collective-bargaining negotiations between the parties were extremely informal, consisting of a series of brief phone calls and a few in-person discussions. This was largely due to the fact that each such negotiation occurred only after the District Council had settled a contract with a general contractor in the industry known as "BAE" (to which Delta acts as subcontractor). The District Council would then ask Delta to agree to the same terms (including wages and benefits), and Delta would assent. Prior to 2014, Delta paid the unit employees over the BAE contractual wage rate, which made agreeing to the BAE terms that much easier. Since at least 2007, the parties also agreed to a "Supplemental Agreement" that provided for certain departures from the BAE contract tailored towards Respondent's business. (Tr. 20, 23–25, 239; GC Exh. 2.)

The last signed collective-bargaining agreement between the parties expired on August 31, 2015. This contract was reached after a series of phone calls and a single in-person meeting between Santana and Sanders.[2] Consistent with past practice, these negotiations were preceded by the Union reaching an agreement with BAE; unlike in past years, however, the BAE-negotiated wage rate surpassed that which Delta was paying the unit employees. According to Santana, he informed Sanders that Delta would need to bring its wages up to match those paid by BAE. Sanders agreed and signed a written collective-bargaining agreement (the Expired Contract). (GC Exh. 1(i) ¶ 6(b), 2, 3; Tr. 24–26, 35–36.)

2. Respondent's pension contributions

Pursuant to the Expired Contract, Respondent was obligated to contribute to the Pacific Coast Shipyards Pension Fund (the Fund). Specifically, the agreement's Article 18.1 provides for a base contribution rate of $1.95 per hour. Moreover, pursuant to its Article 18.4, Respondent agreed to "instruct the Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability that currently exists or unfunded liability that develops during the term of this Agreement as soon as practical." (GC Exh. 2.)

The documentary evidence indicates that, in 2008, the Fund was designated as underfunded, and therefore became subject to a rehabilitation plan to address this status. Pursuant to that plan, Respondent became required to pay a substantial surcharge on its base contribution rate, bringing its total per-hour contribution rate up to $8.18, $9.78, and $11.28 in 2014, 2015, and 2016, respectively. It is undisputed that Respondent paid this surcharge until April 22, 2016. (GC Exhs. 17, 18, 20–22, 26; Tr. 142, 148–150, 159.)

3. The parties' initial statements and conduct regarding a successor contract

As noted above, Sanders passed away on May 4, 2016, before signing another collective-bargaining agreement. The General Counsel alleges that, on about February 8, 2016, Sanders and Santana agreed verbally on the terms of a successor contract to which it should be bound. Because neither party offered any bargaining notes, I have based my factual findings regarding the circumstances surrounding this alleged verbal agreement on the testimony of Santana, another representative of the Union and certain statements by Sanders offered through other witnesses.

On June 24, 2015 (approximately 2 months before the 2008 Agreement was set to expire), Sanders informed Santana in writing that Delta was interested in negotiating a successor contract. (GC Exh. 4.) Santana admitted that Sanders' letter concerned him, because it was more formal than the parties' typical means of communication. (Tr. 89.) There is no reliable evidence of Sanders' motivation in sending the letter; while Sanders, Jr. testified that his father had expressed a desire to negotiate a simpler collective-bargaining agreement "tailored to suit a small business," rather than one based on the BAE contract, this testimony on this subject was too vague and internally inconsistent to be reliable.[3]

Santana responded to the letter with a phone call 2 weeks later. According to Santana, he told Sanders at that time, "my thinking is that we would agree to whatever BAE got in wages and benefits." He initially testified that Sanders immediately stated that he "had no problem with it," but then revised his testimony, stating that Sanders only made this comment after confirming that Delta's supplemental agreement would continue to be included in the parties' contract. (Tr. 44–47.)

According to Santana, the two next spoke in October 2015, when he called Sanders and informed him that the Union was having trouble reaching an agreement on wages with BAE. Sanders responded, "that's fine," and asked Santana to keep him posted. At some point in January 2016,[4] Santana called Sanders and told him that the Union had reached an agreement with BAE (not yet ratified by the membership) that provided for an annual raise of $1.10 for 3 years. Santana testified that Sanders simply responded "okay." On February 2, Santana called Sanders again, and informed him that the BAE agreement had been ratified and that the two men should get together and "go over it." He also reminded Sanders of the three-year wage increase contained in the BAE contract. As Santana testified, "I told him what the amounts were and he said, yeah, that's fine, José." The two agreed to meet on February 8 at Local 1176's office. (Tr. 47–48, 52–56.)

4. The alleged February 8 "meeting of the minds"

On February 8, Sanders and Santana met as planned; also present for the Union was business agent-in-training Richard Morales, who observed but did not participate. According to

[2] Per the parties' usual, informal practice, these negotiations did not involve any exchange of written proposals, and neither Santana nor Sanders took bargaining notes. (Tr. 24.)

[3] Sanders Jr. first testified that he discussed this issue with his father "a couple of different times," at which point he was interrupted by his own counsel, who suggested that he focus on the year 2015. After this, he testified that the first time he discussed this issue with his father was in 2015, and the last time was in "January or February 2016." Then, he suddenly remembered that he had discussed this issue with his father "quite often"—so often, in fact, that he couldn't even estimate how many times. (Tr. 240–241.)

[4] Unless otherwise noted, all dates hereafter refer to the year 2016.

Santana, the discussion about the BAE contract took only a couple of minutes at the beginning of the meeting and included a discussion of the $1.10 annual raise and "the healthcare and the pension." Sanders, he testified, said he was "fine with it." Despite the fact that the meeting had been arranged, in Santana's words, to "go over" the ratified BAE contract, he failed to show it—or any other documentation—to Sanders during this meeting. (Tr. 56–58.)

Morales' recollection of the meeting was different. The discussion, he testified, did *not* begin with Santana informing Sanders about the BAE contract terms, but rather a discussion about an ongoing arbitration. Then, he recalled, "they had brought up [that] the contract with BAE *was going to be finalized* and that [Sanders] needed to come in and – and sign the agreement." According to Morales, instead of saying he was "fine" with any particular contract terms, Sanders said that *once* Santana had gotten the BAE contract signed, he (Sanders) "would come in and sign – review and sign it." Morales took notes at the meeting, which made no mention of a deal being struck, but simply characterized it as "a contract nego" with Sanders. (Tr. 111–112, 114.)[5]

It is undisputed that the Union never presented Sanders with a written Delta contract for his signature. According to Santana, he and Sanders arranged in the beginning of March for a meeting for Sanders "to come in" to the union hall. This never occurred (Sanders cancelled for health reasons); in any event, it does not appear that the Union had prepared a written contract in anticipation of Sanders' appearance at the hall. (Tr. 58, 64–65, 92; GC Exh. 6.)

5. Conduct following February 8

a. Santana's impromptu April visit

According to Santana, he did direct Local 1176's administrative assistant to prepare a 2015–2018 collective-bargaining agreement for Delta in late March. Santana further testified—in a stilted, rehearsed manner—that he dropped in on Sanders unannounced in April because he was nearby Respondent's office. He did not bring a copy of the contract, but instead told Sanders it was "ready" for him to sign, and that he should come by Local 1176's office to do so. According to Santana, Sanders responded that he was "fine" with that. (Tr. 59–60.) No other witnesses were present for this exchange. Respondent offered no evidence to rebut this testimony directly, but did present a less sunny picture of Sanders' relationship with the Union at the time; according to Respondent's witness Floyd Farley ("Farley"), Sanders spoke with him multiple times about the progress of negotiations with the Union. Sanders, he testified, was concerned that the Union was demanding that he sign an agreement, "but they wouldn't produce it." (Tr. 198–199.)[6]

b. The May 3 phone call

It is undisputed that, in April 2016, and without prior notification to the Union, Delta ceased paying the surcharge portion of its pension contributions, submitting only the $1.95 base contribution amount, along with a note claiming an inability to pay the surcharge amount. On May 3, a Fund administrator informed Santana of this; he and Morales called Sanders the same day. (Tr. 61–62, 142, 148–150, 159.) Testimony regarding this telephone conversation was offered by several witnesses:

- According to Santana, when confronted about the pension contributions, Sanders said, "I'm not going to pay it," to which Santana responded, "we had an agreement and you agreed to it that you were going to pay it and you were supposed to have come to my office to sign the agreement." Santana then testified that Sanders conceded, responding that he was in Mexico with his family, but adding "when [I] get back next Monday, I will call you and set up a time with you."

- Morales testified that Santana told Sanders that he owed money to the pension trust fund and "needed to come in and sign a – the agreement." Sanders, he recalled, responded that he was in Mexico and "that he wanted to review the contract and that he would have some questions."

- Farley testified that he observed Sanders on the phone in Mexico stating "something like, 'I'm in Mexico, I'll deal with it next week.'" and then, "do you realize you're threatening me over this phone right now?" After hanging up, Farley recalled, Sanders said something like, "I can't even go fishing in peace."

- Another friend, John Capovilla, recalled similar comments by Sanders, albeit in the opposite order. According to him, Sanders first said, "you're threatening me," and then explained that he was in Mexico and would talk to the caller when he got home the following week.

Santana explicitly denied that, during this conversation, he threatened Sanders or that Sanders accused him of doing so. (Tr. 61–62, 82, 124–125, 128–130, 202, 211.)

Respondent also presented testimony by Sanders' wife (Joyce Sanders) and son (Sanders, Jr.) relating statements he made shortly following the call. Joyce Sanders testified that, on May 3, an upset Sanders told her that Santana had threatened him. Sanders, Jr. reported having a similar conversation with his father on May 4. (Tr. 232, 256–257.)

[5] While Morales admitted that he was not present during a portion of the discussion, he was specific that his absence was at the end, not the beginning of the meeting (when Santana claims Sanders expressed that he was "fine" with the proposed terms). (See Tr. 132–133.)

[6] I agree with Respondent that Sanders' expressions of trepidation about agreeing to the BAE contract terms qualify for the hearsay exception contained in Fed. R. Evid. 803(3). See *U.S. v. Ponticelli*, 622 F.2d 985, 991 (9th Cir.), overruled on other grounds by *United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). While I also agree that testimony by Sanders, Jr. that his father was concerned about rising labor costs is likewise admissible, I find such statements shed little light on whether he had reached a deal with the Union.

ANALYSIS

A. The Parties' Positions

The General Counsel argues that Respondent violated Section 8(a)(5) of the Act when it failed and/or refused to execute a successor contract after the parties established a complete agreement on all of its substantive terms. The General Counsel alternately alleges that Respondent violated Section 8(a)(5) by unilaterally decreasing the amount of its pension contributions required by the Expired Contract. Respondent denies that it violated the Act in any respect, and specifically argues that: (a) no meeting of the minds occurred regarding a successor contract; and (b) it was not obligated to provide the Union with notice and an opportunity to bargain over its decision to reduce its pension contributions.

B. Credibility

The key aspects of my factual findings above incorporate the credibility determinations I have made after carefully considering the record in its entirety. The testimony concerning the material events underlying the General Counsel's allegations contain certain conflicts. I have based my credibility resolutions on consideration of a witness' opportunity to be familiar with the subjects covered by the testimony given; established or admitted facts; the impact of bias on the witness' testimony; the quality of the witness' recollection; testimonial consistency; the presence or absence of corroboration; the strength of rebuttal evidence, if any; the weight of the evidence; and witness demeanor while testifying and the form of questions eliciting responses. As set forth below, I have credited the testimony of Morales over that of Santana when it came to the issue of whether a "meeting of the minds" occurred between the parties.

C. Duty to Execute a Fully Negotiated Collective-Bargaining Agreement

As noted, the General Counsel argues that, despite the lack of a signed successor contract, Respondent is bound to a collective-bargaining agreement verbally agreed to by the late Sanders. Respondent contends that no such agreement was reached.

1. The "Heinz" obligation and "meeting of the minds"

It is well established that the Board lacks the authority to compel a party to agree to any substantive contractual provision of collective-bargaining agreement. Thus, the Board may not order a party to execute an agreement to which it has not assented. *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992), enfd. 997 F.2d 881 (5th Cir. 1993). These principles are reflected in Section 8(d) of the Act, which requires "the execution of a written contract incorporating any agreement reached if requested by either party" but notes that "such obligation does not compel either party to agree to a proposal or require the making of a concession."[7]

Accordingly, the obligation to execute a collective-bargaining agreement arises only once the parties have had a "meeting of the minds" on all substantive issues and material terms of the agreement. See *Sunrise Nursing Home*, 325 NLRB 380, 389 (1998). To prove a meeting of the minds, the General Counsel must prove that the parties' objectively manifested intent, as demonstrated by their communications with each other, as well as their "tone and temperament," shows that they agreed on all substantive issues and material terms contained in the alleged agreement. *Crittenton Hospital*, 343 NLRB 717, 718 (2004); *Diplomat Envelope Corp*., 263 NLRB 525, 535–536 (1982), enfd. 760 F.2d 253 (2d Cir. 1985). It is appropriate to evaluate the parties' conduct against the backdrop of their prior negotiations. *Electrical Workers IBEW Local 938*, 200 NLRB 850 (1972), enfd. 492 F.2d 1240 (4th Cir. 1974).

In determining whether an agreement has been reached by the parties, the Board is not strictly bound to "the technical rules of contract law but is free to use general contract principles adapted to the collective-bargaining context." *New Orleans Stevedoring Co*., 308 NLRB at 1081 (citing *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980)). In this regard, verbal acceptance of the terms of collective-bargaining agreement will bind a party. *Capitol-Hustling Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982) (in order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement). Such verbal acceptance may take the form of asset to an unsigned document with the intent to sign later. See *New Orleans Stevedoring Co.*, 308 NLRB at 1081; *Kelly's Private Car Service*, 289 NLRB 30, 39 (1988), enfd. 919 F.2d 839 (2d Cir. 1990). Moreover, even without explicit assent to a written document, a party's acceptance of an unambiguous verbal offer will create a binding contract. See *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973) ("if words and conduct chargeable to one or any party have but one reasonable meaning, with respect to which the other party has noted concurrence, a contract will be deemed concluded on that basis").

The classic "hallmark indication" of a binding contract having been reached is the conclusion of a meeting (or series of meetings) "with handshakes and mutual expressions of satisfaction on the successful outcome of their endeavor." See *Windward Teachers Association*, 346 NLRB 1148, 1150–1151 (2006) (citations omitted). Conversely, evidence that, throughout the course of negotiations, the parties "stood pat" in their disagreement over at least one substantial and material contract provision will be found to indicate that they never reached a complete agreement. *Intermountain Rural Electric Assn.*, 309 NLRB 1189, 1193 (1992). Since many cases lack evidence of such recognizable indicia of manifested intent, the Board also affords significant weight to whether, following an alleged "meeting of the minds," the parties behaved as if they had, in fact, successfully entered into a new, binding contract. See *Windward Teachers Association*, supra.

2. The General Counsel failed to establish a "meeting of the minds."

Based on the application of the above principles, I find that, as of Sanders' passing, he and Santana had not reached a

[7] Prior to the enactment of Sec. 8(d), the Supreme Court had already reached essentially the same result; in *H.J. Heinz Co. v NLRB*, the Court held that, once the parties have reached an oral agreement, it is unlawful for one of the parties to fail to reduce to writing and apply that agreement. 311 U.S. 514, 526 (1941).

"meeting of the minds" on all substantive issues and material terms of a successor agreement as alleged. First, I do not credit Santana's testimony that the premise for the February 8 meeting was that the BAE contract had been ratified and that Sanders had orally assented to its terms by phone on February 2. Had this been the case, surely Santana would have come to the meeting six days later armed with the executed BAE contract (as he promised Sanders) for them to review. Remarkably, Santana offered no explanation for his failure to do so.

As for the February 8 meeting itself, not only did it lack the tell-tale, congratulatory handshake signaling that a deal had been reached, it was also missing the critical offer and acceptance elements. In this regard, I note that the General Counsel's own witness, Morales, did not corroborate Santana's vague assertions that he presented Sanders with wages and benefits based on the BAE contract. I instead credit Morales as to what occurred on February 8.[8] His account made it clear that on February 8, Sanders, at best, agreed to *review* the BAE contract once it was signed, but did not agree to its unsigned terms sight unseen. This version of the meeting was consistent with the parties' prior negotiations; while Sanders had, in the past, agreed to BAE's *negotiated* wage scale, there is no evidence that he had ever agreed to pay whatever BAE might ultimately agree to. It is further consistent with Farley's testimony that, on numerous occasions in 2015 and 2016, Sanders expressed concern that Santana was pressuring him to agree to the new BAE contract, sight unseen.

I further find that, following February 8, the parties did not behave as if they had, in fact, successfully entered into a new, binding contract. I found particularly unconvincing Santana's testimony that, later in April, he fortuitously found himself in the neighborhood of Respondent's business later for an opportunity to "re-agree" that Sanders was willing to sign a written contract. This claimed encounter simply cannot be squared with the parties' confrontational May 3 phone call. While witness accounts of that call varied, I credit Morales' testimony that, when Santana accused Sanders of ceasing his pension surcharge contributions, he also demanded that Sanders "sign a – the agreement." In other words, Santana told Sanders that he needed to sign *an agreement* (i.e., not "the" agreement they had allegedly reached).[9] I further credit Morales' recollection of Sanders' response—that he wanted to review the Union's contract and "would have some questions." Based on the record as a whole, I find that, on May 3, Santana and Sanders were not making arrangements to sign a contract to which they had verbally agreed, but were in fact still at odds on substantive contractual issues, not the least of which was Respondent's duty to make certain pension contributions.[10]

For the reasons set forth above, the allegation that Respondent violated Section 8(a)(5) of the Act by failing and refusing to execute a complete written agreement reached with the Union is dismissed.

D. Duty to Bargain Before Ceasing Pension Contributions

The General Counsel argues that, even if no enforceable contract were formed by the parties' 2015–2016 conduct, Respondent violated Section 8(a)(5) of the Act by unilaterally ceasing its surcharge contributions to the Fund. As noted, Respondent does not deny that it ceased paying these contributions without giving the Union notice and the opportunity to bargain. Instead, Respondent's defense to this allegation is that its remittance of those contributions would violate Section 302 of the Labor Management Reporting and Disclosure Act of 1959 (Section 302). As explained below, I reject this defense and find that Respondent violated the Act as alleged.

1. The applicable law

It is well established that benefit fund contributions are mandatory subjects of bargaining that generally survive expiration of the contract. Thus, in the absence of a contrary agreement or other applicable exception, an employer violates Section 8(a)(5) by failing to continue making such contributions after the contract expires. *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Southwestern Steel & Supply, Inc. v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986); *Concourse Nursing Home*, 328 NLRB 692, 702 (1999); *N.D. Peters & Co.*, 321 NLRB 927, 928 (1996). This is true regardless of the employer's good faith or motive for doing so. *Local 777, Democratic Union Organizing Committee (Yellow Cab) v. NLRB*, 603 F.2d 862, 890 (D.C. Cir. 1978).

Section 302, on which Respondent relies, makes it unlawful for an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value to any representative of its employees. Section 302(c)(5)(B) excepts from this prohibition payments by an employer to a trust fund established by any representative of his employees for the benefit of the employees, provided that:

> [T]he detailed basis on which such payments are to be made is specified in a *written agreement* with the employer and the employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representative of the employees may agree upon.

29 U.S.C. § 186(a)-186(c)(5)(B) (emphasis added).

[8] As opposed to Santana's somewhat "prepackaged" explanations, Morales' testimony was grudging but unvarnished, leading me to believe that he knew it was not helpful to the General Counsel's case but was nonetheless true.

[9] This mid-sentence pivot was notable. While I have credited Morales on numerous occasions throughout this decision, I find that he attempted on this occasion to refashion his testimony 'on the fly' to render it consistent with the General Counsel's theory of contract formation.

[10] I further rely on the state-of-mind evidence by Respondent witnesses Farley and Capovilla that, during their telephone conversation, Sanders accused Santana of "threatening" him, as well as the testimony by Sanders Jr. and Joyce Sanders that Sanders in fact felt threatened by Santana during the call. I agree with Respondent that such statements by Sanders reveal the acrimony and lack of agreement between the parties as of May 3. See Fed. R. Evid. 803(3).

2. Respondent violated 8(a)(5) by unilaterally ceasing its surcharge pension contributions

The record evidence establishes that the Expired Contract both requires Respondent to make contributions to the Fund, as well as to make appropriate surplus contributions to make up for any unfunded liability. See (R. Exh. 1, Art. 18.1, 18.4). Consistent with these obligations, Respondent did, until April 2016, make such contributions. Nor is there any dispute that Respondent did, at that point, unilaterally cease making all but its base-rate contributions to the Fund. Respondent, however, argues that, despite its past practice of making surcharge contributions, it was privileged to unilaterally change this practice because making such contributions would violate Section 302. I disagree and find that Respondent's alleged concern over Section 302 does not excuse its failure to bargain.

It is true that, while the Board is not charged by the statute with responsibility for enforcing Section 302, it has found it appropriate to consider the applicability of that provision as a possible defense to unfair labor practice allegations, where the Board's remedy would place a party in the position of being required to comply with two conflicting statutory mandates. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986). However, where—as here—the alleged violation is a failure to provide notice and the opportunity to bargain, no such risk is present. Instead, as the Board has explained, an employer that believes Section 302 mandates its cessation of benefit contributions remains

> obligated to bargain in good faith with the [u]nion by informing and discussing with the [u]nion the alleged legal mandates with which the Respondent felt constrained to comply, providing an opportunity to bargain over the proposed change and bargaining to impasse.

Quality House of Graphics, Inc. (Local One-L, Graphic Comm. Int'l Union), 336 NLRB 497, 498–499 (2001).

Here, it is undisputed that Respondent gave the Union no notice of its intention to discontinue making the surcharge contributions or its view that such contributions were proscribed under Section 302. Accordingly, I find that, even assuming that making its full pension contribution would present Respondent with a form of "exigent circumstance" recognized by the Board, this would not excuse its failure to provide the Union with notice and opportunity to bargain over such circumstance. In order to avoid the predicament discussed by the Board in *BASF Wyandotte*, supra, in which compliance with a Board order results in a violation of Section 302, Respondent will be given the chance to prove at compliance that resuming its surcharge contributions would violate Section 302.

CONCLUSIONS OF LAW

1. By unilaterally failing to make pension contributions for certain unit employees from March 2016 to the present, Respondent unlawfully refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

2. The above unfair labor practice affects commerce within the meaning of Section 2(a), (6), and (7) of the Act.

3. Respondent did not violate the Act by failing and refusing to execute and comply with a successor collective-bargaining agreement that embodied the terms of an agreement between Respondent and the Union covering certain unit employees.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I find that it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully ceased making contributions to the Fund on behalf of unit employees since April 2016, I shall order Respondent to make whole its unit employees by making all such delinquent contributions on behalf of eligible unit employees that have not been made since those dates, including any additional amounts due the Fund in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).[11]

Further, I shall order Respondent, on request of the Union, to restore the status quo ante that existed prior to April 2016 by continuing to make timely contributions to the Fund on behalf of all eligible unit employees unless and until such time as it bargains with the Union in good faith to a contrary agreement or bona fide impasse.

Finally, I shall order Respondent to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

Respondent, Delta Sandblasting Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to timely make required contributions to the Pacific Coast Shipyards Pension Fund without bargaining with the Union in good faith to an agreement or bona fide impasse, on behalf of eligible employees in the following unit:

> All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed

[11] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by such fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that Respondent otherwise owes the Fund.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to by Respondent and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

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

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

(a) Make all delinquent pension contributions on behalf of unit employees that have not been made since April 2016, including any additional amounts due the Fund, as set forth in the remedy section of this decision.

(b) Make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest, as set forth in the remedy section of this decision.

(c) Continue making required contributions to the Fund on behalf of eligible unit employees unless and until it has bargained in good faith to a new agreement or bona fide impasse.

(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 pension contributions due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix" at its facilities in Petaluma, California, and Alameda, California.[13] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or has closed or ceased doing business at a facility covered by this order, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at those facilities at any time since April 22, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the Complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 15, 2017

[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."

APPENDIX

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 do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain in good faith with Auto Marine & Specialty Painters Union Local 1176, affiliated with International Union of Painters and Allied Trades, District Council 16 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit (Unit):

All production, repair and maintenance employees employed by Respondent performing work in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, including but not limited to, sandblasting of dredges, floating dry docks, offshore drilling vessels, barges, Mobil drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith and other new work as shall be mutually agreed to by Respondent and the Union; excluding, all employees represented by International Association of Machinists & Aerospace Workers in the bargaining unit defined in Case 20-RC-1275, all employees represented by Northern California Carpenters Regional Council and its affiliated Local Union No. 2236 of the United Brotherhood of Carpenters and Joiners of America in the bargaining unit defined in Case 20-RC-1327, and all employees represented by International Brotherhood of Electrical Workers in the bargaining unit defined in Case 20-RC-2157.

WE WILL NOT make changes to our contributions to the Pacific Coast Shipyards Pension Fund without giving prior notice to the Union and affording it an opportunity to bargain.

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, if requested by the Union, rescind any or all changes to your terms and conditions of employment that we made without bargaining with the Union.

WE WILL make whole the Unit employees and the Pacific Coast Shipyards Pension Fund for any loss of contributions, or benefits, and for any expenses incurred in connection with the failure to make those benefit contributions since April 22, 2016.

DELTA SANDBLASTING CO. INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-176434 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.