Troy Grove[1] ***and*** **International Union Operating Engineers, Local 150, AFL-CIO.** Cases 25–CA–276061, 25–CA–280390

June 22, 2023

DECISION AND ORDER

BY MEMBERS KAPLAN, WILCOX, AND PROUTY

On March 29, 2022, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed a consolidated reply. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions in part and reverse in part.[3] In addition, we amend the judge's remedy and adopt the recommended Order as modified and set forth in full below.[4]

BACKGROUND

The Respondent is a mining company that operates sand and stone quarries, including the Troy Grove and Vermilion quarries. In 2021, it employed approximately four hourly employees at Troy Grove and three at Vermilion as equipment operators and/or maintenance employees. The Respondent has recognized the International Union of Operating Engineers, Local 150, AFL-CIO (Union) as employees' representative since at least May 2008.

This case involves conduct occurring shortly after the tally of ballots for a decertification petition and during negotiations for a new collective-bargaining agreement. The judge found that the Respondent violated Section 8(a)(3) and (1) by laying off unit employees Lyle Calkins and Bradley Lower because they supported the Union. The judge also found that the Respondent violated Section 8(a)(5) and (1) by threatening to unilaterally implement its pension fund proposal before reaching impasse. As discussed below, we reverse the finding that the Respondent unlawfully laid off the two employees and instead find that the Respondent violated Section 8(a)(1) by issuing them layoff notices, and we adopt the judge's finding concerning the threat to unilaterally implement its proposal before impasse.

I. ALLEGED LAYOFF OF EMPLOYEES LYLE CALKINS AND BRAD LOWER

On December 7, 2020, a unit employee at Vermilion filed a decertification petition. The Region conducted a mail-ballot election, and the tally of ballots was scheduled for February 16, 2021.[5] During the week before the February 16 tally, employees Calkins and Lower were assigned to a two-to-three-week assignment restoring equipment in the shop. During the morning of February 16, 2021, Calkins and Lower informed Troy Grove Supervisor Thomas Becker that they were serving as Union observers for the tally.[6] Becker told them to clock out to observe the count virtually and then clock back in after the tally. Calkins and Lower complied with these instructions. The tally of ballots showed four votes for union representation and two votes against.

Approximately one hour after Calkins and Lower returned from serving as observers, Becker handed them layoff notices effective at 4:00 p.m. that day.[7] Calkins asked how long they would be laid off, but Becker did not provide an answer. Calkins sent a copy of the layoff notice to Union Business Agent Stephen Russo via text and

[1] We have amended the caption to reflect the correct spelling of the Respondent's name.

[2] The Respondent has 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 have amended the judge's conclusions of law consistent with our findings herein.

[4] We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein. We shall substitute a new notice to conform to the Order as modified.

[5] The judge erroneously stated that the election, and not the tally, occurred on February 16, 2021. We correct that misstatement here.

[6] In addition to serving as an observer, Calkins was also shop steward at both Troy Grove and Vermilion and a member of the Union's negotiation team.

[7] The record reflects that the Respondent would temporarily lay employees off during cold weather if there was no indoor work available. In reciting the facts, the judge stated that "Becker explained [to the men] that there was a lack of indoor work due to the cold weather." This finding appears to be an inadvertent error. Although Becker, who the judge found was not a credible witness, testified that he issued the layoffs because of the weather and because he was running out of things to do inside, he did not testify–and the record does not show–that he explained this to the men at the time he issued the layoff notices. The judge implicitly acknowledged this later in his decision, where he cited Becker's failure to explain as evidence of pretext.

told Russo "[t]hat didn't take long." At Russo's suggestion,[8] Calkins then inquired with Becker about work at Vermilion because of his (Calkins') seniority status. Becker told Calkins that he would call the Area Production Manager to find out and left the work area. Calkins and Lower resumed working.

Approximately an hour and a half after he issued the layoff notices, Becker returned, retrieved the notices, tore them up, discarded them, and explained that there was too much work to do. Calkins and Lower were still on the clock when Becker rescinded the layoffs. The record does not show that either employee lost pay or benefits.

Applying *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the judge found that the Respondent violated Section 8(a)(3) and (1) by laying off Calkins and Lower. We disagree.

While ample evidence supports the judge's findings of union activity, employer knowledge of the union activity, and animus, the evidence falls short of establishing that the Respondent took adverse employment actions against Calkins and Lower. The undisputed facts show that Calkins and Lower were given layoff notices, but the layoffs were rescinded *before* they took effect and *before* the men stopped working for the day. Thus, the record fails to show the existence of a necessary element of an 8(a)(3) violation—an adverse employment action.[9] Accordingly, we reverse the judge's finding that, by this conduct, the Respondent violated Section 8(a)(3) and (1).

Nevertheless, we find that the Respondent independently violated Section 8(a)(1) by issuing the layoff notices.[10] The layoff notices, which did not follow seniority,[11] were issued without explanation within hours of Calkins and Lower engaging in union activity and were inconsistent with the Respondent's cold weather layoff practice as the men were in the middle of an indoor assignment. Moreover, the Respondent's rescission of the layoffs, only 90 minutes after their issuance, would reasonably support the notion in employees' minds that the notices were initially issued as a knee-jerk reaction to protected activity. We therefore find that the record amply demonstrates that the issuance of the layoff notices would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Accordingly, we find that the issuance of the layoff notices violated Section 8(a)(1). See generally *Print Fulfillment Services LLC*, 361 NLRB 1243, fn. 3 & 65 (2014) (adopting judge's finding that the employer's announcement of its

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[8] The judge erroneously stated that Calkins made the inquiry at Becker's, and not Russo's, suggestion. We correct that misstatement here.

[9] The cases cited by the judge—*Berger Transfer & Storage, Inc.*, 253 NLRB 5, 13 (1980), and *Ark Las Vegas*, 335 NLRB 1284, 1289 (2001)—are inapposite as both cases involved discharges that were rescinded *after* the effective date of the adverse employment action. Here, as noted above, the notices were torn up and rescinded while the two employees remained on the clock – i.e., before they became effective.

[10] Although the layoff notices were not specifically alleged as independent Sec. 8(a)(1) violations, this does not preclude us from finding these violations, as "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Here, the Sec. 8(a)(1) findings are warranted, as the issuance of the layoff notices is closely connected to the complaint's Sec. 8(a)(3) allegation, and the facts that form the basis of the independent Sec. 8(a)(1) violations were fully litigated by the parties.

[11] The Respondent excepts to the judge's finding that the layoffs were "in disregard for employee seniority rights" under the agreement and argues that "the status quo defined by the expired agreement does not require layoff in order of seniority unless the layoff exceeds six days." We reject this argument as it is contrary to the plain language of the agreement.

The relevant provisions of the parties' agreement state:

It is understood and agreed that in all cases of layoffs…the employee's experience and qualifications shall be the primary factor; but where these factors are relatively equal, then seniority shall be the determining factor.

In the event of a seasonal layoff or a layoff in excess of six days, the company shall give the union seven (7) days prior notice in the event that it decides to [lay off] employees out of order of seniority and said notice shall state the reasons for deviating from seniority.

The agreement makes it clear that, where experience and qualifications are relatively equal, the Respondent shall lay employees off (and issue layoff notices) in order of seniority. The record does not reflect that less senior employees were more experienced or qualified than Calkins and Lower or that all employees less senior than Calkins and Lower received layoff notices before they did.

We do not read the language on which the Respondent relies as permitting it to deviate from seniority where experience and qualifications are equal but, rather, freeing it from providing the Union with seven days' notice if the Respondent deviates from seniority for layoffs under six days. Additionally, the Respondent failed to establish that, at the time the layoffs were issued, the intended duration was less than six days. In fact, upon receiving the layoff notice, Calkins inquired about the duration of the layoffs and Becker did not respond.

Moreover, assuming arguendo that the agreement does not require the Respondent to follow seniority, the record reflects that the Respondent had a practice of doing so. Both Calkins and Lower testified that the practice had been for seniority to dictate layoffs. After receiving the layoff notice, Calkins, at Russo's suggestion, asked Becker who was working at the other facility as Russo advised Calkins that the Respondent "can't keep" two less senior employees. Instead of disputing or dismissing Calkins' inquiry, Becker stated that he would call the Area Production Manager and left the area. Accordingly, by issuing layoff notices to Calkins and Lower, the Respondent either violated the terms of the parties' agreement or deviated from past practice without explanation.

intention to lay off an employee who had recently been elected union steward violated Section 8(a)(1)).

II. ALLEGED THREAT OF UNILATERAL IMPLEMENTATION OF PENSION FUND PROPOSAL PRIOR TO IMPASSE

The judge found that the Respondent violated Section 8(a)(5) and (1) by threatening to unilaterally implement its pension fund proposal prior to reaching a bargaining impasse with the Union. As explained below, we agree with the judge's finding.

A. Facts

The parties' most recent collective-bargaining agreement was effective from July 30, 2014, until May 1, 2016 and required the Respondent to contribute to several employee funds, including the Midwest Operating Engineers Welfare Fund and the Midwest Operating Engineers Pension Fund. On April 5, 2016, prior to expiration of the agreement, the parties began bargaining for a successor contract.[12] The parties held approximately 28 negotiation sessions between 2016 and the summer of 2021 discussing, among other things, contributions to the various funds.

At some point early in the negotiations, the Respondent determined that its estimated withdrawal liability from the Pension Fund had increased from $964,378.08 to $1,352,785.27. Once it became aware of the increased liability, the Respondent focused on exiting the Pension Fund and, as such, the parties spent significant time discussing where the former Pension Fund contributions would be reallocated. The parties went back and forth over the next five years on contributions to the various funds. The Union occasionally mentioned either that it was open to moving the contributions or that it agreed to move contributions from the Pension Fund to other funds. The Respondent did not agree with where the Union proposed rerouting the contributions. At one point, the parties appeared to have an agreement that, among other things, ceased Pension Fund contributions but, when the proposal was presented to the unit, the unit rejected it.[13]

On July 12, 2021, the parties met and exchanged proposals. A mediator attended via videoconference. The Union resumed proposing, among other things, continued contributions to the Pension Fund. The Respondent proposed, among other things, a $9.09 contribution for each hour of wages paid for each employee to a 401(k) plan called the Midwest Operating Engineers Retirement Enhancement Fund in lieu of the Pension Fund, and an $8.95 contribution for each hour of wages received to the Welfare Fund. Arthur Eggers, the Respondent's counsel, asked the Union if it would accept an agreement without the Pension Fund contribution, and Union Business Agent Stephen Russo said no. Steven Davidson, the Union's counsel, then asked Eggers if the Respondent would accept an agreement with Pension Fund contributions. Eggers said no and asked why the parties were not at impasse. The Union insisted they were not at impasse because they were attempting to put together a proposal. The Union told Eggers they would prepare a proposal and to "think outside the box." Eggers replied that the Respondent would welcome a proposal but noted that if it contained contributions to the Pension Fund the Respondent would not agree. Davidson replied that the Union "will be creative." The mediator noted that there were other items the parties could negotiate.[14] The Respondent refused to negotiate over the open items because the Union's most recent proposal included contributions to the Pension Fund. The parties scheduled the next session for July 21, 2021.

On July 14, 2021, to prepare for the July 21 bargaining session, the Union sent the Respondent a request for certain information, stating that it was necessary to make a proposal diverting contributions from the Pension Fund to the Retirement Enhancement Fund. That same day, Eggers and Davidson discussed where the parties currently stood, with Eggers claiming they were at impasse and Davidson asserting they were not. Davidson noted that "there might be a scenario in which [leaving the Pension Fund] might be acceptable," and stated that "both sides need to think 'outside the box' and [he] would attempt to develop a proposal that might meet [the Respondent's] request." Davidson also stated that "[he explained] that there was no guarantee, and that [he] made no assurance that the Union would be able to agree or make such a proposal but that [they] needed time to explore options."

On July 16, 2021, the Respondent provided some of the requested information to the Union but also stated that it objected to the Union's request for certain financial information. The Respondent also asked the Union to explain the relevance of some of the requested information but noted that this was not "an objection to [the Union's] request because no objection is being made at this time." Lastly, the Respondent asked the Union to clarify some of

[12] The Union's bargaining team included employees Lyle Calkins and Scott Currie.

[13] Following their rejection of the Respondent's proposal, the unit voted to strike. The strike began on March 19, 2018.

[14] The open items included wages, health insurance, overtime/overtime pay, holidays, bereavement, and boot allowance.

its request but noted again that it was not objecting to the request. Shortly thereafter, the Union clarified its requests, and the Respondent provided some, but not all, of the requested information.

On July 20, 2021, in reply to an email from Eggers, Davidson noted that he had previously stated that the Union was "unwilling to accept the [Respondent's] proposal concerning pension contributions at that time, but [he] never said the Union would never accept such a proposal . . . [w]e are not at impasse . . . [t]here are many issues remaining open, including [the Pension Fund] issue." Davidson also addressed the Respondent's incomplete response to the Union's information request and reiterated the importance of the requested information to prepare "a comprehensive contract counterproposal . . . . "

On July 21, 2021, shortly before the bargaining session was scheduled to begin, Eggers emphatically told Davidson that "the parties are at impasse." At the beginning of the bargaining session, the Union further clarified its July 14 information request.[15] Although neither side produced new proposals, the Union said it needed the outstanding requested information to make a proposal moving Pension Fund contributions to the Retirement Enhancement Fund. Eggers replied that he would let Davidson know what information the Respondent would agree to provide. The mediator then suggested the parties put that issue aside and negotiate over the other open issues. The Respondent refused. After the Union caucused, Eggers declared that the parties were at impasse and that the Respondent was going to implement its last, best, and final offer to cease contributions to the Pension Fund and shift them to the Retirement Enhancement Fund.

Later that day, the Respondent filed a Complaint for Declaratory Judgment in the United States District Court for the Central District of Illinois requesting a declaration that it was "not obligated to make any contributions to the Funds on behalf of Returning Strikers pursuant to ERISA, the CBA, or any other agreement." The following day, the Respondent notified the Administrator of the Pension Fund and the Union that, "effective immediately [the Respondent is] implementing part of [the] July 12, 2021 proposal . . . because the parties have reached impasse as to the critical issue of the pension."[16] With that communication, the Respondent announced that it was unilaterally implementing its proposal ceasing contributions to the Pension Fund and, instead, contributing to the Enhancement Fund.[17] Also, on July 22, 2021, Eggers emailed Russo to confirm Russo's July 21, 2021 explanation of terms used in the Union's July 14 information request and informed him that the Respondent would respond by July 27, 2021, with a date by which it would supply a supplemental response to the July 14 information request. Eggers also confirmed the Union's July 21, 2021 request for information.

Thereafter, Eggers and Davidson engaged in a back and forth over the outstanding information and whether the parties were at impasse. On August 3, 2021, Eggers reiterated his position that the parties were at impasse and that the Respondent had provided the requested information. The Respondent offered to return to the bargaining table on August 16, 2021.[18]

On September 1, 2021, in reply to an August 25, 2021 letter from the Union specifying the information it needed for a counterproposal, the Respondent stated, "THE [RESPONDENT'S] RESPONSE TO THE UNION INFORMATION REQUEST DATED JULY 14, 2021 IS COMPLETE . . . [w]ith regard to the Union Information Request of July 14, 2021[,] the [Respondent] provided a response dated July 16, 2021[,] and a supplemental response dated August 2, 2021. . . . "

B. Discussion

The judge found that the Respondent failed and refused to bargain collectively and in good faith, in violation of Section 8(a)(5) and (1), by threatening to implement its pension plan offer without having reached a valid impasse. Specifically, the judge found that the Respondent failed to demonstrate that the parties had exhausted the prospect of concluding an agreement before the

[15] The Union also requested additional information.

[16] The complaint does not allege, and the General Counsel does not argue, that the Respondent unilaterally implemented its proposal before impasse, only that it threatened to do so.

[17] In its letter to the Pension Fund Administrator and the Union, the Respondent also requested information necessary to make contributions to the Enhancement Fund and requested that it be advised if "any additional notice from the [Respondent] regarding implementation" is required.

[18] Our colleague highlights this conduct as evidence that the impasse announcement was not unlawful, noting that the Respondent "did not suspend bargaining as would be expected when impasse is reached." For one, the Respondent's unlawful conduct is not a mere false declaration of impasse, but rather the threat to implement a significant pension proposal in the absence of impasse. Moreover, after the July 21 false declaration of impasse and threat to implement, nothing in the record suggests that the parties actually met again or, more relevantly, that the Respondent had any intent to continue bargaining over the Pension Fund. Rather, the Respondent's record of repeatedly insisting that it planned to unilaterally switch to the Enhancement Fund and cease contributions to the Pension Fund, with a lawsuit filed toward that end, suggests the opposite. We, therefore, disagree with our colleague's assertion that the Respondent's conduct "effectively negate[d]" its impasse declaration.

Respondent's declaration of impasse and threat to unilaterally implement its pension fund proposal. We agree.[19]

To begin, we agree with the judge's finding that the parties were not at impasse when the Respondent declared impasse at the July 21, 2021 session and announced that it would implement its proposed changes to the pension plan.[20] The Board has held that "overall impasse may be reached based on a deadlock over a single issue." *Atlantic Queens Bus Corp*., 362 NLRB 604, 604 (2015) (citing *CalMat Co*., 331 NLRB 1084, 1097 (2000)). "The party asserting a single-issue impasse has the burden to prove three elements: (1) that a good-faith impasse existed as to a particular issue; (2) that the issue was critical in the sense that it was of 'overriding importance' in the bargaining; and (3) that the impasse as to the single issue 'led to a breakdown in overall negotiations' . . . ." Id. (quoting *CalMat*, supra at 1097). Here, for the reasons explained by the judge and below, the Respondent failed to prove that a good faith impasse existed as to any particular issue and, even assuming that impasse was reached on a particular issue, the Respondent failed to show that it led to a breakdown in overall negotiations.

We find, in addition to the reasons stated by the judge, that the outstanding information request precluded a finding of impasse on the pension plan issue. The Union requested information on July 14, and again on July 21, and identified the information as necessary to prepare a proposal inclusive of the Respondent's desire to exit the Pension Fund. The Board has consistently found that the failure to provide information that is important to ongoing bargaining will preclude a valid impasse. See *E.I. du Pont & Co*., 346 NLRB 553, 558 (2006) (affirming that "[i]t is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse"), enfd. 489 F.3d 1310, 1315 (D.C. Cir. 2007) (citing *Caldwell Mfg. Co*., 346 NLRB 1159, 1170 (2006), and stating that the Board has repeatedly reiterated the principle that "a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties."); see also *Pertec Computer Corp.*, 284 NLRB 810, 812 (1987) ("A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances."). Significantly, the Union reminded the Respondent of the status of its information request before, during, and after the Respondent's July 21, 2021, declaration of impasse, and, as noted above, the Respondent did not object. By the Respondent's own admission, it did not fully reply to the Union's July 14 information request until August 2, almost two weeks after declaring impasse. Accordingly, we adopt the judge's finding that the Respondent failed to show the parties were at impasse on July 21, when the Respondent declared impasse and announced that it was unilaterally ceasing contributions to the pension plan.

Absent a valid impasse, the Respondent had no right to unilaterally cease contributions to the Pension Fund and the judge properly found that its announcement at the bargaining table to the Union, and in the presence of the Union's two employee bargaining committee members, that it would cease contributions violated Section 8(a)(5) and (1) of the Act.[21] The Respondent's announcement and subsequent actions did not suggest that negotiations over the pension would continue; to the contrary, the announcement plainly signaled to the Union and employees on the bargaining committee that the Respondent no longer intended to deal with the Union over the pension. See

[19] While we specifically address the lack-of-impasse finding, we note that the Respondent's exceptions to this finding fall short of the Board's requirements. See Sec. 102.46(a)(1) of the Board's Rules and Regulations (each exception must "[s]pecify the questions of procedure, fact, law, or policy to which exception is taken," "[i]dentify that part of the Administrative Law Judge's decision to which exception is taken," "[p]rovide precise citations of the portions of the record relied on," and "concisely state the grounds for the exception").

[20] Our colleague's characterization of the Respondent's statement as "evincing an intent to effectuate impasse" is inaccurate. The Respondent *declared* impasse on July 21, 2021, prior to and during the scheduled bargaining session, and declared impasse again on July 22, 2021, in its letter to the Union announcing its implementation of its pension proposal. Not only did the Respondent declare impasse, it also sought a declaratory judgment that it was not obligated to make any contributions to the Funds and notified the Pension Fund Administrator that it would cease contributions "because the parties have reached impasse as to the critical issue of the pension." We disagree with any phrasing by our colleague suggesting that these statements and actions expressed anything other than a straightforward declaration of impasse and a pellucid announcement that it was unilaterally implementing its pension proposal without further bargaining with the Union.

[21] While the Respondent excepts to the judge's finding that the parties were not at impasse, it does not explicitly except to the judge's additional finding that the threat of implementation violated Sec. 8(a)(5) and (1). This point is not "specifically urged" by the Respondent in its exceptions or in the Respondent's brief. See Sec. 102.46(b)(2) of the Board's Rules and Regulations ("Any exception . . . not specifically urged shall be deemed to have been waived."). Nor does it contend, explicitly or implicitly, in its exceptions or brief in support, including in the portion of the Respondent's brief cited by our colleague, that the judge's decision made new law or that Board precedent does not recognize a threat to implement in the absence of impasse as a violation of Sec. 8(a)(5). Our colleague makes this argument on his own. However, it is incorrect, as we discuss below.

Centinela Hospital Medical Center, 363 NLRB 411, 413 fn. 9 (2015) (finding an employer's announcement, prior to impasse and during the time when the parties were bargaining for a successor labor agreement, that a new healthcare plan would be implemented in a few months violated Section 8(a)(5) and (1); noting that, by detailing the process employees would need to follow to enroll in the new plan months in advance of the implementation date, the announcement went beyond simply stating a planned change; and finding that, as the announcement did not indicate that negotiations over healthcare were ongoing, the changes were presented as a fait accompli).[22] Even absent evidence that the Respondent's proposal was implemented, we find that the Respondent's announcement violated Section 8(a)(5) and (1) "because it conveyed to employees the message that it no longer intended to deal with the Union as their exclusive representative" with regard to the Pension Fund. *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998) (citing *ABC Automotive Products Corp.*, 307 NLRB 248, 250 (1992)), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000).

Contrary to our colleague's assertion that we are creating new law, Board precedent holds that an announcement of unilateral action, even absent evidence of implementation, violates Section 8(a)(5) and (1). See, e.g., *Wire Products Mfg. Corp.*, supra (finding that an employer violated Section 8(a)(5) and (1) by announcing its intention to convert its existing profit sharing plan to an employee stock ownership plan even if the employer never carried through with its stated intention);[23] *ABC Automotive Products*, supra (affirming a judge's finding that an employer violated Section 8(a)(5) and (1) by unilaterally implementing a change when it announced that its own health and welfare plan would replace the union's welfare fund, where no impasse was reached).

In *ABC Automotive*, supra, an employer whose employees were striking sent a letter to the union stating, inter alia, that all contributions to the union's health fund would terminate and be replaced with the employer's health benefit package. Despite this communication, the employer did not take the promised action to unilaterally replace the union health fund with its own benefit package. In affirming the judge's finding that the employer violated Section 8(a)(5) and (1), the Board rejected the employer's argument that the announcement was not unlawful because it was never implemented and because the employer never took or intended to take any further steps. Although the employer did not implement the change, the Board held that "[t]he damage to the bargaining relationship had been accomplished simply by the message to the employees that the [employer] was taking it on itself to set this important term and condition of employment, thereby 'emphasizing to the employees that there is no necessity for a collective bargaining agent.'" Id. at 250 (citing *Famous-Bar Co. v. NLRB*, 326 U.S. 376, 384-386 (1945), and *NLRB v. Katz*, 369 U.S. 736, 743 fn. 11 (1962)). The Board noted that "such an announcement would cause a reasonable employee to assume that on returning to work . . . a condition of employment would have changed, i.e., the [employer's] implementation of new health and welfare coverage[, and, thus], as far as [striking employees] were concerned, the unilateral change was effectively implemented when it was announced . . . . " Similarly, here, we find the Respondent's announcement would cause a reasonable employee to assume that a new condition of employment would be implemented shortly. Thus, although the complaint does not allege (and, therefore, we do not find) that the unilateral change was implemented when it was announced, we find that the threat of implementation had the same effect here.[24] That is, the Respondent's threat to implement its pension proposal and its subsequent actions to facilitate and reiterate its stated intent to implement sent a message to employees that it was taking it on itself to dictate employees' terms and conditions of employment and that there was no need for the Union.[25]

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[22] Notably, the Board in *Centinela* also found that, in addition to the violation for announcing the intent to implement the new healthcare plan, the later implementation of the health care plan also separately violated the Act.

[23] Our dissenting colleague emphasizes that the unlawful announcement in *Wire Products*, supra, was made "*directly to employees*" (our colleague's emphasis) and in the context where the employer had already withdrawn recognition from the union and ceased bargaining. But, in addition to the fact that in the instant case employees were at the bargaining table when the threat of implementation was made, and thus, the object of the Respondent's threat, the distinctions drawn by the dissent are immaterial. The Board in *Wire Products* found the announcement of intent to implement independently unlawful, reversing the judge to do so because the announcement "conveyed to employees that it no longer intended to deal with the Union." This is exactly what the Respondent's announcement here—in the middle of negotiations, no less—conveyed about the Respondent's intentions with regard to the critical subject of pensions.

[24] It appears that, but for outside forces (namely, the Pension Fund Administrator and the District Court), the Respondent would have accomplished its goal of exiting the Pension Fund, thereby unilaterally changing a term and condition of employment in the absence of a valid impasse.

[25] Our dissenting colleague's essential contention that the Respondent's unlawful declarations of impasse and intent to unilaterally implement should be immunized because they occurred (in part) during bargaining is a theory without law or logic to support it. See *Centinela Hospital*, supra (finding that an announcement of intent to implement new

We thus adopt the judge's conclusion that the Respondent failed and refused to bargain collectively and in good faith in violation of Section 8(a)(5) and (1) by threatening to implement its pension plan offer without having reached a valid impasse.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3 and renumber the subsequent paragraphs:

3. By issuing layoff notices to employees Lyle Calkins and Brad Lower, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees by threatening to unilaterally cease contributions to the Pension Fund on behalf of bargaining unit employees prior to reaching impasse with the Union, we order the Respondent to resume bargaining at the Union's request, if it is not already doing so. Additionally, we amend the judge's recommended remedy in the following respects.[26] First, we shall order the Respondent to remove any reference to the February 16, 2021, issuance of layoff notices from the files of Lyle Calkins and Brad Lower. Second, we shall order the Respondent to rescind its statement to the Pension Fund Administrator that it would cease contributions to the Pension Fund. Third, we shall order the Respondent to compensate the Union for all bargaining expenses it incurred for the July 21, 2021, bargaining session, including any lost wages the Union paid to bargaining committee members for bargaining conducted during working hours. See *Frontier Hotel & Casino*, 318 NLRB 857, 857-859 (1995), enfd. in rel. part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 326 U.S. App. D.C. 194 (D.C. Cir. 1997). We find this award necessary to make the Union whole and to ensure a return to the status quo ante at the bargaining table because the parties were unable to have a meaningful negotiation session on July 21, 2021, as the Respondent, who had not yet responded to the Union's open request for information, declared impasse at the start of the session and, after the Union caucused during the session, again declared impasse, refused to bargain over other open issues, and announced that the Respondent was going to implement its last, best, and final offer to cease contributions to the Pension Fund. Fourth, we shall order the Respondent to make whole any affected employee bargaining committee members for any earnings lost while attending the July 21, 2021, bargaining session, to the extent those earnings were not reimbursed by the Union. See *M.F.A. Milling Co.*, 170 NLRB 1079, 1080 (1968), enfd. sub nom. *Laborers Local 676 v. NLRB*, 463 F.2d 953, 150 U.S. App. D.C. 117 (D.C. Cir. 1972). In this regard, backpay shall be computed in accordance with *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). Fifth, in accordance with our decision in *Cascades Containerboard Packaging – Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), we shall order the Respondent, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director for Region 25 may allow for good cause shown, to file with the Regional Director for Region 25 a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award. Sixth, we shall order the Respondent or, at the Respondent's option, a Board agent, to read the notice aloud at a meeting of employees on company time.[27] Such a public reading of the notice will serve to reassure employees of this small unit, two of whom were members of the Union's negotiation committee, that their employer and its managers are bound by the Act's requirements. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

ORDER

The Respondent, Troy Grove, A Division of Riverstone Group, Inc., Vermilion Quarry, A Division of Riverstone

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healthcare plan announced in midst of bargaining independently violated the Act).

[26] Because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998), cert. denied 525 U.S. 1067 (1999); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001).

[27] Member Prouty would additionally require that a copy of the attached notice be distributed to each employee present at the opening of this meeting or meetings, before the notice is read aloud by management or by the Board agent. Such a requirement would facilitate employee comprehension of the notice and enhance the remedial objectives of the notice reading set forth in the Amended Remedy portion of this Decision. For these reasons, Member Prouty would make distribution to employees of copies of the notice at meetings where it is to be read a requirement in all instances where the Board orders a notice-reading remedy.

Group, Inc., Utica and Oglesby, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing layoff notices to employees because of their membership in or support for the Union or any other labor organization.

(b) Failing and refusing to bargain by announcing that it was unilaterally implementing a pension plan proposal prior to reaching impasse with the Union.

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

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

The employees described in Article 1, Section 1 of the collective bargaining agreement between the Respondent and the Union, effective from July 31, 2014 to May 1, 2016.

(c) Rescind its statement to the Pension Fund Administrator that it would no longer make contributions to the Midwest Operating Engineers Pension Fund.

(d) Compensate the Union for all bargaining expenses it incurred for the July 21, 2021 bargaining session, including any lost wages the Union paid to employee bargaining committee members for bargaining conducted during working hours. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 25 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(e) Make whole any affected employee negotiators for any earnings lost while attending the July 21, 2021 bargaining session in the manner set forth in the remedy section of this decision, to the extent those earnings were not reimbursed by the Union.

(f) Compensate affected employees for the adverse tax consequences, if any of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, 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.

(g) File with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(h) Preserve and, within 14 days of 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.

(i) Post at its Utica and Oglesby, Illinois facilities copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 25, 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, 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.

[28] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted and read within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial component of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and read within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 February 16, 2021.

(j) Hold a meeting or meetings during work hours at its Troy Grove and Vermilion facilities in Utica and Oglesby, Illinois, scheduled to ensure the widest possible attendance of bargaining unit employees, at which the attached notice marked "Appendix" will be read to employees by a high-ranking management official of the Respondent in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a high-ranking management official of the Respondent and, if the Union so desires, the presence of an agent of the Union.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 25 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.

Dated, Washington, D.C. June 22, 2023.

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Gwynne A. Wilcox, Member

_____

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Kaplan, dissenting in part.

I join my colleagues in reversing the judge's finding that the Respondent violated Section 8(a)(3) and (1) by laying off unit employees Lyle Calkins and Bradley Lower, in finding that the Respondent independently violated Section 8(a)(1) by issuing layoff notices to those two employees, and in amending the remedy accordingly.[29] I part ways with my colleagues, however, in finding that the Respondent violated Section 8(a)(5) and (1) by "declaring" impasse and "threatening" to implement its pension proposal during bargaining and in the absence of a valid impasse.[30] As discussed below, given the posture of this case, my colleagues' finding creates new law pursuant to which the inaccurate assertion of impasse while bargaining is ongoing, absent any unilateral action whatsoever and without consideration of the party's overall bargaining conduct, would constitute a *per se* violation of 8(a)(5) and (1). I do not believe that this new interpretation of 8(a)(5) and (1) is consistent with existing Board law, including the Board's recognition that "hard bargaining" is not unlawful, nor is it consistent with the Board's policy of encouraging free and full discussion during bargaining. Therefore, I dissent on this point.

I. BACKGROUND

The facts relevant to the alleged bargaining violation can be summarized briefly. The Respondent has recognized the International Union of Operating Engineers, Local 150, as its employees' representative since at least May 2008. Under the parties' most recent collective-bargaining agreement, which was effective from July 30, 2014 until May 1, 2016, the Respondent was required to contribute to the Midwest Operating Engineers Pension Fund.

On April 5, 2016, the parties began negotiations for a successor agreement. At some point after the parties' first bargaining session, the Respondent became aware that its liability to the Pension Fund had increased by 40%, from approximately $964,000 to $1,353,000. Concerned by the apparent mismanagement of the Pension Fund, the Respondent determined that it did not want to continue contributing to the fund. The parties negotiated over the issue for almost two years. After many rounds of bargaining,

[29] In finding that the Respondent violated the Act by issuing the layoff notices, Member Kaplan finds it unnecessary to reach the issue of whether the layoffs "did not follow seniority" or disregarded "employee seniority rights."

[30] I also disagree with my colleagues' decision to order certain remedies beyond the Board's standard remedies. Specifically, as a result of finding that the Respondent violated Sec. 8(a)(5) and (1), my colleagues have ordered bargaining-expenses and notice-reading remedies. I do not believe that those remedies are warranted in this case. My colleagues require the Respondent to reimburse the Union for the expenses it incurred in connection with the bargaining session on July 21, 2021, because the parties "were unable to have a meaningful negotiation session" on that day. However, nothing in the record suggests that the lack of progress during that meeting was a result of the 8(a)(5) and (1) violation found by my colleagues. They also require the reading of the notice to "reassure employees" that the employer is subject to the Act." Again however, nothing in the record suggests that the Board's standard remedy, posting of the notice, will be insufficient to provide the reassurance sought by my colleagues. See *Postal Service*, 339 NLRB 1162, 1163 (2003) (finding notice reading appropriate only where unfair labor practices are numerous and egregious).

the Respondent presented its last, best, and final offer to the Union in early March 2018. Under the proposal, the Respondent was no longer required to contribute to the Pension Fund. The unit employees voted to reject that offer and go on strike, which they did later that month.

After a three-year hiatus, the parties resumed bargaining over the successor contract on July 12, 2021. The Union again proposed a contract requiring contributions to the Pension Fund, and the Respondent again proposed a contract in which it did not. The Union said it would not agree to a contract that did not require contributions to the Pension Fund, and the Respondent said it would not agree to a contract that did. The Respondent suggested that they were at impasse. The Union denied that they were. After the meeting, by email to the Respondent on July 20, 2021, the Union continued to deny that they were at impasse but confirmed that it was "unwilling to accept [the Respondent's] proposal concerning pension contributions at that time."

When the parties next met for bargaining on July 21, 2021, the Respondent again said that the parties were at impasse and indicated that it would be implementing its proposal to cease contributions to the Pension Fund and begin making contributions to Midwest Operating Engineers Retirement Enhancement Fund instead. By the end of the following day, the Respondent had made similar assertions in correspondence to the Administrator of the Pension Fund and the Union. The Respondent also had filed a complaint in federal court seeking a declaration that it was not obligated to make any contributions to the Pension Fund. However, the Respondent did not, in fact, unilaterally implement its pension proposal at any point. Nor did the Respondent implement any other aspects of the last, best offer that it had presented to the Union in 2018. Indeed, although my colleagues state that the Respondent made a "pellucid announcement that it was unilaterally implementing its pension proposal," they concede, as they must, that "[t]he complaint does not allege, and the General Counsel does not argue, that the Respondent unilaterally implemented its proposal before impasse, only that it threatened to do so." Simply put, following its statement on July 21, the Respondent did not implement any changes whatsoever to employees' terms and conditions of employment.

Not only did the Respondent not implement any proposal following its statement declaring impasse, the Respondent also did not suspend bargaining as would be expected when impasse is reached.[31] Rather, the parties continued to discuss the Union's information requests, and the Respondent continued to provide responsive information to the Union. Further, and importantly, the parties continued to discuss potential dates for additional bargaining sessions, and the Respondent proposed that the parties meet on August 16 to continue bargaining.[32]

II. DISCUSSION

The Complaint in this case alleges that the Respondent engaged in bad faith bargaining because "[a]bout July 21, 2021, [the] Respondent threatened to unilaterally implement its proposed pension plan" before the parties were at impasse. The judge's decision in this case focuses entirely on one question: Whether the Respondent met its burden to establish that the parties "reached a good faith impasse on pension contributions on July 21." In finding that the Respondent failed to meet this burden, the judge was guided by two standards. First, the judge explained that "[a]lthough impasse over a single issue does not always create an overall bargaining impasse *that privileges unilateral action*," unilateral action may be privileged where the issue is "'of such overriding importance' to the parties that the impasse on that issue frustrates the progress of further negotiations."[33] Second, the judge set forth the standards by which a party can establish that "impasse on a single, critical issue *justified its implementation of other bargaining proposals* . . . ." (Emphasis added.)

These standards are, of course, correct. The problem, however, is that neither has any real bearing on the instant case. The Respondent is *not* seeking to justify unilateral action on its pension plan proposal, let alone to justify implementing any "other bargaining proposals." Again, the Respondent is not seeking to justify any unilateral action whatsoever. The only action taken by the Respondent that is alleged by the General Counsel to be unlawful—i.e., sufficient in and of itself to establish bad-faith bargaining—is the statement made by the Respondent during bargaining.

Accordingly, the judge's analysis here is fundamentally flawed. She conflates the question of whether a party may make *unilateral changes* pursuant to a declaration of

[31] Upon reaching a valid impasse, in addition to implementing unilateral changes that are reasonably comprehended by its pre-impasse proposals, an employer may suspend bargaining until a proposal breaks the impasse and revives the parties' duty to bargain. See, e.g., *Richmond Electrical Services Inc.*, 348 NLRB 1001, 1003–1004 (2006).

[32] The record does not indicate whether any additional bargaining sessions were, in fact, held.

[33] Citing *Calmat Co.*, 331 NLRB 1084, 1097 (2000) (emphasis added).

impasse with the question of what *words* a party may say while bargaining is ongoing. The case law she cites in her decision pertains to the former question, but not the latter.

My colleagues, unfortunately, make the same analytical mistake as the judge, reasoning that so long as no impasse has been reached, and therefore unilateral changes would violate Section 8(a)(5) and (1), statements during bargaining evincing an intent to effectuate impasse must also violate Section 8(a)(5) and (1). This is, of course, a false equivalency. And, furthermore, this false equivalency has no basis in Board law. Although my colleagues deny that they are "creating new law" and represent that they are applying what "Board precedent holds," they fail to cite a single case that would support finding a bad-faith bargaining violation as alleged, based solely on the Respondent's statements during bargaining. Contrary to what my colleagues claim, the Board did not suggest, let alone hold, that such an "announcement . . . absent evidence of implementation" violates Section 8(a)(5) and (1) in any of the precedent that they cite.[34]

None of the cases cited by my colleagues as evidence that their decision is not creating new law actually support their contention. In *ABC Automotive Products*, 307 NLRB 248 (1992), the Board found that the employer's communication violated Section 8(a)(5) and (1) "by announcing *and implementing*" a health and welfare plan to replace a union welfare fund because "the unilateral change was effectively implemented when it was announced." Id. at 249-250 (emphasis added).[35] In *Centinela Hospital Medical Center*, 363 NLRB 411, 413 fn.9 (2015), the unlawful unilateral change was effectuated at the time of the announcement. The employer, in the absence of a valid impasse, announced directly to employees that new healthcare plans would be offered during the upcoming enrollment period. Although the employer indicated that the plan would become effective at the beginning of the new plan year, the Board observed that the announcement "did not indicate that negotiations over healthcare were ongoing" and "thereby signaled to employees that the [r]espondent no longer intended to deal with the [u]nion over healthcare" and that it "went beyond simply stating a planned change" as "it indicated that action by employees was required." Id. The Board found, therefore, that the unlawful unilateral change was presented as a fait accompli. Id. In *Wire Products Mfg. Corp.*, 326 NLRB 625 (1998),[36] the employer announced

[34] My colleagues also assert that the Respondent "does not explicitly except to the judge's additional finding that the threat of implementation violated 8(a)(5) and (1)." This is a puzzling statement. Although I agree with my colleagues that the Respondent's exceptions themselves could have adhered more closely to the Board's Rules and Regulations, the Respondent did except to all the violations found by the judge and, specifically, the portions of the judge's decision pertaining to finding the Sec. 8(a)(5) and (1) violation. The Respondent's brief then expressly states:

> The Complaint concerning unfair labor practice charge 25-CA-280390 alleges "prior to the parties reaching impasse," [Respondent] on or about July 21, 2021 "threatened to unilaterally implement its proposed pension plan" and that by this conduct, [Respondent] "has been failing and refusing to bargain collectively and in good faith" with the Union "in violation of Section 8(a)(1) and (5) of the Act." . . . The ALJ erred in finding Counsel for the General Counsel met [her] burden of proving a Section 8(a)(5) and (1) violation of the Act. (ALJD 27-30, . . .).

Especially given the express language in the Respondent's brief in support of exceptions, I do not believe that our decision would survive judicial review were we to conclude that the Respondent did not sufficiently except to the judge's finding that it violated the Act by "threatening" to unilaterally implement its proposed pension plan. See, e.g., *NLRB v. Pan American Grain Co.*, 432 F.3d 69, 72-73 (1st Cir. 2005) (finding that respondent adequately excepted to the Board's failure to order a *Transmarine* remedy, even though it failed to raise that exception expressly).

I further note that, given that the judge's analysis entirely failed to focus on the "threat" allegation and, instead, focused on whether impasse existed, it is not entirely surprising that the Respondent's exceptions were not a model of clarity.

My colleagues also suggest that, because the Respondent did not raise certain arguments in support of its exception, I am precluded from raising those arguments in my dissent. The Board's Rules and Regulations do not support that position. Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations indicates that *exceptions* not raised by a party "*will* be deemed to have been waived." (Emphasis added). The second sentence of Sec. 102.46(a)(1)(ii), in turn, states that exceptions that are raised but fail to conform with the requirements of Sec. 102.46(a)(1)(i)—including Sec. 102.46(a)(1)(i)(D), pertaining to bare exceptions containing no supporting argument—"*may* be disregarded." Sec. 102.46(a)(1)(ii) (emphasis added). In other words, even when parties make exceptions that do not include *any* supporting argument, the Board still has the option to consider those exceptions. And if the Board has the option to consider exceptions that lack supporting argument, the Board must have the authority to decide those exceptions based on its own legal analysis. Accordingly, although Sec. 102.46(a)(1)(ii) suggests that exceptions not raised by a party are deemed to have been waived, the section does not support an interpretation that "arguments" in support of those exceptions may not be considered as part of the Board's analysis when they are not raised by a party. See also *Hilton Hotel Employer*, 372 NLRB No. 61, slip op. at 12 fn.12 (2023) (Member Kaplan, dissenting).

[35] Moreover, the communication in *ABC Products* did not occur while the employer was otherwise fulfilling its duty to bargain. The employer made a related unlawful unilateral change nine months before the communication, when it ceased making contractually required contributions to the health and welfare plan and thereby separately violated Sec. 8(a)(5) and (1). Id. at 249. And the employer committed yet another related 8(a)(5) violation four months before the communication, by conditioning agreement on a successor contract upon the union agreeing to forgo seeking relief for the employer unlawfully ceasing payment of the contributions. Id. at 249 fn. 9.

[36] Enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000).

a unilateral change to its profit-sharing plan *directly to employees*. Prior to this announcement, the employer had unlawfully withdrawn recognition from, and refused to meet and bargain with, the union, and after this announcement, the employer unlawfully unilaterally changed wages and other employment terms. Id. at 625, 627. In this context, the Board found that announcing the unilateral change to the profit-sharing plan was unlawful because the employer had "conveyed to employees the message that it no longer intended to deal with the [u]nion as their exclusive representative regarding terms and conditions of employment." Id. at 627.

Unlike all of these cases, the Respondent here did no more than, while bargaining was ongoing, assert that the parties were at impasse and threaten implementation. It did not implement unilateral changes. It did not engage in direct dealing or present the Union with a fait accompli. Before and after making the statements that my colleagues find violated Section 8(a)(5) and (1), the Respondent maintained the status quo employment terms, offered to meet and bargain with the Union, and otherwise fulfilled its duty to bargain. There is no allegation—let alone finding—to the contrary.

By finding that a statement made during bargaining indicating an intent to implement unilateral changes in the absence of actual impasse is sufficient, in and of itself, to establish a bad-faith bargaining violation, my colleagues are indeed making new law. And it is particularly troubling that this new interpretation of Section 8(a)(5) and (1) runs counter to the Board's longstanding practice of not getting involved in policing specific bargaining proposals or tactics employed at the bargaining table. The Board has recognized, consistent with that longstanding practice, that a "bargaining stance" may be "unrealistic, hard-nosed and even bull-headed" and still not be unlawful. *Teamsters Local 206 (Safeway, Inc.)*, 368 NLRB No. 15, slip op. at 16 (2019). In fact, the Board has found that employers can present an offer as "take it or leave it" without violating their duty to bargain in good faith. See *Industrial Electric Reels, Inc.*, 310 NLRB 1069, 1071-1073 (1993).

The Board has also found that bargaining rhetoric—i.e., what is said during bargaining—warrants particularly minimal scrutiny. The Board "is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining," even when such remarks "may show an intention not to bargain in good faith." *Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990). Indeed, the Board has noted that "[t]o lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." *Allbritton Communications*, 271 NLRB 201, 206 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986).

In conclusion, my colleagues' decision today finds, for the first time, that so long as parties have not actually reached impasse, a statement during the course of bargaining that a party intends to implement its bargaining proposal establishes a bad-faith bargaining violation, *per se*, without any consideration of the party's overall conduct during collective bargaining.[37] I do not believe that this new theory for finding a bad-faith bargaining is consistent with Board precedent. Nor do I believe that it furthers the purposes of collective bargaining for the Board to police statements made at the bargaining table in this manner.

Accordingly, I would dismiss the 8(a)(5) and (1) allegation.[38]

Dated, Washington, D.C. June 22, 2023

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[37] My colleagues indicate that the analysis of the Respondent's declaration of impasse on July 21 should be considered in the context of "subsequent actions." To be clear, there is no allegation that any subsequent actions violated the Act or that the subsequent actions established that the Respondent engaged in overall bad faith bargaining. To the extent that my colleagues find the subsequent actions to be significant in terms of how seriously the Union would take the Respondent's July 21 threat, again, the caselaw does not support a finding that such a threat would constitute a violation of the Act, regardless of the perceived seriousness of the assertion.

In addition, my colleagues place great emphasis on their assertion that the Respondent "declared impasse" on July 21 rather than threatened "to declare impasse and implement its bargaining proposal." I don't see why this distinction is significant. To begin, the General Counsel's complaint alleges the Respondent "threatened to unilaterally implement its proposed pension plan." My dissent clearly recognizes that the Respondent threatened to unilaterally implement its pension proposal; I just do not find that the threat alone violated the Act.

Further, there are two defining features of "declaring impasse": it enables a party to implement its proposals, and it temporarily suspends the duty to bargain. Accordingly, absent any unilateral implementation or refusal to meet to bargain, the effect of "declaring impasse" is essentially equivalent to the effect of when a party states that further bargaining will not be productive because it cannot move off of its position. Under my colleagues' theory of the case, any time a party makes such a statement, it will violate the Act, even if the party effectively negates that statement by continuing to engage in bargaining. I do not believe that is consistent with Board law, nor do I believe that it is conducive to collective bargaining for the Board to police positions taken by parties during negotiations in this manner.

[38] I find it unnecessary to reach the issue whether the parties were at a valid impasse because, as discussed above, I would not find that the Respondent's statement at the bargaining table established a bad-faith bargaining violation regardless of whether an impasse existed at the time.

Marvin E. Kaplan, Member

(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 issue you layoff notices because of your union membership or support.

WE WILL NOT fail and refuse to bargain by announcing that we will unilaterally implement our pension plan proposal prior to reaching impasse with the Union.

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 remove from our files all references to layoff notices issued to Lyle Calkins and Brad Lower and WE WILL notify them in writing that this has been done and that the layoff notices will not be used against them in any way.

WE WILL, on request, bargain in good faith with International Union of Operating Engineers, Local 150 as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

The employees described in Article 1, Section 1 of the collective bargaining agreement between the Employer and the Union which was effective from July 31, 2014 to May 1, 2016.

WE WILL rescind our statement to the Pension Fund Administrator that we will no long make contributions to the Midwest Operating Engineers Pension Fund.

WE WILL compensate the Union for all bargaining expenses it incurred for the July 21, 2021 bargaining session, including any lost wages the Union paid to employee bargaining committee members for bargaining conducted during working hours.

WE WILL make whole any affected employee negotiators for any earnings lost while attending the July 21, 2021 bargaining session, plus interest, to the extent those earnings were not reimbursed by the Union.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 25, 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.

WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

TROY GROVE, INC

Raifael Williams, Esq., for the General Counsel
Steven A. Davidson, Esq. (IUOE – Local 150 Legal Dept.), Countryside, IL, for the Charging Party
Arthur W. Eggers and Carmen C. Green, Esqs. (Califf & Harper PC), Moline, IL, for the Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried remotely via Zoom technology on January 26-28 and 31, 2022. The initial, first, and second amended charges in Case 25-CA-276061 were filed on April 22, April 28, and November 10, 2021, respectively. The charge in Case 25–CA–280390 was filed on July 23, 2021.[1] The complaint in Case 25–CA–276061 alleges that Troy Grove, a Division of RiverStone Group, Inc., Vermilion Quarry, a Division of RiverStone Group, Inc. (the Company or Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act)[2] by laying off employees Lyle Calkins and Brad Lower on February 16, because they supported the International Union Operating Engineers, Local 150, AFL-CIO (Local 150 or Union). The complaint in Case 25–CA–280390 alleges that the Company, on or about July 21, violated Section 8(a)(5) and (1) of the Act by threatening to unilaterally implement its proposed pension plan. The Company denies that Calkins and Lower were laid off and contends that it engaged in

[1] All dates are in 2021 unless otherwise stated.

[2] 29 U.S.C.§§ 151-169.

good faith bargaining before declaring that that it would unilaterally change pension plan contributions after the parties reached impasse on that critical issue.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Local 150, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, with offices and facilities, including sand and stone quarries in Utica and Oglesby, Illinois, provides services, and sells and ships goods on an annual basis valued in excess of $50,000 to states other than Illinois. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and Local 150 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company operates the Troy Grove Quarry (Troy Grove) and Vermilion Quarry (Vermilion). In 2021, the Company employed approximately four hourly employees at Troy Grove and three at Vermilion.[3] They work as equipment operators and/or maintain the processing plant. Mike Ellis is the Company's Vice President and oversees financial and sales matters. Marshall Guth was his predecessor. Jody Pace is the Area Production Manager. He reports to Ellis. Thomas Becker is the Superintendent of operations at Troy Grove. Jacob Allen is the Superintendent of operations at Vermilion. Both report to Pace. Steve Logan is Director of Human Resources. All are or were supervisors and agents at the material times within the meaning of Section 2(11) and (13) of the Act.

Calkins and Lower have been employed at Troy Grove since June 15, 2015 and October 3, 2016, respectively. Calkins has been employed as a mechanic. Brad Lower has been employed as an equipment operator. When hired, their employment applications stated, in pertinent part:

> If I am hired, I understand that I am free to resign at any time, with or without cause and with or without prior notices, and the employer reserves the same right to terminate my employment at any time, with or without cause and with or without prior notice, except as may be required by law. This application does not constitute an agreement or contract for employment for any specified period or definite duration. I understand that no supervisor or representative of the employer is authorized to make any assurance to the contrary and that no implied oral or written agreements contrary to the foregoing express language are valid unless they are in writing and signed by the employer's president.

The Company has a practice of temporarily laying off bargaining unit employees at Troy Grove and Vermilion during cold weather. In instances where a layoff slip is given to an employee, a copy also goes into the employee's personnel file.[4]

B. The Collective-Bargaining Agreement

Local 150 represents employees working in the construction industry in Northwest Indiana, Northern Illinois, and Eastern Iowa. The organization has numerous collective-bargaining agreements covering contractors and their employees throughout its jurisdiction. James Sweeney is the President and Business Manager. Marshall Douglas is the Treasurer. Stephen Russo is a business agent.

The Company has recognized Local 150 as the exclusive collective-bargaining representative of the following unit within the meaning of Section 9(b) of the Act long before May 2, 2008:

> The [Company] recognizes the Union as the sole representative of those classifications of employees who are members of the Union covered by this Agreement in collective bargaining with the [Company] in respect to wages, hours, and working conditions.

The Company and Local 150 Party had an effective collective-bargaining agreement from July 30, 2014, to May 1, 2016 (the CBA).[5] The provisions at issue include the CBA's seniority and pension fund provisions. Seniority is addressed at Article 11, Section 2, which states, in pertinent part:

> Section 2. Seniority is defined as the length of an employee's continuous service within the Bargaining Unit.
>
> It is understood and agreed that in all cases of layoffs, recalls, and promotions, the employee's experience and qualifications shall be the primary factor; but where these factors are relatively equal, then seniority shall be the determining factor.
>
> In the event of a reduction in the workforce, employees in the bargaining unit shall be entitled to exercise their seniority rights pertaining to classification if such cutback exceeds six (6) days, except in the case of a seasonal shutdown. Employees may exercise their seniority rights on the following Monday in the event there is a reduction in the workforce within their classification.
>
> In the event of a seasonal layoff or a layoff in excess of six days, the company shall give the union seven (7) days prior notice in the event that it decides to layoff employees out of order of seniority and said notice shall state the reasons for deviating from seniority.

The CBA required Company contributions into several employee funds. Article 2, Section 6, required employer contributions into Local 150's Retiree Medical Savings Plan Welfare Fund (RMSP). Article 16 required contributions to the Midwest Operating Engineers Pension Fund (the Pension Fund), a

[3] Although witness testimony estimated there were about seven employees at the two facilities, the payroll indicates about 11 were working or temporarily laid off during the payroll week ending February 21. (R. Exhs. 31, 34.)

[4] R. Exh. 29 at 000076, 000090, 0000106, 0000122, 000198, 000201, 000219, 000232, 000254; Tr. 124-25, 198-99, 513-22, 534-37, .

[5] The previous CBA ran from May 2, 2008 through May 1, 2013. (CP Exh. 179.)

multiemployer defined benefit plan, and the Welfare Fund.[6] The CBA also provided for the Company to contribute to a Welfare Fund. The pertinent excerpts read as follows:

> Section 1. It is understood and agreed that there shall be continued a Trusteed Pension Plan known as the [Pension Fund].
>
> Effective May 2, 2013, the Employer shall be liable to contribute $7.75 per hour for which the employee receives wages under the terms of this Agreement to the aforementioned Pension Trust Fund.
>
> Effective April 28, 2014, the Employer's contribution shall increase to $8.43 per hour for which the employee receives wages under the terms of this Agreement to the aforementioned Pension Trust Fund.
>
> Effective April 27, 2015, the Employer's contribution shall increase to $9.09 per hour for which the employee receives wages under the terms of this Agreement to the aforementioned Pension Trust Fund.
>
> At any time when or after the [Pension Fund] has a funded percentage that is less than 65%, and/or the [Pension Fund] refuses to accept contributions from the Employer, then after five (5) days of written notice being mailed by certified mail receipt requested to the Union at 3511 78th Avenue West, Rock Island, Countryside, Illinois 60525, the Employer may terminate its obligations to contribute to the [Pension Fund]
>
> In the event the Pension Fund funded percentage falls below 65%, the allocated contribution amount will go to the Midwest Operating Engineers Retirement Enhancement Fund.
>
> The Pension Fund has been established and shall be administered in accordance with the Labor-Management Relations Act of 1947 as amended.
>
> Payments accompanied by monthly reports on forms provided for the same are due in the Pension Office, 6150 Joliet Road, Countryside, Illinois, 60525, or such other place as designated by the Trustees, not later than the tenth (10th) day of the following month for the preceding month.
>
> Contributions to the Pension Trust shall not constitute or be deemed wages due to the employee.
>
> It is understood and agreed that the Employer, while required to make contribution to the [Pension Fund], shall be bound by the terms and provisions of the Agreement and Declaration of Trust of the [Pension Fund], and all amendments heretofore or hereafter made thereto, as though the same were fully incorporated herein.
>
> If payment for contributions as defined above is not received by the Fund Office by the twentieth (20th) day of the month, the Employer shall be deemed to be in violation of this Agreement and, as to contribution to the [Pension Fund], the aforementioned Trust Agreement.
>
> Failure to pay such contributions shall be subject to Article 14, Section 1, Paragraph h.
>
> It is understood and agreed that the sole liability of the Employer under this Pension Program shall be the payment of the contributions to the aforesaid Pension Fund.
>
> Section 2. The Employer shall pay Eight Dollars and Ninety-five Cents ($8.95) per hour for each hour for which the employee receives wages under the terms of this Agreement into the [Welfare Fund].
>
> The Welfare Fund maintains a place of business at 6150 Joliet Road, Countryside, Illinois, 60525, or at such other place designated by the Trustees. Contributions of the Employer shall be forwarded to such business office together with report forms supplied for such purpose not later than the tenth (10th) day of the following month.
>
> Contributions to the aforesaid [Welfare Fund] shall not constitute or be deemed wages due to the employee.
>
> It is understood and agreed that the Employer shall be bound to the terms and provisions of the Agreement and Declaration of Trust of the [Welfare Fund], and all amendments heretofore or hereafter made thereto, as though the same were fully incorporated herein.
>
> If payment for contributions as defined above is not received by the Fund Office by the twentieth (20th) day of the month, the Employer shall be deemed to be in violation of this Agreement and the aforementioned Trust Agreement.
>
> Failure to pay such contributions shall be subject to Article 14, Section 1, Paragraph h.
>
> It is understood and agreed that the sole liability of the Employer under this Welfare Program shall be the payment of the contributions to the aforesaid Welfare Fund.

C. The Pension Fund

Local 150's agreements with the Company and other employers include varying forms of retirement plans including pensions and 401(k) plans.[7] Examples include the: 2016-2019 agreement with US Silica, which provided for employer contributions to a 401(k) plan (defined contribution plan); (2) 2015-2021 agreement with Northern White Sand, LLC, which provided for employer contributions to a profit sharing and 401(k) plans; 2020-2024 agreement with Northern White Sand, LLC, which provided for employer contributions to a 401(k) plan; 2004-2008, 2008-2011, 2011-2014, 2014-2017, 2017-2020, and 2020-2023 agreements with Linwood Mining and Minerals Corp., which provided for contributions to a 401(k) plan; 2012-2015, 2015-2018, and 2021-2024 agreements with Skyway Concession

[6] Under a defined benefit plan, "regardless of return on investment, the [Pension] Fund pays out a guaranteed level of benefits" to retired members. (Tr. 358.)

[7] These are separate from the Company's Employee Savings Plan, also a 401(k), which is offered to employees. (R. Exh. 35.)

Company LLC, which provided for contributions to an Retirement Enhancement Fund; and 2011-2014, 2014-2015, 2016-2019 agreements with ITR Concession Company LLC, which provided for contributions to a Retirement Enhancement Fund.[8]

Local 150's Pension Fund was established and is administered pursuant to the Labor-Management Relations Act of 1947 as amended. The Pension Trust Fund consists of five management trustees and five Union trustees, each with an equal vote. There is an equal number of Local 150 and management trustees from the various industries that contribute to the Pension Fund. Decisions are made jointly. All votes are equal, no one has a weighted vote.[9]

The Pension Fund's investments lost value when the stock market crashed in the late 2000s, resulting in the Pension Fund having unfunded liability for the benefits owed to retired members. Unfunded liability in the Pension Fund creates withdrawal liability for contributing employers, which an employer must pay if it withdraws from the Pension Fund.[10] Withdrawal can occur in several ways: if an employer negotiates out of a pension fund or enters bankruptcy; if bargaining unit employees decertify the union; if the union disclaims interest in representing the unit.[11]

Pursuant to the Pension Protection Act of 2006 (PPA), Section 305 of the Employee Retirement Income Security Act (ERISA), and Section 432 of the Internal Revenue Code (IRC), the Pension Fund Trustees developed a Funding Improvement Plan (FIP) on January 8, 2013 after the Pension Fund was certified by its actuary on June 29, 2012 as being in endangered status, also referred to as the Yellow Zone, for the plan year beginning April 1, 2012. The audit projected that, as of April 1, 2014, the Pension Fund's funded percentage would be 76.96%. The FIP, designated to run from April 1, 2014 through March 31, 2024, required plan and/or contribution changes projected to enable the funded percentage to improve to at least 84.56% by March 31, 2021, thereby avoiding a projected funding deficiency. FIP also required monitoring and annual updating to ensure progress in eliminating the projected deficiencies.

D. Bargaining Over a New Contract

Prior to the expiration of the CBA, the Company and Local 150 started bargaining over a new contract on April 5, 2016. Over the next five years, the parties would meet 26 times. The Company was represented by labor counsel, Arthur Eggers, along with Guth or Ellis. Local 150 was represented by Steven Davidson, Esq., Sweeney, Douglas, Russo, Floyd Holocker, and unit employees Scott Currie and Lyle Calkins.[12]

The first bargaining meeting was on April 5, 2016. During that meeting, the parties exchanged proposals regarding the following provisions: Article 1, Sections 1, 2 and 3 – Recognition; Article 2, Sections 1 and 6 – Wages and Fringe Benefits; Article 4, Section 1(b) – Holidays; Article 3, Sections 3 and 4 – Hours of Work; Article 5 – Vacations; Article 7, Section 4 – Safety; Article 12 – Bereavement; Article 16 – Pension Fund and Welfare Fund; Article 17, Section 2 – No Strike, No Lockout; Article 20 – Federal PAC Check-Off; Article 21 – Termination. By the second bargaining session on April 12, 2016, the parties tentatively agreed to the Company proposals regarding Article 1–Section 3, Article 17–Section 2, and Article 21, and deletion of the Second Letter of Agreement.

At some point after the first bargaining session, the Company ascertained that its estimated withdrawal liability from the Pension Fund had increased from $964,378.08 to $1,352,785.27. After expressing its concerns at the April 27, 2016 meeting, the Company proposed the following indemnity agreement:

Employer Proposal for Article 16 Pension Fund and Welfare Fund, Section 1

> Discussion leading to proposal The Employer has been told by the Midwest Operating Engineers Pension Fund that the withdrawal liability is now $1,352.785.27 (see attached letter from the Fund dated April 15, 2016). Also see attached the letter from the Fund dated April 19, 2013 which states the withdrawal liability was $964,378.08. Therefore, in two years the Employer's withdrawal liability has increased by $388:407.19 which is 40%. The Employer requests an explanation and requests a meeting with Tom Bernstein to obtain the Fund's information concerning this increase. The Employer intends to make a proposal after the information has been obtained as a result of the inquiries.

Employer Proposal for Article 16 Pension Fund and Welfare Fund Section 2

> New paragraph 8 - A Memorandum of Agreement is attached to the labor agreement as follows:
>
> MEMORANDUM OF AGREEMENT
>
> WHEREAS, Trove Grove Stone Quarry, a division of RiverStone Group, Inc. ("Employer"), and International Union of Operating Engineers, Local Union No. 150 affiliated with the AFL-CIO, hereinafter referred to as the ("Union") and Midwest Operating Engineers Welfare Fund ("Fund") enter into this Memorandum of Understanding;

[8] CP Exh. 164-178; Tr. 282-308.

[9] See *Order Admitting Charging Party Exhibits CP-226 & 227*, and Appendix thereto, dated February 9, 2022.

[10] In contrast, a defined contribution plan such as the Midwest Operating Engineers Retirement Enhancement Fund (401(k) plan) does not incur the risk of withdrawal liability. *(Robbins v. Pepsi-Cola Metro. Bottling Co*., 636 F. Supp. 641, 679 (N.D. Ill. 1986) ("under [defined contribution] plans, by definition, there can never be an insufficiency of funds to cover promised benefits.")).

[11] The Company contends that a private employer has never bargained out of an existing obligation to contribute to the Pension Fund. (R. Exh. 22; Tr. 313.) However, the record is devoid of evidence that any member-employers ever attempted to bargain out of the Pension Fund.

[12] Most of the participants made notes during the negotiations. They were fairly consistent, with some reflecting greater detail than others. All were received in evidence along with the communications exchanged and other relevant documents. (CP Exhs. 1-221.) A transcript of Eggers' notes was also admitted. (CP Exhs. 57a, 63a, 75a, 81a, 87a, 93a, 99a, 105a, 111a, 148a, 157a.)

WHEREAS, the Employer and the Union are parties to a labor agreement by which the Employer makes of contributions to the Fund; and

WHEREAS, the Union has told the Employer that the Fund is the one that is responsible for the liability that may arise and not the Employer.

NOW THEREFORE, it is agreed as follows:

The Fund and the Union agree to jointly and severally defend, indemnify, and hold harmless the Employer, its officers, officials and employees harmless from any and all claims injuries, damages, losses or suits, including attorneys' fees arising out of or in connection with the Fund not being in compliance with the Patient Protection Affordable Care Act ("PPACA") as amended in any other federal or state health care laws, including but not limited to, the Employer directly or indirectly owing Cadillac Taxes and any other penalties or fees due to the Fund not being in compliance with the PPACA.[13]

At the conclusion of this session, the parties agreed to extend the CBA until June 1, 2016, and agreed that any negotiated wage increase would be retroactive to May 2, 2016.

On May 4, 2016, the parties negotiated over the previous proposals but no agreements were reached. During this meeting, the Company asked Thomas Bernstein, administrator of the Pension and Welfare Funds, questions about withdrawal liability and funding levels for the Pension Fund. Bernstein explained the FIP that was in place.

E. The Company's Focus Turns to the Retirement Enhancement Fund

On June 29, 2016, the Company proposed a five-year renewal with 1% annual wage increases, with retroactive payments for employees employed on the date of ratification. The proposal eliminated the $.25 per hour contribution to the RMSP and the $35 per year boot allowance. The Company also proposed the following language in order to switch contributions from the Pension Fund to the Midwest Operating Engineers Retirement Enhancement Fund:

ARTICLE 16 – PENSION FUND & WELFARE FUND:

Section 1 – Change to read as follows:

The employer shall contribute $9.09 per hour for which the employee receives wages under the terms of this Agreement to the Midwest Operating Engineers Retirement Enhancement Fund (a 401(k) plan). Payments to the 401(k) plan shall be made monthly no later than ten days after the month in which the payments were earned.

Section 2 – Add to the current contract the following:

The parties have agreed to the attached [indemnity agreement].[14]

On July 20, 2016, Local 150 rejected the Company's written proposals, dated July 13 and 18, 2016. Local 150's proposals continued to include a three-year renewal and contributions to the Pension Fund.[15] On August 15, 2016, the Company proposed a four-year agreement with 1% annual wage increases, retroactive for those employed on the date of ratification. The Company also continued to propose switching Pension Fund contributions to the Retirement Enhancement Fund, eliminating contributions to the RMSP, and the $35 annual boot allowance.[16]

On August 22, 2016, Stephen Rosenblat, counsel for the Welfare Fund, replied to Bernstein's request for an opinion as to the feasibility of Local 150 and the Welfare Fund indemnifying the Company for any claims relating to the Fund's failure to comply with the Affordable Care Act or the Company being responsible for "Cadillac taxes."[17] He advised the Fund's Trustees to reject such an agreement because he believed that it was unlikely the Fund would incur or cause the Company any liability, as well as the uncertainty of changes to the law.

On September 12, 2016, the Company proposed a revised indemnity agreement. The Company also proposed to contribute $9.09 per hour to the Retirement Enhancement Fund but cease contributions to the Welfare Fund.**[18]**

On September 27, 2016, the Company proposed a four-year CBA with a 1% wage annual increases for the first three years, and a 1.25% wage increase in the fourth year, retroactive to employees employed when the contract was ratified. The proposal continued to include contributions to the Retirement Enhancement Fund instead of the Pension Fund. Additionally, the Company proposed to delete RMSP contributions and the boot allowance. Local 150 revised the proposed wage rate for the third year of the contract.[19]

F. Local 150 Opens the Door to the Retirement Enhancement Fund

On May 1, 2017, Local 150 proposed a revised economic package: a five-year CBA; 4.5% annual wage increases in the first three years and 5% in the last two years; switching contributions from the Pension Fund to the Retirement Enhancement Fund, effective May 1, 2017; contributions of $.50 toward the Pension Fund in the first year and into the Retirement Enhancement Fund for the remaining four years. The Company did not submit any proposals.[20]

On June 29, 2017, the Pension Fund's actuary certified it again to be in Yellow Zone status for the 2017 Plan Year "in light of the financial and employment experience since 2012." On June 5, 2018, the Pension Fund Trustees approved the 2017 Updated

[13] GC Exh. 14 at 3-4.
[14] CP Exh. 26.
[15] CP Exh. 31.
[16] CP Exh. 38.
[17] I take administrative notice that the "Cadillac Tax" refers to the 40% excise tax on high-cost employer health plans that was to take effect in 2022. The Cadillac Tax was repealed on December 20, 2019. See 26 U.S.C § 4980I - Repealed. Pub. L. 116–94, div. N, title I, § 503(a), 133 Stat. 3119.
[18] CP Exhs. 43-48.
[19] CP Exh. 50.
[20] CP Exh. 55.

FIP, beginning April 1, 2017.

On July 5, 2017, Eggers emailed a copy of a letter he received from Bryan Cappel, Director of Operations for the Pension and Welfare Funds, dated June 9, 2017, regarding the Company's withdrawal liability:

> Per our telephone conversation of this morning regarding your faxed letter to me of June 8, 2017 pertaining to the withdrawal liability estimate for plan year April 1, 2015 through March 31, 2016 of $1,451,693.53, the previous amount of $1,352,785.27 was an estimate from March 8, 2016 which was prior to the plan year end and a formal valuation of that year was not completed at that time.
>
> If Troy Grove Stone Quarry, Inc. is planning to withdraw from the Midwest Operating Engineers Pension Fund at this time, please notify the Fund Office in writing at the address above, so that a "formal" determination of withdrawal liability can be calculated by Pension Fund actuarial consultants. If a forma1 determination of withdrawal liability is requested, please also provide payment of $1,000.00, payable to the Midwest Operating Engineers Pension Fund, prior to having this completed.

G. The Company Moves the Goalpost

The parties resumed bargaining on July 10, 2017. At that meeting, the Company proposed a four-year contract with 1.25% annual wage increases. However, rather than capitalize on Local 150's acceptance of its proposal to move Pension Fund contributions to the Retirement Enhancement Fund, the Company revised its original proposal to incorporate an escape hatch:

> ARTICLE 16 – PENSION FUND & WELFARE FUND:
>
> Section 1 – Change to read as follows:
>
> Notwithstanding any other provisions of this Agreement, the Employer is obligated to contribute to the Midwest Operating Engineers Retirement Enhancement Fund (401(k) Plan) only unless and until the first to occur of the following: the Union is decertified, the Employer withdraws recognition of the Union, the Union disclaims interest in representing the bargaining unit or this Agreement expires without there being an obligation to contribute in a new collective bargaining agreement.
>
> This Agreement shall not be in effect until the Midwest Operating Engineers Retirement Enhancement Fund (401(k) Plan) acknowledges and agrees by signing below that the Employer is obligated to contribute to the Midwest Operating Engineers Retirement Enhancement Fund (401(k) Plan) only unless and until the first to occur of the following: the Union is decertified, the Employer withdraws recognition of the Union, the Union disclaims interest in representing the bargaining unit or this Agreement expires without there being an obligation to contribute in a new collective bargaining agreement.
>
> Section 2 – Add to the current contract the following:
>
> Notwithstanding any other provision of this Agreement, the Employer is obligated to contribute to the Midwest Operating Engineers Welfare Fund only unless and until the first to occur of the following: the Union is decertified, the Employer withdraws recognition of the Union, the Union disclaims interest in representing the bargaining unit or this Agreement expires without there being an obligation to contribute in a new collective bargaining agreement.
>
> This Agreement shall not be in effect until the Midwest Operating Engineers Welfare Fund acknowledges and agrees by signing below that the Employer is obligated to contribute to the Midwest Operating Engineers Welfare Fund only unless and until the first to occur of the following: the Union is decertified, the Employer withdraws recognition of the Union, the Union disclaims interest in representing the bargaining unit or this Agreement expires without there being an obligation to contribute in a new collective bargaining agreement.[21]

H. Local 150 Pulls Back But Leaves the Door Open

On July 25, Local 150 proposed a five-year contract with 4.5% annual wage increases in each of the first three years, 4.75% in the fourth year, and 5.0% in the fifth year. Since the Company rejected Local 150's May 1, 2017 proposal to move and increase retirement contributions to the Retirement Enhancement Fund beyond the $9.09 rate, Local 150 resumed proposing contributions to the Pension Fund. Local 150 also produced a copy of Bernstein's July 24, 2017 memorandum estimating the Company's net withdrawal liability as of March 31, 2017 in the amount of $1,772,782. Bernstein addressed the Company's concerns regarding the impact of retroactive contributions increases of $.50 by explaining that they would not impact the extent of the Company's withdrawal liability. The Company did not submit any new proposals.[22]

The parties met on August 10, 2017 but did not exchange proposals. However, Local 150 expressed its willingness to switch contributions from the Pension Fund to Retirement Enhancement Funds "if the money is right."[23]

On August 22, 2017, the Company proposed a three-year contract with 1.75% annual wage increases. The proposal also redirected Pension Fund contributions to the Retirement Enhancement Fund, and kept the RMSP and boot allowance.[24]

On August 29, Local 150 proposed a three-year contract with

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[21] CP Exh. 62.

[22] I based this finding on Russo's credible and unrefuted testimony. (CP Exh. 67.)

[23] CP Exhs. 75 at 2-3, 76 at 2, 77 at 2, 157a at 18.

[24] Guth's notes from this meeting included an excerpt from a decision by the Seventh Circuit Court of Appeals in *Midwest Operating Engineers Welfare Fund, et al. v. Cleveland Quarry*, Case Nos. 15-2628, -3221, -3861, 16-1870 (7th Cir. 2016), ruling that an employer is still obligated to contribute to benefit funds for the life of the CBA even though the employees decertified the union: "RiverStone might have negotiated a collective bargaining agreement that obligated it to contribute to the funds only unless and until the union was decertified, But it didn't." (CP Exh. 80.)

a 4.1% wage increase in the first year, 4.15% in the second year, and 4.16% in the third year. The proposal also moved in the Company's direction regarding retirement benefits. It included additional contributions each year: in the first year, $.50 to the Pension Fund, $.90 to the Welfare Fund, and $.60, allocated by unit employees between wages and RMSP; in the second year, a $2.10 contribution, allocated by unit employees between wages, Welfare Fund, RMSP, and Retirement Enhancement Fund; and (3) in the third year, a $2.20 contribution, allocated by unit employees between wages, the Welfare Fund, RMSP, and Retirement Enhancement Fund.[25] The proposal also included contributions to the Pension Fund, retroactive from the date of ratification to May 2, 2016. Significantly, Local 150 expressed willingness to consider cessation of contributions if it was decertified or disclaimed interest in the bargaining unit. The Company countered with a revised wage rate increase.[26]

On October 17, the Company proposed a three-year contract with 2.25% annual wage increases. The proposal transitioned $9.09 contributions from the Pension Fund to the Retirement Enhancement Fund, plus an additional $.50 contribution for the period from May 2, 2016 to the date of an agreement. It also included an option for unit employees to allocate wage increases, but only to the Welfare Fund.[27]

On October 24, the Company proposed a three-year contract with $.90 annual wage increases and restated its previous proposal regarding retirement contributions Local 150 requested an increase in contributions to the Company's Retirement Enhancement Fund proposal.[28]

On December 5, 2017, the Company proposed a three-year contract with a $1.20 wage increase in the first year, and a $1.25 increase in the second and third years. While Local 150 did not agree to the Company's wage proposal, it essentially agreed to the Company's retirement package: the elimination of Pension Fund contributions, except for the period from May 2, 2017 to September 30, 2017; beginning October 1, 2017, $9.09 hourly contributions to the Retirement Enhancement Fund; and to cessation of contributions to the Pension Fund and Retirement Enhance Fund if Local 150 is decertified or disclaims interest in the bargaining unit. The parties also reached tentative agreements regarding the Cover Page, Index, Introduction, Article 1–Section 2, Article 7–Section 4, and Articles 20 and 21.[29]

On December 20, Local 150 proposed a three-year contract with hourly increases of $1.20 in the first year, $1.50 in the second, and $1.75 in the third year, as distributed by unit employees among wages, Retirement Enhancement Fund, Welfare Fund, and RMSP. Local 150 accepted the Company's December 5, 2017 proposal, including the Pension Fund and the total payout for wages and retirement contributions, but expressed the preference of unit employees to allocate in order to bolster their Retirement Enhancement Fund accounts. The Company, however, rejected that concept, preferring to limit employee allocations only between wages and the Welfare Fund, and made no counterproposal.[30]

I. The Company's Last, Best, and Final Offer

At Local 150's request, the parties met with the FMCS mediator on January 10, 2018. Proposals were not exchanged. On February 14, 2018, the Company proposed a three-year contract with annual hourly wage increases of $1.25 in the first and second years, and $1.20 in the third year. The proposal included the transition of contributions from the Pension Fund to the Retirement Enhancement Fund, which was previously agreed to by Local 150. The proposal also included contributions to the Welfare Fund level as of April 27, 2015. Unit employees could move a portion of any increase to the Welfare Fund, but not the Retirement Enhancement Fund. Increases would be retroactive for employees employed when the contract was ratified.

The parties broke for several hours. When they returned, the Company presented its "last, best, final offer." The only differences were annual hourly wage increases of $1.35 in the first year, $1.30 in the second year, and $1.20 in the third year. A few hours later, bargaining unit voted on that proposal and rejected it.[31]

On March 7, 2018, Local 150 accepted the Company's proposal to eliminate Pension Fund contributions and, instead, redirect those contributions to the Retirement Enhancement Fund. Local 150 conditioned its proposal on the parties agreeing to a higher contribution amount and the ability of unit employees to allocate more of their compensation to the Retirement Enhancement Fund. The Company rejected that proposal outright, reproposed its February 14, 2018 last, best, and final offer to the Union, and requested that Local 150 place it before its members for another vote. Later that day, bargaining unit employees voted and again rejected the Company's last, best, and final offer. They also voted to engage in a strike. Starting about March 19, 2018, the employees engaged in a strike. At the time, there were seven employees in the bargaining unit.

On April 24, 2018 met but did not exchange proposals, the strike continued, and no further bargaining was scheduled. At this point, wages, retroactivity, and contributions to the Welfare Fund, RMSP, and Retirement Enhancement Fund were still open items.[32]

J. The Decertification Petition

On December 7, 2020, unit employee Craig Parsons filed a petition in Case 25-RD-269960 to decertify Local 150 as the employees' exclusive bargaining representative.[33] A mail-in ballot election was held, and a tally of ballots was conducted via videoconference on February 16, 2020. Calkins, the bargaining unit's shop steward, and Lower informed Becker that they were going to observe the tally on behalf of Local 150. Prior to the

[25] CP Exh. 85.
[26] CP Exhs. 85 at 2, 87a at 1-2, 88 at 2, 89 at 5.
[27] CP Exhs. 92 at 3, 93a at 3, 94 at 4.
[28] CP Exhs. 98 at 3-4, 100 at 2.
[29] CP Exhs. 103 at 3-4, 104, 105a at 3, 106 at 9, 107 at 2-3 .
[30] CP Exh. 109 at 2-3, 112 at 2-3.
[31] CP Exhs. 122 at 2-6, 124 at 2.
[32] CP Exhs. 133-138.
[33] . GC Exh. 3.

tally, however, Becker told Calkins and Lower that Pace instructed him to have them clock out of work, observe the tally in the shop office, and clock back in after the tally. Calkins and Lower complied and observed the tally along with the Company's labor counsel, Eggers and Green, and Davidson, Russo, Ellis, and Logan.

Six ballots were opened. Four ballots were in favor of Local 150. The tally lasted approximately one and one-half hours.[34] Objections and challenged ballots were sufficient to determine the outcome of the vote, so the tally was non-determinative and subsequent filings, orders, and proceedings took place in the months thereafter, including a second tally of ballots on October 13. Ultimately, Local 150 and the Company withdrew their objections and challenges, and the Regional Director certified the vote in favor of Local 150 on October 26.

K. The Lay-Off Notices

During the week before the February 16 tally, Calkins and Lower were assigned to a two to three week assignment restoring equipment in the shop. At the time, there was also other work inside and outside the shop that could have been performed. On February 16, approximately one hour after Calkins and Lower clocked back in, Becker handed them layoff notices, effective as of 4:00 p.m. that day. Becker explained that there was a lack of indoor work due to the cold weather. The previous week, Becker laid off unit employees Ben Gibson and Travis Schmidt due to the cold weather and a lack of indoor work. Calkins asked how long he and Lower would be laid off but Becker did not respond.[35]

Calkins quickly sent a copy of the layoff notice to Russo by text message. At the time, Scott Currie was first in seniority, Calkins was second, and Lower was third. At Becker's suggestion, Russo asked Becker who would be loading trucks in Vermilion. Alluding to his seniority rights under the CBA, he told Becker that, if anybody other than Currie was going to be loading trucks in Vermilion, it should be him.[36] As of February 16, the following bargaining unit employees were working, and are listed in order of earliest hire date: Currie, Calkins, Lower, Joshua Webber, Jamie Gott, and David Lewis. Craig Parsons, who was laid off the week before, worked part of the pay period ending February 21. Payroll records indicate that the remaining four unit employees did not work during that pay period: Benjamin Gibson, Kasey Helm, Travis Schmidt, and Hunter Lewis.[37]

Becker simply told Calkins that he needed to call Pace and left the work area. About an hour and a half later, Becker returned, took back the layoff notices from Calkins and Lower, and tore them up. He explained that that he was retracting the notices because there was too much work to do.[38] Calkins and Lower were still on the clock when Becker rescinded the layoffs.[39]

L. Negotiations Resume

On May 25, Eggers informed Davidson that he would contact Douglas and Russo to schedule a session. On May 26, 2021, Eggers requested that Bernstein provide him with an estimate of withdrawal liability for the Company. On May 27, Bernstein replied:

> The enclosed estimate of withdrawal liability is in response to your letter of May 26, 2021 regarding Troy Grove Quarry and Vermilion Quarry. At this time, the most recent withdrawal liability information available is for the Plan Year ending March 31, 2020. Updated information regarding liability through the period March 31, 2021 will not be available until later this year after the Pension Fund's actuary has completed a full valuation of the Plan. Based on the current information available, the estimated withdrawal liability attributed to Troy Grove Quarry and Vermilion Quarry for the Plan Year ended March 31, 2020 is $1,146,201.31.
>
> Please be advised that this calculation is only an estimate and should the Troy Grove Quarry and Vermilion Quarry bargaining unit trigger a withdrawal from the Midwest Operating Engineers Pension Fund, a formal calculation of withdrawal liability will be calculated by Pension Fund actuarial consultants.
>
> If you have any additional questions, please do not hesitate to call me. (CP Exh. 182.)

On May 28, Russo sent Eggers a request for the following bargaining unit information: current wage rates; seniority list, personnel files, employee policy manuals, documents and handbooks; transfer documents; health insurance program, summary, and cost documents.[40]

On June 1, Eggers requested the following information from Bernstein regarding the Pension and Welfare Funds by June 8:

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[34] The credible testimony of Calkins, Lower, and Russo regarding the Company's knowledge of the support provided by Calkins and Lower for Local 150 is undisputed. (Tr. 199-202, 456-60, 504-12.)

[35] Becker was not a credible witness. He appeared overly tentative and evasive when asked whether the Company had a layoff policy or employee work rules – he had no idea. (Tr. 107-110.)

[36] The CBA recognized seniority based on tenure subject to considerations of qualifications and experience. However, Becker clearly gave those factors any consideration before sidelining Calkins and Lower. Nor is there any evidence that the experience and qualifications of Calkins and Lower were any less than Joshua Webber, Jamie Gott, and David Lewis. (GC Exh. 2 at 8.)

[37] This finding is based on the Company's list of bargaining unit employees in order of hire date (R. Exh. 34.) and the employee status as of the pay period ending February 21. (R. Exhs. 31, 34.)

[38] Becker's explanation for rescinding the layoff notices was not credible. He testified that he changed his mind because he decided to take a gamble on the weather warming up so work could be done outdoors. However, the detailed, consistent and credible testimony of Calkins and Lower regarding the machine they were working established that they still had at least another week of inside work left at the time. (GC Exh. 4; Tr. 114-28, 203-06, 456-69, 480-81,493, 508-16, 518-22, 534-537.)

[39] The payroll sheets do not show whether Calkins and Lower experienced a loss of pay due to the events of February 16. (R. Exh. 35 at 000488 and 001029.) However, neither testified to such a result.

[40] CP Exh. 183.

1. For the money that has been taken from the Welfare Plan and diverted to the Pension Plan, please state the following:
   - each date on which an amount was taken and the amount that was taken on that date
   - the total amount that has been taken
2. If any of the amount taken from the Welfare Plan has not been repaid by the Pension Plan, please state the following:
   - each date on which repayment will be made and the amount of repayment on that date
3. If any of the amount taken from the Welfare Plan has been repaid by the Pension Plan, please state the following:
   - each date of repayment and the amount of repayment on that date
4. Is the Pension Plan still taking "reallocating" contributions from the Welfare Plan? If so, please state the amount that is being reallocated. (CP Exh. 186.)

On June 10, Davidson forwarded Bernstein's reply to Eggers information request regarding the Pension Fund.:

> In response to your request for information from the Pension Fund, no money was taken from the Welfare Fund and diverted to the Pension Fund. In the fall of 2017, the Trustees of both the Welfare Fund and the Pension Fund agreed to reallocate future Welfare contributions to the Pension Fund. The reallocation of contributions began in October 2017 and ended in August of 2018. In total, just over $200 million in contributions were reallocated during this period. There is no requirement for repayment of the reallocated contributions.

On June 15, Eggers followed-up by requesting the information regarding the reallocation of Welfare Fund contributions to the Pension Fund:

> Thank you for your email of June 10, 2021. Due to your response, this is to request that you provide to me the following:
>
> 1. Since the Pension Fund took ("reallocated") over $200,000,000 from the Welfare Fund from October 2017 to August 2018, why is the Vermilion Troy Grove estimated liability more for the plan year ended March 31, 2020, at $1,146,201.31 than it was for withdrawals from 4/1/12 to 3/31/13 at $965,530.77?
>
> 2. Since there is no requirement for the repayment of money that is taken ("reallocated") from the Welfare Fund to the Pension Fund, why did the Pension Fund quit taking from the Welfare Fund in August 2018?
>
> 3. How much would the Pension Fund have to take ("reallocate") from the Welfare Fund to fully fund the Pension Plan and eliminate withdrawal liability?
>
> Please provide the requested information by June 22, 2021.
>
> I am providing a copy of this email to Marshall Douglas since this information is requested for the purpose of preparing for negotiations.[41]

On June 25, Eggers sent Davidson a draft of an unfair labor practice charge alleging that Local 150 failed and refused to bargain in good faith by refusing to furnish the Company with requested information that was relevant to the bargaining process.[42]

On July 12, the parties met in-person and exchanged proposals. An FMCS mediator attended via videoconference. Local 150 proposed a five-year contract with wage increases retroactive to May 1, 2016 and continued contributions to the Pension Fund. The Company proposed a revised Cover Page and a one-year contract with a wage rate of $32.39, which was less than the amount it proposed on February 14, 2018. The proposal included the $9.09 contribution to the Retirement Enhancement Fund in lieu of the Pension Fund, and $8.95 contribution to Welfare Fund, the same rate from 2013.

During discussions regarding the Company's withdrawal liability and positions regarding the Pension Fund, Eggers asked if Local 150 would accept an agreement without the pension included. Russo said "no." Davidson then asked Eggers if the Company would accept an agreement with continued Pension Fund contributions. Eggers said "no" and asked why the parties were not at impasse. Local 150 disagreed, insisted they were attempting to put together a proposal, and took a caucus. When they returned, Davidson told Eggers that Local 150 would prepare a proposal and to "think outside the box." Eggers replied that the Company would welcome a proposal but cautioned that if it included the Company's continued contributions to the [Pension] Fund, "inside the box or outside we will not agree[.] [I]f the union can put together a proposal without [the] pension we are very interested." Davidson replied that "we will be creative. Eggers insisted that the Pension Fund was in bad shape and requested information proving otherwise. Davidson agreed to provide the information and canceled the next scheduled session for July 14. He added, however, that "regardless of the info you still say no." During this session, the mediator noted that there were other items that the parties could negotiate as well and the parties scheduled the next negotiation for July 21. The open items included wages, health insurance, contributions to Retirement Enhancement Fund and RMSP, overtime, overtime pay, holidays, bereavement, and boot allowance. However, the Company refused to negotiate over those items because Local 150's proposal continued to include contributions to the Pension Fund.[43]

On July 14, Russo sent Ellis a "Negotiations Information Request" based on Eggers statements on July 12 "that the Company was in a more favorable bargaining position than it was three (3) years ago." Requesting "an explanation" for that assertion, he asked Ellis to provide information by July 16: corporate earnings, sales and profits, the amount of rock sold, and price sheets for the Troy Grove and Vermilion quarries for each year between 2015 and 2021; the membership of the Company's Board of Directors; cost of items associated with "weathering the strike;"

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[41] CP Exh. 184, 187, 189.

[42] CP Exh. 188.

[43] The Company did not dispute testimony that it foreclosed bargaining over other open items because the Pension Fund contributions were still included in Local 150's proposals. (CP Exh. 146-154; Tr. 63, 227-236, 244, 353, 387-394, 414-15, 440-41, 451-52, 469-474.)

expenses incurred for legal and labor counsel between 2016 and 2021; seniority list; ages of all employees; 401(k) contributions and match rates by the Company; wage increases between 2015 and 2021; wage rates; healthcare costs for the replacement workers from 2018 to 2021; total employees hours worked from 2016 to 2021; and Josh Weber's title, position, and transfer date and documents.[44]

On the same day, Eggers informed Davidson that he rescheduled the next meeting for July 21. He reiterated his belief that the parties' positions on the Pension Fund placed them at impasse, and noted Davidson's disagreement with that view and canceling of the meeting initially scheduled for July 14 in an effort to arrive at a creative solution. Davidson replied on the same day:

> Thank you for your letter dated July 14, 2021. Although previously I have not responded to your mischaracterizations, I am writing, in part, to correct some of the mischaracterizations contained in that letter. During negotiations on July 12, I explained that the Union was unwilling to accept a proposal from the Employer to pull employees out of the Midwest Operating Engineers Pension Trust Fund ("Pension Fund") at this time. I further explained that the Union never ever took the position that it would never consider such a proposal and I further explained that there might be a scenario in which that might be acceptable. I also explained that both sides needed to think "outside the box" and that I would attempt to develop a proposal that might meet your request. I explained over and over and over and over that there was no guarantee, and that I made no assurance that the Union would be able to agree or make such a proposal but that we needed time to explore the options. In fact, I am in the process of exploring various options. In the future, please refrain from mischaracterizing the Union's position. If you do not understand the Union's position, simply ask and we will explain.
>
> Also, as I explained, there are a number of issues outstanding, including, but not limited to, wages, retroactivity, term, etc. This list is not exhaustive. We are not at impasse because we are not at impasse. You said that you would "listen" to the Union's proposals. Good faith bargaining requires the Company to consider, not just listen to, the Union's proposals. Please explain why the Company refuses to consider the Union's proposals. With that in mind, please be prepared to respond to the Union's prior proposals.
>
> Finally, please remain consistent with your proposals. During negotiations, you flip flopped on the issue of pension contributions. At one point, you said the Company would never agree to a proposal to continue to make contributions to the Pension Fund. The Company's position is a change in the status quo, as it has made contributions to the Pension Fund for decades, including the bargaining unit members working at the Cleveland Quarry even though the Union had been decertified, and including bargaining unit members at Troy Grove and Vermilion Quarries even though the contract expired. As you well know, the Company was/is legally required to make those contributions, but the point is that the Company making pension contributions is decades old. You also have asked for certain information concerning the Pension Fund. Again, I ask you to explain the relevance if the Company "will not accept an offer with contribution to the Midwest Operating Engineers Pension Fund." I believe this to be evidence of bad faith bargaining, but also of flip flopping. You explain that the Company is not interested but then ask questions about the Plan. You answered by saying that you wanted to "confirm your beliefs." That is neither relevant, good faith bargaining nor productive. Please explain the Company's position. Regardless, I am preparing a response to your Pension Fund questions. We look forward to a productive negotiations session on July 21, 2021.[45]

On July 15, Davidson provided Eggers with Bernstein's reply to Eggers' June 15 request for information regarding the Pension Fund:

> 1. Since the Pension Fund took ("reallocated") over $200 000,000 from the Welfare Fund from October 2017 to August 2018, why is the Vermilion Troy Grove estimated liability more for the plan year ended March 31, 2020, at $1,146,201.31 than it was for withdrawals from 4/1/12 to 3/31/13 at $965,530.77?
>
> Response: The. plan uses a 5-year smoothing method to recognize previous years gains and losses so even with the $200 million in reallocated dollars the liability estimate increased.
>
> 2. Since there is no requirement for the repayment of money that is taken ("reallocated") from the Welfare Fund to the Pension Fund, why did the Pension Fund quit taking from the Welfare Fund in August 2018?
>
> Response: The Trustees of both the Welfare Fund and the Pension Fund agreed to the reallocation of contributions should end in August of 2018.
>
> 3. How much would the Pension Fund have to take ("reallocate") from the Welfare Fund to fully fund the Pension Plan and eliminate withdrawal liability?
>
> Response: The Welfare Fund Trustees did not agree to fully fund the Pension Plan so this number was not calculated at the time the reallocation occurred.[46]

On July 16, Eggers replied to Davidson's July 14 information request. He objected to the request for financial information on several grounds: unit employees went on strike beginning March 20, 2018 and continued to strike; Eggers remarks during negotiations – that the Company was in a better bargaining position because it was able to weather the strike – had no relation to the Company's ability to pay any claims. He attributed the statement to the objection that the Company had toward the Pension Fund:

[44] CP Exh. 193.
[45] CP Exh. 191-192.
[46] CP Exh. 190, 194.

> Instead, the Company has said it is unwilling to pay contributions to the terrible [Pension Fund] under a successor agreement. Therefore, because the Company has never made an inability to pay claim and is not making one now, the Company is not obligated to provide the Company financial information sought by the Information Request. See, e.g., *PSAV Presentation Services*, 367 NLRB No. 103 at 4 (Mar. 12, 2019) ("An employer must provide general financial information to a union when the employer has claimed an inability to pay but not when it has merely expressed unwillingness to pay.").

Eggers also asked for an explanation as to the relevance of information regarding the members of the Company's Board of Directors and Josh Webber, and clarification regarding the meaning of original bargaining unit members and temporary replacement workers. However, he did provide 288 pages of materials responsive to the information request and offered to meet and confer over information that was not provided.[47]

On July 19, Eggers replied to Davidson's July 14 letter. He said Davidson's letter was wrong and reiterated that the Company would "never agree to continue to make contributions to the Pension Fund. The [Pension Fund] is terrible with the company having estimated withdrawal liability of $1,146,201.31." While insisting that the Company would consider all proposals by Local 150, he "anticipated that [Local 150's] proposal would again confirm that we are at impasse on the key issue of contributions not being made to the [Pension Fund]."[48]

Davidson replied on July 20, disagreeing with Eggers version of where negotiations stood: "In summary, as I explained at the table and in my letter, the Union was unwilling to accept the Company's proposal concerning pension contributions at that time, but I never said the Union would never accept such a proposal. We are not at impasse. There are many issues remaining open, including this issue." Davidson also addressed the Company's "incomplete" response to Local 150's information request, and the necessity of such information in order to prepare "a comprehensive contract counterproposal as you have committed to provide."[49]

M. The July 21st Meeting

About one-half hour before negotiations resumed on July 21, Eggers replied to Davidson, emphatically stating, "THE PARTIES ARE AT IMPASSE." He reiterated his previous statements regarding the financial condition of the Pension Fund, the Company's refusal to continue contributing to it, and Local 150's repeated refusal to propose a contract without contributions to it, most recently evidenced by Russo's statement to the mediator on July 12. Eggers also replied to the outstanding issues in Local 150's July 14 information request, stating that it did not maintain a seniority list, needed clarification as to what Local 150 meant by temporary workers because it did not employ any, provided information on the 401(k) plan, and needed an explanation as to the relevance of information regarding Josh Webber.[50]

Eggers also replied to Bernstein's July 14 response to the Company's June 15 request. He asserted that the response was unlawfully delayed because the information was requested by June 22. Additionally, he charged that Bernstein's response failed to answer why "the Pension Fund quit taking from the Welfare Fund in August 2018," and "[h]ow much would the Pension Fund have to take ("reallocate") from the Welfare Fund to fully fund the Pension Fund and eliminate withdrawal liability?"[51]

Neither side produced new proposals at the July 21 meeting, which the FMCS mediator attended by videoconference. Local 150 said it intended to make a proposal moving the Pension Fund contributions to the Retirement Enhancement Fund. However, it explained that the information was needed in order to generate a proposal for contributions, and clarified the information requested on July 14. Eggers replied that he would let Davidson know what information the Company would agree to produce. The mediator then suggested the parties put aside that issue and negotiate over the other open items. Eggers refused because Local 150's proposal still included Pension Fund contributions. After Local 150 caucused, Eggers declared the parties were at impasse and the Company was going to implement its last, best, and final offer to shift contributions to the Retirement Enhancement Fund. Davidson asked if the Company was going to cease Pension Fund contributions. Eggers said yes.[52]

Later that day, the Company filed a complaint for declaratory judgment in the United States District Court for the Central District of Illinois (the district court). In that complaint, the Company requested a declaration that the Company was "not obligated to make any contributions to the Funds on behalf of Returning Strikers pursuant to ERISA, the CBA or any other agreement." The application was premised on the district court's March 31, 2021 Order (the March 31st Order) denying a similar request by the Company's for declaratory judgment on behalf of "Permanent Replacements who are not represented by [Local 150]." The district court ruled that it lacked jurisdiction to resolve claims of unpaid contributions because the expired CBA "incudes no provision requiring the employer to continue contributions during post-expiration negotiations–and thus any failure to pay contributions could only constitute a violation of NLRA § 8(a)(5) instead of ERISA."

The Company's July 21 complaint sought to distinguish the facts from those addressed in the March 31st Order. It argued a distinction based on the fact that, since the March 31 Order issued, the Company and Local 150 reached impasse, and the Company informed Local 150 that it "was implementing its proposal to no longer contribute to the Funds for striking workers who have returned to work for RiverStone ("Returning Strikers'). [Local 150] disagreed with RiverStone."[53]

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[47] CP Exh. 195.
[48] CP. Exh. 196.
[49] CP. Exh. 197.
[50] CP Exh. 198.
[51] CP Exh. 199.
[52] CP Exhs. 155-163; 157a, 225; Tr. 240-245, 394-398, 474-477.
[53] CP Exh. 221.

N. The Company Announces the Cessation of Contributions to the Pension Fund

On July 22, Eggers emailed Russo to confirm his explanation of the terms used in Local 150's July 14 information request regarding original bargaining unit members, temporary replacement workers, Josh Webber, the 401(k) contribution and matching rates, employee healthcare costs, and employee hours worked. He also informed Russo that the Company would respond by July 27. He also confirmed Local 150's new request at the July 21 meeting for the separation dates for bargaining unit employees from July 1, 2015 to the present.[54]

On the same day, Eggers notified Bernstein and Davidson that the Company was unilaterally implementing its proposal regarding Pension Fund contributions:

> This is to notify you that effective immediately Troy Grove and Vermilion Quarry (the "Company") are implementing part of their July 12, 2021 proposal for a collective bargaining agreement between TROY GROVE, a division of RIVERSTONE GROUP, INC. and VERMILION QUARRY, a division of RJVERSTONE GROUP, INC. and THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150 ("Proposal") as to Article 16 Section 1 because the parties have reached impasse as to the critical issue of the pension. Article 16 Section 1 of the Proposal reads (and is being implemented) as follows:
>
> > ARTICLE 16-PENSION FUND & WELFARE FUND: Section 1 - Change to read as follows:
> >
> > THE EMPLOYER SHALL NO LONGER CONTRIBUTE TO THE MIDWEST OPERATING ENGINEERS PENSION FUND.
> >
> > The employer shall contribute $9.09 per hour for which the employee receives wages under the terms of this Agreement to the Midwest Operating Engineers Retirement Enhancement Fund (401(a) plan). Payments to the 40l(a) plan shall be made monthly no later than ten (10) days after the month in which the payments were earned.
> >
> > Notwithstanding any other provision of this Agreement, the Employer is obligated to contribute to the Midwest Operating Engineers Retirement Enhancement Fund (4019a)Plan) only unless and until the first to occur of the following: the Union is decertified or the Union disclaims interest in representing the bargaining unit.
>
> Please provide the information that is necessary for the Company to make contributions to the [Pension Fund].
>
> If you require any additional notice from the Company regarding implementation of the Proposal as stated above, please tell me.[55]

On July 23, Davidson responded to Eggers' July 21 letters to Bernstein and Davidson. In the first letter, Davidson disputed the assertion that Bernstein's response was untimely or nonresponsive. In the second letter, Davidson emphatically restated Local 150's position that "THE PARTIES ARE NOT AT IMPASSE." He recounted that Local 150 needed the requested information in order to provide a counterproposal, which Eggers and the mediator confirmed on July 12, even while declaring a "partial impasse." Davidson also insisted that the Company did, in fact, maintain a seniority list, and reiterated Local 150's need for the information relating to original bargaining unit members, temporary replacement workers, and Josh Webber, all before July 27.[56]

The merry-go-round continued with Eggers' July 27 reply to Davidson's July 23 letters regarding impasse and Local 150's outstanding information requests. Eggers, mischaracterizing what transpired during negotiations prior July 21, asserted that the parties were at impasse because their positions had not changed since negotiations began in 2016. He stated, incorrectly, that Local 150 had not proposed any approach other than one in which the Company contributed to the Pension Fund. Eggers also insisted the Company did not maintain a seniority list. Moreover, while it did hire "permanent replacement workers," it did not hire temporary replacement workers. He concluded that there would be additional informational provided by August 3.[57] On August 2, 2021, the Company submitted a supplemental response to its July 14 response, consisting of payroll records.

On August 2, Davidson notified Eggers that Local 150 filed an unfair labor practice charge on July 23 after the Company declared a partial impasse and unilaterally implemented its proposal to cease contributing to the Pension Fund. Davidson also replied to Eggers' July 27 letter, stating that the response was substantially similar to his previous letters. He reiterated that there was no impasse because Local 150 was waiting for outstanding information regarding employee tenure and inclusion of replacement workers in the bargaining unit in order to generate a counterproposal on the Pension Fund issue.[58]

Eggers replied on August 3, reiterating his position that the parties were at impasse and the Company provided the requested information, including hire dates for current employees. He did, however, offer to negotiate on August 16. With respect to the dates of transfers of employees, Eggers simply replied that three current employees were on strike, and that two of them were working at other "RiverStone locations." He also referred to the Regional Director's dismissal in Case 25-CA-222150 of Local 150's efforts to include the replacement workers in the bargaining unit during negotiations.[59]

Davidson replied on August 13, repeating his assertion that the parties were not at impasse and needed to negotiate over other open issues. He also explained that, while the Regional Director's ruling applied to the replacement workers' initial terms and conditions of employment during bargaining, it did not preclude the fact that a successor agreement would apply to

[54] CP Exh. 200.
[55] CP Exh. 201.
[56] CP Exhs. 202-203.
[57] CP Exh. 204.
[58] CP Exhs. 205-206
[59] CP Exh. 207.

them. Davidson also said that Local 150 was preparing a counterproposal and the outstanding information was necessary in order for Local 150 to make a counterproposal regarding the Pension Fund. Eggers replied on August 16, restating the Company's position that it rejected Local 150's proposals, "all of which include contribution to the [Pension Fund]," and provided all of the outstanding information. He did agree, however, to schedule another negotiation session.[60]

On August 25, Davidson asserted that the Company's unilateral change in diverting funds from the Pension Fund to the Retirement Enhancement Funds violated the Act. In a separate letter the same day, he disputed the assertions in Eggers's August 16 letter and specified the information necessary to formulate a counterproposal for further bargaining: lists of all employees, bargaining unit employees by location, seniority; start, end, transfer, separation dates for all employees at Troy Grove and Vermilion from May 1, 2016 to the present; insurance costs; Company contributions to the 401(k) plan; current wage rates, dates and amounts of wage increases, and monthly hours worked for each employee at Troy Grove and/or Vermilion from 2016 to present. He requested the information by September 10.[61]

On September 1, Eggers replied that the Company response to the July 14 information request was complete with the production of 288 pages on July 16 and supplemental response of August 2. Regarding the August 25 information request, Eggers provided the following responses: list of bargaining unit employees by location – was included in the Company's response to the July 14 information request; seniority lists – the Company does not maintain such a list. With respect to the following requests, Eggers requested an explanation as to their relevance: list of all Company employees; start, end, transfer, and separation dates for Troy Grove and Vermilion employees; monthly health insurance costs for employer and employees in Local 150's plan and the Company's plan; Company contributions to the 401(k) plan for each employee at Troy Grove and Vermilion, including dates and amounts of increases; current wage rates, dates of each wage increase; and monthly hours worked for each employee at Troy Grove and Vermilion from 2016 to the present. He concluded with the standard message that the parties were at impasse but agreed to schedule another bargaining session. Eggers supplemented his response on September 10 with a list of employees by dates of hire and, where applicable, end dates.[62]

On October 29, Davidson replied to Eggers' September 1 letter reiterating that the parties were not at impasse, and Local 150 needed the requested information in order to provide a counterproposal. Davidson added that Local 150 was still waiting for the Company's counterproposals on the other open issues. He explained that Local 150 was willing to negotiate over the open issues while the Company provided the requested information, "particularly now that the Labor Board has certified [Local 150] as the exclusive bargaining representative again." As to the outstanding information, Local 150 Davidson disagreed that the outstanding information was not requested on July 14 information request but offered the following explanations as to relevance: the list of bargaining employees provided did not list locations; a list of all employees at Troy Grove and Vermilion was needed in order to determine the amount of contributions necessary; the CBA referred to a seniority list; employee start, end, transfer, and separation dates, wage rates, dates and amounts of wage increases, hours worked, and insurance costs were needed in order to make a cost comparison of plans, and generate a proposal based on who was in the bargaining unit and when.[63]

O. The Company's August 6th Information Request

On August 6, Eggers submitted an information request to Bernstein and Russo regarding benefit improvements announced by Sweeney at Local 150's general business meeting on July 16, 2021. Eggers also asked for the information relating to Sweeney's statement at the July 12 meeting that the Pension Fund did not have unfunded liability.

Davidson replied on August 20. He said "there were no guarantees, but Local 150 would submit a counterproposal regarding the Pension Fund. Davidson cautioned, however, that Local 150's ability to submit a counterproposal remained impeded by the Company's incomplete response. Davidson then explained the categories and amounts of benefit improvements announced by Sweeney and referred Eggers to Local 150's newsletter for a detailed explanation. He denied that Sweeney stated during negotiations that the Pension Fund has no unfunded liability and explained that an actuarial report would be used to update the Company's withdrawal liability, which at that point was more than 0 and less than $1,146,201.31.[64]

Eggers replied on August 24. He asserted that Davidson's responses violated the Act because they failed to: provided estimates, not the actual costs of the benefit improvements to the present; stated hypothetically that benefit improvements do not necessarily cause unfunded liability, although Sweeney announced benefit improvements causing additional expense in underfunding while the Company's liability is $1,146,201.31; did not provide writings, documents or other documents upon which Sweeney relied on regarding his statement on unfunded liability, including the Local 150 newsletter referenced by Davidson.[65]

Davidson replied on August 27. He asserted that the information provided was adequate because: it was consistent with the Pension Fund's records and plan years; the request was vague and ambiguous, based on assumptions, and required clarification; and the Local 150 article was provided.[66] Davidson replied on the same day, insisting that the Company's August 24 letter fully responded to Local 150's information request. Eggers replied on the same day, stating that Davidson's letter was "wrong and is further proof of Local 150 continuing to violate the Act."[67]

[60] CP Exhs. 210-211.
[61] CP Exhs. 214-215.
[62] CP Exhs. 218-219.
[63] CP Exh. 220.
[64] CP Exh. 208-209, 212.
[65] CP Exh. 213.
[66] CP Exh. 216.
[67] CP Exh. 216-217.

LEGAL ANALYSIS

I. THE LAYOFFS

An employer violates Section 8(a)(3) and (1) of the Act when it terminates an employee because of their concerted and/or union activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983). Under *Wright-Line*, 251 NLRB 1083, 1089 (1980), 1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in order to establish such a violation, the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relation between the discipline and the Section 7 activity. Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

It is undisputed that Calkins and Lower engaged in protected union activity on February 16 and the Company knew of their strong support for Local 150. That day, Lower and Calkins attended the tally of ballots along with the Company's labor counsel and Company management. Pace and Becker were aware that Calkins and Lower were going to serve as observers on behalf of Local 150, and they asked them to clock out of work in order to attend the count. Moreover, Lower and Calkins constantly wore union paraphernalia at work, even stickers on their hats and lunch boxes. *Big Ridge, Inc. v. N.L.R.B*., 808 F.3d 705, 713-714 (7th Cir. 2015) (protected activity includes open and active support for a union including wearing and displaying union memorabilia).

Proof of union animus can be based on direct evidence or can be inferred from circumstantial evidence. *Tubular Corp. of America*, 337 NLRB 99 (2001) (antiunion motivation inferred from circumstantial evidence of, among other things, employer's deviation from past practice). Evidence of discriminatory motivation may include suspicious timing. *Gavilon Grain*, 371 NLRB No. 79, slip op. at 11 (2022) (employer exhibited union animus by imposing more onerous working conditions 1-2 days after union's business agent visited employees).

Here, however, there is strong circumstantial evidence that the active roles undertaken by Lower and Calkin in supporting Local 150 motivated the Company to lay them off. With such a small universe of votes – four votes against decertification, two in favor, the roles of Calkins and Lower loomed large. The Company was clearly not pleased with the result. After all, it had been pushing during negotiations for the incorporation of a decertification escape hatch from the Pension Fund.

The facts and circumstances reveal pretext in several respects: Becker's failure to provide any explanation for the layoff, which occurred suspiciously soon after the Company experienced disappointment at the ballot box, then dodging Calkins' request for an explanation by referring him to regional management; Becker's oblivious response when asked about the existence of any company policies regarding layoffs, topped off by the Company's contention that he could layoff whomever he wanted – all in disregard for employee seniority rights under their continuing terms and conditions of employment under the expired contract; and Becker's sudden about-face, incredulously uncovering an abundance of work that he was unaware of a little over an hour earlier.

The timing of the layoff on the same day as the election was especially important because it conveyed the message that Lower and Calkins were laid off due to their union support. *In Re St. Johns Cmty. Servs. of New Jersey*, 355 NLRB 414 (2010) (discharging employee pursuant to a stricter enforcement of layoff policy less than two weeks after certification election warranted inference of antiunion animus); *Masland Industries*, 311 NLRB 184, 197 (1993), citing *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) (the timing of an adverse action may warrant an inference of unlawful motivation). Moreover, at the time of the layoff, there were three unit employees with less seniority – Joshua Webber, Jamie Gott, and David Lewis – who remained working. Again, however, there was no evidence that any of them had more experience or qualifications than Calkins and Lower – the only way to circumvent seniority – especially to complete the job that they were working on at the time.

The fact that the layoff was rescinded within hours does not negate the fact that the layoff constituted an adverse action, albeit a brief change in employment. *Berger Transfer & Storage, Inc.,* 253 NLRB 5, 13 (1980) (affirming judge's conclusion that the employer violated the Act by discharging strikers during an unfair labor practice strike, even though the discharge was rescinded five days later); *Ark Las Vegas*, 335 NLRB 1284 (2001) (employer violated Section 8(a)(3) by discharging an employee for distributing union literature, even though the discharge was later rescinded). It should also be noted that, although Becker took back the notices and tore them up, he did not provide assurance that the copies that customarily went to Human Resources did not make their way into the employees' personnel files.

Under the circumstances, the Company laid-off Calkins and Lower on February 16 in violation of Section 8(a)(3) and (1) of the Act.

II. THE IMPASSE DECLARATION AND THREAT TO UNILATERALLY CHANGE PENSION CONTRIBUTIONS

Section 8(a)(5) of the National Labor Relations Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.,* 343 NLRB 385 (2004). Pensions and insurance benefits of active employees is a mandatory subject of bargaining. *Allied Chemicals*, 404 U.S. 157 (1971). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Alamo Cement Co.,* 281 NLRB 737, 738 (1986).

"Although impasse over a single issue does not always create an overall bargaining impasse that privileges unilateral action, it may do so when the single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations." *Calmat Co*., 331 NLRB 1084, 1097 (2000) (employer lawfully implemented its last best

offer where the parties failure, during good faith bargaining, to agree on the pension issue resulted in impasse, and destroyed any opportunity for reaching an agreement); *In Re Richmond Elec. Servs., Inc.*, 348 NLRB 1001, 1002 (2006); *Cotter & Co.,* 331 NLRB 787, 787 (2000) (whether an impasse exists depends, among other things, on "the importance of the issue or issues as to which there is disagreement"). A party contending that an impasse on a single, critical issue justified its implementation of other bargaining proposals must demonstrate three things: (1) the actual existence of a good-faith bargaining impasse; (2) that the issue as to which the parties are at impasse is a critical issue; (3) that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. *Calmat Co.*, 331 NLRB at 1097. Here, the Company failed to establish the first and third elements of the defense.

A. The Lack of a Good Faith Bargaining Impasse

The Company did not meet its burden of establishing that the parties reached a good faith impasse on pension contributions on July 21. In order to determine whether or not there is a good faith bargaining impasse, the Board looks at "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiation." *Taft Broad. Co.,* 163 NLRB 475, 478 (1967). The Company must further prove that there can be no progress on any aspect of the negotiation until the impasse relating to the pension contributions is resolved. *Calmat Co.,* 331 NLRB at 1098. Whether or not issue is critical can be evidenced by bargaining behavior. Id.

Here, the Company recognized Local 150 as the sole representative of its employees long before May 2, 2018. The parties successfully negotiated a CBA that was in effect from July 30, 2014 to May 1, 2016. They then bargained over a successor contract over 26 sessions from April 6, 2016 to July 21, 2021. During that time period, the Company indicated that eliminating contributions to the Pension Fund was a critical issue to them. At no time, however, did both parties understand themselves to be at impasse.

First, Local 150 and even the FMCS mediator said on numerous occasions that there were other economic and non-economic issues on the table to discuss before an impasse could occur. Items still on the table included bereavement, extra holidays, boot allowance, overtime when working four ten-hour days, wages, health insurance, retroactivity, and wages that could have been exchanged for a favorable agreement. It is unlikely that every one of these issues was tied with the contributions to the pension fund. Had the negotiations continued, it is plausible that Local 150 would have been flexible with the pension contributions in return for retroactivity or a wage increase. The Respondent, however, unilaterally cut off those possibilities by declaring impasse and threatening to unilaterally change employees terms and conditions of employment regarding Pension Fund contributions.

Secondly, and more importantly, even though that Local 150 eventually received the requested information, they kept insisting that they were open to the Company's primary objective – diverting contributions from the Pension Fund to the Retirement Enhancement Fund. Like an escalator that suddenly reverses direction, however, whenever Local 150 submitted a proposal agreeing to move contributions to the Retirement Enhancement Fund, in conjunction with a request for increased contributions, the Company pulled back, produced regressive proposals, rejected any efforts to negotiate, and kept declaring an impasse in negotiations and threatened to unilaterally divert Pension Fund contributions to the Company's fund of choice. *Cotter & Co*., 331 NLRB at 788 (no contemporaneous understanding between the parties when the Union's attorney specifically stated that the parties were not at an impasse when the Company presented a final offer).

Calmat, where the Board found a valid impasse over a pension plan, is distinguishable. There, the parties were hung up on the pension issue and each side refused to waiver in their position. Id. Here, however, Local 150 expressed willingness to consider cessation of contributions to the Retirement Enhancement Fund if it was decertified or disclaimed interest in the bargaining unit, so it was clearly an option they were willing to agree to at some point. Local 150 also reminded the Company on July 20 that they never told the Company they would refuse to accept a proposal without contributions to the Pension Fund. Local 150 made it clear to the Company that there was still an opportunity to reach an agreement.

Under the circumstances, as of July 21, the parties had not exhausted the prospect of concluding an agreement before the Company declared impasse and threatened to unilaterally implement a change to unit employees terms and conditions of employment regarding Pension Fund contributions. See *Sacramento Union,* 291 NLRB 552,554 (1988) (an impasse occurs "after good faith negotiations have exhausted the prospects of concluding an agreement"). There did not exist an "insurmountable obstacle to an agreement" present between the parties and therefore there was no impasse as of July 21. Cf. *In Re Richmond Elec. Servs., Inc.,* 348 NLRB 1001, 1003 (2006) (wage proposals proved to be an "insurmountable obstacle to an agreement by the time the Respondent declared impasse").

CONCLUSIONS OF LAW

1. The Company, Troy Grove, a Division of RiverStone Group Inc., Vermilion Quarry, a Division of RiverStone Group, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The International Union of Operating Engineers, Local 150, AFL-CIO has been a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off employees Lyle Calkins and Brad Lower, the Company has engaged in unfair labor practices within the meaning of Sections 8(a)(3) and (1) of the Act.

4. By threatening to unilaterally implement its pension plan prior to reaching impasse with the Union, the Company has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of

Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices of the Company described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Company violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees by threatening to unilaterally cease contributions to the Pension Fund on behalf of bargaining unit employees and implement its own pension plan prior to reaching impasse with Local 150, I shall recommend that the Company be ordered to resume bargaining at the request of Local 150.

The Company must also make Lyle Calkins and Brad Lower whole for any loss of earnings and other benefits incurred as a result of their unlawful terminations. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Company shall also compensate the employees for their reasonable search-for work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally the Company shall compensate Lyle Calkins and Brad Lower for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Company will file with the Regional Director for Region 25 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[68]

ORDER

The Respondent, Utica and Oglesby, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to implement our pension plan prior to reaching impasse with Local 150.

(b) Laying off or otherwise discriminating against employees because of their membership in, or support for, Local 150 or any other labor organization.

(c) 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, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> The employees described in Article 1, Section 1 of the collective bargaining agreement between the Employer and the Union which was effective from July 31, 2014 to May 1, 2016.

(b) Within 14 days from the date of the Board's Order, offer Lyle Calkins and Brad Lower full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Lyle Calkins and Brad Lower whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Compensate Lyle Calkins and Brad Lower for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fix, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(e) Within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

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

(g) 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

[68] 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.

copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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

(i) Post at its Utica and Oglesby, Illinois facilities copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the Regional Director for Region 27, 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 February 16, 2021.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 25 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.

Dated, Washington, D.C. March 29, 2022

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 refuse to bargain in good faith with International Union of Operating Engineers, Local 150 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

The employees described in Article 1, Section 1 of the collective bargaining agreement between the Employer and the Union which was effective from July 31, 2014 to May 1, 2016.

WE WILL NOT threaten to implement our pension plan prior to reaching impasse with the Union.

WE WILL NOT lay you off because of your union membership or support.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL pay employees Lyle Calkins and Brad Lower for the wages and other benefits they lost because we laid them off.

WE WILL compensate Lyle Calkins and Brad Lower for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate years.

WE WILL remove from our files all references to the layoffs of Lyle Calkins and Brad Lower and **WE WILL** notify them in writing that this has been done and that the layoff will not be used against them in any way.

TROY GROVE, A DIVISION OF RIVERSTONE GROUP, INC., VERMILION QUARRY, A DIVISION OF RIVERSTONE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-276061 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.

[69] If the facilities are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. 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."