ExxonMobil Research & Engineering Company, Inc. *and* Independent Laboratory Employees Union, Inc. Cases 22–CA–218903, 22–CA–223073, and 22–CA–232016

August 25, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

On June 12, 2019, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions[3] and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[4]

I. BACKGROUND

The Independent Laboratory Employees Union (Union or ILEU) represents approximately 165 employees in a bargaining unit at Respondent ExxonMobil's Annandale, New Jersey research facility. The Union has been the bargaining representative since 1941. The parties' most recent collective-bargaining agreement expired on May 31, 2018. During the time period leading up to the contract's expiration, several divisive issues arose between the parties.

In November 2015, the Respondent began to permanently subcontract some unit jobs, taking the position that the parties' collective-bargaining agreement allowed such subcontracting. The Union filed a grievance over the Respondent's subcontracting, which went to an arbitration hearing in October 2017. The Union argued that the parties' contract barred permanent subcontracting of unit positions.

In mid-2016, a supervisor allegedly denied a request for personal time off, informing the requesting employee: "Union represented employees only receive personal time for jury duty and a death in the family and this is because the Union is getting more aggressive." This prompted the Union to file an unfair labor practice charge alleging that the employee's personal time request was denied in retaliation for the Union's filing of grievances. This charge was informally settled in August 2016. Soon thereafter, the Respondent announced that it had formally rescinded supervisory discretion to grant personal time off. The Union then filed another charge alleging that the rescission of supervisory discretion was in retaliation for the earlier charge. The Respondent asserted that the policy was based on its desire to promote consistency in supervisory decisionmaking. This charge was eventually dismissed by the Regional Director for Region 22.

In November 2017, the Respondent instituted a companywide policy providing 8 weeks of Paid Parental Time Off (PPTO) for all its unrepresented employees. Those employees represented by a union did not receive the benefit. The Union requested bargaining for PPTO on behalf of unit employees in early 2018, but the Respondent deferred the issue to the upcoming contract negotiations.

On March 7, 2018, the Respondent notified the Union of its plan to modify the evaluation procedure for unit employees. The Respondent intended to eliminate a multitier rating system for evaluating employees' performance and replace it with a single binary rating (meets-requirements vs. does-not-meet-requirements). The parties held meetings on this change, but no consensus was reached. At the end of March 2018, the Respondent fully implemented the change, despite the Union's objection.

The parties began bargaining for a new contract on May 7, 2018.[5] The lengthy–and often acrimonious—negotiations spanned 23 sessions lasting through early 2019. Approximately 54 issues were discussed, with the Union raising most of the new proposals. The parties successfully resolved many of these issues, but the unre-

[1] The Respondent's Motion to Expedite Processing of Respondent's Exceptions to the Administrative Law Judge's Decision is denied as moot. In addition, we note that the General Counsel's answering brief was rejected as untimely filed.

[2] An earlier decision in this case was vacated by the Board. See *ExxonMobil Research & Engineering Co.*, 371 NLRB No. 128 (2022) (vacating 370 NLRB No. 23 (2020) and ordering re-adjudication de novo of exceptions). In accordance with that decision, we have considered de novo the judge's decision and the record in light of the exceptions and brief.

[3] No party has excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(5) of the Act by insisting that the Union hold a ratification vote, insisting on bargaining non-economic issues to completion before negotiating economic ones, insisting that the Union waive certain arbitration rights, and foreshadowing impasse.

[4] We have amended the judge's conclusions of law and recommended remedy consistent with our findings herein. We have also modified the judge's recommended Order to conform to our findings and the Board's standard remedial language, and in accordance with *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We have substituted a new notice to conform to the Order as modified.

[5] Where not otherwise indicated, dates herein refer to 2018.

solved issues, several of which are discussed below, were significant enough to prevent overall agreement. The Respondent made its purported last, best, and final offer on June 29, and it pushed repeatedly for the Union to conduct a membership vote on the offer. Despite submission of this offer to the Union, the parties continued to meet for negotiations throughout 2018 and early 2019.

From the outset of the parties' negotiations, the Union sought limits on the Respondent's right to subcontract. About a month into bargaining, the arbitrator issued her ruling on the subcontracting grievance the Union had filed under the prior contract. The arbitrator found in the Union's favor, holding that the subcontracting language from the most recently expired agreement, read alongside its recognition clause, forbade the permanent contracting out of unit jobs. After the arbitrator's decision issued, the Respondent introduced a proposal that would have established its right to subcontract, at least with respect to certain "noncore" positions, subject to the limitation that current employees would not be displaced due to subcontracting. The Respondent insisted that its business plan required that it have the right to contract out these noncore positions.

The subcontracting of unit jobs loomed large as a divisive subject throughout negotiations, with the Respondent strongly suggesting that enshrining its right to subcontract was key to reaching overall agreement. The Union asserted that such subcontracting would constitute a change to the scope of the bargaining unit and that, because such a change was a permissive subject of bargaining, the Respondent's insistence on that subject was unlawful.

In addition to this dispute over subcontracting, the parties disagreed about the Union's repeated attempts to reinstate supervisory discretion to grant personal time off and to give unit employees the same 8 weeks of PPTO that unrepresented employees received. On the issue of supervisory discretion to grant personal time off, the Respondent refused to give ground on any Union proposals to restore such discretion—at times pointing to its interest in consistency in decision making, while at other times pointing to Union aggressiveness in administering the contract and its filing of unfair labor practice charges.

As to PPTO, the Respondent insisted that unrepresented employees had traded off benefits to receive the PPTO and that represented employees would have to make commensurate tradeoffs to achieve the benefit in bargaining. The parties discussed the issue extensively, but the Respondent—despite insisting that the Union give up benefits of similar worth—consistently demurred when the Union sought information on the actual cost of the benefit. When the Union offered to give up a signing bonus in exchange for PPTO, the Respondent expressed incredulity that the Union would make such a tradeoff on behalf of its members. Eventually, the Respondent offered the Union 1 week of PPTO, and the Union continued to press for the 8 weeks received by unrepresented employees.

At a contentious June 29 bargaining session, Russell Giglio, the Respondent's lead negotiator, accused the Union of having bargained regressively on the subcontracting issue. He also presented the Respondent's last, best, and final offer: a 5-year agreement that included broad subcontracting language sought by the Respondent, along with wage increases and a signing bonus. He further suggested that the Union was poorly representing its members by failing to put the Respondent's offer to a vote. On July 3, the Respondent sent a bulletin to employees, summarizing the terms of its final offer and stating in part:

> The Company presented its last, best, and final offer to the ILEU . . . [which] was the result of many productive negotiation sessions between the parties . . . . The offer is a good one, with significant and competitive benefits to the bargaining unit. . . . The ILEU has not yet informed the Company as to whether the offer will be presented to its membership for a vote. The Company believes that employees should have a choice in accepting the offer and deserve a chance to vote. If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.

On July 9, discussions over PPTO intensified. Union President Michael Myers, following repeated efforts to convince the Respondent to give unit employees the same 8 weeks that unrepresented employees enjoyed, pressed Giglio on what it might take to garner PPTO benefits for represented employees. Giglio replied that the employees could "walk away from the bargaining agreement." When pressed by Myers as to what he meant, Giglio reiterated: "If you weren't covered by a Collective Bargaining Agreement, if you were exempt, you would have eight weeks of PPTO." At that point Myers inquired, "So you are saying if we get [de]certified, you will give us eight weeks of PPTO?" Giglio answered, "You said that, I didn't." Giglio later said, "There are other ways to do it . . . . You will have to talk to your attorney." When pressed again by the Union as to "[w]hat would it realistically take," Giglio stated, "I can't answer that." On that same day, at a sidebar, he suggested that, to secure PPTO benefits, employees could "go without a union."

At this point in the negotiations, supervisory discretion to grant personal time off also remained a contentious issue. Notably, also occurring at a July 9 sidebar, Giglio attributed the Respondent's unwillingness to give ground on such supervisory discretion in part to the Union's unfair labor practice charge and "aggressive actions."

On July 25, the Respondent emailed a bulletin to unit employees to clarify its July 3 bulletin. The new bulletin read, in relevant part:

> [O]ur [July 3 bulletin] contained a statement that contradicted what the Company had presented to the ILEU . . . . Specifically, the [Employee Information Bulletin] stated relative to a potential ILEU vote on the Company's offer at the time that "it is expected that Union members be provided reasonable time away from work to meet and vote." . . . The Company should not have said this.
>
> . . . .
>
> Under the National Labor Relations Act (NLRA), the Company's [Employee Information Bulletin] statement about time away from work to vote could be construed as what is called unlawful "direct dealing," meaning we bypassed the ILEU and made an offer directly to its members. That was not the Company's intention, but the Company cannot present a proposal to employees that it has not already presented to the employees' union. The Company will not engage in any direct dealing in the future.
>
> . . . .
>
> Our mistake was not intentional. We had simply forgotten about the details. . . . That is still no excuse, and again, we apologize. We also apologize to ILEU leadership.

Later, during the September 4 bargaining session, the issue of supervisory discretion to grant personal time off arose again, and Giglio stated that the Respondent's refusal to give ground on such discretion was in part due to "the stuff" the Union was bringing forward. He asserted that the Union should "work through channels" rather than invoking formal mechanisms like Board charges to resolve workplace disputes.

On September 28, the Respondent emailed its unit employees another employee bulletin, which stated in part:

> Despite the Company offering 7 dates to meet in August, the parties did not meet in the month of August and have only met 2 times in the month of September.

The bulletin went on to summarize each item of the Union's most recent counterproposal and the Respondent's last offer on each item. It continued:

> Before noon, the ILEU completely withdrew its counterproposal. The ILEU then violated the practice and spirit of the bargaining ground rules by leaving the session unilaterally, despite the Company's best attempt to continue discussions . . . .
>
> The Company is hopeful that an agreement can be reached, and will continue to bargain in good faith toward that end. As a reminder, the Company's offer from July 19, 2018 remains outstanding. The Company hopes ILEU represented employees will have an opportunity to vote on the Company's final offer. The decision of whether or not a vote will be held is made by the ILEU officers.

During the remainder of 2018 and early 2019, the parties continued to meet for negotiations. No real progress was made on subcontracting, and the parties remained at odds over personal time and PPTO. Nevertheless, the parties continued to meet for negotiations during this time, including meeting the week prior to the start of the unfair labor practice hearing in this proceeding.

II. DISCUSSION

A. Alleged Unilateral Implementation of New Employee Evaluation Procedures

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing new employee evaluation procedures in March 2018. The judge first considered whether there was a clear and unmistakable waiver of the Union's right to bargain over the new procedures, ultimately concluding that the Union had waived the right to bargain. The judge next found, however, that even though the Union had waived its right to bargain over evaluation procedures, the change was unlawful because the Respondent presented it to the Union as a fait accompli. Contrary to the judge, we find that the Respondent's implementation was not unlawful.

We first observe that the judge's fait accompli analysis here was misplaced. The judge reasoned that, "[b]y not taking any of the Union's concerns into account," as the contract required, the Respondent presented its evaluation procedures proposal as a fait accompli, and therefore its unilateral change was unlawful. Fait accompli is normally applied to excuse a union's failure to demand bargaining over a proposed change, where the union had no meaningful opportunity for bargaining in any case. It is not implicated where, as here, the threshold issue is whether bargaining was required. See generally *Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 3 (2018) (finding that changes were presented as a fait accompli in the absence of a clear and unmistakable waiver). The judge thus inappropriately applied the fait accompli doc-

trine here to address the question of whether the Respondent's consultation with the Union and consideration of its views, as required by the parties' collective-bargaining agreement, was adequate. Indeed, as explained in more detail below, his inquiry should not have delved into the sufficiency of the Respondent's compliance with the contractual procedures at all.[6]

Having found that the judge erred in applying the fait accompli doctrine here, we further find, contrary to the judge and as explained below, that the Respondent did not violate Section 8(a)(5) and (1) by its implementation of changes to its employee-evaluation procedures.

The judge's application of the Board's clear and unmistakable waiver standard has been superseded by intervening caselaw. Following the judge's decision, the Board issued its decision in *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), in which the Board overruled prior precedent holding that there must be a clear and unmistakable waiver before an employer is privileged to make a unilateral change, adopted the contract-coverage standard, and applied that standard retroactively to all pending cases. Accordingly, as the instant case was pending when *MV Transportation* issued, we analyze the claim here under the contract-coverage standard set forth therein.[7] Under that standard, the threshold question is not whether there has been a clear and unmistakable waiver of the union's right to bargain, but rather whether the unilateral change "falls within the compass or scope of contract language that grants the employer the right to act unilaterally."[8] Id., slip op. at 11. If so, the change will not constitute an 8(a)(5) violation.

With respect to evaluation procedures, the contract in effect when the change was made[9] specified: "The performance of employees will be evaluated and reviewed by Management on a regular and consistent basis in accordance with the established Company-wide procedures. The procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration." The contract further provided, in a management-rights clause, that: "The Company shall retain all rights of management for facilities covered by this Agreement or pertaining to the operation of business, except to the extent that such rights are limited by the provisions of this Agreement."

This contract language plainly encompasses the subject of evaluation procedures and reserves to the Respondent the ability to revise its evaluation procedures. The contract language granted the Respondent the authority to revise its evaluation procedures after "consultation" (*not* "bargaining") with the Union. In initially addressing this topic with the Union, the Respondent highlighted its willingness to take the Union's views into consideration, as the parties' agreement required. Thereafter, the Respondent met with the Union twice to discuss the proposed changes to the evaluation procedures. During at least one of those meetings, the Union expressed its concerns about the proposed changes and, in response, the Respondent explained why it believed the changes were necessary. Subsequently, the parties exchanged several emails regarding the new performance evaluation system. In these emails, both parties further articulated their views on the proposed changes and offered clarifications of their positions, and the Respondent reiterated that it was taking the Union's views into consideration. Thus, for contract-coverage purposes, the record demonstrates that the Respondent consulted with the Union and considered its views.[10] In these circumstances, we find that the disputed change falls within the compass or scope of contract language granting the Respondent the right to act unilaterally in making changes to the employee evaluation procedures.[11] Accordingly, we dismiss the allegation that by making this change, the Respondent violated Section 8(a)(5) of the Act.[12]

[6] We do not interpret the Board's decision in *Los Robles*, 372 NLRB No. 120, slip op. at 1 fn. 2, 12 (2023), cited by Member Prouty in his dissent, as in any way contrary to our position. There, the Board adopted the administrative law judge's findings that a management-rights clause did not authorize the employer to act unilaterally and, separately, that the employer had presented a change in terms and conditions of employment as a fait accompli, instead of bargaining with the union.

[7] Member Wilcox acknowledges that *MV Transportation* is governing law and joins her colleagues in applying that decision here for institutional reasons. Member Wilcox was not a member of the Board when *MV Transportation* issued and expresses no view regarding whether it was correctly decided.

[8] Under *MV Transportation*, if a matter does not fall within the compass or scope of contract language, the Board will then consider whether the union waived its right to bargain over the change applying the clear and unmistakable waiver standard. See id. at 12.

[9] The Respondent changed the employee evaluation procedures at issue here in March 2018, and the parties' collective-bargaining agreement expired May 31, 2018.

[10] As noted above, the judge here went astray when he determined that the Respondent violated the contract by failing to afford enough time for consideration of the Union's views. The question of whether the Respondent *sufficiently* consulted with the Union and *sufficiently* considered its views—i.e., whether the Respondent breached or modified the collective-bargaining agreement is not before us. The issue presented here, rather, is whether the Respondent violated Sec. 8(a)(5) of the Act by making a unilateral change in a mandatory subject of bargaining. There is no allegation or argument that the Respondent's conduct was inconsistent with Sec. 8(d).

[11] Because we find that the Respondent's actions fell within the compass of contractual language, we need not pass on the Respondent's argument that the changes to evaluation procedures were not material.

[12] In dissent, Member Prouty would find that the Respondent violated Sec. 8(a)(5) by making unilateral changes to the employees' evaluation procedures. He acknowledges that the subject of the revision of

We also observe that, even were we to consider this case under the legal standard applied by the judge—clear and unmistakable waiver—we would still find that the Union waived its right to bargain over evaluation criteria. The contract language here makes no provision for bargaining governed by the Act. It merely calls for "consultation" with the Union, which indicates a distinct process. By calling for such consultation, the parties have unmistakably opted for such a process as an alternative to bargaining. See *Omaha-World Herald*, 357 NLRB 1870, 1871 (2011) (holding that language by which employer agreed to "advise" union of pension plan changes and to "meet to discuss and explain changes" supported finding of waiver and observing that, if union had not waived bargaining rights, there would be no need to "include any language about a lesser contractual right").[13] To the extent there is an argument that the parties conditioned changes to the evaluation criteria on prior "consultation" with the Union, we reiterate that the Respondent did in fact consult with the Union, and the sufficiency of compliance with that contractual process is not implicated here, where only a unilateral-change violation under Section 8(a)(5) is alleged, not a breach or modification of the agreement under Section 8(d).

B. Alleged Unlawful Insistence on Subcontracting Proposal

Board law establishes that a party violates Section 8(a)(5) when it conditions agreement on a mandatory subject of bargaining on reaching agreement on a permissive subject of bargaining. See *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1732 (2011) (finding that "midterm modification of a collective-bargaining agreement is a nonmandatory subject of bargaining, and as such it cannot be insisted on as a condition for reaching agreement on mandatory subjects"). Conversely, parties may insist on agreement on a mandatory subject as a condition of overall agreement.

Here, the judge found that that the Respondent unlawfully conditioned agreement for a new contract on agreement to a proposal to allow subcontracting of unit positions. He reasoned that the subcontracting of unit jobs constitutes a change in the scope of the bargaining unit and is thus a permissive subject of bargaining. In reaching this conclusion, however, the judge misinterpreted a passage in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), addressing the issue of subcontracting. The Supreme Court's decision stated:

> We are thus not expanding the scope of mandatory bargaining *to hold*, *as we do now*, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d).

Id. at 215 (emphasis added). The judge read this passage as a suggestion by the Supreme Court that subcontracting of unit positions is *not* a mandatory subject of bargaining, but only permissive. It is clear, however, that the Supreme Court was merely noting that its holding—that contracting out of unit work *is* a mandatory subject—was consistent with the extant understanding of the scope of mandatory bargaining, not an expansion.

Board cases further clarify that the subcontracting of unit jobs is a mandatory subject of bargaining. In *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993), the Board rejected the argument that a "proposal seek[ing] to change unit scope [was unlawful] because [it] would permit actions that in theory could reduce the size of the bargaining unit or alter its membership." The Board cited *Fibreboard* in support, noting that the Su-

---

evaluation procedures is covered by the parties' collective-bargaining agreement, but asserts that, under the agreement, the Respondent was prohibited from making any such changes unless it consulted with the Union and took the Union' views into consideration. Based on his assessment of the facts, our colleague would find that the Respondent made no meaningful attempt to consult with the Union or take its views into consideration and, as a result, concludes that the contractual circumstances under which the Respondent was permitted to act unilaterally are not present here.

We disagree. Whether or not the Respondent sufficiently complied with the requirements imposed by the collective-bargaining agreement is immaterial where the only issue presented is whether the Respondent failed to bargain in good faith under Sec. 8(a)(5) of the Act—as opposed to the separate issue of whether the Respondent's conduct amounted to a modification of the agreement under Sec. 8(d). As we have explained, the contract here did not require the Respondent to bargain with the Union in the statutory sense. There is no allegation, in turn, that the Respondent modified the contract by its conduct. Because the contract did not require the Respondent to bargain, a simple failure to comply with *the contract's* requirements does not make the Respondent's conduct an unlawful unilateral change (i.e., a failure to bargain), contrary to our dissenting colleague's view. As our dissenting colleague acknowledges, the parties' agreement covers the Respondent's revision of the employees' evaluation procedures. In any case, as explained above, the Respondent indeed consulted with the Union about these changes, consistent with the agreement's requirements.

[13] We recognize that *Omaha-World Herald* based its finding of no waiver on the presence of multiple examples of language from the parties' agreement and pension plan documents that evidenced such waiver. Here, of course, the parties' collective- bargaining agreement also included a management-rights clause that reinforces the specific language concerning employee evaluations. Further, the pertinent contract language specifies that evaluations will be conducted "by Management . . . in accordance with the established *Company-wide procedures*." (Emphasis added.) This language, by tethering evaluations of Union-represented employees to "Company-wide procedures" (which would logically be determined by the Respondent insofar as such procedures might implicate employees outside the immediate bargaining unit), further shows that the Union has waived its bargaining rights here.

preme Court authorized proposals to subcontract all unit work. The Board concluded that a proposal to reassign unit work, even all the unit's work, affected only what work the unit employees performed—and *not* whom the union represented—and was thus a mandatory subject. See also *Hill-Rom Co.*, 297 NLRB 351, 358 (1989) (finding that transfer of work outside bargaining unit is mandatory subject of bargaining, which is "not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best"), enf. denied 957 F.2d 454 (7th Cir. 1992).[14]

Under these circumstances, the Respondent's insistence that an agreement include a subcontracting provision was consistent with a party's lawful prerogative to condition agreement upon resolution of a mandatory subject of bargaining. Therefore, we reverse the judge and dismiss this allegation.[15]

C. Alleged Retaliatory Refusal to Bargain Over Discretionary Personal Time

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain, and independently violated Section 8(a)(1) by conveying that it was refusing to bargain with the Union about reinstating supervisor's discretionary authority to grant personal time off to employees for retaliatory reasons. In so finding, the judge concluded that the Respondent's refusal to bargain was in response to the Union's filing of unfair labor practice charges. As noted above, the Respondent's original elimination of discretionary personal time in September 2016 came after a May 2016 unfair labor practice charge the Union filed challenging a supervisor's denial of personal leave (allegedly in retaliation for Union aggressiveness). And, after discretionary personal time was eliminated, the Union filed another unfair labor practice charge in November 2016 attacking this change in policy as retaliation for its previous unfair labor practice charge.[16] We agree that, in view of multiple statements by the Respondent indicating that the Union's unfair labor practice charges motivated its refusal to seriously consider Union proposals regarding discretionary personal time, the Respondent both stated an unlawful retaliatory purpose in violation of Section 8(a)(1) and refused to bargain for an unlawful reason in violation of Section 8(a)(5) and (1).

In so finding, we observe that the most brazen statement of retaliatory intent came at a sidebar discussion on July 9, when Giglio said that the Respondent was not interested in bargaining over personal time "because of the Union's filing of the ULP in 2016 and its aggressive actions." Such an unvarnished pronouncement of retaliatory motive standing alone tends to establish a retaliatory motive.

Beyond this statement, Giglio made other statements indicating a disdain for the Union and its efforts to pursue the reinstatement of supervisor's discretionary authority to grant personal time-off. In this regard, on September 4, Myers pointed out that the Union had previously filed a meritorious charge,[17] alleging that personal time had been denied by an individual supervisor due to Union aggressiveness. Giglio replied: "That is exactly the issue. That is why we won't agree to personal time, because this is the stuff that the ILEU brings forward." And he further suggested that the Union, instead of filing a charge, "should have worked through the channels," and that it "brought [the personal-time policy] upon yourself." Giglio observed that "[t]here has never been as bad a relationship [between Respondent and Union], to my knowledge, as there is now; and to me, the catalyst that changed that is when you took over as president."

We find that the above statements crossed a line—moving from a rationale based on improved consistency in the Respondent's decisions regarding time off to a rationale based on hostility toward the Union's perceived aggressive approach to asserting its statutory rights. Whatever concerns the Respondent may have had about the inefficiencies generated by supervisory discretion in granting time off, Giglio's remarks reflect that the Respondent also harbored a hostility toward the Union's assertion of its statutory rights per se.[18] Condemning the

[14] The court did not disagree with the above-quoted proposition from *Hill-Rom Co*. Rather, the Board found, on other grounds, that the respondent had altered the scope of the unit, and the Seventh Circuit disagreed with that finding.

[15] As a result, we find it unnecessary to pass on the Respondent's argument that its conduct in bargaining did not amount to its conditioning of agreement to a contract on its subcontracting proposal, nor on its contention that the judge's permissive-subject analysis violated due process.

[16] The former charge was informally settled, and the latter was dismissed.

[17] More accurately, as previously noted, the charge was informally settled. The Union then filed its November 2016 charge (that was ultimately dismissed), alleging that the September 2016 policy that eliminated supervisory discretion was retaliatory.

[18] While we acknowledge that, at times during the parties' bargaining sessions, the Respondent seemed to endorse a rationale for its bargaining refusal based on the efficiencies garnered through greater supervisory consistency, at best, it sent mixed messages.

On May 24, for instance, Giglio explained that the Respondent could not accede to the Union's request to reinstate discretionary personal time because, "when the [Union] brought the [unfair labor practice charge] claiming that the *lack of consistency* was causing issues, it forced the [Respondent's] hands to memorialize what would be a *consistent* interpretation . . . . " In this regard, Giglio's comments appeared to suggest the unfair labor practices may have alerted the Respondent to issues of supervisory consistency.

Union's "aggressive actions" or urging that the Union work "through channels" to seek redress for a potential violation of the Act—in lieu of filing unfair labor practice charges—suggests more than an effort to streamline managerial policies to achieve consistency. Rather, such statements indicate a punitive gesture arising out of pique at the Union's efforts to assert its rights.

In these circumstances, we find that Giglio's remarks violated Section 8(a)(5) and independently violated Section 8(a)(1), as the judge found. Specifically, Giglio's statements unlawfully conveyed to unit employees at the bargaining table that the Respondent was refusing to bargain with the Union about supervisory discretion to grant personal time off in retaliation for the Union's filing of Board charges on the matter. See, e.g., *Kroger Co.*, 311 NLRB 1187, 1194 (1993), affd. 50 F.3d 1037 (11th Cir. 1995). As to the 8(a)(5) violation, while the Respondent argues there can be no such violation because the parties extensively discussed the issue of supervisory discretion in granting personal time off, we find that the Respondent, by the statements described above, indicated a retaliatory motive behind its refusal to give ground on personal time in negotiations. As Myers' credited testimony reflects, on July 9, Giglio stated a retaliatory motive for the Respondent's unwillingness to entertain personal time proposals. In so doing, Giglio conveyed to the Union that no matter how much discussion on the topic occurred, the Respondent had predetermined not to give ground, on a retaliatory basis. We find Giglio's statements to be analogous to situations where an employer unlawfully refuses to bargain or conditions further bargaining on a union's withdrawal of pending charges, see, e.g., *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034 (1986), and to surface-bargaining cases where, in spite of engaging in the formalities of bargaining, the respondent employer nonetheless harbors an unlawful end goal. See *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000) (describing unlawful surface bargaining as "employing the forms of collective bargaining without any intention of concluding an agreement"), enfd. 26 Fed.Appx. 435 (6th Cir. 2001). Thus, for the foregoing reasons, we find that the Respondent violated Section 8(a)(5) and, independently, Section 8(a)(1) by its statements at the bargaining table in connection with the personal time issue.

D. Allegation that the Respondent Unlawfully Conditioned PPTO on Employees Declining to Support the Union

The judge found that the Respondent violated Section 8(a)(1) when it offered PPTO benefits to employees on the condition that they give up or decertify the Union.[19] In so doing, the judge relied on statements made by Giglio on July 9 and concluded that they constituted an unlawful promise of benefits to employees that they would receive PPTO if they ceased supporting the Union. Unlike the judge, we do not find that Giglio's statements constituted an unlawful promise of benefits. Rather, as explained below, we find that the Respondent violated Section 8(a)(1) by informing employees that, at least with respect to PPTO, they were better off without being represented by the Union.[20]

Prior to July 9, Giglio had repeatedly made the point that unrepresented employees had implicitly paid for

Similarly, at the July 8 session, the Respondent's human resources official suggested that the Respondent was not hostile to Union charges, but merely sought to address conditions giving rise to such charges. She stated: "I know you are claiming that you are not going to file a lawsuit or an unfair labor practice, but there is going to be some instance when you guys are going to get angry at us for not being consistent. So unless we write down every single case and what the parameters are around it, it will never be the same."

But even as the Respondent occasionally suggested a nonretaliatory motive, it still managed to muddy the waters as to what its real intent was. On May 24, Giglio made the point: "We see the real downside to having inconsistencies, and it has certainly been demonstrated by this leadership team in the ILEU that you are quick to grieve, *quick to ULP*, quick to file lawsuits, so we want to keep as much ambiguity out of this as we can." (Emphasis added.) In other words, even as he presented a nonretaliatory motive, Giglio simultaneously launched a broadside against the aggressiveness of the Union's leadership, suggesting a hostility toward its assertion of rights. In this context, we conclude that the overall message the Respondent conveyed to the Union, especially in view of the statements described infra, professing unmistakable hostility to Union charges, reflects the Respondent's intent.

[19] The judge, apparently inadvertently, described this in the text of his decision as an 8(a)(5) violation as well as an independent 8(a)(1) violation. His analysis, Conclusions of Law, and the language of the complaint, however, make clear that the issue here is solely an independent 8(a)(1) allegation. We therefore treat this issue accordingly.

[20] Although the complaint alleges that, by his statements, Giglio violated Sec. 8(a)(1) by promising benefits to employees if they withdrew their support from the Union, "[i]t is well settled that 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*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Our finding here that the Respondent violated Sec. 8(a)(1) by conveying to employees that they would be better off without the Union satisfies both prongs. The violation we find based on Giglio's statement is essentially a matter of undisputed documentary evidence—identical to and divulged in connection with the evidence pertaining to the unlawful promise-of-benefits allegation, much of which is undisputed. See id. (*Pergament* rule applied "with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses"). In addition, we find that the issue has been fully litigated as well. The Respondent's arguments here have focused on how Giglio's July 9 remarks would be understood by the employees. Thus, whether characterized as an unlawful promise of benefits or an unlawful statement that employees would be better off without the Union, both questions turn on the same facts and considerations.

PPTO in their benefits package by forgoing benefits that represented employees enjoyed and that the Union had not articulated any commensurate concessions it was willing to give. And yet, the Respondent's bargaining team, despite Union requests, could give no estimate of what the cost of PPTO might be.[21] When the Union suggested it would forego an item of tangible value—its signing bonus—in exchange for PPTO, the Respondent did not make an effort to determine whether and how much PPTO this might cover. Rather, despite having insisted that the Union would have to give up something of commensurate value for PPTO, it expressed incredulity[22] that the Union would trade something of value for PPTO.[23]

Then, at the July 9 bargaining session, Union negotiator Myers bluntly asked Giglio, "So what would it take to get eight weeks of PPTO?" Giglio replied, "Walk away from the bargaining agreement." Myers asked what he meant by that, and Giglio responded: "If you weren't covered by a [c]ollective[-b]argaining [a]greement, if you were exempt, you would have eight weeks of PPTO." At that point Myers inquired, "So you are saying if we get [de]certified, you will give us eight weeks of PPTO?" Giglio answered, "You said that, I didn't." Giglio later said, "There are other ways to do it . . . . You will have to talk to your attorney." Also that day, at a sidebar, Giglio stated that to get PPTO, employees would have to "go without a Union."

Coming on the heels of the Respondent repeatedly evading the Union's questions about what it would take to obtain PPTO for the represented employees, Giglio's July 9 statements crystalized the Respondent's position that it had no interest in extending the PPTO benefit to its represented employees. In that context, viewed objectively, Giglio's July 9 statements would reasonably be understood to convey to employees on the Union's bargaining committee that, at least with respect to PPTO, the employees were better off without union representation. On that basis, we find Giglio's statements unlawful. See *Cherry Hill Convalescent Center*, 309 NLRB 518, 518, 521, 536 (1992). The Respondent asserts in its exceptions brief that Giglio's statements were made sarcastically and could not be taken seriously, but the Board's task is to examine the objective context to determine how reasonable employees would construe the statements. See *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004), enfd. sub nom. *UFCW Local 204 v. NLRB*, 447 F.3d 821 (D.C. Cir. 2006). As explained above, under the circumstances here, we find that the Respondent reasonably conveyed to its employees that they were better off without the Union in violation of Section 8(a)(1).

E. Direct Dealing Allegation

Direct dealing occurs when (1) an employer communicates directly with union-represented employees; (2) the discussion is for the purpose of establishing or changing wages, hours, or other terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication is made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010); *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

The judge here found that, by telling its employees that it "believe[d] that employees should have a choice in accepting the [Respondent's last, best, and final] offer and deserve a chance to vote," the Respondent interfered with the internal union process of submitting a proposal to ratification and thereby engaged in unlawful direct dealing. See *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003) ("[T]he Board has long held that contract ratification votes and procedures are internal union affairs upon which an employer is not free to intrude.") (internal quotation omitted). The judge's finding does

[21] The record reflects considerable evasiveness on giving the Union a straight answer on costs of PPTO such that it could formulate a cost-sensitive counterproposal. Giglio told the Union that PPTO was part of unrepresented employees' "compensation package that . . . has got to be paid for somehow." The Union requested an economic analysis, and Giglio professed he didn't know if he could "get [his] hands" on one but would "look into it." The Union further asked what benefits unrepresented employees gave up, and Giglio said he would have to see if the information was available. The Union would also ask about usage levels by unrepresented employees. The Respondent ultimately provided no data in response to these inquiries. When the Union continued to press concerning "information on how PPTO is paid for" by unrepresented employees. Giglio stated, "There is not a direct answer to that question." When the Union asked about how many employees took advantage of PPTO, the Respondent again stated, "We don't have that information." When pressed to elaborate, Giglio stated that "the whole benefits package is a crazy calculation . . . [I]t is highly complicated." When Myers then asked, "Did the Company cost out what one week of PPTO would be for the represented population," Giglio said, "I am sure we did. We don't have it with us."

[22] Giglio stated: "[D]o you really think you are doing your constituents the right thing by saying no ratification bonus? Do you really think 144 of those people would want PPTO versus $5,000 up front?"

[23] The Respondent did offer 1 week of PPTO without insisting on concessions from the Union. This slightly weakens the case that the Respondent's conduct suggested it was withholding PPTO to show that employees were better off without the Union. Notably, the offer came only after the arbitrator's ruling put the Respondent in a weakened position, forcing the Respondent to negotiate for new contract language to provide for subcontracting rights. Further, the Respondent repeatedly, and explicitly, lauded its own "magnanimity" in giving the one week and stressed the extraordinariness of this being the first example of represented employees receiving the benefit. Such a grudging offer of 1 week of PPTO does not negate the Respondent's unexplained intransigence—even when the Union offered to trade a benefit—in refusing to offer additional weeks, and its declaration that its refusal was because employees were represented by the Union.

not clearly fit within either direct-dealing caselaw or other lines of precedent. To wit, in cases involving an employer's encouragement of employees to seek a ratification vote, the Board has required an element of coercion (or, at a minimum, a backdrop of misconduct rendering the communications coercive) in order to find a violation of the Act. See *Armored Transport*, supra; *Borden, Inc.*, 308 NLRB 113, 128 (1992), enfd. 19 F.3d 502 (10th Cir. 1994), cert. denied 513 U.S. 927 (1994). Here, the Respondent merely stated its "belief" that there should be a vote. Because this statement was not coercive, we find that a critical factor for finding the statement unlawful is not present here.

A second proposed theory of why the bulletin constituted direct dealing was that the Respondent thereby made an offer concerning terms of employment directly to employees. The General Counsel contended at trial that, by noting to employees in a July 3 statement that the Respondent "expected" that employees would receive paid leave for ratification voting, the Respondent made a proposal concerning a term of employment directly to employees before making it to the Union. Assuming arguendo that this statement constituted direct dealing, we find no violation because the Respondent effectively repudiated any such violation when it advised unit employees on July 25 that "it should not have said" that employees would receive paid time for a vote and apologized for bypassing the Union. The judge found that the Respondent's repudiation was not effective because, in his view, Board law requires that a repudiation be sent to all affected employees, including employees outside the bargaining unit.[24] However, Board law does not require that employees outside the bargaining unit be notified. See *TBC Corp. & TBC Retail Group, Inc.*, 367 NLRB No. 18, slip op. at 2 (2018) (holding repudiation adequate that "notif[ied] the affected employees").

Further, in our view, the repudiation satisfies the other criteria set forth in *Passavant*.[25] Notably, the *Passavant* standard is not to be applied in a "highly technical and mechanical manner" and voluntary remedial action by employers "should be encouraged." *The Broyhill Co.*, 260 NLRB 1366, 1366–1367 (1982) (internal quotations omitted). Thus, we consider whether the Respondent's repudiation effectively dispelled the effects of any unlawful conduct.

Here, the repudiation followed shortly after the July 3 statement—3 weeks. This is a reasonable period of time to allow for the Respondent to recognize its error and to compose and distribute a repudiation. See *Gaines Electric Co.*, 309 NLRB 1077, 1081 (1992) (repudiation timely where it occurred 1 month after the unlawful threat). In addition, under the circumstances, the modest lapse in time does not appear motivated by a mere desire to avoid legal culpability. Compare *Passavant*, 237 NLRB at 139 ("Nor can we ignore the fact that Respondent delayed until very nearly the eve of the issuance of complaint before publishing its disavowal."). In the July 25 statement, the Respondent candidly admitted to making a "mistake" in its July 3 statement when it engaged in conduct that "could be construed" as direct dealing, and specifically pointed out that under the law it "cannot present a proposal to employees that it has not already presented to the employees' union." Compare *DirecTV U.S. DirectTV Holdings*, 359 NLRB 545, 548 (2013), reaffirmed and incorporated by reference, 362 NLRB 415 (2015), and cases cited therein (addressing "confusion" or "misunderstanding," or "clarifying" one's intent, not sufficient to constitute an admission). The Respondent also made explicit assurance that such conduct would not occur again, and nothing in the Respondent's July 25 statement would reasonably cause employees to doubt the As effectiveness of the repudiation or the Respondent's assurance that it would not bypass the Union to make offers of terms and conditions directly to employees.[26]

---

[24] The language from the case the judge relies on indicates that the key concern is that all employees *affected by the unlawful conduct* receive the retraction. Although the case states that all employees who received the threat needed to receive the repudiations, it prefaces the discussion by stating the boilerplate law that there must be publication "to the employees involved." See *Auto Workers Local 785 (Dayton Forging)*, 281 NLRB 704, 707 (1986) (quoting *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978)). Thus, *Dayton Forging*'s reference to "all employees" was simply a paraphrase, and sending the repudiation to all employees affected by the unlawful conduct would be adequate.

[25] To be valid, "repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. . . . [T]here must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct . . . after the publication. . . . And, finally . . . such repudiation . . . should give assurances to employees that in the future their employer will not interfere with the exercise of their Sec[.] 7 rights." *Passavant Memorial Area Hospital*, 237 NLRB at 139 (internal quotations and citations omitted).

[26] In dissent, Member Prouty would find that the Respondent's July 25 statement to employees did not constitute an adequate repudiation under *Passavant* of its July 3 direct dealing statements. In so finding, he asserts that the timing of the repudiation here was not adequate. He also contends that the Respondent did not unambiguously admit its culpability and, instead, provided only a hedging acknowledgement that it had engaged in a direct dealing violation in its July 3 statement. Our colleague asserts that such an acknowledgement is not sufficient under *Passavant*, particularly since the Respondent had engaged in other unremedied unfair labor practices and its July 25 statement to employees did not reference their Sec. 7 rights or assure employees that it would not violate these rights. We disagree, not least because (as noted), the Board encourages voluntary remedial action by employers and so does not apply *Passavant* technically or mechanically. See *The*

Because the repudiation here satisfies the criteria set forth by the Board, we find that the General Counsel has not established a direct-dealing violation.

F. Alleged Unlawful Disparagement

At the parties' June 29 bargaining session, Giglio told the Union that it was engaging in regressive bargaining and suggested that its failure to take the Respondent's offer to a vote constituted ineffective representation of the unit employees. Further, a September 28 bulletin, posted by the Respondent where unit employees could read it, claimed that the Union had violated ground rules and walked away from a bargaining session. The judge found that the Respondent's statements in this regard constituted disparagement of the Union in violation of Section 8(a)(1), reasoning that they suggested that the Union was the reason that unit employees had not received improved benefits. As explained below, we disagree.

In assessing allegations of unlawful disparagement, the Board has stated that "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co.,* 305 NLRB 193, 193 (1991). Instead, unlawful disparagement generally involves an attempt to undermine the union as bargaining representative, either through falsely ascribing responsibility for the loss of benefits or otherwise misleadingly or coercively calling into question its ability to represent employees. See *RTP Co.*, 334 NLRB 466, 467–468 (2001), enfd. sub nom. *NLRB v. Miller Waste Mills*, 315 F.3d 951 (8th Cir. 2003), cert. denied 540 U.S. 811, 124 S. Ct. 51, 157 L. Ed. 2d 23 (2003) (finding an employer may violate Section 8(a)(1) by "misrepresent[ing] the Union's bargaining positions" in a way that tends to cause employees to become alienated from the Union).

Here, in finding the disparagement violation, the judge did not point to any specific misleading or coercive statements by the Respondent in either the September 28 bulletin or the June 29 meeting. Rather, he concluded that, in general, the Respondent's words might convey to employees an "unflattering" impression of the Union's bargaining efforts. This, however, is not sufficient to constitute a "disparagement" violation. See *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004) (finding that "demeaning" comments that "did not suggest that the employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights" did not establish unlawful disparagement). Cf. *Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 fn. 9 (2016) (holding that statement "clearly calculated to mislead employees as to the Union's conduct with regard to restoration of . . . benefits" amounted to "interference, restraint, and coercion that unlawfully tended to undermine the Union"), enfd. in relevant part 885 F.3d 100 (2d Cir. 2018). The Respondent's statements in the September 28 bulletin, while critical of the Union, were not objectively false or misleading. Similarly, Giglio's statements at the June 29 session appear to reflect only his point of view as to the Union's conduct and, importantly, were spoken in the midst of discussions with the Union's bargaining team. Thus, any critical comments would be viewed in the context of heated negotiations.[27] In the absence of any communicationsby the Respondent that were false or misled employees into a negative impression of the Union's bargaining conduct, we find, contrary to the judge, that the General Counsel has failed to establish that the Respondent unlawfully disparaged the Union.

G. Bad-Faith Bargaining Allegation

The judge concluded that the cumulative effect of the violations he found warranted a finding of overall bad faith on the part of the Respondent. We disagree. Here, the Respondent engaged in numerous bargaining sessions and reached agreement on most issues. In addition, while the Respondent may have engaged in lawful hard bargaining with the Union, it was clearly desirous of

Broyhill Co., supra, 260 NLRB at 1366–1367. As explained above, under the circumstances, the timing of the Respondent's July 25 statement to employees was reasonable. In addition, in the July 25 statement, the Respondent acknowledged that its July 3 statements to employees amounted to direct dealing under the NLRA and candidly admitted that it had bypassed the Union. The Respondent also specifically informed employees that under the law it "cannot present a proposal to employees that it has not already presented to the employees' union[,]" forthrightly stated that it erred by doing so, and expressly stated that it would not engage in such conduct in the future. While the Respondent engaged in other unfair labor practices around this time, they were distinct from the direct dealing statements and, under the circumstances, would not undermine the Respondent's timely and clear repudiation in the July 25 statement. On the facts here, considered in light of Board policy, it is appropriate to treat the Respondent's repudiation as effective.

[27] The judge also considered the July 3 emailed bulletin from the Respondent to unit employees as background and found it to contain "false communications" that would drive a wedge between employees and the Union, and that the subsequent correction of the July 3 email was not timely enough to undo the harm. We disagree that the bulletin involved any false communications (and thus the question of timeliness of the correction is moot as to this issue). Although the judge was unclear on what in the July 3 email was a "false communication," he was apparently referring to the statement that allegedly constituted direct dealing. That statement was: "If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote." The statement expressed what was "expected," evidently by the Respondent. There is no evidence that the Respondent did not expect this, and therefore no evidence that the statement was false.

reaching an agreement, and in fact the parties resolved the vast majority of issues over the course of extensive bargaining sessions. Moreover, none of the violations we have found herein evidence overall bad faith on the part of the Respondent. Critically, on this record, we find no basis for concluding that the Respondent lacked an intent to reach agreement, a key component of finding that a party engaged in overall bad faith in bargaining. See *Latino Express, Inc.*, 360 NLRB 911, 921 (2014) (finding two indicia of bad faith insufficient to establish overall bad-faith bargaining in light of total context); *Reichhold Chemicals, Inc.*, 288 NLRB 69, 69 (1988) ("We . . . find that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse on a nonmandatory subject of bargaining, i.e., the waiver of access to Board processes. . . . We, however, have decided to adhere to the Board's previous finding that the Respondent's overall conduct establishes that it engaged in lawful hard bargaining, rather than unlawful surface bargaining."), enfd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). In these circumstances, we find, contrary to the judge, that the Respondent did not engage in overall bad-faith bargaining in violation of Section 8(a)(5).

III. CONCLUSION

We find that the Respondent violated Section 8(a)(1) by stating that it was refusing to bargain with the Union about supervisory discretion to grant personal time off because of the Union's prior unfair labor practice charges and, relatedly, violated Section 8(a)(5) and (1) by refusing to bargain about such supervisory discretion for retaliatory reasons. We further find that the Respondent violated Section 8(a)(1) by implying that represented employees would be better off without the Union because they would receive additional paid parental leave. In all other respects we find no violations of the Act, and the related complaint allegations are dismissed.

AMENDED CONCLUSIONS OF LAW

1. Renumber Conclusions of Law 5, 6 and 7 as Conclusions of Law 4, 5, and 6.

2. Delete Renumbered Conclusions of Law 4(b)-4(e).

3. Delete Renumbered Conclusion of Law 5(b) and reletter the subsequent subparagraph accordingly.

4. Substitute the following for Conclusion of Law 5(c):

> "(c) Making statements implying that employees would be better off without the Union because they would receive additional paid parental leave on July 8, 2018."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain steps to effectuate the policies of the Act. With respect to our finding that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union about the issue of supervisory discretion to grant personal time because the Union had previously filed charges against this Respondent on this matter, we note the specific circumstances under which we find this violation. Specifically, the Respondent's refusal to bargain over this discrete matter for retaliatory reasons is embedded in a larger bargaining context where we have found that the Respondent did not engage in overall bad-faith bargaining. As a result, we find that an affirmative bargaining order is not warranted here and that a cease-and-desist remedy is sufficient to remedy the Respondent's bargaining-related violation. See, e.g., *Ellicott Development Square*, 320 NLRB 762, 762, 778 (1996), enfd. 104 F.3d 354 (2d Cir. 1996).[28]

ORDER

The Respondent, ExxonMobil Research & Engineering Company, Inc., Annandale, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making statements implying that employees would be better off without Independent Laboratory Employees Union, Inc. (the Union) because they would receive additional paid parental leave.

(b) Telling employees that it is refusing to bargain with the Union about supervisory discretion to grant personal leave because the Union filed unfair labor practice charges.

(c) Refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit about supervisory discretion to grant personal leave because the Union filed unfair labor practice charges.

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

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

[28] The judge's recommended remedy included a public reading of the notice by a Board agent or responsible management official. We find that this extraordinary remedy is not warranted in the circumstances of this case. See, e.g., *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34, slip op. at 1 (2018). We accordingly amend the judge's remedy to remove the notice-reading remedy.

(a) Post at its Annandale, New Jersey facility copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed by email to all unit employees. They shall also be distributed electronically, such as by posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps 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 May 7, 2018.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

Dated, Washington, D.C. August 25, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

For the reasons I stated in my dissenting opinion in *District Hospital Partners, L.P. d/b/a The George Washington University Hospital*, 372 NLRB No. 109, slip op. at 7–12 (2023), I believe that the Board's 2020 decision in this case, reported at 370 NLRB No. 23 and dismissing the complaint in its entirety, should not have been vacated. Accordingly, I respectfully dissent from the majority's decision to find that the Respondent violated the Act.

Dated, Washington, D.C. August 25, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting in part.

While I join my colleagues in the disposition of most of the issues in this case, I write separately to express my disagreement on two of the allegations. As explained below, I would find that the Respondent violated Sec. 8(a)(5) and (1) by its unilateral change to evaluation procedures and by its direct dealing set forth in a July 3 bulletin. I therefore respectfully dissent as to these two issues.

I.

First, I dissent from my colleagues' conclusion that the Respondent's unilateral change to its employee evaluation procedure was privileged by the collective-bargaining agreement. In *MV Transportation*, the Board announced it would apply a "contract coverage" standard to determine whether an employer has acted lawfully when it effects a unilateral change—with the core inquiry of this analysis whether the contract "plainly expressed" the parties' intent to allow an employer to act unilaterally

[29] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens 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 notice 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."

on an issue. 368 NLRB No. 66, slip op. at 9 (2019).[1] In my view, the contractual language in this case plainly expresses the parties' intent *to forbid unilateral action* with respect to evaluation procedures absent certain preconditions. The facts show that these preconditions were not met here.

Under *MV*, one must ascertain whether the relevant contract language "covers the challenged unilateral act." It will be found to do so "if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally." Id., slip op. at 11. "[U]nder the contract coverage test . . . the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, it is determined that the disputed act does not come within the compass or scope of a contract provision that grants the employer to right to act unilaterally, the analysis is one of waiver." Id., slip op. at 2. Importantly, "[u]nder contract coverage, *the parties* are firmly in control of negotiating the parameters of unilateral employer action, as they should be." Id., slip op. at 10 (original emphasis).

The relevant contract language here states:

> The performance of employees will be evaluated and reviewed by Management on a regular and consistent basis in accordance with the established Company-wide procedures. The procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration.

By dint of this plain language, applying ordinary principles of contract interpretation, the compass of the contractual passage's language authorizing unilateral action on evaluation procedures seems clear to the following extent: the language encompasses unilateral action to revise these procedures solely if and after "Management has consulted with the Union and taken its views into consideration." In other words, the procedures "may be revised" unilaterally by the Respondent, but only *if such conditions are met*. As *MV* requires, we must accord due respect to the parties' "negotiati[on] [of] the parameters of unilateral employer action"; the parties' negotiated-for language that does not authorize unilateral changes in the absence of these specified parameters. Id., slip op. at 10. Thus, in this case, while there is no doubt that the subject of the revision of evaluation procedures is covered by the contract,[2] "the parties' intent 'plainly expressed'" in the contract, forbids, it does not grant, a right of unilateral action except under specified conditions. Id. slip. op. at 9. This constitutes the limited "parameters of unilateral employer action" that the parties have chosen for themselves. Id. at 10.

As to whether the preconditions were satisfied, I find that the facts here establish that they were not.[3] Any efforts by the Respondent to consult over the changes were mere pantomime. As the judge found,[4] the changes were presented as a fait accompli, and the Respondent, by notifying the Union mere weeks before it effectuated a change that it had been contemplating for months, afforded the Union no meaningful opportunity to make its views known, nor for the Respondent to meaningfully consider those views, and in any event there is no evidence that the Respondent did take the Union's views into consideration, as required before being authorized

[1] I adhere to the position I have taken in past cases implicating *MV Transportation* and take no view on whether that case was correctly decided. However, I accept its application here as extant precedent.

[2] To be clear, the mere fact that the contract addresses employee evaluations does not mean the unilateral change is encompassed by the contract, as *MV* requires. Rather, the question is whether the contract evinces the parties' intent to authorize the unilateral change – and here, it does so only if the consultation/consideration conditions are met.

[3] My colleagues point to the fact that there appeared to be some consultation with the Union here and decline to delve further into whether there was contractually sufficient compliance, on grounds that here there is only a unilateral change violation. Yet they do not answer the question of *why* it is necessary to have a separate Sec. 8(d) allegation when, by the parties' clear agreement, resolving the contractual issue "applying ordinary principles of contract interpretation," is all that is necessary to determine whether the parties have authorized a unilateral change here. In my view, an interpretation of the contractual preconditions to unilateral changes here is intertwined with and part of the "contract coverage" analysis, and no separate allegation should be necessary. What the majority characterizes as focusing on the sufficiency of the Respondent's contract compliance is necessary in this case if the Board is to determine whether the preconditions for authorizing unilateral action chosen by the parties have been met. If the Board fails to engage with whether those preconditions are met, this enables the Respondent's circumvention of the Union's fundamental bargaining rights, which the Union took care to conditionally preserve, just as surely as if the Respondent acted in the absence of such a contractual fig leaf. If we fail to do this, we are failing to "give effect to the limits—or absence of limits—upon which the parties themselves have agreed." *MV,* slip op. at 10. Thus, I believe the Board must determine whether the relevant preconditions to making unilateral changes are satisfied here as part of the contract-coverage analysis. In this case, I do not believe that is even arguably the case.

[4] The judge imports "fait accompli" principles that normally arise in a context where the question is whether the union waived its right to bargain by inaction. In such cases, a union would not ordinarily waive its right by inaction where it was clear the employer did not intend to meaningfully bargain but rather presented the change as a done deal. Nonetheless, I find the general notion of fait-accompli to be relevant here in that a unilateral change presented as a fait accompli would not meet the contractual preconditions permitting unilateral action. See *Los Robles*, 372 NLRB No. 120 (2023) (expressly adopting judge's reasoning in finding an 8(a)(5) unilateral change violation, where the judge rejected the employer's "contract coverage" defense, finding that the change was presented as "a fait accompli," and the contractual "meet and confer" prerequisites to the unilateral change were not satisfied).

by the contract to take unilateral action.[5] Thus, the limited contractual circumstances under which the Respondent was granted the right to act unilaterally are not found here. Accordingly, the contract coverage defense fails. See *IBEW v. NLRB*, 9 F. 4th 63, 74–75 (2d Cir. 2021) (under a "contract coverage" analysis, where contract sets forth "specific limits" on unilateral authority and respondent "cannot justify its unilateral imposition" based on the "contractual prerequisites," the unilateral change is unlawful).

MV provides that, if the contract does not authorize the change, one must next determine whether the Union has clearly and unmistakably waived its right to bargain over the issue. Supra 368 NLRB No. 66, slip op. at 12. My colleagues would find that, even applying that standard, the Union waived its right to bargain over the change in evaluation procedures. I disagree. Here, the language does not clearly waive the Union's rights; rather, it does the opposite, preserving those rights absent certain conditions. Because, as I have discussed, those conditions are not met, I do not believe waiver had been established under the clear and unmistakable waiver standard.[6]

For all these reasons I would find that the Respondent violated Section 8(a)(5) and (1) by its implementation of a new evaluation procedure.[7]

II.

I would also find, contrary to my colleagues, that the Respondent engaged in unlawful direct dealing when it stated, in a company bulletin, that it "expected" employees would be paid for time spent at a ratification vote. My colleagues decline to pass on the merits of the underlying issue—whether this constituted direct dealing—and instead rule that, if it were direct dealing, it was subsequently sufficiently repudiated by the Respondent to relieve it of liability. I reject this reasoning.

The relevant passage, distributed to employees in a July 3, 2018 bulletin in the midst of difficult and tense negotiations, stated:

> The Company believes that employees should have a choice in accepting the offer and deserve a chance to vote. If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.

As to the merits of the allegation, I would find that the underlying conduct was direct dealing in violation of Section 8(a)(5) and (1). On July 3, the Respondent conveyed that it anticipated allowing employees leave from their work if the contract were submitted to ratification. The use of the term "expect," coming from one's employer, the entity that issues one's paychecks and sets the schedule, would reasonably instill the impression that this was a concrete offer of time away from one's job if there were a ratification vote. And provision of such time away from work to employees is a term and condition of employment, one which the Respondent was required to raise and bargain with the Union over prior to addressing its proposal to employees. See *Naperville Ready Mix*, 329 NLRB 174, 184 (1999), enfd. 242 F.3d 744 (7th Cir. 2001) (discussions about matters related to terms and conditions of employment with employees in absence of union constitutes unlawful direct dealing).

Indeed, bypassing the Union and making the proposal to employees was especially pernicious in this context, where the Respondent was also attempting to leverage employee sentiment against the bargaining team by its presentation of bargaining updates to the unit. Without giving the bargaining team an initial chance to address any such time-off proposal and to provide context in which employees might understand why the Union had not agreed to a ratification vote with time off of work for voters, the Respondent's conduct would tend to undermine the Union by suggesting it was rejecting policies that might otherwise appear to be favorable to employ-

[5] The Respondent emailed the Union regarding the changes, which had been in the works since December 2017, on March 7, 2018. After an exchange of emails and a couple meetings, the change was implemented on March 28, in spite of the Union's strenuous request for more bargaining. Further, a union information request on the issue was submitted just before implementation and was not fulfilled until March 27, one day before implementation. The mere fact that the Respondent solicited emails from the Union on its views and mechanically recited that it was considering them is far from dispositive. The hasty, compressed schedule on which the parties discussed a change that the Respondent had been planning to make for months—but declined to share with the Union even as it worked out the plan's details—and its obstinate adherence to a seemingly self-imposed deadline suggest that the Respondent's efforts in consulting with the Union and considering its views were hardly genuine. Any reasonable interpretation of the contract's consult/consider language would require that the Respondent act in good faith in effectuating these requirements, and thus, before being permitted to implement unilaterally.

[6] I disagree with my colleagues' conclusion that the parties' agreement to permit unilateral action if the specified "consultation and "consideration" conditions are satisfied, equally means that the statutory duty to bargain is waived or otherwise impaired even if those conditions are not satisfied. The statutory duty to bargain exists independently of the contract and is only impaired if the parties agree to such impairment. Thus, in my view, in terms of either waiver or *MV's* contractual coverage standard, where the specified conditions are not satisfied (and absent actual bargaining), any unilateral change in evaluation procedures is a violation of the Act's duty to bargain.

[7] I agree with the judge and would reject the Respondent's argument that there can be no violation here because the changes were immaterial. While the Respondent may have retained ultimate control over employee ratings and their impact on one's workplace standing, by eliminating some ratings categories the Respondent denied employees more granular information concerning their performance that might help them informally protest their rating or improve their performance.

ees. See *Royal Motor Sales*, 329 NLRB 760, 761 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001) ("direct dealing, particularly when negotiations with the union are occurring, is inconsistent with the employer's statutory bargaining obligation, tends to undermine the status of the bargaining agent, and interferes with employees' Section 7 rights"). Thus, in my view, the July 3 bulletin constituted direct dealing.

As to whether the unlawful direct dealing was repudiated by the Respondent's subsequent July 25 email, I part ways with my colleagues. In my view, the language of the Respondent's email did not satisfy the test for repudiation set forth in *Passavant Mem'l Area Hosp.*, 237 NLRB 138, 139 (1978). The *Passavant* factors are aimed at determining, in broad context, whether affected employees will be assured as to the sincerity of their employer's disavowal of unlawful conduct such that any effect of the unlawful conduct would be dissipated in the same way a government remedy with its notice and assurances would do. See *Harborlite Corp.*, 357 NLRB 1752, 1754 (2011), rev. den. 765 F.3d 1198 (10th Cir. 2014) (*Passavant* intended to ensure that repudiation "undo[es] the effects of . . . earlier unlawful" conduct).

The Respondent's allegedly repudiatory July 25 email stated that the earlier (July 3) bulletin "could be construed as what is called unlawful 'direct dealing.'" It stated it "should not have said this," that it was unintentional (it had "simply forgotten about the details"), indicated it would "not engage in any direct dealing in the future," and apologized to employees and the Union leadership.

In my view, the *Passavant* factors must be examined in their entirety and with an eye toward how, *in toto*, they would affect employees' perception of the purported repudiation. First off, I believe the Respondent has failed to forthrightly state that it violated the Act—in other words it was not unambiguous in admitting culpability, as *Passavant* requires. It stated that its conduct "could be construed as what is called unlawful 'direct dealing.'" Such hedging, legalistic acknowledgment is rendered all the more dubious, in the eyes of employees, by the fact that the Respondent committed other unfair labor practices—namely its statement that employees could only get PPTO if they abandoned the Union and the retaliatory failure to bargain over personal leave, as found in today's decision—that remained unremedied (in other words, it failed to meet *Passavant*'s requirement that the repudiation be "free from" other unlawful conduct). These other violations themselves pertained to unlawful bargaining-table conduct[8] and would cast doubt on the Respondent's sincere commitment to avoiding unfair labor practices in the course of its negotiations with the Union. Relatedly, it never mentioned Section 7 in its July 25 email.[9] See *Passavant*, supra 237 NLRB at 138–139 (1978) ("repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights").

Finally, the Respondent delayed its so-called repudiation by 3 weeks, thereby allowing any disaffection sown by its direct dealing—among a bargaining unit already potentially concerned about the Union's efficacy due to the other violations—to fester in the workplace. While I agree that 3 weeks might be adequately timely under other circumstances, under these conditions, 3 weeks was inadequate to satisfy *Passavant*'s timelines factor. Cf. *Benteler Indus.*, 323 NLRB 712, 715 (1997), enfd. 149 F.3d 1184 (6th Cir. 1998) (unpub.) (issuance of purported repudiation "two or more weeks" after unlawful conduct insufficient in light of other infirmities under the *Passavant* standard). I therefore conclude, based on all the above considerations, that the repudiation here is not sufficient to apprise employees of the sincerity of the Respondent's disavowal, nor would it wipe the slate clean by effectively assuring employees that the Respondent was committed to behaving lawfully. I would not find it sufficient to relieve the Respondent of its liability for direct dealing.[10]

I would therefore find that the Respondent's statements concerning its expectation that employees would

[8] The majority points to the distinctness of these other violations we now find. Although these other violations may be technically different from a direct-dealing violation, the fact is the Respondent here repeatedly and unlawfully took steps to undermine the Union and its bargaining position—by suggesting employees would be better off without a Union in that only nonunion employees received PPTO and by refusing to bargain over personal time. Offering time off to employees for a ratification vote—which would doubtless further undermine the Union to employees by causing them to question why the Union was not letting them vote on an offer—compounds the effect of these other violations. These violations were unremedied at the time of the Respondent's "repudiation" and are inconsistent with *Passavant's* recognition that "there must be no proscribed conduct on the employer's part after the publication." *Passavant*, 237 NLRB at 138.

[9] Its efforts to reassure employees as to future violations – coming after a half-hearted admission that it had done anything wrong (stating that "[t]o the extent" we interfered with your rights, we were wrong, and professing to "sincere[ly] desire" not to do so in the future) – are insufficient here in my view.

[10] While I agree that *Passavant* should be applied realistically and in a manner that encourages voluntary repudiation, see *Broyhill Co.*, 260 NLRB 1366 (1982), I do not believe that requiring the Respondent to be forthright, to avoid other unlawful conduct, and to promptly issue its repudiation of unlawful conduct committed in the middle of contentious bargaining are onerous impositions.

be given paid leave for a ratification vote violated Section 8(a)(5) and (1).[11]

Dated, Washington, D.C. August 25, 2023

David M. Prouty, Member

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 make statements implying that you would be better off without Independent Laboratory Employees Union, Inc. (the Union) because you would receive additional paid parental leave.

WE WILL NOT tell you that we are refusing to bargain with the Union about supervisory discretion to grant personal leave because the Union filed unfair labor practice charges.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit about supervisory discretion to grant personal leave because the Union filed unfair labor practice charges.

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

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INC.

[11] I agree with my colleagues that the judge incorrectly found that the repudiation must be publicized to all employees, and not merely affected employees, to satisfy the final *Passavant* criterion.

The Board's decision can be found at https://www.nlrb.gov/case/ 22-CA-218903 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

Joanna Pagones Ross, Esq., for the General Counsel.

Jonathan Spitz, Daniel Schudroff and *Amanda Fray, Esqs. (Jackson Lewis, P.C.)*, and *Craig Stanley, Esq.* (ExxonMobil), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Newark, New Jersey, on March 19–21, 2019. The complaint alleges that ExxonMobile Research & Engineering Company, Inc. (the Company or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] on numerous occasions in 2018[2] by failing to bargain in good faith with the Independent Laboratory Employees Union, Inc. (the Union) while negotiating a successor collective-bargaining agreement, disparaging and denigrating the Union, promising employees higher wages and eight weeks of paid parental time off (PPTO) if employees withdrew from Union representation, refusing to bargain over personal time because of a previously filed unfair labor practice charge, implementing changes to the employee performance review system without prior notice to the Union and affording it an opportunity to bargain, and bypassing the Union and dealing directly with bargaining unit employees about being provided with time away from work to vote on contract ratification.

The Company denies that it engaged in bad faith bargaining, emphasizing the fact that the parties agreed to approximately ninety percent of the topics during that time and engaged in continuous negotiations over economic matters. It also contends that it lawfully disseminated information to employees regarding the status of negotiations, retracted its statement to employees about time away from work to vote, insists that the statement about PPTO was a sarcastic, stray remark that merely reflected that all non-union employees receive PPTO, and was entitled to revise the performance evaluation process after taking the Union's views into account.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] 29 U.S.C. §§ 151–169.

[2] All dates refer to 2018 unless otherwise stated.

by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, has been engaged in the operation of a research and development facility located in Annandale, New Jersey, where it annually provides services valued in excess of $50,000 to customers located outside the State of New Jersey, and purchases and receives materials valued in excess of $50,000 directly from points outside the State of New Jersey. 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 that the Union 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's Research and Engineering Technology Center is located close to the larger town of Clinton, New Jersey and for that reason is commonly referred to as the Clinton facility. The facility supports the Company's Upstream, Downstream and Chemical business operations, including 432 laboratories, 92 plants and 850 offices. The Clinton facility "is responsible to project thirty to forty years forward seeking solutions to anticipated energy challenges" by developing differentiated and high-impact technologies and products that are the foundation of the Company's competitive advantage.

Prior to 2018, the Company endeavored to remain competitive in the energy industry by selling two refineries, most of its retail fuels business, and a number of pipeline assets. It also consolidated various business units at its central campus in Houston and, in 2018, merged its research operations in Paulsboro, New Jersey with the Clinton facility.

B. The Collective-Bargaining Relationship

The Company has been a party to approximately 25 collective-bargaining agreements throughout the United States over the past thirty years, including the latest one with the Union at the Clinton facility. None have resulted in a work stoppage, strike or lockout and the Company has never declared an impasse during collective bargaining.

The Union's relationship with the Company dates back to August 31, 1944, when it was certified as the exclusive collective-bargaining representative of the following bargaining unit:

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio - Visual Technician, Audio-Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

The most recent collective-bargaining agreement was effective from June 1, 2013, through May 31, 2018 (the CBA). The parties reached agreement in 2013 after seven bargaining sessions. As of May 2018, approximately 165 employees were members of the bargaining unit. Approximately 80 percent of bargaining unit employees are research technicians.

During the bargaining period at issue, the Company's chief negotiators were Russell Giglio, a research and development business advisor, and Lyndsey Naquin, a human resources and labor advisor.[3] The Union's chief negotiators were senior research technicians Michael Myers and Thomas Fredriksen, the Union's president and vice president, respectively.

C. Key Excerpts from the CBA

1. Article X—Pay

Section 8—Time Paid During Regular Schedule

> A. Straight time shall be paid for any time worked during an employee's regular schedule.
>
> B. In computing the 40 hours of time in the regular weekly schedule, in addition to time
> actually worked, time in the regular schedule not worked by reason of any of the following absences shall be included:
>
> 1. With pay—
>
> a) Reporting for work with a reasonable expectation of work but being sent home for lack of work or other reason beyond the employee's control.
>
> b) Vacationing.
>
> c) Jury duty and death in the immediate family to the extent provided in Sections 1 and 2 of Article XVI.
>
> d) On a recognized holiday falling within the regular schedule.
>
> e) Any absence approved with pay by the Company.
>
> 2. Without pay—
>
> a) An absence approved by the Company for conducting Union business.
>
> b) Any absence approved by the Company.
>
> c) Disability certified by a Medical Division.

Section 11—Accelerations

> A. The Company may, on the basis of performance and abil-

[3] Giglio and Naquin are admitted supervisors and/or agents within the meaning of Secs. 2(11) and 2(13) of the Act.

ity as judged by the Company, accelerate for any employee the time intervals between scheduled pay increases shown on the Progression Schedule, in any such case the date of the accelerated scheduled pay increase shall be the anniversary date for determining subsequent schedule pay increases.

B. The Company will provide the Union with a list, without names, of all salaries for represented employees by. classification, once each calendar year within thirty days of a Union request.

Attachment 1—Uprates (partial chart)

Represented by Bargaining Unit—Contract Coordinator, Designer, Lead
Pay—10%
Typical Criteria for Consideration—(for contract coordinators and designers) Higher PA rating, High Initiative, Potential for Promotion, Appropriate skills/experience for assignment, Availability from current assignment; (for leads) Satisfactory or better PA rating, Good initiative, Appropriate skills/experience for assignment, Availability from current assignment, Involvement in activity.

2. Article XIII—Promotions
There are two kinds of promotion: (a) Earned–for jobs above the entering level job other than "vacancy only" jobs. (b) To fill permanent job vacancies in "vacancy only" jobs above the entry level. Promotions will be made on the basis of the rules hereinafter.

Section 3—Determining Available Employees for Consideration for "vacancy only" promotions

C. Additionally, effective 6/1/02, in the Administrative-Technician /Assistant and Systems Technician /Assistant job families only, employees will be eligible for promotion to the Senior classification, notwithstanding the fact that no vacancy then currently exists, if they are rated outstanding for twenty four (24) consecutive months. Effective 6/1/06, in the Administrative Technician /Assistant and Systems Technician/Assistant job families only, employees will be eligible for promotion to the Senior classification, notwithstanding the fact that no vacancy then currently exists, if they are rated outstanding for thirty six (36) consecutive months.

Section 4—Earned Promotion—Guide
The following is the guide to the application of performance appraisals to earned promotions on or after June 1, 1996.

A. Earned Promotion in the Minimum Time – A designation of "will be eligible for
earned promotion in the minimum time" for a consecutive period of twenty four (24) months after reaching the top of progression in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will earn promotion to the next higher level of job classification in twenty four (24) months after reaching the top of progression.

B. Earned Promotion But Not in the Minimum Time – A designation of "will be eligible
for earned promotion but not in the minimum time," for a consecutive period of thirty six (36) months after reaching the top of progression, in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will earn promotion to the next higher level of job classification at the end of the 36 -month period if a candidate for advancement to Grade 1. Employees will not be eligible for advancement to Senior Grade unless they meet the requirements of Paragraph A which requires an employee to be rated outstanding for twenty four (24) consecutive months.

C. Not Eligible for Earned Promotion -A designation of "will not be eligible for earned
promotion in the foreseeable future," in Section V, "Eligibility for Earned Promotion," on the Performance Appraisal Form, means that the employee will not earn promotion to the next higher level until the progress and development improves.

D. Performance Change -If an employee's rate of progress and development has changed
such that it does not appear that the employee is eligible for advancement in the time period indicated during the last performance appraisal(s), it is urged that a current appraisal be provided as soon as practical after identifying the changed rate of progress and development with an appropriately modified designation in Section V on the Performance Appraisal Form. Such a change in the rate of progress and development should be brought to the employee's attention via a performance appraisal at least three (3) months before the expected date of earned promotion based upon the prior appraisal(s).

3. Article XVIII—Contract Work
The Company may let independent contracts.

At the time a contract is let, involving work customarily performed by employees on or after Jan. 1,1975, the dollar value of which will be in excess of $50,000, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such contract irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

At the time a purchase order is let, involving work customarily performed by employees on or after January 1,1975, the aggregate cost of which will be in excess of $50,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

In the event a purchase order is let, involving work customarily performed by employees on or after January 1,1975, the

aggregate cost of which is not anticipated to be in excess of $50,000 in a year and it becomes apparent that the aggregate cost of said order will exceed $50,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available in the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.

Furthermore, in the event that employees have been demoted or laid -off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromoted demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

4. July 1, 2014 Side Letter Agreement Amending Article XVIII—Contract Work

At the time a contract is let, involving work customarily performed by employees on or after August 1, 2014, the dollar value of which will be in excess of $250,000, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such contract irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

At the time a purchase order is let, involving work customarily performed by employees on or after August 1, 2014, the aggregate cost of which will be in excess of $250,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

In the event a purchase order is let, involving work customarily performed by employees on or after August 1, 2014, the aggregate cost of which is not anticipated to be in excess of $250,000 in a year and it becomes apparent that the aggregate cost of said order will exceed $250,000 in a year, the Company will inform the appropriate Union Delegate of, and discuss the reasons for, the letting of such purchase order irrespective of whether such work is to be performed on Company premises or elsewhere. The notification will be confirmed in writing by the Division Management involved.

However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available in the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.

Furthermore, in the event that employees have been demoted or laid -off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromoted demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid -off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

This Agreement shall remain in effect until 12:01am on June 1, 2018, and may not be modified without the mutual consent of the parties hitherto.

5. Article XXVI—Work Performance
Section 6–Performance Reviews

The performance of employees will be evaluated and reviewed by Management on a regular and consistent basis in accordance with the established Company -wide procedures. The procedures may be revised by the Company as necessary, after Management has consulted with the Union and taken its views into consideration.

Section 7–Unsatisfactory Work Performance

A. When the work performance of an employee is unsatisfactory, Management will call to the attention of the employee the shortcomings of the employee's work as part of the routine supervisory function and will attempt to assist the employee to improve the employee's performance. Employees whose work is deemed unsatisfactory after the prescribed remedial steps may be subject to a formal discussion with a supervisor, demotion, written warning or termination.

B. Any employee whose work is unsatisfactory and has not been made satisfactory as a result of prior informal discussion will be called in by the employee's supervisor for a formal discussion. The employee will be told of the elements of the employee's work which are inadequate and the ways in which the employee's performance may be made satisfactory. The

employee may request that a Union representative be present at such discussion. The fact that such discussion was held will be subsequently confirmed in writing to the employee, with a copy to the Union.

C. During such discussion, Management may inform the employee that if the employee's work performance has not become satisfactory within a specified period of time (for example, 30 days, or some longer period), the employee may be demoted. If the employee's performance does not become satisfactory during the period specified, the employee may be demoted to a job with a lower rate of pay in the Promotional Group.

D. At the time of such discussion, or subsequent thereto, Management may determine that the work performance of the employee is so unsatisfactory as to warrant a warning notice, and may give the employee such notice. The warning notice will state the basis of Management's determination that the employee's work is unsatisfactory, the improvements in performance required, the period of time to which the warning notice applies, and that unless the employee's performance improves sufficiently within the time specified, the employee's employment may be terminated at the expiration of the warning notice or within six (6) months thereafter. A copy of the warning notice will be sent to the Union, and the Union will be notified in advance if the employee will be terminated.

E. The period of time in which a warning notice for unsatisfactory work performance is effective varies according to the circumstances of the case, but is ordinarily not less than thirty (30) days nor more than six (6) months.

F. A warning notice for unsatisfactory performance will be removed from an employee's file two (2) years after its expiration.

6. Article XXVIII—Management Rights

The Company shall retain all rights of management for facilities covered by this Agreement or pertaining to the operation of business, except to the extent that such rights are limited by the provisions of this Agreement.

D. Contracting of Unit Work

The contracting out of unit work was an issue prior to the commencement of bargaining over a new CBA. The issue emanated from the July 21, 2014 side letter agreement, which amended Article XVIII – Contract Work. In or around November 2015, the Company began permanently contracting out certain unit positions. On August 25, 2016, the Union filed unfair labor practice charges alleging that the Company replaced unit employees "with contractors supplied by third-party joint employers without paying union wages/benefits or recognizing the Union as the bargaining unit representative of said employees." The Board deferred the charges to the parties' grievance procedure and the Union promptly grieved the contracting issue. The Company denied the grievance and the Union submitted the dispute to arbitration. Arbitration hearings were conducted on August 4, 2016 and October 18, 2017.

On May 25, arbitrator Joyce Klein concurred with the Union's assertion that the Company violated the CBA by permanently filling bargaining unit positions with contractors and directed "that the Company cease and desist from the permanent contracting of bargaining unit positions" at the Clinton facility. The arbitrator determined that the Company's broad management rights regarding the contacting out of unit work were overridden by the "limitations inherent both in the plain language of Article XVIII and in the Recognition Clause." On June 20, the Union filed a motion to confirm the arbitration in United States district court. In August, the Company filed a motion to vacate the arbitration award but subsequently withdrew its petition to enforce the arbitration award.

E. Excused Absences with Pay

The Union also filed unfair labor practice charges regarding "excused absence with pay." On May 5, 2016, the Union filed Case 22-CA-175772 alleging, in relevant part, that the Company unilaterally changed a term and condition of employment by refusing to grant an employee "excused absence with pay." In that regard, a bargaining unit employee was granted time off from work with pay for the birth of his child using a mixture of vacation days and "excused absence with pay" in accordance with Article X, Section 8 of the contract entitled "Time Paid During Regular Schedule." Upon the employee's return to work, his supervisor informed him, "Union represented employees only receive personal time for jury duty and a death in the family and this is because the Union is getting more aggressive." The parties resolved this charge through an informal settlement agreement requiring the Company to post a notice and pay the affected employee's lost wages.

On September 29, 2016, the Company issued a letter clarifying that represented employees are entitled to absences "excused with pay" only for jury duty and a death in the family. The Company explained that "[f]or items such as doctor's appointments, home maintenance appointments, family medical issues, baby bonding, and other issues that may arise, employees have the right to vacation time as outlined in the [CBA] or excused without pay." In response, the Union filed Case 22-CA-187777 on November 7, 2016, alleging that the Company unilaterally ended the practice of "excused absence with pay" for baby bonding in retaliation for the Union filing Case 22-CA-175772. The Board's Region 22 dismissed the charge and the ensuing administrative appeal was denied.

In November 2017, the Company implemented a parental paid time off policy (PPTO) granting employees eight weeks paid time off for the birth or adoption of a child. At the Company and Union's quarterly meeting in December 2017, however, the Company clarified that PPTO did not apply to bargaining unit employees. The Union requested to bargain over PPTO on or about January 29 and again on February 28, but the Company insisted that discussions be put off until negotiations for a successor agreement commenced.

F. Changes to the Performance Approval Process

In accordance with the CBA, unit employees' performance

evaluations are conducted annually for the previous calendar year. Prior to 2018, the evaluation forms specified eleven criteria: job knowledge; reliability and consistency of performance; working with supervisors, peers and customers; initiative and supervision required; adaptability and flexibility in responding to changes; punctuality and attendance; safety/health/environment; supports diversity; other; overall equality of work; and overall quantity of work. As of March, the form also listed five categories in rating overall assessment of performance: outstanding; exceeds expectations; meets expectations; needs improvement; and unsatisfactory. The eligibility for promotion section required supervisors to identify whether an employee was eligible for promotion in the minimum time, eligible for promotion but not in the minimum time, or not eligible for promotion.[4]

On March 7, Giglio informed Myers that the Company intended to change the performance appraisal process for 2017.[5]

> Please let this email serve as advanced notice of changes to the Wage Performance Appraisal Process per Article XXVI, Section 6 - Performance Review, as outlined in the attached letter. There are no changes or implications to the current Employee Development Review (EDR) process. Please let me know if you have any questions or wish to discuss this matter further. Thank you.

Giglio's email proposed removing the dimensions of performance from the performance appraisal form. His letter attached to the email read:

> The purpose of this letter is to provide you advanced notice of the proposed changes to the wage performance appraisal process per Article XXVI, Section 6 - Performance Review, as outlined below. There are no changes or implications to the current Employee Development Review (EDR) process.
>
> Summary of Changes:
> Performance measured by current job assignment expectations, strengths, and developmental opportunities of each employee:
> - Details of Current Assignment (comments only)
> - Strengths (comments only)
> - Development Opportunities (comments only)
> - Overall Assessment (rating based on above-mentioned comments)
> - Eligibility for earned promotion excluded from performance appraisal form
> - Performance Appraisals in the form of a SharePoint list (hard copies available to print, as requested)
> - Overall Assessment–2 categories (Meets Requirements & Does Not Meet Requirements)
> - Does Not Meet Requirements should be interpreted by the Union as Needs Improvement and/or Unsatisfactory. The Company will continue to follow the guidance outlined in Article XXVI, Section 7 – Unsatisfactory Work Performance for these cases
>
> Please let me know promptly if you have any concerns or questions on these items- happy to discuss further.

Myers replied on March 8 that the Union was reviewing the proposal and asked that it not be implemented until it had an opportunity to bargain over the change. He also asked for clarification as to whether the Company planned to implement this new system for 2017 evaluations. Naquin, replying shortly thereafter, explained that the Company intended to implement the new evaluation process in the near term as part of the 2017 performance evaluation process." Citing Article XXVI, Section 6, she expressed the Company's willingness to "take the Union's views into consideration but ask that you share those with us as soon as practical given the time-sensitive nature of the performance appraisal process." Giglio confirmed Naquin's remarks the following day.

On March 14, Myers and Fredriksen met with Giglio. Myers asked if the proposal was a corporate-wide change or limited to the Clinton facility. Giglio told him that the Company had been reviewing the performance appraisal process since December 2017. Myers asked why the Union had not been involved sooner with the proposed changes. He expressed concerns about a performance appraisal process that evolved from five categories to a system that simply reported whether an employee was or was not doing his/her job. He further explained that employees wanted to know how they were doing in the various facets of their jobs and be acknowledged when they performed beyond their job expectations. Giglio explained that "they were making this change because unless people received an outstanding rating, they're often unhappy with the process, so they wanted to get rid of that."[6]

Giglio met again with Myers and Fredricksen on March 17 in response to the announced changes. The Union objected to the changes and several emails followed. On March 20, Giglio emailed a summary of the discussions from the March 14 meeting. On March 23, Fredricksen sent an information request regarding the announced changes. Giglio provided the requested information on March 27. Giglio responded to Fredricksen's March 26 email on March 28 stating, in relevant part, that the Company would implement the change in the performance appraisal form as of March 28.

The Union objected to any changes in the performance evaluation process for the 2017 assessment period on the grounds that employees were not notified of the change in rating criteria prior to the start of the assessment period and its retroactive application. The Company disagreed, maintaining that it provided the Union with the requisite notice under the CBA on

[4] Myers testified credibly that his performance evaluations were done sometime between June and November following the evaluated year. (GC Exh. 6, 12; Tr. 35.)

[5] mGiglio conceded that the Company had been planning the change since December 2017 but neither notified nor consulted the Union because it wanted to have the new change in place before giving notification. (Tr. 48, 192).

[6] This finding is based on Myers' credible and unrefuted testimony. (Tr. 46–50.)

March 7 and followed it with consultation on March 14.[7]

At the March 14 meeting, however, Giglio claimed that "needs improvement" and "unsatisfactory" would not both fall into the newly created category of "does not meet requirements." When questioned about his explanation in the March 7 email, Giglio responded, "I guess I did not read what I signed."

Giglio rejected the Union's objections in subsequent emails on the grounds that this CBA provision is not limited to the yearly performance rating. On March 20, he rejected the Union's request not to use the new form in assessing 2017 performance because it learned of the change too late:

> The Company's position remains that it intends to utilize the updated performance appraisal forms for the upcoming assessment period. In accordance with Article XXVI, Section 6 – Performance Review, the Company gave the ILEU advanced notice of its intent to update the appraisal process and furthermore provided a reasonable amount of time to take its views into consideration. The Company's formal notice on March 7, 2018 and verbal discussion on March 14, 2018 to understand the ILEU's views and specific recommendations took place in advance of the performance appraisal process being kicked off.

Giglio also dismissed the ratings change from "needs improvement and/or unsatisfactory to "does not meet requirements" on the grounds that Article XXVI, Section 7 did not change past practice because it is utilized to address concerns for unsatisfactory "work performance." Finally, Giglio asserted that the Company notified the Union of the proposed changes, offered it an opportunity to consult, and took the Union's views into consideration prior to implementation.

On March 26, Fredriksen replied to Giglio and Naquin with "some corrections/additions" to Giglio's March 20 email:

> More accurately, the [Union] expressed their disagreement with changing the wage performance appraisal system membership had already after the worked under the expectation they were being evaluated the same way they had been since at least 1996. This change is ex post facto, and the [Union] finds this unfair to the membership.
> * * * * * *
> In the meeting, there was a lot of confusion over "Does Not Meet Requirements should be interpreted by the Union as Needs Improvement and /or Unsatisfactory." Russ said this had to be addressed. In response, the [Union] seeks clarity on this point: is the new "once- yearly performance rating" process divorced from administration of Article XXVI, Section 7
> . . . .
> Russ stated that development of this new process had begun in December 2017, and that he first became aware of it in Jan 2018. The Union was not consulted at all until the Company was fully ready to implement the process, as is evident by the alarmingly rapid deployment. Russ was unable to fully articulate the new performance appraisal process on March 14, and yet calendar appointments were sent out across the company as early as the very next day.
>
> When the Union made a proposal over PPTO on January 29th, with a follow-up on February 28th, Russ responded: "we suggest that the impending formal contract negotiations (approximately 2 months hence) presents a better opportunity to comprehensively consider and address this issue, which requires significant internal discussion and analysis."
>
> The Union estimated three people would qualify for PPTO between now and the end of the contract. The Company provided less than two weeks notice for a change that will directly affect the entire bargaining unit. There was no true interest in hearing any of our ideas. Why is a topic of this magnitude not being addressed at negotiations?
>
> We are aware that evaluations have already taken place. Again, evaluations were scheduled the day after we met – March 15 – and took place the business day after your last correspondence – March 22.
>
> The lack of interest in attempting to obtain a meaningful input from the Union has yet again left us in a sour position. As stated in our March 14th meeting, the Union believes that involving us early, and negotiating in good faith, would more easily facilitate the arrival of mutually agreeable terms for any and all changes the Company would seek to make.

On March 26, Fredriksen also requested information relating to unit employee performance appraisals for the previous three years: total number of performance appraisals given; and number of performance appraisal assessments rated at each of the categories in the "Overall Assessment of Performance" (Exceeds Expectations, Meets Expectations, Needs Improvement, and Unsatisfactory). On March 27, Giglio provided the information, listing the total number of performance appraisals rated at the applicable levels for 2014, 2015 and 2016.

On March 28, Giglio replied to Fredriksen's March 26 email protesting the unilateral change as a fait accompli:

> Thank you for clarifying your concerns related to this matter. The Company has and will
> continue to seek improvements in all business processes, including but not limited to wage performance appraisals. Further, the Company will continue to follow the existing agreement for the consideration and implementation of any and all changes.
> ***
> The "new once-yearly performance rating" could result in an individual being subject to
> Article XXVI, Section 7- Unsatisfactory Work Performance in the same manner, and to the same extent as at any other point in the performance cycle when the individual's work performance is determined to be unsatisfactory. The Compa-

[7] Giglio testified that under the new performance appraisal form "there is no hurdle of two outstandings" for an employee to be accelerated into the next pay increase level, which he recognized is not consistent with the collective-bargaining agreement's requirements. (Tr. 270).

> ny has already clearly articulated that Article XXVI, Section 7 - Unsatisfactory Work Performance has always;:
> been interpreted and applied to facilitate contemporaneous performance management. Again, this is no change from historical administration of the agreement.
> ***
> As stated in the Company's March 7, 2018 notification letter, "The purpose of this letter
> is to provide you advance notice of the proposed changes to the wage performance appraisal process per Article XXVI, Section 6- Performance Review, as outlined below. There are no changes or implications to the current Employee Development Review (EDR) process." The fact is that the EDR process has not changed. The Performance Appraisal form was modified to be a more appropriate tool for documenting management input and conclusions concerning employee performance. Employees are still afforded an opportunity to provide input, orally or in writing, in support of their performance accomplishments and knowledgeable other recognitions, or disagreement with his or her
> supervisor's evaluation.
>
> To clarify our March 14, 2018 discussion, the process to identify efficiencies and improvements to the wage performance appraisal process actually did not begin until the end of January 2018. Whether "calendar appointments were sent out" on the day following our discussion is not relevant. Calendar appointments are merely placeholders
> for a discussion that occurs on a yearly basis. We can, however, verify to you that to date no performance appraisal document or formal Communication initiating the 2018 performance appraisal process has been sent out to supervisors[8]; and this is because the Company has delayed initiation of the process to insure the Union more than ample time to address its concerns regarding this minor change in accordance with Article XXVI, Section 6 – Performance Review. Because the Company has notified the Union and provided the Union with ample time to provide input, and has given reasonable consideration to the Union's input prior to formal implementation of the new form, it is now the Company's intention to formally initiate the performance review process for the 2017-2018 performance period.

On March 28, Fredriksen thanked Giglio for his timely response and requested a copy of the most recent performance appraisal template. Giglio provided a copy a short time later.

The change was rolled out without the next several months, as evidenced by Myers' most recent evaluation in August. At that time, his supervisor, Kathleen Edwards, handed him the "2018 Performance Assessment" for the 2017 calendar year. In accordance with the Company's custom and practice, she discussed the assessment and incorporated his comments in the form.

[8] That representation was not true, however, since at least one unit employee was evaluated in accordance with the new appraisal form in March.

G. Bargaining Over a Successor Agreement

1. Overview

The parties met on twenty-three occasions. The Union made thirty-four proposals, the Company made five and there were numerous modified versions of those proposals. Approximately fifty-four issues were discussed and the parties resolved about fifty of them.

2. The Parties Agree to Commence Bargaining

The Union sent the Company a request to bargain over a new agreement on March 28, along with an information request. Giglio responded on April 16 and, consistent with the parties' most recent bargaining in 2013, proposed seven meeting dates commencing on May 7. He proposed several ground rules and four "clean-up/housekeeping items." Myers replied on April 23, generally agreeing to the proposed ground rules changes and expressing the Union's willingness "to agree to extend the contract to June 15 as long as any agreement will be retroactive to June 1." Giglio replied on April 27 that it was "premature to consider a contact extension at this time. The Company's expectation is that both parties work diligently to reach an agreement by June 1, 2018, 12:01 a.m." Myers replied on May 2 with proposed minor changes. The parties agreed to commence bargaining on May 7 but did not, however, reach agreement regarding the timing and location of the ratification meeting or whether non-economic proposals would be bargained to conclusion prior to discussing economics.

3. The May 7 Bargaining Session

On May 7, the Company and the Union commenced bargaining for a successor contract. Giglio opened by reiterating the Company's preference that the parties reach tentative agreement on noneconomic issues before addressing economic proposals. The Company and the Union then exchanged written proposals. After a four hour recess to review the Union's thirty-four proposals, the Company returned and Giglio explained that "there were a number of proposals where the verbiage either didn't match the CBA or there was a lot of the section left out." He proposed "going forward . . . to standardize the format the way we provided our proposals to you. Take the entire section of the CBA that you are looking to make changes to and delete, you know, put a line through what you propose, deleting and highlight. . . . I think it will make it a lot more efficient going forward." Myers responded by asking if Giglio had "any particular proposals that were questioned." He did not directly respond to Giglio's suggestion, but the parties started the discussions by focusing on noneconomic proposals. Both proposals included competing amendments to Article XVIII and the Company's ability to contract out bargaining unit work. The Union's proposal (U-31) replaced Article XVIII with the following:

> The Company may let independent contracts. The purpose of independent contracts is not to erode the bargaining unit or restrict or limit its growth.
>
> The company will not use contractors for more than a maximum of 5% of the total Represented work force or 10% of any given job family. Number of contractors engaged in Pro-

> ject work in the trades are not limited or included as part of the total count towards the maximum limit.
>
> No position will be contracted for more than six months without the consent of the
> Union.
>
> Furthermore, in the event that employees have been demoted or laid-off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities, will (1) repromote demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

The Company's contract work proposal (C-2) eliminated the threshold dollar amounts and the requirement that the Company notify the Union before contracting out work:

> The Company may let independent contracts.
> However, during any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available In the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.
>
> Furthermore, in the event that employees have been demoted or laid-off because of lack of work, the Company, prior to letting out future contracts involving work customarily performed by employees and provided that all the equipment necessary in the performance of such work is available in the Company facilities will (1) repromote demoted employees qualified to perform such work, and (2) recall, in accordance with Section 1 of Article IX, laid-off employees qualified to perform such work, provided the employees conduct and the job performance prior to and during such layoff were satisfactory to the Company.

4. The May 14 Bargaining Session

Giglio opened the second day of bargaining by informing the Union that the Company's negotiators were not authorized to extend the CBA past June 1. He expected the parties to proceed as efficiently as possible in bargaining over their respective proposals but raised "the possibility of, come June 1st, we say, 'Wow, we just reached impasse.' And if that is the case, the Company would give you a last, best, and final. We hope not to do that. We hope that collectively we will reach an agreement on each one of those proposals and side letters, but that is the way the process works."

Myers replied that he was surprised by the number of issues that the Company considered noneconomic. Giglio recapped the Company's four issues: twelve-hour standard shifts, contracting out work, the grievance procedure, and the direct payment of dues to the Union. A bunch of items stacked under "housekeeping," however, amounted to a fifth set of issues.

The parties exchanged written proposals again. The Company responded to each of the Union's noneconomic proposals, including contracting, PPTO and personal time. The Company's contracting proposal remained the same as the one that it proposed on May 7.

5. The May 16 Bargaining Session

On day three of bargaining, the Company modified its contracting proposal to amend Article XVIII as follows:

> The purposes of independent contracts is not to erode the bargaining unit nor to restrict or limit its growth.
> The Company will not use contractors for more than a maximum of 5% of the total Represented workforce or 10% of any given job family. The number of independent contractors engaged in project work in the trades are not limited as part of the total count towards the maximum limit.
> No position will be contracted for more than six months without consent of the Union.

When Giglio got to the Union's contracting proposal, however, he said there was no "need to spend a lot of time on that right now because that one is where there is a very, very wide gap between [the proposals], and I don't see that gap narrowing significantly with more debate at this point in time, unless you care to discuss it." Myers replied that "a large gap would be reason to discuss it." Extensive discussion ensued over the Company's rationale for contracting flexibility and resistance to any limitation on such authority. Pressed by Myers for an explanation, Giglio revealed the Company's bottom line:

> Because it is untenable. Number one, it is not the way we run our business. At the very worst case that we are talking about here, Mike, which is why I wanted to defer discussion about this, we will live with it as it is written. We are not going to make these changes. If you are not going to be agreeable to deal with the changes that we have proposed, I can tell you that these are not changes that the Company would be interested in. So, I mean, we can continue to talk about it. We can continue to debate it, I have no problem with that, but I think we are so far apart on this that it probably won't resolve itself by living with the existing language.

6. The May 21 Bargaining Session

During the fourth day of bargaining, the parties agreed to several proposals and the Union modified several proposals and withdrew eight others. Among the proposals agreed to by the Company were nearly all of the Union's items relating to benefits, including health dependent care leave and an educational refund program. However, the Company did not acquiesce to the Union's proposal for four weeks of PPTO. Instead, Giglio asked the Union to provide data as to how many unit employees might benefit from such leave. With respect to contracting out unit work, the Company's proposal remained unchanged.

At the end of the session, the Company requested a copy of the Union's bylaws and posed several questions: whether the Union had a strike vote in place; the time, date and location of the ratification vote; the "verbiage" the Union planned to use on the ballot for a ratification vote; the process to be used for the ratification vote; who would conduct the count for the ratification vote; and how the Union would inform employees of the results.

7. The May 24 Bargaining Session

Myers and Giglio opened the fifth bargaining session by briefly addressing the Company's information request from the previous day. Then they engaged in legal jousting over whether the Company's reliance on accrued vacation time, as opposed to personal time, sufficed in complying with New Jersey's new disability law. That debate was followed by extensive discussion regarding the Union's PPTO proposal. Giglio asserted that the compensation packages of non-represented employees indirectly paid for those benefits and then asked what the Union offered in return. Myers asked what non-represented employees paid for such benefits. Giglio did not have an answer but said he would look into it.

After the lunch break, the parties discussed the Company's contracting proposal and its desire to address spikes in workload with contractors in lieu of hiring and firing employees. The Union challenged the Company's contention that there had been spikes in demand and the parties discussed the cost benefits of employing contractors versus employees. Myers concluded that discussion by suggesting that the parties move on since the matter was in the midst of arbitration.

Giglio and Myers also argued over personal time and the Company's insistence on leaving it to supervisory discretion. Giglio attributed the Company's position to the Union's previous unfair labor practice charge, and Myers replied that it amounted to retaliation.

The Union withdrew five proposals for a total of fifteen withdrawn to that point. Otherwise, the status of the proposals on contracting, personal time, and PPTO remained the same as the parties' May 14 proposals.

8. The May 25 Bargaining Session

Myers opened the session the following day by explaining the Union's economic proposals, including a discussion of position descriptions. There was also discussion about the number of contractors that have been brought in since 2013. Myers asserted that ninety-six percent of all new hires since 2013 were contractors and opined that contracting was being used to screen new hires. After the lunch break, Giglio said that the Company would review the Union's economic proposals and come up with a counteroffer. The session concluded with agreement on several items and disagreement on several others. However, there was no change in position regarding contracting, personal time, or PPTO.

9. The May 25 Arbitration Award

On May 25, arbitrator Joyce Klein issued an arbitration award regarding a 2016 grievance challenging the Company's ability to permanently contract certain work. The Company took the position, based on Article XVIII and its long-standing practice, that its contracting rights were limited only to the extent that they would not result in layoffs. The arbitrator, however, rejected that position, ruling that irrespective of layoffs, the Company could not prospectively contract permanent jobs. The award did not limit the Company's rights on temporary contracting.

10. The May 29 Bargaining Session

The parties started the seventh bargaining session by following up the discussion from May 25 regarding several economic items. The Company countered with a package that included a proposal to eliminate Side Letter 100 and add a safety shoe subsidy if the Union agreed to withdraw its unfair labor practice charge regarding the alleged changes to performance appraisals. The Union's counter declined to address withdrawal of the charge at that point but included several concessions, as well as a modified proposal on personal time.

After reviewing the Union's proposals during the lunch break, Giglio returned and stated that the parties were far apart and the Company was not going to counter the Union's latest proposals. He did, however, say that the Company would provide a modified contracting proposal at the next session.

The discussion then turned to the Company's wage rate proposals for a seven year contract and the Union's request for copies of other CBAs agreed to by the Company. Giglio and Naquin objected and raised the matter of their May 21 request to the Union for information regarding its voting process for ratification and going out on strike. Myers explained that the Union did not see the relevance regarding its internal processes and noted that the Company initially rejected the Union's ground rule proposal to allow for ratification votes during work time as had been allowed during past negotiations. He concluded by asking whether the Company obtained information as to how non-represented employees paid for PPTO. Giglio simply replied "not yet" and did not address the ratification issue further. Otherwise, there was no discussion of the parties' proposals on contracting, personal time and PPTO.

11. The May 31 Bargaining Session

The eighth day of bargaining focused mostly on wages. Early on, however, Giglio requested a brief side bar meeting. During that encounter, he handed Myers a revised contract work proposal, acknowledged that the Union won the arbitration, and expressed the Company's desire for a solution. Giglio then proceeded to say that the Company would not agree to the Union's personal time proposal, but suggested that employees would not notice it because of the additional compensation that the Company would agree to.[9]

The Company's proposal included an agreement not to appeal or challenge the May 25 award and apply it only prospectively, eliminated the dollar thresholds, eliminated the permanent contracting of research technicians through attrition but permitted it for the materials, trades, graphics, and admin technician positions, permitted the continuation of temporary contracting, and eliminated any obligation to replace contractors with employees. Myers reviewed the proposal and replied that

[9] Giglio did not refute Myers credible testimony regarding this remark. (Tr. 86, 274–275.)

it was "not going to work." Giglio replied that it was just a first draft. At a subsequent side bar meeting, the parties agreed to extend the CBA until June 9.

Aside from the side bar discussion, the rest of the session focused on the Company's presentation of wage data and discussion about technical changes to contract language. The parties recessed early in order to caucus and for Giglio to return with a modified proposal. Instead, however, the parties resumed off-the-record discussions in the hotel bar.[10]

12. The June 4 Bargaining Session

During day nine of bargaining, the Union countered with eight weeks of PPTO, personal time as proposed on May 7, a requirement for new employees to join the Union within thirty days, the discontinuation of one day of leave for United Way contributions, pay schedules, and standardizing the twelve hour non-standard shifts. It also objected to the permanent contracting of positions but agreed to remove the audiovisual, reproduction, accounting and administrative positions from the bargaining unit and keep the sixteen mechanics as unit employees while consenting to the permanent contracting of future mechanic hires. Finally, the Union also rejected the proposal to limit future interpretation of the side letter to its terms to the exclusion of the Act, prior awards, standards, practices or any applicable provisions in the CBA.

After caucusing, the Company partially responded to the Union's counter proposal, offering in pertinent part: to refrain from appealing the arbitration award; amend the side letter by eliminating monetary thresholds; refrain from permanently contract out wastewater treatment and utility operators, research techs, electronics techs and information techs through attrition or as vacancies occur; allow contracting in lieu of hiring research techs, electronics techs and information techs for work fluctuations and other short term or discrete business needs; continue temporary contracting practices, including the right to utilize contractors to staff relative to projects, work fluctuations and other short term or discreet business needs; continue to contract any jobs contracted as of June 1, 2018; and permanently contract materials, mechanics, graphics, and admin techs. The Company also proposed to render the May 25 award and the Act inapplicable for future interpretation of the letter agreement;

Giglio also said that personal time was "not going to happen." The parties then caucused for three hours before resuming late in the afternoon. The session concluded shortly thereafter, with Giglio emphasizing that the parties needed to reach closure on the contracting issue before it was able to present its last, best and final offer.

13. The June 5 Bargaining Session

At the tenth bargaining session, the Union countered the Company's June 4 proposal. Myers stated at the outset that the Union was "not interested in changing the scope of the bargaining unit" and would only consent to the contracting of services trainees. Otherwise, the Union maintained its position regarding safety shoe allowances, PPTO and eliminating the United Way day off practice. The Union also modified its proposal by limiting the twelve-hour non-standard shift to operations requiring "24/7 staffed operations." The Union also restored the 8% temporary pay increase, specific overtime pay differentials, a $5,000 ratification bonus, and pay increases of 7.5% in year one, 5% in year two and 5% in year three.

In response, Giglio asserted that the Union's counterproposal limiting contracting out to services trainees regressed from the previous negotiations over eleven items in the side letter. He was "willing to speak about everything" but warned that the Company would be unable "to talk bundles until we nail down the contracting out verbiage."

After extensive argument over the issue, the parties caucused and reconvened about an hour later. The Company proposed a package that included the contract work side letter proposal from June 5, the safety shoe subsidy, limited the twelve-hour non-standard shift, discontinued the United Way Day off, and one week of PPTO if the Union withdrew its unfair labor practice charge relating to the performance appraisal form.[11] The Company opposed the Union's agency shop provision and its revised personal time policy, and urged dropping these proposals to finalize the contract. The Company also submitted its first wage proposal: a $2,500 ratification bonus and a five-year contract with step pay increases: 1% in year one, 1% in year two, 1.5% in year three, 2% in year four, and 2.5% in year 5. Giglio concluded by stating that the Company would consider the Union's suggestion that the parties seek the assistance of a federal mediator.

14 The June 8 Bargaining Session

Giglio opened the eleventh bargaining session by announcing the Company's agreement to extend the CBA during negotiations. He reiterated the Company's position as the one presented on June 5 and proposed discussion over contracting, the twelve-hour shift and wages. Myers replied by reiterating his proposals of June 4 and 5.

The parties then engaged in extensive discussion over the Company's proposal for one week of PPTO. Meyers asked if the Company ascertained how it paid for the PPTO afforded to non-represented employees, but neither Giglio nor Naquin had an answer. No progress was made on that issue. The Company then went through its revised wage and benefits proposal, and the parties broke with an agreement to meet again on June 19.

15. The June 19 Bargaining Session

At the thirteenth bargaining session, the Company reiterated its proposal from June 5, including one week of PPTO and no personal time. After extensive arguing as to the applicability of the arbitration award and whether it was retroactive, the Union countered the Company's June 5 proposal by agreeing to the permanent contracting of the audio visual, reproduction, and

[10] Giglio testified that he was optimistic about an impending deal after the bargainers met for drinks later on. However, whatever transpired during that dialogue was not documented and Giglio did not refute Myers' credible testimony that he rejected the proposed C-2 side letter almost immediately after being presented with it during the first side bar meeting that day. (Tr. 85-87, 277–279.)

[11] Giglio's testimony that the Company previously proposed one week of PPTO during "the second or third bargaining session" was incorrect. (Tr. 261).

accounting positions, in addition to the attrition of administrative positions and maintaining at least twenty mechanics. The Union's revised proposal otherwise prohibited the Company from permanently contracting out the positions listed in the recognition clause without its expressed permission but agreed to temporary contracting out "to manage fluctuations in workload and other short term or discrete business needs. The Company may not utilize a contractor in the same position for more than 12 months without consent from the Union."

Frustrated with the Union's new proposal on the contracting issue, Giglio announced that the contract would expire in forty-eight hours. With about an hour left in the bargaining session, the Company clarified its shift proposal. The session concluded after further accusations that neither party budged from their proposals—the Union's May 31 counteroffer and the Company's June 5 proposal. Giglio also rejected Myers proposal for a mediator.

16. The June 25 Bargaining Session

At the thirteenth day of bargaining the Company maintained its position from June 5 with respect to contracting, one week of PPTO, and no personal time. The Union submitted a revised counterproposal agreeing to withdraw the charge relating to the performance appraisal form in return for eight weeks of PPTO and personal time for births/adoptions (five days), and severe and discretionary emergencies (16 hours annually for each). It also proposed to withdraw its agency shop proposal and discontinue the United Way Day off. The wage proposal included a $5,000 ratification bonus and a four year contract with pay increases of 5% in year 1, 3% in year 2, 3% in year 3, and 3.5% in year 4. The shift proposal was modified to specify a normal work weeks of either thirty-six hours or forty-eight hours based on mutual agreement between the parties and an eight percent shift differential.

The Union's revised counterproposal also reduced the number of mechanics from twenty to sixteen and increased the number of days the Company could utilize contractors in certain bargaining unit positions from sixty days to ninety days without extending a permanent job offer due to demonstrated spikes in workload. Auto mechanics and medical positions, however, would remain under the twelve month limit.

Giglio branded the counterproposal as "incredibly regressive" and expressed displeasure that the Union had not closed the gap with the Company's contract work side letter proposal. He also noted the difference between the proposed wage increases. Giglio emphasized that the Company had been "clear since Day 1 that we weren't looking to fill what we consider noncore positions permanently with contactors.[12] That is what we are bargaining for. . . . All I can tell you is that we have been consistent for as long as we have had proposals on the table and that is what we are looking for and you are not making any progress whatsoever in that area."

17. The June 29 Bargaining Session

Giglio opened the fourteenth bargaining session by describing the parties' bargaining effort as having lasted already more than doubled the amount of sessions compared in 2013 and nearly 2,000 hours of employee and management participation. He asserted that that the parties were moving closer to an agreement until June 4 when the Union's proposals submitted a regressive proposal and then failed to submit a good faith counteroffer to the Company's June 5 proposal and, in particular, the Company's "primary outstanding proposal in contracting out."

Giglio then conveyed the Company's last, best, and final offer (LBFO). It also included a $5,000 ratification bonus and one week of PPTO but no personal time. The proposal did not include any economic concessions. Its revised C-2 portion stated the following:

> 1. The Union agrees to immediately withdraw and dismiss with prejudice its current petition to confirm Arbitration Award. The Company and the Union will not appeal or challenge the Arbitration Award issued by Arbitrator Joyce Klein on May 25, 2018.
> 2. Paragraphs 2, 3 and 4 will be removed from Article XVIIII, and the supplemental Side Letter on notice and dollar thresholds is hereby terminated.
> 3. The Company will add the Auto Mechanic position to Exhibit II of the contract.
> 4. The Company will not permanently contract Research, Electronics, Sr. Info Tech, Info Tech/Asst., Sr. Wastewater Treatment Operator, Wastewater Treatment Operator, and Sr. Utilities Operator, Utilities Operator job families through attrition or as vacancies occur.
> 5. The Company may permanently contract Material & Service Coordinator, Mechanics, Graphics Design, and Sr. Admin Tech, Admin. Tech/Asst. job families through attrition or as vacancies occur.
> 6. The Company may continue, at its sole discretion, its current temporary contracting practices across all job families, including the right to utilize contractors to staff relative to projects, work fluctuations and other short term or discrete business needs.
> 7. The Company may continue to permanently or temporarily contract any positions contracted as of May 25, 2018.
> 8. Nothing in this Letter of Agreement or in the CBA shall be interpreted to require the Company to maintain a specific level of staffing or mixture of work.
> 9. Any arbitrator, court or government agency shall be limited to the express terms of this Letter of Agreement and shall not consider prior arbitration awards, custom, prior practice, industry standards, the NLRA, or the CBA's Recognition Clause, Work Classifications or other provisions in the interpretation of this Agreement, its terms or intent.
> 10. To the extent there is a dispute between Article XVIII or any other provision of the CBA and this Letter of Agreement, this Letter of Agreement shall govern.

Giglio warned that if the offer was not accepted and ratified by July 11 it would result in a significantly lower wage and ratification bonus offer. Myers repeated his view that the LBFO was premature, and the Union caucused to consider the offer.

[12] Considered in context with the record as a whole, Giglio apparently meant to say core instead of non-core position. (Jt. Exh. 13 at 33-34.)

Myers returned five hours later and stated that the Union was still reviewing the LBFO. He noted, however, that the offer was illegal because there were still other issues on the table and unfair labor practice charges had been filed. Giglio reiterated the deadline and predicted that the Company's next offer would be significantly lower. He said he would be willing to meet again on July 9 but the Union would only hear a "broken record:" the Company's LBFO. Myers replied that the bargaining committee would not recommend the LBFO for ratification. Giglio criticized Myers' response and accused him of misrepresenting 144 unit employees for the sake of preserving "13 jobs because we're not putting anybody out – those would be filled through attrition or vacancy." He implored Myers to bring the matter to his "constituency because I think they're going to say: Man, are you wrong, and maybe we elected the wrong guy . . . see how they feel about this offer because we're certainly going to tell them about it."

18. The July 3rd Employee Information Bulletin

The Company did just that. Following this session, on July 3, the Company sent an employee information bulletin to all employees at the Clinton facility:

> The purpose of this bulletin is to advise you that EMRE and the Independent Laboratory Employees' Union, Inc. (ILEU) have met for 14 collective bargaining negotiation sessions. The Company presented its last, best, and final offer to the ILEU on Friday, June 29, 2018 with an expiration date of July 11, 2018 at 12:01am. This offer was the result of many productive negotiation sessions between the parties and tentative agreement was reached on nearly all items. The offer is a good one, with significant and competitive benefits to the bargaining unit. The Company believes a longer-term contract is beneficial; with an uncertain economy, a longer-term contract provides greater continuity and clarity regarding general wage increases. This very fair and competitive offer should allow us to continue to be a world class research organization.
>
> The ILEU has informed the Company that it is considering the offer and the parties have agreed to meet and discuss on Monday, July 9, 2018. The ILEU has not yet informed the Company as to whether the offer will be presented to its membership for a vote. The Company believes that employees should have a choice in accepting the offer and deserve a chance to vote. If and when the ILEU brings the Company's last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.
>
> The key aspects of the offer are summarized below:
>
> - 5-year agreement (Date and Month Agreement is Ratified 2018 to Date and Month Agreement is Ratified 2023)
> - Annual wage increases of 1% Year 1, 1 % Year 2, 1.5% Year 3, 2% Year 4, 2.5% Year 5; and a $5,000 ratification bonus paid to all ILEU members upon acceptance of the offer if ratified on or before July 11, 2018 at 12:01am
> - Parental Paid Time Off (PPTO) 1 week per occurrence of birth /adoption of a child
> - Safety shoe allowance of $175 /employee (currently $150 /employee)
> - Overtime meal allowance of $10 /employee (currently $8 /employee)
>
> If you have specific questions regarding the full offer, please contact your supervisor or your Union Representative.
>
> Employee Information Bulletins (EIBs) such as this one will be sent to you via email and also posted on this SharePoint site. Any Clinton employee may respond to the "Submit A Question" survey on the SharePoint site anonymously or choose to include his/her name if requesting follow-up. Questions received from employees may be converted to anonymous FAQs for the benefit of the entire site population.
>
> As always, our number one priority is the safety of employees. Thank you for continuing to keep safety at the forefront.

19. The July 9 Bargaining Session

Myers opened the fifteenth session by reading a counterproposal to June 29 LBFO, which included: a safety shoe allowance; eight weeks of PPTO; discontinuance of the United Way Day; a four-year contract with no ratification bonus; a pay schedule of 2.5% pay increase in year one, 2.5% pay increase in year two, 3% pay increase in year three, and 3.5% pay increase in year four; non-standard shifts to be negotiated; and a personal time policy eliminating designated categories. The C-2 portion deleted the proposal that the Union withdraw its petition to enforce the arbitration award, agreed to continue temporary contracting for up to twelve months unless the Union agreed to a longer period, prohibited the permanent contracting of positions through attrition without the Union's consent, consented to permanently contracting certain bargaining unit positions but specifically rejecting the permanent contracting of others, required maintaining an agreed upon number of mechanics, and deleted the proposal to limit a court, arbitrator, or government agency's interpretation of this side agreement.

After discussing the Union's counterproposals, the Company caucused for three hours. Upon returning, Giglio attempted to elicit whether the Union was claiming illegality as to the Company's proposal that it withdraw the arbitration claim and/or agree to have the side letter override the Act. Myers explained that the Union would continue to object to any language that limited its rights under the Act. Giglio replied that the arbitration award was not retroactive.

At one point, the parties recessed for a side bar discussion where Giglio emphasized the Company's continued insistence on the discretion to contract out and that it was "not interested in personal time at this time, because of the Union's filing of the [unfair labor practice charge] in 2016 and its aggressive actions." When asked by Myers as to what the Union would have to do for the Company to agree to eight weeks of PPTO,

Giglio said, "go without a union."[13] When they returned, Giglio reiterated the Company's continued insistence for the right to contract out noncore positions. He characterized the Union's failure to yield at all on its proposal as regressive and "word-smithing." Fredrickson replied that the Company should not have the right to determine who should be excluded from the bargaining unit.

The parties also discussed included Myers' request to reinstitute labor-management quarterly meetings, supervisory discretion in granting personal time off, shift pay differentials, and the ratification bonus. Finally, the discussion turned to the Union's demand for eight weeks of PPTO, a benefit that is available to the Company's non-represented employees. Giglio stated that personal time "goes back to the issue we had that was resolved after the Union filed a ULP and was resolved in 2016, I guess, at the National Labor Relations Board." He explained that inconsistencies had led to grievances and unfair labor practice charges."[14] Myers then asked what the Company wanted in exchange for eight weeks of PPTO. Giglio said "[w]alk away from the bargaining agreement," adding that "[i]f you weren't covered by a [CBA], if you were exempt, you would have eight weeks of PPTO." He also noted that there were other ways to achieve the PPTO benefit and advised the Union to consult with counsel. Myers then asked, "So you are saying if [we] get [de]certified, you will give us eight weeks of PPTO?" Giglio replied, "You said that, I didn't."[15]

The meeting concluded with Myers asking to schedule another meeting. Giglio replied, "[n]o, I think you guys can take the vote." When asked by Fredriksen if Giglio would meet with them again, Giglio replied, "[i]f the contract is not ratified, we will certainly meet again."

20. The July 19 Bargaining Session

The parties met very briefly for the sixteenth day of bargaining since a stenographer was not available. The Company proposed a modified version of its LBFO. It reduced its previous offer of a $5,000 ratification bonus to $2,500 but withdrew its demands that the Union withdraw its petition to confirm the arbitration award and exclude the provisions of the Act from future interpretation of the contracting side letter.

21. E-mail dated July 25

On July 25, the Company emailed all employees at the Clinton facility a correction regarding the representations in the July 3rd employee information bulletin:[16]

> The ILEU notified the Company last week that our EIB of July 3, 2018 contained a statement that contradicted what the Company had presented to the ILEU prior to bargaining. The Company confirmed that the ILEU was correct, and we apologize. Specifically, the EIB stated relative to a potential ILEU vote on the Company's offer at the time that "it is expected that Unión members be provided reasonable time away from work to meet and vote:" The Company included the same statement in an MIB. The Company should not have said this.
>
> When discussing bargaining ground rules in early May before bargaining, the Company's
> last ground rule proposal to the ILEU included a proposal stating that the Company would not authorize employees to be away from work for ratification activities: The ILEU responded that it disagreed with this proposal. The parties agreed to move forward with bargaining. The Company communicated internally that it was agreeable to allowing employees time away from work to vote but never notified the ILEU or modified its proposal.
>
> Under the National Labor Relations Act (NLRA), the Company's EIB statement about time away from work to vote could be construed as what is called unlawful "direct dealing," meaning we bypassed the ILEU and made an offer directly to its members. That was not the Company's, intention, but the Company cannot present a proposal to employees that it has not already presented to the employees' union. The Company will not engage in any direct dealing in the future.
>
> The Company goes to great lengths to ensure that it always follows the law and always
> provides accurate information. Our mistake was not intentional. We had simply forgotten
> about the details arid final status of the ground rules discussions both internally and with
> the ILEU. That.is still no excuse, and again, we apologize. We also apologize to ILEU leadership: The parties have had their differences and disagreements during these
> negotiations, but the Company would never intentionally misstate or act unlawfully. We
> will be more diligent moving forward.
>
> We are sending this communication because we want to do what is right and we want to comply with the NLRA, which the above-described statement violated. To the extent that the Company's misstatement interfered with your and/or the ILEU's rights under the NLRA, again, the Company was wrong. It is our sincere desire to comply with the NLRA and all other laws. Therefore, going forward we will not do anything to interfere with your or the ILEU's rights.

[13] This finding is based on the credible and unrefuted testimony of Myers and Fredrickson, and corroborated by Giglio's subsequent comments at the table. (Tr. 101-102, 324-325, 334-335; Jt. Exh. 15 at 86.) Giglio's denial that he made the comment during the side bar was not credible given his subsequent comments on the record. (Tr. 263.)

[14] Giglio testified that he referenced the charges as examples of what happens when there is discretionary language. He also conceded that the Union previously proposed a personal time policy with specific categories and hour allotments. (Tr. 263, 266, 286; Jt. Exh. 86-87).

[15] Myers and Fredrickson understood the remarks to mean that unit employees would receive the same amount of PPTO as non-represented employees if they were not covered by the CBA. Giglio testified that he was being sarcastic and made the comment during bargaining "out of frustration." (Tr. 101-103, 160-162, 166, 263, 300, 325, 334, 341-343; Jt. Exh. 15 at 113-115.)

[16] Myers credibly testified that only bargaining unit employees received this e-mail, in contrast to the July 3 employee information bulletin, which was sent to all employees. (Tr. 113).

22. The July 26 Bargaining Session

The parties continued negotiations over the C-2 proposal on the seventeenth day of bargaining. There was no movement from the Union's July 9 proposal and the Company's July 19 proposal. Giglio acknowledged that contracting was the primary stumbling block and, as for the Union's refusal to agree to changes to the scope of the bargaining unit, "[w]e can't live with that." He reiterated that position later on, emphasizing that "[t]his is what the Company requires . . . if there is something that you need in return to make this happen, bring it forward, we are here to negotiate." Myers replied that the Union was not interested in the contracting proposal.

23. The September 4 Bargaining Session

During the eighteenth day of bargaining, the Union replied to the Company's July 19 proposal with a slightly modified version of its July 9 proposal relating to non-standard shift schedules. After a three hour break to caucus, the parties returned and Myers asked if Giglio had a counteroffer. Giglio replied that the Company was waiting for a counteroffer on the contracting issue and urged the Union to provide one in order to "wrap this whole thing up very quickly." He restated the Company's priority that core positions be staffed by employees and noncore positions permanently replaced by contractors once they become vacant.

During subsequent discussion, Fredriksen noted that noncore is not a term defined in CBA. Giglio agreed but asserted that it is a term mentioned during arbitration proceedings and "discussed across this table for quite a long time, and it is a term we can memorialize in the CBA going forward, if that is so desired."[17] There was, however, no movement on the contracting issue, leading Giglio to declare that "we have been as clear as we possibly can be that C2 is the linchpin in moving these negotiations forward. So we will continue to meet, but unless and until [the Union] gets serious about a counterproposal to C2, we are going to continue to do what we are doing and go through these exercises in futility."

Giglio did not directly address the Union's proposal for eight weeks of PPTO except to refer to it during the discussion on the contracting. He explained that there used to be an "unwritten process" that supervisors had the discretion to grant personal time off. However, that process ended when the Company attempted to formalize the process and the Union brought charges. Giglio concluded by remarking that "is why we won't agree to personal time, because this is the stuff that the [Union] brings forward." Personal time was, as Giglio described it, a "gravy train that has now moved on."

24. The September 27 Bargaining Session

During the nineteenth bargaining session, the Union submitted a revised counterproposal package, which included a $5,000 ratification bonus and a higher frontloaded pay increase proposal: 5% in year one, 3% in year two, 3% in year three, and 3.5% in year four. The Union agreed to maintain the Company's corporate personal time policy and proposed: non-standard shift schedules requiring Union notification prior to implementation; a forty-hour rest period; forty-eight hours of consecutive rest between days off; two out of every four weekends as scheduled days off; and no more than three switches between the standard shifts every four weeks. The C-2 portion was revised in pertinent part:

> Add: Auto Mechanic
>
> Remove: Sr. Systems Tech, Systems Tech /Asst., Accounting, Sr. Medical Lab Tech, Medical Lab Tech, X-Ray Tech
>
> Altered Contracting Practice
>
> For the Mechanics job family, the Company may fill any future vacancies with contractors. All employees currently in these positions will retain their jobs until they retire, are promoted, or leave on their own accord. All employees currently in these positions will receive lead pay for the remainder of their time in said positions.
>
> Additionally, the Services Trainee positions may be regularly staffed by contractors. In the event of a surplus of employees, backdowns, or layoffs, all contractors in these positions will be removed before any bargaining unit employee is laid off.
>
> For the Audio Visual, Reproduction Services, Materials & Services Coordinator, and Maintenance and Operations job families, the Company must fill any future vacancies with employees. Contractors currently in these positions may remain as contractors until they are removed by the Company, are hired as employees, or leave on their own accord.

Giglio appreciated the "movement on C-2," and the parties broke to caucus. During that time, Giglio complained to Myers about the formatting of the Union's counterproposal because it did not adhere to the side letter format agreed to by the parties. He characterized it as a regressive proposal and accused Myers of "throwing the mechanics under the bus."[18]

When the parties returned to the table, Giglio rebuked the Union for failing to submit its counteroffer in the same format as the Company's C-2 proposal. Giglio complained that the Union's proposal was unacceptable because it was not in the same format as, and would have to be reworked into, the Company's July 19 proposal – a task that would take the rest of the day. He asked if the Union intended to provide the counterproposal in the format previously agreed to by the parties. Myers attempted to change the discussion to the mechanics classification proposal, but Giglio insisted that the parties resolve the formatting issue first. Myers then asked, "[d]id you tell us to put contract language that we were comfortable with into a proposal for you.?" Giglio replied that he wanted the Union's proposal in "the standardized, agreed-to-format" and asked, "Mike, answer my question. Okay? Are we wasting time here? Do you want us to take the rest of the day to manipulate this into our July 9 proposal, or do you want to do it?" He added

[17] The core/noncore references were mentioned during arbitration but only by the Company and were never adopted by the Union.

[18] This finding is based on Myers credible and unrefuted testimony. (Tr. 115–119.)

that "[i]t is a yes-or-no answer." Frustrated, Myers responded by withdrawing the Union's proposal from that morning and dared Giglio to go tell his boss, Bruce March, that he was making the format an issue. The parties continued quibbling over format, with Giglio noting that, although not in the ground rules, the parties agreed early on to "line out and highlight" the previous proposals.[19] Myers then called for a caucus. Upon returning from lunch, Myers announced that the Union was leaving and the session adjourned.

25. September 28th Employee Information Bulletin Disparaged the Union

Following that contentious session, the Company emailed an employee information bulletin to all Clinton employees:

> The purpose of this note is to provide an update on collective bargaining between [the Company] and the . . . ILEU.
>
> As a reminder, any Clinton employee may respond to the "Submit a Question" survey on the SharePoint site anonymously or choose to include his/her name if requesting follow-up. Questions received from employees may be converted to anonymous FAQs for the benefit of the entire site population.
>
> Despite the Company offering 7 dates to meet in August, the parties did not meet in the month of August and have only met 2 times in the month of September. The 19th session was held on Thursday, September 27, 2018.
>
> In the 19th session, the ILEU made a counterproposal to the Company's July 19, 2018 outstanding offer. The ILEU's counterproposal dated September 27, 2018 included but was not limited to the following terms:
>
> 1. $5,000 non -benefits bearing payment to union members in good standing only
> - Company's July 19, 2018 outstanding offer Includes a $2,500 ratification bonus to all ILEU represented employees as of the date of ratification
> 2. Retroactivity to June 1, 2018
> - Company's July 19, 2018 outstanding offer does not include retroactivity
> 3. Contracting Out Language
> - The ILEU's counterproposal did not counter the Company's July 19, 2018 outstanding offer
> 4. Personal Time and 8 weeks of PPTO
> - Company's July 19, 2018 outstanding offer includes 1 week of PPTO and no personal time
>
> Before noon, the ILEU completely withdrew its counterproposal. The ILEU then violated the practice and spirit of the bargaining ground rules by leaving the session unilaterally, despite the Company's best attempt to continue discussions during the remainder of the day. The ILEU's refusal to continue bargaining was extremely disappointing. No progress was made, and the next session has not yet been scheduled.
>
> The Company is hopeful that an agreement can be reached; and will continue to bargain in good faith toward that end. As a reminder, the Company's offer from July 19, 2018 remains outstanding. The Company hopes ILEU represented employees will have an opportunity to vote on the Company's final offer. The decision of whether or not a vote will be held Is made by the ILEU officers. Any questions on if the Company's final offer will be presented to membership for a vote should be directed to the ILEU.
>
> As always, your safety and the safety of all employees at the Clinton site is the single most important factor as these negotiations continue. Thank you for your continued patience and diligence.

26. The November 29 Bargaining Session

During the twentieth day of bargaining, the Union submitted a revised counterproposal package which included two revisions from its September 27 counterproposal. The personal time proposal was modified to reflect the one proposed on July 9 and the contract term was reduced to three years with pay increases of 3.5% for each year.

Giglio replied that contracting out positions remained the "number one priority for the Company. We are not going to make an agreement unless contracting out is addressed." He then clarified that statement by "finding it unlikely that we will be able to reach an agreement between the [Union] and the Company unless we address the contracting out. I am not saying we can't. I am saying we are here to bargain for that."

The parties then discussed the Union's counterproposals. Giglio agreed to consider the Union's contracting proposal, but said that PPTO was "not going to happen. You are governed by a [CBA]; therefore, you do not get the same benefits as everyone else . . . the Company has magnanimously offered one week of PPTO. . . So you have to bargain for it."

Giglio also rejected the Union's personal time proposal due to "the ULP [charge] that was filed by the Union and determined by the NLRB that there was too much ambiguity in allowing supervisory discretion." As Myers attempted to explain how the Union's proposals benefited the Company, Giglio interjected that "we are not addressing contracting out. Are you refusing to bargain over contracting out?" Myers denied that the Union was refusing to bargain and insisted that the Company's proposal was unacceptable.

After caucusing for an hour and a half, Giglio countered by agreeing to the Union's request for notification prior to the implementation of non-standard shift schedules and increasing base pay from five percent to six percent. Otherwise, the proposal did not deviate from the Company's July 19 offer for contracting, no personal time and one week of PPTO.

[19] Myers testified that he withdrew the proposal because Giglio "was dictating on how we were supposed to give proposals for many days and we were kind of tired of it . . . He told me I was wasting his time and that they would have to spend hours formatting our proposal into what they wanted it to be and I didn't think that was necessary." (Tr. 133-135.)

27. The January 16, 2019 Bargaining Session

Myers opened the twenty-first session by handing out a letter stating that an additional remedy from the arbitration ruling required the parties to bargain any future United Way Day off. He reiterated that it was a benefit that the Union was still willing to discontinue in accordance with other benefits. Giglio replied that it was a step backward but opined the parties were close to resolving most items except for the contracting issue. He proposed that the parties pick up where they left off on November 29. Myers agreed.

Myers began with the Union's November 29 proposals relating to non-standard shifts, the discontinuation of United Way Day off, six weeks of PPTO, and thirty-two hours of personal time. The Company responded with a counterproposal on non-standard shifts. The Union did not submit a contracting proposal.

28. The February 28, 2019 and March 14, 2019 Bargaining Sessions

The parties met two additional times, most recently one week before the hearing on March 14, 2019. Transcripts of those sessions were not offered into evidence.

LEGAL ANALYSIS

The General Counsel alleges that the Company violated Section 8(a)(5) and (1) by conducting the twenty-three bargaining sessions in bad faith. Specifically, she describes eleven different instances that evidence the Company's bad faith in the bargaining process, portraying the Company as scheming at every possible turn to thwart the Union and engage in surface bargaining. She also alleges four Section 8(a)(1) violations.

The Company denies each specific allegation of bad faith and presents its bargaining representatives as reasonable but hard bargainers. It characterizes the Union as intransigent and blames the breakdown of the bargaining process on irreconcilable differences between the Union and itself, insisting bad faith on its part had nothing to do with these protracted negotiations.

I. BAD FAITH GENERALLY

The duty to bargain in good faith in Section 8(a)(5) requires that an employer bargains with the "sincere purpose to find [a] basis of agreement" with the Union. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). To comport with this duty, an employer must make "reasonable effort in some direction to compose its differences with the union." Ibid. An employer fails to satisfy this duty when it "will only reach an agreement on its own terms and none other." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). To determine whether an employer failed to bargain in good faith, the Board examines the totality of the conduct at and away from the bargaining table. See *Public Service Co. of Oklahoma*, 334 NLRB 487, 488-490 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (examining the total content of the employer's activity to determine whether it violated the Act). This includes the nature of the bargaining demands, unilateral changes, withdrawal of already-agreed-upon provisions without sufficient explanation, the failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete*, supra at 261.

II. INTRUSION INTO THE UNION

The General Counsel alleges that the Company intruded by asking for internal Union information at the May 21 and 29 meetings and directly dealing with bargaining unit members in the July 3 email. In support of this position, the General Counsel contends that the requests for information and email to employees amounted to an impermissible attempt to influence internal Union processes. The Company denies that it unlawfully tried to influence the ratification vote by asking for information or direct dealing. It further argues that even if it did engage in direct dealing, it adequately repudiated any unlawful conduct.

A. Direct dealing

An employer directly deals with bargaining unit members when it: (i) communicates directly with union-represented employees; (ii) to establish or change wages, hours, and terms and conditions of employment or to undercut the role of the union; and (iii) does so to the exclusion of the union. *Metalcraft of Mayfield*, 367 NLRB No. 116, slip op. at 8 (2019) (employer "sent the . . . letter directly to Union employees and did not provide a copy to the Union"). Cf. *Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (no purpose to exclude when employer included union in feedback for implementation of a new system). The Board applies a totality-of-the-circumstances inquiry when determining whether an employer intends to undercut the union's role. See *Public Service Co. of Oklahoma*, supra.

Here, the Company communicated directly with union-represented employees in the July 3 email, meeting the first prong of the *Permanente* test. *Permanente*, supra. By sending the July 3 email, the Company attempted to coerce the Union to hold a ratification vote for the contract that would result in changes to the wages and hours. The Company also used this email to undercut the Union's bargaining position since the bargaining committee did not acquiesce to the Company's proposals at the time. Instead, the Company encouraged employees to ask their bargaining representative for a ratification vote rather than leaving it to internal union processes. Thus, the Company's conduct met the second prong of the *Permanente* test. Cf. *Southern California Gas Co.*, 316 NLRB 979, 981-982 (1995) (employer did not meet the second prong by merely collecting information from employees rather than communicating proposals to them). Finally, the Company excluded the Union by not sending it the July 3 email to the Union, thus satisfying the third prong of the *Permanente* test. *Metalcraft of Mayfield*, supra.

The Company argues that the emails constituted a simple communication of the way it viewed the bargaining process to unit members. Ye it concedes that the communication conveyed Giglio's "expectation" that the Union hold a vote, conveying an effort to changes terms and conditions of employment. Cf. *Southern California Gas Co.*, supra. Accordingly, the Company engaged in direct dealing with bargaining unit employees.

When an employer engages in direct dealing, it can repudiate its conduct under the *Passavant* standard. To make an effective repudiation under *Passavant*, an employer must specifically

repudiate the coercive conduct in a timely and unambiguous manner. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978). The repudiation must also be free from other proscribed illegal conduct, adequately published, and free of subsequent illegal conduct. Ibid. An employer adequately publishes a repudiation when the employer communicates it to all employees who received the coercive communication, not just to bargaining unit members. *Auto Workers Local 785*, 281 NLRB 704, 707 (1986).

Here, the Company sought to repudiate its July 3 email on July 28 but did not publish it adequately. By only sending the repudiation to bargaining unit employees, the Company violated the requirement in *Auto Workers Local 785* to communicate the repudiation to all employees who received the coercive communication, not just the bargaining unit employees. 281 NLRB at 707. Therefore, the Company's repudiation is insufficient.

The Company also seeks refuge in *Eagle Transport Co.*, where an employer did not violate the Act by unilaterally correcting miscalculated paychecks. 338 NLRB 489, 490 (2002) (reasoning that a mistake unilaterally corrected did not constitute a unilateral change). There, the Board reasoned that punishing an employer for a simple mistake which it promptly corrected would exceed the Act's scope. Ibid. The Company's comparison, however, does not hold water because the violation in *Eagle Transport Co.* was unintentional, while the violation here was clearly intended (i.e. not sending the repudiation to all affected employees). Moreover, *Eagle Transport Co.* analyzes whether a unilateral change in wages without bargaining was unlawful. Ibid. This is inapplicable as to the question of whether the Company adequately published its repudiation. Thus, the Company unlawfully engaged in direct dealing with unit employees and failed to adequately repudiate that action in violation of Section 8(a)(5) and (1).

B. Intrusion into the certification process

A union has sole authority as to when or whether it will submit a contract for ratification to its membership. *M&M Oldsmobile*, 156 NLRB 903, 905 (1966). Thus, an employer violates the Act by insisting that a union submits its contract for ratification. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 3, fn.6 (2018). Employers can, however, communicate their opinions regarding the process a union uses for a vote. See, e.g., *Westinghouse Electric Corp.*, 232 NLRB 56, 56 (1977) (lawful communication that a union strike vote was premature and that employees should instead vote to certify the contract); *Alexander Linn Hospital Assn*, 244 NLRB 387, 392-393 (1979) (lawful communication about which site could be used for a union vote); *Putnam Buick, Inc.*, 280 NLRB 868, 869 (lawful communication that employees should ratify contract individually and not hold strike vote).

Here, the Company asked for internal Union information, including the procedures for ratification votes, at the May 21 and May 29 meetings. The Company also mentioned its desire for the Union to hold ratification votes over its proposed contract in the July 3 and September 28 emails. These communications, however, did not amount to insistence. The Union did not respond to the two requests for information on May 21 and 29, and the Company did not push back on this denial. The record reflects no other requests, and the Company dropped the topic in future negotiations. Thus, the record does not support the General Counsel's allegation of unlawful insistence. Cf. *Dish Network Corp.*, 366 NLRB at 3 (lack of good faith bargaining when the employer refuses to meet until the Union agrees to submit a contract for ratification).

Furthermore, the content of the emails merely indicates that the Company sought to communicate its views regarding the contract and its views as to whether the Union should hold a ratification vote on its proposals. The General Counsel stresses that the Company said that failing to ratify its proposal at that meeting would result in a much worse offer at the June 29 meeting. Giglio made that statement, however, to condition the acceptance of a new CBA on the contracting side letter—not to make the Union hold a vote on the contract. Like in the cases cited above, the Company lawfully communicated its opinion in a way that demonstrates no coercive intent. Accordingly, this allegation is dismissed.

III. REFUSAL TO BARGAIN OVER PERSONAL TIME AS RETALIATION FOR FILING UNFAIR LABOR PRACTICES CHARGE

The General Counsel alleges that the Company refused to bargain with the Union over personal time policies in retaliation for the Union filing a previous unfair labor practice charge against the Company. The Company denies this allegation and insists that it refused to adopt the flexible policy proposed by the Union because the previous charge alleged that supervisors arbitrarily applied their discretion.

Personal time is a mandatory subject of bargaining. *Venture Packaging, Inc.*, 294 NLRB 544, 553 (1989). Refusal to bargain over a mandatory subject violates the duty of good faith. Id. at 544. When examining the refusal to bargain, the Board considers factors such as the motives and parties' states of mind, whether the parties have maintained an ongoing relationship, and whether other unfair labor practices are involved, among others. *Chevron Chemical Co.*, 261 NLRB 44, 45–47 (1982), enfd. 701 F.2d 172 (5th Cir. 1983). The Board examines these factors with an emphasis on the totality of the circumstances. See *Public Service Co. of Oklahoma*, 334 NLRB at 488–490.

Several times throughout the bargaining sessions, the Company declared that it would not bargain over personal time because the Union previously filed an unfair labor practice charge. On July 8, the Company stated that it was not interested in bargaining about personal time because of the previous charge and "[the Union's] aggressive actions." On September 4, the Company stated that "the gravy train has moved on" regarding a favorable personal time policy due to the previous charge. The Company reiterated the same position at the November 29 meeting. In each circumstance, the Company clearly expressed a refusal to bargain due to the previous unfair labor practice charge.

The Company seeks to justify these statements as a modification of the policy to comply with the Act, but the evidence demonstrates otherwise. Cf. *Otis Elevator Co.*, 283 NLRB 223, 226 (1987) (no violation where the employer refuses to budge on one issue due to disagreement rather than any underlying

unfair labor practice). Accordingly, the Company violated Section 8(a)(1) by refusing to bargain over personal time in retaliation for the Union filing a previous unfair labor practice charge.

IV. DENIGRATION OF THE UNION

The General Counsel alleges that the Company unlawfully denigrated the Union at the June 29 bargaining session and in the September 28 email. Specifically, the General Counsel alleges that the Company made false accusations about the Union that effectively drove a wedge between employees and the Union and implied that the Union bore fault for employees not receiving improved benefits. The Company denies these allegations and characterizes its communications as accurate descriptions of the bargaining process to employees.

Employers denigrate unions in violation of the Act when they discourage the exercise of Section 7 rights. *Dayton Hudson Corp.*, 316 NLRB 477, 483 (1995) (violation when employer denounced one employee in the presence of another). One way they denigrate unions is by communicating with employees in a way that places the burden on the union for the employer withholding benefits. See, e.g., *Met West Agribusiness*, 334 NLRB 84, 84 (2001) (employer's "statement placing the onus on the Union for denying a wage increase clearly violated the Act"); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987) (attribution to union of denial of wage increase is unlawful). Another way is by making false communications that will likely drive a wedge between the union and employees. See *Armored Transport*, 339 NLRB 374, 378 (2003) (employer denigrated the union by trying to drive a wedge between the union and employees). The employer can, however, inform employees about the status of negotiations, proposals previously made to the union, or its version of a breakdown in negotiations. *Procter & Gamble Manufacturing Co.*, 160 NLRB 334, 340 (1966) ("As a matter of settled law, Section 8(a)(5) does not . . . preclude an employer from communicating, in noncoercive terms, with employees during the collective bargaining negotiations.").

Here, the Company took several actions that implied the union bore fault for employees not receiving better benefits. At the June 29 bargaining session, the Company said that the Union began to act regressively and stated that Myers was poorly representing bargaining unit members. Read in this context, the September 28 email, by characterizing the Union as ungrateful and comparing employees' contemporary benefits to those proposed by the Company, implied that the Union bore fault for passing on the opportunity to increase benefits. Additionally, the Company included false communications in its July 3 email. It corrected these misconceptions in the July 28 email, but waiting nearly a month to do so tended to drive a wedge between employees and the Union. These communications included enough disparaging content that in the totality of the circumstances these messages denigrated the Union. See *Public Service Co. of Oklahoma*, supra.

The Company characterizes these messages as merely informing the Union of its version of the breakdown in negotiations, citing *Procter & Gamble*, supra. Despite this characterization, the unflattering portrayal of the Union in these emails unlawfully disparaged it because it placed the burden on the Union for employees not receiving improved benefits. *Met West Agribusiness*, supra. Thus, the Company violated Section 8(a)(1) by disparaging the Union and its leadership on June 29 and September 28, 2018.

V. UNILATERAL CHANGE TO THE APPRAISAL SYSTEM

The General Counsel alleges that the Company unilaterally changed the terms of the appraisal system. The Company does not deny the unilateral change. It argues, however, that it lawfully changed the appraisal system in a non-material way and, in any event, that the Union waived its right to bargain over changes to the appraisal system.

Employers violate the Act when they enact unilateral changes of mandatory subjects without giving the union an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 735, 747 (1962). Specifically, an employer must notify and bargain with its employees' bargaining representative before changing employment appraisal systems. *Safeway Stores*, 270 NLRB 193, 195 (1984). Unilateral changes to appraisal systems only violate the Act, however, when those changes are "material, substantial, [or] significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

Changes in policy that modify employee incentives are material changes. *Murphy Diesel Co.*, 184 NLRB 757, 764 (1970), enfd. 454 F.2d 303 (7th Cir. 1971) (material change where change from informal time requirements to requiring the submission of written excuses for lateness). Mere changes in the way an employer conducts an existing procedure are not material, though. *Rust Craft Broadcasting of New York*, 225 NLRB 327, 327 (1976) (change from handwritten time cards to time clocks not significant); *UNC Nuclear Industries*, 268 NLRB 841 (1984) (change from non-oral to oral startup readiness tests for nuclear operators not significant). When changes are so minimal they lack impact, employers can unilaterally enact them. *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991) (citing *Rust Craft Broadcasting*, supra).

Before the Company changed the appraisal system, the form contained eleven specific criteria for evaluating employees. These evaluations led to promotion or discipline if employees met specific thresholds on the eleven factors. After the unilateral change, the form only contained three general criteria that gave reviewing supervisors significantly more discretion. The Company also did not specify how promotion and discipline would work under the new system. These changes drastically affect the incentives of the employees due to changing what employees strive toward when seeking to gain promotion or avoid discipline. The transformation here from many discrete factors to a few generalized factors mirrors the large shift in *Murphy Diesel*. *Murphy Diesel*, supra.

The Company argues that this change merely modifies the way supervisors record evaluations. This assertion, however, flatly contradicts the Company's testimony that it currently had no specific process addressing promotion and discipline under the new system. The changes here bear no resemblance to the minor changes in *Rust Craft Broadcasting* and *UNC Nuclear*. Those changes did not materially change employee incentives; these changes will. Thus, the change is material.

The Company next argues that the Union waived its right to bargain over these changes in the CBA. Unions can waive the ability to bargain over unilateral changes in terms or conditions of employment through a collective bargaining agreement. *Omaha World-Herald*, 357 NLRB 1870, 1871 (2011). This waiver must be clear and unmistakable. *New York Mirror*, 151 NLRB 834, 839–840 (1965) ("The Board will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject unless the contract expressly or by necessary implication confers such a right."); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.").

Pursuant to a waiver, an employer can lawfully enact a unilateral change if the employer has a sound basis for ascribing a particular meaning to the contract. *Vickers, Inc.*, 153 NLRB 561, 570 (1965) ("The Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement. Where . . . an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, . . . the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct"). The Board will not find a waiver, however, when the employer presents the bargaining representative with a "fait accompli." *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip. op. at 2 (2018).

Article XXVI, Section 6 of the CBA permits the Company to revise appraisal procedures "as necessary, after Management has consulted with the Union and taken its views into consideration." This clause establishes a process allowing the Company to change appraisal procedures in a way that sidesteps its statutory obligation to bargain. The Company thus has a sound basis for interpreting this text as a waiver since the Union agreed to only consult with the Company. *Vickers, Inc.*, supra. The General Counsel argues that this language does not waive the right to bargain since it does not mention any release of the right to bargain under the Act, but such an explicit release is not necessary given the freedom afforded to employers with a reasonable understanding of a contract. Ibid. Thus, the Union waived its rights to bargain over changes to the appraisal system.

The Company did, however, present the change as a fait accompli. After notifying employees of the change in a March 7 email, the Union emailed the Company, laying out its concerns. The Company and the Union discussed them, and the Company eventually proceeded with the change as planned on March 28. By not taking any of the Union's concerns into account, the Company "merely [presented information] concerning the fait accompli." *Harley-Davidson Motor Co.*, supra at 3. In *Harley-Davidson*, the Board found notice of under a month to be insufficient. Ibid. The twenty-one-day time period between notice and implementation is insufficient under *Harley-Davidson.* Ibid. (finding a time of twenty days insufficient). Therefore, the Company violated Section 8(a)(5) and (1) by enacting a unilateral change to its appraisal system without first notifying and consulting with the Union.

VI. BAD FAITH DEMANDS IN THE BARGAINING PROCESS

The General Counsel alleges that the Company bargained with a general demeanor of bad faith throughout the bargaining process by making repeated unlawful demands, including conditioning acceptance on a contracting side letter that addresses a permissive subject and foreshadowing an impasse. She also alleges three per se violations: (i) offering PPTO in exchange for decertifying the Union; (ii) demanding to bargain non-economic issues to conclusion prior to bargaining economic issues to conclusion; and (iii) conditioning acceptance of the contract on a contracting side letter that is repugnant to the Act.

A. Promise of PPTO if Employees Decertified the Union

Employers cannot give an implied promise of benefits if a reasonable employee thinks he receives the benefits in exchange for voting out the union. See *Viacom Cablevision*, 267 NLRB 1141, 1141 fn.3 (1983) (describing *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979), where the Board found a violation when the employer went to great lengths to contrast union and non-union pension plans). One way they make an illegal implied promise is by comparing the benefits afforded to union members and non-members. *Grede Plastics*, 219 NLRB 592, 593 (1975) (letter stressing non-union employees receive better wages and benefits than union employees illegally implies better benefits in exchange for decertifying the union). An employer has a general right to compare represented and unrepresented employees' wages and benefits absent a threat, though. *Langdale Forest Prods.*, 335 NLRB 602, 602 (2001) (finding lawful statements about a legal obligation to bargain accompanied with comparisons of union and non-union benefits).

Here, when Myers asked Giglio at the July 9 meeting what the Union could give in return for the Company's agreement to eight weeks of PPTO, Giglio said the employees could "go without a Union." Myers sought clarification and asked Giglio whether decertification of the Union would lead to eight weeks of PPTO. Giglio replied, "You said that, I didn't." These statements clearly express an offer to exchange PPTO for decertification of the Union. Compare *Grede Plastics*, supra, with *Langdale Forest Prods.*, supra.

The Company argues that Giglio made these remarks sarcastically. The facts demonstrate, however, that Giglio intentionally made these statements during protracted bargaining over PPTO. But even if the statement was intended as sarcastic, the Board analyzes its legality based on its impact on a reasonable employee. *Viacom Cablevision*, supra. A reasonable employee would understand such statements as implying a promise of a benefit in exchange for decertifying the Union. Under the circumstances, Giglio's July 9, 2018 statement violated Section 8(a)(5) and (1).

B. Bargaining Non-Economic Issues to Conclusion

When an employer inflexibly insists on bargain non-economic issues to completion before addressing economic issues, the employer acts in bad faith. *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034 (1986). Merely deferring the discussion of economic issues to a later date, however, does not violate the Act so long as the deferral does not lead to undue

delay. *Long Island Jeep, Inc.*, 231 NLRB 1361, 1367 (1977). In *Long Island Jeep*, the Board found no undue delay when parties did not bargain over economic issues until the fifth meeting. Id. at 1361.

Here, the General Counsel characterizes the Company as unyielding and ceaselessly insistent on bargaining non-economic issues to completion. The facts do not demonstrate that, though. The Company opened the first bargaining session by stating its desire to bargain non-economic issues to completion. The Union did not agree to this demand but bargained only over non-economic issues for the first few meetings. In subsequent meetings, the Company and the Union started to discuss economic issues (personal time on May 21, wages on May 25, wage data on May 31). This behavior demonstrates that the Company did not insist on bargaining non-economic issues to completion. In fact, it began bargaining economic issues at the sixth meeting, similar to the employer and union waiting to discuss economic issues until the fifth meeting in *Long Island Jeep*. Ibid. Therefore, the Company's position as to the timing for discussion of the economic issues did not violate Section 8(a)(5) and (1).

C. The Side Letter as Repugnant to the Act

Employers can legally hard bargain over provisions to arbitrate. *Chevron Chemical Co.*, 261 NLRB at 46. Unions can also completely waive their rights to the Act through their collective bargaining agreements. See *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (the Act does not override the requirements of the Federal Arbitration Act); Id. at 1631 (courts shall "enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted" (emphasis original) (quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)).

Here, the General Counsel first argues that waiving rights to the Act under an arbitration agreement is repugnant to the Act, claiming that the purpose of the Act requires preventing employees from waiving their rights to the Act under arbitration agreements. She also cites Board precedent that significantly predates *Epic Systems* and the modern line of Federal Arbitration Act precedent. But these arguments hold no weight. The Court in *Epic Systems* summarily rejected the General Counsel's argument. Id. at 1631 (rejecting a purposive argument against enforcement of the Federal Arbitration Act and citing many previous decisions where that same argument failed). Thus, a waiver of rights to the Act under an arbitration agreement is not repugnant to the Act itself.

The General Counsel also asserts that the Company unlawfully insisted on the arbitration waiver as a side term. If it did, however, it did so lawfully because the decision whether to arbitrate claims is a mandatory subject of bargaining. See *Chevron Chemical Co.*, supra. The Company did no such thing, though. It offered the arbitration term at the June 4 bargaining session in a side letter. At the July 19 session, after the Union indicated it would not agree to that term, the Company dropped the term from the side letter. The Company cannot unlawfully insist on a term it eventually dropped. See *Smurfit Stone Container Enterprise*, 357 NLRB 1732, 1735-36 (2011), enfd. 594 Fed. Appx. 897 (9th Cir. 2014) ("The proper test for unlawful insistence is whether agreement on the mandatory subjects of bargaining [was] conditioned on the nonmandatory subject of bargaining."). Thus, the Company's efforts to have the Union agree to an arbitration waiver did not violate Section 8(a)(5) and (1). That allegation is dismissed.

D. Conditioning on the Side Letter as Bad Faith

An employer bargains in bad faith when it unlawfully insists on a term that is a permissive subject of bargaining. Id. at 1732. "The proper test . . . is whether agreement on the mandatory subjects of bargaining [was] conditioned on the nonmandatory subject of bargaining." Id. at 1735-36 (2011). Altering the scope of a bargaining unit is a permissive subject. See *Wackenhurt Corp.*, 301 NLRB 835, 852 (2005) ("Once a specific job has been included within the scope of a bargaining unit by either Board action or consent of the parties, the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board." (quoting *Hill-Rom Co. v. NLRB*, 957 F.2d 454, 457 (7th Cir. 1992)).

The Company cites the Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB* to establish that contracting to alter the scope of the bargaining unit is a mandatory subject of bargaining. 379 U.S. 203 (1964). In doing so, however, the Company ignores the Court when it states:

> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d).

Id. at 215. Thus, when an employer unlawfully insists on changing the scope of the bargaining unit as a term of employment, it violates the Act.

Here, the Company insisted on altering the scope of the bargaining unit as a condition of its agreement at several meetings. At the third meeting, the Company proposed allowing contracting up to 5% of the bargaining unit and up to 10% of any job family for no more than six months without the consent of the Union. At this meeting, when the Union objected, Giglio said that removing this provision was "not [a] change[] that the Company would be interested in." The Company argues that this conduct is not intended to change the scope of the bargaining unit, but that has no merit because the Supreme Court in *Fibreboard* held otherwise. Ibid. (describing changing the bargaining unit as replacing bargaining unit employees with independent contractors who perform the same work).

At a side bar on May 31, the Company introduced a similar proposal. At the June 4 meeting, the Company said that it needed the Union to "come to an agreement on contracting before [it could] provide a last best and final." The Union received a letter on June 5 stating the same information. On June 19, the Union acquiesced somewhat to the Company's demands, but the Company returned on June 25 and insisted on the same proposal. On June 29 the Company conveyed an

LBFO that included language on contracting. At that meeting, the Company said "the offer would go down significantly" if the Union did not ratify the proposal with contracting terms by July 11. At the July 9 meeting, the Company continued to insist on contracting language, as it did on September 4. On September 27, the Union offered a counterproposal that changed the contracting term, but the Company excoriated the Union for not using the proper format to the point that the Union had to leave the meeting. On November 29, the Company again said that it could not reach an agreement with the Union without this proposal.

The Company repeatedly insisted that it could not reach a final agreement without an agreement on its contract work proposal. This demonstrates that the Company conditioned a final agreement on the contracting term, a permissive subject. The Company argues, however, that insistence is not unlawful as long as the insisting party does not press to impasse, citing *Taft Broadcasting Co.*, 274 NLRB 260 (1985). That position is meritless, however, since the Supreme Court, in *NLRB v. Borg-Warner Corp.*, held otherwise. See 356 U.S. 342, 346-348 and 350 (1958) (describing the insistence in the absence of impasse as violating the Act). The Company only needs to unlawfully condition its agreement to violate the Act—and it did. Thus, the Company violated Section 8(a)(5) and (1).

E. Foreshadowing Impasse as Bad Faith

An employer bargains in bad faith when it does not bargain with a sincere effort to reach an agreement. *Mid-Continent Concrete*, 336 NLRB at 259. Here, the General Counsel alleges that the Company foreshadowed the rocky road ahead when Giglio expressed concern on June 4 that the Union would not acquiesce to contract work proposal and, as a result, impasse would ultimately occur. Giglio made this statement, however, when expressing fear of an impasse before June 15, the CBA's expiration date. Impasse was never declared at any of the sessions, nor did the Company seek to manufacture one. Accordingly, this allegation is dismissed.

F. General Conduct

The Company's general conduct throughout the entire bargaining process demonstrates overall bad faith on its part. Although the Company did not violate the Act in every manner alleged by the General Counsel, it did engage in several unfair labor practices. Specifically, the Company directly dealt with unit members, refused to bargain over personal time in retaliation for the Union filing unfair labor practice charges, denigrated the Union, unilaterally changed the appraisal system in violation of the Act, offered to decertify the Union in exchange for PPTO, and conditioned a new CBA on a permissive contracting side letter.

The Board examines the totality of the circumstances when examining whether the conduct of an employer constitutes bad faith. *Public Service Co. of Oklahoma*, 334 NLRB at 488-490. The total conduct of the Company here demonstrates numerous instances of bad faith. See *Mid-Continent Concrete*, supra at 261 (describing various indicia of bad faith, factors that appear here). Thus, the Company violated Section 8(a)(5) and (1) by its overall conduct throughout the bargaining process.

CONCLUSIONS OF LAW

1. The Respondent, ExxonMobile Research & Engineering Company, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit of employees (the bargaining unit):

> Accountant, Accountant Senior, Accounting Assistant, Audio -Visual Assistant, Audio - Visual Technician, Audio -Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X -Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

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

(a) Failing and refusing to bargain collectively and in good faith with the Union over personal time as the exclusive bargaining representative of its employees on July 8, September 4 and November 29, 2018;

(b) Implementing material changes to its employee performance review system on March 28, 2018 without prior notice to the Union and affording it an opportunity to bargain with respect to this conduct and the effects of this conduct;

(c) Bypassing the Union and dealing with employees in the bargaining unit on July 3, 2018 through Employee Information Bulletin 2018-06; and

(d) Its failure to bargain in good faith by unlawfully insisting on reaching an agreement on contracting out unit employees' work, a permissive subject of bargaining, as a condition to reaching a final agreement.

(e) Its overall failure and refusal to bargain collectively and in good faith with Union as recited above during the period of March 2018 to January 2019.

5. The Respondent violated Section 8(a)(1) by:

(a) Failing and refusing to bargain collectively and in good faith with the Union over personal time as the exclusive bar-

gaining representative of its employees on July 8, September 4 and November 29, 2018;

(b) Disparaging the Union's leadership during bargaining on June 29, 2018 and by email on September 28, 2018; and

(c) Promising to grant unit employees eight weeks of parental paid time off on July 8, 2018 if they withdrew from Union representation.

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

REMEDY

Having found that the Respondent 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, including rescinding the unlawful unilateral change to employee performance appraisals, make whole employees for any loss of pay or benefit they may have suffered as a result of said unilateral change in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River,* 356 NLRB 6 (2010).

Additionally, having found that the Respondent unlawfully conditioned negotiations with the Union on a nonmandatory subject of bargaining—the contracting out of unit employees' work—it is ordered, upon request by the Union, to bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, to embody it in a signed agreement. Upon resumption of bargaining, it is further ordered to reinstate all tentative agreements reached during contract negotiations. See *Health Care Services Group*, 331 NLRB 333 (2000).

The Respondent shall also be ordered to schedule meetings to ensure the widest possible attendance where a representative shall read the notice to employees during worktime and in the presence of a Board agent or, in the alternative, have a Board agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, ExxonMobile Research & Engineering Company, Inc., Annandale, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying the Independent Laboratory Employees Union, Inc.(the Union) and giving it an opportunity to bargain.

(b) Disparaging or denigrating the Union as the exclusive collective-bargaining

representative of unit employees.

(c) Bypassing the Union and dealing directly with employees in the bargaining unit regarding terms and conditions of employment.

(d) Promising to grant unit employees parental paid time off if they withdraw from the Union.

(e) Insisting on bargaining over permissive subjects as a condition to reaching a final collective-bargaining agreement.

(f) 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) Upon request of the Union, rescind the unilateral change to the employees' performance appraisal system.

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

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio-Visual Technician, Audio-Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

(c) Make whole the employees for any loss of earnings and other benefits suffered as a result of the change in the employees' performance appraisal system.

(d) On request, bargain with the Union in good faith to an agreement or impasse concerning any proposed changes in terms of employment.

(e) Within 14 days after service by the Region, take the following actions to notify employees of this Order at its facility in Annandale, New Jersey:

(1) Post copies of the attached notice marked "Appendix."[21]

[20] 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.

[21] 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 Na-

Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(2) Distribute the notices 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 March 28, 2018.

(3) Schedule meetings to ensure the widest possible attendance where a representative shall read the notice to employees during worktime and in the presence of a Board agent or, in the alternative, have a Board agent read the notice to employees during worktime in the presence of the Respondent's supervisors and agents.

The complaint is dismissed insofar as it alleges violations of the Act that I have not specifically found.

Dated, Washington, D.C. June 12, 2019

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 implement any changes in wages, hours or other terms and conditions of employment of the following employees exclusively represented by the International Association of Machinists and Aerospace Workers, Tyson Lodge No. 175, District 98 (the Union) without first notifying and affording the Union the opportunity to collectively bargain over said changes:

> Accountant, Accountant Senior, Accounting Assistant, Audio-Visual Assistant, Audio- Visual Technician, Audio - Visual Technician Senior, Electronics Technician Assistant, Electronics Technician, Electronics Technician Senior, Graphics Design Assistant, Graphic Design Technician, Graphics Design Technician Senior, Administrative Assistant, Administrative Technician, Senior Administrative Technician, Information Assistant, Information Technician, Information Technician Senior, Maintenance and Operations Assistant, Maintenance and Operations Technical Assistant, Materials and Services Coordinator, Mechanic, Mechanic Senior, Medical Laboratory Technician, Medical Laboratory Technician Senior, LPS Coordinator, Senior LPS Coordinator, Reproduction Services Assistant, Reproduction Services Technician, Senior Reproduction Services Technician, Technician, Research Technician, Research Technician Senior, Services Trainee, Systems Assistant, Systems Technician, Systems Technician Senior, Utilities Operator, Utilities Operator Senior, Utilities Operator (Other Plant) Senior, Wastewater Treatment Operator, Wastewater Treatment Operator Senior, X-Ray Technician, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors as defined in the Act.

WE WILL NOT disparage or denigrate the Union as the exclusive collective-bargaining representative of unit employees.

WE WILL NOT bypass the Union and deal directly with employees in the bargaining unit regarding terms and conditions of employment.

WE WILL NOT promise to grant unit employees parental paid time off if they withdraw from the Union.

WE WILL NOT insist on bargaining over permissive subjects as a condition to reaching a final collective-bargaining agreement.

WE WILL NOT 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.

WE WILL, on request of the Union, rescind the unilateral change to the employees' performance appraisal system.

WE WILL, on request by the Union, bargain collectively and in good faith concerning terms and conditions of employment of unit employees, and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request, bargain with the Union in good faith to an agreement or impasse concerning any proposed changes in terms and conditions of employment of employees in the following bargaining unit exclusively represented by the Union

WE WILL make whole the employees for any loss of earnings and other benefits suffered as a result of the change in the employees' performance appraisal system.

EXXONMOBIL RESEARCH & ENGINEERING COMPANY, INC.

tional 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."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-218903 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.